

Africa's Role in the Reform of International Investment law and the Investor State Dispute Settlement (ISDS) System

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Abstract

One of the global key drivers of development is investment, with most investors moving from the developed world to invest in the developing regions of the world which are rich in natural resources such as the African continent. These investment activities naturally come with disputes. However, most of these investors do not have faith in the ability of the domestic judicial system of the host countries to address these disputes if and when they arise. As a result, the key players put in place the investor state dispute settlement system to handle such disputes, a system that is designed to work to a large extent independent of the host country's legal and institutional framework. However, most of the host countries which are mainly from the developing world have over the years complained that the investor state dispute settlement system is unfairly designed to favour the investors at the expense of the interests of the host states. Most of them have therefore been pushing for reforms. This paper explores the role of Africa in such reforms. It calls for a more active and meaningful involvement of African countries in the ISDS reforms debate as a way of ensuring that any continued use of ISDS does not adversely affect the development agenda of the African states and the continent in general. In addition, African countries must move from being investment rule-takers to being part of the rule makers.

1. Introduction

The global economy is mainly driven by trade and investment carried out by both states and private companies in the form of Foreign Direct Investments.¹

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Most investors move from the developed world to invest in the developing regions of the world which are rich in natural resources such as the African continent, a continent endowed with immense natural and human resources as well as great cultural, ecological and economic diversity.² These foreign investment activities naturally come with disputes. Thus, laws determine whether and how investments may be made in a specific country, the nature of the respective privileges of the non-national or foreign investors and the host country's government.³ Considering that most of these foreign investors do not have faith in the ability of the domestic judicial system of the host countries to address these disputes if and when they arise⁴, the key players in international investment put in place the investor state dispute settlement system to handle such disputes, a system that is designed to work to a large extent independent of the host country's legal and institutional framework.⁵

However, most of the host countries which are mainly from the developing world have over the years complained that the investor state dispute settlement system is unfairly designed to favour the investors at the expense of the

¹ James E Anderson, Mario Larch and Yoto V Yotov, 'Trade and Investment in the Global Economy' (National Bureau of Economic Research 2017); Hezron M Osano and Pauline W Koine, 'Role of Foreign Direct Investment on Technology Transfer and Economic Growth in Kenya: A Case of the Energy Sector' (2016) 5 *Journal of Innovation and Entrepreneurship* 31.

² 'Africa: A Continent of Wealth, a Continent of Poverty' (*War on Want*, 30 June 2015) <<https://waronwant.org/media/africa-continent-wealth-continent-poverty>> accessed 13 August 2020; Ayodele Odusola, 'Investing in Africa Is Sound Business and a Sustainable Corporate Strategy' (*Africa Renewal*, 20 August 2018) <<https://www.un.org/africarenewal/web-features/investing-africa-sound-business-and-sustainable-corporate-strategy>> accessed 13 August 2020; 'Poverty and Development in Africa' <<https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html>> accessed 13 August 2020; Pippa Morgan and Yu Zheng, 'Tracing the Legacy: China's Historical Aid and Contemporary Investment in Africa' (2019) 63 *International Studies Quarterly* 558.

³ Shirley Ayangbah and Liu Sun, 'Comparative Study of Foreign Investment Laws: The Case of China and Ghana' (2017) 3 *Cogent Social Sciences* 1355631.

⁴ Leon E Trakman, 'Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo' (2012) 35 *UNSWLJ* 979.

⁵ 'About ICSID | ICSID' <<https://icsid.worldbank.org/About/ICSID>> accessed 13 August 2020.

interests of the host states.⁶ According to the *World Investment Report 2019*, about 70 per cent of the publicly available arbitral decisions in 2018 were rendered in favour of the investor, either on jurisdiction or on the merits.⁷ Most of these developing world countries have therefore been pushing for reforms in the ISDS system.⁸ This paper explores the role of Africa in such reforms and the possible alternatives.

2. The Investor State Dispute Settlement System: Prospects and Challenges

Notably, the foundations of the modern international investment regime were laid in the aftermath of World War II, where International Investment Agreements (IIAs) were meant to fill the legal gap left by the breakdown of colonial systems and in light of the expropriation policies adopted in many newly independent as well as communist states that often involved the denunciation of contracts between foreign investors and host countries.⁹ The traditional investment treaties therefore included a core of substantive provisions meant to ensure foreign investors are treated without discrimination and according to a general international minimum standard, are compensated in the case of expropriation, have the right to move investment-related capital freely in and out of the host country and also included provisions that required host states to honour investment contracts between investors and host states, provisions that still persist in modern investment treaties.¹⁰

⁶ TRALAC TRADE LAW CENTRE, 'Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol' (*tralac*)

<<https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html>> accessed 13 August 2020.

⁷ United Nations Conference on Trade and Development, *World investment report 2019: Special economic zones*. UN, 2019, p.102.

⁸ Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Berlin <https://www.die-gdi.de/uploads/media/giz2015-en-Study_Developing_countries_and_the_future_of_the_international_investment_regime.pdf> accessed 13 August 2020.

⁹ Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Berlin <https://www.die-gdi.de/uploads/media/giz2015-en-Study_Developing_countries_and_the_future_of_the_international_investment_regime.pdf> accessed 13 August 2020, p.6.

¹⁰ *Ibid*, p.6.

With the introduction of IIAs came Investment- State Dispute Settlement system (ISDS). This is because the majority of IIAs signed since the late 1980s include investor–state dispute settlement mechanisms that, in cases of alleged breaches of IIA provisions, allow foreign investors to sue host states before an independent international tribunal without having to rely on the diplomatic protection of its home country.¹¹ This was based on the idea that increased legal protection would stimulate foreign investment and thus lead to economic development.¹² Technically, these treaties were created as a substitute for insufficient political and legal institutions in host countries.¹³ The IIAs offer a range of substantive rights and procedural guarantees to investors: the substantive rights offered include relative standard of treatment; National Treatment and Most Favored Nation Treatment; absolute standard of treatment; rules on expropriation and compensation; and transfers of capital and returns as well as restriction against performance requirements, while the procedural guarantees relate to the question of dispute settlement which is primarily done through international arbitration.¹⁴ The International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA) are the two primary institutional hosts for international investment arbitrations.¹⁵ The most commonly used arbitration rules to govern the cases

¹¹ Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, p.8.

¹² Ibid, p.8; See also Gerald M Meier, 'Legal-Economic Problems of Private Foreign Investment in Developing Countries' (1966) 33 *The University of Chicago Law Review* 463; Pascal Liu and others, *Trends and Impacts of Foreign Investment in Developing Country Agriculture: Evidence from Case Studies*. (Food and Agriculture Organization of the United Nations (FAO) 2013); Matthias Görgen and others, *Foreign Direct Investment (FDI) in Land in Developing Countries* (GTZ 2009).

¹³ Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Berlin, p.10.

¹⁴ Tabitha Kiriti, 'Strategic Consultative Meeting on Reforming Bilateral Investment Treaties (BITs) in Kenya | WTO Chairs' <<http://wtochairs.org/kenya/outreach-activity/strategic-consultative-meeting-reforming-bilateral-investment-treaties-bits>> accessed 15 August 2020.

¹⁵ Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] *Rethinking International Investment Governance: Principles for the 21st Century* (2018), p. 32.

are produced by ICSID and the United Nations Commission on International Trade Law (UNCITRAL).¹⁶

Some consider ISDS as probably the most extensive arbitration mechanism in international law, with the intended aim of the ISDS mechanisms initially promoted by ICSID being to 'depoliticise' the resolution of investment-related disputes.¹⁷ In addition, ISDS is meant to 'delocalise' dispute resolution and allow foreign investors to bypass the local court system of host states, thus allowing foreign investors to seek compensation for the alleged wrongdoings of host states without having to exhaust local remedies.¹⁸

Despite the earliest proponents of the ISDS system's advantages, and as already pointed out, most of the developing world countries, especially in the African continent have in recent times complained about the unfair effects of the ISDS system on their domestic affairs.¹⁹ Specifically, African countries have raised concerns about the traditional investor-state dispute settlement (ISDS) system including: lack of legitimacy and transparency; exorbitant costs of arbitration proceedings and arbitral awards; inconsistent and flawed decisions; the system allows foreign investors to challenge legitimate public welfare measures of host states before international arbitration tribunals, and governments are concerned about their sovereignty or policy space as they have discouraged governments from adopting public welfare regulations, resulting in regulatory chill.²⁰ Regulatory chill is used to refer to a situation where governments do not enact or enforce legitimate regulatory measures due to

¹⁶ Ibid, p. 32.

¹⁷ Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Berlin, pp. 15-16.

¹⁸ Ibid, p.16.

¹⁹ GRAIN, 'Stop the Unfair Investor-State Dispute Settlement against Africa' <<https://www.bilaterals.org/?stop-the-unfair-investor-state>> accessed 13 August 2020.

²⁰ TRALAC TRADE LAW CENTRE, 'Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol' (*tralac*) <<https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html>> accessed 13 August 2020; see also Michael D Nolan, 'Challenges to the Credibility of the Investor-State Arbitration System' *American University Business Law Review*, Vol. 5, No. 3, 429 <<https://papers.ssrn.com/abstract=3157420>> accessed 13 August 2020.

concern about ISDS.²¹ It has been noted that using lawsuit threats as a bargaining chip, arbitration lawyers also encourage their clients to use the threat of investment disputes as a way to scare governments into submission.²² In addition to the above challenges, divergent interpretation by arbitral tribunals of identical treaty clauses has also led to a fragmentation of ISDS case law, thereby undermining the confidence of many countries in the system. This lack of confidence has been exacerbated by the fact that cases are litigated and decided by a small professional community of arbitrators and counsels who generally hail from western countries and elite socio-economic backgrounds. Furthermore, the systematic use of ISDS has excluded national courts from the process of hearing disputes involving public law/policy matters.²³

Notably, in a number of high-profile ISDS cases, host countries have been sued by foreign investors on the basis of a seemingly outdated treaty signed decades previously.²⁴ It is documented that there has been an unprecedented boom in the number of claims against African countries where, between 2013 and 2019 only, African States have been hit by a total of 109 recorded investment treaty arbitration claims which represents about 11% of all known investor-state disputes worldwide.²⁵

It has also been noted that the sharp increase in the number of ISDS related cases filed between 1987 and 2014 took many countries by surprise, with

²¹ Tanaya Thakur, 'Reforming the Investor-State Dispute Settlement Mechanism and the Host State's Right to Regulate: A Critical Assessment' [2020] *Indian Journal of International Law* <<https://doi.org/10.1007/s40901-020-00111-2>> accessed 13 August 2020.

²² Kavaljit Singh and Burghard Ilge, 'Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices' [2016] New Delhi: Both Ends, Madhyam, Centre for Research on Multinational Corporations < <https://www.somo.nl/wp-content/uploads/2016/03/Rethinking-bilateral-investment-treaties.pdf> > accessed 13 August 2020, p. 248.

²³ Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] *Rethinking International Investment Governance: Principles for the 21st Century* (2018), p. 33.

²⁴ Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] *Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH*, p.6.

²⁵ GRAIN, 'Stop the Unfair Investor-State Dispute Settlement against Africa' <<https://www.bilaterals.org/?stop-the-unfair-investor-state>> accessed 13 August 2020.

developed countries having started to recalibrate the contents of their IIAs, and developing countries generally stopping to sign new treaties or even beginning to terminate existing ones.²⁶ Indeed, as a result of the highlighted concerns raised by the developing countries, some states such as Indonesia and South Africa have gone as far as unilaterally terminating IIAs on a larger scale.²⁷ Some players view ISDS as a system that "threatens domestic sovereignty by empowering foreign corporations to bypass domestic court systems" and "weakens the rule of law."²⁸

The United Nations Conference on Trade and Development (UNCTAD) observes that national investment laws operate within a complex web of domestic laws, regulations and policies that relate to investment (e.g. competition, labour, social, taxation, trade, finance, intellectual property, health, environmental, culture).²⁹ However, most of the times, it is the enforcement of these domestic laws against them that the foreign investors seek to challenge before the investor-state arbitration tribunals when they do not favour them or would result in higher operating costs.³⁰

²⁶ Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, p.8.

²⁷ Ibid, p.8.

²⁸ Michael D Nolan, 'Challenges to the Credibility of the Investor-State Arbitration System' American University Business Law Review, Vol. 5, No. 3, 429 <<https://papers.ssrn.com/abstract=3157420>> accessed 13 August 2020.

²⁹ United Nations Conference on Trade and Development, World Investment Report 2018 (United Nations, 2018), p. 106 <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> Accessed 15 August 2020.

³⁰ Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Interplay Between Investor-State Arbitration and Domestic Courts in the Existing IIA Framework' in Gabrielle Kaufmann-Kohler and Michele Potestà (eds), *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* (Springer International Publishing 2020) <https://doi.org/10.1007/978-3-030-44164-7_3> accessed 15 August 2020; 'Issues in International Trade: A Legal Overview of Investor-State Dispute Settlement' <<https://www.everycrsreport.com/reports/R43988.html>> accessed 15 August 2020; GRAIN, 'Investor-State Dispute Settlement Using the ECOWAS Court of Justice: An Analysis and Some Proposals' <<https://bilaterals.org/?investor-state-dispute-settlement-41351>> accessed 15 August 2020.

Taking Kenya as an example, Kenya has been sued before international investment arbitration tribunals based on its Bilateral Investment Treaty's (BITs) commitments.³¹ In 2013, when Kenya considered new changes in the mining sector to ensure its people benefit from its mineral resources, some investors sued the Government. In *Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya*³², the claimants, Cortec Mining Kenya Limited (CMK), a private company constituted in Kenya, and its majority shareholders, Cortec (PTY) Limited and Stirling Capital Limited, two British holding companies, began to invest in a mining project in a niobium and rare earths exploration project located at Mrima Hill in Kenya in 2007, and obtained their Special Prospecting License (SPL 256) in 2008, which expired in December 2014 after two renewals. According to the investors, they were also granted Special Mining License 351 (SML 351) in March 2013 based on SPL 256.³³ However, in August 2013, the newly elected Kenyan government investigated and suspended several hundred "transition period" mining licences, including the investors' SML 351, due to "complaints regarding the process." According to the investors, this amounted to a revocation of their licence.³⁴ In 2015, the investors filed a request for an investor-state arbitral tribunal established under a bilateral investment treaty (BIT), where they claimed that Kenya's revocation of their SML 351 (their "key asset") constituted a direct expropriation contrary to the United Kingdom–Kenya BIT.³⁵

³¹ For a list of Kenya's BITs, see 'Mapping of IIA Content | International Investment Agreements Navigator | UNCTAD Investment Policy Hub' <<https://investmentpolicy.unctad.org/international-investment-agreements/iaa-mapping>> accessed 15 August 2020.

³² *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29.

³³ 'Kenya Prevails in BIT Arbitration: British Investors' Claims Dismissed Due to the Absence of Environmental Impact Assessment – Investment Treaty News' <<https://cf.iisd.net/itn/2018/12/21/kenya-prevails-in-bit-arbitration-british-investors-claims-dismissed-due-to-the-absence-of-environmental-impact-assessment-xiaoxia-lin/>> accessed 15 August 2020.

³⁴ *Ibid.*

³⁵ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments, dated 13 September 1999; 'Kenya Prevails in BIT Arbitration: British Investors' Claims Dismissed Due to the Absence of Environmental Impact Assessment – Investment Treaty News'

The Kenyan Government's position was that "there was no expropriation of the "purported licence [SML 351]" by the Government because the licence was *void ab initio* for illegality and did not exist as a matter of law, as held by the Courts in Kenya. As a result, the Government argued, "where there is no protected investment, there can be no expropriation."³⁶

The International Centre for Settlement of Investment Disputes (ICSID) Tribunal held it lacked jurisdiction to hear a dispute concerning a mining project that the tribunal found did not comply with domestic environmental law.³⁷ The tribunal thus confirmed that both the ICSID Convention and the BIT protected only "lawful investments". It held that non-compliance with the protective regulatory framework was a serious breach.³⁸ Concluding both on

<<https://cf.iisd.net/itn/2018/12/21/kenya-prevails-in-bit-arbitration-british-investors-claims-dismissed-due-to-the-absence-of-environmental-impact-assessment-xiaoxiaolin/>> accessed 15 August 2020; see also Lorenzo Cotula and James T Gathii, 'Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya' (2019) 113 *American Journal of International Law* 574.

³⁶ Para. 4, Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya; see also Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2015] eKLR, ELC NO. 195 OF 2014 (Formerly Misc. Application No. 298 Of 2013 (JR)); Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR, Civil Appeal 105 of 2015. At the High Court stage, the trial court held as follows: '*A party who flouts the law to gain an advantage cannot expect that the court will aid him to sustain the advantageous position that he acquired through the violation of the law. The acquisition by the Applicant of the Mining Licence was not in compliance with the law and the licence was void abinitio and liable to be revoked. The 1st Respondent had a duty and obligation in the interest of the public to have the licence revoked*'.

Notably, while the Tribunal held that it was not bound by the decision of the Kenyan courts but it had reached the independent conclusion that SML 351 was void (para 11, Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya).

³⁷ Lorenzo Cotula and James Gathii, 'Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya' (2019) 113 *American Journal of International Law* 574.

³⁸ 'Kenya Prevails in BIT Arbitration: British Investors' Claims Dismissed Due to the Absence of Environmental Impact Assessment – Investment Treaty News' <<https://cf.iisd.net/itn/2018/12/21/kenya-prevails-in-bit-arbitration-british-investors-claims-dismissed-due-to-the-absence-of-environmental-impact-assessment-xiaoxiaolin/>> accessed 15 August 2020.

jurisdiction and merits that SML 351 was not a protected investment, the tribunal dismissed all of the investors' claims. The tribunal ordered the investors to pay half of the costs claimed by Kenya, in view of the unsupported "corruption objection" allegation and other blameful conduct by Kenya during the arbitral proceedings.³⁹

The Claimants in the Cortec case have, however, since applied for annulment of the award,⁴⁰ seeking partial annulment of the Award on two grounds: (i) that the Tribunal manifestly exceeded its powers (ICSID Convention, Article 52 (1)(b))' and (ii) that the Tribunal failed to state the reasons on which the Award was based (ICSID Convention, Article 52(1)(e)).⁴¹

Notably, whatever the outcome of the pending application, the award raised significant issues of public international law, including how questions of investor compliance are considered in investor-state dispute settlement and the legal implications of investor noncompliance.⁴² Should the Claimants in this case succeed in their application for annulment, it is likely to add to the complexities surrounding the ability of host countries to regulate the investors' activities that are likely to interfere with their duties under the sustainable development agenda and other regulatory laws, relating to human rights, economic, social and environmental concerns.⁴³ Thus, the abuse of Investor State Dispute Settlement System by the foreign investors and the adverse effects on host countries go beyond the huge financial burdens that it can

³⁹ Ibid.

⁴⁰ Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya (ICSID Case No. ARB/15/29), Application for Annulment, 15 February 2019, 'Case Details | ICSID' <<https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/15/29>> accessed 15 August 2020.

⁴¹ Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya (ICSID Case No. ARB/15/29), Application for Annulment, 15 February 2019, para. 2.

⁴² Lorenzo Cotula and James Gathii, 'Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya' (2019) 113 *American Journal of International Law* 574.

⁴³ Hans Christiansen, *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs* (Organization for Economic 2002); Mohammed Aminu Aliyu, 'Foreign Direct Investment and the Environment: Pollution Haven Hypothesis Revisited'.

potentially place on the losing state to affect its sovereign ability to regulate the investors' activities in protection of public interests and welfare as well as meeting its sustainable development goals.⁴⁴

3. Reforming the Investor State Dispute Settlement System

It is worth pointing out that the influx in the number of ISDS cases filed by private investors is not only directed at the developing countries only but is also affecting middle income countries as well as the developed countries.⁴⁵ However, the bulk of these cases still involve developing countries as the respondents.⁴⁶ More countries and policy makers have therefore been calling for reforms to the ISDS system which is still largely viewed as more investor friendly at the expense of the hosts' countries' interests.⁴⁷

⁴⁴ Ridi, Niccolò. *Shifting paradigms in international investment law: more balanced, less isolated, increasingly diversified*. Vol. 27, no. 2. UK: Oxford University Press, 2016; Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] *Rethinking International Investment Governance: Principles for the 21st Century* (2018).

⁴⁵ UNCTAD, "Investor-State Dispute Settlement Cases Pass the 1,000 Mark: Cases And Outcomes In 2019," *IIA Issue Note*, Issue 2, July 2020 < <https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d6.pdf> > accessed 13 August 2020.

⁴⁶ 'Fact Sheet on Investor-State Dispute Settlement Cases in 2018 | Publications | UNCTAD Investment Policy Hub' <<https://investmentpolicy.unctad.org/publications/1202/fact-sheet-on-investor-state-dispute-settlement-cases-in-2018>> accessed 13 August 2020.

⁴⁷ Menu, An Action. "Reforming the International Investment Regime: An Action Menu" Chapter 15: World Investment Report 2015: Reforming International Investment Governance

< https://unctad.org/en/PublicationChapters/wir2015ch4_en.pdf > accessed 13 August 2020; Gaukrodger, D. and K. Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing

< http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf > accessed 13 August 2020; Hancock, Angus. "A Dispute about Disputes: New Zealand and the Future of ISDS." (2018)

<<https://www.otago.ac.nz/law/research/journals/otago716076.pdf>> accessed 13 August 2020; Emma Aisbett, Bernali Choudhury, Olivier de Schutter, Frank Garcia, James Harrison, Song Hong, Lise Johnson, Mouhamadou Kane, Santiago Peña, Matthew Porterfield, Susan Sell, Stephen E. Shay, and Louis T. Wells, *Rethinking International Investment Governance: Principles for the 21st Century* (2018) < <http://ccsi.columbia.edu/files/2018/09/Rethinking-Investment-Governance->

It has been observed that the trend towards more balanced IIAs was, incidentally, started by the United States (US) and its North American Free Trade Agreement (NAFTA) partners, Canada and Mexico, in response to a number of high-profile ISDS cases, where the three NAFTA countries introduced a number of pioneering provisions that aimed to recalibrate the relationship between investment protection and the regulatory policy space of host countries.⁴⁸ The recalibration of IIAs sought to increase governmental policy space relating to the regulation of foreign investors featuring a more restrictive definition of the investments covered, fair and equitable treatment clauses that do not require more beneficial treatment than is granted by customary international law, and a more constrained meaning of indirect expropriation.⁴⁹ With regard to the ISDS mechanism, the US introduced transparency requirements for arbitral proceedings and provisions aimed at preventing the filing of 'frivolous' claims, and it also strengthened the role of non-disputing parties.⁵⁰

In 2017, the United States announced it would seek to excise the investor-state dispute settlement from NAFTA, and in 2015, the European Commission declared that an investor-state dispute settlement is not suited to resolution of

September-2018.pdf> accessed 13 August 2020; Kavaljit Singh and Burghard Ilge, 'Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices' [2016] New Delhi: Both Ends, Madhyam, Centre for Research on Multinational Corporations; Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] Rethinking International Investment Governance: Principles for the 21st Century (2018); Anthea Roberts, 'UNCITRAL and ISDS Reforms: What Are States' Concerns?' (*EJIL: Talk!*, 5 June 2018) <<https://www.ejiltalk.org/uncitral-and-isds-reforms-what-are-states-concerns/>> accessed 13 August 2020; Thomas Dietz, Marius Dotzauer and Edward S Cohen, 'The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System' (2019) 26 *Review of International Political Economy* 749.

⁴⁸ Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, p.8.

⁴⁹ Axel Berger, 'Developing Countries and the Future of the International Investment Regime' [2015] Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, p.9.

⁵⁰ *Ibid*, p.9.

investment treaty disputes, and it began publicly pursuing development of alternative models.⁵¹

According to the United Nations Conference on Trade and Development's (UNCTAD's) World Investment report 2019, forward-looking international investment agreements' reform is well under way and involves countries at all levels of development and from all geographical regions, and with almost all the treaties concluded in 2018 containing a large number of reform features.⁵² Some of the reforms are sustainable development-oriented, meant to take into account the sustainable development goals and aspirations.⁵³ The UNCTAD's Reform Package for the International Investment Regime sets out five action areas which include: safeguarding the right to regulate, while providing protection; reforming investment dispute settlement; promoting and facilitating investment; ensuring responsible investment; and enhancing systemic consistency.⁵⁴

UNCTAD's World Investment Report 2019 has also pointed out that Investor-State arbitration continues to be controversial, spurring debate in the investment and development community and the public at large. As such, it has identified five principal approaches which have emerged from IIAs signed in 2018: (i) no ISDS, (ii) a standing ISDS tribunal, (iii) limited ISDS, (iv) improved ISDS procedures and (v) an unreformed ISDS mechanism.⁵⁵ In these principal approaches to ISDS, used alone or in combination:⁵⁶

⁵¹ Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] *Rethinking International Investment Governance: Principles for the 21st Century* (2018), p. 26.

⁵² United Nations Conference on Trade and Development, *World investment report 2019: Special economic zones*. UN, 2019, p. 104.

⁵³ *Ibid*, p. 104.

⁵⁴ *Ibid*, p. 104.

⁵⁵ United Nations Conference on Trade and Development, *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

⁵⁶ United Nations Conference on Trade and Development, *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

(i) No ISDS:

The treaty does not entitle investors to refer their disputes with the host State to international arbitration (either ISDS is not covered at all or it is subject to the State's right to give or withhold arbitration consent for each specific dispute, in the form of the so-called "case-by-case consent") (four IIAs entirely omit ISDS and two IIAs have bilateral ISDS opt-outs between specific parties).⁵⁷

(ii) Standing ISDS tribunal:

The treaty replaces the system of ad hoc investor–State arbitration and party appointments with a standing court-like tribunal (including an appellate level), with members appointed by contracting parties for a fixed term (one IIA).⁵⁸

(iii) Limited ISDS:

The treaty may include a requirement to exhaust local judicial remedies (or to litigate in local courts for a prolonged period) before turning to arbitration, the narrowing of the scope of ISDS subject matter (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from the ISDS scope) and/or the setting of a time limit for submitting ISDS claims (19 IIAs).⁵⁹

(iv) Improved ISDS procedures:

The treaty preserves the system of investor–State arbitration but with certain important modifications. Among other goals, such modifications may aim at increasing State control over the proceedings, opening proceedings to the public and third parties, enhancing the suitability and impartiality of arbitrators, improving the efficiency of proceedings or limiting the remedial powers of ISDS tribunals (15 IIAs).⁶⁰

⁵⁷ *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

⁵⁸ *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

⁵⁹ *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

⁶⁰ *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

(v) Unreformed ISDS mechanism:

The treaty preserves the basic ISDS design typically used in old-generation IIAs, characterized by broad scope and lack of procedural improvements (six IIAs).⁶¹

Following the above highlighted approaches, countries therefore have a number of options to choose from while negotiating their IIAs with foreigners. They can settle on the approach that most favours their domestic interests while participating in international investments development.

4. Role of Africa in the Reform of Investor state dispute settlement

System: Way Forward

Some authors have argued that African governments should maximize foreign investments by: eliminating corruption; improving safety and security; strengthening macroeconomic environment, investing in quality education and skill development in science, technology and innovation; and avoiding a 'race to the bottom' syndrome, that gives unnecessary tax holidays and waivers to foreign companies.⁶² However, as already pointed out, some African states such as South Africa have already started terminating their IIAs in favour of more favourable dispute settlement forums, such as State-State arbitration.⁶³ Thus, while some states decide to opt out of ISDS system in favour of domestic courts or regional bodies, others prefer initiating reforms to their obligations under IIAs.⁶⁴

Some authors have suggested that some of the ways in which ISDS can be made more responsive to the concerns raised would be making the system more transparent, forming a clear standard of review, and establishing a permanent

⁶¹ Ibid, p. 106.

⁶² Ayodele Odusola, 'Investing in Africa Is Sound Business and a Sustainable Corporate Strategy' (*Africa Renewal*, 20 August 2018) <<https://www.un.org/africarenewal/web-features/investing-africa-sound-business-and-sustainable-corporate-strategy>> accessed 13 August 2020.

⁶³ Tanaya Thakur, 'Reforming the Investor-State Dispute Settlement Mechanism and the Host State's Right to Regulate: A Critical Assessment' [2020] *Indian Journal of International Law* <<https://doi.org/10.1007/s40901-020-00111-2>> accessed 13 August 2020.

⁶⁴ Ibid.

arbitration forum or creating an appellate mechanism in order to strike a balance between investment protection and protecting the host states' right to regulate.⁶⁵ The appellate mechanism especially would be useful in addressing the concern regarding substantive inconsistency between arbitral decisions in investment treaty arbitration.⁶⁶

4.1 To Retain ISDS or not?

As already pointed, the mechanism allowing private investors to submit investment claims to international arbitration has come under increasing public scrutiny, with several actors criticizing its lack of legitimacy.⁶⁷ UNCTAD's World Investment Report 2019 has also pointed out that Investor-State arbitration continues to be controversial, spurring debate in the investment and development community and the public at large. As already discussed above, it has identified five principal approaches which have emerged from IIAs signed in 2018: (i) no ISDS, (ii) a standing ISDS tribunal, (iii) limited ISDS, (iv) improved ISDS procedures and (v) an unreformed ISDS mechanism.⁶⁸ While it may not be possible yet to for African countries to agree on a single approach to these reforms, countries have these options to choose from while negotiating their IIAs with foreigners depending on their negotiating power, concerns and development needs.

4.2 'Africanization' of International Investment Law: Empowerment of Regional Dispute Settlement Bodies

In addition to the reform efforts going at the international arena, there have been efforts by the African Union aimed at what has come to be popularly known as 'Africanization' of international investment law. The first step

⁶⁵ International Bar Association, 'Consistency, efficiency and transparency in investment treaty arbitration,' *A report by the IBA Arbitration Subcommittee on Investment Treaty Arbitration*, November 2018.

⁶⁶ *Ibid.*

⁶⁷ Andrea Bjorklund, Yarik Kryvoi and Jean-Michel Marcoux, 'Investment Promotion and Protection in the Canada-UK Trade Relationship' [2018] Available at SSRN 3312617, p.v.

⁶⁸ United Nations Conference on Trade and Development, *World investment report 2019: Special economic zones*. UN, 2019, p. 106.

towards this was evidenced by the drafting of *Pan-African Investment Code*⁶⁹, whose main objective is to promote, facilitate and protect investments that foster the sustainable development of each Member State, and in particular, the Member State where the investment is located.⁷⁰ The Code is meant to apply as a guiding instrument to Member States as well as investors and their investments in the territory of Member States as defined by this Code.⁷¹ In addition, this Code is meant to define the rights and obligations of Member States as well as investors, and principles prescribed therein.⁷²

The Pan-African Investment Code is hailed as the first continent-wide African model investment treaty elaborated under the auspices of the African Union, drafted from the perspective of developing and least-developed countries with a view to promote sustainable development.⁷³ In an attempt to make investment activities by foreigners more responsive to the sustainable development needs of African states, the Code has introduced some of innovative features such as the reformulation of traditional investment treaty provisions and the introduction of direct obligations for investors.⁷⁴ If adopted, this Code could potentially contribute to the reforms of the international and regional investment regimes.

Some commentators within the Continent have also proposed that setting up of regional courts is the way to go. For instance, in relation to the West African region, it has been suggested that for States in West Africa there might already exist a ready-made investment tribunal in the form of the Court of Justice of

⁶⁹ African Union Commission, Draft Pan-African Investment Code, Draft, December, 2016 <https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf > Accessed 13 August 2020.

⁷⁰ *Pan-African Investment Code*, Article 1.

⁷¹ *Ibid*, Article 2(1).

⁷² *Ibid*, Article 2(2).

⁷³ Makane Moïse Mbengue and Stefanie Schacherer, 'The "Africanization" of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 *The Journal of World Investment & Trade* 414.

⁷⁴ *Ibid*.

the Economic Community of West African States (ECOWAS).⁷⁵ To the proponents of this position, all that is required is to activate the arbitral jurisdiction of the ECOWAS Court of Justice, considered the most successful of the African sub-regional courts, and extend its jurisdiction to cover investor-state jurisdiction.⁷⁶ This, it has been argued, given the present widespread dissatisfaction with investor-State dispute settlement, can provide an alternative to arbitration that is already up and running and would also help to cement African States' role as 'investment rule-makers' rather than 'rule-takers'.⁷⁷ This approach may also be duplicated in relation to the other regional courts such as the East African Court of Justice.⁷⁸ Currently, the African countries trade in terms of blocks, with States forming Regional Economic Communities (RECs) such as the East African Community (EAC), Economic Community of West African States (ECOWAS) and Southern African Development Community (SADC).⁷⁹ The debate is still ongoing with emergence of discourse on a possibility of a continental approach to the investment debate with the drafting of such instruments as the Pan African Investment Code⁸⁰ and the African Continental Free Trade Agreement.⁸¹

⁷⁵ GRAIN, 'Investor-State Dispute Settlement Using the ECOWAS Court of Justice: An Analysis and Some Proposals' <<https://bilaterals.org/?investor-state-dispute-settlement-41351>> accessed 15 August 2020.

⁷⁶ Ibid.

⁷⁷ Ibid; See also 'Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice' <https://www.researchgate.net/publication/314518756_Rule-Takers_or_Rule-Makers_A_New_Look_at_African_Bilateral_Investment_Treaty_Practice> accessed 15 August 2020.

⁷⁸ See Muigua, K., Book Chapter: 'Effectiveness of Arbitration Institutions in East Africa,' in Onyema, E. (ed), *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions*, (Kluwer Law International, The Netherlands, 2016).

⁷⁹ Muigua, Kariuki, "Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges." <<http://kmco.co.ke/wp-content/uploads/2020/06/Investment-Related-Dispute-Settlement-under-the-African-Continental-Free-Trade-Agreement-Promises-and-Challenges-Kariuki-Muigua-June-2020.pdf>> Accessed 15 August 2020.

⁸⁰ African Union Commission, Draft Pan-African Investment Code, Draft, December, 2016.

⁸¹ Muigua, Kariuki, "Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges."

4.3 Capacity Building in Investment Knowledge and Expertise

While some commentators often argue that the lopsided relations in investment law negotiations that characterise the developed-developing world relations, others have argued that in contrast to North-South relations, negotiation outcomes seem to be shaped more by expert knowledge than by power asymmetries.⁸² This, they have argued, is evidenced by a situation where powerful states like Egypt fail to dominate negotiations, while small-island-state Mauritius with its strategic investment policy agenda succeeds in setting the terms of investment agreements.⁸³ It has been observed that the foreign companies operating in Africa often have high bargaining power in the negotiations due to their influential position and backing from their governments. On the other hand, African governments have low bargaining power in these contracts or agreements because they are less influential.⁸⁴ They are more flexible in negotiations than their foreign counterparts. In exchange,

⁸² 'Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice' <https://www.researchgate.net/publication/314518756_Rule-Takers_or_RuleMakers_A_New_Look_at_African_Bilateral_Investment_Treaty_Practice> accessed 15 August 2020.

⁸³ Ibid; See also 'Investing In Mauritius – Foreign Investment And Business Activity - Government, Public Sector - Mauritius' <<https://www.mondaq.com/inward-foreign-investment/560050/investing-in-mauritius-foreign-investment-and-business-activity>> accessed 15 August 2020; Zafar, Ali. "Mauritius: An economic success story." *Yes Africa can: Success stories from a dynamic continent* (2011): 91-106; Sobhee, Sanjeev K. "The economic success of Mauritius: lessons and policy options for Africa." *Journal of Economic Policy Reform* 12, no. 1 (2009): 29-42; Kalinichenko, Liudmila N., and Zinaida Novikova. "Mauritius: africa's business and financial centre." *Asia and Africa today* 4 (2020): 60-66.

⁸⁴ Jr Louis T. Wells, 'Negotiating with Third World Governments' [1977] *Harvard Business Review* <<https://hbr.org/1977/01/negotiating-with-third-world-governments>> accessed 16 August 2020; Rasmus Hundsbæk Pedersen, 'The Politics of Oil, Gas Contract Negotiations in Sub-Saharan Africa' (Danish Institute for International Studies 2014) <<https://www.jstor.org/stable/resrep15998>> accessed 16 August 2020; R Harrison Wagner, 'Economic Interdependence, Bargaining Power, and Political Influence' (1988) 42 *International Organization* 461; 'Mining to Profit Africa's People' (*Africa Renewal*, 15 April 2009) <<https://www.un.org/africarenewal/magazine/april-2009/mining-profit-africa%E2%80%99s-people>> accessed 16 August 2020.

they end up giving what rightfully belongs to the people to foreigners.⁸⁵ There is a need for African countries to fight corruption, which often affects these negotiations and enforcement of domestic laws⁸⁶

The *World Investment Report 2018* outlines challenges arising from the policymaking interaction between IIAs and the national legal framework for investment as follows: policymakers in charge of national and international investment policies might be operating in silos and create outcomes that are not mutually supportive or, worse, conflicting; incoherence (e.g. between a clearly defined Fair and Equitable Treatment (FET) clause in one or several IIAs and a broad FET clause in an investment law) may have the effect of rendering IIA reform ineffective; and incoherence between investment laws and IIAs may also create Investor-state dispute settlement (ISDS)-related risks when national laws include advance consent to international arbitration as the means for the settlement of investor-State disputes, which could result in parallel proceedings.⁸⁷ It has also been observed that post-2000, investors have increasingly relied on expansive interpretations of vaguely-drafted provisions in IIAs, national investment laws, investment contracts, and the dispute resolution provisions contained within such agreements, to sue host states for alleged violations of treaty or contractual obligations. This practice of "contract, treaty and forum shopping" has contributed to the multiplication of ISDS cases.⁸⁸ In addition, litigants place their court cases in the court system

⁸⁵ Africa Development Bank, "Resource companies ripping-off Africa"-AFDB Chief <<http://uk.reuters.com/Art./2013/06/16/uk-africa-economy-idUKBRE95FOEH20130616> > Accessed 15 August 2020.

⁸⁶ See *World Duty Free Company Limited v. Kenya*, ICSID Case No. ARB (AF)/00/7, Award (4 October 2006) and *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29. In both cases, there were allegations of corruption by high ranking Kenyan officials. While the World Duty case was not based on any Treaty, it shows how corruption can affect the country's ability to attract genuine investment by foreigners.

⁸⁷ United Nations Conference on Trade and Development, *World Investment Report 2018* (United Nations, 2018), p.107.

⁸⁸ Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] *Rethinking International Investment Governance: Principles for the 21st Century* (2018), p. 32.

perceived most likely to find in their favour, thus affecting the legitimacy of the whole ISDS system.⁸⁹

There is therefore a need for the African Governments to invest in highly knowledgeable experts while negotiating and drafting the terms of investment agreements in order to ensure that the resultant documents are not only non-ambiguous but also guarantee that they do not adversely affect their ability to regulate the investment activities and enforcement of domestic laws.

5. Conclusion

As it has been highlighted above, IIAs grant extensive rights to a wide range of foreign investors against host states, without imposing any reciprocal obligations on those investors. Where broader concerns such as human rights or sustainable development⁹⁰ are included within IIAs, they do not, for the most part, demand action from investors or states. As a result, the legal framework for investment operates on an understanding of justice where fairness to investors is the dominant principle.⁹¹

As a result, there is a growing international consensus that more is needed from international investment treaties and the regime in general, if they are to have a meaningful future, or any future at all, and this consensus is increasingly revolving around the sustainable development paradigm.⁹² As it has been demonstrated in this paper, the traditional approach to ISDS and investment law as adopted in the earlier investment agreements has continually been criticized especially by the developing countries as giving private investors unfair advantage to challenge domestic public policies of the host countries.

⁸⁹ Ibid, p. 32.

⁹⁰ UN General Assembly, *Transforming our world : the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

⁹¹ Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] *Rethinking International Investment Governance: Principles for the 21st Century* (2018), p. 31.

⁹² Mann, H., "Reconceptualizing international investment law: its role in sustainable development." *Lewis & Clark Law Rev.* 17 (2013): 521, p. 536.

This is because from its earliest origins, investment law has often been regarded as an isolated regime intended to ensure investors' benefits.⁹³

In order to overcome the mechanism allowing private investors to submit investment claims to international arbitration, some policy-makers and negotiators have responded to these criticisms through various approaches included in recent IIAs and model agreements, namely: a reformed investor-state dispute settlement mechanism through the inclusion of new provisions, a return to diplomatic protection and state-to-state arbitration, reliance on domestic courts, Alternative Dispute Resolution Mechanisms, hybrid approaches, and an investment court system.⁹⁴

There is a need to change the current trend where African states tend to be rule-takers in North-South relations, and yet enjoy greater agency in negotiations of South-South BITs. Only few African countries, however, use their greater say in intra-African negotiations to include public policy exceptions in BITs.⁹⁵ African countries have demonstrated some efforts towards either completely ditching the ISDS system in favour of domestic courts or coming up with customised legal instruments such as the Pan-African Investment Code, designed to offer guidelines to African countries when entering into or designing investment agreements with foreign investors. These homegrown solutions are meant to achieve this by: further clarifying the content of standards of protection that are traditionally included in IIAs; limiting definition of indirect expropriation; adopting constraining provisions imposing direct obligations on foreign investors in the face of domestic regulatory

⁹³ Emma Aisbett and others, 'Rethinking International Investment Governance: Principles for the 21st Century' [2018] *Rethinking International Investment Governance: Principles for the 21st Century* (2018), p. 3.

⁹⁴ Andrea Bjorklund, Yarik Kryvoi and Jean-Michel Marcoux, 'Investment Promotion and Protection in the Canada-UK Trade Relationship' [2018] Available at SSRN 3312617, p.v.

⁹⁵ 'Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice' <https://www.researchgate.net/publication/314518756_Rule-Takers_or_Rule-Makers_A_New_Look_at_African_Bilateral_Investment_Treaty_Practice> accessed 15 August 2020.

measures; and limiting foreign investors' access to international independent arbitral tribunals, among others.⁹⁶

Clearly Africa has a key role in the reform of international investment law and the ISDS system:

Whichever approach they choose to adopt, African countries need to play a greater role in policy and rulemaking in international investment law, especially in relation to the ISDS system to ensure that they protect their domestic policies while at the same time attracting investments into their territories to boost national and regional development.

⁹⁶ Andrea Bjorklund, Yarik Kryvoi and Jean-Michel Marcoux, 'Investment Promotion and Protection in the Canada-UK Trade Relationship' [2018] Available at SSRN 3312617, p.v.

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