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Investor-state arbitration and African states: advancing the proposal for a Pan-African Investment Court

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Abstract

The adjudication of investor–state dispute settlement (ISDS*) between African states and other countries has drawn criticisms of the remedies and the legal instruments, bilateral and multilateral investment agreements. Thus, African states have argued for a new regulation regime that balances the rights of host states and foreign investors. This article argues for the creation of a Pan-African Investment Court.*

Introduction

Since the end of the colonial era, there has been a wave of "Africanisation" of economic and political activities within the African continent. These moves have largely precipitated a new thinking of ensuring that African domestic affairs and their relationship with the international community must, on one hand, be African-led and also support the sovereignty of African states. Within the sphere of international investment law, this novel thinking has always resonated strongly in the determination of African states to enshrine an international investment law regime that positively supports and preserves its internal economic and sovereignty aspirations. In the emerging wave of progressive reform measures across a broad spectrum of the global investment community, African states have mostly engaged in piecemeal initiatives, thereby displaying a docility that may not properly serve its interests and people. Apart from South Africa's Protection of Investment Act, No.22 of 2015, African states have not been proactive players in the march towards enthroning a new international investment law framework that balances the rights of foreign investors and host states. Irrespective of this, however, African states have evidenced a willingness to deviate from being peripheral figures in the investment law reform agenda through some regional economic alliances that seek to create greater economic co-operation and harmonisation within the various regions of the continent. In addition, there are plans for a Continental Free Trade Area (CFTA) by the 55 members of the African Union (AU) that will harmonise the various African investment regulation instruments and transform the continent into a single investment powerhouse that supports the continuous attraction of foreign direct investments (FDIs) and the preservation of the regulatory space of *I.C.C.L.R. 96 its states. In view of these developments, it is argued in this article that the ambition of such a wider continental economic integration, transformation and growth cannot be successfully achieved if African states do not fashion and own the adjudicatory arm of the international investment architecture. Hence, this article finds that this regional and continental economic harmonisation and integration process presents a veritable opportunity for the African economic alliance to be solidified through the creation of a Pan-African Investment Court (PAIC). A PAIC, it is argued, will not only best serve the interest of African states through increased attraction of FDIs and economic output but will also promote and protect the interests of foreign investors and the sovereignty of host states within the continent. Overall, a PAIC with its unique features, it is argued, will aid in the reformation of international investment law from its much-criticised ISDS model into one that balances the rights of both the host states and foreign investors.

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In the past three years, the idea of an investment court has started to manifest itself in the EU reform of international investment law. The proposal rests on the premise that private arbitration is not appropriate for handling matters involving national public policy. [1] As a result, in May 2015, the European Commission announced plans to replace international investment tribunals with a traditional court system. [2] This includes plans for a public investment court system with an appellate mechanism, composed of publicly appointed judges with qualifications comparable to those of members of the World Trade Organization's (WTO) Appellant Body or judges of the International Court of Justice (ICJ). In fact, the Transatlantic Trade and Investment Partnership (TTIP) Draft (2015), Ch.2: Investment, s.3, art.9(2) provides:

"The … Committee shall, upon the entry into force of this Agreement, appoint fifteen Judges to the Tribunal. Five of the Judges shall be nationals of a Member State of the European Union, five shall be nationals of the United States and five shall be nationals of third countries." [3]

This mechanism has already been incorporated in the EU–Vietnam Draft Free Trade Agreement 2016 [4] and the Comprehensive Economic and Trade Agreement (CETA) Finalised Draft 2016. [5] However, the idea is not new and lessons should be learned from standing initiatives. For example, the Arab Investment Court, created under the Unified Agreement for the Investment of Arab Capital in the Arab States, is bolstered by over 10 years of jurisprudence. ***I.C.C.L.R. 97** [6]

These reforms are a reflection of the criticisms, led by the international community, that have attended the international arbitration system. Gus van Harten has expressed concern over investment tribunals by arguing that they "undermine basic principles of democratic representation and accountability" and that they are not built to accommodate the quality of review necessary for public law adjudication. [7] Furthermore, the decisions of investment tribunals have a broader impact beyond the parties to the dispute. In reality, Surya Subedi argues that

"the pronouncements that these tribunals make as to the existence or non-existence of an alleged rule of international foreign investment law or the meaning and scope of a rule have wider ramifications and implications for other States as well as for international law as a whole". [8]

In fact, investment tribunals regularly choose the rules that would apply to the dispute and often choose to ignore public international law. Fundamentally, investment tribunals operate in a hybrid world consisting of private and public law, with broad discretion on the choice of rules. [9] This is why academic commentators such as Garcia-Bolivar argue:

"The interpretation of concepts and principles that are peculiar to States and public international law cannot be left to the view of ever changing arbitrators." [10]

Although the enforcement mechanisms and procedural rules were developed in the context of private commercial arbitration, scholars such as Anthea Roberts classify investment arbitration as a public law system. The discontent is anchored on several fronts, especially the inability of host states to effectively regulate and administer their countries because of the requirement to balance internal democratic decisions with the right of investors. [11] Hence, the formulation of an investment court system through the many progressive policy reform proposals is aimed at rebalancing the international investment climate between host states and investors.

African countries have also begun to reform their investment laws to reflect the reform agenda across the world. Since the first intra-Africa Bilateral Investment Treaty (BIT) between Egypt and Somalia was signed in 1982, there has been an astronomical rise in such agreements between African countries and with other ***I.C.C.L.R. 98** countries of the world. [12] African countries have begun to chart a new course for four reasons.

As a result of these developments, the aim of this article is threefold. First and foremost, it begins by examining the volume and value of FDIs into the African continent. This is to enable the determination of just to what extent African states have attracted FDIs with its current proliferation of international investment agreements (IIAs). Thereafter, the decided cases, especially those involving some African states and based on ISDS, will be explored. The intent is to use such case critiques to highlight the far-reaching ways in which arbitration centres have interpreted and applied certain investment protection standards such as fair and equitable treatment (FET). Furthermore, this exploration and the reactions in the wake of the cases will evidence the fundamental rationales behind the disaffection of most states from the current practice and application of ISDS.

Moving on, this article will investigate the novel treaty-making measures which have been undertaken by African states in view of their dissatisfaction with the intrusive nature of investment treaty protection standards on domestic policy-making and national sovereignty. Correspondingly, the regional alliances and economic harmonisation communities which are an offshoot of the new wave of innovative treaty-making initiatives and regional economic realignments will be discussed. This will enable a critical analysis of the etymological basis underpinning the argument of this article for the creation of a PAIC. Thereafter, other reasons such as the public nature of investor–state disputes (ISDs), which is contrary to commercial private arguments, will be explored to evidence the wider social-political impact of the awards and decisions of arbitral panels. This impact will once more be explained as one of the reasons why calls for a move towards a court system have occupied the front burner of the discussion on investment treaty adjudication in recent times.

Finally, the structure and benefits of the proposed PAIC will be outlined, thus using this part of this article to evidence and validate the reasons for the argument for the creation of an investment court system on the African continent. Overall, this article will conclude by offering the reasons why an investment court system is expedient at this time. Beyond its usefulness for broader African socio-economic integration and emancipation, this article will provide grounds to validate all the arguments contained in the entire discussion.

Foreign direct investment in Africa

The growing number of IIAs goes towards explaining the surge in ISDS claims, which has generated much of the dissatisfaction with the international investment order. The total number of global ISDS claims crossed the 690 mark in 2015, [13] with the majority of new cases brought under BITs pursuant to investment protection standards such as FET and expropriation. [14] However, the historical **I.C.C.L.R. 99* disparity in investment policy between developed and developing countries continues. Notwithstanding the surge in the contraction of much IIAs, especially BITs, the expected increase of FDI inflow into the continent remains at an abysmal level of $54 billion in the year 2015. [15] This represents a 3.1% share and a 4.6% decrease from the 2014 report of the world investment flow chart. [16] In comparison with the $541 billion for Asia and $504 billion for Europe with much lower investment agreements, it can be argued that Africa has not fully realised the potential inherent in the high number of IIAs within its domain. Consequently, the extent to which the many IIAs have enhanced and increased FDI inflow remains an intense subject of academic and expert study, eliciting different views and opinions. [17]

Investor–state caseload

African states are also concerned with the plight of other states in their reform agendas, exemplifying that IIAs, especially BITs, prohibit to a large extent the powers and rights of governments to sufficiently discharge their regulatory responsibilities and obligations or to reverse decisions that could engender serious damage in their countries. These concerns of decision reversal and investor reprisal were cogently evidenced in the aftermath of the people-led political transitions popularly known as the Arab Spring in North Africa. [18] In the wake of the transition in Egypt, a foreign investor had made a claim which was, however, challenged by Egypt, [19] accusing the new Government of Morsi that a concession contract which was consummated under the previous regime of Mubarak breached its investment law provisions of mandatory compensation to the investors for increasing the minimum wage.

Furthermore, the past decade has been accompanied by a litany of investor claims for a breach of some substantive investment protection standards because of several armed and civil conflicts and issues within the African continent. The armed conflicts and civil unrest have been the reasons underpinning the bringing of claims by investors of breaches of the investment protection standards of which Africa is one of the active signatories and participants, especially FET provisions, which are a major part of the various investment protection standard instruments. **I.C.C.L.R. 100* This provision is one of the main bases on which investor claims are instituted within Africa and the global investment community. [20] For instance, the cases of *American Manufacturing (1997)* and *Wena Hotels (2000)* were commenced following armed conflict and civil unrests, [21] during which investors argued that full protection and security standards which require the protection of foreign investments were not fully discharged by these countries. Apart from these two claims, other African countries have also been slammed with claims hinging on full protection and security, a consequence of several years of armed struggle, conflict and civil strife within the continent. For example, Tunisia and Algeria have on this basis also experienced investor claims of full protection and security following years of armed conflict and guerrilla warfare within its borders. [22]

Therefore, it is evident that these investor claims are not only capable of constituting a barrier to the political, economic and social emancipation of states in the shadow of any conflict through a series of financially damaging claim actions, but they also pose a chilling effect on governmental activities aimed at the effective regulation of its territorial space through the fear of investor reprisals hinged on the infringement of substantive protection standards contained in IIAs. Hence, provisions such as full protection and security and FET have been used as vehicles against African states, thereby limiting and impinging on the making of progressive policies of states. A veritable example of this fear is Egypt, which faced nine investor claims in the aftermath of the civil strife in its country.[23]

Despite the intrusion of FET into the internal regulatory powers and space of most countries, the provision has remained the most potent tool for investor claim actions, thus transforming it into the most commonly deployed instrument for protecting the rights and economic interests of foreign investors. For instance, in the case of *Siag and Vecchi v Arab Republic of Egypt*,[24] the investors pre-emptively sought the protection of their investments in light of an attempt to expropriate their investments by the police of Nuweiba. In the ensuing claim action, the tribunal reversed the seizure by deciding that the expropriated investment should be returned to the claimants as the action breached the full security and protection provisions of the enabling treaty.[25] In view of this far-reaching impact of FET on the national regulatory space, some states have elected to devise limiting mechanisms through the introduction of innovative ideas in their treaty drafting with other countries. ***I.C.C.L.R. 101** [26] Through these measures, the true meaning, operational scope and applicability of protected standards are explained, thus enabling a regime of clarity.

Thirdly, the operation of the ISDS framework is entirely based on deciding any issues through the lenses of the applicable treaty as well as the Vienna Convention on the Law of Treaties (VCLT).[27] This convention implies that, during the interpretation of treaties, the "ordinary meaning" of the words, the *travaux préparatoires*, any further or prior agreements between the states, and the circumstances and language of the conclusion of the treaty must be taken into account.[28] However, evidence abounds that adherence to this requirement has not been met as the proliferation of investment treaties has underpinned the different interpretation of texts and cases of the same subject-matter. For example, the decisions of the tribunals in the cases of *CME v Czech Republic* [29] and *Lauder v Czech Republic*,[30] where related issues were interpreted differently by two different panels, has been said to be "the ultimate fiasco in investment arbitration".[31]

Lastly, there is no cogent appeal mechanism for the ISDS system as its current means of appeal are highly limited in scope. This is perhaps a result of the well-enunciated principle that arbitral panels must be the final arbiters of any issues that is brought to them. The only form of second redress is the annulment procedure contained in the International Centre for Settlement of Investment Disputes (ICSID) rules that allows for the review of cases, but only on matters of the law and its application and not on questions of fact.[32] Essentially, the appeal mechanisms can only be allowed for the review of the process of applying the law leading to any award, in order to ascertain whether the panel has acted in an ultra vires manner or conformed to the rules. Inevitably, this inability to provide an appeal mechanism for the review of cases that may have been wrongly decided has been deemed to be one of the greatest Achilles heels of the ISDS system. Furthermore, this reason has been used to accuse the system of being in favour of investors to the detriment of host states. This bias of the system can be contextualised in the fact that only investors can institute claim actions against states, which states cannot do against investors. In this way, therefore, members of arbitral tribunals are wont to make favourable rulings for investors so that the system can continue to be lucrative for themselves too, since they draw their salaries and emoluments from the parties to any case. ***I.C.C.L.R. 102** [33]

Innovative treaty-making practices

African countries have started to embrace the new generation of investment treaties espoused around the world and are slowly moving away from the European style of lean model BITs, as exemplified by the Reciprocal Investment Promotion and Protection Agreement between Nigeria and Morocco 2016.[34] This bilateral investment treaty between Nigeria and Morocco sought to rebalance the investment powers and rights between investors and host states by resolving most of the contentious issues in international investment law. For example, it abolished most favoured nation (MFN) treatment by stating that treatment of foreign investors and of citizens of host states must be equal.[35] Further clarity was provided in determining the meaning of equal treatment and investors of like circumstances as being on a case-by-case basis, taking into account all the circumstances of a particular issue on its merits. Similarly, the treaty adopted the international customary law standard as the minimum standard of treatment that may be afforded to an investor from any of the contracting states. Remarkably, and a departure from most BITs, the Nigeria and Morocco BIT clarifies that full security and FET do not create and grant substantive rights to investors and

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their application [36] cannot be beyond that which may be reasonably expected from a host state under customary international law standards. Likewise, expropriation is permitted especially for public purposes and followed by compensation of the fair market value. This in effect suggests that the two states are allowed by the treaty to take such measures as may guarantee the interest of their countries. It suggests therefore that the ability of the countries to continually make legitimate internal decisions without the fear of breaching the provisions of the treaty may not arise. Hence, if the Philip Morris and Uruguay case [37] had been argued under this treaty, then Uruguay might not have been in breach, as the action they undertook was for the protection of the health of their citizens, which is an important public purpose endeavour. Once more, unlike the provisions of most BITs, there is no prompt and adequate provision in this treaty as all claims are to be reviewed subject to the circumstances of each case. Among the most fundamental provisions of the treaty is the requirement for investors, in the course of their operations, not to endanger the environment. It also grants host states the discretion to take necessary measures that would enable them to protect the environment against harmful practices that might arise during the course of investment operations.

Regionalism in Africa

At the continental level, there is a consensus on extending the scope of the Tripartite Free Trade Area (TFTA) by creating an African-wide CFTA by the 55 Member States of the AU by 2017 and an African Economic Community by 2034. ***I.C.C.L.R. 103** [38] Furthermore, the Pan-African Investment Code, which was adopted by Member States of the AU in 2016 as a non-binding model investment framework, seeks to ensure that the advancement of investments and sustainable development within the region are mutually inclusive. [39] All these agreements and alliances are geared towards enhancing greater economic integration and harmonisation and driving more investments within the African continent.

In the context of investment law devolvement and economic integration, African states have evidenced their willingness to join the community of nations in charting a new course for investment policy protection. Although this still largely remains at the peripheral level, however, there are several piecemeal progressive policy developments which seek to boost the investment climate as well as balance the right of investors with the ability of host states to effectively regulate their territories. These policy reform proposals are reflected in the various Regional Economic Community (REC) initiatives for economic integration and harmonisation, such as the Southern African Development Community (SADC) Protocol on Finance and Investment, [40] the East African Community (EAC) Model Investment Code, [41] the Common Market for Eastern and Southern Africa (COMESA) [42] with its Common Investment Area (CCIA), and the Economic Community of West African States (ECOWAS) Trade Liberalisation Scheme [43] and Supplementary Act on the Common Investment Rules, [44] which establish a Free Trade Area (FTA) and common customs union within the regions. [45] In addition, the Arab Maghreb Union (UMA), Sahel-Saharan States (CEN-SAD) and Intergovernmental Authority on Development (IGAD) are also advancing towards greater economic harmonisation and co-operation. Already, Member States of the COMESA, SADC and EAC are at an advanced stage towards creating a TFTA which will cover and control about 58% of Africa's total gross domestic product (GDP). [46]

On the regulatory front, these investment protection frameworks have been used to regulate and drive investments across the African landscape. Remarkably, some of them contain the novel policy of investment courts as framework for ISDS. ***I.C.C.L.R. 104** Leading the departure from the traditional BIT provisions is the COMESA CCIA agreement, which explained the scope of fair and equitable treatment (FET) that is usually the bone of contention in arbitration, balanced the locus standi of both host states and investors to sue for a claim, granted and clarified most favoured person substantive protection to COMESA investors and, most importantly, provided for a court system as an alternative to arbitration.

Similarly, the *SADC Protocol on Finance and Investment (Model BIT)*, among other things, provided for and changed most IIA provisions such as FET and uncompensated expropriation. Furthermore, it departed from BIT provisions by expunging MFN and the right of investors to sue for claim, a demand for the exhaustion of local remedies by investors before approaching arbitration panels and ultimately a rebalancing attempt by providing exceptions in investor rights for national security purposes. Under this model, compensation has to be "fair and adequate" instead of the traditional "prompt, adequate and effective" wording as contained in BITs. Consequently, the SADC and COMESA propositions attempt to balance the right of investors with the power of states to regulate their territorial space by taking into cognisance the local realities of their region such as their capacities to affectively discharge their obligations to investors.

Likewise, the ECOWAS models provide for the use of the ECOWAS Court of Justice, national courts and tribunals as arbiters of disputes; this is a clear departure from the international arbitration provisions in most IIAs. Furthermore, while guaranteeing the transfer of assets regarding investments for its investors, the ECOWAS instrument also imposes obligations on investors

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for the protection of human and labour rights, hence evidencing a departure from traditional BIT routes. Correspondingly, the non-legally binding EAC Model Investment Code provides for the notification of the state through the submission and receipt of an investment dispute certificate from the appropriate national agency and department before proceeding to international arbitration using the rules of ICSID. Significantly, South Africa has taken the bull by the horns through its revolutionary approach towards recalibrating the investment law regime in Africa. This is evidenced in its decision to cancel several BITs with countries such as Spain, Switzerland and Denmark, and the enactment of the South African Protection of Investment Act in 2015.[47] Once more, this legislation grants lesser rights and protections than are traditionally contained in BITs, thus leading the transformation of African states as not just takers of investment laws but also reformers and inventors of novel progressive policies aimed at achieving a rebalance between states and investors.

The public nature of investor–state arbitration

ISDS is a system which functions on a very high level of confidentiality.[48] Perhaps, this confidential nature is underpinned by the orthodox confidential position expected from those in commercial fiduciary relationships to mitigate any consequences on stakeholders and the business units of the commercial partner. But, for the purposes of ISDS, such a confidentiality argument cannot be justifiable ***I.C.C.L.R. 105** since it impacts on the resources of a state and its policy-making obligations. Despite its commercial law origin, investment arbitration cannot be treated as a private affair because states which are parties to such proceedings represent their citizens and, as already mentioned, offset any awards against them with public funds. Hence, it is a public issue, which therefore must incorporate a high level of transparency. Even though arbitral tribunals "wield enormous power, displacing local courts and making decisions about the rules that govern major portions of host country economies and, by extension, their societies", most of their deliberations are privately discharged.[49] As a result, these impacts have necessitated the argument that ISDS cannot be treated as a normal commercial dispute resolution, and thus issues of transparency must be attended to seriously and made mandatory.

Proposed Pan-African Court

A permanent investment court is one of the two pathways that have emerged from the global debate aimed at resolving ISDs. On one hand is the suggestion of keeping the current ISDS system and reforming it to reflect current challenges and criticisms. On the contrary, there is an argument for a total dismantling of this arbitration model and its replacement with an investment court system. It has been evidenced herein that a reformed ISDS will still not resolve the issues which have led to its criticism, hence, a PAIC is proposed as the panacea to a rebalanced ISDS framework.

The PAIC proposal is inspired by the developments within the EU, which is tilting towards an investment court system as an alternative to ISDS. Although this African version is more comprehensive and revolutionary in comparison with the EU version, there is evidence that the EU envisages that an investment court system will become a permanent variable within its investment treaties, thereby fundamentally replacing the ISDS as a mechanism for resolving ISDs. Within this framework, it is intended that the EU's bilateral treaties will be replaced with a multilateral "opt-in" system that mirrors that of the Mauritius Convention 2017,[50] which enables states to accept to be bound even for pre-existing investment agreements.

This proposal for a PAIC is timely because of the noticeable failures of the ISDs. Thus, it will be solely responsible for determining intra-African investment treaties and disputes. This method of regulating and determining ISDs has been hailed by some academics as the future of investment law devolvement. For example, Mann and Von Moltke have commented that the present arbitration model "was not designed to address complex issues of public policy that now routinely come into play in investor-state disputes".[51] As such, Subedi and Butler have opined that a continental dispute resolution mechanism such as the PAIC is capable of rebalancing investment agreements between the public and private constituencies ***I.C.C.L.R. 106** of investors and states.[52] However, according to them, this can only be achieved through an independent body which is free from control by either the investors or the states. Furthermore, the idea of an investment court has also received support from the United Nations Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred-Maurice de Zayas, as contained in the *De Zayas Report*.[53] It was argued in this report that investor–state arbitration and its awards are not compatible with the norms and practices of international law, invalid and null as well as *contra bonos mores*, with its attempt towards "creating a new legal order beyond the Charter of the United Nations".[54]

Among the benefits of a PAIC will be a deviation from ISDS in intra-African disputes between agreeing members. More fundamentally, an investment court would have rebalanced the rights of investors and states, thereby allowing states to effectively regulate their territories without the disadvantage of infringing the protected standards. Thus, it will be able to draw

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up such policies for the good governance and administration of their countries that are seemingly impossible in the current ISDS framework. This is because the current system leads states to bend over backwards and limit their sovereign state in order to keep the countries of investors and their nationals happy for these investors to invest in their countries. Through this mechanism, more developed countries are in a stronger bargaining position, which may lead developing states which require FDIs the more to agree to terms that may not be favourable to their country and its citizens. As such, a PAIC would rebalance the global distribution of wealth, thereby enshrining fairness and equity in the negotiation of treaties. Furthermore, an investment court system will infuse more consistency and predictability in the resolution of ISDs. This is because of its use of the principles of convention courts and legal system such as the doctrine of precedent.

The Pan-African Investment Court as a timely intervention

Therefore, having explored the African investment regulatory mechanisms and framework, it is evident that African states are active players within the international investment community. More importantly, the level of co-operation and regional realignments evidences a strong will towards greater economic harmonisation, taking cognisance of the number of intra-African BITs and regional economic organisations. These instruments also showcase the strong intention of African states to depart from traditional ISDS and BIT provisions in an attempt to rebalance IIAs in favour of host states. As can be deduced, however, such a rebalancing will not be achieved through a continuous reliance and use of ISDS. Thus, this article recommends that African states should utilise this realignment and these harmonising measures to create a PAIC. This call for an investment court, complete **I.C.C.L.R. 107* with a tribunal of first instance and an appellate tribunal, is important because, according to Garcia-Bolivar,

"the interpretation of concepts and principles that are peculiar to States and public international law cannot be left to the view of ever changing arbitrators". [55]

Several scholars have lent their voices to the topical issue of departing from ISDS into a more balanced and consensually approved international investment law regime. According to Páez,[56] African states have been active players within the international investment law regime, with several BITs consummated with states from other continents. However, the envisaged advantages that should normally have been a correlative outcome of such agreements have been elusive, stemming from the one-sided nature of these IIAs such as BITs. Thus, this "cluttered spaghetti-bowl of investment regimes" has not been beneficial to African countries. Instead of a continuous reliance on the ISDS system, with its inconsistent nature, Páez has suggested a more harmonised framework of African regulatory measures, towards creating "an African Continental Investment Area (ACIA) as an alternative to the existing investment regime". [57] Such a continental investment regime should be a derivative of better harmonised regional economic areas, as evidence abounds of how RECs have been pioneers of economic integration and harmonisation within the African continent. In providing a support for a more united front by states of the African continent, it has been highlighted that individual BITs will not serve the greater interest of the states within the continent, hence offering a support to the proposal of this study for a common multilateral treaty with a RIC for the attraction of more FDI into Africa.

On the issue of rulemaking and regulation, Mbengue and Schacherer[58] have opined that Africa is incrementally moving away from the role of consumers of investment law regimes to makers of one through the Pan-African Investment Code and other measures, such as the South African investment court. The rule-takers' role is a consequence of the need for the attraction of FDI from the more developed countries of the world; hence, there is an unequal balance of powers during the negotiation of investment treaties. However, the roles are being reversed through the invention of modern investment treaties by the revolutionary measures of regional actors such as the COMESA, EAC, ECOWAS and SADC among others. According to the authors, the Pan-African Investment Code, being the very first continental investment treaty irrespective of its non-binding nature, is a useful guide towards enacting the investment chapter of the CFTA. Therefore, its provisions should be better harmonised because most of it is a departure from traditional BIT routes and incorporates salient African realities. Consequentially, any future multilateral agreement should mirror the provisions of the Pan-African **I.C.C.L.R. 108* Investment Code, as it will enable the protection of investors while allowing African states and governments to effectively administer their countries.

In an effort towards effecting a common investment front, Denters[59] suggests that Africa need not look further as it possesses a large number of regulatory frameworks which are spearheaded by the RECs. Most of these regional rules contain novel provisions and initiatives which are in tandem with the concerns of a section of the investment community on the ability of host states to regulate their countries while protecting investor rights. All that is required is integration and agreement by states within Africa, as it will

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"boost the flow of foreign investment to and across Africa by simplifying and harmonizing the normative environment, and by enhancing the effectiveness and mobility of multinational companies". [60]

Overall, these novel introductions and piecemeal departure from traditional BIT and ISDS standards are capable of erasing the concerns of stakeholders about the current BIT framework and thus may crystallise into rebalancing international investment law.

A PAIC is possible because the novel inventions from some of the RECs which have shifted from investment protection to facilitation are a common derivative of the current narrative of international investment law. [61] As such, the facilitation of investment is good as it will engender greater growth and a flow of FDI, and "should reduce transaction costs and obviate complex administrative procedures" in investment administration. [62] But, notwithstanding the disbandment of the SADC tribunal, Ofodile [63] recommends that a multilateral treaty should be revisited by African states as it will help bolster their economies and attract more sustainable developing to the continent. In all instances, the BIT route cannot be conclusively envisaged as possessing any features that may make it susceptible to a reform, only a total denunciation and a paradigm shift towards an investment court system that will suffice in Africa's bid to harnessing its huge potentials as well as attracting more FDI into its fold.

Conclusion

This article has discussed all the issues underpinning the concerns over the current ISDS and the gradual shift to novel progressive policies of an investment court. Within an African context, there are available and credible moves which are championed by regional blocs towards reforming international investment law that will protect the right of states to regulate their affairs while facilitating investment opportunities for investors. Consequently, considering this strong drive and ***I.C.C.L.R. 109*** willingness towards an investment court system by the global investment community, this article argues that Africa must not be left on the sidelines and margins of this fundamental devolvement and reform of international investment law. As such, African countries should learn from the already existing models such as the CFTA and Pan-African Investment Code and in fact champion the reformation process to the benefit of the states and citizens of the continent.

Furthermore, such a court could mirror the recently concluded CETA model, which provided for an investment court that is manned by publicly appointed judges as well as deriving its jurisdiction through a multilateral agreement by all parties to readily submit themselves to the competence of the court. Other measures such as the make-up of the judges will follow the same multilateral agreement wherein the appointment of tribunal members is rotated from the Member States for a determinable term. The confidence of developed states and investors in an African institution will not wane if there is evidence of balance and fairness in the constitution of the investment court. With the continent being attractive for investments with its huge returns, it is envisaged that investors will continue to operate and submit themselves to an African institution.

Notwithstanding the attraction of this proposal, it is, however, recognised that the challenge which has confronted similar proposals of its ilk has revolved on the format and workability of a PAIC. Questions on its scope, functionality and competence have remained the factors that may hamper any proposed investment court for the African continent. For example, the demise of the SADC tribunal following the decision in the case of *Mike Campbell* [64] evidences how the weak institutional structures in Africa could serve as a clog in the wheel of creating a court system for the continent. Despite the outcome of the case and the disbandment of the Tribunal by members of the SADC, it is hereby argued and proposed that a multilateral investment treaty, accompanied by an investment court, would better serve the social economic interests of African states. As contained in the Doha Ministerial Declaration 2001, [65] a balanced investment treaty which protects the rights of host states and investors is possible and can be pursued.

Hence, this article calls for the use of regional and continental frameworks to institute an investment court for Africa which would encompass the reverse of the working mechanisms of arbitration centres. Such a call is made with the aim of using it as a launch pad for more investment inflow and sustainable development in Africa.

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Footnotes

1 Gus van Harten, "A Case for International Investment Court", Inaugural Conference of the Society for International Economic Law (16 July 2008), pp.5–9.

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