1. *Abstract*

*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 its relationship with the international community must on one hand be African led, and also supports 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 global investment community, Africa states have mostly engaged in piecemeal initiatives, thereby display 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 the willingness to deviate from being peripheral figures in this investment law reform agenda through some regional economic alliances which seeks 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 fifty-five members of the African Union (AU) that will harmonise the various African investment regulations and transform the continent into a single continental investment powerhouse that supports the continuous attraction of foreign direct investments (FDIs) and the preservation of the regulatory space of its states. In view of these developments, it is argued in this paper that such larger continental economic integration, transformation and growth ambition cannot be successively achieved if African states do not fashion and own the adjudicatory arm of international investment law. Hence, this paper finds that this regional and continental economic harmonisation and integration processes 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 argue well for 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 will have aided in the reformation of international investment law from its currently criticised Investor-State Dispute Settlement (ISDS) model into one that balances the rights of both the states and foreign investors.*

1. Introduction

In past three years, the idea of an investment court has started to manifest 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]](#footnote-1) As a result, in May 2015, the European Commission announced plans to replace international investment tribunals with a traditional court system.[[2]](#footnote-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 Organisation’s (WTO) Appellant Body or judges of the International Court of Justice (ICJ). In fact, chapter 2, section 3, Article 9(2) of the Transatlantic Trade and Investment Partnership (TTIP) Draft Investment Chapter (2015) provides that: “[t]he […] Committee shall, upon the entry into force of this Agreement, appoint fifteen Judges to the Tribunal.[[3]](#footnote-3) 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.” This mechanism has already been incorporated in the EU–Vietnam Draft Free Trade Agreement (2016)[[4]](#footnote-4) and the Comprehensive Economic and Trade Agreement (CETA) Finalised Draft (2016).[[5]](#footnote-5) . However, the idea is not new and lessons should be taken from standing initiatives. For example, the Arab Investment Court, created under the Unified Agreement for the Investment of Arab Capital in the Arab States, bolsters over thirty years of jurisprudence.[[6]](#footnote-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 they are not built to accommodate the quality of review necessary for public law adjudication.[[7]](#footnote-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]](#footnote-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]](#footnote-9) This is why academic commentators such as Garcia-Bolivar argue that “[t]he interpretation of concepts and principles that are peculiar to States and public international law cannot be left to the view of ever changing arbitrators.” 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.[[10]](#footnote-10) 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]](#footnote-11) Hence, the formulation of an investment court system through the many progressive policy reform proposals, are 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 have been an astronomical rise in such agreements between African countries and with other countries of the world.[[12]](#footnote-12) African countries have begun to charter a new course for four reasons.

* 1. Foreign Direct Investment in Africa

The growing number of IIAs somewhat explains the surge in ISDS claims, which has generated much of the dissatisfaction with international investment order. The total number of global ISDS claims crossed the 690 mark in 2015,[[13]](#footnote-13) with a majority of new cases brought under BITs pursuant to investment protection standards such as Fair and Equitable Treatment (FET) and expropriation.[[14]](#footnote-14) However, the historical 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 fifty-four billion dollars in the year 2015.[[15]](#footnote-15) This represents a 3.1% share and a 4.6% decrease from the 2014 report of the world investment flow chart.[[16]](#footnote-16) In comparisons with the 541 billion dollars for Asia and 504 billion dollars for Europe with much lower investment agreements, then it can be argued that Africa have not fully realised the potentials 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 opinion, eliciting different views and opinions.[[17]](#footnote-17)

* 1. Investor-State caseload

The UNCTAD reports that a record 70 ISDS cases were registered in 2015, compared to 11 registered cases in 1999, thus bringing the cumulative number of known ISDS claims to 696 by the end of 2015.[[18]](#footnote-18) However, the actual number of cases could be higher, as many remain unpublished, due to the wishes of the parties. Of the concluded ISDS proceedings in 2015, 36 per cent went in favour of the host State, 26 per cent in favour of the investor and 26 per cent were settled.[[19]](#footnote-19) Moreover, excluding cases that were settled or otherwise discontinued, dismissed at the jurisdictional stage or where the tribunal found liability without awarding any damages, 60 per cent of the cases were decided in favour of the investor as opposed to 40 per cent of the host State.[[20]](#footnote-20) This puts the dissatisfaction into context, especially since 60 per cent of cases commenced between 2013 -2015 were against developing States with the most frequent home State of the claimants being a developing country.[[21]](#footnote-21)

Between 1972 and 2014, 111 cases accounting for a fifth of all documented investment-treaty based cases were against African countries.[[22]](#footnote-22) In terms of caseload, among African countries, Egypt has been a respondent in the most number of cases (26, ranking third globally), followed by the Democratic Republic of Congo (eight cases). ICSID has been at the centre of these disputes by handling 107 of the 111 cases. Most of the disputes arose from economic sectors such as Oil, Gas, Mining, Electric Power & Other Energy, which attract the most Foreign Direct Investment (FDI) in Africa.[[23]](#footnote-23) Furthermore, only two per cent of arbitrators, conciliators and *ad hoc* Committee Members appointed in ICSID and Additional Facility held cases are African, neither have African countries as respondents been particularly keen on choosing Africans as arbitrators.[[24]](#footnote-24) Both the high number of ISDS claims and poor participation in investment arbitration offer support for a new dispute settlement direction.

Secondly, African states are also concerned with the plight of other states in their reform agendas, exemplifying that IIAs, especially BITs, prohibits to a large extent the powers and rights of governments to sufficiently discharge their regulatory responsibilities and obligations or reverse decisions that could engender serious damages to in their countries. This concerns of decision reversal and investor reprisal is cogently evidenced in the aftermath of the peoples led political transitions, popularly known as the Arab spring in North Africa.[[25]](#footnote-25) In the wake of the transition in Egypt, a foreign investors had made a claim, which was however challenged by Egypt,[[26]](#footnote-26) 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 have been accompanied with 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 unrests have been the reasons underpinning the bringing of claims by investors of breaches of this investment protection standards which Africa is one of the active signatories and participants, especially in the

Furthermore, armed conflicts and civil upheavals on the African continent over the past decades have been greeted by several foreign investor claims for breach of a range of substantive investment protection standards. The FET standard is a key component of the international investment architecture, in which African States have a vested interest. Since a number of African states have been confronted with civil strife and armed conflict in the past decades, the full protection and security clause in the FET standard, has had an important role to play in the claims brought by foreign investors against African States.[[27]](#footnote-27) For example, the physical protection and security component of full protection security was invoked in American *Manufacturing & Trading, Inc* v. *Republic of Zaire* (1997) following armed conflict and in *Wena Hotels Ltd* v. *Arab Republic of Egypt* (2000) following civil strife.[[28]](#footnote-28) Several African States recovering from years of conflict have been confronted with claims for physical damage caused to investment and non-violent actions that have impacted on the economic value of the investments. For example, Tunisia and Algeria have faced guerrilla warfare in parts of their territory since the 2000s, and a result, foreign investors have been able to invoke the full protection and security clause against these countries.[[29]](#footnote-29)

In essence, these claims could operate as a hindrance to social, economic and political recovery following conflict by not only subjecting African States to financially damaging claims but also producing a ‘chilling effect’ to governmental action designed to stabilise the country in fear that it could impede any of the treaty obligations. Thus, substantive provisions such as FET and full protection and security have formed the basis of several decisions against African States, in the process limiting the progressive policies of countries such as Egypt, which faced nine cases by foreign investors following the civil unrest in the country.[[30]](#footnote-30)

However, despite its impact on national regulatory space, the FET standard is the most commonly invoked investment treaty provision making it a key component of international investment law on safeguarding foreign investors’ economic interests.[[31]](#footnote-31) This is exemplified by the case of *Waguih Elie George Siag and Clorinda Vecchi* v. *Arab Republic of* *Egypt*, where the claimants, after learning that their investment was to be seized, sought protection of their investment from the Nuweiba Police. The tribunal decided that the expropriated investment should be returned to Siag & Vecchi because of the illegality of the expropriation and since the respondent had violated its obligations under the full protection standard.[[32]](#footnote-32) However, some States have resorted to innovative treaty drafting practices as a means of limiting their exposure to FET-based claims.[[33]](#footnote-33) Despite that, Eric De Brabandere finds that African States “do not generally deviate from existing conceptions of FET and [full protection and security], in the sense that there does not seem to be any Africa-specific conception of the FET and [full protection and security], standards of treatment.” He argues that there is a general unwillingness to steer away from the traditional formulation of these standards, which as a result limits African State’s ability to reduce their exposure to claims deriving from those standards. Thus, African countries have a vested interest in the reform of ISDS, to ensure that claims are brought to bodies that recognise the public international element of these claims (see the discussion on public international law below).

Thirdly, in the *ad hoc* ISDSsystem, cases are decided upon the language of the applicable treaty guided by the Vienna Convention on the Law of Treaties (VCLT) which requires interpreting a specific treaty provision to include consideration of the “ordinary meaning” of the text, subsequent agreements between the State parties, the *travaux preparatoire*, and the circumstances surrounding the treaty’s conclusion.[[34]](#footnote-34) However, with over 3000 IIAs, containing differing provisions and between different parties, these principles of interpretation leave plenty of scope for conflicting interpretation of similar or even identical phrases. This can be exemplified by the decisions in *CME v. Czech Republic* and *Lauder* v. *Czech Republic*; parallel cases handled by two different arbitral tribunals in what has been described as “the ultimate fiasco in investment arbitration.”[[35]](#footnote-35) An American businessman Ronald Lauder brought an investor-state claim against the Czech Republic under the US-Czech Republic BIT (1991) via the United Nations Commission on International Trade Law UNCITRAL) route.[[36]](#footnote-36) However, having structured his investment in TV Nova (a broadcasting firm), through a Dutch investment vehicle, the investor made another claim against the Czech Republic under the Netherlands-Czech Republic BIT (1991) via the ICSID route. Within days of each other, the Czech Republic was ordered by an ICSID tribunal to pay 270 million US dollars plus interest while the UNCITRAL tribunal dismissed the case on merit.[[37]](#footnote-37) This is compounded by the fact that each case is decided upon the language of the applicable treaty and the unique facts before the tribunal; cases interpreting similar circumstances or even applying the same treaty are merely persuasive authority.

Fourthly, the current ISDS system provides only limited scope for appeal due to a well-established principle that an arbitration award should be final. For instance, the ICSID rules permit annulment proceedings on specific grounds, none of which permit review of the tribunal’s findings of fact and only permit review of the determinations of law if it can be proved that the tribunal “manifestly exceed[ed] its powers.”[[38]](#footnote-38) While the nature of those proceedings is based upon local law, many jurisdictions apply grounds similar to those found in the UNCITRAL Model Law, which do not generally permit the domestic court to review the tribunal’s findings of fact or determinations of law.[[39]](#footnote-39) The absence of an appeals mechanism to review factual errors has fed the campaign against tribunals in the *ad hoc* system as biased against States. This bias occurs because, even though both parties generally pick at least one member of the tribunal and both parties are jointly responsible for arbitrator fees until a final award is issued, only investors can initiate cases in the ISDS system.[[40]](#footnote-40) As a result, tribunal members whose salary depends on the number of cases they adjudicate supposedly are incentivised to make sure investors see the system as helpful and legitimate, leading them to rule in the investors’ favour.[[41]](#footnote-41) This is compounded by the small, interrelated pool from which most parties select their counsel and arbitrators, with an arbitrator in one case often serving as counsel in another.[[42]](#footnote-42) In fact, the former Singaporean Attorney General and current Chief Justice Sundaresh Menon in his keynote speech at the International Council for Commercial Arbitration in 2012 questioned the independence of investment arbitrators[[43]](#footnote-43) and argued that many investment tribunals have interpreted the substantive laws beyond the original intention of the parties.[[44]](#footnote-44) This is compounded by the inadequate representation of developing countries amongst panellists, which is hardly surprising given that investment arbitrators are normally highly qualified counsel opting for adjudication, traditionally from developed States.

Last but not least, through investor-state arbitration, foreign investors enjoy a unique right to access a completely separate legal system which is not available to domestic investors and without any matching obligations under domestic public policy.[[45]](#footnote-45) This leaves local communities or entities that are negatively impacted on by the company’s activities, excluded from such favourable treatment. This has contributed to the campaign against the ISDS system for its encroachment on State sovereignty, particularly a State’s right to regulate.[[46]](#footnote-46) In particular, critics argue that investment tribunals are not sufficiently equipped to deal with national public policy concerns such as environmental protection, public health and financial stability.[[47]](#footnote-47) For example, the Italian investors’ case against the Republic of South Africa’s over policy changes in the mining industry provides a good example of the uneasy relationship between private interests and national public policy.[[48]](#footnote-48) In 2004, South Africa enacted a Mineral and Petroleum Resources Development Act (MPRDA) with the goal of redressing historical apartheid-centric inequalities in the mining industry. The new system terminated previously held mining rights and required companies to reapply for licences, and instituted a mandatory 26 per cent ownership stake in the industry for black South Africans. Subsequently, a group of Italian investors brought an investor-state claim against South Africa arguing that they had unlawfully expropriated their investment and treated them unfairly. Four years later, the Italian investors dropped their claim and were ordered to pay £290,000 towards South Africa’s legal costs. In the end, South Africa was left with over £3 million in legal fees to pay and the pressure of the case forced the government to allow the Italian investors’ companies to transfer only five per cent of ownership to black South Africans. Subsequently, South Africa pushed forward plans to terminate a large number of old BITs.[[49]](#footnote-49) Thus, these five reasons support the view that Africa faces the same concerns and challenges, as other reform active States in Latin America, Asia and even the EU, over ISDS.

* 1. 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 lean model BITs, as exemplified by the Reciprocal Investment Promotion and Protection Agreement between Nigeria and Morocco (2016).[[50]](#footnote-50) This bilateral investment treaty between Nigeria and Morocco sought to rebalance investment powers and rights between investors and host states by resolving most of the contentious issues in international investment law. For example, it abolished the most favoured nation (MFN) treatment by stating that treatments to foreign investors and that of citizens of host states must be equal.[[51]](#footnote-51) 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.[[52]](#footnote-52) Similarly, the treaty adopted the international customary law standard as the minium standard of treatment that may be afforded to an investor from any of the contracting states.[[53]](#footnote-53) Remarkably and a departure from most BITs, the Nigeria and Morocco clarifies that full security and fair and equitable treatment (FET) does not create and grant substantive rights to investors and also their application[[54]](#footnote-54) 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 that 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 had been argued under this treaty, then Uruguay may not have been in its 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 provisions of most BITs, there is not 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 make necessary measures that will enable them to protect the environment against harmful practises that may arise during the course of investment operations.

* 1. Regionalism in Africa

At the continental level, there is a consensus on extending the scope of the TFTA by creating an African wide Continental Free Trade Area (CFTA) by the fifty-four member states of the African Union (AU) by 2017 and an African Economic Community by 2034.[[55]](#footnote-55) Furthermore, the Pan-African Investment Code (PAIC) which was adopted by Member States of the African Union 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.[[56]](#footnote-56) All these agreements and alliances are all geared towards enhancing greater economic integration and harmonisation and to drive more investments within the African continent.

In the context of investment law devolvement and economic integration, African States have evidenced the willingness to join the community of nations in charting a new course for investment policy protection. Although still largely domiciled at the peripheral level, however, there are several piecemeal progressive policy developments which seeks to boast 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[[57]](#footnote-57), East African Community (EAC) Model Investment Code,[[58]](#footnote-58) Common Market for Eastern and Southern Africa (COMESA)[[59]](#footnote-59) with its Common Investment Area (CCIA) and the Economic Community of West African States (ECOWAS) Trade Liberalisation Scheme[[60]](#footnote-60) and Supplementary Act on the Common Investment Rules[[61]](#footnote-61) which establishes a Free Trade Area (FTA) and common customs union within the regions.[[62]](#footnote-62) In addition, the Arab Maghreb Union (UMA), Sahel-Saharan States (CEN-SAD), Intergovernmental Authority on Development (IGAD) are also advancing towards greater economic harmonisation and corporation. Already, member states of the COMESA, SADC and EAC are at advanced stages towards creating a Tripartite Free Trade Area (TFTA) which will cover and control about fifty-eight per cent of Africa’s total Gross Domestic Product (GDP).[[63]](#footnote-63)

On the regulatory front, these investment protection frameworks have been used to regulate and drive investments across the African landscape. Remarkably, some of them contains the novel policy of investment courts as framework for ISDS. 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 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’ as contained in BITs. Consequently, the SADC and COMESA propositions attempts to balance the right of investors with the power of States to regulate their territorial space by taking into cognizance the local realities of their region such as their capacities to affectively discharge their obligations to investors.

Likewise, The ECOWAS models provides 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, whilst guaranteeing the transfer of assets regarding investments for its investors, the ECOWAS instrument also imposed obligations on investors for the protection of human and labour rights, hence evidencing a departure from traditional BIT routes. Correspondingly, the non-legally binding East African Community 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. Profoundly, South Africa has taken the bull by the horn 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.[[64]](#footnote-64) Oncemore, this legislation grants lesser rights and protections as are traditionally contained in BITs, thus leading the transforming 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.

* 1. The publicness of investor-state arbitration

Lack of transparency

 is one of the foremost challenges facing ISDS due to the high level of confidentiality often permitted in investor-state arbitration.[[65]](#footnote-65) This derives from traditional commercial disputes in which a high degree of confidentiality is maintained to ensure that the businesses of the concerned parties is not affected or harmed by the proceedings. It also means that related parties, such as suppliers, would not be affected by the proceedings. However, in an investor-state dispute, such a high degree of confidentiality is difficult to justify given the public nature of the dispute and the impact it could have on a country’s resources or policy. Nonetheless, there is a growing shift towards greater transparency of procedure in international arbitration. For example, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, which came into effect on 1 April 2014, have incorporated important changes to transparency within the UNCITRAL arbitral rules.[[66]](#footnote-66) They are complemented by the Mauritius Convention on Transparency (‘Mauritius Convention’) 2014.[[67]](#footnote-67) However, given the public international law nature of investor-state claims, transparency should be a mandatory requirement.

Despite its origin in narrow commercial law disputes, investment treaty arbitration is considered to be public in nature because the State is a party to the proceedings which so often involve complex public interest and public policy issues. Although investment 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” the adjudication process is naturally private.[[68]](#footnote-68) Gus Van Harten has expressed concern over investment tribunal’s by arguing that they “undermine basic principles of democratic representation and accountability” and they are not built to accommodate the quality of review necessary for public law adjudication.[[69]](#footnote-69) 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.”[[70]](#footnote-70) 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.[[71]](#footnote-71) This is why academic commentators such as Garcia-Bolivar argue that “[t]he interpretation of concepts and principles that are peculiar to States and public international law cannot be left to the view of ever changing arbitrators.” 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. This is premised on three main reasons.

First and foremost, investment arbitration is premised on a regulatory relationship between foreign investors who are governed by States.[[72]](#footnote-72) The involvement of the State makes public law analogies appropriate for filling gaps in the respective treaty on matters such as public policy considerations, or resolving any interpretive ambiguities. The public law paradigm also reaffirms the essential understanding that States are the architects of the investment treaty regime which justifies the interpretation of the applicable law, where there is doubt, in a manner that sides with maintaining State control over the regime and the arbitrators involved.[[73]](#footnote-73) This means that international arbitration is merely an application of diplomatic espousal, leaving the State with the discretionary power to waive or settle investment claims at any time, use countermeasures or even pursue State-State arbitration instead of investment arbitration.[[74]](#footnote-74)

Secondly, investment arbitration is not merely about contractual disputes between private parties but national public interests are often in the fore.[[75]](#footnote-75) This is compounded by the fact that investor-state arbitrators engage in a form of review over national law that resembles public constitutional or judicial review that is undertaken by Supreme Courts.[[76]](#footnote-76) This supports the public law nature of investment arbitration. However, the public law paradigm permits techniques for limiting the level of intervention in national policy.[[77]](#footnote-77) This is because investment arbitration is not only a form of dispute settlement but functions as a public adjudication body which means it must take into account the broader implications of the decisions on the people in those States, and the knock on effect on other States. It is a recognition that the investment regime is not a self-contained form of public law, which means investment arbitrators may in some instances borrow laws of other public international law regimes, for example, laws on human rights and trade, in order to ensure that the public element is widely considered in their decision.[[78]](#footnote-78) This makes investment arbitration an agent for the defragmentation of public international law, by for example, taking into account human rights norms when interpreting IIAs.[[79]](#footnote-79)

Last but not least, investor-state arbitration is a product of public international law because of the State’s involvement in the agreement and the primary rules generated by the network of IIAs are overseen by secondary rules of public international law such as the Articles of State Responsibility and the customary rules of treaty interpretation.[[80]](#footnote-80) Thus, investment arbitrations do not merely adjudicate over discrete commercial disputes rather they exert a form of global governance that regulates State conduct.[[81]](#footnote-81) Furthermore, the manner in which investor-state claims are structured closely resembles regional and global mechanisms designed to protect human rights because the claims by private investors are directed against State action based on the rights in a given treaty.[[82]](#footnote-82) Thus, investor-state claims resemble other public international law regimes, such as the trade regime, where a balance between economic and non-economic interests of the State has to be struck.[[83]](#footnote-83) Despite their bilateral foundation, the structure, content and remedies provided under BITs are not those of a mere investment agreements because the whole regime produces effects comparable to those made by recognised public international law regimes.[[84]](#footnote-84) This supports de Zayas’s contention that ISDS represents a “major threat” to a “democratic and equitable international order” because the arbitrators “act as if they were above the international human rights regime” even though they are “not natural guardians of the public interest.”[[85]](#footnote-85) Thus, international investment law is classified in some quarters as a form of public international law which supports adjudication through public body that recognises its public international law obligations.

BELOW IS A MORE UPDATED ANALYSIS OF THE REFORM PATHS AND PAIC—REWORD IT AND USE

The global debate has produced two general alternative ways of reforming ISDS: i) keep but reform the ISDS mechanism; ii) dismantle and replace it with a regional or an international court system. Both reform pathways are examined next before reaching a circumspect conclusion on the best way forward.

* 1. ISDS reform pathways

Part of the motivations behind international investment law reform is to rebalance international investment agreements in favour of host States. In a bid to attract FDI, States often choose to reconcile their changing environmental, political and economic policies with honouring the promises made to investors under the respective IIA. If the regulatory activities of a State negatively impact on a foreign investor’s investment, the investor would be entitled to initiate international arbitration. Thus, by choosing to limit their regulatory space, out of enlightened self-interest, States leave themselves exposed to international arbitration.[[86]](#footnote-86) This has led some academic commentators to question the extent to which IIAs actually promote investment, especially when a State is subject to costly claims in the future.[[87]](#footnote-87) It is therefore imperative, that “a delicate balance [is] struck between the regulatory powers of the host state and the need to legally protect the interests of foreign investors.”[[88]](#footnote-88) At present, it is evident from the concluded IIAs and investment treaty arbitration cases, that this balance has not been achieved. It is not surprising, therefore, that a paradigm shift in international investment policy has surfaced through increased demand for restrictive investment policies and a dispute settlement mechanism that supports national public policy. The challenges facing the ISDS system are slowly influencing policy developments in this area, as exemplified by the PAIC negotiations which saw considerable debate around the issue of dispute settlement, in fact they were the only provisions on which the drafters failed to reach an agreement.[[89]](#footnote-89)

* 1. Option 1

Option one has already started to take shape in Africa and there is evidence both at sub-regional and domestic level that supports a marked departure from the orthodox BIT approach to dispute settlement. At continental level, during experts’ meetings, South Africa, together with a number of SADC Member States, argued for the exclusion of ISDS from the PAIC.[[90]](#footnote-90) However, the majority of African countries were in support of the inclusion of ISDS in the PAIC as a lever for attracting foreign investment given the lack trust in the Africa’s judicial systems. The countries in favour of ISDS were however in agreement that it needs to be reshaped in such manner that limits State exposure to costly claims. The PAIC provides for ISDS by permitting “disputes arising between investors and Members States under the specific agreements that govern their relations [to] be resolved under those agreements.”[[91]](#footnote-91) The PAIC also requires the investor and the concerned Member State to seek to resolve the dispute within 6 months at the latest, through consultations and negotiations, which may include the use of non-binding, third-party mediation or other mechanisms.[[92]](#footnote-92) The requirement of exhaustion of local remedies is a rare practice in recent IIAs with the exception of Indian Model BIT (2016). Article 15(1) requires that within one year of the measure becoming known, the investor “must first submit its claim before the relevant domestic courts or administrative bodies of the Defending Party for the purpose of pursuing domestic remedies in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed.” The measure applies unless “there are no available domestic legal remedies capable of reasonably providing any relief in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed by the investor” or where five years have elapsed after “exhausting all judicial and administrative remedies” and “no resolution has been reached satisfactory to the investor.”[[93]](#footnote-93) However, it is likely that the clause would be amended and clarified during treaty negotiation processes in order to ensure that the purpose of the clause is clear as to whether it is an obligation to resort to court or to exhaust all local remedies.

The drafters of the PAIC included a requirement for foreign investors to exhaust local remedies before a request for arbitration could be submitted.[[94]](#footnote-94) This makes investor-state arbitration a remedy of last resort under the PAIC. The PAIC further limits investors’ access to ISDS by putting a requirement that consent to arbitration should be given on a case-by –case basis or based on national law: “[T]he dispute may be resolved through arbitration, subject to the applicable laws of the host State and/or the mutual agreement of the disputing parties.”[[95]](#footnote-95) This means that if the host State’s law does not permit ISDS, as in the case of the South African Investment Bill,[[96]](#footnote-96) then ISDS would not be supported. Even though the host State’s law permits ISDS, the investor would need consent from the host State in order to access ISDS. Even without any provision in the host State’s law on ISDS, the investor would still need a mutual agreement before initiating proceedings.

Furthermore, the PAIC permits States to file claims against investors in investor-state arbitration under article 43.1, as follows: “[w]here an investor or its investment is alleged by a Member State party in a dispute settlement proceeding under this Code to have failed to comply with its obligations under this Code or other relevant rules and principles of domestic and international law, the competent body hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.”[[97]](#footnote-97) These counterclaims, are permitted by the ICSID Convention only under certain conditions.[[98]](#footnote-98) However, counterclaims are a rarely in this area with only a handful of treaties such as the COMESA Investment Agreement[[99]](#footnote-99) and the SADC Model BIT.[[100]](#footnote-100) In practice, investment tribunals often deny jurisdiction on counterclaims due to a lack of clear treaty provisions expressly permitting them.[[101]](#footnote-101) Thus, the inclusion of an express reference to counterclaims in the PAIC removes any doubt that investors have consented to counterclaims. This provision would allow the State to enforce investor obligations contained in the PAIC by challenging any violation of treaty protections such as the environment and human rights through counterclaims. Thus, the dispute settlement provisions of the PAIC aim to overcome the shortcomings of the current ISDS system by using exhaustion of local remedies requirements and counterclaims as a means of limiting State exposure to ISDS.

At sub-regional level, RECs have signed agreements and developed model laws containing investment protection standards and dispute settlement mechanisms with variances to the traditional BIT approach. These RECs which have led the regional integration campaign through the establishment of free trade areas and launched programmes for the establishment of regional Customs Unions include the EAC, the Economic Community of Central African States (ECCAS), COMESA, ECOWAS and SADC.[[102]](#footnote-102) The rest of the RECs, including the Community of Sahel-Saharan States (CEN-SAD), the Intergovernmental Authority on Development (IGAD) and the Arab Maghreb Union (UMA) are at the stage of coordinating Member State activities towards greater economic cooperation. However, the COMESA, the EAC, ECOWAS and SADC agreements deserve an independent an analysis due to the progressive nature of their provisions.

First and foremost, the Investment Agreement for the COMESA Common Investment Area (CCIA) was adopted in 2007.[[103]](#footnote-103) The Investment Agreement provides rules for dispute settlement in both State-State and investor-state disputes. The CCIA Agreement obliges disputing parties to seek to resolve their disputes through amicable means, both prior to and during the cooling-off period, which is a minimum of six months.[[104]](#footnote-104) If a decision is not reached, a disputing party can seek a mediator to resolve the matter during the cooling-off period.[[105]](#footnote-105) In investor-state disputes, an investor from a COMESA Member State may submit the dispute for arbitration via a competent local court, the COMESA Court of Justice, or pursue international arbitration.[[106]](#footnote-106) In State-State disputes, a decision may be sought from a tribunal constituted under the COMESA Court of Justice.[[107]](#footnote-107) Thus, the CCIA Agreement offers a new approach to ISDS by incorporating the realities and sensitivities of African States. For example, in order to qualify for protection and thereafter obtain the right to dispute settlement under the agreement, the number of jobs created, the impact on local communities, the length of operation in the country and the amount of investment made in the host State, are taken into account.[[108]](#footnote-108)

Secondly, the Protocol on Finance and Investment for the SADC free trade area came into force in 2010.[[109]](#footnote-109) The Protocol covers all the areas normally found in IIAs and grants investment protections such as uncompensated expropriation (Article 5) and FET (Article 6). Initially, the Protocol provided that investor-state disputes had to first be referred to a competent host State court and then, international arbitration via the SADC tribunal, ICSID or an arbitration panel based on UNCITRAL rules (Article 28).[[110]](#footnote-110) Following amendment in 2016, the Protocol now requires that, after failing to settle the dispute amicably, investors should exhaust local remedies before resorting to arbitration. [[111]](#footnote-111) In addition, annex I of the Protocol was amended so as to remove access to ISDS leaving only reference to State-to-State dispute settlement, although the changes are yet to be ratified. Furthermore, in a move designed to harmonise investment policies in the sub-region, a SADC Model BIT was completed in 2012.[[112]](#footnote-112) The SADC Model BIT does not make it obligatory to resort to mediation, it does however provide that either disputing party may request mediation of the dispute after a notice of intent has been submitted.[[113]](#footnote-113) The SADC Model BIT also requires the exhaustion of local remedies before arbitration proceedings are commenced: “the Investor or Investment, as appropriate, (i) has first submitted a claim before the domestic courts of the Host State for the purpose of pursuing local remedies, after the exhaustion of any administrative remedies, relating to the measure underlying the claim under this Agreement, and a resolution has not been reached within a reasonable period of time from its submission to a local court of the Host State . . . .”[[114]](#footnote-114) Thus, an investor is required to exhaust local remedies unless they can prove that “there are no reasonably available legal remedies capable of providing effective remedies of the dispute concerning the underlying measure” or the available dispute settlement mechanisms “provide no reasonable possibility of such remedies in a reasonable period of time.”[[115]](#footnote-115) If local remedies have been exhausted, the time limit for bringing an arbitration claim is one year from the conclusion of the request for such remedies.

The SADC Model BIT also prevents the initiation of arbitration under a BIT if the issue in dispute is covered by a choice of forum clause contained in any investment law, regulation, permit or contract.[[116]](#footnote-116) Furthermore, both the CCIA Agreement and the SADC Model BIT permits ISDS[[117]](#footnote-117) but attempt to limit the potential for multiple claims by including fork-in-the-road clauses that prevent an investor from choosing another forum after having initiated proceedings for a claim relating to the same subject matter.[[118]](#footnote-118) They also permit counterclaims; under the CCIA, a State may do so in defence, right of set-off, or a similar claim;[[119]](#footnote-119) and in SADC, a counterclaim could be for damages or relief resulting from alleged breach BIT obligations.[[120]](#footnote-120) The SADC Model BIT also permits civil action by the host State, private entities or political subdivisions for alleged breach BIT obligations.[[121]](#footnote-121) Thus, both regional instruments are not only focused on investment protection but also investment facilitation through the imposition of obligations on both parties.

Thirdly, the ECOWAS Supplementary Act on the Common Investment Rules for the Community was adopted in 2008.[[122]](#footnote-122) On dispute settlement, parties may refer their case to the ECOWAS Court of Justice, or to a national court or tribunal.[[123]](#footnote-123) The approach taken in the Supplementary Act of including a chapter on duties and obligations of investors marks a clear departure from traditional BITs. These duties and obligations include the protection of human rights, labour rights (post establishment) and social and environmental impact (pre-establishment). Last but not least, the EAC Model Investment Code was adopted in 2006, and although not legally binding, serves as a reference guidance for the design of laws and policies on investment in the region.[[124]](#footnote-124) On dispute settlement, the Code requires investors to apply for an investment certificate at a designated national investment agency, which would enable them to submit any dispute with the host State to international arbitration under the ICSID rules.[[125]](#footnote-125) However, the Code does not show a marked departure from the traditional BITs. Thus, the PAIC and most regional investment instruments in Africa support ISDS but make it conditional upon the amicable settlement of disputes.[[126]](#footnote-126)

Last but not least, this restrictive approach to ISDS at sub-regional level is replicated in a number of recent domestic initiatives. For example, South Africa has recently reviewed and terminated thirteen BITs and adopted a domestic legislation on the protection of investment.[[127]](#footnote-127) The South African Promotion and Protection of Investment Bill does not contain ISDS.[[128]](#footnote-128) In fact, during the experts’ meetings, South Africa, together with a number of SADC Member States, argued for the exclusion of ISDS from the PAIC.[[129]](#footnote-129) Furthermore, non-binding Alternative Dispute Resolution (ADR) methods such as mediation and conciliation have been incorporated in treaty provisions in Africa. For example, the COMESA Investment Agreement provides that where no alternative means of dispute settlement are agreed upon, “a party shall seek the assistance of a mediator to resolve disputes during the cooling-off period.”[[130]](#footnote-130) Similarly, the SADC Model BIT provides that after submission of the notice of intent, “the Investor or the host State may request mediation of the dispute, in which case the other disputing party may agree to such mediation.”[[131]](#footnote-131) This system of preliminary review was recently incorporated in the Morocco- Nigeria BIT (2016), which was signed on 3 December 2016 with the overarching aim of strengthening “the bonds of friendship and cooperation” between the two States. The BIT provides for the establishment of a Joint Committee to oversee the administration of the treaty, comprised of representatives of the two States (Article 4). One of the BIT’s most innovative provisions is a requirement that before initiating arbitration proceedings, any dispute must be assessed through consultations and negotiations by the Joint Committee (Article 26(1)). Although this requirement expressly refers to disputes between the parties (being the two State signatories), the provisions that follow suggest that the requirement may apply equally to investor-State disputes. In order to initiate the consultation procedure, the home State of the investor must submit a request to the Joint Committee. This provision aims to better facilitate amicable resolution of disputes and to reduce the likelihood of disputes proceeding to arbitration.

Despite the emerging practice towards ISDS both continental, sub-regional and domestic level, it should be emphasised that the CCIA is not operational, the SADC Model BIT is not binding and no country has taken steps to model their BITs on it. Generally, African countries continue to rely on ISDS and the collapse of the SADC tribunal following the *Mike Campbell Ltd & others* v. *Zimbabwe* decision clearly undermines any effort to project dispute resolution in Africa as an alternative to international arbitration.[[132]](#footnote-132) Thus, these pro-State innovations alone are unlikely to rebalance international investment agreements in favour of host states. They need to be accompanied by a dispute settlement mechanism that recognises and supports national regulatory space and local realities.

* 1. Proposed Pan-African Court

The proposed EU bilateral investment courts will be accompanied by an appeals facility.[[133]](#footnote-133) The aim is to increase consistency of awards and enhance predictability of the law, while correcting erroneous decisions of the tribunal of first instance.[[134]](#footnote-134) Decisions by the appeals tribunal would guide arbitrators in adjudicating future disputes, thus creating a system of precedent, but also help disputing parties in judging the strengths of their case before embarking on a costly dispute. The proposal for an appeals facility has been incorporated under Article 8(28) of the CETA Finalised Draft (2016): “an appellate tribunal is hereby established to review awards rendered under this Section.” However, this tribunal will only begin to operate once the CETA Joint Committee adopts a decision setting out its functioning and financing in more detail, pursuant to Article 8(28)(7) of the treaty. Similarly, chapter 8, section III, Article 13(1) of the EU-Vietnam Draft FTA (2016) states that: “[a] permanent Appeal Tribunal is hereby established to hear appeals from the awards issued by the Tribunal.” It means that an award rendered by an arbitral tribunal constituted by the treaty will be subject to review by an appeals tribunal. Furthermore, five EU Member State signatories to a ‘Non-paper’ in 2016 alluded to the possibility of creating a permanent appeal mechanism.[[135]](#footnote-135) Thus, it appears that the idea of an appeals mechanism is growing momentum in the EU alongside the investment court system.

The proposal for a Pan-African Investment Court draws inspiration from the reform action in the EU which is steering towards a court system as replacement for ISDS. While the Pan-African idea appears grander than the proposals in the EU, there is intimation that the EU is seeking to make the investment court system a feature of their investment policy going forward and eventually to replace ISDS.[[136]](#footnote-136) The EU bilateral investment courts could make way for a permanent multilateral court, operating on the basis of an opt-in system and applying to multiple agreements between many trade partners. Gabrielle Kaufmann-Kohler and Michele Potestà advocate for an ‘opt-in’ option similar to the Mauritius Convention,[[137]](#footnote-137) whereby States could express their agreement with respect to existing investment agreements. They conclude that “the Mauritius Convention could provide a useful model if States wish to pursue such broader reform initiatives at a multilateral level.”[[138]](#footnote-138) Thus, the EU could create a multilateral court, by extending the bilateral position for example in TTIP and CETA, either as a self-standing international body or part of an existing multilateral organisation such as WTO. This is the blueprint for the Pan-African Investment Court.

The Pan-African Investment Court would be dedicated to intra-African investment agreements and investment disputes. A court structure has been chosen because existing arbitration-based institutions have been deemed unsuitable to handle disputes involving public policy matters. Academics Mann and von Moltke agree that existing dispute settlement institutions “were not designed to address complex issues of public policy that now routinely come into play in investor-state disputes.”[[139]](#footnote-139) Even the WTO has been criticised as a ‘rich man’s club’, for allegedly prioritising the interests of developed countries thereby tainting its decision-making processes.[[140]](#footnote-140) The WTO is also a body designed to promote free trade thus making its ethos inconsistent with the objectives of a body that is required to adjudicate over public and private interests, taking into account societal values such as human rights. As suggested by Subedi and Butler, a “clean slate” is necessary, if a continental dispute settlement body is to survive.[[141]](#footnote-141) Operating under an independent organisation would allow the Pan-African Investment Court to balance the competing private and public interests, without being held back by the political agendas of the organisation.

The proposal for a Pan-African Investment draws inspiration not only from the growing multilateralism, the investment court system proposed in the EU reform of international investment law and the PAIC, but also from the recommendation of the UN Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred-Maurice de Zayas, in the de Zayas Report.[[142]](#footnote-142) The report argues that such investor-state arbitral awards are incompatible with public international law norms and invalid as *contra bonos mores*,[[143]](#footnote-143) as well as constituting a “corporate move against the fundamentals of state sovereignty.”[[144]](#footnote-144) The report added that tribunals are attempting to “create a new legal order beyond the Charter of the United Nations” or a “*legibus solutus* . . . exempt from the rule of law, general principles of law and basic codes of conduct.”[[145]](#footnote-145) The de Zayas Report did not only contain literature criticising ISDS from a wide spectrum of civil society groups including NGOs, academic and practitioners,[[146]](#footnote-146) it referred to it as “anti-democratic”[[147]](#footnote-147) and urged state victims of “*contra bonos mores* investor-state dispute settlement… [to]. . . jointly refuse implementation” of the agreements and should consider replacing ISDS with national courts or a designated international investment court.[[148]](#footnote-148)

A Pan-African Investment Court promises three key benefits. First and foremost, it would help to avoid access to ISDS, at least in relation to intra-African BITs or for those States that have opted in. Second, by administering public international law, it would allow States to regulate important social issues such as the environment and human rights without tarnishing their reputation as investor friendly nations. Under the current regime, in order to retain their investor friendly status, States have had to limit their regulatory space, thus inducing investors to invest on the assumption that their investment would be safer. Given the benefit investment can bring to a country such as jobs and infrastructure, the investor friendly status has somewhat placed developing countries in a stronger bargaining position. Removing this status could help to promote FDI in countries that have historically not yielded high investor attention due to their inability to compromise on national regulatory space. Thus, the proposed Pan-African Investment Court and its accompanying institutions could lead to a more inclusive and fairer system of distributing global wealth and investment. Third and lastly, a Pan-African Investment Court could help to increase predictability and consistency in intra-African investment disputes. As exemplified by the *Lauder* arbitrations where two investment tribunals reached different decisions over identical facts, legal norms and parties,[[149]](#footnote-149) consistency is a long-standing problem in international investment law.[[150]](#footnote-150) Having a majority of investment disputes handled under one institution could lead to consistency in the interpretation of *lex specialis* of international investment law, including the outcome of disputes. A Pan-African Investment Court with an appellate mechanism would over time build up a body of jurisprudence thereby creating consistency and predictability in decision making.

* 1. Economic integration and multilateralism in Africa

The continued defragmentation of IIAs and harmonisation of investment policy in Africa and around the world provides impetus and justification for a Pan-Investment Court.[[151]](#footnote-151) It is on this basis that the UNCTAD identified “a compelling need for a multilateral mechanism that deals with today’s investment policy-making challenges”[[152]](#footnote-152) which is being achieved through consensus around international investment rules. According to the UNCTAD, these drivers are both at national and international level: “[a]t the national level, [‘new generation’ investment policies] include integrating investment policy into development strategy, incorporating sustainable development objectives in investment policy and ensuring investment policy relevance and effectiveness. At the international level, there is a need to strengthen the development dimension of [IIAs], balance the rights and obligations of States and investors, and manage the systemic complexity of the IIA regime. New generation’ investment policies further incorporate innovative investment promotion and facilitation mechanisms.”[[153]](#footnote-153) The UNCTAD adds that “[t]he overarching objective of investment policymaking is to promote investment for inclusive growth and sustainable development” in light of crises over food security and the environment.[[154]](#footnote-154) This requires increased international cooperation and coherence in international investment policy, which is also starting to emerge.[[155]](#footnote-155) For example, as part of its G20 Presidency,[[156]](#footnote-156) China proposed in 2015 a voluntary multilateral investment agreement, which signifies China’s new direction towards investment,[[157]](#footnote-157) and it is evidence of increased cooperation. As a result, in July 2016, the G20 adopted the ‘Guiding Principles for Global Investment Policymaking.’[[158]](#footnote-158) Around the same time, the European Commission described the proposed international investment court in TTIP as a “stepping stone towards a permanent multilateral system for investment disputes.”[[159]](#footnote-159) Lack of cooperation and coherency was a major stumbling block in the past towards multilateralism and it appears that we are experiencing systematic defragmentation of IIAs.[[160]](#footnote-160) This is supported by an empirical study of 2107 IIAs which found “dominant treaty practice in recent years” unlike old treaties which had “no established pattern” on sustainable development and business conduct.[[161]](#footnote-161)

The cooperation and integration of investment policy in Africa is not promoted and driven forward by public policy organisations only,[[162]](#footnote-162) but also the activities of the RECs. North Africa has two RECs: the UMA and CEN-SAD. The Eastern and Southern Africa has six groupings: COMESA, the EAC, SADC, the Inter-Governmental Authority on Development

(IGAD), the Southern African Customs Union (SACU) and the Indian Ocean Commission (IOC). Central Africa has two groupings: ECCAS and the Economic Community of Great Lakes countries (ECGLC). There are three RECs in West Africa: ECOWAS, the West African Economic and Monetary Union (UEMOA) and the Mano River Union (MRU). Each of the RECs has an instrument that relates directly or indirectly to investment. In the context of multilateralism, the picture becomes more murkier when we consider the number of States that belong to more than one REC. Of the 55 African countries, only six have one membership with the Democratic Republic of Congo belonging to four RECs simultaneously. A further 28 African countries have dual membership and 20 belong to three RECs. This overlapping membership indicates that a majority of the African countries are willing to embrace multilateral investment policy as a means of encouraging intra-African investment.[[163]](#footnote-163) For instance, in June 2015, the regions of SADC, COMESA and EAC signed the Agreement on a Tripartite Free Trade Area (TFTA).[[164]](#footnote-164) The objective is to promote the harmonization of trade and investment amongst these three RECs representing 58 per cent of Africa’s total Gross Domestic Product (GDP).[[165]](#footnote-165) The aim is to create the largest economic block in Africa, with plans to extend the free trade area to ECOWAS, ECCAS and AMU Member States. More significantly, leaders of the TFTA announced at the June 2015 African Union Summit in South Africa, plans for a Continental Free Trade Area (CFTA) with all African Union Member States.[[166]](#footnote-166) The launch of the CFTA negotiations is a critical step in Africa’s goal for self-determination, with the goal of creating a trade zone spanning the entire African continent.[[167]](#footnote-167) The REC activity makes Africa’s integration efforts easier but also facilitates intra-African investment.

Intra-African investment is critically important especially if Africa wants to achieve self-determination and take up a leading role in the international economic order. As of March 2017, African countries have signed 882 IIAs to foster investment.[[168]](#footnote-168) There are 723 agreements signed with non-African countries and 159 intra-African BITs. Despite commanding a large share of intra-African IIAs, the level of intra-African FDI remains markedly low. The case for increased economic integration in pursuit of economic benefits is supported by statistical evidence indicating the dire state of intra-African investment. Data from UNCTAD shows that intra-African FDI is manifestly limited both in terms of volume and diversity.[[169]](#footnote-169) It estimates that intra-African FDI accounts for only five per cent of the total FDI in Africa in terms of value.[[170]](#footnote-170) Much of the criticism has been directed towards South Africa, the continent’s second largest economy, for failing to use its entrepreneurial advantage to its fullest. By far the most important source of FDI outflows in Africa stem from North Africa, with countries such as Libya and Egypt directing some of their FDI outflows at Africa. However, intra-African FDI is markedly remains very low. Nonetheless, the UNCTAD acknowledges that there is “some evidence that intra-regional FDI is beginning to emerge in non-natural resource related industries.”[[171]](#footnote-171) The UNCTAD recommends harmonisation of regional trade and investment agreements to help Africa realise its intra-regional FDI potential.[[172]](#footnote-172)

The economic integration is accompanied by a new wave of multilateralism in Africa spearheaded by the negotiations for a PAIC. Without multilateral rules on investment that bind African States and mandates a Pan-African Investment Court, the proposal would be difficult to realise. This is because States would be free to create conflicting investment rules at national level or in their BITs, including omission of the Pan-African Investment Court from the dispute settlement options. The PAIC offers a certain minimum standard of treatment that every intra-African IIA should contain but without a dispute settlement body that recognises thorny issues such as national regulatory space, its goal would be difficult to realise. Thus, the convergence in investment rules under PAIC offers an opportunity for harmonizing investment obligations but also it supports the creation of a court that supports the PAIC’s economic agenda. With the CFTA on the horizon, perhaps a way forward could be for multilateral treaty on investment. At the time of writing, the legal nature of the PAIC is still uncertain, with the potential to become a binding treaty applicable in all AU Member States or a Model treaty operating as a guide to Member States IIA negotiations. The outcome is a political question which is likely to be influenced by external factors but nonetheless, provides a platform for instituting a Pan-African Investment Court.

Incorporation the Pan-African Investment Court in PAIC is important because the current regime, consisting of thousands of IIAs, which are similar but with important differences, would make it difficult for the court to discharge its duties. Therefore, a formal treaty on investment that contains the minimum standards espoused by a diverse group of countries is necessary. Tania Voon argues that the foregoing assumption that multilateral rules should be one size fit all is false, rather a ‘variable geometry’ in WTO agreements shows that endorsing different standards for different types of countries may sometimes be necessary and essential in gaining consensus over an international legal framework.[[173]](#footnote-173) This variable geometry is also remarked upon by James Gathii in relation to WTO provisions for ‘special and differential treatment’ of developing countries, by giving them greater flexibility, blanket exceptions to depart from core obligations,[[174]](#footnote-174) and additional time to implement obligations.[[175]](#footnote-175) Thus creating a Pan-African Investment Court in the PAIC would not be an easy feat but the political and economic landscape looks markedly different today thus making it easier to achieve and lessons can be drawn from the EU’s proposal for a similar court system.

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 corporation 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 rebalancing will not be achieved through a continuous reliance and use of ISDS. Thus, this research recommends that African states should utilise this realignment and harmonising measures to create a Regional Investment Court (RIC). This call for a RIC, complete 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’.[[176]](#footnote-176) Consequently, considering this strong drive and willingness towards an investment court system by the global investment community, this thesis argues that Africa must and cannot be left on the side-lines and margins of this fundamental devolvement and reform of international investment law. As such, they should learn from the already existing models such as CFTA and PAIC and in fact champion the reformation process to the benefit of States and citizens of the continent. Furthermore, it can mirror the recently concluded CETA model which provided for an investment court that is maned by publicly appointed judges as well as derive its jurisdiction through a multilateral agreement by all parties to readily submit themselves to the competence of the court. Other measures such as make-up of the judges will follow the same multilateral agreement wherein appointment of tribunal members are rotated from the Member States for a determinable term. The confidence of developed states and investors on an African institution will not wane if there is evidence of balance and fairness in the constitution of the RIC. 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 nobility of this proposal, it is however recognised that the challenge which have confronted similar proposals of its ilk have revolved on the format and workability of a RIC for Africa. Questions on its scope, functionality and competence has remained the singular derivative that may hamper any proposed RIC for the African continent. For example, the demise of the SADC tribunal following the decision in the case of Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe[[177]](#footnote-177) evidences how weak institutional structures in Africa could serve as a clog in the wheel of creating a RIC. 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 a RIC will better serve the social economic interests of African States. As contained in the Doha Ministerial Declaration 2001,[[178]](#footnote-178) a balanced investment treaty which protects the rights of host states and investors is possible and can be pursued.

Literature review

Several scholars have lent their voices on the topical issue of departing from ISDS into a more balanced and consensually approved International investment law regime. According to Páez,[[179]](#footnote-179) Africa have been active players within the international investment law regime with several BITs consummated with States from other continents. However, the envisaged goodies which should normally been a correlative outcome of such agreements have been elusive stemming from the one-sided nature of these IIAs such as BITs. Thus, these ‘cluttered ‘spaghetti-bowl’ of investment regimes’ have not been beneficial to African countries. Instead of a continuous reliance on the ISDS system with its inconsistency nature, she suggested for a more harmonised framework of the African regulatory measures towards creating ‘an African Continental Investment Area (ACIA) as an alternative to the existing investment regime’. Such continental investment regime should be a derivative of a better harmonised Regional Economic Areas as evidences abound 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[[180]](#footnote-180) have opined that Africa are incrementally moving away from the role of consumers of investment law regimes to makers of one through the Pan African Investment Code (PAIC) 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 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 COMESA, EAC, ECOWAS, SADC among others. According to the authors, PAIC being the very first continental investment treaty irrespective of its non-binding nature is a useful guide towards enacting the investment chapter of the Continental Free Trade Agreement (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 PAIC as it will enable the protection of investors whilst allowing African States and governments to effectively administer their Countries.

In an effort towards effecting a common investment front, Denters[[181]](#footnote-181) suggests that Africa need not look further as it possess an avalanche of regulator frameworks which are spearheaded by the RECs. Most of these regional rules contains novel provisions and initiatives which are in tandem with the concern of a section of the investment community on the ability of host states to regulate their countries whilst protecting investor rights. All that is required is integration and agreement by States within Africa as it will ‘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’. 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, thus may crystallise into rebalancing international investment law.

A RIC for Africa 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.[[182]](#footnote-182) As such, the facilitation of investment is good as it engender greater growth, flow of FDI and ‘should reduce transaction costs and obviate complex administrative procedures’ in investment administration. But, Notwithstanding the disbandment of the SADC tribunal, Ofodile[[183]](#footnote-183) recommended 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 to 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.

Research Originality

The introductory part above highlights incremental initiatives aimed at rebalance international investment law. In the context of Africa, there are novel progressive measures such as the CFTA, PAIC, COMESA CCIA and the South African investment law which are all geared towards enshrining progressive policies that will encapsulate local African realties towards finding a balance in investment law that will effectively protect investors whilst supporting the regulatory powers of host states to administer their countries. The ultimate objective of these developments is to infuse a court system that will replace the current ISDS which have been subjected to so much criticisms. Although several scholarships[[184]](#footnote-184) have called for the invention of a court system for Africa, however, the Achilles-heel of these moves have hinged on how to establish this court system as well as its functionality and operational nature. Thus, this research is the first of its kind to call and propose workable measures for the creation of a Regional Investment Court for Africa. Secondly, the African continent has experienced a wave of democratisation which was precipitated by the protests of 2014-2016, popularly dubbed as the Arab Spring, that swept across several African countries such as Egypt, Libya and Tunisia does impact on the governments of these countries.[[185]](#footnote-185) Such political transitions possess all the trappings of investment claims for breaches of the provisions of IIAs by succeeding government.[[186]](#footnote-186) For example, There was a reversal of a sale of a land by a minister under the Mubarak regime by an Egyptian court in the aftermath of the fall and deposition of the Mubarak regime.[[187]](#footnote-187) Finally, African states are not insulated from the identified challenges of the ISDS. As an active player in the investment community, it also desires progressive policies and frameworks that will engender sustainable growth and development within is fold. It is argued herein that the creation of a RIC will be a step in the right direction towards achieving these objectives. In consequence, this intervention comes at a very auspicious time where the global investment community are at crossroads hinging on how to reform and achieve an international investment regime suitable for the contemporary times. Thus, this research endeavours to fill this gap in academic scholarship by investigating how a rebalance that will preserve the internal regulatory space of host States whilst enhancing the advancement of FDIs, aid the harmonisation and integration of African economies as well as promote the social prosperity of its people can be achieved.

Conclusion

This research 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 is available and credible moves which are championed by regional blocks into reforming international investment law that will protect the right of states to regulate their affairs whilst facilitating investment opportunities for investors. Hence, the study calls for the use of the regional and continental frameworks to institute an Investment Court for Africa which shall encompass the reverse of the working mechanisms of arbitration centres. Such call is made with the aim of using it as a lunch pad for more investment inflow and sustainable development in Africa.

1. Gus Van Harten, A Case for International Investment Court, Inaugural Conference of the Society for International Economic Law, (16 July 2008), 5-9. [↑](#footnote-ref-1)
2. European Commission Conceptual paper, *supra4 9.*  [↑](#footnote-ref-2)
3. European Commission, Transatlantic Trade and Investment Partnership between the EU-US <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\_153807.pdf > accessed 16 June 2017. [↑](#footnote-ref-3)
4. European Commission, EU-Vietnam FTA <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\_154224.pdf > accessed 16 June 2017. [↑](#footnote-ref-4)
5. European Commission, EU-Canada CETA <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter > accessed 16 June 2017. [↑](#footnote-ref-5)
6. The Unified Agreement was signed on 26 November 1980 in Amman, Jordan, and entered into force on 7 September 1981. Walid Ben Hamida, The development of the Arab Investment Court's case law: new decisions rendered by the Arab Investment Court (2014) International Journal of Arab Arbitration, 6, 12. [↑](#footnote-ref-6)
7. Gus Van Harten, Private authority and transnational governance: the contours of the international system of investor protection. (2005) Rev Int Political Econ 12:600, 600. [↑](#footnote-ref-7)
8. Surya Subedi, International investment law: reconciling policy and principle. (Hart Publishing, 2016) 172. [↑](#footnote-ref-8)
9. Anthea Roberts, Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System (2013) 107 American Journal of International Law 45. Notably, in this article, as well as in her other work, Roberts herself does not draw the conclusion that ISDS is a ‘public law’ regime; she suggests that it is best seen as “sui generis”. p. 94. In other work, Roberts argues for the “hybrid” nature of investment treaties, see State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority (2014) 55 Harvard International Law Journal 1; ‘Triangular Treaties: The Extent and Limits of Investment Treaty Rights’ (2015) 56(2) Harvard International Law Journal 353. [↑](#footnote-ref-9)
10. [↑](#footnote-ref-10)
11. Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay) …. The company had sued the ground claiming that an anti-smoking legislation aimed at controlling the smoking of cigarette thereby enhancing the health of the citizens have breached its substantive protections granted in the Bilateral Investment Treaty between Uruguay and Switzerland [↑](#footnote-ref-11)
12. United Nations Conference on Trade and Development (UNCTAD), ‘International Investment Agreements Navigator’ <http://investmentpolicyhub

.unctad.org/IIA> accessed July 5 2017; This report shows that Africa holds about 81% of a total of 780 BITs with non-African countries whilst 17 States holds about two third percent of this ratio with five North African countries of Tunisia, Egypt, Morocco and Algeria holding the largest share. [↑](#footnote-ref-12)
13. UNCTAD, Investor-State Dispute Settlement: Review of Developments in 2015 (IIA Issue Note No 2, June 2016) 1. [↑](#footnote-ref-13)
14. UNCTAD, Investor-State Dispute Settlement: Review of Developments in 2015 (IIA Issue Note No 2, June 2016) 1. [↑](#footnote-ref-14)
15. UNCTAD, 'World Investment Report (WIR): Investor Nationality: Policy Challenges' 22 June 2016, Imprint: New York/Geneva, UN, 4 [↑](#footnote-ref-15)
16. UNCTAD, 'World Investment Report (WIR): Investor Nationality: Policy Challenges' 22 June 2016, Imprint: New York/Geneva, UN, 36 [↑](#footnote-ref-16)
17. See Mary Driemeier, ‘Do Bilateral Treaties Attract FDI? Only a Bit and They Could Bite’ (2003) World Bank Policy Research Working Paper 3121 <http://documents.worldbank.org/curated/ en/113541468761706209/pdf/multi0page.pdf (accessed on July 5 2017) 1-36, Mahembe Edmore, 'Foreign direct investment inflows and economic growth in SADC countries: a panel data approach' (2014) PhD thesis 1-150 http://uir.unisa.ac.za/bitstream/handle/10500/14232/dissertation\_mahembe\_e.pdf?sequence=1&isAllowed=y (acessed on July 2015), United Nations Economic Commission for Africa (UNECA), ‘Foreign Direct Investment vs National Champions?: The Role of FDI and Domestic Firms in Catalyzing Structural Transformation in Eastern Africa’ Background Paper ECA/SRO-EA/ICE/2014/6 (18th Meeting of the Intergovernmental Committee of Experts (ICE), Kinshasa, 17–20 February 2014) [↑](#footnote-ref-17)
18. UNCTAD, Investor-State Dispute Settlement: Review of Developments in 2015 (IIA Issues Note No 2, June 2016) 2. [↑](#footnote-ref-18)
19. UNCTAD, Investor-State Dispute Settlement: Review of Developments in 2015, (IIA Issues Note No 2, June 2016) 1. An additional 10 per cent of cases were discontinued, while in the remaining 2 per cent a breach was established but no damages awarded. [↑](#footnote-ref-19)
20. UNCTAD, Investor-State Dispute Settlement: Review of Developments in 2015 (IIA Issues Note No 2, June 2016) 7. [↑](#footnote-ref-20)
21. UNCTAD, Investor-State Dispute Settlement: Review of Developments in 2015 (IIA Issues Note No 2, June 2016) 3. [↑](#footnote-ref-21)
22. UNECA, “Investment landscape in Africa” (E/ECA/CRCI/9/ Addis Ababa, 21 October 2015) 5. [↑](#footnote-ref-22)
23. ICSID, The ICSID Caseload – Statistics, (Issue 2017-1), 12. [↑](#footnote-ref-23)
24. Uche Ewelukwa Ofodile, Africa and the System of Investor-State Dispute Settlement: To Reject or Not to Reject? (TDM 1, 2014), 2.2. [↑](#footnote-ref-24)
25. For example, following the fall of the Mubarak government, an Egyptian court queried and reversed the sale of land by a former tourism minister to a foreign investor for a price below its market value. See Hussain Sajwani, DAMAC Park Avenue for Real Estate Development S.A.E., and DAMAC Gamsha Bay for Development S.A.E. v Arab Republic of Egypt, ICSID Case No. ARB/11/16; *see* also Jarrod Hepburnand Luke E Peterson, Panels Elected in ICSID Matters involving Moldova, Egypt, and the Central African Republic, IA Reporter (12 January 2012). [↑](#footnote-ref-25)
26. *Veolia Propreté* v. *Arab Republic of Egypt* (ICSID Case No. ARB/12/15); see Luke E Peterson, French company, Veolia, launches claim against Egypt over terminated waste contract and labour wage stabilization promises” IA Reporter (27 June 2012). [↑](#footnote-ref-26)
27. Eric De Brabandere, Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity, JWT 18 (2017) 530, 536. [↑](#footnote-ref-27)
28. *American Manufacturing & Trading, Inc* v. *Republic of Zaire*, ICSID Case No

ARB/93/1, Award (21 February 1997) and *Wena Hotels Ltd* v. *Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award (8 December 2000). [↑](#footnote-ref-28)
29. *LESI SpA and ASTALDI SpA* v. *République Algérienne Démocratique et Populaire*, ICSID Case No ARB/05/3, Award (12 November 2008); *Lundin Tunisia BV* v. *Republic of Tunisia*, ICSID Case No ARB/12/30, Award (22 December 2015). [↑](#footnote-ref-29)
30. For example, *Asa International SpA* v. *Arab Republic of Egypt*, ICSID Case No ARB/13/23

(Registered 13 September 2013); *Ampal-American Israel Corp. and others* v. A*rab Republic of Egypt*, ICSID Case No. ARB/12/11. [↑](#footnote-ref-30)
31. Andrew Newcombe and Lluis Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer Law International 2009) 255. [↑](#footnote-ref-31)
32. As contained in Article 4(1) of the Italy-Egypt BIT, see *Waguih Elie George Siag and Clorinda Vecchi* v. *Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award (1 June 2009) paras 451–56. [↑](#footnote-ref-32)
33. On the impact of broad FET provision see Jacob Stone, Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment, (2012) Leiden Journal of International Law 25, 82; Rudolf Dolzer, Fair and Equitable Treatment: Today’s Contours, (2013) Santa Clara Journal of International Law, 12(7), 16-31. On African perspective, see Eric De Brabandere, *supra* 25. [↑](#footnote-ref-33)
34. Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331; VCLT hereafter) The VCLT applies only to treaties between States. Agreements involving international organizations are governed by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) [1986] 25 ILM 543. The first 72 Articles of the 1986 VCLT—regarded as reflecting customary international law— address the same subjects as Articles 1- 72 of the original VCLT. See generally, Arts. 31-32. [↑](#footnote-ref-34)
35. Buffard Isbelle, James Crawford, Gerhard Hafner and Alain Pellet International law between universalism and fragmentation: festschrift in honour of Gerhard Hafner*.* (BRILL, 2008), 116. [↑](#footnote-ref-35)
36. UNCITRAL Arbitration Rules (revised 2010) UN General Assembly Resolution (A/RES/31/98); Unlike ICSID and the ICSID Additional Facility, there is no dedicated institution associated with the administration of arbitrations pursuant to the UNCITRAL Arbitration Rules. However, the parties may agree that the services of an institution such as ICSID or the Permanent Court of Arbitration (**PCA**) will be responsible for administering an *ad hoc* UNCITRAL arbitration. [↑](#footnote-ref-36)
37. *Ronald S.* Lauder v*.* The Czech Republic, UNCITRAL. Final Award, 3 Sep 2001, see para 313 “In addition, the Arbitral Tribunal considers that none of the actions or inactions of the Media Council caused a direct or indirect damage to Mr. Lauder’s investment.”*CME Czech Republic BV* v. *Czech Republic*, Final award and separate opinion, (2006) 9 ICSID Rep 264, (2006) 9 ICSID Rep 412. [↑](#footnote-ref-37)
38. See ICSID Convention, supra 4, art. 52. [↑](#footnote-ref-38)
39. UNCITRAL Model Law on International Commercial Arbitration, *supra* 34, art. 34(2). [↑](#footnote-ref-39)
40. Typically, each party will select an arbitrator, and the third (often presiding) arbitrator, is selected by the mutual agreement of the parties. Pragmatically, parties choose individuals who they believe will offer the greatest chance of winning. [↑](#footnote-ref-40)
41. *See generally* Susan Franck, Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes, Virginia Journal of International Law, Vol. 55, 2014 p. 60-61 (analysing case outcomes over several years and noting that “the general trend was for states to win cases either at roughly equivalent levels to investors or at a slightly higher rate than investors”). [↑](#footnote-ref-41)
42. Charles B. Rosenberg and M. Imad Khan, Who Should Regulate Counsel Conduct in International Arbitration? White & Case LLP (April 14, 2016). [↑](#footnote-ref-42)
43. Sundaresh Menon (2012) Keynote Speech at the International Council for Commercial Arbitration <<http://www.arbitration-icca.org/AV_Library/AV_Library_textformat/ICCA_2012_Singapore_Keynote_Menon.html>>accessed 30 June 2017. [↑](#footnote-ref-43)
44. Sundaresh Memon, The transactional protection of private rights: issues, challenges and possible solutions (2015) Asian J Int Law 5:219–245. [↑](#footnote-ref-44)
45. Gustavo Laborde, The Case for Host State Claims in Investment Arbitration, (2010) Journal of International Dispute Settlement, 1, 97; see also EU Commission, Press Release, EU finalises proposal for investment protection and Court System for TTIP, 12 November 2015, <http://europa.eu/rapid/press-release\_IP-15-6059\_en.htm> accessed17 July 2017. [↑](#footnote-ref-45)
46. See Suzanne A Spears, ‘The Quest for Policy Space in a New Generation of International Investment Agreements’ (2010)13 Journal of International Economic Law 1037, 1040; Aikaterini Titi, ‘The Right to Regulate in International Investment Law’ (Hart Publishing, 2014) Chapter VII; Lorenzo Cotula, ‘Do Investment Treaties Unduly Constrain Regulatory Space?’ (2014) Questions of International Law 9, 19; Joachim Karl, ‘International Investment Arbitration: A Threat to State Sovereignty?’ in Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), ‘Redefining Sovereignty in International Economic Law’ (Hart Publishing, 2008) 225. [↑](#footnote-ref-46)
47. Charles H Brower, Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes, in: Sauvant (ed.), Yearbook on International Investment Law and Policy 2008–2009, (Oxford University Press, 2009) 356. [↑](#footnote-ref-47)
48. *Piero Foresti, Laura de Carli & Others* v. *The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01. [↑](#footnote-ref-48)
49. *See* Xavier Carim, a former deputy director-general in South Africa’s Department of Trade and Industry Republic of South Africa, Bilateral Investment Treaty Policy Framework Review: Government Position Paper (June 2009),10; Xavier Carim. Lessons from South Africa’s BITs Review. Columbia FDI Perspectives No. 10: 25 November 2013. [↑](#footnote-ref-49)
50. Reciprocal Investment Promotion and Protection Agreement between The government of the Kingdom of Morocco and The Federal Republic of Nigeria (2016) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5409> (accessed on July 5 2017) 1-24 [↑](#footnote-ref-50)
51. Ibid. 20 above, article 6(2) [↑](#footnote-ref-51)
52. [↑](#footnote-ref-52)
53. [↑](#footnote-ref-53)
54. Ibid 20 above, article 7 (a)(b) [↑](#footnote-ref-54)
55. Ilmari Soininen, ‘The Continental Free Trade Area: What’s Going On?’ (24 October 2014) www.ictsd.org/bridges-news/bridges-africa/news/the-continental-free-trade-area

-whats-going-on (accessed 15 July 2017) [↑](#footnote-ref-55)
56. Pan-African Investment Code, 'Draft preamble' 26 March 2016 http://repository.uneca.org/bitstream/handle/10855/23009/b11560526.pdf?sequence=1 (accessed 5 July 2017) para 8 [↑](#footnote-ref-56)
57. Southern African Development Community (SADC), ‘protocol on Finance and Investment' (2006) http://www.sadc.int/files/4213/5332/6872/Protocol\_on\_Finance\_\_Investment2006.pdf (accessed on July 5 2017) 1-112 [↑](#footnote-ref-57)
58. See generally; East African Community Legislative, 'Report of the committee on Communication, Trade and Investment in the workshop on Investment policies and strategies in EAC the region’ (2015) <http://www.eala.org/new/index.php/key-documents/reports/548-workshop-on-investment-policies-and-strategies-in-the-eac-region/file> (accessed on July 5 2017) 1-20 [↑](#footnote-ref-58)
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60. Economic Community of West African States, 'Mid-year Meeting of National Approvals Committees on the ECOWAS Trade Liberalisation Scheme (2011), Accessed on July 5 2017, 1-11 [↑](#footnote-ref-60)
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62. Trudi Hartzenberg , 'Regional Integration in Africa' (2011) World Trade Organization Economic Research and Statistics Division Staff Working Paper ERSD-2011-14, 1-17, UNCTAD, 'African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods' (2016), Imprint: New York/Geneva, UN [↑](#footnote-ref-62)
63. Organisation of African Unity (Now African Union) Treaty establishing the African Economic Community (AEC) Abuja Treaty 1991 <http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=173333> (accessed on July 5 2017). Twenty-four Member states of the Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC) and Southern African Development Community (SADC) have signed this agreement as at 10 June, 2015, The Continental Free Trade area: Making it work for Africa” (Policy Brief No.44, December 2015), African Union, 'Decision on the Report of the High Level African Trade Committee (HATC) on Trade Issues' [↑](#footnote-ref-63)
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67. United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2014, opened for signature 17 March 2015, not yet in force) (‘Mauritius Convention’). *See generally* Lise Johnson, The Mauritius Convention on Transparency: Comments on the treaty and its role in increasing transparency of investor-State arbitration (CCSI Policy Paper, September 2014). [↑](#footnote-ref-67)
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70. Surya Subedi, International investment law: reconciling policy and principle. (Hart Publishing, 2016) 172. [↑](#footnote-ref-70)
71. Anthea Roberts, Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System (2013) 107 American Journal of International Law 45. Notably, in this article, as well as in her other work, Roberts herself does not draw the conclusion that ISDS is a ‘public law’ regime; she suggests that it is best seen as “sui generis”. p. 94. In other work, Roberts argues for the “hybrid” nature of investment treaties, see State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority (2014) 55 Harvard International Law Journal 1; ‘Triangular Treaties: The Extent and Limits of Investment Treaty Rights’ (2015) 56(2) Harvard International Law Journal 353. [↑](#footnote-ref-71)
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73. *Ibid*, ‘59–61. For the view that the most effective supranational forms of adjudication operationalize a principal-agent function between state principals and their adjudicator agents, see Eric Posner and John Yoo, A Theory of International Adjudication’ (2005) 93 California Law Review 1. [↑](#footnote-ref-73)
74. *See generally* Anthea Roberts, Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System, *supra* 54, pp. 64 and 70–74 (discussing whether investor claimants are accorded their own independent rights). [↑](#footnote-ref-74)
75. *Ibid*, 45–46, and 78. [↑](#footnote-ref-75)
76. *Ibid*, 46, 58–63. [↑](#footnote-ref-76)
77. *Ibid*, 66–67, 55 and 64. But see Stephan W. Schill, Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review (2012) 3:3 Journal of International Dispute Resolution 577 (agreeing that *in dubio mitus* would violate the principle of the equality of the parties but rejecting it as inconsistent with textual demands of IIAs). [↑](#footnote-ref-77)
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80. *See generally* Anthea Roberts, Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System, *supra* 44, pp.50–52 (discussing the role of the Vienna Convention on the Law of Treaties and other public international law regimes). [↑](#footnote-ref-80)
81. *Ibid*, 65–66. [↑](#footnote-ref-81)
82. *Ibid*, 69–74. [↑](#footnote-ref-82)
83. *Ibid*, 70–74. This helps to explain the common tendency, often praised, to draw from WTO law in the interpretation of investment law. See Valentina Vadi, *Analogies in International Investment Law and Arbitration* (Cambridge University Press, 2016) 209–217. [↑](#footnote-ref-83)
84. Stephen Schill’s *The Multilateralization of International Investment Law* (Cambridge University Press, 2009) Chapters 3 & 4. [↑](#footnote-ref-84)
85. UNGA, Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred-Maurice de Zayas’ (14 July 2015) UN Doc A/HRC/30/44 (de Zayas Report hereafter) para 15. [↑](#footnote-ref-85)
86. Joost Pauwelyn, At the edge of chaos? Foreign investment law as a complex adaptive system, how it emerged and how it can be reformed. (2014) ICSID Rev 29:372, 372. [↑](#footnote-ref-86)
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108. *Ibid*, art 1(II); The agreement imposes a three-year cut-off period for submission of an arbitration claim. CCIA Agreement, art 28(2). [↑](#footnote-ref-108)
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