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The COMESA Common Investment Area: Substantive Standards and Problems in Dispute Settlement

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The COMESA Common Investment Area: Substantive Standards and Procedural Problems in Dispute Settlement*

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The Common Market for Eastern and Southern Africa (COMESA) is an organisation of 20 African states established in 1994, replacing the previous Preferential Trade Area between the members.[1] Since its inception COMESA has taken an active role in the economic integration of its members. In 2000 the COMESA Free Trade Area was established.[2] On 22 and 23 of May 2007 the twelfth Summit of COMESA Authority of Heads of State and Government, held in Nairobi, Kenya, adopted the Investment Agreement for the COMESA Common Investment Area (CCIA

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[1] COMESA member States are: Burundi, Comoros, Democratic Republic of Congo (DR Congo), Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. The Founding Treaty can be accessed at http://www.comesa.int/comesa%20treaty/comesa%20treaty/Multi-language_content.2005-07-01.3414/en

[2] See COMESA Secretariat *COMESA in Brief* (Lusaka, 3rd ed April 2007) at para.7.

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Agreement).[3] According to COMESA, "the CCIA Agreement is a precious investment tool whereby the COMESA Secretariat contemplates to create a stable region and good investment environment, promote cross border investments and protect investment, and thus enhance COMESAs attractiveness and competitiveness within COMESA Region, as a destination for Foreign Direct Investment (FDI), and in which domestic investments are encouraged."[4] Among the key pillars of the Agreement is the, "settlement of investment disputes through negotiations and arbitration mechanism."[5] It is the purpose of this paper to examine the new CCIA Agreement and the investor-state dispute settlement mechanism that this treaty has put in place. It will do so not only through an examination of procedural structures, but also by considering the interaction between these and the substantive claims that can be brought by an investor under the Agreement.

The paper will do so in three stages. First, so as to set the scene, the wider contemporary debate on the problems of investor-state dispute settlement, and their proposed solutions, will be examined so as to explain the background against which the dispute settlement provisions of the CCIA Agreement were finalised. It is clear from the face of these provisions that they seek to offer a new approach to investor-state dispute settlement which takes into account the types of problems that will be outlined below. Indeed it is fair to say that the CCIA Agreement is a significant new model for these purposes, in that it proposes an approach that is sensitive to the realities of developing states and of the particular conditions that influence approaches to international commercial arbitration in Africa. Given that the majority of International Investment Agreements (IIAs) are based on

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[3] CCIA Agreement available at http://www.comesa.int/investment/regimes/investment_area/Folder.2007-11-06.4315/Multi-language_content.2007-11-07.1023/en
[4] COMESA "Investment Agreement for the CCIA: Legal tool for increasing investment flows within the COMESA" (2007) available at http://www.comesa.int/investment/regimes/investment_area/Folder.2007-11-06.4315/Multi-language_content.2007-11-06.5437/en
[5] Ibid.

developed country or developed regional models, this requires that serious attention is paid to the CCIA Agreement in the wider investment law community. It offers an alternative formulation and points to how future generations of IIAs might be drawn up so as to provide, in the words of the Agreement, “investors with certain rights in the conduct of their business within an overall balance of rights and obligations between investors and Member States.”[6] The second part of the paper will offer a detailed analysis of the investor-state dispute settlement procedures in the CCIA Agreement. The third part will then consider the types of claims that an investor can make under the Agreement. There are numerous innovations in the substantive provisions of the Agreement that will have a significant effect on the subject matter of possible claims and thus on their admissibility before a tribunal whose jurisdiction is based on the Agreement.

(1) Current Issues in Investor-State Dispute Settlement

The main feature of investor-state dispute settlement under IIAs has been the rapid rise of litigation during the first years of the 21st century. According to the most recent UNCTAD figures, in 2007, at least 35 new investor-State cases were filed, 27 of which were filed with the International Centre for Settlement of Investment Disputes (ICSID). The total cumulative number of known treaty-based cases has now reached 290. These disputes were filed with ICSID (or the ICSID Additional Facility) (182), under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) (80), the Stockholm Chamber of Commerce (14), the International Chamber of Commerce (5), and ad hoc arbitration (5). One further case was filed with the Cairo Regional Centre for International Commercial Arbitration, one was administered by the Permanent Court of Arbitration and for two cases the exact venue was unknown to UNCTAD.[7]

6 CCIA Agreement above n.3 Article 11.
7 UNCTAD IIA MONITOR No. 1 (2008) *International investment agreements: Latest developments in*

Much of this increase can be attributed to the bringing of over 30 cases against Argentina in the aftermath of its financial crisis in 2001/2002, and in the extension of the ICSID Additional Facility Rules to NAFTA arbitrations.[8] Equally the fact that a very large number of IIAs, mostly Bilateral Investment Agreements (BITs), have been concluded since the 1980s (current UNCTAD estimates place the number of concluded BITs at 2,573 at the end of 2006[9]) has created more opportunities for investors to bring treaty-based claims. Furthermore, investors are beginning to understand the value of treaty claims in situations where they feel they have no effective local legal or other remedies to settle their differences with the host country. This is in part due to the rise of specialist international investment lawyers and their entrepreneurship in seeking out clients who could bring IIA based claims. Whatever the actual reasons may be, a sharp rise in investment treaty-based litigation has caused a number of concerns that are central to the development of dispute settlement procedures and remedies in this area.

On the part of investors, the foremost concern is whether dispute settlement provisions in IIAs are truly effective in protecting their rights and interests. While claims can be brought awards are often far lower than the sum claimed. For example in the case of *TECMED v Mexico*, in its award rendered in May 2003, the tribunal found the governmental measure at issue to violate the full protection and security standard and to be expropriatory. The compensation ($5.5 million) awarded was far below the amount

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investor-State dispute Settlement UNCTAD/WEB/ITE/IIA/2008/3 http://www.unctad.org/en/docs/iteiia20083_en.pdf at 1-2.

[8] On the Argentine cases see Carlos E.Alfaro and Pedro M Lorenti "The Growing Opposition of Argentina to ICSID Arbitral Tribunals: A Conflict between International and Domestic Law?" 6 JWIT 417 (2005). On NAFTA arbitrations see further www.naftaclaims.com and for critical background see IISD/WWF *Private Rights, Public Problems A Guide to NAFTA's Controversial Chapter on Investor Rights* (Winnipeg, IISD 2001).

[9] UNCTAD IIA MONITOR No. 3 (2007) *Recent developments in international investment agreements*
(2006 – June 2007) UNCTAD/WEB/ITE/IIA/2007/6
http://www.unctad.org/en/docs/webiteiia20076_en.pdf at 2

claimed which was $52 million.[10] Equally in the recent awards against Argentina under the US-Argentina BIT of 1991 the tribunals that found against Argentina nonetheless held that their award of damages would take account of the reality of the economic crisis that Argentina was facing.[11] Thus investor's claims will be considered in the full context of the surrounding circumstances. As one tribunal has put it, BITs "are not insurance policies against bad business judgments".[12]

On the part of host countries, concerns have been expressed, first, as to the risk of large awards being made against them. For example in the case of *CME v Czech Republic*, an award of some $350 million was made. This raised serious concerns about the legitimacy of such large awards. However, given the fact that most awards fall significantly below the amount claimed this award may be somewhat out of line with mainstream practice.[13] On the other hand, should the Argentine cases go against the host country it has been estimated that Argentina would face a compensation bill of some $80 billion.[14]

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[10] *Tecmed v Mexico* ICSID Case No Arb (AF)/00/2 Award of 29 May 2003, 43 ILM 133 (2004)

[11] Thus in *Sempra Energy International v Argentine Republic* ICSID Case No. ARB/02/16 Award 28 September 2007 at http://ita.law.uvic.ca/documents/SempraAward.pdf the tribunal stated: "The Tribunal does not believe that the issue here is one of lowering the standards of protection set under the Treaty or the law. This being said, however, the manner in which the law has to be applied cannot ignore the realities resulting from a crisis situation, including how a crisis affects the normal functioning of any given society. This is the measure of justice that the Tribunal is bound to respect. The Tribunal will accordingly take into account the crisis conditions affecting Argentina when determining the compensation due for the liability found in connection with the breach of the Treaty standards Award." (at para. 397). See also *CMS Gas Transmission Co v Argentina* ICSID Case No ARB/01/8 Award of 12 May 2005, 44 ILM 1205 (2005) at paras.165-166, 240: "[the] reality of the crisis … cannot be ignored … facts do not eliminate compliance with the law but do have a perceptible influence on the manner in which the law can be applied."

[12] *Maffezini v Spain* Case No. ARB/97/7 award of 13 November 2000: 16 ICSID Rev-FILJ 248 (2001) at para.64.

[13] *CME v Czech Republic* award of 13 September 2001 and the parallel London award of *Lauder v Czech Republic*, of 3 September 2001, can be accessed at http://www.cetv-net.com . The Stockholm award was challenged by the Czech Republic before the Svea Court of Appeals in *Czech Republic v CME Czech Republic BV*. The Court of Appeals turned down the Czech challenge and upheld the award, including the approach taken to the calculation of damages based on the market value principle: SVEA Court of Appeals Judgment of 15 May 2003: 42 ILM 919 (2003) see too the Introductory Comment by Thomas Waelde: 42 ILM 915 (2003).

[14] See William W. Burke-White and Andreas von Staden "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties" 48 Va.Jo.Int'l.L. 307 (2008) at 311.

It is hard to see how such a sum could ever be paid by a host country. The social implications of such a pay out could be disastrous and would lead to complex negotiations about debt financing and reconstruction, as no other routes would exist for such sums to be found.

A second concern for host states is that international arbitral tribunals lack the legitimacy of a court of law and so they ought not to have the responsibility to pronounce upon the legality or otherwise of governmental action. Indeed their power to do so may result in an illegitimate interference with the host country's right to regulate and could lead to "regulatory chill" in that host country authorities would make decisions not based so much on the wider public interest but with a view to avoiding liability to investors under an applicable IIA.[15] In some cases this could lead to decisions that favour investor rights over other equally important, if not superior, claims upon the regulatory obligations of public authorities.

A third major concern for host countries is the risk that particular cases will give rise to multiple claims from the same multinational corporate group, causing overstretch in resources and time devoted to defending such claims. This occurred in the CME litigation against the Czech Republic, where both the Netherlands based holding company of the entity undertaking the investment in the Czech Republic and the owner of the parent company both brought separate proceedings in separate venues arising out of the same facts.[16] Corporate groups will not be seen as a single entity for these purposes.[17] This raises concerns that the group as a whole might seek to use

[15] See UNCTAD *World Investment Report 2003* (New York and Geneva, United Nations, 2003) at 111 and 145-47.

[16] See *CME v Czech Republic* and *Lauder v Czech Republic* above n.13. See further "Who Wins and Who Loses in Investment Arbitration? Are Investors and Host States on a Level Playing Field? – The Lauder/Czech Republic Legacy" in 6 JWIT pp.59-77 (2005); Charles Brower and Jeremy Sharpe "Multiple and Conflicting International Arbitral Awards" 4 JWI 211 (2003).

[17] See *CMS Gas Transmission Company v Argentina* ICSID Case No.ARB/01/8 decision on jurisdiction 17 July 2003 available at www.worldbank.org/icsid/cases or 42 ILM 788 (2003) at para. 80. See too *Azurix v Argentina* ICSID Case No.ARB/01/12 decision on

its ability to bring multiple claims as a means of putting pressure on the host country to admit liability. This point was been made in relation to the abovementioned multiple claims against the Czech Republic. However, in that proceeding, the Czech Republic decided against arguing for a consolidation of the claims. On the other hand, different entities in the group will have different interests to protect and so to assimilate these parties and these claims may well deprive multinational groups of important legal rights that ensure the proper operation of the investment.[18]

Other stakeholders apart from investors and host countries have also entered the debate on investor-state dispute settlement. In particular, certain Western Non Governmental organisations (NGOs) have been vocal critics of the procedures involved in such cases.[19] Their concerns centre on the issue of whether all the relevant stakeholder groups, that might be affected by the operation of an investment and the outcome of possible litigation between the investor and host country, can know of that process and have a meaningful input into it, so as to ensure that their perspective is considered by the tribunal. This position challenges the legitimacy of arbitral tribunals, often composed of private practitioners who have no official capacity other than an appointment by the parties, as deciders of major public policy issues. In this the NGOs

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jurisdiction 8 December 2003 available at www.worldbank.org/icsid/cases or 43 ILM 262 (2004) at paras.86-90.

[18] See Christoph Schreuer *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) at p.249.

[19] Among the most knowledgeable in the field is the Canadian based International Institute for Sustainable development (IIISD). See for example, IISD Publications Centre Comments on ICSID Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration" (Howard Mann, Aaron Cosbey, Luke Eric Peterson, Konrad von Moltke, IISD, 2004); IISD http://www.iisd.org/publications/pub.aspx?pno=667 and Center for International Environmental Law (CIEL) Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations (revised version - December 2007) http://www.iisd.org/pdf/2008/investment_revising_uncitral_arbitration_dec.pdf . See too William Greider "Invalidating the 20th Century: How the right is using trade law to overturn American democracy" *The Nation* Vol.273 No.11 October 15 2001 p.21, who focuses on NAFTA dispute settlement in particular, displaying how much this has caused anxiety in North American political circles.

share the same concerns as host countries about regulatory chill and the inhibition of legitimate regulatory decisions.

On a more technical level this perspective demands greater transparency in knowledge about the existence of arbitral proceedings, a significant number of which take place in secret, openness of hearings and transparency of documentation as well as greater accountability of arbitrators for their decisions. In addition rights of third parties to appear as *amici curiae* are advocated. The issue of legitimacy is further elaborated by concern over the impartiality of arbitrators, many of whom may act as counsel in other cases whose outcome can be affected by the outcome of the case in which they are arbitrators. This leads to demands for stricter rules on the appointment and eligibility of arbitrators. Finally as regards the increasing number of public awards that are inconsistent and confusing in their interpretation of treaty provisions, this position has advocated the establishment of a system of appellate review of awards.

Such concerns led ICSID itself to consider reforms including prompt publication of awards where the parties exercise their right to permit such publication, more open procedures allowing access to proceedings for interested third parties and a possible ICSID appeals facility.[20] Some of these reforms were instituted in the latest changes to the Arbitration Rules in 2006, allowing, in particular, for third party participation in ICSID arbitration at the discretion of the tribunal after the consultation of both parties.[21]

Given the context of the present paper some further concerns relating to the use of investor-state arbitration in Africa must be highlighted.[22] International

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[20] See ICSID Secretariat *Possible Improvements of the Framework for ICSID Arbitration* (Discussion Paper, 22 October 2004); ICSID Secretariat *Suggested Changes to the ICSID Rules and Regulations* (Working Paper, 12 May 2005).

[21] See Arbitration Rules Rule 37(2) in *ICSID Convention, Regulations and Rules* (ICSID/15, 10 April 2006 available at www.worldbank.org/icsid/basicdoc/CRR_English_final.pdf).

[22] See especially Amazu A. Asouzu *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (Cambridge, Cambridge

commercial arbitration has been viewed with some suspicion in Africa in the past. This is due to numerous factors. The most important are the colonialist roots of this system of dispute settlement.[23] In particular, in colonial times, disputes over international trade transactions would be controlled by the standard terms of trade exchanges and trade associations dominated by colonialist business interests. These systems of arbitration were internal to these bodies. Accordingly, Africans were largely kept out of these bodies and so could not know how these systems worked. In addition, the main national arbitration laws of the time were based on old precedents from the metropolitan legal system. These laws were not replaced by new laws after independence resulting in obsolete procedures that did not reflect the state of the art in commercial arbitration.[24]

Further difficulties arise out of the historical lack of participation in the development of international commercial arbitration on the part of Africans. Many of the major international institutions dealing with international commercial arbitration were founded before the majority of African states had achieved independence. Thus their rules and procedures were determined without an African presence.[25] This contributed to an essentially Western view of what proper arbitral procedures were and to the further reinforcement of limited African knowledge on the subject. In addition, after decolonization, the newly independent African states concentrated on issues of political self-determination and sovereignty, culminating in calls for a New International Economic Order (NIEO) in the early 1970s.[26] They did not prioritise the reformulation of international commercial law, including international arbitration, further entrenching the distance between this method of dispute settlement and African laws and practices.

University Press, 2001) and Samson L. Sempasa "Obstacles to International Commercial Arbitration in African Countries" 41 ICLQ 387 (1992).

[23] See Asouzu previous note at 416 et seq.

[24] See Sempasa above n.22 at 391.

[25] Asouzu above n.22 at 420-21; Sempasa above n.22 at 395.

[26] Sempasa ibid at 390 and 394.

Linked to these sovereignty concerns, newly independent African states expressed misgivings about the value of international commercial arbitration as a means of settling their commercial disputes. Given that, in the early post-colonial period, most economic activity was conducted by the state[27] there was little interest in the practices and procedures of international commercial arbitration, a system designed to provide redress for disputes between private commercial parties. This situation occurred at the same time as the rise of foreign direct investment by multinational enterprises (MNEs) in African states. Such investments often involved major investment projects in natural resource extraction or infrastructure development governed by concession contracts which provided for delocalized international arbitration. Such procedures were seen as an imposition on the state by the foreign investor, who had the upper hand in bargaining power over the host country when the concession was given.[28] Moreover, this feeling of external imposition was exacerbated by the general suspicion, on the part of foreign investors, of domestic courts and the judiciary in the newly independent African states. Investors felt, rightly or wrongly, that national laws and procedures could not be trusted to deliver justice in countries where the state was the dominant presence in business and which appeared prone to authoritarian rule and widespread corruption.[29] Unfortunately, such attitudes are still commonly encountered today placing a break on the willingness of foreign investors to use local laws and dispute settlement systems and on their lawyers to advise on such a course of action.[30]

More recently, attitudes to international commercial arbitration have been changing in Africa. In particular, as the market-based model of economic development has become increasingly accepted by African states,[31] the need

[27] Asouzu above n.22 at 30.
[28] Sempasa above n.22 at 393.
[29] See Asouzu above n.22 at 35, 37-38, 105-108 and 425.
[30] For a strong critique of this prejudice see generally Asouzu above n.22.
[31] See for example the COMESA Treaty (above n.1) Article 151 “Creation of an Enabling Environment for the Private Sector” and Article 152(1) “Strengthening the Private Sector”:

to ensure that commercial arbitration is available and is based on modern and effective procedural foundations has increased.[32] The response has been to pass more modern arbitration laws, some of which are based on the UNCITRAL Model Arbitration Law of 1985,[33] to accede to the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958 (The New York Convention),[34] and to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 (the ICSID Convention), which established ICSID.[35] In addition regional arbitration centres have been established in Cairo and Lagos.[36]

Against this background, as will be shown in the next two sections, the CCIA Agreement represents a challenging new departure. As noted in the introduction to the paper, it provides a system of investor-state arbitration that seeks to reconcile the concerns both of investors, African host countries and other stakeholders in the fair and effective resolution of disputes through regional dispute settlement mechanisms. It offers to the investor the choice of international arbitration based on a balance of rights and obligations between them and the respondent state. In this the CCIA Agreement can be viewed as a significant response to the concerns of investors about local remedies while at the same time structuring the available substantive types of claim to ensure that legitimate state rights to regulate are not unduly curtailed and that the rights and interests of significant third parties are not ignored.

"The Member States shall endeavour to adopt programmes to strengthen and promote the role of the private sector as an effective force for the development, progress and reconstruction of their respective economies."

[32] See further Dr C.J.Amasike (ed) *Strengthening of Arbitration and ADR Institutions and Centres in Africa as a Catalyst for Foreign Investment* (Arbitration and Alternative Dispute Resolution in Africa, Yaliam Press, Nigeria, 2007) and Dr C.J.Amasike (ed) *Building a Contemporary and an Effective Arbitration and ADR in Africa* (Arbitration and Alternative Dispute Resolution in Africa, The Regent (Printing and Publishing) Ltd, Nigeria, 2005).

[33] See Asouzu above n.22 ch.5.

[34] See ibid ch.6.

[35] The Washington Convention on Settlement of Investment Disputes Between States and Nationals of Other States 1965: 4 ILM 524 (l965); 575 UNTS 159 extensively discussed in relation to Africa in Asouzu above n.22 Part 4.

[36] See Asouzu ibid Part 2.

(2) Investor-State Dispute Settlement Procedures under the CCIA Agreement

Dispute settlement is governed by Part Three of the CCIA Agreement. Part Three offers two principal methods of dispute settlement: state-to-state and investor-state. The former does not normally extend to issues directly arising out of investor claims in most IIAs.[37] However, the CCIA Agreement does allow the home state of a COMESA investor to bring a claim where, "the respondent has breached an obligation under [the CCIA Agreement], and that the claimant or its investor has incurred loss or damage by reason of, or arising out of, that breach."[38] The precise scope of this provision is unclear as regards claims brought where the investor suffers loss or damage. For the most part investor-state disputes will be settled under the investor-state provisions. It would appear that in certain cases, presumably those not covered by investor-state dispute settlement, a right to diplomatic protection of the investor is permitted. Given the rather uncertain nature of diplomatic protection as a device for the protection of foreign investors, it is unlikely that this procedure will be much used.[39]

Investor-state dispute settlement is open only to COMESA investors. According to Article 1(4) of the CCIA Agreement this includes a natural or juridical person of a Member State, "making an investment in another Member State, in accordance with the laws and regulations of the Member State in which the investment is made." For the purposes of this definition "natural person" means a person having citizenship of a

Member State in accordance with its applicable laws and regulations; and "juridical person" means, "any legal entity duly constituted or otherwise organised under the applicable laws and regulations of a Member State." In the case of a juridical person owned or controlled by foreign nationals, this

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[37] See UNCTAD *Dispute Settlement: State-State* Series on issues in international investment agreements (New York and Geneva, United Nations, 2003).

[38] CCIA Agreement above n.3 Annex A Article (2) (1)

[39] On which see further Peter T. Muchlinski *Multinational Enterprises and the Law* (Oxford, Oxford University Press, 2nd ed, 2007)at 704-707.

shall not qualify as a COMESA investor unless, "it maintains substantial business activity in the Member State in which it is duly constituted or organised." This requires, "an overall examination, on a case-by-case basis, of all the circumstances, including, *inter alia*: the amount of investment brought into the country; the number of jobs created; its effect on the local community; and the length of time the business has been in operation."[40] The availability of investor-state dispute settlement is thus limited to investors from other COMESA Member States. Accordingly, a non-COMESA investor would need first to establish a subsidiary, branch or other legally recognised form of business association in a COMESA country so as to benefit from this procedure. In addition the non-COMESA investor would have to comply with the substantial business activity requirement which introduces an "effective link" type of nationality test into such cases.[41]

Before either type of dispute settlement mechanism can be invoked the CCIA Agreement demands use of other dispute settlement techniques. Thus, Part Three begins with Article 26 on negotiation and mediation. According to Article 26 the claimant, whether a state or COMESA investor, shall issue a notice of intention to initiate a claim to the other potential disputing party. There follows a minimum six-month cooling-off period between the date of the notice and the date a party may formally initiate a dispute. Article 26 (3) asserts that, "[t]he parties shall seek to resolve potential disputes through amicable means, both prior to and during the cooling-off period." In this the CCIA Agreement follows the extensive practice in IIAs to provide for the

[40] CCIA Agreement above n.3 Article 4 (1).
[41] On which see the *The Nottebohm Case (Liechtenstein v* Guatemala) I.C.J. Reports 1955 p.4; David Harris "The Protection of Companies in International Law in the Light of the Nottebohm Case" 18 ICLQ 275 (1969) at 285-295. This approach to corporate nationality was rejected by the International Court of Justice in the *Case Concerning The Barcelona Traction, Light and Power Company, Limited* (New Application: 1962) (Belgium v Spain) Second Phase, Judgment of 5 February 1970, I.C.J. Reports 1970 p.3. However the ICSID Convention (above n.35) uses a simpler control test of corporate nationality in Article 25 (2) (b) on which see further Muchlinski above n.39 at 726-31.

use of informal dispute settlement methods in the first place.[42] The CCIA Agreement goes on the mandate mediation where no alternative means of dispute settlement is agreed upon by the parties. The mediator will be chosen by the parties from the COMESA list of mediators, or by the President of the COMESA Court of Justice where the parties cannot agree. This procedure does not affect the minimum cooling-off period. If the parties accept a mediation ruling it becomes immediately binding upon them.[43] This is an innovative development in IIAs. It places Alternative Dispute Resolution (ADR) at the heart of the dispute settlement process. It also allows the parties time before they go to arbitration. In this it may discourage needless litigiousness, something that has become a rather unwelcome development under IIAs in more recent times.

Should amicable negotiation or mediation under Article 26 fail then arbitration may be resorted to in accordance with the requirements of Article 28 of the CCIA Agreement. Claims are restricted to Part Two of the Agreement, which deals with investor rights and obligations. Investors cannot bring claims based on the general obligations of Member States or the institutional provisions under Part One.[44] A three year limitation period is imposed on the bringing of claims.[45] The investor must assert that the respondent state, in whose territory the investor has made an investment, has breached an obligation under Part Two and that the investment has incurred loss or damage by reason of, or arising out of, that breach.

The investor is given the choice of a number of dispute settlement fora under Article 28:

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[42] See, for further examples, UNCTAD *Dispute Settlement: Investor-State* Series on issues in international investment agreements (New York and Geneva, United Nations, 2003) at 23-26.
[43] CCIA Agreement above n.3 Article 26 (4)-(6).
[44] Ibid Article 10.
[45] By Article 28 (2) of the CCIA Agreement, “No claim shall be submitted to arbitration if more than three years have elapsed from the date on which the COMESA investor first acquired, or should have first acquired, knowledge of the breach and knowledge that the COMESA investor has incurred loss or damage.”

> "(a) to the competent court of the Member State in whose territory the investment has been made;
> (b) to the COMESA Court of Justice in accordance with Article 28(b) of the COMESA Treaty; or
> (c) to international arbitration:
>
> > (i) under the International Centre for the Settlement of Investment Disputes (ICSID) Convention, provided that both the home state of an investor and Member State in whose territory the investment has been made are parties to the ICSID Convention;
> > (ii) under the ICSID Additional Facility Rules, provided that either the non-disputing Party or the respondent is a party to the ICSID Convention;
>
> (ii) under the UNCITRAL Arbitration Rules; or
> (iv) under any other arbitration institution or under any other arbitration rules, if the both parties to the dispute agree."

This range of choice is typical of modern dispute settlement clauses in IIAs.[46] In addition Article 28 introduces what is termed "arbitration without privity" in that, as paragraph 4 clarifies,

> "Each Member State consents to the submission of a claim to arbitration under this Agreement in accordance with its provisions. Each investor, by virtue of establishing or continuing to operate or own an investment subject to this Agreement, consents to the terms of the submission of a claim to dispute resolution under this Agreement if he exercises the right to bring a claim against a Member State under this Agreement."

[46] See further UNCTAD above n.42 at 37-44 and see Antonio Parra "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment" 12 ICSID Rev-FILJ 287 (1997).

By this provision each Contracting State makes a unilateral offer of arbitration which is accepted by the investor when they make the choice to use one of the methods of arbitration listed. For example, should the investor choose ICSID arbitration this will amount to consent for the purposes of Article 25 of the ICSID Convention if the foreign investor accepts the offer by choosing ICSID arbitration in writing, usually by filing a claim with ICSID.[47] This approach to consent has been termed "arbitration without privity" in that the host country makes an offer to all foreign investors which can be subsequently accepted by any investor involved in a dispute with that country, thereby obviating the need for a prior arbitration agreement between them.[48]

Article 28 makes the choice of the investor final and exclusive. By paragraph 3, "[i]f the COMESA investor elects to submit a claim at one of the fora set out in paragraph 1 of this Article, that election shall be definitive and the investor may not thereafter submit a claim relating to the same subject matter or underlying measure to other fora." This is known as the "fork-in-the road" clause. Such "fork-in-the-road" clauses have been the subject of arbitral interpretation before ICSID.[49] The key issue concerns whether the dispute submitted by the investor to the national courts or tribunals is one that invokes a claim of a breach of the applicable IIA, or whether it is an independent cause of action that raises no such issue.[50] If the national claim is identical to the international claim made before the ICSID Tribunal then the jurisdiction of the latter body has been excluded by the investor's choice under the fork-in-the-road provision. However, questions that can only be determined under the applicable national law of the host country, such as whether a license has been properly refused or a tax properly charged, can only be considered before national courts or tribunals in the first instance. Such determinations do not, of themselves,

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[47] This was accepted in the Report of the Executive Directors on the Washington Convention, para. 24: see 4 ILM 524 (1965) at 527. See further Schreuer above n.18 at 198-221.
[48] See Jan Paulsson "Arbitration Without Privity" 10 ICSID Rev-FILJ 232 (1995).
[49] See the discussion in Schreuer above n.18 at 239-49.
[50] See *Genin v Estonia* ICSID Case No.ARB/99/2 award of 25 June 2001 available at www.worldbank.org/icsid/cases or 17 ICSID Rev-FILJ 395 (2002) at paras.331-3.

raise any issues as to the breach of an IIA. Accordingly a choice of national tribunal by the investor in such a case will not operate to oust ICSID jurisdiction where the investor subsequently brings a separate claim alleging breach of the CCIA Agreement.[51]

The reference of an issue of national law to the relevant national dispute settlement body should not preclude a subsequent international claim being brought under the treaty for an alleged violation of its protection provisions, on the ground that such a claim relates to the investment protected under the applicable treaty and is separate from the underlying national legal dispute. In such a case there can be no fork-in-the-road, as there is no identity of subject-matter in the two legal proceedings. In addition, it is not open to the host country to avoid its responsibility under international law by relying on an exclusive jurisdiction clause in a contract with the investor if the national claim is not one based exclusively on the investment contract but also raises issues as to the conformity of governmental action with the IIA.[52]

The remaining provisions of Article 28 introduce significant innovations into the arbitral procedure, which seek to respond to concerns over the lack of transparency and third party participation in arbitral proceedings and to balance the rights and obligations of investors in relation to their right to bring claims. On the first of these issues, Article 28 (5) to (7) introduce the public availability of all documents related to the arbitration and open public hearings on both procedural and substantive issues, both of which are subject, on the part of the tribunal, to such exceptional steps as are necessary, to protect confidential business information.[53] In addition, the

[51] See Muchlinski above n.39 at 697
[52] See Muchlinski ibid. See further *Compania de Aguas Aconquija SA and Compagnie Generale des Eaux (Vivendi) v Argentina* ICSID Case No.ARB/97/3 award of 21 November 2000 available at www.worldbank.org/icsid/cases or 40 ILM 426 (2001) at paras. 53-5 upheld by the Ad Hoc Annulment Committee in *Compania des Aguas del Aconquija SA and Vivendi Universal (Formerly Compagnie Generale des Eaux) v Argentina* ICSID Case ARB/97/3 decision on annulment 3 July 2002) available at www.worldbank.org/icsid/cases or 41 ILM 1135 (2002). at paras 38-42.
[53] CCIA Agreement above n.3. By Article 28 (5): "All documents relating to a notice of intention to arbitrate, the settlement of any dispute pursuant to Article 28, the initiation of

arbitral tribunal shall be open to the receipt of *amicus curiae* submissions. This is to be done in accordance with the process set out in Annex A in relation to state-to-state disputes with necessary adaptation for application to investor-state disputes.[54]

Article 8 Annex A deals with *amicus curiae* submissions. It is a rather general provision which leaves much to be determined. [55] It asserts that, "[t]he tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party (the "submitter")".[56] Thus the tribunal is not bound to accept such a submission but has discretion over whether to do so. By paragraph 3 of Article 8, "[t]he CCIA Committee may establish and make available to the public a standard form for applying for status as amicus curiae. This may include specific criteria which will help guide a tribunal in determining whether to accept a submission in any given instance." Therefore more detailed guidance on how this discretion is to be used must await the formulation of such guidelines, which is not mandatory given the non-binding language used in this paragraph.[57] The submissions shall be provided in English, French or Portuguese or in the principal language of the host state. To ensure the identity and affiliation of the submitter the submission, "shall identify the submitter and any Party, other government, person, or organization, other than the submitter, that has provided, or will provide, any financial or other

an arbitral tribunal, or the pleadings, evidence and decisions in them, shall be available to the public."

[54] Ibid Article 28 (8).

[55] CCIA Agreement above n.3 Annex A Article 8. By para.3, "The CCIA Committee may establish and make available to the public a standard form for applying for status as amicus curiae. This may include specific criteria which will help guide a tribunal in determining whether to accept a submission in any given instance."

[56] CCIA Agreement ibid Annex A Article 8.

[57] Some guidance as to what could be included in such guidelines can be obtained from Article 39(4) of the Canadian Model Foreign Investment Protection Agreement: "In determining whether to grant leave to file a non-disputing party submission, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the arbitration; and (d) there is a public interest in the subject-matter of the arbitration." Available at http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf.

assistance in preparing the submission." Submissions may relate to any matter covered by the CCIA Agreement that is relevant to the claim before the tribunal. Again the tribunal will be the judge of what is or is not relevant.

This provision is not a very strong assertion of *amicus curiae* rights given the high degree of discretion left to the tribunal. However, this is consistent with for example current practice at ICSID, where third party submissions will only be admitted at the discretion of the tribunal after consultation with both parties.[58] Equally it is more detailed than other such provisions in other IIAs. For example Article 28 (3) the US-Rwanda BIT of 2008 simply states, "[t]he tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party."[59] On the other hand the Canadian Model Foreign Investment Protection Agreement of 2004 has a detailed provision on this issue.[60] While such provisions serve to increase transparency and stakeholder participation, they may also have the effect of burdening the parties to the dispute, who may be obliged to respond to arguments made by the *amicus curiae*, and to force parties to settle or refuse to settle based on public pressure rather than on the basis of the applicable legal rules.[61] However, this consequence may be required so as to ensure that investor-state disputes involving major public interest issues take account of those issues as well as narrow rules of law. It also reinforces the need to consider revising IIAs to ensure that the balance of rights and obligations is not geared too far in favour of investors without also considering the host country's regulatory responsibilities and the effects of investor rights on thirds party rights.

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[58] See above n.21.
[59] US Rwanda BIT 19 February 2008 at http://www.ustr.gov/assets/Trade_Agreements/BIT/Rwa/asset_upload_file743_14523.pdf
[60] See Canada FIPA above n.57 Article 39.
[61] See UNCTAD *Investor State Dispute Settlement and Impact on Investment Rulemaking* (New York and Geneva, United Nations, 2007) at 86-87.

As to the issue of balance between the rights and obligations of investors, Article 28 (9) contains a significant innovation in IIA practice. It states that:

> "A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages."[62]

This provision must be read in conjunction with Article 13, which states that "COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made." It is under national law that a balancing of rights and responsibilities can be drawn up. Failure to observe applicable national law would take the investors claim outside the realm of the dispute settlement provisions of the CCIA Agreement. Some recent arbitral awards have considered similar formulations in BITs. Some BITs contain wording to the effect that the definition of an investment covered by the agreement is one made "in accordance with host state law".[63] This can confirm that both foreign and domestic investors have to observe local law and that only those investments that are compliant with local law can obtain protection under the BIT, including any applicable laws on entry and establishment of foreign investment. Thus a tribunal can refuse jurisdiction over a dispute where the investor has acted in a fraudulent manner that renders the obtaining of an investment contract illegal under the law of the host state, by

[62] CCIA Agreement above n.3 Article 28 (9).

[63] For example the BIT between Chile and New Zealand states that "investment" means any kind of asset or rights related to it, "provided that the investment has been made in accordance with the laws and regulations of the Contracting party receiving it…" cited in UNCTAD *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (New York and Geneva, United Nations, 2007) at 9.

reason of breaches of good faith and unjust enrichment rules.[64] Equally, where the investor obtains a contract in knowing violation of nationality of ownership requirements under host state laws, this can take the dispute outside the protection of the BIT.[65] On the other hand violations of host state law after the entry of the investment cannot go to jurisdiction but only to the merits of the claim.[66]

The remaining provisions of Part Three deal with enforceability of awards, the maintenance of a roster of COMESA arbitrators and the governing law in disputes. As to enforceability, the CCIA Agreement requires that, "Member States shall adopt such domestic rules as are required to make final awards enforceable in domestic legal proceedings in their states."[67] Unlike the ICSID Convention there is no automatic recognition of awards as if they were decisions of a court of law.[68] However, the execution of the ICSID award will be governed by the laws concerning the execution of judgments in force in the state where execution is sought.[69] This includes the applicable law relating to a foreign state's immunity from execution.[70] Thus the respondent state still enjoys the protection of the law of sovereign immunity as applied in the enforcing state.[71] In practical terms, therefore, the

[64] See *Inceysa Vallisoletana SL v El Salvador* ICSID Case No Arb/03/26 Decision on Jurisdiction 2 August 2006 available at http://ita.law.uvic.ca/documents/Inceysa_Vallisoletana_en_001.pdf See for analysis Christina Knahr "Investments 'in accordance with host state law'" 4 *Transnational Dispute Management* Issue 5 September 2007 available at www.transnational-dispute-management.com

[65] See *Fraport AG Frankfurt Airport Services Worldwide v The Philippines* ICSID Case No Arb/03/25 Award of 16 August 2007 available at http://ita.law.uvic.ca/documents/FraportAward.pdf see too Knahr ibid.

[66] Ibid at paras. 344-45.

[67] CCIA Agreement above n.3 Article 29.

[68] See ICSID Convention above n.35 Article 54.

[69] Ibid. Article 54 (3)

[70] Ibid. Article 55.

[71] See for example the US case *LETCO v Government of Liberia* 650 F.Supp. 73 (SDNY 1986), 26 ILM 695 (1987) *aff'd* memo No.86-9047 (2d Cir, May 19, 1987). See too Georges Delaume "Sovereign immunity and transnational arbitration" in J. Lew (ed) *Contemporary Problems in International Arbitration* (London, Queen Mary College Centre for Commercial Law Studies, 1986) 313. In *SOABI (SEUTIN) v Senegal* (France, Cour de Cassation, 11 June, 1991), 30 ILM 1167 (1991), it was held that a foreign state that has consented to ICSID arbitration has thereby agreed that the award may be granted recognition (*exequatur*) which, as such, does not constitute a measure of execution that might raise issues pertaining to the

enforceability of an ICSID award is subject to the overriding principle of protecting the property belonging to a foreign sovereign, which is used for sovereign rather than commercial purposes, against execution, this being the most commonly applicable rule found in national laws.[72] By contrast the COMESA rule is rather in the form of a harmonisation measure which leaves much open to the national legislative organs. That said it is highly unlikely that the law of sovereign immunity could be disregarded. It is likely that the Member State concerned might pass a specific statute giving automatic recognition to the COMESA award, but subject to overriding national laws on the recognition of international arbitral awards. In this regard the question whether or not the Member State is a signatory of the New York Convention would be a relevant consideration. There appears nothing on the face of the CCIA Agreement to alter the application of that Convention to COMESA Awards. More pressing is the issue whether the national law of the Member State recognises and applies the New York Convention.[73]

As to the roster of arbitrators, the COMESA Secretariat shall maintain such a roster of "qualified arbitrators from which parties to an arbitration under this Agreement may select arbitrators."[74] This follows ICSID practice where a panel of suitably qualified arbitrators is also established. Again much is left open, such as the composition of arbitral tribunals the types of qualifications required of a member of the roster and the procedures for appointment of

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immunity from execution of the state concerned. The ICSID Convention provided an autonomous and simple system of recognition which excluded domestic rules concerning recognition of foreign awards. The Award in *SOABI v Senegal* is reproduced in 6 ICSID Rev-FILJ 125 (1991).

[72] See for example *AIG Capital Partners Inc and another v Republic of Kazakhstan (National Bank of Kazakhstan intervening)* [2005] EWHC 2239 (Comm) [2006] 1 All ER 284 (QBD) where it was held that the property of a state's central bank or monetary authority was subject to state immunity under s.14(4) of the State Immunity Act 1978 and so could not be used to satisfy an ICSID award, even if such property was being held by third parties on behalf of the central bank or monetary authority.

[73] See further Asouzu above n.22 who notes at 208 that relatively few African countries have adopted the New York Convention. As of the time of writing (June 2008) of the COMESA Member States (see n.1 above) only Djibouti, Egypt, Kenya, Madagascar, Mauritius, Zambia and Zimbabwe had ratified the New York Convention see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html .

[74] CCIA Agreement above n.3 Article 30

individual tribunals. Other IIAs have more detailed provisions on this issue.[75]

Finally as regards the governing law, by Article 31 of the CCIA Agreement:

> "When a claim is submitted to an arbitral tribunal, it shall be decided in accordance with this Agreement, the COMESA Treaty, national law of the host state, and the general principles of international law."

The choice of governing law has been a contentious issue in investor-state arbitration. Normally the law of the host country is the law applicable to an investment contract between the investor and host state. However, this may not preclude all application of international law. Indeed, in interpreting Article 42 of the ICSID Convention, ICSID tribunals have consistently held that national law will apply only to the extent that it is consistent with general principles of international law.[76] For example, it would not be open to the host state to exclude the international law relating to expropriation, as embodied in a BIT, by reference to an inconsistent national law.[77] More recently, the *ad hoc* Annulment Committee in the case of *Wena Hotels v Egypt* went a step further and held that, in an appropriate case, a tribunal could apply the law of the BIT, to the exclusion of national law, under the terms of Article 42(1) in the absence of agreement as to the proper law between the parties.[78]

The CCIA Agreement appears also to use international law as a corrective standard. Though there is a hierarchy of norms working down from the

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[75] See for example the US-Rwanda BIT above n.59 Article 27 Canada Model FIPA above n.57 Article 29-31.

[76] ICSID Convention above n.35 Article 42(1): "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules of the Conflict of Laws) and such rules of international law as may be applicable." See *Amco Asia v Indonesia* resubmitted case 89 ILR 580 at 594 para.40 (1992).

[77] See *Compania del Desarrollo de Santa Elena v Costa Rica* ICSID Case No.ARB/96/1 award of 17 February 2000, 15 ICSID Rev-FILJ 169 (2000) at para.64.

[78] ICSID Case No.ARB/98/4 Decision of the *ad hoc* Committee 28 January 2002, 41 ILM 933 (2002) at paras.40-41.

specific provisions of the Agreement, the COMESA Treaty, and national law to the general principles of international law, this cannot be read as somehow limiting international legal review of the other provisions. An international tribunal cannot accept a plea from the respondent state that provisions of its own law or deficiencies in that law are an answer to a claim against it for an alleged breach of international law.[79] This principle was affirmed by the ICSID Tribunal in *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*,[80] and this approach is likely to inform the interpretation of Article 31 of the CCIA Agreement, subject to one further issue. Given that COMESA is creating a supranational legal order not unlike that of the European Union, it is arguable that international law can apply only to the extent that this serves to develop the supranational order. The two are not necessarily identical. Thus a COMESA tribunal might be fully entitled to depart from general international law where the express terms of the CCIA Agreement or of the COMESA Treaty diverge from this. On a procedural level this is unlikely to cause difficulties as a COMESA tribunal will be an international tribunal that must follow rules of international law in the conduct of its procedures.

By contrast in relation to substantive protection of investor rights, the specific provisions of these Treaties, rather than the much contested international minimum standard of protection for aliens and their property, will be the correct guide for determining the scope of the rights and obligations of COMESA investors. This is especially so given the development orientation of the fundamental aims of COMESA, which may not be entirely compatible with the traditional concept of the international minimum standard, with its

[79] By Article 27 Vienna Convention on the Law of Treaties 1969: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty..." Similarly, by Article 3 of the International Law Commission Articles on State Responsibility 2001: “The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law” (ILC Report of 53rd Sess. ILC (2001) GAOR 56th Sess, Supp.10).

[80] Award on the Merits 20 May 1992: 32 ILM 933 (1993).

stress of the protection of investor rights.[81] This proposition is possibly controversial but it is hard to see how else Article 31 of the CCIA Agreement can be read, given the nature of the substantive rights of action that a COMESA investor might enjoy. They do not necessarily coincide with the international minimum standard, but rather create a COMESA standard of protection.

(3) Substantive Rights of Action under the CCIA Agreement

It has already been noted that investors can only bring claims in relation to an alleged infringement of their rights under Part Two of the CCIA Agreement. Part Two contains the main standards of protection found in most IIAs, though with some important adaptations that will be considered further below.[82] In particular, the fair and equitable treatment standard the non-discrimination provisions and the expropriation clause warrant closer attention. The other substantive provisions of Part Two, on the transfer of

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[81] See COMESA Treaty above n.1 Article 6 which states: "The Member States, in pursuit of the aims and objectives stated in Article 3 of this Treaty, and in conformity with the Treaty for the Establishment of the African Economic Community signed at Abuja, Nigeria on 3rd June, 1991, agree to adhere to the following principles:
(a) equality and inter-dependence of the Member States;
(b) solidarity and collective self-reliance among the Member States;
(c) inter-State co-operation, harmonisation of policies and integration of programmes among the Member States;
(d) non-aggression between the Member States;
(e) recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;
(f) accountability, economic justice and popular participation in development;
(g) the recognition and observance of the rule of law;
(h) the promotion and sustenance of a democratic system of governance in each Member State;
(i) the maintenance of regional peace and stability through the promotion and strengthening of good neighbourliness; and
(j) the peaceful settlement of disputes among the Member States, the active cooperation between neighbouring countries and the promotion of a peaceful environment as a pre-requisite for their economic development."
On the controversy surrounding the international minimum standard of treatment see Charles Lipson *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (University of California Press, 1985). See too for a statement by the International Court of Justice expressing concern over this issue *Case Concerning The Barcelona Traction, Light and Power Company* above n.41 at paras.89-90.
[82] They are: fair and equitable treatment (Article 14), transfer of assets (Article 15), movement of labour (Article 16), national treatment (Article 17), most favoured national treatment (Article 19), expropriation (Article 20), compensation for losses (Article 21).

assets, movement of labour and, compensation for losses, raise no significant new issues. Their formulations conform to standard IIA practice and need not be further discussed here. The protection of Part Two extends only to investments of COMESA investors that have been duly registered with the relevant investment authority in the host country and which have been made either before or after entry into force of the CCIA Agreement.[83] It covers only disputes involving claims that have arisen since the entry into force of the Agreement.[84] Thus the CCIA Agreement has no retroactive force and claims arising before its entry into force will have to be dealt with by other means.

Turning to the substantive rights, the right to fair and equitable treatment has a distinctive formulation that introduces a degree of judicial review of state administrative action. According to Article 14 (1) of the CCIA Agreement, "[f]air and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world." By Article 14 (2) this is said to prescribe, "the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments and does not require treatment in addition to or beyond what is required by that standard." The final sentence of Article 14 (2) is a direct reference to a controversy that arose under the fair and equitable treatment standard in the North American Free Trade Agreement (NAFTA). In the NAFTA arbitration *Pope and Talbot v Canada* the tribunal asserted that the fair and equitable treatment standard is "additive" to the international minimum standard.[85] On the other hand, the NAFTA Free Trade Commission issued a Note of Interpretation on 31 July 2001 which rejected any notion that Article 1105 of NAFTA contained any elements that were "additive" to the

[83] CCIA Agreement above n.3 Article 12 (1) and (2).
[84] Ibid Article 12 (3).
[85] See *Pope and Talbot v Canada* Award on the Merits of Phase 2, 10 April 2001 at para.110 available on www.naftacliams.com.

international minimum standard.[86] The CCIA Agreement affirms the view that the fair and equitable treatment standard can be equated with the international minimum standard. However Article 14 (3) continues:

> "For greater certainty, Member States understand that different Member
> States have different forms of administrative, legislative and judicial systems and that Member States at different levels of development may not achieve the same standards at the same time. Paragraphs 1 and 2 of this Article do not establish a single international standard in this context."

This is a departure from the traditional notion of the international minimum standard as an absolute standard of treatment and introduces a degree of flexibility in its interpretation based on the level of development of the respondent country. In this regard Article 14 appears to curtail significantly the protection afforded to an investor in relation to maladministration as it provides a novel defence, unknown in general international law, to the effect that the host country can plead its level of development as an explanation for poor administrative practices. This is not an approach that will find favour with investors, but it is an understandable attempt to curtail unreasonable claims.

Indeed there is some arbitral case-law which suggests that the specific conditions in the host country are a factor that tribunals can taken into account when assessing whether a BIT has been infringed. Thus, the tribunal, in the *CMS Case* held that account should be taken of the effect of abnormal conditions, prompted by the economic crisis in Argentina, in

[86] The Note of interpretation was considered to be mandatory by the Tribunal sitting on the damages award in the *Pope and Talbot Case*: see *Pope and Talbot v Canada* award in respect of damages, 31 May 2002, available on www.naftaclaims.com or 41 ILM 1347 (2002). This was confirmed in *Loewen v United States* ICSID Case No. ARB (AF)/98/3 award of 26 June 2003: 42 ILM 811 (2003) at para.128.

assessing the scope of protection afforded to the investor by an investment treaty.[87] It continued:

> "The crisis had in itself a severe impact upon the Claimant's business, but this aspect must to some extent be attributed to the business risk the Claimant took on when investing in Argentina, this being particularly the case as it related to decrease in demand. Such effects cannot be ignored as if business had continued as usual. Otherwise both parties would not be sharing some of the costs of the crisis in a reasonable manner and the decision could eventually amount to an insurance policy against business risk, and outcome that, as the Respondent has rightly argued, would not be justified."[88]

Such concerns may be relevant in special cases, such as transitional economies, economies in crisis, and, possibly, highly underdeveloped countries or failing states. However, the actual condition of the host country cannot be used as an excuse for bad governance where the host country is able to offer high standards of administrative action but fails to do so. It may be rather too easy for a host country to use this argument in justifying its own regulatory shortcomings. Thus some limits need to be developed to this argument. So far the existing case law remains relatively unclear.[89]

Turning to national treatment, this will only be available for COMESA investors as of right by 2010. Up until then the Member States need only make "every effort" to extend the standard to such investors.[90] Thus, under the terms of the CCIA Agreement, it would appear that no claim based on

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[87] *CMS v Argentina* above n.11 at para.244.
[88] Ibid. para.248.
[89] See further Nick Gallus "The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection" 6 JWIT 711 (2005). Gallus notes that there has been a significant number of BIT based ICSID cases in which the developing host country's level of development was not taken into account. However in *AMT v Zaire* (ICSID Case No. ARB /93/1 award of 21 February 1997: 36 ILM 1531 (1997)) the issue was relevant to the determination of compensation, where the claimant was found to have been aware of local conditions (at paras. 7.14-7.15).
[90] CCIA Agreement above n.3 Article 3 (b) (i).

national treatment can be brought until 2010 as the respondent host country could defend the claim on the basis that it is not obliged to provide national treatment until that time. Once available, national treatment will cover both pre-entry and post entry treatment and will be subject to a comprehensive "like circumstances" test.[91] In addition, the national treatment provision will be subject to a negative list of exceptions and qualifications under Article 18 of the CCIA Agreement.

By contrast most-favoured-nation (MFN) treatment is immediately available. It too extends to pre and post entry treatment and is subject to the same "like circumstances" test as national treatment. It is subject to the common exceptions relating to regional integration agreements and taxation conventions that are found in most MFN provisions in IIAs.[92] MFN shall not apply to investment agreements entered into by Member States with non-Member States prior to the entry into force of the CCIA Agreement. This ensures that COMESA investors will be unable to use the MFN clause to extend the operation of agreements with non-COMESA countries into the CCIA Agreement. The latter is the sole basis of rights for COMESA investors in the region and it cannot be supplemented by rights from other investment treaties concluded with non-Member States.

The expropriation provision in Article 20 is worded so as to protect legitimate regulatory actions of the host country from challenge under the dispute settlement provisions.[93] Thus compulsory intellectual property licences or the revocation, limitation or creation of intellectual property

[91] See ibid Article 17.
[92] Ibid Article 19.
[93] Ibid Article 20. See too Article 23(3) which provides for a special procedure in relation to claims for expropriation based on a tax measure: "An investor that seeks to invoke Article 20 with respect to a taxation measure must refer to the Secretary General of the COMESA at the time that it gives its notice of intention to arbitrate under Article 28 the issue of whether that taxation measure involves an expropriation. The Secretary General shall ask the competent authorities of the host state and home state whether they do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, in which case the investor may submit its claim to arbitration, if the other conditions of Article 28 have been fulfilled as well.

rights, are outside its protection to the extent that such measures are consistent with applicable international agreements on intellectual property.[94] In addition, a measure of general application shall not be considered an expropriation of a debt security or loan solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.[95] On a more general level, Article 20 (8) states:

> "Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article."

This provision is an important restatement of the limits of investor protection under the law relating to expropriation. Recently concern has been expressed that, with the extension of IIA provisions on expropriation to indirect or regulatory takings, legitimate exercises of regulatory power taken for essential policy reasons might fall foul of investor claims, thereby weakening the ability of the host state to regulate and leading to "regulatory chill".[96] Other more recent IIAs have also included provisions distinguishing between legitimate regulation and a regulatory taking and the CCIA Agreement is adding to this trend.[97] One notable issue arising here is whether the legitimacy of the measure in question will be considered in the light of its proportionality to the regulatory aim being pursued. Such an

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[94] Ibid Article 20 (6).
[95] Ibid Article 20 (7).
[96] See further Muchlinski above n.39 at 587-96.
[97] See for example the US-Rwanda BIT above n.59 Article 6 and Annexes A and B. In Annex B para.4 (b): "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations." See too Canadian FIPA above n.57 Article 13 and Annex B(13) (1) (c): "Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation."

approach is taken in the Canadian FIPA.[98] It remains to be seen if COMESA tribunals might apply a similar principle, or whether they will emphasise the right to regulate and give to the host country a large measure of discretion in interfering with investor rights. Finally Article 20 (9) requires that the host country gives to the investor a right to judicial or administrative review of any act of expropriation and valuation of compensation under national law. Such review will take into account the requirements of Article 20. This is not an exhaustion of local remedies requirement as the provision does not mandate the use of such procedures prior to making a claim under Article 28 of the CCIA Agreement.

Article 22 of the CCIA Agreement adds a general exceptions clause which serves to reinforce the host states right to regulate in the areas listed provided that, "such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investor**s** where like conditions prevail, or a disguised restriction on investment flows."[99] This approach follows the structure of Article XX of the GATT and introduces a "chapeau" outlining a test of the legitimacy of a measure in relation to the aims of the Agreement. It applies an analogy with the GATT Agreement, which refers to arbitrary and unjustifiable

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[98] See previous note.
[99] CCIA Agreement above n.3 Article 22(1). Article 22 goes on to say that, "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures:
(a) designed and applied to protect national security and public morals;
(b) designed and applied to protect human, animal or plant life or health;
(c) designed and applied to protect the environment; or
(d) any other measures as may from time to time be determined by a Member State, subject to approval by the CCIA Committee.
2. Nothing in this Agreement shall be construed to prevent a Member State from adopting, maintaining or enforcing any measure that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to the principles outlined in sub-paragraphs 1(a) to (c) above.
3. Nothing in this Agreement shall be construed to:
(a) preclude a Member State from applying measures that it considers necessary for the fulfillment of its obligations under the United Nations Charter with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests; or
(b) require a Member State to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests.

discrimination and disguised restrictions on trade, by referring to disguised restrictions on investment.[100] Under the GATT this has been interpreted as introducing a "least trade restrictive" test for regulatory measures requiring the protection of Article XX.[101] A similar approach based on a "least investment restrictive" test could also be developed by COMESA tribunals. It would involve examining whether the policy aim in question could have been achieved with less interference to the investors rights or to their investment.

Finally, Articles 24 and 25 of the CCIA Agreement provide procedures involving the CCIA Committee in relation, respectively, to emergency safeguard measures necessitated by threats of serious injury to the economy of a Member State caused by economic liberalisation and temporary balance of payments measures.[102] Again the content of these provisions owe more to the GATT than to other IIAs, which do not in general contain such provisions. In relation to investor-state disputes they provide a means of dispute avoidance as they allow for the Committee to act as an adjudicator of the conformity of host state measures with the CCIA Agreement, by reason of the requirement of notification of the measures to the Committee on the part of the Member State undertaking them. This can prevent the alternative situation where the host Member State passes measures unilaterally and, should the measures cause loss to the investor, the latter will bring a claim. This occurred in relation to disputes concerning Argentina's emergency measures in response the peso crisis in 2000-2001 resulting in a large number of BIT based arbitrations.[103] It is not entirely clear whether decisions made under Articles 24 and 25 can form the basis of a claim by the investor. Although these provisions are located in Part Two of the CCIA Agreement, it appears that investors cannot challenge the determination of the CCIA Committee as its powers of decision are granted

[100] See too for a similar formulation Canada FIPA above n.57 Article 10.
[101] See *United States- Standards for Reformulated Gasoline and Conventional Gasoline* WTO Appellate Body adopted 20 May 1996 WT/DS2/AB/R at 22-29.
[102] CCIA Agreement above n.3 Articles 24 and 25.
[103] On which see Burke-White and Von Staden n.14 above.

by Article 7 (2) (b) in Part One of the CCIA Agreement and, as noted earlier, investors are specifically excluded from making claims concerning issues arising out of Part One. However private sector representatives can be present at CCIA Committee meetings as *ex officio* members and to that extent can have an input.

Concluding Remarks

This paper has examined the new investor-state dispute settlement provisions of the CCIA Agreement. This is a significant departure in IIA practice as it represents a developing country arrangement and not one between a developed and developing country, as is usual in relation to the majority of BITs. Therefore it is a significant example of what developing countries in Africa see as the proper approach to this field of dispute settlement. In this it should act as a counter-example to the developed country dominated models of IIAs and to offer a new departure for analysis of how future IIAs should be structured. That said it also reflects certain new developments taken in US and Canadian Model BITs in particular. This may indicate the gradual emergence of a new international consensus about the balance of rights and obligations on the part of the host country in IIAs, giving to it more flexibility in carrying out legitimate regulatory action. Where the CCIA Agreement goes further, though, is in the introduction of the concept of investor obligations as a balance against host country obligations. This is still a very tentative development and it is rather limited compared to certain NGO initiatives in this field.[104] However it does represent a new departure in IIA practice and one which may develop more fully over time. What the CCIA Agreement does not do is to provide extensive and detailed procedural provisions on investor-state dispute

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[104] See for example the Canadian based International Institute for Sustainable Development (IISD) IISD *Model International Agreement on Investment for Sustainable Development Negotiators Handbook* (April 2005 revised April 2006) http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf . The Model Agreement is reproduced in 20 ICSID Rev-FILJ 91 (2005) and see too Howard Mann "Introductory Note" ibid. 84.

settlement such as appear in the US and Canadian Models. In addition many important issues are left unaddressed, such as the consolidation of multiple claims or appellate review. However, this should not detract from the fact that the CCIA Agreement offers a great deal of food for thought about the further evolution of investor-state dispute settlement issues in future generations of IIAs.