

# SOAS Arbitration in Africa Conference 2017

Cairo Regional Centre for International Commercial Arbitration (CRCICA)

3 - 5 April 2017



## Venue

Cairo Regional Centre for International Commercial Arbitration (CRCICA)  
1 Al-Saleh Ayoub St., Zamalek 11211, Cairo, Egypt



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## Principal Organisers and Funders of the Conference

### SOAS University of London Team

**Organiser/convenor:** Dr Emilia Onyema, *PhD, FCIArb*, School of Law, SOAS, University of London.

**Co-convenor:** Judge Edward Torgbor (Kenya).

**Rapporteur:** Dr Councillor Ndudi Olokotor, SOAS  
Dr Jean Alain Penda, Consultant, PricewaterhouseCoopers LLP, London.

**Administration:** Ms Christine Djumah School of Law, SOAS, University of London.  
Ms Chim Emuchay, Malvern College, Worcestershire.

### Cairo Regional Centre for International Commercial Arbitration (CRCICA)

Dr Ismail Selim, Director, CRCICA  
Wissam Samy Elmolla, Head, CRCICA Conferences and External Relations Department  
Yahia Rashwan, IT Consultant | Conferences and External Relations Department  
Rania Abdel-Hamid, General Coordinator | Conferences and External Relations Department  
Aly Farouk, Administrative Assistant | Conferences and External Relations Department

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## 2. Programme

# **The Role of African States & Governments in the Development of Arbitration in Africa**

**Third SOAS University of London Arbitration in Africa Conference**

**Cairo Regional Centre for International Commercial Arbitration, 3-5 April 2017**

## **Programme**

### **Day 0: 03 April 2017**

1200-1700: Registration at Cairo Regional Centre for International Commercial Arbitration (CRCICA)

**1830-2030: Welcome Reception at Salon Vert, Cairo Marriott Hotel & Omar Khayyam Casino,  
sponsored by WilmerHale LLP London**

### **Day 1: 04 April 2017**

0800-0930: Registration at Cairo Regional Centre for International Commercial Arbitration (CRCICA)

0930-0945: Welcome by Dr Ismail Selim, Director, CRCICA

0945-1000: Welcome by Dr Nabil El Araby, President, Board of Trustees, CRCICA

1000-1010: Welcome by Ambassador Mahmoud Nayel, Deputy Director of African Management,  
Egyptian Ministry of Foreign Affairs

1015-1025: SOAS Arbitration in Africa Research Project: Dr Emilia Onyema, SOAS

1030-1100: Keynote address by Judge Mohammad Amin El Mahdi, Former Minister of transitional  
Justice & National Reconciliation; Former President of the Egyptian State Council; Former President  
of the High Administrative Court of Egypt; Vice President CRCICA Board of Trustees.

### **1100-1120: Tea Break and Group Photo**

### **1130-1330: Panel 1: Year 2 Update from Arbitration Institutions in Africa**

**Chair:** Ms Alexandra (Xander) Kerr Meise, Adjunct Professor, Georgetown University Law Center

Ms Ndanga Kamau, LCIA-MIAC, Mauritius

Mr Kizito Beyuo Ghana Arbitration Centre, Accra

Dr Fidele Masengo, Kigali International Arbitration Centre, Rwanda

Ms Deline Beukes, Africa ADR, South Africa

Dr Dalia Hussein, CRCICA, Egypt

Mr Hicham Zegrary, CIMAK, Morocco

### **1330-1440: LUNCH**

**1445-1745: Panel 2: Attitude of African Governments towards Arbitration**

**Chair:** Judge Edward Torgbor, Kenya/Ghana

Ms Maryan Hassan, Somalia

Dr Tunde Ajibade, Nigeria

Dr Nagla Nassar, Egypt

Ms Bintou Boli Djibo, Burkina Faso

Mr Ousmanou Sadjo, Congo

Prof David Butler, South Africa

Mr Bakri Mohamed Abakar Mohammed, Sudan

**1800-1900: Drinks Reception & Book Launch at CRCICA, sponsored by Faculty of Law and Social Sciences, SOAS University of London**

**Day 2: 05 April 2017**

**0930-1100: Panel 3: Roundtable with UNCITRAL**

This roundtable will examine arbitration related UNCITRAL texts and their adoption by African states

**Moderator:** Dr Emilia Onyema, SOAS University of London

Dr Gaston Kenfack Douajni, APAA

Mr Timothy Lemay, UNCITRAL Dr

Mohamed Abdel Raouf, Egypt

Mrs Doyin Rhodes-Vivour, Nigeria

Dr Kennedy Gastorn, AALCO

Mr Jonathan Ripley-Evans, South Africa

**1100-1115: Tea Break**

**1120-1330: Panel 4: Legal Environment for Investment Arbitration**

This panel will critique the ease of doing business in Africa; the environment for investment; and the engagement of African states in investment arbitration

**Chair:** Ms Rose Rameau, University of Ghana (Fulbright Scholar)

Mr Tsegaye Laurendeau, Shearman & Sterling LLP

Ms Rukia Baruti, Africa International Legal Awareness (AILA) | University of Geneva

Dr Chrispas Nyombi, University of Bedfordshire

Mr Ike Ehiribe, Seven Stones Chambers, London

Dr Jimmy Kodo, OHADA Region

Mr Jimmy Muyanja, Uganda

Prof Dr Walid Ben Hamida, University of Evry, Paris

**1330-1445: LUNCH**

**1450-1630: Panel 5: View from Outside Africa**

**Chair:** Prof Emmanuel Gaillard, Shearman & Sterling LLP

Ms Smrithi Ramesh, Kuala Lumpur Regional Centre for International Arbitration, Malaysia.

Mr Duncan Bagshaw, Stephenson Harwood LLP

Mr Steven Finizio, WilmerHale LLP

Ms Alexandra (Xander) Kerr Meise, Georgetown University Law Center

Mr Baiju Vasani, Jones Day LLP

Professor Antonio Crivellaro, BonelliErede

Dr Luis Gonzalez Garcia, Matrix Chambers, London

1630-1640: Short Break

**1645-1745: Response from Attorneys-General & Government Ministers Present**

**Chair:** Chief Bayo Ojo, ICAMA, Abuja

Mr Mostafa El Bahabety, Egyptian Vice Minister of Justice for Arbitration Affairs

Mr Abubakar Malami, SAN, Attorney-General & Minister of Justice, Nigeria

Prof Githu Muigai, SC, Attorney-General, Kenya

**1750-1805: Closing remarks by Dr Emilia Onyema, SOAS University of London**

**1930-2200: Closing dinner at Inter Continental Semiramis Hotel, Cairo, sponsored by ICAMA, Abuja**

**After dinner speech** by Ms Smrithi Ramesh, Assistant Director (on behalf of Datuk Professor Sundra Rajoo, Director) of Kuala Lumpur Regional Centre for International Arbitration, Malaysia

**Rapporteurs:** Dr Jean-Alain Penda and Dr Councillor Ndudi Olokotor

## SOAS Arbitration in Africa Conference Series

### The Role of African States & Governments in the Development of Arbitration in Africa



**Group Photograph of Delegates at  
Cairo Regional Centre for International Commercial Arbitration  
(CRCICA)**

**3 April 2017**



**Group Photograph of Delegates at  
Welcome Reception at Salon Vert, Cairo Marriott Hotel & Omar Khayyam  
Casino, sponsored by WilmerHale LLP London**

**4 April 2017**



Book Launch - 4 April 2017 (L-R: Edward Torgbor, Emilia Onyema, David Butler)



SOAS Drink Reception - 4 April 2017



**Sponsor 1: Faculty of Law and Social Sciences, SOAS University of London**  
**5 April 2017**



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### **3. Discussion Paper**



## Discussion Paper

Dr Emilia Onyema (SOAS)

### **Introduction**

This is the third conference in the series of four identified themes in our research project on transforming and enhancing the use of arbitration as the dispute resolution of choice within the African continent. The four year research project itself is titled ‘Creating a Sustainable Culture of Arbitration as a mechanism for Commercial Dispute Resolution in Africa’. This research project is necessary because as stated in my introduction to the *Addis Ababa Discussion Paper* for our first conference in this series which examined the role of arbitration institutions in this process<sup>1</sup>:

there is no viable empirical research in this field in the continent to inform decisions, revision of laws, and knowledge and practice sharing across the continent.

The primary purpose of this research project is to “increase the visibility (of arbitration practitioners in Africa) and the viability of arbitration in the domestic, intra-Africa and international dispute resolution market”. To achieve this,

This project will pull together stakeholders in the sector of dispute resolution, articulate and monitor their practices and (measure the) impact of the outcome of our conferences and research output, to find a measurable change in all aspects of arbitration in the continent. The various aspects are arbitration specific laws and rules and their reviews; courts and judges; arbitration institutions; arbitration practitioners; and the state. The second (goal) of this research (project) is knowledge sharing between researchers and academics, arbitration practitioners, and arbitration institutions outside and within the continent.<sup>2</sup>

Our second conference which was hosted by the Lagos Court of Arbitration (22-24 June 2016) focused on the role of judges and courts in the promotion and viability of arbitration in Africa. The conference papers and discussions critically examined the disposition of various African courts towards arbitration.<sup>3</sup> In 2016, our Lagos Conference Paper partly concluded:

Clearly African governments need to do more to make cities in their countries attractive venues; their courts accessible and credible, ensure security of lives and property, among others, to attract not just investors but to ensure that when these investors and their own citizens have disputes, they choose such cities as seats of arbitration and appoint arbitrators of African origin as their dispute resolvers. In addition and even more viable is the importance of creating an enabling legal environment for domestic and intra-Africa arbitration references to thrive.

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<sup>1</sup> Our first conference held in the premises of the African Union in Addis Ababa on 23 July 2015. The conference papers are available online at: <http://eprints.soas.ac.uk/20421/> (hereafter, ‘Addis Ababa Conference Paper’)

<sup>2</sup> Addis Ababa Conference Paper, page 23.

<sup>3</sup> For more information see the SOAS/LCA Conference Booklet available for download at: <http://eprints.soas.ac.uk/22727/> (hereafter, ‘Lagos Conference Paper’)

This third conference will interrogate these concluding words in greater depth.

### **Aims of the conference**

This conference primarily aims to examine how African States and governments can better support the growth of domestic and international arbitration in their individual countries and collectively across the continent.

This third conference will therefore focus on the role of African governments (executive and legislative branches) in creating efficient legal and regulatory environments for arbitration (and its support industries) to thrive. The papers and discussions will interrogate the role of African States and governments in arbitration. It is important to clearly define this role especially with the private nature of the arbitration process. Having identified these generic roles governments play in arbitration, the discussions will closely interrogate the performance of various African States and explore how they can contribute to the promotion and growth of arbitration in their various states and across the continent.

The role states and governments play in arbitration can be conveniently divided into legal and non-legal regimes. The legal or regulatory regime will focus primarily on the legislative arm of government by examining the process and content of laws relevant to arbitration. In this context there will be a Roundtable discussion with UNCITRAL<sup>4</sup> to interrogate the reasons behind the few adoptions of UNCITRAL texts by African States and suggest possible remedial measures.

Though arbitration is a private dispute resolution mechanism, at various stages reliance on the powers of States and governments may become necessary. In addition, States have competence over such matters as: law reform, opening up of the African legal market, legal professional training as it relates to university curricula (to include training in dispute avoidance and ADR); negotiating and concluding investment related agreements; sovereign immunities; etc.

It is now recognised that a strong regulatory regime with weak or inadequate supporting environment, primarily made up of non-legal factors which are within the competence of the executive arm of government, will not pull in the arbitral references.<sup>5</sup> In recognition of this fact, the gaps in the support facilities by various African governments will be examined and possible solutions suggested. The primary aim of examining the impact of such non-legal factors is to provide a holistic discussion of the gaps which need to be filled to produce a sustainable environment that will attract disputes for resolution on the continent. It will also help government officials in attendance understand the far reaching impact of governmental policies and actions. In this way our conference proceedings will contribute to the continued development of an enabling environment for commercial activities to thrive on the continent, thereby enhancing its economic development.

In examining the role of states and government in arbitration, investment arbitration cannot be left off the menu. This is primarily because states are primary players in concluding investment agreements and as disputants in investment arbitration. States therefore need to create a viable

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<sup>4</sup> UNCITRAL is the United Nations Commission on International Trade Law  
[http://www.uncitral.org/uncitral/uncitral\\_texts/arbitration.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html)

<sup>5</sup> Such non-legal factors include: efficient transportation; power; communication technologies; hotels; security; political stability; etc.

environment for dispute avoidance and where disputes arise, effectively and efficiently manage the dispute resolution process, and comply with legitimate awards, while sparingly deferring to the protection of sovereign immunity.

This third conference will therefore discuss:

- The role for African States and governments in making their countries attractive seats for arbitration.
- How African States and governments can better support the development of arbitration in their various countries.
- How African States and governments can better promote the use of arbitration in resolving commercial disputes.
- How arbitration specialists can partner with and support African States and governments in their tasks of promoting the use of arbitration.
- How UNCITRAL can better engage with African States and governments in achieving her mandate.
- The reformation and modernisation of arbitration laws in African States.
- Whether African States should open up their legal markets to embrace new developmental initiatives.
- The right of disputants to freely choose their legal representation in arbitration and its implication for the legal market of African States.
- The role of government lawyers in supporting the development of arbitration.
- Whether African governments are ready and well equipped to participate beneficially in international investment arbitration.
- The impact of the recourse to sovereign immunity on African States.
- The tension between the exercise of the regulatory powers of the State and support for arbitration by African States.
- Whether Africa needs a pan-African court for arbitration and related matters.

#### Venue for the conference

This third SOAS Arbitration in Africa conference will be hosted by the Cairo Regional Centre for International Commercial Arbitration.<sup>6</sup> The Cairo Regional Centre is the oldest of the AALCO<sup>7</sup> Arbitration institutions in Africa. Others are the Lagos Regional Centre (1989)<sup>8</sup> and the Nairobi Regional Centre (2013)<sup>9</sup>. The Cairo Regional Centre remains very active in the administration of international arbitration cases market and is a very viable centre which attracts references from across the world primarily the MENA<sup>10</sup> region. We are hopeful that with the greater engagement of African countries with each other, disputants searching for tried, tested and experienced arbitral institutions to administer their dispute within the continent, will find the Cairo Regional Centre an excellent choice.

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<sup>6</sup> Cairo Regional Centre <<http://crcica.org/>>

<sup>7</sup> AALCO is the Asian-African Legal Consultative Organisation <<http://www.aalco.int/scripts/view-posting.asp?recordid=1>>

<sup>8</sup> Lagos Regional Centre <http://www.rcicalagos.org/>

<sup>9</sup> Nairobi Regional Centre <<http://www.ncia.or.ke/about-ncia/>>

<sup>10</sup> MENA refers to the countries in the Middle East North Africa region.

### **Outline of the conference panels**

As has become customary with our conferences, the **Panel 1** will receive progress reports from arbitration institutions operating in Africa. On this panel, representatives from the various arbitral institutions will present the actions and results (if any) they have taken since our last conference in Lagos and any differences such actions have made on the development of arbitration in their respective countries. This panel will be chaired by Ms Alexander Kerr Meise, Fellow, Columbia Center on Sustainable Investment; Adjunct Professor, Georgetown University Law Center.

**Panel 2** will examine the attitude of the governments of various African States towards arbitration. This panel will effectively set the context for the conference deliberations and will be moderated by Judge Edward Torgbor, Chartered Arbitrator. **Panel 3** will be a roundtable discussion focusing on UNCITRAL arbitration related texts and their possible adoption (or adaptation) by African countries. This roundtable discussion will be moderated by Dr Emilia Onyema, SOAS University of London. **Panel 4** will examine the legal environment for investment arbitration in Africa. The speakers on this panel will critique the performance of African countries on the *Ease of Doing Business* (World Bank Rankings and Report); the environment for foreign and domestic investments and the engagement of African states in investment arbitration. This panel will be moderated by Ms Rose Rameau, Fulbright Scholar, University of Ghana. **Panel 5** will provide the view of non-African practitioners and will be moderated by Professor Emmanuel Gaillard of Shearman & Sterling LLP. Speakers on this panel will share the experiences of other countries in supporting arbitration. **Panel 6** will be a response from the attorneys-general from various African countries and will be moderated by Chief Bayo Ojo, SAN. Dr Jean-Alain Penda and Dr Councillor Ndudi Olokotor will act as rapporteurs for the conference.

The conference **keynote address** will be given by Judge Mohammad Amin El Mahdi, the former Minister of Transitional Justice and National Reconciliation; Former President of the Egyptian State Council; Former President of the High Administrative Court of Egypt, and current Vice President of the CRCICA Board of Trustees. Judge Mahdi was also the Egyptian appointed arbitrator in the very well-known SPP v Egypt arbitration<sup>11</sup>. The conference closing **after dinner speaker** is Datuk Prof Sundra Rajoo, Director, Kuala Lumpur Regional Centre for International Arbitration, Malaysia

One of the goals of these conference series is to create a meeting point for Africans in arbitration to interact with a view to working together. There will therefore be several social events focused on networking as part of this conference. On the **evening of 4 April**, the output from the 2015 conference published by Wolters Kluwer in 2016 and edited by Dr Emilia Onyema, *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions*, will be launched at a reception sponsored by the Faculty of Law and Social Sciences, SOAS University of London. Judge Edward Torgbor, who wrote the *Foreword* to the book and the author contributors to the book, shall speak to the book.

### **Appendix**

This Discussion Paper includes three Tables. Table 1 lists the 54 independent States that make up the African continent and their arbitration related laws and conventions as at end of December 2016. Tables 2a and 2b reproduce the rankings for African States in the World Bank Ease of Doing Business Report, 2017 (with some 2016 comparators).

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<sup>11</sup> SPP v Arab Republic of Egypt, ICSID Case No ARB/84/3

### **Expected output from the conference**

The papers presented at the conference and a final report from the conference will be published online on the SOAS and conference website and made freely available to the general public.

### **Conference website**

All information relevant to the main research project and all the connected conferences including registration for this conference are available online at: <http://www.researcharbitrationafrica.com/>

### **Language**

The conference proceedings shall be conducted in Arabic, English and French with tri-lingual translation. The *Discussion Paper* is published in the three languages on the conference website mentioned above.

### **Appreciation**

We thank Dr Mohamed Abdel Raouf (former CRCICA Director) for accepting our request to host this conference at CRCICA. We also thank Dr Ismail Selim (current CRCICA Director) for co-organising this conference with us. We are especially grateful to Mrs Wissam Elmolla and her team at CRCICA (with particular mention of Mr Yahia Rashwan, Mrs Rania Abdel-Hamid and Mr Aly Farouk) for the professionalism and quest for excellence in all they do and for their cooperation with our team in organising this conference. We thank Christine Djumah and Chim Emuchay who ensured the SOAS end of the operation ran smoothly.

We thank all our sponsors and particularly mention: Chief Bayo Ojo and ICAMA who have consistently sponsored our conference closing dinner since 2015 (Addis Ababa), 2016 (Lagos) and 2017 (Cairo); and WilmerHale LLP who sponsored our Lagos conference and our welcome reception here in Cairo, many thanks for your support of our work!

We thank our keynote speaker, Judge Mohammad Amin El Mahdi of the CRCICA Board of Trustees; and Datuk Sundra Rajoo, our closing dinner speaker.

We thank all our panel chairs, panellists, rapporteurs and all attendees, especially those who continue to travel round the continent on our conference train! Thank you! We look forward to continuing our discussions on arbitration in Africa in Kigali in 2018!

### **2018 Conference**

The last conference in these series of conferences will focus on arbitration practitioners and how we can support the growth of the arbitral market in Africa. This conference will particularly interrogate the role of practitioners in arbitration particularly as: arbitrators, counsel, expert witness, tribunal secretary, administrator of arbitral centres. Our 2018 conference will be hosted by the Kigali International Arbitration Centre, **Kigali**, Rwanda from **14-16 May 2018**. Please note these dates in your diaries and we very much look forward to seeing you and your colleagues in Kigali.



# Director, CRCICA



## Dr Ismail Selim

Dr Selim is the Director of the CRCICA since January 2017. Dr Selim started off his carrier as an associate at Shalakany Law Office. Further, he integrated the Egyptian judicial system where he started off as a Public Prosecutor in the Office of the Prosecutor General of Egypt, then a civil Judge, until he joined Zulficar & Partners Law Firm in 2009, as a leading member of its Arbitration Group and where he was promoted to Partner in 2013. Further, in May 2015, Dr Selim joined Nour and Selim in association with Al Tamimi and Company as Partner and Head of Dispute Resolution, Cairo. In parallel to his former judicial career, Dr Selim was seconded to the Cairo Regional Centre for International Commercial Arbitration from 2003 until 2007 where he acted as Legal Advisor. Further, Dr Selim became a member of CRCICA Advisory Committee as of 1st May 2016. Moreover, Dr Selim teaches Private International Law at the IDAI in Cairo (Sorbonne University) since 2011 and has taught Arbitration Law and Private International Law in several Universities in Egypt. He has been constantly appointed as Presiding arbitrator, Sole Arbitrator and Co-Arbitrator and has acted as a Counsel in more than forty ad hoc and institutional cases under various rules such as CRCICA, Swiss Rules, UNCITRAL, DIFC-LCIA and the ICC Rules and in diverse fields including telecommunications, electricity, oil and gas, hospitality, construction, banking, shareholders disputes, advertisement, international sale of goods and media and entertainment. Dr Selim has acted as Counsel in several post-arbitral litigation proceedings before Cairo Court of Appeal. In 2007, he accomplished an internship program at the ICC Court of International Arbitration in France, has published several articles in learned Egyptian and International journals and was a speaker in several national and international conferences, especially in the field of arbitration and investment.

# President, Board of Trustees, CRCICA

## Dr Nabil El Araby



Dr. Nabil El Araby Chairman of the Board of Trustees, Cairo Regional Centre for International Commercial Arbitration (present). Previously the Secretary General of the League of Arab States July 2011 - 2016, He was appointed Egyptian Minister of Foreign Affairs in March 2011, He served as director of the Cairo Regional Centre for International Commercial Arbitration from 2008 to 2011. Previously He was a Judge at the International Court of Justice from 2001 until February 2006, He was appointed the Permanent Representative to the UN in New York from 1991 to 1999; a member of the International Law Commission of the United Nations from 1994 to 2001; President of the Security Council in 1996; the Permanent Representative to the UN Office at Geneva from 1987 to 1991; he was Legal Adviser and Director in the Legal and Treaties Department at the Ministry of Foreign Affairs from 1983 to 1987; Head of the Egyptian delegation to the Taba dispute negotiations from 1986-1988; in 1988 agent of the Government of Egypt in the Taba arbitration; Ambassador to India from 1981 to 1983; He was Legal Adviser and Director in the Legal and Treaties Department at the Ministry of Foreign Affairs from 1976 to 1978; and was Egypt's Legal Advisor to the Camp David Middle East peace Conference in 1978.

## Ambassador Mahmoud Nayel



Ambassador Mahmoud Nayel is Deputy Assistant Minister of Foreign Affairs for the Nile Basin Countries Affairs. He has held various positions including as, Ambassador of Egypt to Eritrea, Deputy Secretary General of the Egyptian Fund for Technical Cooperation with Africa; Deputy Head of Mission at the Egyptian Embassy in Brazil; and as diplomat in different Functions in Egypt's Embassies in Moscow & Rome. He holds an MSc in Politics from SOAS University of London.

# Keynote Speaker



## Judge Mohammad Amin El Mahdy

Former Minister of Transitional Justice and National Reconciliation; Former President of the Egyptian State Council; Former President of the High Administrative Court of Egypt; Vice-Chairman CRCICA Board of Trustees.



## Dr Emilia Onyema

Dr Emilia Onyema is a senior lecturer in International Commercial Law at SOAS, University of London. She is a Fellow of the Chartered Institute of Arbitrators; qualified to practice law in Nigeria; a non-practising Solicitor in England; alternative tribunal secretary of the Commonwealth Secretariat Arbitral Tribunal (London); and is listed on various arbitrator-selection panels. She is a member of the court of the Lagos Chamber of Commerce International Arbitration Centre (LACIAC), and member of the Advisory Committee of the Cairo Regional Centre for International Commercial Arbitration (CRCICA). Her latest book published by Kluwer is an edited collection on, "The Transformation of Arbitration in Africa: the Role of Arbitral Institutions" (2016).



## Ismail Selim's speech

Excellencies,

Dear Distinguished speakers and guests.

Dear African Sisters and Brothers.

Dear friends of Africa who are interested in our continent.

A very good morning to everyone and thank you for joining us at this lovely conference.

It is a great honour for me to deliver this address to you today.

At the outset, I would like to express my extreme happiness of seeing this lovely Conference as the third and last of a series of events that took place throughout this Africa Arbitration Week that we are savoring in the premises of the CRCICA. We have firstly started with a very informative Conference organized by the AILA and the University of Geneva, then CRCICA hosted the ICCA **Second Consultative Workshop on Cooperation among African Arbitral Initiatives**, and finally we have this distinguished 3<sup>rd</sup> SOAS University of London Arbitration in Africa Conference, entitled “The Role of African States and Governments in the development of Arbitration in Africa”. This Africa arbitration week will culminate with a sightseeing tour on 6 April for those who would like to discover the ancient Egypt civilization through a visit of the Pyramids of Giza and the Egyptian Museum.

I would like to express my sincere thanks to the School of Oriental and African Studies of the University of London (“SOAS”) and Dr. Emilia Onyema, for their confidence in CRCICA as a venue and co-organiser of this distinguished conference.

Indeed, the SOAS is a remarkable institution which has developed an outstanding research project for the transformation and enhancement of the use of arbitration as the dispute resolution of choice within the African continent. Through its disciplinary expertise, regional focus and academic staff interested in Africa, SOAS has worked tirelessly on the development of arbitration in African countries.

Likewise, the CRCICA shares the same devotion and owes a duty to support arbitration in Africa by virtue of the 1979 Agreement entered into between AALCO and the Arab Republic of Egypt. The said Agreement entrusts CRCICA with certain missions such as the promotion of arbitration and other ADR techniques in the Afro-Asian region, preparation of international arbitrators and legal scholars from the Afro-Asian region and coordination with and provision of assistance to other arbitral institutions.

Historically, CRCICA entered into cooperation agreements with 8 African institutions in Morocco, Libya, Sudan, Cameroon, Ghana, South Africa, Zimbabwe, and Somalia. Interestingly, not all of our co-signatories are arbitration centres, some are also law institutes and chambers of commerce.

It should be recalled that CRCICA organized in 1989 the first ever arbitration training workshop in the Afro-Asian Region. CRCICA has also fulfilled its duty in providing advice, technical assistance and consultations to the then newly established African Arbitration Centers, such as Lagos in 1989 and Addis Ababa in 2002.

In 2002 and beyond, CRCICA participated in the regional educational scheme of the African Centre for Legal Excellence of the International Law Institute (ILI) to build legal capacities in Africa through a network of trainings around the continent generally and in Uganda particularly.

In 2009, CRCICA hosted the first China-Africa Legal Forum which is a sub-project of the Forum on China-Africa Cooperation (FOCAC) established in 2009 in Beijing with the involvement of 44 African countries and 17 international organizations to boost Sino-African Trade.

On 15 May 2016, the then Director of the CRCICA delivered a lecture in English to 20 delegates from several African states on the pre-award arbitral proceedings. The lecture was given within the context of a training program specially tailored for the African delegates by the National Centre for Judicial Studies (NCJS), the training department of the Egyptian Ministry of Justice.

Upon the request of the delegates, the lecture was followed by a visit to CRCICA headquarters where they were familiarized with concrete aspects of the arbitral proceedings.

Today two members of the CRCICA Board of Trustees come from African Countries other than Egypt, specifically, Somalia, Nigeria Mrs. Funke Adekoya SAN and as of this year, we also have Dr. Emilia Onyema as a member of the CRCICA Advisory Committee.

On a look back at CRCICA's long-established record of cooperation in Africa, CRCICA ought to pay tribute to the names of two late African figures who supported CRCICA in its earlier years and contributed much of experience and expertise to its regional standing, those are the names of **Dr. Amazou Asouzu of Nigeria** and **Mr. Norman Mururu of Kenya**.

Dr. Asouzu was a lecturer at King's College of London and had various academic contributions on the development of arbitration in Africa, which he believed CRCICA have been a key element of.

Mr. Norman Mururu, as an international lawyer and former chair of the Kenya Branch of the CIArb, had partnered with Dr. Mohamed Aboul-Enein, the late Ex-Director of CRCICA and the catalyst of its renaissance for more than 25 years, in enhancing arbitration culture and trainings in various African countries.

Today, I would like to thank my predecessor Dr. Mohamed Abdel Raouf who thought of the brilliant idea of hosting the ICCA and SOAS African events.

I also am very grateful to my colleagues at CRCICA Conferences and External Relations Department, headed by Ms. Wissam Elmolla, for their efforts and logistic support to this event.

I would like to express my sincere appreciation to all the sponsors for their contributions. Particularly, I would like to thank WilmerHale LLP for sponsoring yesterday's cocktail at the Marriott Hotel. I also thank all the other sponsors to this event, namely Faculty of Law & Social Sciences, SOAS University of London, Cairo Regional Centre for International Commercial Arbitration (CRCICA), International Centre for Arbitration and Mediation Abuja (ICAMA) , Wilmer Cutler Pickering Hale and Dorr LLP, London, Stephenson Harwood LLP, London, Youssef & Partners Attorneys, Cairo

Shahid Law Firm, Cairo, JonesDay LLP, London, TMS Law Firm, Cairo, Shalakany Law Office, Cairo

Nour & Selim in association with Al Tamimi & Company, Cairo, Matouk Bassiouny, Cairo, Ms Alexandra (Xander) Kerr Meise, AILA, OHADA, ILFA, I-ARB and TDM.

Furthermore, I must have a special recognition to Mr. Yasser Mansour for sponsoring three young African Lawyers from Kenya and the **Comoro Islands** to attend this event. Such sponsoring includes the return ticket from Nairobi to Cairo, hotel accommodation and a touristic tour.

Finally, you will recall the Akan (Ghanaian) proverb proverb that I mentioned in my speech of 2 April. This proverb says:

**Wisdom is like a baobab tree; no one individual can embrace it."**

Today and again, I will take advantage of this African context to share with you another proverb (a Nigerian one this time) that reflects the purpose of this conference. Its a beautiful Nigerian proverb among the vast treasure of African oral literature. The proverb says:

***In the moment of crisis, the wise build bridges and the foolish build walls. (English)***

***Dans les situations de crise, les sages construisent des ponts et les sots construisent des murs. (French)***

This metaphor is a reminder of the importance of facing challenges together, united to keep our minds open to innovative ideas and pathways for growth instead of giving in to fear.

Accordingly, these conferences are a gathering place where we can all work together, share our different knowledge and exchange our experiences and I quote Emilia Onyema "talk to each other" to better face together today's challenges of arbitration in Africa.

We need to build bridges and demolish some artificial walls that are unduly separating certain African Countries. This foolish wall is called North Africa or MENA Region vs. Sub-Saharan Africa.

We need to build other bridges and demolish other fake walls that are creating isolated islands in Africa. I mean the divide between anglophones and francophones in Africa and as mentioned by Toullos yesterday we must not forget the portuguese speaking countries in Africa. I agree with Toullos, we must not forget Angola, Mozambique, Guinea-Bissau, Cape Verde, São Tomé and Príncipe and Equatorial Guinea.

Today by hosting this conference we are building a bridge and destroying a wall. Further and for the very first time in the history of CRCICA we have build another bridge, I am happy to re-announce that we have launched on 31 March 2017 the French Version of our Arbitration Rules to meet the Francophone and some African Users' needs.

Now, I will give the floor to his Excellency Dr Nabil Alarabi who is, as we all know, among others, a Diplomat, Former Secretary General of the Arab League, Former Minister of Egypt, Former Judge at the International Court of Justice and the current Chairman of CRCICA Board of Trustees.

I wish this distinguished Conference a remarkable success and to all participants a very pleasant stay in Cairo.

And I thank you for your kind attention.



## Welcome Address by Dr Emilia Onyema

### Welcome

Welcome to Cairo and to our third conference in our series of “SOAS Arbitration in Africa” Conferences.

### Appreciation

Thank you to CRCICA for hosting us.

Thank you to **Dr Mohamed Abdel Raouf** who accepted my invitation to CRCICA to host us when he was Director.

Thank you to **Dr Ismail Selim**, current Director of CRCICA for all his support and assistance with the organisation of this conference.

Thank you to **Mrs Wissam ElMolla** and her team here at CRCICA for working tirelessly with our team at SOAS to organise this conference.

We are grateful.

### About SOAS

SOAS is celebrating her **100<sup>th</sup> anniversary** of researching, teaching and sharing information about ME, Africa and Asia. We are very proud of the fact that outside our regions, we have the highest concentration of academics who study these regions.

In 2014, in the course of my research on arbitration in Africa, I was confronted with the fact that African countries are not fully represented in international arbitral discourse; we do not host many international arbitration references neither do our courts make pronouncements that influence the direction of international arbitral practice, law or jurisprudence. My research led me to the conclusion that Africa generates disputes that are arbitrated; it however raised the following questions: why are these disputes not arbitrated on the continent? Why are so few arbitrators of African origin appointed to arbitral tribunals (even by African parties) as the data from various institutions attest?

The search for answers to these questions birthed this SOAS Arbitration in Africa project. I shared some of my thoughts with Judge Edward Torgbor, who as it happened, was also grappling with the same questions. We decided to collaborate in this research project. Dr Jean-Alain Penda joined us to add the understanding of francophone Africa to this project.

I identified four major stakeholders in arbitration and decided as part of the project, to construct four conferences that will focus on each major stakeholder in arbitration in Africa. This led to our first **conference in 2015**, hosted by the Office of the **General Counsel, Africa Union Commission** in Addis Ababa. While writing the *Discussion Paper* for our 2015 conference, I realised we did not know how many active arbitral institutions operate in Africa. As a result of our research in this area, ICCA has now updated our list of institutions and included additional information. This information is publicly available on the ICCA website.

In **2016**, we focused on the courts and judges and their support of arbitration in Africa. We were hosted by the **Lagos Court of Arbitration Centre**. This year, 2017, our conference will focus on the

legislative and executive branches of governments and how they can better support the development of arbitration in Africa.

## **Goal of this Project**

The goal of this research project is to promote arbitration in Africa; and African arbitration practitioners and institutions to each other and to the international arbitration community.

## **Outputs**

This evening we will **launch the first book** from this conference series which focuses on the major arbitration institutions in Africa; and titled: The Transformation of Arbitration in Africa: the role of arbitral institutions; published by Kluwer in 2016 (and which you can **order with 20% discount**. Order forms have been emailed to each of you).

We are currently writing the second book on the attitude of African courts and judges to arbitration. I am editing this book which will also be published by Kluwer.

We are hopeful that after this conference we will publish the third book in the series which will be edited by Judge Edward Torgbor.

## **Why these books?**

Through our publications, we wish to add our “African Voices” to international arbitral discourse. We wish to have Africans also write about Africa with their own ‘African insights’ to provide some degree of balance in the literature and information about the continent. We also wish to project as many Africans with expertise in this field of study as our project will permit.

## **Funding**

Organising conferences or carrying out independent research requires funding. So we thank all our sponsors for their continued support since we started on this journey. This year, I will like to particularly mention Mr Yasser Mansour who sponsored some of our younger Kenyan colleagues to attend this conference. Thank you!

There will be many more opportunities to thank all our supporters and funders including all of you who are attending this conference, over the next two days.

## **The programme**

We very much hope that all attendees will fully participate in the discussions as we explore together how our governments and states can better support the development of arbitration in Africa.

Enjoy the conference; meet new people; make new friends and contacts that you can appoint or nominate as arbitrators in the future!

Thank you!



# Panel 1: Year 2 Update from Arbitration Institutions in Africa

**Brief:** African arbitration institutions will update the conference on their activities to support the development of arbitration since our Lagos conference. They will particularly respond on our request that they provide yearly reports on their activities which should be accessible on their websites.

**Chair:** Ms Alexandra (Xander) Kerr Meise, Adjunct Professor, Georgetown University Law Center

Ms Ndanga Kamau, LCIA-MIAC, Mauritius

Mr Kizito Beyuo Ghana Arbitration Centre, Accra

Dr Fidele Masengo, Kigali International Arbitration Centre, Rwanda

Ms Deline Beukes, Africa ADR, South Africa

Dr Dalia Hussein, Cairo Regional Centre, Egypt

Mr Hicham Zegrary, CIMAIC, Morocco



**Panel 1**

## Panel 1: Chair



**Ms Alexandra (Xander) Kerr Meise**

Ms. Meise represents and advises sovereign governments and private entities in preventing and resolving international investment, commercial, public international law, and human rights disputes in domestic, international, and ADR fora, including before arbitration tribunals, other local and international tribunals, the PCA, and the ICJ. She also teaches International Human Rights Law at Georgetown University Law Center and serves as a Fellow of the Columbia Center on Sustainable Investment at Columbia University. Before her legal career, Xander worked in finance and international political development.

## Panel 1: Speakers



**Ms Ndanga Kamau**

Prior to joining LCIA-MIAC in 2015, Ndanga worked in mainland Africa, Europe, and the United States specialising in public international law, international dispute resolution, oil, gas & mining, and international development. Ndanga is passionate about the development of dispute resolution mechanisms in Africa, and regularly speaks and writes on the subject. She is an alumnus of the “Leading in Public Life” leadership programme for young Africans, has an LLM from the MIDS programme in Geneva, a degree in economics from the University of Cape Town, and was called to the Bar by Middle Temple in 2010. Ndanga is Kenyan, an avid runner, and speaks and writes English, Kikuyu, Kiswahili, French and Dutch with varying levels

## Panel 1: Speakers

### Mr Kizito Beyou



Kizito Beyuo is the founder of Beyuo & Co in Accra, Ghana, a law firm providing focused and pragmatic legal services. His practice of over two decades has been involved primarily in civil commercial and corporate areas of law. Kizito's current practice focuses mainly on corporate and commercial law with emphasis on litigation and arbitration. He has over the years acted as counsel or arbitrator in several commercial arbitrations in Ghana. He is a member of the Ghana Arbitration Centre and LCIA and is a member of the ICC Task Force on Maximizing the Probative Value of Witness Evidence.

### Dr Fidele Masengo



Dr Fidele Masengo is Board member of Kigali International Arbitration Center (KIAC) who has been appointed to serve as KIAC Executive Director assuming temporary the duties of KIAC General Secretary. He has served as the Deputy Chief of Party and Senior Technical Adviser within USAID-Chemonics International- LAND Project since June 2012 up to May 2015. Before joining USAID-LAND Project, Fidèle worked and is still working as legal consultant. He also worked as independent Advocate registered with Rwanda Bar Association since 2005 and in various other key legal positions in Rwanda, most notably in Rwanda Ministry of Justice as the Director of Public Prosecution services and Relations with the courts (from 1999 to 2001) and as the Director of the Administration of Justice (from 2001 to September 2004).

## Panel 1: Speakers

### Ms Deline Beukes



Deline, a graduate from the University of Pretoria, acquired extensive experience in the commercial world before being appointed Chief Executive Officer of the Advertising Standards Authority of South Africa, a body responsible for the resolution of advertising disputes. She represented South Africa at the European Advertising Standards Alliance in Brussels for ten years and also acted as arbitrator for commercial communication disputes in the liquor industry in South Africa. In 2009 she joined the Arbitration Foundation of Southern Africa (AFSA) to develop a dispute resolution mechanism for cross-border commercial disputes. In 2016 she was appointed CEO of the newly established China-Africa Joint Arbitration Centre (CAJAC Johannesburg) and is also involved in the development of AFSA International.

### Dr Dalia Hussein



Dalia Hussein is a legal advisor at the CRCICA and Lecturer at the Faculty of Law, Zakazik University. Dalia was an Administrative Prosecutor in Egypt, and Counsel in arbitration practice where she represented states and private parties in commercial and investment disputes before many institutions including CRCICA, ICSID and DIAC. Dalia holds a Maîtrise en Droit from Paris I Pantheon Sorbonne University, an LL.B. from Cairo University, an LL.M. in Private International Law and International.

## Panel 1: Speakers

### Mr Hicham Zegrary



Hicham Zegrary, 40 years old, is the recipient of the Ecole Nationale d'Administration (Paris, Badinter class 2010) and Holds a Master of Public Affairs from Paris Dauphine University and pr a PhD thesis on arbitration. In November 2010, he joined Casablanca Finance City Authority as head of Legal Affairs and January 2012 he is Director of Operations & Institutional Affairs. Since March 2016 he is Secretary General of Casablanca International Mediation & Arbit Centre. Mr. Zegrary began his professional career in February 2002 in Microsoft North Africa as Legal C in Intellectual Property Department. In October 2004, he joins the General Inspection of Finance related to the Minister of Econ Finances which is in charge of auditing projects funded by international financial organization auditing management of state-owned companies and departmental corporations. He is member of the ENA Alumni Association, member of ICCA and member of Association D Commerce.

## STRIVING FOR AN ATTRACTIVE AFRICAN HUB FOR INTERNATIONAL COMMERCIAL ARBITRATION

### *A case study of the Kigali International Arbitration Centre*

By Dr. Fidèle Masengo<sup>12</sup>

#### **ABSTRACT**

Arbitration is a private way of resolving disputes with binding effect that may arise from a contractual relationship or another kind of relationship. This alternative mode of dispute resolution is undoubtedly one of the oldest but still popular methods of settling dispute. When compared to litigation, the arbitration process is hailed notably for its confidentiality, flexibility and less time consuming.

Until recently, the use of arbitration in solving commercial disputes was not well known in Rwanda due to the fact that it is fairly a new concept and there was limited awareness among the general public. The legal framework governing arbitration is very new. Several legal instruments were only adopted these last years to regulate the matter. Among them are notably, Law No. 005/2008 of 14/02/2008 on Arbitration and Conciliation in Commercial Matters and Law No. 51/2010 of 10/01/2010 establishing the Kigali International Arbitration Centre and Determining its Organisation, Functioning and Competence. The main purpose of the current legal framework is to provide a speedy and effective commercial dispute mechanism to reduce the workload/backlog of the courts. Establishing an institutional arbitration administered by Kigali International Arbitration Centre, a specialist arbitral institution governed by its own rules of arbitration has tremendously contributed to the use of institutional arbitration in Rwanda. Today, 54 cases have been filed with KIAC in less than 5 years and with parties from more than eleven different countries worldwide (Rwanda, USA, Kenya, Italy, Pakistan, Senegal, South Africa, Dubai, Germany, Uganda and Zambia). This is an unbeatable and incomparable achievement for a newly established arbitration institution.

The role played by KIAC and the Rwandan Government in the operationalization and tremendous growth is very remarkable. An analysis of current KIAC arbitration system reveals several strengths and opportunities for the Centre to serve as an international hub in Africa for effective commercial arbitration. However, some challenges are also observed for the institution to stand firmly in the worldwide competition.

This paper offers an analysis of a model of evolution of an arbitral institution in Africa based on a case study of Kigali International Arbitration Centre and the extent to which it positions itself as an African and International venue of choice for commercial arbitration. Specifically, the research paper examines the role played by the newly established institution and the Rwandan government. The author identifies opportunities, challenges and proposes the measures needed to improve the effectiveness of KIAC institutional arbitration.

The paper was prepared using desk review research. The researcher used analytical method whereby legal texts, textbooks, as well as electronic sources that are in relation to the subject matter. This paper is also based on decisions issued by courts of Rwanda from 2008 to 2016.

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<sup>12</sup>Dr. Fidele Masengo is the Secretary General of Kigali International Arbitration Centre. He holds a PhD in Law from the University of Antwerp in Belgium and Masters in Economic Law from the Catholic University of Louvain in Belgium. He has taught International Commercial Arbitration, International Economic law and International Competition Law at various universities in Rwanda. He has written books and published many articles.

## **INTRODUCTION**

Rwanda is a country that has been affected by the 1994 Genocide against Tutsis. Consequently, the society was severely and negatively affected. The justice sector was one of the most affected by the genocide. Its infrastructures were devastated and its personnel exterminated. Since 1994, the urgent duty of the post-genocide government was to rebuild the entire country and the justice system in particular. An effort to definitely address the past injustice, forging unity, reconciliation and peace among Rwandan communities was made. In this scope, several legal instruments were adopted to reinvent the institutions and uplift the level of justice standards. Criminal justice, civil justice and commercial justice were all concerned by the reforms.

As far as commercial justice is concerned, a reform aimed at improving the legal environment of business, investment and economic development was envisioned. This reform led to the creation of commercial courts. At the same time, alternative disputes resolution such as arbitration and conciliation were introduced to offer alternative solutions to business and investment disputes.

The following pages present the policy and legal framework of arbitration in Rwanda (I). It critically analyses the critical factors that make Rwanda an arbitration friendly jurisdiction (II). I will also assess the success indicators of KIAC as an African arbitral institution (III). The last section will discuss key suggestions for making Rwanda an attractive International venue for arbitration (IV). At the end, a summary conclusion has been presented.

### **I. OVERVIEW OF POLICY, LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING LEGISLATION IN RWANDA**

#### **1. Meaning of arbitration under Rwandan law**

Article 3 (2) of the Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters defines arbitration as ‘a procedure applied by parties to the disputes requesting an arbitrator or a jury of arbitrators to settle a legal, contractual or another related issue’.

This definition is not very clear. It does inform the reader about certain aspects of the arbitration process such as the binding effect, the procedures, etc. Butler and Finsen define arbitration as ‘a procedure whereby parties to a dispute refer that dispute to third party, known as an arbitrator, for a final decision, after the arbitrator has first impartially received and considered evidence and submissions from the parties.’<sup>13</sup>

It is worthy to note that arbitration is a private way of resolving disputes with binding effect that may arise from a contractual relationship or another kind of relationship.<sup>14</sup> An arbitration proceeding is administered and managed by a knowledgeable, independent, and impartial third party and the parties to a dispute present their arguments and evidence to the arbitrator who decides the case and resolves the dispute.

#### **2. Arbitration and business dispute resolution**

The legal and judicial system of every country or institution plays an important role in providing the confidence to international investors. It is often said that a sound legal system is a key to the economic development and social stability of a country. Therefore, good economic growth depends on a viable

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<sup>13</sup> Butler, David and Finsen Eyvind *Arbitration in South Africa, law and practice* (1993), p. 1.

<sup>14</sup> About arbitration and mediation, Available at <http://www.arbitration.co.za/pages/about.aspx>.

legal framework. This viability requires legal systems that are consistent with economic realities and providing rules of commercial disputes.

It is in this context that arbitration, which was mainly an institution of peace, aimed at establishing the rule of law to restore harmony between people destined to live with each other has also been introduced by many countries in commercial matters as an ultimate way of settling disputes arising from international trade.

The motivations of using arbitration as one of the method of settling business and investment disputes<sup>15</sup> are of several kinds: the longing for justice to be administered efficiently, the parties wish to see a different law applied other than that prescribed by the State, for example a right based on the usage of trade or *lex mercatoria*.<sup>16</sup> Parties wish that the dispute be settled, as quickly as possible to their mutual satisfaction and that it will not lead to a break down in their business relationships. Furthermore, the type of disagreement that arise between the parties could involve certain technical issues which would best be dealt with in arbitration as both parties might be more willing to hire a specialist in that field. Arbitration can also save time as the parties are free to decide when and where they can meet. Furthermore, arbitration seems to satisfy businessmen in that it meets the key requirements of commerce such as confidentiality. It is in that perspective that institutions advocating for arbitration were created<sup>17</sup> such as International Chamber of Commerce (ICC),<sup>18</sup> International Centre for Settlement of Investment Disputes (ICSID)<sup>19</sup> and London Court of Commercial Arbitration (LCIA).<sup>20</sup> Two of them are most common in international commerce. The most famous and oldest is the International Council for Commercial Arbitration (ICA) and the ICSID.

### **3. The place of arbitration in Rwanda Government Justice strategy**

Justice, Reconciliation, Law and Order Sector Strategy (JRLOSS 2) is one of the key component of The Government of Rwanda medium term development policy in the second Economic Development and Poverty Reduction Strategy (EDPRS 2). The strategy outlines the Government's agenda and priorities over the five-year period from July 2013 to the end June 2018.<sup>21</sup> The overall objective of the JRLOSS is "to strengthen the rule of law to promote accountable governance, a culture of peace and enhanced poverty reduction,"<sup>22</sup> through five prioritised outcomes.

Arbitration is included in the said strategy. In fact, it is part of the Outcome 4 - Enhanced rule of Law, Accountability and Competitiveness.<sup>23</sup> Under this component, the strategy focuses on key actions in relation to creating infrastructures, legislation and mechanisms by which competitiveness can be enhanced and access to justice promoted. In particular, this policy-document focuses on all arbitration and ADR-related outputs and activities. Among those activities, one can mention the review of the arbitration legal framework including but not limited to the 2008 arbitration law, the development of arbitration and ADR policy and the creation of synergies between the Judiciary and the newly established Kigali International Arbitration Centre.

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<sup>15</sup>A Redfern and M Hunter *Law and practice of International Commercial Arbitration* 4ed (2004) 1 Sweet & Maxwell.

<sup>16</sup>Y Dezelay and G Bryant Garth *Dealing in virtue: international commercial arbitration and the construction of a transnational legal order* (1996) 3 University of Chicago.

<sup>17</sup>A Redfern and M Hunter op cit note 1 at 48.

<sup>18</sup>Established in Paris in 1923.

<sup>19</sup>Established in 1966.

<sup>20</sup>Founded in 1842.

<sup>21</sup>Justice, Reconciliation, Law and Order Sector Strategy (JRLOSS 2) 2013-2018

<sup>22</sup>Ibid

<sup>23</sup>Ibid

The government has understood that a more effective use of arbitration has a range of benefits. Arbitration can notably create a better business environment through reducing court case load burdens, improve clearance rates, and raise efficiency of the administration of justice. Arbitration offers to parties in disputes an increased access to justice, while providing quicker, cheaper and more tailored outcomes than is possible through the courts.

## **II. CRITICAL FACTORS THAT ADVOCATE FOR RWANDA AS AN ARBITRATION-SUPPORTIVE JURISDICTION**

The Government of Rwanda had a vision of a world class arbitration center. This is materialized in the arbitration supportive legal and institutional frameworks envisioned since the conception of the arbitration project.

### **1. Background of arbitration legislation in Rwanda**

Arbitration was historically introduced in Rwanda as a chapter of the civil and commercial procedures code of 15 July 1964. This was a very summarized piece of legislation. During the law reform of 2004, the law no 18/2004 on code of procedure, commercial, social and administrative inserted an entire title of 33 articles on arbitration<sup>24</sup>. The content of this legislation was based on the Belgian arbitration legislation. This legislation was changed in 2008 with the adoption of the Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters. During its initiation, it was very clear that the legislator wanted to make the 2008 law as compatible as possible with the Model Law in order to reflect the best practice in arbitration and inspire trust to its users. It is obvious that the current law is based on UNCITRAL Model Law.

Through the 2008 Act, Rwanda has really revised and modernized its arbitration legislation in order to provide for the needs of the development of arbitration as an ideal system for business disputes resolution. Unlike the 2004 law, the current legislation favors arbitration in different ways. First for all, the law recognizes and respects the parties' choice of arbitration. Any valid arbitration clause contained in a contract will automatically turn court to lack jurisdiction. Secondly, the current legislation provides clear arbitration process. Thirdly, the law minimizes all unnecessary court intervention in the procedures except where so provided in the law itself. Finally, the said law has served as a reference for the establishment of Kigali International Arbitration Centre.

### **2. A path to a modern arbitration law**

Before the establishment of the current legislation on arbitration, Rwanda had a very old legislation of early sixties. By establishing a modern legislation on arbitration and other ADRs, the Rwandan Government has played a key role in promoting arbitration. As said above, the matter is primarily governed by the Law No. 005/2008 of 14/02/2008 on Arbitration and Conciliation in Commercial Matters (Arbitration Law), and the Law establishing the Kigali International Arbitration Centre (KIAC).

Beside these two laws, other laws, with reference to arbitration, have also been put into place such as the Law No. 26/2005 of 17/12/2005 relating to Investment and Export Promotion and Facilitation (Investment Law), the Law No. 13/2009 of 27/05/2009 Regulating Labour in Rwanda<sup>25</sup>, the Law No.

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<sup>24</sup> Title VIII from article 365 to 398. See the Official Gazette Special bis of 30/07/2004.

<sup>25</sup> Articles 143 to 148 which provide for referral of collective employment disputes that are not amicably solved to an arbitration committee

50/2007 of 18/09/2007 determining the establishment, organization and functioning of cooperative organizations in Rwanda<sup>26</sup>.

### **3. The establishment of Kigali International Arbitration**

#### **A. The initial project and the creation of the Centre**

One of the key achievements towards a supportive policy in arbitration was the creation of Kigali International Arbitration Centre by an Act of the Parliament. The Centre was created as an initiative of the Rwanda Private Sector Federation (RPSF), supported by the Government of Rwanda as part of investment climate Reforms. This initiative emerged as a response to a need expressed by economic operators facing delays in courts. An initial study on the creation of the Centre was commissioned by the Private Sector Federation<sup>27</sup>. The purpose of the study was to draw a roadmap to promote the effective and efficient use of ADR means in commercial dispute resolution to complement the existing civil and commercial justice reforms. One of the first conclusions of the report of the study revealed that Rwanda ‘recognizes that the existing arbitral institution<sup>28</sup>(s) might be both inadequate and ineffective in addressing the modern concerns of commerce and investment’<sup>29</sup>. The Study recommended a Centre established by a Law.

After the approval of the said study report, a Draft Bill on Law establishing the Center and determining its functioning was prepared and approved by the Government. The Draft Bill was passed by the Parliament and published in the Official Gazette No. 09 bis of 28<sup>th</sup> February 2011 under law n° 51/2010 Of 10/01/2010 establishing the Kigali International Arbitration Centre and determining its organization, functioning and competence. KIAC was established as an organ operating under the Rwanda Private Sector Federation (PSF) with the support of the Government of Rwanda.

#### **B. A wide mission given to the Centre**

During the establishment of the Centre, the Government has given KIAC a wide mission in promoting arbitration and ADR. In fact, as an ADR Centre, KIAC has been given the ordinary function of case intake and administration and process management once a case has been registered. These two activities are service-delivery oriented. KIAC performs other duties connected to its core functions such as Marketing and ADR promotion, training and advocacy.

Through this mission, KIAC has core functions to promote Rwanda regionally and internationally commercial arbitration. It has the vision to position itself as the regional choice for commercial dispute resolution<sup>30</sup>. In that perspective, KIAC’s mission focuses on delivering appropriate, confidential and effective dispute resolution services in Rwanda and the region<sup>31</sup>. Hence, the Centre provides facilities and needed assistance to conduct domestic and International arbitration. It also provides all necessary the logistical support to conduct arbitration and mediation.

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<sup>26</sup> Articles 129 – 130 provides that disputes not resolved amicably through the board, are referred to arbitrators appointed by the parties. The arbitrators’ decision is appealable within 15 days.

<sup>27</sup> D. AMEYO, Study of promotion and other alternative modes of commercial conflict resolution, June 2008.

<sup>28</sup> An institution known as Centre d’Arbitrage et d’Expertise du Rwanda owned by a former lawyer existed (CAER) with a very limited functionality. It rarely attracted cases from parties due to uncertainty of its legal status (a non for profit association).

<sup>29</sup> Ibid.

<sup>30</sup> KIAC, Annual Report, 2013-2014.

<sup>31</sup> *Idem*.

#### **4. Adoption of modern arbitration rules**

One important feature in arbitral proceedings is the rules that will govern the whole process and as such KIAC administers cases under the KIAC arbitration Rules<sup>32</sup> and UNCITRAL Arbitration Rules. Following the establishment of KIAC, other key legal instruments were produced including the Ministerial order no 16/012 of 15/05/2012 determining the Arbitration Rules of Kigali International Arbitration Centre. The Ministerial Order is a set of modern arbitration rules reflecting the international best practices in the matter (rules modeled on the UNCITRAL arbitration rules) published in the Official Gazette No.22 bis of 28 May 2012. These rules cover all aspects of the arbitral proceedings.

Under Article 7 of the said Rules it is stated that where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration or such amended Rules as the Centre may have adopted to take effect before the commencement of the arbitration and it further goes on to state that by agreeing to arbitration under the Rules, the parties have accepted that arbitration shall be administered by the Centre.<sup>33</sup> Based on this article, parties that wish to bring their matters to the Centre have an option of submitting to the said rules or nominate which other rules they would like the Centre to follow during the arbitral proceedings.

There are other features in the current legislation and KIAC rules indicating how Rwanda legislation favors arbitration. Among those aspects, one can list the freedom to be assisted by counsel chosen by parties. In fact, KIAC rules state that parties to arbitration can be represented by their lawyers in all arbitral proceedings. From this provision, foreign lawyers are not excluded.

According to the rules, parties have the ability to determine the language of the proceedings, the freedom to choose the arbitrators even out of KIAC panel. Another key aspect includes the power of the arbitral tribunal to issue interim and emergency measures. Articles 33 and 34 together with Annex 2 of the rules give details on the general procedural framework in which emergency procedures are carried out. To date, two claims have been submitted to KIAC for appointment of emergency arbitrator.

#### **5. Value given to arbitral award, their recognition and enforcement**

Arbitral awards published in Rwanda have the same effect as any final and conclusive court judgment. As such, an arbitral award cannot be appealed to the local courts, unless if there is a significant error in the procedures, invalidity of arbitral agreement, the composition of the tribunal, inarbitrability, conflict with the public security of the Republic of Rwanda<sup>34</sup>.

##### **A. KIAC awards fully enforced**

To date, despite few challenges introduced to courts, no single award from KIAC has been set aside by the courts. Instead, as shown by the statistics collected from the courts, Rwandan courts have showed a strong trust to KIAC awards. This is also a result of the use of well-trained neutrals and KIAC scrutiny of awards.

##### **B. Adhoc awards**

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<sup>32</sup> See [www.kiac.org.rw](http://www.kiac.org.rw) website for both the arbitration and mediation rules

<sup>33</sup> See the KIAC arbitration rules 2012

<sup>34</sup> Article 47 of the 2008 Law.

There is an interest to know if the adhoc awards are well enforced as it is for KIAC awards. Many arbitral awards taken by adhoc arbitrations that were challenged have not been set aside. However, there are few of them that were set aside for genuine reasons based on article 47 of the 2008 arbitration act. It should be noted that in some cases where the competent court had set aside the award, the court of appeal sometimes reviewed and canceled the decision on setting aside the award.

### C. The case of foreign awards

Rwandan courts rarely refuse to enforce adhoc arbitral awards. If it happens, it is mainly due to only reasons provided for in the law. Also, the duration of the various steps of the award enforcement is not long. It is done in a very short time for all awards meeting the legal standards.

The arbitration friendly-jurisdiction is also attested in the recognition and enforcement of foreign arbitral awards. In fact, Rwanda has ratified<sup>35</sup> the United Nations Convention on the Recognition and enforcement of foreign arbitral awards (The 1958 New York Convention). As a result, KIAC arbitration awards issued in Rwanda are enforceable in all New York Convention signatory countries in accordance with the spirit of the Convention.

Again, all awards made in any New York Convention signatory country can be enforced in Rwanda. Rwanda arbitration law has adopted the provision of the Model Law on the recognition and enforcement of foreign awards but has included a reciprocity condition (article 50 of the 2008 Law). This means that awards taken by non-signatory of the New York Convention are likely to be unenforceable in Rwanda unless if a reciprocity agreement exists.

## III. KIAC'S SUCCESSFUL ACHIEVEMENTS IN ARBITRATION

### 1. KIAC as a growing arbitral institution

KIAC has tremendously grown as an arbitral institution. This can be attested domestically, regionally and even internationally. Domestically, KIAC is gaining genuine trust among its users. In fact, within the last four years that KIAC has been operational, it has been able to live up to its mission which is "To promote Rwanda as a venue of efficient arbitration services and a Centre of excellence for research and training of professionals in ADR"<sup>36</sup>. KIAC is proving to be model institution within the East African region and Africa as a whole when considering the cases that have been filed with the institution. Within Rwanda, KIAC's reputation grows each and every day and this is shown by NGOs, GoR, judiciary and other public institutions have expressed the trust in terms of case administration number and partnership.

Internationally, KIAC is quickly building its reputation. In fact, an international arbitration can be looked at in two ways: One is the kind of transaction; does it involve transaction that is either in a State other than the place of arbitration or that takes place in two or more States. The other method is to consider the parties; do they come from different States.<sup>37</sup>

Most importantly, Article III of the New York Convention on the recognition and enforcement of foreign arbitral awards requires the currently 135 Contracting States to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon..." It is upon this foundation stone that the entire edifice of international commercial

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<sup>35</sup> On November 3<sup>rd</sup>, 2008 The UNCITRAL announced that Rwanda has become the 143<sup>rd</sup> country to accede to the New York Convention. The Convention entered into force for Rwanda on January 29, 2009.

<sup>36</sup> See [www.kiac.org.rw](http://www.kiac.org.rw) website

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<sup>37</sup> The course on dispute settlement in international trade, investment and intellectual property, prepared by Mr.Eric.E.Bergsten for the United Nation Conference on trade and development ([www.unctad.org](http://www.unctad.org))

arbitration is built.<sup>38</sup> Hence, Rwanda being a signatory to the convention gives KIAC another plus in its quest to be the premier hub for international arbitration centre within the region. This can also be attested by the enforcement of awards within KIAC<sup>39</sup>.

## **2. KIAC impressive arbitration caseload**

KIAC has recorded an impressive arbitration case load in comparison with other similar Centers. A record of 54 cases with parties from USA, Rwanda, Kenya, Italy, Pakistan, Senegal, South Africa, Dubai, Germany, Uganda and Zambia. The amount in dispute per case varies between 15,000- 6,000,000 USD. The total amount in dispute for 54 cases exceeds now 34 millions of USD.

This is a milestone since it takes between 4 and 5 years for a newly established Centre to administer the first Case.

**Table 1: Cases administered for last five years**

Cases, Awards and settlement	July 2012-June 2013	July 2013-June 2014	July 2014-july 2015	July 2015-June 2016	July 2016-to March 2017	Cumulative total for 5Years
Cases Filed	5	12	11	12	14	54
Cases submitted under KIAC Rules	4	6	8	9	12	39

KIAC high arbitration rates of cases is impressive. It can be partly attributed to the cultural roots of ADR in Rwanda based on ‘Abunzi’ mediation which put emphasis on amicably settling disputes as opposed to litigation. The rapid increase in the number is also due to a very aggressive communication campaign targeting different sectors such as the financial and real estate sectors. It is also a result of a perfect collaboration with the government.

## **3. Capacity building in Arbitration.**

When KIAC was established no professional existed in Rwanda. In order to build the capacity in ADR matters, KIAC took the lead to ensure that potential professional arbitrators and mediators are sensitized, trained and enrolled to its panel. Within four years of operations, over 350 professionals have been trained and accredited by the Chartered Institute of Arbitrators-UK. KIAC's capacity building initiative of training and certifying professionals has facilitated the creation of a pool of qualified of arbitrators in the country. This makes Rwanda among the top countries in Africa with the highest

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<sup>38</sup>idem

<sup>39</sup>KIAC annual report 2014/2015([www.kiac.org.rw](http://www.kiac.org.rw)) Pg 9 under the heading key achievements in service delivery.

number of CIArb certified arbitrators in Africa. KIAC has trained more than 15 arbitrators from the EAC region and few people from the United States, Switzerland and South Sudan<sup>40</sup>.

#### **4. Pool of qualified and experienced arbitrators**

KIAC has a panel of both domestic and international arbitrators who have vast knowledge, are experienced, credible and independent in a wide range of field. This is one of the important factors that an arbitration centre of an international status needs.<sup>41</sup> KIAC domestic panel has more than 70 arbitrators who are Associate and Members of CIArb. They are from various professions including lawyers, engineers, certified accountants, etc.

On top of its domestic panel, KIAC has quickly attracted international arbitrators to its panel. Many of them are PhD and Masters holders who are fellows of CIArb certification or equivalent to it. This is a sign of trust and confidence for a new Center. The table and the graph below present the data of KIAC international panel of arbitrators.

As practiced by most international arbitration centre, parties to KIAC arbitration are free to nominate their arbitrators, subject to confirmation by the Centre in accordance with its rules and when called upon to appoint an arbitrator, it does that primarily from one of its panel of arbitrators.

#### **Academic Qualifications of Arbitrators of KIAC**

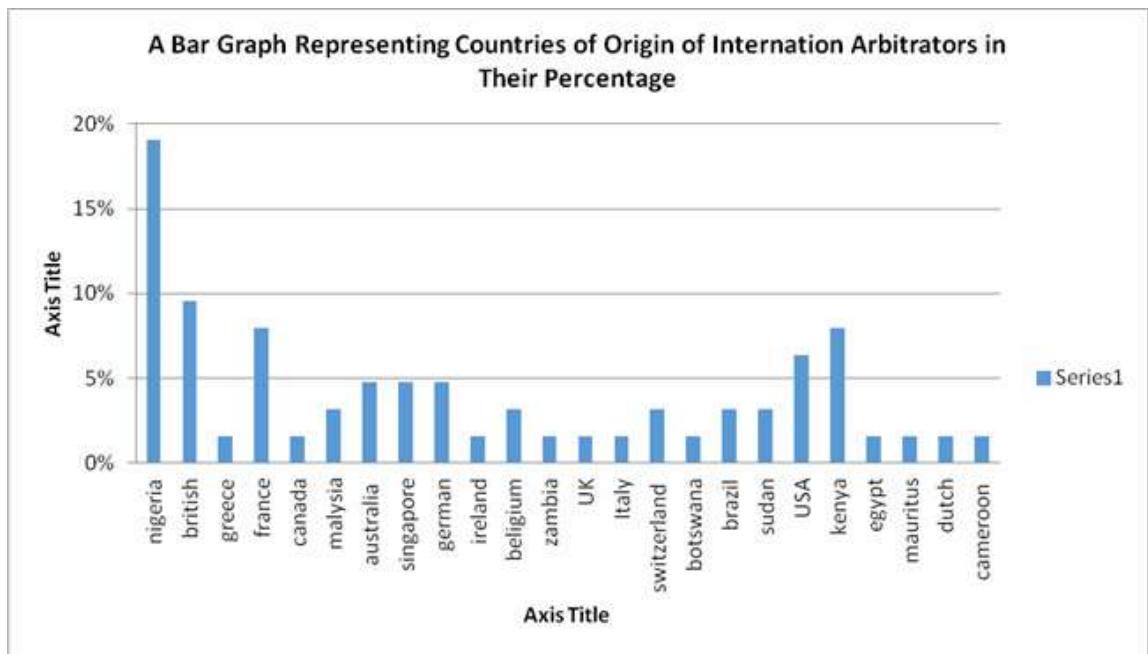
Highest degree held	Number in %
1. Ph.D.	23 %
2. Master's	37 %
3. Bachelor's	40 %

#### **Countries of Origin for International Arbitrators**

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<sup>40</sup> <http://www.kiac.org.rw/spip.php?article122>

<sup>41</sup>See [www.kiac.org.rw](http://www.kiac.org.rw) website



## 5. Organizing and hosting international conferences

Since its launch in May 2012, KIAC has organized two international conferences that have attracted professionals from over 18 countries worldwide and contributed to increase of awareness and significant behavior change toward arbitration.

## IV. SUGGESTIONS FOR MAKING RWANDA A MORE ATTRACTIVE VENUE FOR INTERNATIONAL ARBITRATION

### 1. Building on the existing country reputation as a friendly jurisdiction to arbitration

Since the enactment of the 2008 law and the establishment of KIAC, Rwanda is slowly but surely building its reputation as a country that has tremendously improved its justice commercial system. The country has also created an image of a friendly jurisdiction to arbitration.

The progress of Rwanda courts in their adherence to the arbitration-friendly jurisdiction is very impressive for a country where modern arbitration legislation has been introduced very recently. The reform of Rwandan courts has improved their functioning and, as a result, developed a friendly approach to KIAC arbitration. This a result of a strong partnership between the Centre and the Judiciary. In fact, since the establishment of KIAC, various communication campaigns targeting judges and registrars were intentionally organized to raise the awareness about arbitration. Trainings were also designed for the judicial personnel. A number of judges have even completed various levels of certified arbitration programs. Basing on the trust to KIAC, courts always appoint arbitrators from KIAC panel of arbitrators for their appointment decisions.

### 2. Benefits associated to the signatory of the New York Convention

The recognition and enforcement of foreign arbitral awards by the judicial jurisdiction where a centre is found also plays an important role in making the centre more favorable and Rwanda being a signatory to the New York Convention means that the competent courts in Rwanda can enforce

arbitral awards of other countries that also ratified the New York Convention<sup>42</sup>. Any party wishing to enforce a foreign award may do so by way of application to the competent court under article 50 and 51 of the law on arbitration and conciliation in commercial matters<sup>43</sup>.

### **3. Support by the Government**

#### **A. Strong support during the Centre official launch**

During the validation of the Final Report proposing the preliminary work for the establishment of the Centre (March 2011), a robust timetable for sensitizing and marketing the Centre after its establishment was also proposed. This came after the publication of the KIAC law 2010. In that document the implementation action plan was presented<sup>44</sup>, and the process of operationalizing KIAC was set to commence in May 2011<sup>45</sup>. Due to technical and financial challenges, the launch which was proposed in May 2011 was delayed for one year. As a result, the Centre was officially launched in May 2012.

During the launching, an outstanding event was organized by the Private Sector Federation. The event was honored by the participation of very high government officials led by the Prime Minister and Members of the Business Community. The Chief Justice delegated his Deputy to attend the event as a sign of strong support to the new institution.

#### **B. Stakeholders support during the Center's inception stage**

When KIAC was conceived, an initial budget to finance its infrastructure and operations was also prepared in partnership with the Government, the Private Sector Federation. International donors were also approached to fund the Centre. It was agreed that the PSF and the donor community were to mainly fund the Centre until it becomes financially self-sustaining.

Connecting KIAC to PSF funding is understandable since KIAC was its own initiative. Since its establishment up to March 2015, KIAC received support from PSF under the Alternative Dispute Resolution Project, a three years' project supporting the operationalization of the Centre with contributions from ICF, PSF and Government of Rwanda. The support from PSF covered the staff remuneration while the Government funds were used for the acquisition of State of art modern building. ICF support was mainly channeled in the operationalization of the Centre, professional skills development and awareness campaigns.

### **4. An opportunity of KIAC being an independent institution**

Many arbitral institutions claim to be independent referring to the legal provisions that create them. However, practitioners and researchers have several times questioned the independence that depends on the government funding and personnel.

KIAC is one of the few institutions that are really independent. Since its creation, KIAC was established as an independent institution. The institution is independent from the Government. It is also independent from the Judiciary. Parties to a dispute elect to refer the dispute directly to KIAC for

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<sup>42</sup> Article 50 law no005/2008 of 14/02/2008 Law on arbitration and conciliation in commercial matters (Rwanda)

<sup>43</sup> idem

<sup>44</sup> Annex VI on the Report on Implementation pln.

<sup>45</sup> See Annex VII of the report on the detailed implementation plan.

resolution. This autonomous status makes KIAC a unique regional institution of its kind. Many other arbitration centers established within the region are functionally and financially dependent to their respective governments or are court-connected.

KIAC has a Governance Board comprised of seven Members with knowledge and practice in arbitration, who are nationals of different countries (Rwanda, France, Nigeria and Mauritius).

Among the 7 members, 6 are appointed by the Rwanda Private Sector Federation and 1 was appointed by the Attorney General. 3 Board Members are international while 3 are Rwandan citizen. Prior to their appointment, the Board members appointed by RPSF were recommended by arbitral institutions (Permanent Court of Arbitration, The Chartered Institute of Arbitrators on London), legal professions (Rwanda Bar Association, Allen & Overy), academic institutions. All those Board Members are individuals who have an excellent reputation both in the area of expertise and for high ethical standards.

The Secretary General is appointed by the Board. There is no possible subordination to the Government.

## **5. Other benefits derived from the country's reputation**

An international arbitration centre located in Kigali brings with it a lot of opportunities for Rwanda as a country and the entire region of the East Africa. Having a reputable centre within the region also gives confidence to investors how may and are mostly not very confident in the judicial systems of most African countries due to corruption and delay in handling of commercial matters. Rwanda makes an exception to that rule. In fact, for the last 5 years, Rwanda has been ranked in good positions in fighting against the corruption by transparency international<sup>46</sup>and also national reports on corruption have shown that the Rwandan judicial system is an independent branch<sup>47</sup>. For the last two years, Rwanda has been also ranked as the best performing country in the East and Central Africa and 3rd easiest place to do business in Africa<sup>48</sup>. This can be a boost for foreign investors to set their businesses in Rwanda and also having an independent judicial system is another opportunity that may attract those foreign investors.

Other pillars that support arbitration include Government support in enhancing strategies to foster private sector growth and sustainable economic development. These efforts are gradually paying off. Rwanda has sustained an economic growth rate of over 8% in the last ten years<sup>49</sup>. The fact that the Rwandan Courts have shown to be independent and do not interfere with arbitration matters is another reason parties should consider in using KIAC as their arbitration institution. The government also introduced a very favorable visa policy for African citizens that includes but not limited to getting a visa on arrival.

## **6. The benefits of legal regime and plurality of international languages**

Rwanda has a very big advantage compared to the rest of the EAC countries when it comes to legal system and language. Concerning the legal regime, Rwanda has been a civil law system country.

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<sup>46</sup> Report by Transparency international, Corruption Perceptions Index 2015.

<sup>47</sup> Report by Transparency International Rwanda, professionalism of Rwandan Courts Observation report, released July 2015.

<sup>48</sup> <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB16-Full-Report.pdf>

<sup>49</sup> idem

However, due to the influence of East Africa Community, during this last decade the country has adopted a set of legislation inspired by common law legal tradition. This gives KIAC an upper hand as it has a panel of arbitrators comprised of highly accomplished and respected experts mastering both legal regimes. The fact that the centre also has a large number of qualified arbitrators who have a good understanding of different international languages including but not limited to English and French is another opportunity that the centre will easily expand its influence beyond the region and into jurisdictions that use these languages and/or legal systems.

## **7. Overcoming the KIAC's challenges**

Every newly established institution faces different challenges and KIAC is not an exception to this, but as history has shown over and again the ones who are able to face these challenges and take a positive approach in solving them always become better.

### **A. Funding of the Centre**

For an international arbitration centre to be seen as independent and credible it also has to be independent financially. Most international arbitration centres achieve this independence by the number of arbitration cases filed with them. Despite the current caseload of arbitration cases filed with KIAC, it is still very early for the Centre to be considered self-sustainable financially.

One of the major problems that come with lack of funding is the attracting of the best and experienced worked force. The work force in terms of number and capability is an important element in how an arbitration centre is viewed or perceived. Currently the staff in KIAC is not of a satisfactory number and this may affect its ability in its service delivery within the international community and domestically. Both government and donor's organization's support is needed to help the Centre achieve its mission.

### **B. Review and update of the current legislation on arbitration**

As said in our previous pages, Rwanda is a UNCITRAL Model Law country. However, the drafting of the 2008 arbitration law has omitted some very important aspects of the Model Law. Hence, there is a need to improve the current legislation to make it more competitive and make the Rwanda jurisdiction a more arbitration friendly jurisdiction than it currently is. Despite this great achievement in establishing the 2008 arbitration law, it is worthy to note that the latter has some imperfections and inconsistencies to address in order to reflect current best practice. In a recent concept paper on the legal framework for Arbitration in Rwanda, KIAC identified some issues which need to be reviewed and addressed in updated arbitration and other related legislation. Those include notably the need to designate the High Court and the Commercial High Court as the competent courts to intervene in arbitral proceedings, the unclear wording about the rights of appeal against awards that should be clarified and restricted, the review and update of the law to include arbitration in civil as well as commercial matters.

The supportive role of the national courts in arbitration matters should be seen in such a way that it makes the country an arbitration friendly location.

The approach of the Rwandan judiciary to international arbitration can make or break the centre to a certain extent. If the country can have laws that allow for specialized judges who specifically deal with arbitration matters in an international level would be a step on the right direction.

Currently in Rwanda there is no Foreign Arbitration Award Act or an International Arbitration Act which are likely to be found in jurisdictions that have fully embraced the international arbitration as a way of resolving commercial disputes.

### **C. Increasing the qualification and competence of KIAC neutrals**

As said, KIAC has been able to recruit a very big number of its panel of domestic arbitrators. However, there is still a need to enhance their capacity and increase the competence of the neutrals listed on the said panel. In fact, one of the advantages of having qualified people with experience and from within the EAC is that it can help in reducing the expenses and cost of the arbitral process. A target aimed at raising the profile and number of current domestic arbitrators from Associate level to the next levels of membership and fellows of CIArb will reduce the capacity gap so as to build more confidence on its selection of arbitrators.

### **D. Training capability of the Centre**

The Centre regularly organizes symposiums, workshops and training activities. The most recent was the workshop on international arbitration (investment arbitration) in partnership with Rwanda Development Board, Rwanda Bar Association and Shearman and sterling LLP law firm from Paris, France. KIAC knows how important this type of workshop is valuable to its staff and members of its panel but it on its own does lack the needed capability to be a training centre due to such issues as staffing and financing of such projects. One of its current project is to become a Chartered Institute of Arbitration Branch.

### **E. Intensive awareness and Marketing campaigns**

One of the major challenges is making the Centre well known and recognized internationally. This can be achieved by first winning the confidence of the international business community and likeminded institutions. Going by the global competitiveness report Rwanda is ranked 17<sup>th</sup> when it comes to strong public and private institutions.<sup>50</sup> This is a clear sign that the institutions within Rwanda are strong and doing well and all that the KIAC needs to do is to fight the perception and negativity that surround African institutions.

### **F. Strategy to attract the Adhoc arbitration cases**

Arbitration can take two forms either ad hoc or institutional arbitration. This is largely decided by the parties and based on the form of advice they have received from their legal representatives. An institutional arbitration is one in which a specialized institution intervenes and takes on the role of administering the arbitration process. Each institution has its own set of rules which provide a framework for the arbitration, and its own form of administration to assist in the process<sup>51</sup>.

Ad hoc arbitration is one which is not administered by an institution such as the KIAC. The parties will therefore have to determine all aspects of the arbitration themselves - for example, the number of arbitrators, appointing those arbitrators, the applicable law and the procedure for conducting the arbitration. Provided the parties approach the arbitration with cooperation, ad hoc proceedings have the potential to be more flexible, faster than institutional proceedings. The absence of administrative fees alone provides an excellent incentive to use the ad hoc procedure.<sup>52</sup> One of the reason for parties

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<sup>50</sup> World economic forum (<http://reports.weforum.org/global-competitiveness-report-2015-2016/>)

<sup>51</sup> <http://www.out-law.com/en/topics/projects--construction/international-arbitration/institutional-vs-ad-hoc-arbitration/>

<sup>52</sup> Idem

opting for ad hoc arbitration is also the perception that institutional arbitration is expensive and it is a perception which KIAC needs to debunk by making known the fees and the benefits that institutional arbitration within KIAC has against the ad hoc process. It is also important to note that lawyers themselves prefer ad hoc arbitration more than institutional arbitration for selfish reasons on being the fact that they can have a high share of the fee paid by the parties. Thus, KIAC needs to adopt a strategy that helps to attract a big number of cases settled now by the adhoc arbitrators. However, a recent study<sup>53</sup> by the Institute for Legal Practice and Development has showed that KIAC arbitration is far cheaper than the adhoc one<sup>54</sup>.

## CONCLUSION

All things considered it is clear from the above shown findings that KIAC as an international arbitration center has played a major role in arbitration matters in Rwanda and within the region since it was established. Despite arbitration being a new concept in many if not all African countries, KIAC has achieved its mission and many of its objectives including being the choice for commercial dispute resolution, providing trainings and workshops for different judicial personnel, reducing the backlog of cases in commercial courts and the centre has been seen as the next logical step, by both the Government and private initiative, for Rwanda to continue to improve its reputation to attract business and investment.

Furthermore, arbitration has provided a significant contribution to facilitating foreign investment and trade through provision of adequate and timely solutions to disputes. On the other hand, Arbitration has proven to immensely contribute to the overall task of providing Justice to all thus reducing backlogs that have been a challenge in the service delivery of courts. This ultimately encourages investment which in the long run foster economic growth and strengthen the rule of law.

Given the various achievements of the centre (KIAC), there are also some other things that need to be adopted by the center in order to continue in providing world class arbitration services. From this one can humbly recommend the development of supplementary rules especially regarding the enforcement of foreign arbitral awards in a specific and detailed way and also adopt a law on international arbitration act underlying those international arbitration principles. Another thing concerns the marketing strategy, here one can say that KIAC has tried all its best to brand itself within the country but the centre needs to extend its marketing strategies first within the region and then to the rest of the world. In addition to this, the centre may look forward to publishing books and articles in different legal journals.

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<sup>53</sup> ILPD, Study to establish the cost of settlement and resolution of a commercial dispute, Final Report, January 2016.

<sup>54</sup> KIAC arbitration costs less than 4 % of the value of the dispute whereby adhoc arbitrators reach up to 27%.



## Panel 2:

# Attitude of African Governments towards Arbitration

**Brief:** Panellists will share their views of the attitude on their home states/governments towards supporting arbitration.

**Chair:** Judge Edward Torgbor, Kenya/Ghana

Ms Maryan Hassan, Somalia

Dr Tunde Ajibade, Nigeria

Dr Nagla Nassar, Egypt

Ms Bintou Boli Djibo, Burkina Faso

Mr Ousmanou Sadjo, Congo

Prof David Butler, South Africa

Mr Bakri Mohamed Abakar Mohammed, Sudan



**Panel 2**

## Panel 2: Chair



### Judge Edward Torgbor

Hon. Justice Edward Torgbor, CA, FCIArb, LLD, is currently a Specialist International and Chartered Arbitrator and Mediator based in Nairobi (Kenya), Fellow of the Chartered Institute of Arbitrators (England) and Vice-President of the LCIA African Users' Council. Judge Torgbor's experience includes being formerly a Barrister in England, Judge of the High Court of Kenya, Professor of Law (Stellenbosch University) and Court Member of the LCIA. He is an Advocate of the Supreme Court of Zambia, Attorney at Law, Ghana, CIarb Lecturer and Tutor in arbitration law and practice. He has published for professional journals in Africa and United Kingdom (the LCIA and Chartered Institute of Arbitrators). He continues to play varied roles as Keynote Speaker, Chairman, Presenter and Resource Person at numerous arbitration conferences, seminars and workshops in various countries in Africa and Europe. Specializations include: Domestic & International arbitration/ADR practice; International Trade & Investment Law; Corporate and Commercial Law; Energy and Natural Resources, Banking, and Designing regulatory frameworks for Public Sector reform, and governance facilitation. He was lead Counsel for the Eastern and Central African Trade Development Bank (PTA Bank) and Legal Consultant for UNEP and UN-Habitat. He drafted a Framework Environmental Law for the Kingdom of Cambodia and compiled a Compendium of Judicial Decisions on Environmental Law under UNEP Consultancy, and wrote a Guidebook on "The Right to Adequate Housing" for UN-Habitat. He is a law graduate from the Universities of Edinburgh, Cambridge and Stellenbosch, with many years' experience in the legal, judicial and academic fields, and in dispute resolution.

## Panel 2: Speakers

### Dr Tunde Ajibade



Dr. Babatunde Ajibade, SAN is the Managing Partner of S. P. A. Ajibade & Co. Since his admission to the Nigerian Bar in 1989, Dr. Ajibade has been engaged in active and full-time corporate and commercial practice, save for time taken out to pursue his postgraduate education. His area of academic specialization is in the field of Private International Law, with particular interest in the law relating to the recognition and enforcement of foreign judgments. Dr. Ajibade has been involved in all aspects of corporate and commercial dispute resolution in Nigeria, and has expertise in litigation involving the recognition and enforcement of foreign judgments, banking law, intra-company shareholder disputes, as well as insolvency and insurance litigation. Dr. Ajibade was elevated to the rank of Senior Advocate of Nigeria in December, 2007. He is a Fellow of the Institute of Advanced Legal Studies in London, an International Practice Fellow of the International Bar Association and a Fellow of the Chartered Institute of Arbitrators, United Kingdom.

### Dr Nagla Nassar



Head Dr. Nagla Nassar is Senior Partner at NassarLaw which was established in 1885. Before joining NassarLaw she was Senior partner at a leading Egyptian Law firm which she joined upon her return from the World Bank where she was with the ICSID Secretariat. She graduated from Cairo University and Trinity College where she got her M. Litt and has an LL.M from Harvard University as well as a PhD from Geneva University and the Diploma of The Hague Academy in Private International Law. She has several publications relating to arbitral practice.

## Panel 2: Speakers



### Ms Bintou Boli Djibo

Business/company, former legal advisor lawyer member Constitutional Chamber of the Supreme Court, arbitration and mediation trainer commercial, arbitrator and mediator development Expert for arbitration and Mediation Center, President of the Association of Centres of arbitration and Africans of Mediation (ACAM), Expert about UNDP and ITC/Geneva, an officer of the order National Knight of the National order



### Mr Ousmanou Sadjo

Founder of COJA, President of CADEV Africa; Manager of the Permanent Center of arbitration and mediation of the CADEV (CPAM) at CADEV CADEV University of Rennes I, Faculty of legal and Political Sciences

### Ms Maryan Hassan



Maryan Hassan is a Somali British Lawyer who currently works as a Legal Adviser to the Federal Government of Somalia (Office of the Prime Minister). She is a member of the New York convention task force for Somalia alongside Gary Born, Baiju Vasari and Ilham Kabbouri. She is a panel member of the ICSID panels of arbitrators and conciliators, nominated by Somalia. Making her the youngest arbitrator at the institution at the time of her appointment. Maryan is a postgraduate of SOAS, University of London where she focused on investment and commercial arbitration, international trade and post conflict development - of which her research on Somalia was selected for presentation at the Institute for Global and Policy (IGLP) at Harvard Law School. She is the first Somali recipient of the prestigious JAMS International Weinstein Fellowship in ADR and will be based at ICSID and Harvard Law School this year.

## Panel 2: Speakers



### Professor David Butler

David Butler is Emeritus Professor in Mercantile Law at Stellenbosch University, South Africa, where he has taught International Commercial Arbitration for many years. He was the author of the SA Law Reform Commission's report *Arbitration: An International Arbitration Act for South Africa* in 1998. He remains closely involved in the project to have the UNCITRAL Model Law adopted by South Africa for international arbitration, which is likely to happen shortly. His particular research interest is on the development of arbitration law and practice in African jurisdictions and he has regularly participated at arbitration conferences in several African countries since 1994. (100 words)



### Mr Bakri Mohamed Abakar

Bakri Mohammed Abakar, an arbitrator expert he is the founder and general manager of the Al-Aayan Center for arbitration and dispute Settlements, he holds a Higher Diploma in Philosophy from the University of Al-Neelin, he holds a Master degree of Law from the University of Al\_Neelin, a former mayor and former member of the Sudanese parliament, he is the founder of the Forum for arbitration and the legal culture in the University of Al-Neelin, he participated in several conferences related to arbitration within and outside the Sudan, he participated in the Sudanese peace negotiations in Kenya, a professor of law at the Open University of the Sudan.

## The attitude of the South African government to arbitration\*

David Butler\*\*

### Introduction

The stated focus of the Conference is on the role of African governments (executive and legislative branches) in creating efficient legal and regulatory environments for arbitration. The Conference Discussion Paper rightly identifies the importance of “clearly [defining] this role especially with the private nature of the arbitration process”.

The emphasis in this contribution is on private arbitration and ADR, rather than on state-provided dispute resolution processes, although some reference will be made to these as they can clearly impact on the need for and the utilisation of private arbitration in the fields in which these processes are available.

In 1994 South Africa became a constitutional democracy under the rule of law. Section 34 of our Constitution deals with the right of access to justice. The relationship between private arbitration and section 34 was considered by the Constitutional Court in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews* in 2009.<sup>55</sup> The court stated that the twin hallmarks of private arbitration are firstly that it is based on the parties’ consent and secondly that it is private, i.e. a non-state process (para 198). The court held that section 34 does not apply directly to private arbitration (para 218). Section 34 however does impose a positive obligation on the state to provide courts and other appropriate forums for the resolution of disputes (para 200). Private arbitrators are required by the common law to proceed fairly and what is “fair” will be influenced by modern constitutional values (para 221). The grounds on which the court may set aside an arbitral award under section 33 of the Arbitration Act must be construed fairly strictly. The goals of private arbitration will be undermined if the courts enlarge their powers of scrutiny imprudently (para 235). Giving effect to these principles, South African courts have made a major contribution since 1998 to develop the common law on arbitration and to interpret the existing arbitration statute in ways which bring our arbitration law more in line with international standards, even without legislative amendments. (This will be the subject of a chapter in the forthcoming book resulting from the 2<sup>nd</sup> SOAS Conference on the attitude of national courts in Africa to arbitration.)

My contribution to the discussion today turns on the role of the South African government in creating an efficient legal and regulatory environment for arbitration. This will be determined in part by the SA government’s attitude to arbitration. The focus is mainly on the executive branch of government, as the legislative branch can only consider the measures relevant to arbitration which the executive branch decides to introduce in parliament in the form of Bills for enactment.

It is also necessary to understand that there are probably divergent views on private arbitration within the South African executive. This is partly explained by the fact that South Africa, by most standards,

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<sup>55</sup> [2009] ZACC 6; 2009 4 SA 529 (CC).

has a very large cabinet. There is a Minister of Economic Affairs, a Minister of Finance and a Minister for Trade and Industry. My contribution is focused on the Ministry of Justice and Constitutional Affairs and the Ministry of Trade and Industry. However, the Chief Procurement Officer in the National Treasury is responsible for coordinating state supply chain management.<sup>56</sup> Private arbitration can potentially be used and has been used for disputes relating to state procurement contracts. For this purpose one must note section 217(1) of the Constitution, which provides:

“When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”

It should be noted that “contracts” is used as a verb. It is arguable that the system, which has transparency among its key requirements continues for the duration of the contract, and that the subsequent cancellation of the contract could, at least in certain circumstances, amount to administrative action.<sup>57</sup> I will revert to this point below, both in the context of the confidentiality of arbitration proceedings and in the context of arbitrability.

This paper will first deal with the much-delayed introduction of the UNCITRAL Model Law in South Africa for international arbitration and then consider the provisions of the International Arbitration Bill of 2017 regarding the New York Convention. The government’s apparent rejection of arbitration for investment disputes with foreign investors will then be explained. The paper then refers to certain entities, both private and provided by the state, particularly ombudsmen, which offer affordable dispute resolution in certain fields to individuals, as an attractive alternative to private arbitration. The use of private arbitration by public bodies in practice is then considered. This is followed by a brief discussion on the government’s attitude to certain aspects of arbitrability, with particular reference to the non-arbitrability of the validity of administrative action, in the context of disputes pertaining to state procurement, together with a concluding comment.

### 1)The much delayed introduction of the UNCITRAL Model Law for International Arbitration

Regarding the role of the South African government in support of arbitration, the executive was initially strongly supportive of private arbitration between 1996 and 1998. This resulted in the SALRC report: *Arbitration: An International Arbitration Act for South Africa* in July 1998. The Draft Bill accompanying the report was approved by cabinet. The 1999 election brought a cabinet reshuffle and a change of political leadership at the Department of Justice. The International Arbitration Bill lacked a political champion until this role was assumed by the current Deputy Minister of Justice in the latter part of 2015. By that time the Bill had been updated, partly to take account of UNCITRAL’s own amendments to the Model Law in 2006. A revised International Arbitration Bill was approved by Cabinet on 1 March 2017 and the Bill has subsequently been published by the Department of Justice with a view to its introduction in parliament. The comments in this section are restricted to the provisions in the Bill regarding the adoption of the Model Law. (Other aspects of the Bill will be dealt with in the appropriate section below.) Certain small amendments have been made to the Bill during

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<sup>56</sup> See e.g. the Preferential Procurement Policy Framework Act, 5 of 2000 and the latest Preferential Procurement Regulations of 2017 in GG 40553 of 20 January 2017. The regulations commence on 1 April 2017 (see reg 17).

<sup>57</sup> See *Logbro Properties CC v Bedderson NO* [2002] ZASCA 135, but compare *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* [2010] ZASCA 94.

the updating process since 2012 to avoid sources of potential controversy during the legislative process. This has resulted in certain “nice to have” clauses from earlier drafts being omitted.<sup>58</sup>

The drafters wished to use the Bill as a vehicle to promote South Africa as a seat for international arbitration in Africa. For this reason, modifications or additions to the UNCITRAL text were restricted to those deemed reasonably necessary for the Model Law to be successfully implemented in South Africa.

The most user-friendly way of adopting the Model Law from the perspective of foreign users is through incorporation by reference. Hence s 6 states that the Model Law is to apply in the Republic subject to the provisions of this Act. “Model Law” is defined as the text adopted by UNCITRAL in 2006, as adapted in Schedule 1 to the Bill. This approach, as opposed to redrafting the UNCITRAL Model Law in the text of the Bill, was strongly recommended by the SALRC in 1998 and has been retained.

The Bill binds “public bodies”, as defined,<sup>59</sup> but subject to s 13 (the dispute resolution provision) of the Protection of Investment Act of 2015. (The significance of s 13 is explained below.) The Model Law’s definition of “international” in article 1(3) has, however, been adopted without alteration. Thus, will the International Arbitration Bill or the 1965 Act apply to an arbitration between an SA registered SPV and a public body arising out of a large infrastructure project, for example the construction of Gautrain? This could well depend on the wording of the arbitration clause and how our courts apply article 1(3)(c) of the Model Law.

Other interesting features:

- The omission of articles 17 B and 17 C regarding the possibility of the tribunal granting preliminary orders on an *ex parte* basis;
- The retention of the SALRC’s carefully nuanced provision on court ordered interim measures, which specifies the powers of the court and when the court may be approached instead of the arbitral tribunal, in preference to the UNCITRAL text of article 17 J;
- The revision of the definition of arbitrability from the 1965 Act – “status” has been replaced as an excluded category by matters which the parties are not entitled to dispose of by agreement (s 7(1)). Restrictions on arbitration in other legislation could be a more important obstacle to private arbitration. This is discussed below.

There is also an interesting addition on confidentiality in s 11, which distinguishes between an arbitration involving a public body and one between two commercial parties. In the latter case the arbitration may be held in private and in that event, the award and other documents created for the arbitration must be kept confidential, unless disclosure is required by reason of a legal duty or to protect or enforce a legal right (s 11(2)).

S 11(1) requires arbitration proceedings to which a public body is a party to be held in public, unless for compelling reasons, the arbitral tribunal directs otherwise. This provision is arguably influenced by s 217(1) of the Constitution, discussed above, which provides that where a public body contracts for goods or services, it must do so in accordance with a transparent system. This transparent system

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<sup>58</sup> For example, the default appointing authority for the appointment of the arbitral tribunal in article 11 of the Model Law, where the parties have failed to designate their own appointing authority, is now the court. (Compare article 6(2) in sch 1 of the SALRC’s Draft Bill in its 1998 report.)

<sup>59</sup> The term “public body” includes a functionary or institution exercising a public power or performing a public function in terms of any legislation. Most, if not all, “state-owned companies” as defined in the Companies Act, 71 of 2008 would be included as well as “organs of state” as defined in the Preferential Procurement Policy Framework Act 5 of 2000.

arguably applies to the contract for its duration. However, s 11(1) can be justified more simply: public bodies cannot escape the publicity associated with court proceedings by resorting to private arbitration.<sup>60</sup>

How will “compelling circumstances” be interpreted? The arbitral tribunal could possibly take into account when a public court is likely to order certain information to be kept confidential, for example the identity of a witness.<sup>61</sup> For example, in an arbitration between a public body and a foreign aircraft supplier, a senior state official, who is not a party to the arbitration, is accused of receiving a commission to facilitate the contract through a front company. Alternatively, the tribunal could be influenced by the ICC Rules article 22.3, whereby the arbitral tribunal can take measures for protecting “trade secrets and confidential information”.

To the extent that the arbitral tribunal rules that compelling circumstances require that an arbitration involving a public body should be held in private, the confidentiality exception in s 11(2) will apply. (“Where the arbitration is held in private . . .”)

## 2) Support for the New York Convention

Arguably the most important advantage offered by arbitration for resolving trans-border commercial disputes, compared to litigation in a national court, is the availability of the New York Convention of 1958. One way in which African governments can therefore show their support for arbitration is by acceding to the New York Convention. States in Southern Africa which have yet to accede to the Convention are now reduced to three (Malawi, Namibia and Swaziland), from five, two years ago. South Africa acceded to the New York Convention in 1976, but the legislation in 1977<sup>62</sup> to give effect to this accession was seriously defective.

There are at least four important criticisms: the legislation omitted article II on the enforcement of arbitration agreements, leaving the court’s discretion under the Arbitration Act of 1965 not to enforce valid arbitration agreements still applicable; the 1977 legislation fails to deal with recognition of awards as opposed to their enforcement; the legislation creates the impression that the court has a discretion as to whether or not to enforce a foreign award, as opposed to an obligation; and finally it is not clear that the stated grounds on which enforcement may be refused are exhaustive. In addition, the Protection of Businesses Act of 1978 requires the consent of the Minister of Trade and Industry for the enforcement of certain foreign awards, a restriction which clearly conflicts with South Africa’s obligations under the Convention.<sup>63</sup>

All these problems are satisfactorily addressed in the International Arbitration Bill of 2017, chapter 3 of which will replace the defective 1977 legislation. Some of the defects in the 1977 legislation were

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<sup>60</sup> S 11(1) is also justified by s 195 of the Constitution, which sets out the basic values and principles applying to public administration, including the need to foster transparency, “by providing the public with timely, accessible and accurate information”. S 195(3) of the Constitution requires national legislation to promote the values listed in s 195(1).

<sup>61</sup> However, the procedure for obtaining privacy and confidentiality could well differ. The court could order the media not to publish or disclose the name of a certain witness. However, the arbitral tribunal’s powers only extend to persons who are parties to the arbitration. Therefore the only way of obtaining privacy and confidentiality is to hold the arbitration, or the relevant part of it, *in camera*.

<sup>62</sup> The Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977.

<sup>63</sup> See the SALRC’s Report of July 1998, paras 3.14-3.15 and 3.89.

possibly politically motivated. By approving the 2017 Bill, the executive demonstrates its support for proper compliance with South Africa's obligations under the NYC.<sup>64</sup>

### 3)Apparent rejection of investment arbitration:

There has been a clear shift in the South African government's attitude to investment arbitration in the last two decades. Post 1994, the government entered into a number of BITs. These BITs, in their dispute resolution clauses, provided for investor-state investment disputes to be resolved by arbitration. Some of these clauses provided for ICSID arbitration, among other alternatives. This created the perception that South Africa intended to accede to the Washington Convention of 1965. The SALRC in its 1998 report recommended that South Africa should join ICSID, also with a view to providing protection to South African companies who were making trans-border investments in Africa.

In June 2009, the DTI published a position paper, the *Bilateral Investment Treaty Policy Framework Review*, which highlighted the one-sided nature of the protection provided to foreign investors by first-generation BITs and exhibited suspicion regarding investment arbitration. The direct cause of the review was arguably a response to the *Foresti* arbitration under the Republic's BIT with Italy in 2007.<sup>65</sup> Subsequently, in the face of foreign criticism, the government cancelled most of the existing BITs.<sup>66</sup> In 2015 the Protection of Investment Act 22 of 2015 was enacted but the Act has still to come into operation. Some of the concerns which led to this Act appear from the preamble, e g the need to secure "a balance of rights and obligations of investors to increase investment in the Republic" and "the government's right to regulate in the public interest in accordance with the law." The most important provision for present purposes is section 13, the dispute resolution clause. Investment disputes should in the first instance, be referred to mediation and a foreign investor is not precluded from approaching any competent court in the Republic (s 13(4)). In short, foreign investors under the Act are restricted to the state courts, unless the dispute can be resolved by mediation.

The only mention of arbitration is in s 13(5):

"(5) The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. ... Such arbitration will be conducted between the Republic and the home state of the applicable investor."

The only arbitration envisaged by the Act in the context of investor disputes is state to state arbitration, which would require the consent of both state parties. The government clearly objects to the notion of being compelled to arbitrate non-contractual disputes with foreign investors in a private arbitration. However, where a foreign investor contracts with a (South African) public body, the

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<sup>64</sup> Pending the enactment of the International Arbitration Bill, SA courts should be mindful of s 233 of the constitution when interpreting and applying the 1977 legislation. S 233 requires the court to prefer any reasonable interpretation of the relevant legislation "that is consistent with international law over any alternative interpretation that is inconsistent with international law".

<sup>65</sup> *Piero Foresti, Laura De Carli and others v Republic of South Africa* Case no ARB(AF)/07/1. The award of 4 August 2010, in which the tribunal only had to decide the issues of discontinuance and costs, is available on ICSID's website, [www.worldbank.org/icsid](http://www.worldbank.org/icsid).

<sup>66</sup> The German ambassador was particularly vocal in criticising the decision and in warning about its negative effects on foreign investment. Subsequently, German support for arbitration provisions in BITs lessened substantially when the Swedish firm Vattenfall used the ISDS clause in a treaty to refer a claim for € 3.7 billion in compensation to arbitration, arising from Germany's decision to close all nuclear power stations in Germany.

dispute resolution clause in the contract is a matter for negotiation and arbitration is by no means excluded.

South Africa's neighbour, Namibia, recently enacted the Namibia Investment Promotion Act 9 of 2016 to replace the Foreign Investment Act of 1990. Whereas s 13 of the previous statute gave foreign investors a right to international arbitration, s 28 of the new Act allows the investor to request mediation, while retaining the jurisdiction of the Namibian Courts. The responsible minister may however agree in writing that a dispute be referred to arbitration in Namibia under the Arbitration Act of 1965. Although ISDS may still take place by arbitration where both parties agree, the juridical seat of that arbitration must be Namibia.

As far as the foreign investments of South African companies are concerned, the government cannot provide blanket protection for investments in specified host states by unilateral action. An inherent weakness with the protection offered by arbitration clauses in BITs in an African context is that it takes two to tango. Several important economic powers in Africa have shown little enthusiasm for BITs.

The reason for government and informed public disillusionment with investment arbitration, both in South Africa and elsewhere, has been well expressed by *The Economist*:

"If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as 'investor-state dispute settlement', or ISDS."<sup>67</sup>

#### 4)Promotion of state-provided forums for affordable dispute resolution

Improved legislation for domestic arbitration is from a practical perspective less urgent and from a political perspective more controversial than the International Arbitration Bill of 2017. The SALRC's Draft Bill to replace the Arbitration Act of 1965 for domestic arbitration was updated in 2013. It may well be that the Department will await the outcome of the intended resumption of the investigation by the SALRC into possible legislation on ADR and mediation, before proceeding with new legislation for domestic arbitration.

It may be controversial to say so at an arbitration conference aimed at promoting arbitration in Africa, but domestic arbitration, at least in South Africa, is not generally seen as a way of promoting access to justice for the overwhelming majority of the community. ADR and mediation may legitimately be seen as promoting access to justice for those who could not afford to consider litigating in state courts. However, there is no doubt that arbitration in the context of complex construction disputes regarding large infrastructure projects, for example the Gautrain project, effectively reduces the burden on the courts.<sup>68</sup>

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<sup>67</sup> See *The Economist* 11 October 2014 "The Arbitration Game", available at <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration> (accessed 30 March 2017).

<sup>68</sup> See PM Nienaber "Toegepaste kontraktereg – oor arbitrasies en dies meer" (2016) 27 *Stell LR* 393 394.

The South African government has increasingly sought to make use of Ombudsmen as a way of providing affordable dispute resolution for the financially weaker party.<sup>69</sup> Moreover, the Long-term Insurance Ombudsman provides an excellent example of a successful private scheme, brought into being and financed by the long-term insurance industry.<sup>70</sup> The FAIS Ombud (the Ombud for Financial Services Providers) was established in terms of section 20 of the Financial Advisory and Intermediary Services Act, 37 of 2002 (the “FAIS Act”). The main objective of the FAIS Ombud is to investigate and resolve complaints in terms of the FAIS Act and the Rules promulgated under it. A further function of the FAIS Ombud is to resolve complaints in terms of the Financial Services Ombud Schemes Act, 37 of 2004 (the “FSOS Act”), which are not covered by any of the other voluntary ombud schemes, for example the Long-Term Insurance Ombudsman, referred to above. The FAIS Ombud received 4263 claims falling within its jurisdiction during the 2015/2016 financial year, many of which related to negligent advice by intermediaries on the investment of retirement savings.<sup>71</sup>

A tax ombudsman has also recently been introduced.<sup>72</sup> Until recently, disputes in the context of sectional title schemes (condominium) were required, in terms of the standard rules for such schemes, to be referred to private arbitration. This method was used for approximately two decades and was unfortunately not a success. It would appear that the two main failings were the over-involvement of lawyers and the excessive expense and duration of the process. This method has been replaced by a state-provided dispute resolution scheme, provided by the Community Schemes Ombud Service Act 9 of 201, which commenced on 7 October 2016. It is funded in part by a levy on all owners of units or interests in the schemes that are subject to the Act. In spite of the success of other ombudsman schemes in South Africa, there is not much optimism that this particular scheme will be successful.

Although the Companies Act 71 of 2008 introduced the Companies Tribunal for resolving intra-corporate disputes through mediation or arbitration before a state-provided tribunal, s 166(1)(c) leaves the door open for private mediation and arbitration and it is likely that this will be the preferred route. The (South African) Institute of Directors has recommended that, in compliance with the King Code on Corporate Governance, South African companies should include a multi-tiered dispute resolution clause in their contracts, providing first for direct negotiations,<sup>73</sup> then mediation and finally arbitration.

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<sup>69</sup> See generally N Melville “Has Ombudsmania reached South Africa? The Burgeoning role of ombudsmen in commercial dispute resolution” (2010) 22 SA Merc LJ 50-65. Melville is a former Ombudsman for Banking Services.

<sup>70</sup> See the Annual Report 2015 of the Ombudsman for Long-Term Insurance. The report stresses that the Ombudsman provides a free service and the report contains interesting information on the number of complaints received and how long it takes to deal with them. Complainants succeed in approximately 29% of the complaints.

<sup>71</sup> See the FAIS Ombud Annual Report 2015/2016.

<sup>72</sup> See Tax Ombud Annual Report 2014/15.

<sup>73</sup> Under South African law, a clause providing for disputes to be settled by negotiation is enforceable as long as there is a deadlock-breaking mechanism. See *Makate v Vodacom Ltd* 2016 4 SA 121 (CC), [2016] ZACC 13 paras 96-102.

## 5) Use of arbitration by public bodies

Case law is indicative of the continued use of arbitration in South Africa for contractual disputes involving public bodies in the period since 2005. At least six cases,<sup>74</sup> some quite influential, spring to mind. Arbitration has also been used to resolve disputes arising from major infrastructure projects. The Gautrain project resulted in at least eleven arbitrations, all relating to main contracts.<sup>75</sup> A new harbour near Port Elizabeth also resulted in a major arbitration.

Legislation directed at public procurement does not contain express provisions on dispute resolution.<sup>76</sup> Contracts for the procurement of goods and services do on occasion contain arbitration clauses, although the current General Conditions of Contract available from the website of the Chief Procurement Officer at the National Treasury include a dispute resolution clause which provides for mediation followed by litigation in the state courts.<sup>77</sup>

The Preferential Procurement Regulations of 2017 include the possibility of an organ of state cancelling a procurement contract because of misrepresentations made by a tenderer submitting an offer, regarding matters dealt with in the regulations. Assuming that the contract contains an arbitration clause wide enough to cover the dispute, is there any reason why the arbitration clause should not be enforced? South African law recognises both the doctrine of the severability of the arbitration clause and *kompetenz kompetenz*, particularly when the parties have chosen arbitration rules containing appropriate provisions in this regard.<sup>78</sup> On the one hand it can be argued that the dispute relates to a commercial contract. (It must be conceded that the dispute concerns the formation of the contract. In the case of a dispute regarding the performance of the contract, it is easier to argue that the dispute is a purely commercial matter.) On the other hand, it is arguable that a dispute regarding the formation of a contract for public procurement, or even its cancellation for that matter, could easily give rise to questions regarding the validity of administrative action. As discussed below, this is not a matter which is necessarily appropriate for resolution by private arbitration.<sup>79</sup>

As regards disputes relating to a tendering process, which does not result in the aggrieved party's offer being accepted, it is clear from *Telkom v Mzanzi* that the arbitration clause in the stipulated conditions or terms of contract has no application, as there is not yet a contract.<sup>80</sup>

The South African courts in the constitutional era have shown a greater willingness to uphold arbitration agreements and awards and are aware that if courts are too inclined to intervene unnecessarily, this will undermine the goals of private arbitration. According to section 195(1) of the

<sup>74</sup> *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA), which concerned an international arbitration; SA [2006] 139 (SCA); *North West Provincial Government v Tswaing Consulting CC* 2007 4 SA 452 (SCA); *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews* [2009] ZACC 6; 2009 4 SA 529 (CC); *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd* 2011 4 SA 642 (GSJ); *Telkom v Mzanzi & others* (383/12) [2013] ZASCA 14; and *State Information Technology Agency Soc Ltd v ELCB Information Services (Pty) Ltd* 2016 JDR 0723 (GP).

<sup>75</sup> See PM Nienaber "Toegepaste kontraktereg – oor arbitrasies en dies meer" (2016) 27 *Stell LR* 393 394.

<sup>76</sup> The Preferential Procurement Policy Framework Act, 5 of 2000 and the 2011 and 2017 Preferential Procurement Regulations. Reg 14 of the latter regulations provides remedies for an organ of state in the case of misrepresentations by the tenderer, including the cancellation of the contract and the inclusion of the tenderer on a list maintained by the national Treasury of entities precluded from submitting tenders.

<sup>77</sup> The dispute resolution clause is clause 27 of the GCC (2010), which is also used e.g. by the Department of Water and Sanitation.

<sup>78</sup> *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd* [2013] ZASCA 83, 2013 6 SA 345 (SCA); *Zhongji Construction v Kamoto Copper Company* [2014] ZASCA 160, 2015 1 SA 345 (SCA).

<sup>79</sup> See para 6 below.

<sup>80</sup> [2013] ZASCA 14. The *ACSA v ISO Leisure* case referred to in para 6 below is distinguishable on its facts.

Constitution, the basic values underpinning public administration include “effective, economic and efficient use of resources” and a high standard of professional ethics. If these values are taken seriously by public bodies, arbitration can certainly provide a more appropriate forum for resolving commercial disputes involving a public body than the state courts. There has nevertheless been a tendency on the part of some organs of state to use the courts as a delaying tactic.<sup>81</sup>

## 6) Restrictions on arbitrability

As stated above, s 7(1) of the International Arbitration Bill treats all matters, which parties are entitled to dispose of by agreement, as arbitrable, unless arbitration is excluded by the provisions of another law or where the arbitration agreement is contrary to public policy.

Examples of restrictions on arbitration in other legislation are provided by the Patents Act 57 of 1978 s 18, the Competition Act 89 of 1998 s 65 and the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill, 2016 s 27, each of which appears to give exclusive jurisdiction to the state tribunal created in terms of the legislation, to the exclusion of private arbitration. Two of the three statutes or bills referred to impose restrictions on arbitrability in the context of intellectual property.

One of the long-standing restrictions on arbitrability in South African law is that relating to matrimonial causes: s 2(a) of the Arbitration Act 42 of 1965 prohibits arbitration regarding “any matrimonial cause or any matter incidental to any such cause”. One result of this provision is that disputes arising out of a settlement agreement as part of a divorce order, cannot subsequently be referred to arbitration. Family lawyers have for decades argued that this restriction is too wide. A recent response to this problem by the executive was to refer the matter to the SALRC as part of a broader inquiry. In December 2015 the Commission produced Issue Paper 31 entitled “Family Dispute Resolution: Care of and Contact with Children.”

One chapter of the paper is devoted to dispute resolution processes. It is submitted that private arbitration is not suitable for disputes relating to children, particularly in view of the relatively narrow grounds on which an arbitral award can be taken on review to the court under s 33 of the Arbitration Act. Matrimonial property disputes could arguably be dealt with by arbitration, but again, not where the disputes involve the interests of children. Legislative efforts to provide better protection to children (e.g. the Children’s Act 38 of 2005) have in effect broadened the issues regarding children which should not be subject to arbitration. In this context, the reference to “matrimonial causes” in s 2 is clearly too narrow, as it implies that the parents of the child in question were at one time married.

Meanwhile a multi-disciplinary “industry” is developing, whereby “facilitators”, often with the input of the parties’ lawyers, compile and administer “parenting plans”. The parents agree to comply with directives of the facilitator, until a court of competent jurisdiction rules otherwise. Post-divorce parenting plans will typically involve interpreting and applying the settlement agreement incorporated in the divorce order, but in practice, the directive could easily involve what is, objectively, a variation of the court order. Although the directive is only binding until a court decides otherwise and therefore lacks the finality of an arbitral award, the post-divorce parenting plan has become a way of bypassing the prohibition in the Arbitration Act. The Commission’s investigation is on-going, and family lawyers,

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<sup>81</sup> The saga culminating in *Black Sash Trust v Minister of Social Development and Others* [2017] ZACC 8, which is further discussed below, provides a recent unfortunate example.

who have had mixed experiences with the state-provided family courts, continue to agitate for the amendment of s 2. The form which this amendment should take remains controversial.

Perhaps the most interesting question regarding arbitrability is in relation to the validity of administrative action. In *Airports Company SA v ISO Leisure OR Tambo (Pty) Ltd*,<sup>82</sup> an unusual factual situation occurred where any tenderer submitting a tender in response to a request for proposals issued by ACSA agreed to be bound by the contractual terms in the Request for Proposals, which included an arbitration clause. ACSA rejected the tender of ISO Leisure and granted the contract to another bidder. ISO Leisure disputed the rejection of its tender and ACSA wanted this dispute to be referred to arbitration in terms of the arbitration clause. The arbitrator queried whether disputes regarding the validity of administrative action are arbitrable, as the court is given exclusive jurisdiction to determine this question by legislation to give effect to s 33 (the administrative justice provision) of the Constitution. The court agreed with the arbitrator that the issue was not arbitrable and was reserved for the High Court, despite the existence of an arbitration agreement.

Normally, when a proposed construction project is subject to tender, a contract only comes into existence between the employer and a contractor, when the employer accepts the bid of a specific contractor. The employer would not usually wish to go to arbitration with contractors whose bids have been rejected. However, there is also a practical difficulty. An arbitral tribunal's powers only extend to persons who are parties to the reference to arbitration. The problem is illustrated by one of South Africa's most notorious procurement disputes regarding the granting of a contract by the South African Social Security Agency ("SASSA") to Cash Paymaster Services (Pty) Ltd ("CPS") on 3 February 2012 for the monthly payment of social grants on behalf of the state to approximately 17 million beneficiaries. The validity of the tender process was challenged by another company, All Pay. The Constitutional Court declared that the tendering process was fatally flawed with the result that the contract between SASSA and CPS was unconstitutional.<sup>83</sup> The court subsequently suspended the declaration of invalidity until 31 March 2017, to give SASSA the opportunity of either awarding a new contract following a proper tender process or to take over the making of payments itself, when the "contract" expired.<sup>84</sup> SASSA failed to do either, resulting in a further application to the Constitutional Court to ask the Court to sort out the mess. The second application involved the applicant, an intervening party, seven respondents and two friends of court. Even fervent advocates of arbitration would hopefully agree that the procedural quagmire arising from this disaster is best left to the court. Unlike an arbitrator, the court has the power to ensure that all interested parties are joined and is not dependent on the consent of the parties concerned. The Constitutional Court in its judgment ordered the relevant minister to be joined in her personal capacity, for the purpose of showing why she should not be held personally liable for the costs.<sup>85</sup>

#### Concluding comment

The South African government may be generally supportive of commercial arbitration, particularly in the international sphere, and in disputes not involving public bodies. An international arbitration with its seat in South Africa and involving a public body should take place in public. The government seems to be becoming more cautious in promoting private commercial arbitration in

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<sup>82</sup> 2011 4 SA 642 (W).

<sup>83</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42; 2014 1 SA 604 (CC).

<sup>84</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 4 SA 179 (CC).

<sup>85</sup> See *Black Sash Trust v Minister of Social Development and Others* [2017] ZACC 8 para 3-15 and para 13 of the order.

domestic disputes to which a public body is a party. It would be easy enough for the public body to stipulate in the arbitration clause that the arbitration should take place in public. Where the hearing of an arbitration commences in public, it is easier than in the case of mediation to ensure that the outcome of the process is also made public in the interests of transparency.<sup>86</sup> The government is possibly also concerned about the limited grounds for having an adverse arbitral award set aside by the court.<sup>87</sup> The government is entirely opposed to private arbitration with foreign investors relating to non-contractual disputes.

It is surely up to supporters of arbitration to demonstrate that private arbitration will generally result in commercial disputes involving a public body being resolved by way of a good quality award on the merits in less time and with less costs than by using the state courts. If that can be adequately demonstrated, the state and public bodies would not be justified in routinely excluding arbitration in favour of litigation.

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<sup>86</sup> A possible danger to transparency lies in a dispute resolution clause providing first for mediation and then arbitration, if mediation is unsuccessful. I concede that the mediation proceedings can hardly be conducted in public. However, there is the need to guard against a settlement agreement between a public body and a commercial company, which results from the mediation, being made subject to a blanket confidentiality provision. It is submitted that such a blanket confidentiality provision would undermine constitutional values and be in breach of public policy.

<sup>87</sup> The state and public bodies could not reasonably be motivated by a general fear of bias on the part of arbitral tribunals. The state and public bodies are the losing parties in litigation with sufficient regularity for some frustrated politicians to infer that some judges at least are biased.



# Panel 3:

## Roundtable with UNCITRAL

**Brief:** This roundtable will examine arbitration related UNCITRAL texts and their adoption by African states

**Moderator:** Dr Emilia Onyema, SOAS University of London

Dr Gaston Kenfack Douajni, APAA

Mr Timothy Lemay, UNCITRAL

Dr Mohamed Abdel Raouf, Egypt

Mrs Doyin Rhodes-Vivour, Nigeria

Dr Kennedy Gastorn, AALCO

Mr Jonathan Ripley-Evans, South Africa



**Panel 3**

## African States and UNCITRAL Arbitration-related Texts

Dr Emilia Onyema (SOAS University of London).

Data available on the UNCITRAL website shows that as it relates to arbitration, UNCITRAL has the following texts:

Model Law on International Commercial Arbitration 1985 with amendments adopted in 2006. The arbitration legislations in **103 jurisdictions in 73 States** are based on the Model Law. **25** of these are based on the 2006 revision. The arbitration laws of **10** Africa states are based on the Model Law and of these 10 only the laws in Mauritius and Rwanda are based on the 2006 revision. The remaining 8 states are: Egypt; Kenya; Madagascar; Nigeria; Tunisia; Uganda; Zambia; and Zimbabwe.

UNCITRAL Arbitration Rules, 1976 revised in 2010 and 2013 (adopted a new article 1 paragraph 4). These Rules have been adopted by various arbitration institutions as the basis of their arbitration rules. The UNCITRAL website provides some examples of such institutions from various states including Egypt (Cairo RC); Mauritius (LCIA-MIAC); Nigeria (Lagos RC); South Africa (AFSA). This list is obviously incomplete. For example the rules of KIAC (Kigali); LCA (Lagos); LACIAC (Lagos); NCIA (Kenya) to name a few are all based on the UNCITRAL Rules.

Model Law on International Commercial Conciliation, 2002. Though the UNCITRAL website does not list any African State as member to this Model Law, some African states have included provisions on conciliation in their national arbitration laws. An example is Nigeria with her Arbitration and Conciliation Act.

UNCITRAL Conciliation Rules 1980. This text influenced the provisions on conciliation of some African states as mentioned above.

UN Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention on Transparency) adopted on 10 December 2014 (not yet in force). This convention has been ratified by Canada (12/12/2016) and Netherlands (05/06/2015) and signed by 17 States of which **four** are African States (Congo, Gabon, Madagascar, and Mauritius). The Convention requires three ratifications to enter into force.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (New York Convention) 1958. This Convention has **156 parties** with Angola set to become the 157<sup>th</sup> party this year. **35 African States** are currently parties to this Convention. If you check the appendix to our Conference *Discussion Paper*, you can easily find out the status of your country. So the question is why have the remaining 19 African States not ratified the New York Convention? What can we do to persuade these countries to consider ratifying the Convention?

The key questions our panel will examine are:

- Why do such few African countries adopt UNCITRAL Texts (in comparison to the ICSID Convention for example)?
- How can UNCITRAL better engage with arbitration practitioners in Africa?
- Is it desirable for African countries to engage with UNCITRAL and adopt their texts?

## Panel 3: Moderator



### Dr Emilia Onyema

Dr Emilia Onyema is a senior lecturer in International Commercial Law at SOAS, University of London. She is a Fellow of the Chartered Institute of Arbitrators; qualified to practice law in Nigeria; a non-practising Solicitor in England; alternative tribunal secretary of the Commonwealth Secretariat Arbitral Tribunal (London); and is listed on various arbitrator-selection panels. She is a member of the court of the Lagos Chamber of Commerce International Arbitration Centre (LACIAC), and member of the Advisory Committee of the Cairo Regional Centre for International Commercial Arbitration (CRCICA). Her latest book published by Kluwer is an edited collection on, "The Transformation of Arbitration in Africa: the Role of Arbitral Institutions" (2016).

## Panel 3: Speakers



### Mr Timothy Lemay

Timothy Lemay is Principal Legal Officer and Head of the Legislative Branch of the International Trade Law Division / Office of Legal Affairs, the Secretariat of UNCITRAL (the United Nations Commission on International Trade Law) based in Vienna. He has also served as Secretary of UNCITRAL's Working Group III (Online Dispute Resolution). Before joining UNCITRAL in July 2009, he served as Chief of the Governance, Human Security and Rule of Law Section of UNODC (the United Nations Office on Drugs and Crime), prior to which he was Chief of UNODC's Global Programme against Money Laundering. Tim joined the UN in 1995 following a career as a lawyer in Canada in private practice, with the Attorney General of Nova Scotia and latterly with Canada's Department of Justice in Toronto. He is a graduate of Dalhousie Law School and a member of the International Bar Association as well as several bar associations in Canada.



### Dr Mohamed Abdel Raouf

Dr Mohammed Abdel Raouf is an Attorney at law, ABDEL RAOUF LAW FIRM, Cairo-Egypt and an Associate Professor at Université Paris 1 Panthéon-Sorbonne. He specializes in international commercial arbitration and ADR as well as in commercial contracts, investment agreements, construction, real estate and sports-related disputes. His arbitration experience as counsel and arbitrator covers a wide range of arbitration Rules including those of CRCICA, UNCITRAL, ICC, AAA, ICSID, PCA, DIAC, CAS, GCC, ADCCAC and the BCDR. He is a member of the Governing Board and former Vice President of the International Council for Commercial Arbitration (ICCA), a member of the Board of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), a member of the Advisory Committee of CRCICA, a CEDR Accredited Mediator, and an Arbitrator listed in the Panel of Arbitrators of the Court of Arbitration for Sport (CAS).

## Panel 3: Speakers

### Mrs Doyin Rhodes-Vivour



Adedoyin Rhodes-Vivour was educated at the University of Lagos (LLB Hons), University of Lagos (LLM) and King's College London, University of London (MA, International Peace and Security) with merit. She has an international practice diploma in arbitration and is a fellow of the Chartered Institute of Arbitrators and chartered arbitrator; a mediator accredited by the CEDR (UK); a member of the Court of the Permanent Court of Arbitration (PCA), The Hague, the Netherlands; a member of the board, Lagos Court of Arbitration and a member of the ICC Commission on Arbitration. She has very significant experience in oil and gas, maritime, power, construction, banking/finance and corporate/commercial disputes. She is the chairperson of the Chartered Institute of Arbitrators (Nigeria branch) and pioneer president of the Maritime Arbitrators Association of Nigeria. She is a member of the International Law Association (ILA) international committee on international commercial arbitration, and the pioneer chair of the committee on international commercial arbitration of the ILA's Nigerian branch. She has written various articles on arbitration and ADR. She acts as resource person at domestic and international conferences and seminars and is an approved tutor of the Chartered Institute of Arbitrators (UK).

### Dr Kennedy Gastorn



Prof. Kennedy Gastorn, of United Republic of Tanzania, is the sixth Secretary-General of the Asian-African Legal Consultative Organization (AALCO). He took office on 15th August, 2016. He was elected for a four-year term at the Fifty-Fifth Annual Session held in New Delhi (HQ), India. Prior to his current appointment, Prof. Gastorn was the Director of International Affairs of the University of Dar es Salaam, Tanzania and the immediate past Head of the Department of Public Law, University of Dar es Salaam School of Law. He was also a member of the National Environmental Advisory Committee in the Vice President's Office United Republic of Tanzania. Prof. Gastorn is an accomplished legal scholar and author and has co-edited and published numerous research papers and books on international legal issues ad regional integration in particular. His writings include: Books titled "The impact of Tanzanian's new land laws of the customary land rights of pastoralists: A case study of the Simanjiro and Bariadi Districts" (2008); "Processes of Legal Integration in the East African Community" (2011), and "Constitutional Reform Processes and Integration of East Africa" (2013). He has received several academic awards including the Fulbright African Research Scholar in 2014 at the Buffalo Law School, State University of New York.

## Panel 3: Speakers



### Mr Jonathan Ripley-Evans

Jonathan is a Director in the Dispute Resolution Department of Cliffe Dekker Hofmeyr. Jonathan enrolled as a candidate attorney at Cliffe Dekker Hofmeyr in 2009 and was promoted to associate in 2011. In 2013, Jonathan was promoted to senior associate and in 2016 became a director. Jonathan obtained his BCom (Law) degree from the Rand Afrikaans University, his LLB degree from the University of Johannesburg, his LLM degree from the University of Saarland (Germany) and an advanced certificate in ADR through the University of Pretoria in collaboration with the Arbitration Foundation of South Africa (AFSA). Jonathan is a member of the Chartered Institute of Arbitrators and is an AFSA accredited mediator and arbitrator. Jonathan also sits on the Africa Committee of the China Africa Joint Arbitration Centre (CAJAC). Jonathan has contributed to numerous publications, including the International Arbitration Review, 7<sup>th</sup> Edition, Thompson Reuters Practical Law and the International Comparative Legal Guide series, 2017.



### Dr Gaston Kenfack Douajni

Gaston Kenfack Douajni is a Cameroonian Magistrate; currently the Director of Legislation at the Ministry of Justice in Cameroon, he has obtained a Doctorate of International Economic Law at the University of Paris I (Pantheon Sorbonne) in 2005, a Certificate on trade, negotiations and settlement of trade disputes at the Kennedy School of Government –Harvard University (USA) in 2004 and an Habilitation to Direct Researches at the University of Pau in France. Since 2008, he is Professor of business and arbitration law at the International Relations Institute of Cameroon (IRIC)-University of Yaoundé II, Guest Professor at the Institute of International Studies-University of Paris II and at the University of Paris-Sud. Former member of the ICC Court of Arbitration and Corresponding member of the Paris Institute of International Arbitration in the OHADA space, he has delivered numerous opinions on contracts, business, investment, banking, mediation and arbitration law. He is the Editor of the “Revue Camerounaise de l’Arbitrage”, the President of the Association for the Promotion of Arbitration in Africa (APAA) and, since July 2016, the current President of the United Nations Commission on international Trade Law (UNCITRAL).

## Panel 4: Legal Environment for Investment Arbitration

**Brief:** This panel will critique the ease of doing business in Africa; the environment for investment; and the engagement of African states in investment arbitration.

**Chair:** Ms Rose Rameau, University of Ghana (Fulbright Scholar)

Mr Tsegaye Laurendeau, Shearman & Sterling LLP

Ms Rukia Baruti, Africa International Legal Awareness (AILA) | University of Geneva

Dr Chrispas Nyombi, University of Bedfordshire

Mr Ike Ehiribe, Seven Stones Chambers, London

Prof Dr Walid Ben Hamida, University of Evry, Paris

Dr Jimmy Kodo, OHADA Region

Mr Jimmy Muyanja, Uganda



**Panel 4**

## Panel 4: Chair



### Ms Rose Rameau

Rose Rameau was a Fulbright Scholar at the University Of Ghana School Of Law from 2014-2016 where she taught Investment and International Commercial Arbitration, General Principles of Arbitration as well as contemporary Issues in Arbitration. Rose Rameau is an active member of the ABA International Law Section. She is Vice-Chair of the Africa Committee and the International Energy and Natural Resources Committee of the ABA International Law Section. Ms. Rameau represents Host States and investors in investment disputes and is also ready for appointment as arbitrator. Her most recent case involves an oil and gas dispute between the Federation of Nigeria and an American company and its shareholders before the International Center for Investment Disputes (ICSID) in Washington DC. Her Recent article entitled "Ghana's Future in the Offshore Oil Business" is published in the Fall 2015 Issue of the ABA International Law News Journal. A Member of the Chartered Institute of Arbitrators in the UK, she is fluent in English, French, and Spanish. Ms. Rameau is admitted to practice law in France, Florida, District of Columbia, and New Jersey.

## Panel 4: Speakers



### Mr Tsegaye Laurendeau

Tsegaye Laurendeau is a Senior Associate in Shearman & Sterling's International Arbitration Practice Group. He has represented companies and States in arbitrations brought under the ICC, LCIA, CRCICA, UNCITRAL and ICSID Arbitration Rules, with particular focus on commercial and investment arbitrations involving financial, valuation and accounting issues. Prior to joining Shearman & Sterling, Tsegaye practiced as an associate in the Project Finance group of a Magic Circle firm, acting for financial institutions and project developers in relation to the financing and development of large energy and infrastructure projects in Sub-Saharan and Northern Africa. Tsegaye is an active member of a number of organizations which focus on the development of international arbitration in Africa, including in his native Ethiopia. In particular, he currently serves as the LCIA-YIAG Regional Co-Representative for Africa.



### Dr Chrispas Nyombi

Chrispas Nyombi is a Senior Lecturer in Law at the University of Bedfordshire, joining in October 2014. He is currently the LLM Course Coordinator and Module leader for the following modules on the LLM International Business Law, and LLM International Commercial and Dispute Resolution Law courses. Chrispas has an abiding interest in various aspects of International Commercial Law and has presented his work nationally and internationally. Externally, Chrispas provides expert advice to the Uganda Law Reform Commission on Corporate and Commercial law matters. He is also part of the Task Force set up by the Djibouti Chamber of Commerce and Intergovernmental Authority on Development (IGAD) to design, create and develop an international arbitration centre in Djibouti. It is hoped that the centre will foster relationships in the Horn of Africa and lead to greater cooperation and prosperity in the region.

## Panel 4: Speakers



### Ms Rukia Baruti

Rukia Baruti is a qualified solicitor in England & Wales. She is founder and Managing Director at Africa International Legal Awareness (AILA), a not-for-profit organisation working to build legal professional competence and encourage recognition of existing international legal expertise of African lawyers. Prior to founding AILA, Rukia practised law at SJ Berwin's International Arbitration Group in London. She also held the position of Vice-President of the London Court of International Arbitration Africa Users' Council. She benefits from experience in the roles of counsel, arbitrator and tribunal secretary in arbitrations. She is currently completing a PhD on investment laws in Africa.



### Mr Ike Ehiribe

Ike Ehiribe is a barrister, chartered arbitrator and accredited mediator at 7 Stones Commercial & IP Chambers in London. He is an experienced international dispute resolution practitioner having been appointed arbitrator, mediator, expert determiner and administrative tribunal panelist by a number of international arbitral institutions. He is listed on a number of international arbitral panels including the Panel of Neutrals of the United Nations backed World Intellectual Property Organisation (WIPO) based in Geneva and the Energy Panel of the International Centre for Dispute Resolution (ICDR) in the US etc. He is a member of the ICC (UK) Branch, the ICC Institute of World Business Law in Paris, ICCA in The Hague and the Arbitration committee of the IBA. He is also a member of the LCIA and is a Councillor of the African User's Council of the LCIA. He is a visiting professor at the Center for International Legal Studies, Salzburg, a visiting lecturer and senior teaching fellow in international trade law modules at the School of Oriental & African Studies at the University of London. He is also an approved tutor, trainer and assessor of international and domestic arbitration, and mediation for the Chartered Institute of Arbitrators in London.

## Panel 4: Speakers



### Dr Jimmy Kodo

Mahutodji Jimmy Vital Kodo was the Technical advisor to the President of the Common Court of Justice and Arbitration of the organization for Harmonization of Business Law in Africa (OHADA), in Abidjan, Côte d'Ivoire. Before joining the Court, he has practiced law in Paris and Nanterre (France) and served as Adjunct Professor at the University of Paris-Est Creteil, France. He holds law degrees respectively from University of Abomey-Calavi, Benin (Master's Degree), University of Lille 2, France (LL.M), and University of Paris-Est Creteil (LL.D). In 2008, Mr Kodo co-authored the Annotated OHADA Code, published by the Institut International de Droit d'Expression et d'Inspirations Françaises (IDEF). He also published the first comprehensive case law study of the application of OHADA law since the establishment of that legislation (*L'Application des Actes Uniformes de l'OHADA*, Publications de l'Institut Universitaire André Ryckmans 5 (Louvain-la-Neuve: Academia-Bruylant, 2010)).



### Professor Dr Walid Ben Hamida

Dr. Walid Ben Hamida is a Professor of Law at the University of Paris-Saclay University (Evry-Val d'Essonne), France. He is a member of the International Chamber of Commerce (ICC) Arbitration Court. He served as arbitrator, expert and counsel in many cases under ICSID, ICC and ad hoc rules. His practice focuses on Arab laws, Islamic law, Investment Law, International law, Investor-State Dispute Settlement and Arbitration. Dr. BEN HAMIDA authored more than 70 publications in the Arabic, French and English languages. He cooperates with many international organisations on issues of ADR, International Trade, Investment and Arab legal systems (World Bank, ESCWA, UNCTAD). He is a regular speaker at conferences on arbitration and dispute settlement, and visiting professor in more than 40 countries.

## Panel 4: Speakers



**Mr Jimmy Muyanja**

Mr. Jimmy Muyanja, LLM (Commercial Law), is the Executive Director, Center for Arbitration and Dispute Resolution (CARDER), Uganda. He is a Board Member of Nairobi Centre for International Arbitration, and a registered Arbitrator and Mediator, Centre for Arbitration and Dispute Resolution, Kampala, Uganda. He has authored several papers on Arbitration in Uganda. He developed reporting scheme for Uganda Arbitration cases on the UNCITRAL Case Law on Uncitral Text; developed jurisprudence on compulsory appointment of Arbitrators; and also developed and oversaw implementation of case division scheme for court-connected mediation at the Commercial Court of Uganda. He is a Member, NCIA legislation Committee and has arbitrated and mediated cases within Uganda.



## Investment Laws in West Africa

Rose Rameau

There are about 18 countries in Western Africa, with 15 being members of the Economic Community of West African States (ECOWAS) (Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast, Liberia, Mali, Mauritania, Niger, Nigeria, Saint Helena, Senegal, Sierra Leone, Sao Tome and Principle and Togo). Each of these countries have signed the 1965 Washington Convention<sup>88</sup> and have participated in the massive signing of Bilateral Investment Treaties boom in the 1990's and still counting.

ECOWAS is designed to have all the member states operate under one economic block similar to the European Community's ability (EU) to enter into treaties that bind all EU member states. Currently, the world has witnessed that even the EU is facing challenges entering into free trade agreements such as the CETA<sup>89</sup> and the TTIP<sup>90</sup> that would bind the member states. Because many West African states base their laws on the Western concept of international law, they are facing a bigger problem in their implementation of investment laws. International investment agreements

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<sup>88</sup> Convention on the Settlement of the Investment Disputes Between States and Nationals of Other States.

<sup>89</sup> Daniel L. Kiselbach, The Canada – EU Free Trade Agreement Demystified: New Opportunities for Trade, Investment and Government Procurement, Global Trade and Customs Journal “*The Canada-European Union Comprehensive Economic and Trade Agreement (CETA)* ‘agreement in principle’ was signed on 18 October 2013 by Prime Minister Harper and European President Jose Manuel Barroso. On 29 October 2013, the Prime Minister tabled a report on CETA and hailed it as: ‘the biggest deal ever concluded by Canada’. If it is not the biggest deal, it is certainly a big deal. CETA provides a variety of trade, investment and government procurement opportunities to Canadian and EU businesses which are expected to pay dividends for years to come. CETA will provide Canada with access to the twenty-eight member EU, which has over 500 million consumers, and CDN 17 trillion in annual economic activity. It will remove 98% of EU import tariffs on goods originating from Canada (e.g., aerospace parts, agricultural products, automobiles, beef and bison, chemicals, dairy products, forest products, fruits and vegetables, grains and oils, industrial machinery, iron and steel, IT equipment, medical equipment, metals, minerals, plastic products, and seafood products). CETA could boost Canada’s annual income by CDN 12 billion, create 80,000 jobs, and result in a 20% annual increase in bilateral trade. Once CETA is ratified, Canada will have preferential trade agreements with countries having 53% of global GDP (approximately CDN 36.4 trillion), and a trade advantage over the USA. The EU expects CETA to result in duty savings of approximately CDN 700 million. CETA will remove Canadian import tariffs on goods including automobiles, some cheeses, industrial machinery, seafood products, and wine and spirits. European exporters will save three times as much in annual duty payments as Canadian exporters. Canadian businesses and consumers stand to benefit if retailers and exporters pass on duty savings to them. At present Canada is the EU’s fourth largest source of investment, and the EU’s twelfth largest export market. CETA is not just a free trade agreement. It addresses issues such as services and investment; government procurement; intellectual property; dispute settlement; sustainable development, the environment; immigration and labour. This ambitious agreement will create business opportunities for a large number of sectors including: advanced manufacturing; the automotive industry; chemicals and plastics; agriculture and agri-food; food processing; metals and mineral products; fish and seafood products; information and communications technology; services; investment and government procurement. Within an improved regulatory environment under CETA, Canadian and EU businesses will be able to forge new alliances, and access new markets.”

(IIAs) exist at the bilateral, regional and multilateral levels. An Example of the Regional and multilateral agreements are the North American Free Trade Agreement (NAFTA)<sup>91</sup> between US-Mexico and Canada and the Energy Charter which is a multilateral agreement. At the bilateral level, is situated many BITs that were signed between developed countries and Lesser Economically Developed Countries (LEDCs), in particular west African Countries.

One of the common features of the IIAs is that they all have a dispute resolution section that usually oust the jurisdiction of local courts, by referring any future dispute to an institutional arbitral tribunal such as the ICSID, ICC, LCIA or just an ad hoc arbitral tribunal under the UNCITRAL rules. Many LEDCs have signed IIAs in particular the BITs, because they were made to believe that they would increase foreign direct investment (FDI) in their countries and such treaty would likely contribute to the development of their countries.<sup>92</sup> Now 25 and some years later, West African States that had signed these IIAs find themselves with huge arbitral awards against them for violating these agreements. Cognizant that West African States are not alone in this phenomena, next are the Latin American countries such as Argentina and others. This development has prompted many LEDCs to revise their investment laws and at times to even withdraw from BITs, treaties altogether.<sup>93</sup> In addition it has prompted some states to draft and propose their own BITs, such as Cameroun and South Africa.<sup>94</sup>

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<sup>91</sup> Kiselbach and Katherine Xilinas, Partner, Ernst and Young / Couzin Taylor titled *How Will Globalization Affect Free Trade* which was originally presented at the ABA International Section's Fall Meeting in Montreal on October 22, 2015 "The North American Free Trade Agreement (NAFTA) is a mature agreement, and although controversial, is generally regarded as one of the first and most important FTA's that set a pattern for others."

<sup>92</sup> M. SORNARAJAH, « Power and Justice : Third World Resistance in International Law », *Singapore Year Book of International Law and Contributors*, 2006, pp. 19-57 (spéc., p. 32).

<sup>93</sup> James MOUANGUE KOBILA, Quel cadre juridique optimal pour attirer les investissements privés en Afrique ? Le cas du Cameroun (Unpublished) « L'Afrique du Sud a ainsi dénoncé ses TBI avec la Belgique et le Luxembourg en 2012 ; puis avec l'Allemagne, l'Espagne, les Pays-Bas et la Suisse en 2013 ; mais aussi avec l'Australie, le Danemark et l'Allemagne en 2014. Voir Emmanuel GAILLARD, « L'avenir des traités de protection des investissements », in : Charles LEBEN (dir.), *Droit international des investissements et de l'arbitrage transnational*, Paris, Pedone, 2015, pp. 1027-1045 (spéc., p. 1027) et le *World Investment Report*, 2015, *Reforming international Investment Governance*, p. 110”

<sup>94</sup> Dominique CARREAU et Patrick JUILLARD rapportent qu'« entre 2000 et 2005, six pays africains ont ainsi publié leur propre modèle de convention bilatérale de promotion et de protection des investissements (Bénin, Burkina-Faso, Burundi, Ghana et Ouganda) » (*Droit international économique*, 4<sup>e</sup> éd., Paris, Dalloz, 2010, p. 452).

In looking at investment laws in Western Africa, one can review it at the bilateral level, regional level and international level. A fragmentation of West African laws at each of those levels is very present. Such fragmentation is due to language barriers as West Africa is divided into French Speaking, English and Portuguese. At the bilateral level, there are BITs between African States, however, African states engage in very little trading amongst themselves. At the Regional level, rest ECOWAS and other economic blocks that have been attempting to implement the laws by passing directives and protocols designed to bind Member States for a better sustainable development and enhancement of African International Law. At the International level, there exists the African Union, yet still not powerful enough to hold each Member State accountable for possible violations because of the notion of supranationality in that each state wish to maintain its individual sovereignty.<sup>95</sup>

The ICSID Convention has served as the main source of laws for investor protection at the international level and it is usually stated that African states maintain the effectiveness of the convention because 25 percent of the ICSID involves African States. In fact, the first 25 cases that were registered at ICSID, African states were parties to at least 15 of them.<sup>96</sup> As of 31 December 2016 ICSID has registered a total of 597 cases and about 134 of them involved African States. Below features a list of the ICSID cases as of 31 December 2016.

	Case No	Claimant (s)		Respondent
1	ARB/72/1	Holiday Inn S.A	vs	Morocco
2	ARB/74/1	Adriano Gardella S. p. A	vs	Ivory Coast
3	ARB/76/1	République du Gabon	vs	Société Serete S.A

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<sup>95</sup> Adelardus Lubango Kilangi, Introduction to African Union Law, International Law Seminar for African Universities

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<sup>96</sup> Institut Afrique Monde, Un Demi-Siecle Africain Au CIRDI, Regards Retrospectif et Prospectifs, 27 mars 2017, p. 13

4	ARB/77/1	AGIP S.p.A	vs	Republic of Congo
5	ARB/77/2	S.A.R.L Benvenuti & Bonfant	vs	Republic of Congo
6	ARB/78/1	Guadalupe Gas Product Corp	Vs.	Federal Republic of Nigeria
7	ARB/81/2	Klöckner Industrie-AnlagenGmbH	vs	République-Unie du Cameroun et Société Camerounaise des Engrais
8	CONC/82/1	SEDITEX Engineering Beratungsgesellschaft für die Textilindustriem.b.H	vs	Democratic Republic of Madagascar
9	ARB/82/1	Société Ouest Africaine des Bétons Industriels	vs	Republic of Senegal
10	ARB/83/2	Liberian Eastern Timber Corporation	vs	Republic of Liberia
11	ARB/84/1	Atlantic Triton Company Limited	vs	République Populaire Révolutionnaire du Guinée
12	ARB/84/3	Southern Pacific Properties (Middle East) Limited	vs	Arab Republic of Egypt
13	ARB/84/4	Maritime International Nominees Establishment	vs	Republic of Guinea
14	ARB/86/1	Ghaith R. Pharaon	vs	Republic of Tunisia
15	ARB/87/1	Société d'Etudes de Travaux et de Gestion SETIMEG S.A	vs	Republic of Gabon
16	ARB/89/1	Manufacturers Hanover Trust Company	vs	Arab Republic of Egypt et General Authority for Investment and Free Zones
17	ARB/92/1	Vaccum Salt Products Ltd.	vs	Republic of Ghana
18	ARB/93/1	American Manufacturing & Trading Inc.	vs	Democratic Republic of Congo
19	CONC/94/1	SEDITEX Engineering Beratungsgesellschaft für die Textilindustriem.b.H	vs	Madagascar

20	ARB/95/3	Antoine Goetz at al	vs	Republic of Burundi
21	ARB/97/1	Société d' Investigation de Recherche et d'Exploitation Minière	vs	Burkina Faso
22	ARB/97/2	Société Kufpec (COngo) Limited	vs	Republic of Congo
23	ARB/97/8	Compagnie Française pour le Développement des Fibres Textiles	vs	Côte d'Ivoire
24	ARB/98/3	International Trust Company of Liberia	vs	Liberia
25	ARB/98/4	Wena Hotels Limited	vs	Arab Republic of Egypt
26	ARB/98/7	Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L.	vs	Democratic Republic of Congo
27	ARB/98/8	Tanzania Electric Supply Company Limited	vs	Arab Republic of Egypt
28	ARB/99/5	Alimenta S.A	vs	Gambia
29	ARB/99/6	Middle East Cement Shipping and Handling Co. S.A.		Arab Republic of Egypt
30	ARB/99/7	Patric Mitchell	vs	Democratic Republic of Congo
31	ARB/00/4	Salini Construttori S.p.A. et Italstrade S.p.A	vs	Morocco
32	ARB/00/6	Consortium R.F.C.C	vs	Morocco
33	ARB/00/7	World Duty Free Company Limited		Kenya
34	ARB/00/8	Ridgepointe Overseas Developments, Ltd.	vs	République Démocratique du Congo et Générale des Carrières et des mines
35	ARB/01/2	Antoine Goetz et autres	vs	Burundi
36	ARB/01/5	Société d'Exploitation des Mines d'Or de Sadiola S.A	vs	Republic of Mali
37	ARB/02/4	Lafarge	vs	Republic of Cameroun
38	ARB/02/9	Champion Trading Company & Ameritrade International, Inc.	vs	Arab Republic of Egypt
39	ARB/02/14	CDC Group plc		République de Seychelles
40	ARB/02/15	Ahmonseto, Inc. et autres	vs	Arab Republic of Egypt

41	ARB/03/8	Consortium Groupemewnt L.E.S.I-DIPENTA	vs	République Démocratique Populaire d'Algérie
42	ARB/03/11	Joy Mining Machinery Limited	vs	Arab Republic of Egypt
43	ARB/03/14	Miminco LLC et Autres	vs	Democratic Republic of Congo
44	CONC/03/1	TG World Petroleum Limited	vs	République du Niger
45	ARB/04/5	Compagnie d'Exploitation du Chemin de Fer Transgabonais	vs	Republic of Gabon
46	ARB/04/11	Russell Resources International Limited et autres	vs	Democratic Republic of Congo
47	ARB/04/12	ABCI Investments Limited	vs	Republic of Tunisia
48	ARB/04/13	Jan de Nul N.V. et Dredging International N.V.	vs	Arab Republic of Egypt
49	ARB/05/3	LESI, S.p.A et Astadi, S.p.A	vs	République Démocratique Populaire d'Algérie
50	ARB/05/6	BernadusHenricusFunnekotter et autre	vs	Zimbabwe
51	CONC/05/1	Togo Electricité	vs	Togo
52	ARB/05/15	Waguiah Elie George Siag et ClorindaVecchi	vs	Arab Republic of Egypt
53	ARB/05/19	Helnan International Hotels A/S	vs	Arab Republic of Egypt
54	ARB/05/21	African Holding Company of America, Inc. et Société Africaine de Construction au Congo S.A.R.L		Democratic Republic of Congo
55	ARB/05/22	Biwater Gauff (Tanzania) Limited	vs	Tanzania
56	ARB/06/7	Togo Electricité et GDF-Suez Energie Services		Togo
57	ARB/06/12	Scancem International ANS	vs	Congo
58	ARB(AF)/07/1	Piero Foresti, Laura de Carli et autres		South Africa
59	ARB/07/2	RMS Production Corporation	vs	République Centrafricaine

60	ARB//07/10	M. MeerapfelSöhne AG	vs	République Centrafricaine
61	ARB/07/18	Shell Nigeria Ultra Deep Limited	vs	Federal Republic of Nigeria
62	CONC/07/1	Shareholders of SESAM		République Centrafricaine
63	ARB/07/24	Gustav FWHamester GmbH & Co KG	vs	Republic of Ghana
64	ARB/08/17	Participaciones Invisiones Portuarias SARL	vs	Republic of Gabon
65	ARB/08/18	Malicorp Limited	vs	Arab Republic of Egypt
66	ARB/08/20	Millicom International Operations B.V. et Sentel GSM S.A.	vs	Republic of Senegal
67	ARB/09/14	Mærsk Olie, Algeriet A/S	vs	République Démocratique Populaire d'Algérie
68	ARB/09/15	H&H Enterprises Investments Inc.	vs	Arab Republic of Egypt
69	ARB/09/19	Carnegie Minerals (Gambia) Limited	vs	Republic of Gambia
70	ARB/10/4	Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud	vs	Democratic Republic of Congo
71	ARB/10/10	Olyana Holdings	vs	Rwanda
72	ARB/10/12	Standard Chartered Bank	vs	Tanzania
73	ARB/10/15	Bernhard von Pezol et autres	vs	Zimbabwe
74	ARB/10/20	Standard Chartered Bank (Hong Kong) Limited	vs	Tanzania Electric Supply Company Limited
75	ARB/10/21	International Quantum Resources Limited, Frontier SPRL et Compagnie Minière de Sakania SPRL	vs	Democratic Republic of Congo
76	ARB/10/25	Border Timbers Limited, Timber Products International (Private) Limited, et Hangani Development Co. (Private) Limited	vs	Zimbabwe
77	ARB/11/6	Bawabet Al Kuwait Holding Company	vs	Arab Republic of Egypt
78	ARB/11/7	National Gas S.A.E	vs	Arab Republic of Egypt
79	ARB/11/11	AHS Niger and Menzies Middle East et Africa S.A	vs	Niger
80	ARB/11/14	Diamond Fields Liberia Inc.	vs	Liberia

81	ARB/11/16	Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E., et DmacGamsha Bay for Development S.A.E	vs	Arab Republic of Egypt
82	CONC/11/1	RSM Production Corporation	vs	Cameroun
83	ARB/11/29	Getma International et others	vs	Republic of Guinea
84	ARB/11/32	Indorama International Finance Limited	vs	Arab Republic of Egypt
85	ARB(AF)/1/2/2	Grupo Francisco Hernando Contreras	vs	Equatorial Guinea
86	ARB/12/8	Société Industrielle des Boissons de Guinée	vs	Republic of Guinea
87	CONC(AF)/12/1	Hess Equatorial Guinea Inc et Tullow Equatorial Guinea Limited	vs	Equatorial Guinea
88	ARB/12/11	Ampal-American Israel Corporation at al	vs	Arab Republic of Egypt
89	ARB/12/15	Veola Propreté	vs	Arab Republic of Egypt
90	CONC/12/2	Equatorial Guinea	vs	CMS Energy Corporation and others
91	ARB/12/26	Sudapet Company Limited	vs	South Sudan
92	ARB/12/30	Lundin Tunisia B. V.	vs	Tunisia
93	ARB/12/32	Gelsenwasser AG		République Démocratique Populaire d'Algérie
94	ARB/12/34	Tullow Uganda Operations PTY LTD	vs	Uganda
95	ARB/12/35	Orascom TMT Investments S.ar.l	vs	République Démocratique Populaire d'Algérie
96	ARB/12/36	Société Civile Immobilière de Gaëta	vs	Republic of Guinea
97	ARB/13/3	Ossama Al Sharif	vs	Arab Republic of Egypt
98	ARB/13/4	Ossam Al Sharif	vs	Arab Republic of Egypt

99	ARB/13/5	Ossama Al Sharif	vs	Arab Republic of Egypt
100	ARB/13/7	Joseph Houben	vs	Burundi
101	ARB/13/14	RSM Production Company	vs	Cameroun
102	ARB/13/15	Lundin Tunisia B.V	vs	Tunisia
103	ARB/13/16	Société des Mines de Loulo S.A.	vs	Mali
104	ARB/13/20	Interocean Oil Development Company et Interocean Oil Exploration Company	vs	Nigeria
105	ARB/13/23	ASA International S.p.A	vs	Arab Republic of Egypt
106	ARB/13/25	Tullow Uganda Operations Pty Ltd et Tullow Uganda Limited	vs	Uganda
107	ARB/13/29	Cementos la Union S.A et AridosJavita S.L.U	vs	Arab Republic of Egypt
108	ARB/13/34	Courts (IndianOcean) Limited et Courts Madagascar S.A.R.L	vs	Madagascar
109	ARB/13/37	Utsch M.O.V.E.R.S International GmbH, Erich UtschAktiengesellschaft, et Helmut Jungbluth	vs	Arab Republic of Egypt
110	ARB/14/2	Michael Dagher	vs	Sudan
111	ARB/14/4	Union Fenosa Gas, S.A	vs	Egypt
112	ARB/14/6	African Petroleum Gambia Limited (Block A1)	vs	Gambia
113	ARB/14/7	African Petroleum Gambia Limited (Block A4)	vs	Gambia
114	ARB(AF)/1/4/2	Oded Besserglik	vs	Mozambique
115	ARB/14/19	VICAT	vs	Senegal
116	ARB/14/22	BSG Resources Limited	vs	Guinea
117	ARB/14/23	TamagotBumi S.A. et BumiMauritania S.A	vs	Mauritania

118	ARB/14/31	Tariq Bashir and SA Interpetrol Burundi	vs	Burundi
119	ARB/15/7	WalAmEnergy Inc.	vs	Kenya
120	ARB/15/11	Total E&P Uganda BV	vs	Uganda
121	ARB/15/12	PT Ventures, SGPS, SA		Republique du Capo Verde
122	ARB/15/18	Capital Finance Holdings Luxembourg SA.	vs	Cameroun
123	ARB/15/21	MenzieS Middle East and Africa S.A. Aviation Handling International Ltd.	vs	Senegal
124	ARB/15/29	Cortec Mining Kenya Limited, Cortec (Pty) Limited et Stirling Capital Limited	vs	Kenya
125	ARB(AF)/1/5/1	Strabag SE	vs	Libya
126	ARB/15/41	Standard Chartered Bank (Limited) Hong Kong	vs	Tanzania
127	ARB/15/46	BSG Resources (Guinea) Limited et BSG Resources (Guinea) SARL	vs	Republic of Guinea
128	ARB/15/47	Arcelor Mittal S..A.	vs	Arab Republic of Egypt
129	ARB/16/1	Al Jazeera Media Network	vs	Arab Republic of Egypt
130	ARB/16/2	Champion Holding Company & others	vs	Arab Republic of Egypt
131	ARB/16/11	Société Resort Company Invest Abidjan, Stanislas Citerici et Gérard Bot Beograd	vs	Côte d'Ivoire
132	ARB/16/15	AngloGold Ashanti (Ghana) Limited	vs	Republic of Ghana
133	ARB/16/32	Thomas Gosling and Others	vs	Republic of Mauritius
134	ARB/16/37	LP Egypt Holdings I, LLC, Fund III Egypt, LLC and OMLP Egypt Holding I, LLC	vs	Arab Republic of Egypt



# **State-owned enterprises (SOEs) as tools for African States to engage with and promote the use of arbitration**

**Mr Tsegaye Laurendeau**

## **Introduction**

- Stating the obvious, a fundamental prerequisite for increasing the use of arbitration and international arbitration references in Africa, is continued economic growth.
- A number of sub-Saharan Africa countries performed well on the Ease of Doing Business World Bank rankings, i.e. increasing private sector participation and FDIs.
- However, much of the economic growth in Africa is driven by SOEs.
- This means that in addition to their role as policy makers, African States are also key economic players.
- This gives African States a further fundamental tool to effect change in Africa.
- Will discuss:
  - i. African SOEs as agents for promoting the use of and Africanising arbitration
  - ii. African SOEs : ideally placed to take advantage of Africa's competitive advantage in the area of finance arbitration

### **1. African SOEs as agents for promoting the use of and Africanising arbitration**

- The importance of SOEs in economic growth in Africa is likely to continue growing: former state economies transitioning to market economy, influence of the Chinese model, suspicion about private sector since the 1990's international lenders imposed privatisations and the 2008 financial crisis.
- SOEs have best of both worlds: direct access to the State/executive branch and mighty economic players. E.g. Eskom, one of the biggest SOEs in the world; Ethiopian Electric Power, sits on 45,000 megawatts of just hydropower.
- As a result, SOEs are in a position to discuss as equals, if not dominant party, with foreign companies. Discuss my experience re cement plant project promoters in Ethiopia vis a vis international lenders.
- SOEs will soon be at the heart of mega power and infrastructure projects which will involve African and international parties: e.g. East Africa Power Pool (power interconnection) projects; Northern Corridor Integration Projects.

- SOEs can leverage their strategic position to push for African governing law/arbitration institutions/arbitrator appointing authority.
- 2. African SOEs : ideally placed to take advantage of Africa's competitive advantage in the area of finance arbitration**
- Africa has a competitive advantage in the area of finance arbitration: explain.
  - At the same time, Africa faces a huge financing gap for its infrastructure projects which cannot be filled by the likes of AfDB or IFC.
  - This explains the growth of capital and debt markets in Africa in recent years.
  - This growing financial industry will bring with it complex disputes: e.g. what experts refer to as excessive debt of Africa's subprime State borrowers.
  - The fundamental goal here is to create African expertise and knowledge in this new area – already foreign experts can be heard complaining about the lack of local expertise and suggesting managing this industry from outside of Africa.
  - SOEs are again ideally placed to leverage their strategic position: SOEs act either as borrowers or issuers of debt instruments.
  - As such, they can greatly assist by, in particular: appointing local counsel to negotiate financing instruments; when disputes arise, appointing African arbitrators and counsel who can develop expertise in this area.

END



## **Shaping Investment Arbitration: The Experience of COMESA and SADC**

*Rukia Baruti\**

### **Abstract**

*This paper discusses the role played by African States in shaping the development of international investment arbitration. In particular, it looks at how Member States of the COMESA and SADC have responded to the issues raised in the arbitral practice of investment treaties.*

### **1. Introduction**

The development of international investment arbitration beyond its contractual basis is a relatively recent phenomenon. Not too long ago, it was inconceivable – unless consent to arbitrate had been given in a concession contract – for private investors to initiate direct arbitration against host States. But neither Contracting Party to the first bilateral investment treaty ('BIT') nor signatory of the 1965 Convention on the International Centre for Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention')<sup>97</sup> would have foreseen that they had unwittingly participated in a chain of events that would ultimately limit host States' sovereign powers and open other bases up for direct arbitration by private investors.

Now, the right to initiate arbitration against a host State is not only contained in contracts but also in host State laws, bilateral, regional and multilateral investment instruments. And ever since, investment arbitration has developed considerably, in large part due to a proliferation of BITs and their interpretation and application by arbitral tribunals. While these developments have seen African States involved in more than a third of the total number of investment arbitrations at ICSID, their role in the development of international investment arbitration has thus far been almost exclusively limited to signing BITs and defending enforcement of BITs against them.

This paper reviews the development of international investment arbitration and the changing role of the African States in it. In particular, the States belonging to the Common Market for Southern and

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<sup>97</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

Eastern Africa ('COMESA')<sup>98</sup> and the Southern African Development Community ('SADC').<sup>99</sup> In doing so, it traces the emergence of investment arbitration, its development by the practice of arbitral tribunals and the experience of COMESA and SADC Members with investment arbitration. It then considers how COMESA and SADC Members have responded to the issues raised in the arbitral practice of BITs. It concludes by suggesting that their response hints at an evolving shift in roles from mere observers to a more hands-on role in the development of investment arbitration by the African States.

## 2. The Emergence of Investor-State Arbitration

Investment arbitration was born out of the need to address the deficiencies of diplomatic protection as a means of resolving investor-State disputes. In the 1930s, host States had concluded some concession contracts in the mining and oil sectors with private investors. These concession contracts included investor-State arbitration clauses to protect private investors from unilateral changes by the host State.<sup>100</sup> However, as evidenced by the great oil nationalisation arbitrations of the 1970s, there were significant problems with these types of arbitrations due to the abuse of sovereign powers by host States within a contractual framework.<sup>101</sup>

Furthermore, while the inclusion of these clauses addressed the problems encountered with diplomatic protection, investor-State arbitrations were not possible without a concession contract between the private investor and the host State and only a minority of private investors ever had a concession contract.<sup>102</sup> Accordingly, in the absence of a concession contract providing for investor-State arbitration, diplomatic protection remained the only option for resolving disputes between host States and private investors.<sup>103</sup>

Subsequently, BITs appeared to offer another solution to the investor-State dispute settlement problem. This solution was in most of the older BITs from the 1960s concluded by the European States

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<sup>98</sup> Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

<sup>99</sup> Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

<sup>100</sup> Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as A Complex Adaptive System, How It Emerged And How It Can Be Reformed* (Rochester, NY: Social Science Research Network, 24 January 2014), p. 392 <<https://papers.ssrn.com/abstract=2271869>> accessed 27 February 2017.

<sup>101</sup> Campbell McLachlan, 'Investment Treaty Arbitration: The Legal Framework in Albert Jan van Den', in *50 Years of the New York Convention: ICCA International Arbitration Conference*, ed. by Albert Jan van den Berg, ICCA Congress Series (Kluwer Law International; Kluwer Law International, 2009), XIV, 95–145 (p. 98).

<sup>102</sup> McLachlan, XIV, p. 98.

<sup>103</sup> Pauwelyn, p. 392.

mostly with developing States, which contained an umbrella clause. The umbrella clause – also known as the “observance of undertakings” clause – required either party to “observe any other obligations” it may have entered into with regard to investments by nationals or companies of the other Party. This clause arguably obliged host States under the BIT to comply with investment contracts concluded with private investors, effectively elevating a contract claim to a treaty claim. However, the precise scope of an umbrella clause has been the subject of controversy and inconsistent decisions by arbitral tribunals.<sup>104</sup>

Conversely, the genius of the 1965 World Bank ICSID Convention was in embodying an investor-State dispute settlement system in an instrument that bound the Contracting States thus ensuring that any agreements on dispute resolution voluntarily entered into would be honoured. The ICSID Convention authorised both conciliation and arbitration as a means of resolving investor-State disputes. Not only did the ICSID Convention create a self-contained system that kept out the national courts, on arbitration, but it also adopted the model of commercial-style arbitration before specialised international tribunals. These tribunals would issue final and binding awards recognised and enforceable in any ICSID Contracting State as if it were a final judgment of a court in that State.<sup>105</sup> Accordingly, the ICSID Convention obligated States to comply with ICSID awards as an international law obligation.<sup>106</sup> Furthermore, in creating ICSID as a neutral forum for the direct determination of investor-State disputes, it depoliticized the process by obviating the need to involve the investor’s home State.

However, mere ratification of the ICSID Convention does not confer jurisdiction on ICSID or its arbitral tribunals – a Contracting State has to have given consent. As the Report of the Executive Directors on the ICSID Convention states, among other things, consent to jurisdiction needs to be in writing and once given it cannot be withdrawn unilaterally.<sup>107</sup> Nevertheless, paragraph 24 of the Report provides that it does not require the consent of both parties to be expressed in a single instrument. On this, it states that “a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of ICSID, and the investor might give his

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<sup>104</sup> See *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, paras 166-67; *Société Générale de Surveillance S.A. v. Republic of the Philippines*, (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, paras 115, 119.

<sup>105</sup> ICSID Convention, art. 54.1.

<sup>106</sup> McLachlan, XIV, p. 96.

<sup>107</sup> ICSID Convention, art. 25(1).

consent by accepting the offer in writing.” Thus, in a first of its kind, the 1984 *SPP v Egypt* case<sup>108</sup> saw a claimant successfully initiate arbitration at ICSID by accepting a host State’s unilateral offer to arbitrate contained in a 1988 Egyptian investment law to which Egypt had adhered by Law No. 90 of 1971 acceding to the ICSID Convention.

Then in 1987 in the *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*<sup>109</sup> case the claimant, a Hong Kong company, invoked Article 8(1) on ‘Reference to International Centre for Settlement of Investment Disputes’ of the 1980 UK-Sri Lanka BIT to initiate ICSID arbitration. Sri Lanka did not challenge ICSID’s jurisdiction and this case became the first that ICSID registered based solely on a BIT provision.

Following the *AAPL v Sri Lanka* case the majority of BITs started explicitly including provisions on investor-State dispute settlement ('ISDS') with arbitration under ICSID. At around the same time, the shortage of capital<sup>110</sup> and the need to attract it had intensified and spurred conclusion of BITs, which had become the preferred method of investment protection following the failure to conclude a multilateral agreement on investment.<sup>111</sup> Like most developing countries, African countries viewed inward foreign direct investment ('FDI') as an integral part of their development strategy. As such, the notion that to attract FDI, States have to demonstrate their ability to protect such investment, has, over the decades, been ingrained in the economic mindsets of African States. Consequently, at the height of their pursuit of such investment COMESA and SADC Members concluded many BITs. These BITs were negotiated on the basis of a pre-existing model agreement drafted by the developed State.

The proliferation of BITs was accompanied by the conclusion of Regional Free Trade Agreements like the 1993 North Atlantic Free Trade Agreement ('NAFTA') and multilateral treaties such as the 1994 Energy Charter Treaty ('ECT') both of which included arbitration provisions affording private investors the ability to invoke treaty violations directly. Simultaneously, ICSID membership grew and became the leading forum for the resolution of investor-State disputes with the number of claims filed annually

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<sup>108</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Decision on Jurisdiction 14 April 1988.

<sup>109</sup> *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/87/3)

<sup>110</sup> Ibrahim F.I. Shihata (1991), ‘Promotion of Foreign Direct Investment - A General Account, with Particular Reference to the Role of the World Bank Group’, *ICSID Review*, 6.2 (1991), 484–509 (p. 488).

<sup>111</sup> This included the unsuccessful efforts to establish a multilateral framework for investment including the 1948 Havana Charter, which contemplated codifying investment protection through the establishment of an international trade organization; the 1959 Abs-Shawcross Draft Convention on Investment Abroad which was to provide the basis for a multinational agreement on investment protection for the Organisation for Economic Co-operation and Development (*OECD*); and the *OECD*’s attempt to negotiate a multilateral agreement on investment in the 1990s.

having increased dramatically from barely having any in the 1970s to registering 597 cases by the end of 2016.<sup>112</sup>

### 3. Development of Investment Arbitration

As cases at ICSID increased, so did the development of investment arbitration. While investment treaties provide the framework of investment arbitrations, the treaties need to be interpreted then applied. But there may be situations faced by an arbitral tribunal that neither the investment treaty concerned nor the applicable law and arbitration rules addresses. In such cases, there is a general understanding that arbitral tribunals have inherent powers or the discretion to fill the jurisdictional lacuna to enable them to exercise their powers in controlling the arbitration process.

As a result, investment arbitration tribunals have played a significant role in interpreting and applying investment treaties thus developing investment arbitration. In this regard, arbitral tribunals have, through their practice of treaty interpretation and application, developed – albeit inconsistently – certain areas of investment arbitration in ways that treaty parties had not anticipated. Such areas have included: (i) expanding grounds for founding jurisdiction by, for example, expansive interpretation of the definition of ‘investment’ and ‘investor’ or through the application of the most-favoured-nation (‘MFN’) clause;<sup>113</sup> (ii) extending the interpretation of the fair and equitable treatment standard (‘FET’);<sup>114</sup> (iii) establishing the basis for third party participation;<sup>115</sup> (iv) delineating the scope of interim measures;<sup>116</sup> and (v) deciding on the standard for non-expropriation breaches,<sup>117</sup> scope and

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<sup>112</sup> ICSID Caseload Statistics (Issue 2017-1) <[https://icsid.worldbank.org/en/Documents/resources/ICSID\\_percent20Web\\_percent20Stats\\_percent202017-1\\_percent20\(English\)\\_percent20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID_percent20Web_percent20Stats_percent202017-1_percent20(English)_percent20Final.pdf)> accessed 27 February 2017.

<sup>113</sup> William Rand, Robert N. Hornick, and Paul Friedland, ‘ICSID’s Emerging Jurisprudence: The Scope of ICSIDs Jurisdiction’, *New York University Journal of International Law and Politics*, 19 (1986), 33; Chen Huiping, ‘Expansion of Jurisdiction by ICSID Tribunals: Approaches, Reasons and Damages’, *Journal of World Investment & Trade*, 12 (2011), 671–88.

<sup>114</sup> *S.D. Myers v. Government of Canada* (NAFTA) (UNCITRAL), Partial Award, (12/11/00), 40 I.L.M. 1408, 2001, para 264; *Pope and Talbot v. Government of Canada*, (NAFTA) (UNCITRAL), Award on the Merits (April 10, 2001), 7 ICSID Reports 102, paras 105-118.

<sup>115</sup> *Methanex Corp. v. United States of America*, (NAFTA) Decision of the Tribunal on Petitions from Third Persons to intervene as “Amici Curiae” <<http://www.state.gov/documents/organization/6039.pdf>> accessed 2 March 2017; *Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, (ICSID Case No. ARB/03/19) Order in response to a Petition for Participation as Amicus Curiae (19 May 2005), in particular at para 15.

<sup>116</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, (ICSID Case No. ARB/05/22), Procedural Order No. 1, Request for Provisional Measures, September 31, 2006, paras. 100-102, <[http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C67/DC1581\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C67/DC1581_En.pdf)> accessed 2 March 2017.

<sup>117</sup> *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, (ICSID Case No. ARB/01/7), Award, 25 May 2004, para. 238; *CMS Gas Transmission Company v. Republic of Argentina*, (ICSID Case No. ARB/01/8), Award, 12 May 2005, para. 410.

valuation<sup>118</sup> of compensation.

Whereas some of these developments through arbitral practice have been welcomed by treaty parties and subsequently incorporated into their treaties<sup>119</sup> and institutional arbitration rules,<sup>120</sup> many still have not and have in fact left questions open by rendering conflicting awards.<sup>121</sup> This disconnect between what treaty parties expect from their investment instruments and how arbitral tribunals have interpreted and applied them has caused tension between States and arbitral tribunals.

Consequently, some States have exercised their inherent powers to address some of the issues raised in the interpretation of their treaties. On this, Article 31(3) (a) and (b) of the Vienna Convention on the Law of Treaties ('VCLT') provides that treaty interpretation shall take account of the treaty parties' subsequent agreements and practice. Additionally, some investment treaties include provisions stating that the treaty parties can issue joint interpretations (even after arbitration is underway) that will bind investor-State tribunals.<sup>122</sup> The exercise of this power has divided opinions of investment treaty tribunals. Some tribunals anxious about ensuring equality of the parties have expressed concern because they consider that a State that is alleging to be issuing an interpretation of a treaty during an on-going arbitration, may, in fact, be making an illegitimate attempt to amend the treaty retroactively.

This issue first arose in *Pope & Talbot v Canada*<sup>123</sup> when the NAFTA States decided to issue their interpretation on the FET standard. Although the interpretation was issued after the Award on Merits ruling that Canada had violated the FET standard, the determination of damages had yet to be made. The tribunal considered this to be an amendment of the treaty designed to interfere with on-going arbitration proceedings but concluded that its findings of liability would stand.

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<sup>118</sup> *Metalclad Corporation v. Mexico*, Award of 30 August 2000, 40 I.L.M. (2001) 36, para. 121; *Wena Hotels Ltd v. Arab Republic of Egypt*, (ICSID Case No. ARB/98/4), Award of 8 December 2000, 41 I.L.M. (2002) 896, para. 122; *Técnicas Medioambientales Tecmed S.A. v. Mexico*, (ICSID Case No. ARB (AF)/00/2) Award of 29 May 2003, 43 I.L.M. (2004) 133, para. 186; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, Award of 25 May 2004 <[http://www.italaw.com/documents/MTD-Award\\_000.pdf](http://www.italaw.com/documents/MTD-Award_000.pdf)> accessed 2 March 2017.

<sup>119</sup> Free Trade Commission, *Statement on Non-Disputing Party Participation*, 7 October 2003 <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf>> accessed 2 March 2017; 2006 Amendments to the ICSID Arbitration Rules (Article 37).

<sup>120</sup> 2006 Amendments to the ICSID Arbitration Rules (Article 37); 2013 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

<sup>121</sup> Frank Spooenberg and Jorge E. Vinuales, 'Conflicting Decisions in International Arbitration', *Law and Practice of International Courts and Tribunals*, 8 (2009), 91–114.

<sup>122</sup> See NAFTA Art. 1105; Article 30(3) 2012 US Model BIT; Article 20(2) of the China-Canada BIT.

<sup>123</sup> See *Pope & Talbot Inc. v Government of Canada* (Award on the Merits Phase 2) NAFTA Case (UNCITRAL) (10 April 2001) paras 111-118 holding that Canada had breached its obligation to provide fair and equitable treatment to the investor.

In part, due to the dissonance between States and arbitral tribunals regarding the interpretation of investment treaties an increasing number of developing States, including African countries, are disengaging from the regime of concluding BITs.<sup>124</sup> Many States are concerned that the unpredictability of tribunal decisions interferes with their ability to regulate by influencing them to make regulatory decisions based on the need to avoid liability to investors under a BIT. Accordingly, States are seeking to renegotiate current BITs, unilaterally terminating existing treaties or denouncing multilateral arbitration conventions.<sup>125</sup>

#### **4. COMESA and SADC Experience with Investment Arbitration**

Equally, the experience of investment arbitrations by COMESA and SADC Members has soured their perception of BITs. As at the end of 2014, more than half (61 percent) of COMESA and SADC Members had been involved in a total of 60 investor-State arbitrations, a majority (55) of which were ICSID arbitrations representing 11.11 percent of the total number of ICSID arbitration claims at the time.<sup>126</sup> Despite involving African States, these 60 arbitrations only had 15 African arbitrators as members of the tribunals.

Also by the end of 2014, COMESA and SADC Members had concluded more than 15 percent of the total number of BITs<sup>127</sup> and all BITs they concluded from the 1990s contained investor-State arbitration clauses. Despite the increase in the number of BITs they concluded, there was no corresponding increase in the percentage of FDI inflows into COMESA and SADC regions (Fig. 1). Furthermore, not only did the increase in the number of concluded BITs fail to show a corresponding increase in FDI inflows, but there was a gradual increase in the number of investor-State arbitrations involving COMESA and SADC Members (Fig. 2).

This rise in investor-State arbitration claims in COMESA and SADC regions is alarming. It raises concerns not only about the investment climate in these States and their ability to comply with their BIT obligations – but given their developing status – it also raises concerns about the detrimental

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<sup>124</sup> *Investing in the SDGs: An Action Plan*, ed. by United Nations Conference on Trade and Development (2014), World Investment Report, 2014 (New York: United Nations, 2014), p. xxxi.

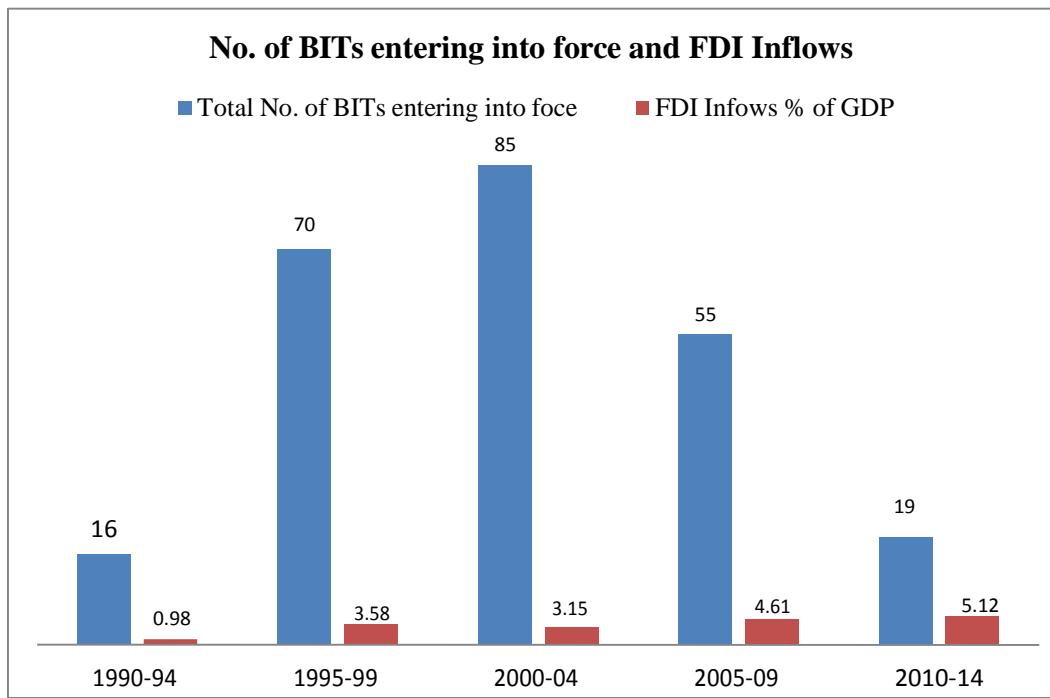
<sup>125</sup> Venezuela denounced and sought to renegotiate its BIT with the Netherlands in 2008; Ecuador terminated nine of its BITs with other Latin American States in 2008 and sought to terminate 13 other BITs in 2010 but only managed to denounce the BIT with Finland; Bolivia denounced its BIT with the US in 2011; South Africa denounced its BITs with the Belgium-Luxembourg Economic Union in 2012, with the Netherlands, Switzerland and Spain in 2013 and with Austria and Germany in 2014.

<sup>126</sup> ICSID Database <<https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx>> accessed 31 December 2015.

<sup>127</sup> UNCTAD, ‘International Investment Agreements Navigator’ <<http://investmentpolicyhub.unctad.org/IIA/>> accessed 13 December 2014.

impact on their economies as a result of the amount of money spent on defending claims and paying damages to successful investor Claimants.

**Figure 1. BITs in force and FDI inflows (Percentage of GDP) in COMESA and SADC**

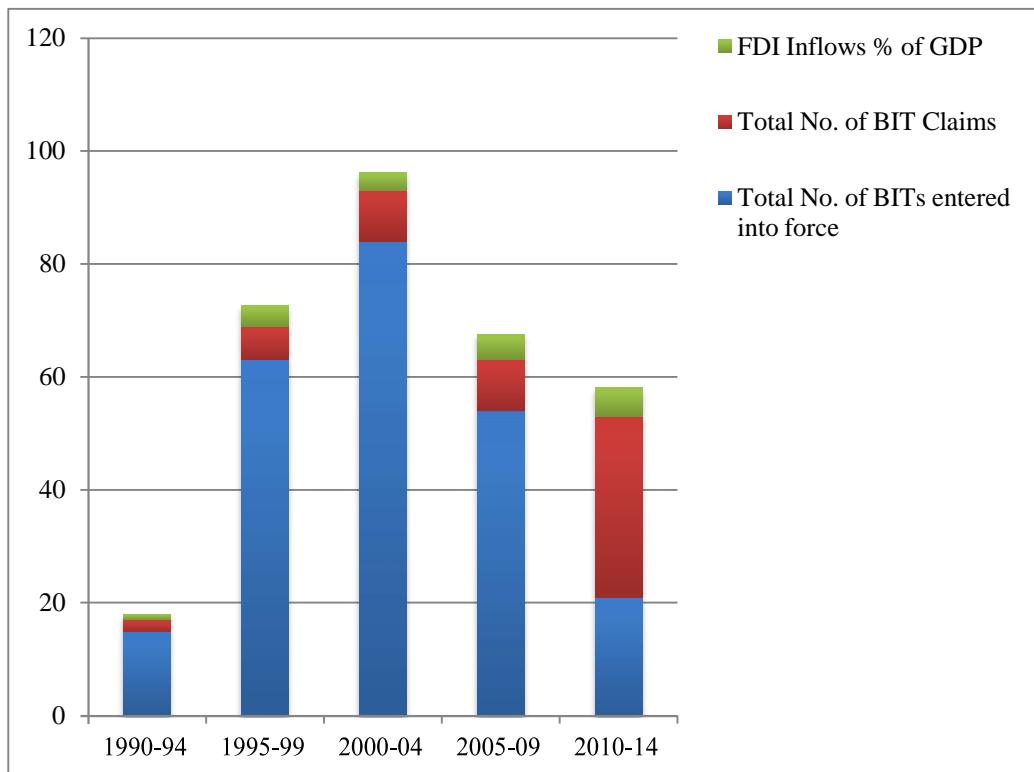


SOURCE: Compiled using UNCTAD International Investment Agreement Database and UNCTAD STAT<sup>128</sup>

<sup>128</sup> UNCTADStat

<[http://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx?sCS\\_referer=&sCS\\_ChosenLang=en](http://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx?sCS_referer=&sCS_ChosenLang=en)>  
accessed 11 October 2015.

**Figure 2. BITs in force, Investment Claims and FDI inflows in COMESA and SADC**



SOURCE: UNCTAD, ICSID and PCA Databases<sup>129</sup>

Out of 39 concluded cases, 13 were settled; three were discontinued; four were dismissed; 11 were in favour of the investor; seven were in favour of the host State; and two had no information available for review. Given that the settled arbitrations involved some monetary compensation to the investors, it is reasonable to conclude that the host States lost more cases than they won.

The underlying causes of the rise in investment arbitration claims in these States included (a) a violent change in government; (b) legal and political instability in the aftermath of anti-government protests; (c) conflict situations due to civil strife; (d) corruption; (e) a change in government policy or law; and (f) insufficiently developed tax regimes. The most common cause of investment disputes was a change of policy or a change of law. Such changes raise the issue of the regulatory space required by developing States to be able to adopt new laws and policies designed to improve their economies and the lives of their citizens without the fear of being challenged by foreign investors. While most of these causes for investment disputes can arise in any given country, they are invariably more common in developing States, and the longer they remain unaddressed, the more crippling they are on the capacity of developing States to adhere to the rule of law, let alone comply with their BIT obligations.

<sup>129</sup> *Supra* note 31; ibid and PCA Cases <<https://pca-cpa.org/en/cases/>> accessed 12 October 2015.

Additionally, provisions in BITs – especially those in the older BITs – were rather vague. Not having participated in their drafting, COMESA and SADC Members are more likely to interpret their provisions differently from the predominantly “Western” or developed country arbitral tribunals.<sup>130</sup> The fact that African arbitrators are very rarely appointed in such arbitrations is disadvantageous because the African perspective in the development of investment arbitration by way of interpretation of their BITs is lacking.

## 5. The Shaping of Investment Arbitration by COMESA and SADC

Given the preceding, COMESA and SADC Members decided to attempt a regional approach to regulating FDI. They did so by concluding regional investment instruments. In 2007 COMESA concluded the COMESA Common Investment Area Agreement ('CCIA Agreement').<sup>131</sup> In 2006, SADC concluded the SADC Protocol on Finance and Investment ('FIP'), which came into force in 2010.<sup>132</sup> Annex I of the FIP on Co-operation on Investment was amended in August 2016. However, the changes have yet to be ratified<sup>133</sup> and the amended FIP is not publicly available for review. Additionally, in 2012, SADC concluded the SADC Model Bilateral Investment Treaty.<sup>134</sup>

Even though the CCIA Agreement is yet to enter into force and the amendments to the FIP are yet to be ratified, and the SADC Model BIT is currently being revised,<sup>135</sup> these instruments show a significant change in the focus of attention in investment instruments. This change is evident not only in the level of detail but also in the new provisions introduced as well as in the restriction or omission of certain traditional standards of protection. These instruments include provisions aimed at addressing some of the concerns raised in the practice of investment tribunals, with the specific aim of shifting the emphasis away from the protection of investments.

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<sup>130</sup> *American Manufacturing & Trading, Inc. v. Republic of Zaire* (ICSID Case No. ARB/93/1), Award, 21 February 1997 (hereinafter American Manufacturing Award) where Zaire had a different interpretation of Article IX of the 1984 Zaire-US BIT to that of the tribunal.

<sup>131</sup> COMESA Common Investment Area Agreement (23 May 2007, not yet in force) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/3092>> accessed 9 February 2017.

<sup>132</sup> SADC Protocol on Finance and Investment (FIP) (signed 18 August 2006, entered into force 16 April 2010) <[www.sadc.int/files/4213/5332/6872/Protocol\\_on\\_Finance\\_Investment2006.pdf](http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance_Investment2006.pdf)> accessed 2 February 2017.

<sup>133</sup> Luke Eric Peterson, 'Investigation: In Aftermath of Investor Arbitration against Lesotho, SADC Member States Amend Investment Treaty So As To Remove ISDS and Limit Protections', *IAReporter* (February 20 2017) <<http://www.iareporter.com/articles/investigation-in-aftermath-of-investor-arbitration-against-lesotho-sadc-member-states-amend-investment-treaty-so-as-to-remove-isds-and-limit-protections/>> accessed 21 February 2017.

<sup>134</sup> SADC, 'SADC Model Bilateral Investment Treaty Template with Commentary' (2012) <[www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf](http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf)> accessed 9 February 2017.

<sup>135</sup> UNCTAD, *World Investment Report 2016: Recent Policy Developments and Key Issues* (United Nations 2016).

## **5.1. Standards of Treatment**

Although the FIP includes the FET standard, it qualifies it by providing that it shall be no less favourable than the treatment granted to investors of a third state.<sup>136</sup> As such, it links FET to MFN treatment, which should limit potential damages by ensuring that all foreign investors receive the same level of compensation. In the amendments to the FIP, the FET standard has been deleted.<sup>137</sup> The FIP does not provide for national treatment ('NT'); instead, Article 7 allows the Member States to grant preferential treatment to their nationals in accordance with their domestic legislations to enable them to achieve national development objectives. However, it requires the Member States to 'eventually harmonize their respective domestic policies and legislation within the spirit of non-discrimination.'<sup>138</sup> The amendments to the FIP offer NT on post-establishment rights of management, operation and disposition of investments.<sup>139</sup>

FET has been given special attention in the CCIA Agreement and the SADC Model BIT because it is the most frequently invoked standard. In this regard, the CCIA Agreement obliges Member States to apply FET to investors and their investments in accordance with the customary international law minimum standard<sup>140</sup> and clarifies that this 'does not require treatment in addition to or beyond what is required by that standard.'<sup>141</sup> It acknowledges that the Member States have different forms of administrative, legislative and judicial systems and that they understand that different levels of development may not achieve the same standards at the same time.<sup>142</sup> This approach differs from the traditional one to the international minimum standard by introducing a degree of flexibility in its interpretation based on the level of development of the respondent country.<sup>143</sup> Moreover, the CCIA Agreement excludes the full protection and security provision.

The SADC Model BIT recommends not to include the FET standard and suggests an alternative standard called 'Fair Administrative Treatment.' This standard requires, taking into consideration the level of development of the Member State in reviewing its approach to procedural justice or due process in administrative, legislative, and judicial processes so as to ensure that these do not operate in a manner that is arbitrary or that deny justice or due process to investors or their investments.<sup>144</sup>

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<sup>136</sup> SADC FIP Annex I, art 6.

<sup>137</sup> Peterson.

<sup>138</sup> SADC FIP, art 7(2).

<sup>139</sup> Peterson.

<sup>140</sup> CCIA Agreement art 14(1).

<sup>141</sup> *ibid* art 14(2).

<sup>142</sup> *ibid* art 14(3).

<sup>143</sup> Peter Muchlinski, 'The COMESA Common Investment Area: Substantive Standards and Procedural Problems in Dispute Settlement' in CL Lim (ed), *Alternative Visions of the International Law on Foreign Investment - Essays in Honour of Muthucumaraswamy Sornarajah* (CUP 2016) 131.

<sup>144</sup> SADC Model BIT, art 5.1, Option 2.

While it recommends excluding the FET standard, it does include it as an option but links it to the customary international law minimum standard by using the specific language of the *Neer* case,<sup>145</sup> which is known for its high threshold.<sup>146</sup> While the SADC Model BIT includes a provision on ‘protection and security’, it makes it a standalone provision that is not linked to FET, but instead to non-discriminatory treatment. Furthermore, compensation relates to losses suffered as a result of war or another armed conflict, which is determined on a non-discriminatory basis.<sup>147</sup>

Similarly, to avoid uncertainty in the interpretation of the phrase ‘like circumstances’ with respect to non-discrimination provisions, both the CCIA Agreement and the SADC Model BIT require an overall examination on a case-by-case basis of all the circumstances of an investment so that a broad view is taken as opposed to merely looking at whether the investors are in the same sector or a related or competitive sector.<sup>148</sup> The amendments to the FIP contain a similar provision.<sup>149</sup> Both the CCIA Agreement and the SADC Model BIT exclude NT for measures included in the exceptions or exclusion lists, and the SADC Model BIT also allows for the exclusion of NT to certain sectors.

The MFN clause has been excluded from the SADC Model BIT. Also, unlike the CCIA Agreement, which confers NT for both pre-establishment and post-establishment rights, the SADC Model BIT only covers non-discrimination for post-establishment rights of management, operation and disposition<sup>150</sup> to limit the potential for claims.

The regional investment instruments of COMESA and SADC include provisions on expropriation and compensation. While the FIP still adopts the typical BIT standard for compensation, the CCIA Agreement requires ‘prompt’ and ‘adequate compensation’, which may be adjusted to ‘reflect the aggravating conduct by a COMESA investor or such conduct that does not seek to mitigate damages.’<sup>151</sup> However, the amendments to the FIP provide for “fair and adequate” compensation.<sup>152</sup> Similarly, the SADC Model BIT departs from the typical expropriation provision in at least two ways. Firstly, it does not require an expropriation to be non-discriminatory to be lawful. The explanation given for this is that expropriations are commonly targeted and specific and could, therefore, be

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<sup>145</sup> *Neer v Mexico*, Opinion (15 October 1926) (1926) 4 RIIA 60.

<sup>146</sup> See SADC Model BIT, art 5.2, Option 1 (‘...the demonstration of an act or actions by the government that are an outrage, in bad faith, a wilful neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency’).

<sup>147</sup> *ibid* art 9.

<sup>148</sup> *ibid* art 4.2; CCIA Agreement, art 17(2).

<sup>149</sup> Peterson.

<sup>150</sup> SADC Model BIT, art 4.

<sup>151</sup> CCIA Agreement, art 20(2).

<sup>152</sup> Peterson.

viewed as discriminatory anyway. Secondly, it adopts a different standard of compensation for expropriation, which is ‘fair and adequate’ to be paid ‘within a reasonable period of time.’<sup>153</sup>

Both the CCIA Agreement and the SADC Model BIT allow host States to pay awards that are ‘significantly burdensome’ in instalments, i.e. on a yearly basis ‘over a period agreed by the Parties, subject to interest at the rate established by agreement’ of the disputants or by a tribunal.<sup>154</sup> However, compensation will not be payable for ‘the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property.’<sup>155</sup> Similar provisions are included in the amendments to the FIP.<sup>156</sup>

Furthermore, a measure of ‘general application shall not be considered an expropriation of a debt security or loan covered by these agreements solely on the basis that the measure imposes costs on the debtor that cause it to default on the debt.’<sup>157</sup> In addition, both instruments affirm the right of a host State to regulate for the public good by providing that regulatory measures taken by a host State ‘designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment’ will not constitute an indirect expropriation.<sup>158</sup> This provision is also adopted in the amendments to the FIP.<sup>159</sup>

As seen above, provisions on standards of protection in the COMESA, EAC and SADC investment instruments show a clear restriction in coverage compared to similar provisions in traditional BITs. There is also a complete exclusion of some of the standards of protection typically found in BITs.

## **5.2. *Host States’ Rights***

To further limit the coverage of the standards of protection, the regional investment instruments introduce host States’ rights. In this regard, the CCIA Agreement permits a host State to take ‘emergency safeguard measures’ if it suffers injury as a result of economic activities under the CCIA Agreement<sup>160</sup> and to take ‘measures to safeguard balance of payments ... external financial difficulties’ by applying restrictions on investments with respect to which it has undertaken commitments on

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<sup>153</sup> SADC Model BIT, art 6.1.

<sup>154</sup> CCIA Agreement, art 20(5); SADC Model BIT, art 6.4.

<sup>155</sup> CCIA Agreement, art 20(6); SADC Model BIT, art 6.5.

<sup>156</sup> Peterson.

<sup>157</sup> CCIA Agreement, art 20(7); SADC Model BIT, art 6.6.

<sup>158</sup> CCIA Agreement, art 20(8); SADC Model BIT, art 6.7.

<sup>159</sup> Peterson.

<sup>160</sup> CCIA Agreement, art 24.

transfers of assets, NT, MFN treatment and expropriation if it suffers a serious balance-of-payment and external financial difficulties.<sup>161</sup>

The FIP includes a specific article on the ‘Right to Regulate’ that allows the Member States to regulate in the interests of the public. Through this provision, Member States can ‘adopt, maintain or enforce any measure’ considered appropriate for ensuring that ‘[i]nvestment activity is undertaken in a manner sensitive to health, safety or environmental concerns.’<sup>162</sup> This provision has been expanded in the amendments to the FIP to allow a host State to ‘take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.’<sup>163</sup>

Similarly, the SADC Model BIT includes a provision on the ‘Right of States to Regulate.’<sup>164</sup> It provides that a host State ‘has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.’<sup>165</sup> This right is to be ‘understood as embodied within a balance of the rights and obligations of Investors and Investments and host States.’<sup>166</sup>

The SADC Model BIT also bestows upon host States the right to pursue development goals. In this respect, a host State ‘may grant preferential treatment’ to any enterprise ‘in order to achieve national or sub-national regional development goals.’<sup>167</sup> A host State may also ‘support the development of local entrepreneurs’ and ‘seek to enhance productive capacity, increase employment, increase human resource capacity and training, research and development.’<sup>168</sup> Finally, a host State may take measures to ‘address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures.’<sup>169</sup> It appears that the introduction of provisions on host States’ rights in these regional instruments aims to balance out the rights and obligations of host States and investors.

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<sup>161</sup> ibid art 25.

<sup>162</sup> SADC FIP, Annex I, art 14.

<sup>163</sup> Peterson.

<sup>164</sup> SADC Model BIT, art 20.

<sup>165</sup> ibid art 20.1.

<sup>166</sup> ibid art 20.2.

<sup>167</sup> ibid art 21.1.

<sup>168</sup> ibid art 21.2.

<sup>169</sup> ibid art 21.3.

### **5.3. *Investor Obligations***

In developing the balancing act, the regional investment instruments introduce provisions on investor obligations. In this respect, the FIP requires investors to abide by the laws, regulations, administrative guidelines as well as policies of the host State.<sup>170</sup> The amendments to the FIP require investors to abide by this provision for the ‘full cycle of those investment’.<sup>171</sup> Similarly, the CCIA Agreement requires investors and their investments to comply with all applicable domestic measures of the host State.<sup>172</sup> The SADC Model BIT has several provisions placing obligations on investors. These include an obligation against corruption,<sup>173</sup> compliance with domestic laws,<sup>174</sup> provision of information,<sup>175</sup> environmental and social impact assessment,<sup>176</sup> environmental management and improvement,<sup>177</sup> the minimum standard for human rights, environment and labour;<sup>178</sup> corporate governance standards,<sup>179</sup> investor liability,<sup>180</sup> as well as transparency of contracts and payments.<sup>181</sup> In deviating further from the approach of the traditional BITs, these regional instruments take into account host State concerns by incorporating investor obligations to integrate environmental, social and governance issues in investment decision-making.

### **5.4. *Dispute Settlement***

While retaining the BIT practice of including ISDS provisions, the regional investment instruments take a more restrictive approach to allowing recourse to arbitration. They also allow counterclaims intended to achieve a more balanced access to investment dispute resolution. All the regional investment instruments confer on investors the right to bring direct claims against a host State but make this conditional upon attempting an amicable settlement of disputes. The FIP requires that (after failing to settle the dispute amicably), investors should exhaust local remedies before resorting to arbitration. However, the amendments to the FIP do not include an ISDS provision and provide only for State-to-State dispute resolution.<sup>182</sup>

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<sup>170</sup> SADC FIP, Annex I, art 10.

<sup>171</sup> Peterson.

<sup>172</sup> CCIA Agreement, art 13.

<sup>173</sup> SADC Model BIT, art 10.

<sup>174</sup> ibid art 11.

<sup>175</sup> ibid art 12.

<sup>176</sup> ibid art 13.

<sup>177</sup> ibid art 14.

<sup>178</sup> ibid 15.

<sup>179</sup> ibid art 16.

<sup>180</sup> ibid art 17.

<sup>181</sup> ibid art 18.

<sup>182</sup> Peterson.

The CCIA Agreement obliges disputing parties to seek to resolve their disputes through amicable means, both before and during the cooling-off period.<sup>183</sup> The cooling-off period is a minimum of six months. If no alternative means of resolving a dispute is agreed, a disputing party is obliged to seek the assistance of a mediator to resolve it during the cooling-off period.<sup>184</sup> If three months before the expiration period of the cooling-off period the disputing parties have failed to agree on a mediator, the President of the COMESA Court of Justice, or his designate, shall appoint a mediator from the COMESA Secretariat's list. The appointment shall be binding on the disputing parties.<sup>185</sup>

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, and the other disputing party may agree to such mediation.<sup>186</sup>

Additionally, both the CCIA Agreement and the SADC Model BIT impose a three-year cut-off period for submission of an arbitration claim.<sup>187</sup> Like the FIP, the SADC Model BIT requires the exhaustion of local remedies before arbitration proceedings are commenced. If local remedies have been exhausted the time limit for bringing an arbitration claim under the SADC Model BIT is one year from the conclusion of the request for local remedies.<sup>188</sup> Moreover, the SADC Model BIT prevents the initiation of arbitration under a BIT if the issue in dispute would be covered by choice of forum clause contained in any investment law, regulation, permit or contract.<sup>189</sup>

Whereas the CCIA Agreement and the SADC Model BIT provide investors with a choice of forum for bringing claims against a host State, including arbitration under the ICSID Convention and *ad hoc* arbitration under the UNCITRAL Arbitration Rules or under any other arbitration institution or rules,<sup>190</sup> they also 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.<sup>191</sup>

The CCIA Agreement and the SADC Model BIT allow host States to bring counterclaims against investors. Under the CCIA Agreement, the host State may do so as a defence, counterclaim, right of

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<sup>183</sup> CCIA Agreement, art 26(3).

<sup>184</sup> ibid art 26(4).

<sup>185</sup> ibid art 26(5).

<sup>186</sup> SADC Model BIT, art 29.3.

<sup>187</sup> CCIA Agreement, art 28(2) and SADC Model BIT, art 29.4.

<sup>188</sup> SADC Model BIT, art 29.4.

<sup>189</sup> ibid art 29.9(b).

<sup>190</sup> CCIA Agreement, art 28(1) and SADC Model BIT, art 29.6.

<sup>191</sup> CCIA Agreement, art 28(3) and SADC Model BIT, art 29.4(c).

set-off or a similar claim.<sup>192</sup> Under the SADC Model BIT, a host State may counterclaim for damages or other relief resulting from an alleged breach of the BIT.<sup>193</sup> The SADC Model BIT also allows the initiation of a civil action by the host State, political subdivisions or private entities in domestic courts against an investor or investment for damages arising from an alleged breach of the obligations set out in the BIT.<sup>194</sup> In reformulating their dispute resolution provisions, the regional instruments attempt to shift the focus away from investment protection and towards investment facilitation.

## 6. Conclusion

Investment arbitration developed in response to the need to better protect foreign investors and their investments. This protection was achieved by establishing ICSID to provide a more effective forum for the resolution of investor-State disputes. Simultaneously, developed States drafted and concluded BITs mostly with developing States, which later offered arbitration under ICSID and are seemingly skewed in favour of investors. However, the prominence of ICSID as the preferred forum for ISDS and the proliferation of BITs as well as investment tribunal practice, have not been favourable to COMESA and SADC Members who have had to defend a relatively high percentage of ICSID arbitrations.

While COMESA and SADC Members signed several BITs at the height of their pursuit of FDI, they had little if any input in their drafting or the subsequent development of investment arbitration. In recognition of the failure of BITs as a tool for attracting FDI and the need to prevent the rise of investment arbitration claims, COMESA and SADC Members concluded regional investment instruments. It is evident from the content of these investment instruments that they are in response to the arbitral practice of investment tribunals as they shift the focus of their purpose away from the protection of investors and their investments.

This approach is apparent not only in the inclusion of specific provisions aimed at balancing out the rights and obligations of host States and investors but also in the limitation of coverage or omission of certain investment protection provisions. Viewed holistically, the deliberate shift away from an emphasis on protection demonstrates the changing role of these African States in the international investment regime from mere observers to fully fledged participants keen to shape the development of investment arbitration.

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<sup>192</sup> CCIA Agreement, art 28(9).

<sup>193</sup> SADC Model BIT, art 19.2.

<sup>194</sup> ibid art 19.3.



## A case for a Regional Investment Court for Africa

Chrispas Nyombi\*

### Abstract

Since the end colonial rule, African countries have sought self-determination, both on domestic and international fronts, but their participation in the international economic order has been, at best, abysmal. In a recent wave of international investment law reform, progressive measures have been pursued in Asia, the Latin American countries have denounced the Investor- State Dispute Settlement (ISDS) system en masse, while the European Union (EU) has proposed the creation of an Investment Court system. With the exception of South Africa, African states have been largely oblivious to these international investment policy departures. It is argued in this paper that Africa's economic aspirations cannot be realised through inaction, rather a developmental mind-set must be harnessed, one that supports attracting Foreign Direct Investment (FDI) while preserving national regulatory space. This paper found that Africa has already embraced the new generation of investment policies that seek to create a balance between investors' interests and national public policy, but at regional level. Africa is also undergoing a process of regionalisation in a bid to promote greater economic cooperation and harmonisation in trade and investment, with plans for a Continental Free Trade Area (CFTA) with all fifty-five African Union (AU) member states. It is argued in this paper that the regional integration and regulatory harmonisation at regional level creates a unique opportunity for the establishment a Regional Investment Court (RIC) in Africa, via a multilateral treaty on investment. The RIC is proposed as the way forward, after evaluating competing reform proposals, because it serves Africa's current social-economic developmental aspirations, at a time when the institutions of international investment law are under increased scrutiny.

### 1. Conceptual underpinning

It is a core principle of democracy that government exercises its authority for personal and communal self-determination.<sup>195</sup> This implies that States, guided by democratic principles, are trustees of public interests, which are promoted through the legitimate exercise of national sovereignty.<sup>196</sup> Thus, provided that governmental power is exercised through legitimate national sovereignty and democratic authority, such as the ceding of dispute resolution authority to an international arbitral body, and provided the body exercises its adjudicatory role within the confines set out in the relevant treaties, the State and its citizens are bound to respect its decisions.<sup>197</sup> However, when viewed

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<sup>195</sup> Universal Declaration of Human Rights, UNGA Res 217A (III) (10 December 1948) Article 21(3) (the will of the people shall be the basis of the authority of government); See also Nick W Barber, "The Constitutional State" (OUP 2010) 38; Martti Koskenniemi, "What Use for Sovereignty Today?" (2011) 1 Asian J Intl L 61, 65.

<sup>196</sup> See James Crawford, "Democracy and the Body of International Law" in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (CUP, 2000) 92-93.

<sup>197</sup> See Edward Guntrip, "Self-determination and foreign direct investment: reimagining sovereignty in international investment law", (2016) International and Comparative Law Quarterly, 65(4) 829-857; Jeremy Waldron, "Are Sovereigns Entitled to the Benefit of the International Rule of Law?" (2011) 22 EJIL 315, 326; Armin von Bogdandy, "The Telos of International Law-Christian Tomuschat's General Course and the Evolution of the Universalist Tradition" in Pierre-Marie Dupuy and others (eds), *Völkerrecht als Wertordnung-Common Values in International Law: Festschrift für Christian Tomuschat*" (KP Engel 2006) 703, 707; Christian Tomuschat, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century" (1999) 281 RCADI 1, 70; Eyal Benvenisti, "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders" (2013) 107 AJIL 295. 300.

through the imperfect lens of political history, democratic principles alone cannot hold a multilateral system together, no matter how legitimate or justified; public consensus is pivotal. It was a global rebuke of diplomatic protection spearheaded by the Latin American States that ultimately led to the development of international arbitration as a medium for Investor-State Dispute Settlement (ISDS).<sup>198</sup> This decade has seen landmark events such as Britain's decision to leave the European Union (EU) buttressed by concerns over national sovereignty and democratic principles,<sup>199</sup> and the increased rejection of ISDS.<sup>200</sup> For example, an EU-wide consultation on the inclusion of ISDS in the investment chapter of the Transatlantic and Trade and Investment Partnership (TTIP) culminated in an outright rejection of the arbitral mechanism by a wide spectrum of the EU civil society.<sup>201</sup> Thus, the ISDS mandate is under increased scrutiny, with national sovereignty at the forefront of this campaign.

In the context of international investment law, a paradigm shift in international investment protection policy has recently surfaced through increased demand for progressive investment policies and a dispute resolution mechanism that supports national public policy.<sup>202</sup> In the EU, for example, investment courts have been heralded as the future of ISDS, featuring in the EU-Vietnam Free Trade Agreement (FTA)<sup>203</sup> and the Comprehensive Economic Trade Agreement (CETA) between the EU and Canada,<sup>204</sup> with plans to include it in all future EU trade agreements with an investment chapter.<sup>205</sup> The aspirations behind the EU's proposal for an investment court resonate in the passage of Garcia-Bolívar: "[t]he interpretation of concepts and principles that are peculiar to States and public

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<sup>198</sup> See Paul Peters & Nico Schrijver, "Latin America and International Regulation of Foreign Investment: Changing Perceptions" (1992) 39 NILR 368; Douglas M. Johnston, *The Historical Foundations of World Order: The Tower and the Arena* (Leiden: Martinus Nijhoff, 2008) 636; Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital*" (CUP, 2013). Part 1.

<sup>199</sup> See Tim Congdon, *How Much Does the European Union Cost Britain?* (2014) London: UK Independence Party; Robert Ford and Matthew J. Goodwin, *Revolt on the Right: Explaining Public Support for the Radical Right in Britain* (New York: Routledge, 2014); On the consequences of Brexit see Scott L. Baier, Jeffrey H. Bergstrand, Peter Egger & Patrick A. McLaughlin, "Do economic integration agreements actually work? Issues in understanding the causes and consequences of the growth of regionalism", (2008) *The World Economy*, 31, 461–497.

<sup>200</sup> See Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, (2007) *New York Law Journal* (June 26); A denunciation provision is contained in Article 71 of the ICSID Convention: "Any contracting state may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice."

<sup>201</sup> EU Commission Report: "Online public consultation on investment protection and investment or-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)" Brussels, (13 January 2015) SWD, 3 final. p. 3. [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153044.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf) (accessed 12 March 2017); Peter Muchlinski, "Towards a Coherent International Investment System: Key Issues in the Reform of International Investment Law", in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy* (2012) 411.

<sup>202</sup> 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.

<sup>203</sup> European Commission, EU-Vietnam FTA [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154224.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154224.pdf) (Accessed 16 March 2017); See Chapter 13 of the agreement.

<sup>204</sup> European Commission, EU-Canada CETA <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter> (Accessed 16 March 2017). See Chapter 8 of the CETA agreement.

<sup>205</sup> European Commission Conceptual paper "Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court", published on the 5 May 2015.

international law cannot be left to the view of ever changing arbitrators.”<sup>206</sup> This paper argues that Africa should not be left behind in the on-going international investment law reform process; rather they should learn and where necessary, lead on these reforms. African countries have embraced the international investment law regime having concluded BITs, ratified ISDS-based multilateral treaties such as the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention),<sup>207</sup> the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),<sup>208</sup> the Agreement Establishing the African Trade Insurance Agency,<sup>209</sup> and the International Convention on Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).<sup>210</sup> It is argued in this paper that a multilateral treaty on investment would serve African countries better than the current patchwork of BITs, based on evidence of regional integration and regulatory harmonisation. However, reforming substantive rules is only half of the task; African countries must consider the creation of a Regional Investment Court (RIC) as a means of reforming the much-maligned ISDS system. The plan is to take a TTIP-style investment court system, with borrowed features, and design a mechanism that serves investors interests and expectations while preserving national regulatory space.

This analysis is timely because waves of democratisation have swept across North Africa in the past decade, impacting on countries with a growing body of investment treaties such as Tunisia, Egypt and Libya.<sup>211</sup> Such political transitions are likely to be accompanied by investment treaty claims, as incumbent governments try to reverse the actions of previous regimes. 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.<sup>212</sup> Similarly, a claim by a foreign investor that a stabilisation provision in a concession contract signed under the Mubarak government required the Morsi government to compensate them for the increase in minimum wage

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<sup>206</sup> Omar E. García-Bolívar, Sovereignty vs. Investment Protection: Back to Calvo? (2009) *ICSID Review* 24 (2) 464-488; See also 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.

<sup>207</sup> *Convention establishing the Multilateral Investment Guarantee Agency*, 11 October. 1985, 1508 U.N.T.S. 99 (I-26012) (entered into force 12 April 1988). 181 Member countries (as of March 2017).

<sup>208</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 Jun. 1958, 330 UNTS 38 (entered into force 7 Jun. 1959). Sao Tome and Principe become the forty-fifth country in Africa to ratify the said convention on May 21, 2013.

<sup>209</sup> *Agreement Establishing the African Trade Insurance Agency*, 18 May 2000. <http://213.154.74.164/invenio//record/1025/files/25835.pdf> (Accessed 27 March 2017) 573- 611.

<sup>210</sup> *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 Mar. 1965, (1965) 4 ILM 524. As of March 2017, 161 States have signed and 153 have ratified the ICSID Convention.

<sup>211</sup> Mohsin Khan, “Is Inflation Hurting Growth in the Arab Transition Countries?” *MENASource*, Atlantic Council, March, 12, 2013 ; Mohsin Khan and Karim Mezran, “The Libyan Economy after the Revolution: Still No Clear Vision,” *Issue Brief*, Atlantic Council, August 28, 2013; Danya Greenfield and Amy Hawthorne, *US and EU: Lack of Strategic Vision, Frustrated Efforts Toward the Arab Transitions*, (Washington, DC: Atlantic Council, September 25, 2013) .

<sup>212</sup> 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 Jarrod Hepburn and Luke E Peterson, “Panels Elected in ICSID Matters involving Moldova, Egypt, and the Central African Republic” *IA Reporter* (12 January 2012).

was challenged.<sup>213</sup> Besides political transitions, African countries share the same burdens and concerns as other reform active States, that International Investment Agreements (IIAs), particularly Bilateral Investment Treaties (BITs), limit the regulatory space thereby making it difficult for governments to discharge their public responsibilities under the shadow of ISDS.<sup>214</sup> Thus, African countries have a vested interest in the future of international investment law, and rather than sitting on the periphery, they should take centre stage. As aforementioned, the EU has led the way in this endeavour by establishing an international court in TTIP and CETA to resolve investor-state disputes arising from the agreement, as a response to the criticism of investor-state arbitration. Thus, the creation of a RIC, responsible for a large number of bilateral and multilateral agreements, plus an appellate body to correct substantively wrong awards, could help bring about the much-needed consistency in decision making and a rebalancing of IIAs in favour of host States in Africa.

The aim of this paper is threefold. First, both Africa's growing economic profile and regional integration are examined. Secondly, Africa's position in international investment law is examined with particular emphasis on her aspiration for social-economic development in an era defined by the increased flow of trade and investment on the continent. Thirdly, although a number of proposals for reforming ISDS have been suggested by the United Nations Conference on Trade and Development (UNCTAD)<sup>215</sup> and numerous academics,<sup>216</sup> investment courts appear to be paving the way. This paper evaluates the reform choices open to African countries before reaching a decision on a RIC. Last but not least, the practicalities surrounding the design and implementation of the investment court are explored before reaching a circumspect conclusion.

## 2. The investment landscape in Africa

Before examining the proposal for a RIC, it is important to appreciate the investment and regulatory landscape in Africa. According to the World Investment Report 2016, foreign investment flows into Africa amounted to fifty-four billion dollars in the year 2015 (down seven per cent) compared to 504 for Europe and 541 for Asia.<sup>217</sup> Thus, Africa held 3.1 per cent of the world's FDI flows down from 4.6 per cent in 2014.<sup>218</sup> In West Africa, a slump in investment in Nigeria, the largest economy on the continent, weak commodity prices and a delay in major projects such Royal Dutch Shell's multibillion-dollar offshore oil operations culminated in a decline in investment.<sup>219</sup> Despite that, consumer spending remained strong and the German pharmaceutical company Merck, for example, opened its

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<sup>213</sup> *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).

<sup>214</sup> See Susan D. Franck, "*The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*", (2005) 73 Fordham L. Rev. 1521; Charles N. Brower, Charles H. Brower II, Jeremy K. Sharpe, "*The Coming Crisis in the Global Adjudication System*" (2003) 19 Arb. Int'l 415.

<sup>215</sup> UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) and the 2012, 2013, 2014 and 2015 *World Investment Reports*, 77-88.

<sup>216</sup> See for example Gus Van Harten, "A Parade of Reforms: The European Commission's Latest Proposal for ISDS" (2015) *Osgoode Legal Studies Research Paper* No. 21/2015.

<sup>217</sup> UNCTAD, "*World Investment Report (WIR)*: Investor Nationality: Policy Challenges" 22 June 2016, Imprint: New York/Geneva, UN, 4.

<sup>218</sup> UNCTAD, "*World Investment Report (WIR)*: Investor Nationality: Policy Challenges" 22 June 2016, Imprint: New York/Geneva, UN, 36.

<sup>219</sup> UNCTAD, "*World Investment Report (WIR)*: Investor Nationality: Policy Challenges" 22 June 2016, Imprint: New York/Geneva, UN, 40.

first office in Nigeria as part of a broader African expansion.<sup>220</sup> Similarly, French chocolatier Cémoi established its first chocolate processing factory in Côte d'Ivoire.<sup>221</sup> In Central Africa, FDI flows fell by thirty-six per cent as flows to the two commodity rich countries (Congo and the Democratic Republic of the Congo declined) significantly.<sup>222</sup> Similarly, East Africa experienced a two per cent decrease from 2014.<sup>223</sup> Investor confidence returned to North Africa with FDI flows rising by nine per cent largely due to investments in Egypt, where FDI flows increased by forty-nine per cent, driven mainly by the expansion of foreign affiliates in the financial industry (CIB Bank and Citadel Capital) and pharmaceuticals (Pfizer).<sup>224</sup> FDI flows to Morocco remained high with the country continuing to serve as a major manufacturing base for foreign investors in Africa. In 2015, Morocco attracted FDI in the automotive industry, especially from France and real estate developments from West Asia. Thus, despite a drop in overall FDI inflow, a number of African countries experienced growth in investment.

Trends show that foreign investment in Africa is likely to grow in the coming decades. Foreign investors from developing economies are increasingly active in Africa, but those from developed countries remain the major players. This is reflective of recent global trends of rising FDI flows from emerging markets with half of the top ten investors in Africa coming from developing economies, including China and India.<sup>225</sup> China's FDI stock increased significantly as they overtook South Africa as the largest investor from a developing country in the region.<sup>226</sup> Despite that, developed economies, led by the United Kingdom, the United States and France, remain the largest investors in the continent.<sup>227</sup> As a result, it is predicted that FDI inflows to Africa would return to growth in 2016/2017 due to the growing number of greenfield projects being announced.<sup>228</sup> Major automotive firms are expected to continue to expand into Africa such as PSA Peugeot-Citroen, Renault and Ford in Morocco, Volkswagen and BMW in South Africa, Honda in Nigeria, Toyota in Kenya and Nissan in Egypt. Furthermore, Textile and garments firms from Bangladesh, China and Turkey seeking alternative production bases for export to the European Union (EU) and North America see countries such as Ethiopia as ideal bases.<sup>229</sup> Thus, despite a fall in FDI inflow in 2015, investment in Africa is projected to increase.

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<sup>220</sup> UNCTAD, "World Investment Report (WIR): Investor Nationality: Policy Challenges" 22 June 2016, Imprint: New York/Geneva, UN, 40.

<sup>221</sup> UNCTAD, "World Investment Report (WIR): Investor Nationality: Policy Challenges" 22 June 2016, Imprint: New York/Geneva, UN, 40.

<sup>222</sup> UNCTAD, "World Investment Report (WIR): Investor Nationality: Policy Challenges" 22 June 2016, Imprint: New York/Geneva, UN, 40.

<sup>223</sup> UNCTAD, "World Investment Report (WIR): Investor Nationality: Policy Challenges" 22 June 2016, Imprint: New York/Geneva, UN, 40.

<sup>224</sup> UNCTAD, "World Investment Report (WIR): Investor Nationality: Policy Challenges" 22 June 2016, Imprint: New York/Geneva, UN, 40.

<sup>225</sup> UNCTAD, "World Investment Report (WIR): Investor Nationality: Policy Challenges" 22 June 2016, Imprint: New York/Geneva, UN, 41.

<sup>226</sup> UNCTAD, "World Investment Report (WIR): Investor Nationality: Policy Challenges" 22 June 2016, Imprint: New York/Geneva, UN, 41.

<sup>227</sup> UNCTAD, "World Investment Report (WIR): Investor Nationality: Policy Challenges" 22 June 2016, Imprint: New York/Geneva, UN, 41.

<sup>228</sup> UNCTAD, "World Investment Report (WIR): Investor Nationality: Policy Challenges" 22 June 2016, Imprint: New York/Geneva, UN, 42.

<sup>229</sup> UNCTAD, "World Investment Report (WIR): Investor Nationality: Policy Challenges" 22 June 2016, Imprint: New York/Geneva, UN, 42.

Although FDI is crucial for the economic growth of African countries, intra-regional investment is equally important especially if Africa wants to achieve self-determination and take up a leading role in international investment law reform. Data from the United Nations Conference on Trade and Development (UNCTAD) shows that intra-regional FDI in Africa is manifestly limited both in terms of volume and diversity.<sup>230</sup> It estimates that intra-regional FDI in Africa accounts for only five per cent of the total FDI in Africa in terms of value.<sup>231</sup> 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. Nonetheless, South Africa's intra-regional FDI eclipses those of Kenya and Nigeria, two important foreign investors in the region. Kenya, East Africa's largest economy, has realised high FDI outflows to its neighbours Uganda and Tanzania, and considered East and Central Africa's hub for financial services.<sup>232</sup> However, FDI outflow from Kenya into the region is relatively small but it is predicted to grow in coming decades. Similarly, Nigeria, Africa's largest economy, actively targets the financial services sectors of other African countries with its FDI outflows. By far the most important source of FDI outflows in Africa stems from North Africa, with countries such as Libya and Egypt directing some of their FDI outflows at Africa. However, compared to the overall FDI flow in Africa, intra-regional FDI is markedly low. Nevertheless, UNCTAD acknowledges that there is "some evidence that intra-regional FDI is beginning to emerge in non-natural resource related industries."<sup>233</sup> UNCTAD recommends harmonisation of regional trade and investment agreements to help Africa realise its intra-regional FDI potential.<sup>234</sup>

### **3. Regional integration in Africa**

The goal of increased harmonisation of trade and investment is at the heart of the regional integration plan for Africa spearheaded by the African Economic Community (AEC).<sup>235</sup> The AEC is an organisation of the African Union with a mandate to establish mutual economic development among African states. This is to be achieved through the creation of custom unions, free trade areas, a central bank, a single market, a common currency and ultimately an economic and monetary union. Regional trade blocks in Africa, also known as Regional Economic Communities (RECs), mainly the East African Community (EAC), the Economic Community of Central African States (ECCAS), Common Market for Eastern and Southern Africa (COMESA), ECOWAS and the Southern African Development Community (SADC) have led the regional integration campaign through the establishment of free trade areas and have launched programmes for the establishment of regional Customs Unions.<sup>236</sup> The rest of the RECs, including the Community of Sahel-Saharan States (CEN-SAD), the Intergovernmental Authority on

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<sup>230</sup> UNCTAD, "*World Investment Report (WIR): Investor Nationality: Policy Challenges*" 22 June 2016, Imprint: New York/Geneva, UN, 41-42.

<sup>231</sup> UNCTAD, "*World Investment Report (WIR): Investor Nationality: Policy Challenges*" 22 June 2016, Imprint: New York/Geneva, UN, 27.

<sup>232</sup> UNCTAD, "*World Investment Report (WIR): Investor Nationality: Policy Challenges*" 22 June 2016, Imprint: New York/Geneva, UN, 79.

<sup>233</sup> UNCTAD, "*World Investment Report (WIR): Non-equity modes of international production and development*" 26 July 2011, Imprint: New York/Geneva, UN, xiv.

<sup>234</sup> UNCTAD, "*World Investment Report (WIR): Non-equity modes of international production and development*" 26 July 2011, Imprint: New York/Geneva, UN, xiv.

<sup>235</sup> The Abuja Treaty (1991) Treaty establishing the African Economic Community (AEC); African Union, "*Decision on the Report of the High Level African Trade Committee (HATC) on Trade Issues*" (December 2015); UNCTAD, "*The Continental Free Trade area: Making it work for Africa*" (Policy Brief No.44, December 2015).

<sup>236</sup> Generally see UNCTAD, "*African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods*" (2016), Imprint: New York/Geneva, UN.

Development (IGAD) and the Arab Maghreb Union (UMA) are at the stage of coordinating Member State activities towards greater economic cooperation. This is essentially the platform for the proposed launch of a Tripartite Free Trade Area (TFTA)<sup>237</sup> (signed in June 2015 and pending ratification by national parliaments) covering COMESA, SADC and EAC Member States, covering fifty-eight per cent of Africa's total GDP.<sup>238</sup> 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. Thus, Africa is geared towards greater regional integration, leading to greater harmonisation in trade and investment on the continent. 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 fifty-four African Union Member States. The launching of the CFTA negotiations is a critical step in Africa's goal for self-determination, by creating a trade zone spanning the entire African continent.<sup>239</sup>

Since both the TFTA and CFTA proposals are likely to pave way for increased economic cooperation and foreign investment in Africa, it is expected that both regional and foreign investors would in return demand investment protection before investing. Thus, the goals of increased FDI, intra-African trade and economic cooperation are unlikely to be achieved without a functioning regulatory framework for foreign investment. The need to study the relationship between the economic development of Africa and international investment treaties was expressed at the African Union Conference of Ministers of Trade, held in Addis Ababa in October 2013. This has culminated in a growing body of research focusing on economic and regulatory harmonisation in Africa.<sup>240</sup> However, academic attention alone cannot defeat the perception that Africa is a risky destination for investment. Africa needs strong regulatory frameworks that guarantee essential protections.

#### **4. Regulatory Landscape in Africa**

The international investment regulatory framework in Africa (at global, regional and national level) is examined below.

##### **4.1 The global regulatory framework**

At global level, the Agreement on Trade-Related Investment Measures (TRIMs) is one of the four principal legal agreements of the WTO trade treaty, and all members of WTO are bound by it.<sup>241</sup> The

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<sup>237</sup> Also known as the African Free Trade Zone (AFTZ) was announced at the EAC-SADC-COMESA Summit on 22 October 2008. Also known as the African Free Trade Zone (AFTZ).

<sup>238</sup> Pearson, Mark. *Trade Facilitation in the COMESA-EAC-SADC Tripartite Free Trade Area.* (tralac. 2011).

<sup>239</sup> African Union, "Draft Framework, Road Map and Architecture for Fast-tracking the Continental Free Trade Area(CFTA)," 2011; UNCTAD, "The Continental Free Trade Area: Making in Work for Africa" (No.44, December 2015); UNCTAD, "Building the African Continental Free Trade Area: Some Suggestions on the Way Forward" (UNCTAD/DITC/2015/1).

<sup>240</sup> United Nations Commission for Africa (UNECA), "Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration: Implications for Regional Integration" (February 2016, Addis Ababa, Ethiopia).

<sup>241</sup> WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, *The Results of the Uruguay Round of Multilateral Trade Negotiations* 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [hereinafter Marrakesh Agreement or WTO Agreement]. It has a total of 164 WTO members, Liberia and Afghanistan being the newest members joining in 2016. In Africa, only Criteria and South Sudan (submitted an application for observer status in 2012) are the UN member states which are neither members nor observers; see also TRIMS Agreement: Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh

scope of the multilateral agreement is limited to investment measures affecting trade in goods, thus measures that harm trade in services are not covered. TRIMs enables international firms to operate more easily within foreign markets by restricting policies such as local content requirements, trade balancing requirements, foreign exchange restrictions and export restrictions that had historically been used to promote domestic interests, while having a negative impact on the commercial presence of foreign investors. In addition, investment made in the form of commercial presence by natural persons is governed by the General Agreement on Trade in Services (GATS).<sup>242</sup> Under GATS, the level of commitment to liberalizing the service sector differs from country to country depending on their commitment schedules.<sup>243</sup> Furthermore, the Declaration on International Investment and Multinational Enterprises of the Organization for Economic Cooperation and Development (OECD) is an open agreement, adopted by thirty-five OECD countries and eleven non-members including Tunisia, Morocco and Egypt.<sup>244</sup> This is a formal commitment to improve the investment climate by promoting social and economic development of multinational enterprises.

Another important OECD instrument is the Code of Liberalization of Capital Movements (legally enforceable) which promotes progressive and non-discriminatory liberalization of capital movements, establishment and transactions mainly in service industries.<sup>245</sup> In addition, the OECD Policy Framework for Investment, a soft law instrument, that underpins the fundamental principles of non-discrimination, rule of law and protection of property rights, has been participated in by African states including South Africa, Senegal, Mozambique, Morocco, Egypt and Tanzania.<sup>246</sup> The OECD Policy Framework for Investment was influential in Africa's decision to launch an Investment Initiative of the New Partnership for Africa's Development (NEPAD) with four the primary objectives: promotion of sustainable growth and development, accelerating the empowerment of women, integrating Africa into the world economy and eradicating poverty.<sup>247</sup> This is evident in the recent drive towards social-economic development.

Furthermore, fifty-four African countries are members of the Multilateral Investment Guarantee Agency (MIGA).<sup>248</sup> MIGA is the fifth member of the institution of the World Bank Group acting as an

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Agreement Establishing the World Trade Organization, Annex 1A, *The Results of the Uruguay Round of Multilateral Trade Negotiations* 143 (1999), 1868 U.N.T.S. 186 [hereinafter TRIMs Agreement]

<sup>242</sup> GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, *The Results of the Uruguay Round of Multilateral Trade Negotiations* 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

<sup>243</sup> Examples can be found on [https://www.wto.org/english/tratop\\_e/serv\\_e/serv\\_commitments\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm) (Accessed 13 March 2017).

<sup>244</sup> The OECD Declaration and Decisions on International Investment and Multinational Enterprises, DAF/E/IME(2011) 20.

<sup>245</sup> The OECD *Code of Liberalisation of Capital Movements* and of Current Invisible Operations (2016), available on the OECD website. However, the obligation to liberalise is qualified by a member's reasonable public interest concerns (Article 3 of the code).

<sup>246</sup> The OECD *Policy Framework for Investment* (11 September 2015), available on the OECD website.

<sup>247</sup> The *New Partnership for Africa's Development* (NEPAD) [http://aprm-au.org/admin/pdfFiles/aprm\\_dpec.pdf](http://aprm-au.org/admin/pdfFiles/aprm_dpec.pdf) (Accessed 18 February 2017).

<sup>248</sup> *Convention Establishing the Multilateral Investment Guarantee Agency* and Commentary on the *Convention* (Washington, D.C.: MIGA). Currently has 181 Member States. The others are International Bank for Reconstruction and Development (IBRD), International Development Association (IDA), International Finance Corporation (IFC), and the International Centre for Settlement of Investment Disputes (ICSID).

investment insurance facility to encourage confident investment in developing countries. MIGA provides political risk insurance and credit enhancement guarantees as a means of protecting foreign direct investment against political and non-commercial risks mainly in the developing countries. Similarly, the International Finance Corporation (IFC), another arm of the World Bank, offers investment, advisory and asset management services to investors in order to encourage private sector development particularly in the developing countries.<sup>249</sup> Both institutions are funded by Member States through paid-in capital and the issuance of debt obligations in international capital markets. Last but not least, ICSID has been ratified by forty-four African countries.<sup>250</sup> Non ICSID members from Africa include Angola, Cape Verde, Djibouti, South Africa, Equatorial Guinea, Namibia, Eritrea and Libya. Thus, a majority of African countries have ratified the ICSID convention giving foreign investors access to ICSID's dispute resolution tribunals.

However, ICSID's dispute resolution mechanism is at the heart of the campaign to reform international investment law due to disagreements over the practice of investor-state arbitration. In 2015, sixty-two per cent of the known investment treaty arbitration disputes were handled under the ICSID procedural rules.<sup>251</sup> However, investors can agree to pursue their investment disputes via other arbitral rules such as those provided by United Nations Commission on International Trade Law (the UNCITRAL rules),<sup>252</sup> or through private arbitral institutions such as the International Chamber of Commerce (ICC) and Stockholm Chamber of Commerce (SCC). Thus, at global level, investment in Africa is governed by a multiplicity of regulatory instruments designed to promote investment protection, economic liberalisation and social development.

#### **4.2 The regional regulatory framework**

At sub-regional level, RECs have signed agreements and developed model laws containing investment protection standards. First, the Investment Agreement for the COMESA Common Investment Area (CCIA) was adopted in 2007 granting national and most-favoured nation protection to COMESA investors, in addition to the right of free transfer of payments.<sup>253</sup> Similarly, expropriation must be for a public purpose and accompanied by 'prompt, adequate and effective' compensation.<sup>254</sup> The

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<sup>249</sup> See World Bank, "*International Finance Corporation (IFC) inaugural report : July 24, 1956 - September 15, 1956.*" Washington DC, Currently has with 184 Member states.

<sup>250</sup> Signed but not ratified include Ethiopia (1965) and Guinea-Bissau (1991). None members include Angola, Cape Verde, Djibouti, South Africa, joining other economic powerhouses including India, Mexico and Brazil.

<sup>251</sup> There were 70 known ISDS cases in 2015- the highest ever in a single year. UNCTAD, "*Investor-State Dispute Settlement: Review of Developments in 2015*" June 2016, IIA Issue Note No 2) 4. ICSID Additional Facility expands ICSID's reach by allowing states and investors of states that have not ratified the ICSID Convention to agree to have their dispute resolved through ICSID's Additional Facility Rules.

<sup>252</sup> 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.

<sup>253</sup> CCIA, "Investment Agreement for the COMESA Common Investment Area" signed 23/05/2007; Articles 15 (transfer of assets), 17 (national treatment) and 19 (Most Favoured Nation); in the preamble to the CCIA, Member States express a conviction that the measure, "shall contribute towards the realisation of the Common Market and the achievement of sustainable development in the region."

<sup>254</sup> COMESA, "Investment Agreement for the COMESA Common Investment Area" signed 23/05/2007, Articles 20 and 14.

Investment Agreement also provides rules for dispute settlement in both state-state and investor-state disputes. 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.<sup>255</sup> In state-state disputes, a decision may be sought from a tribunal constituted under the COMESA court of justice.<sup>256</sup> Thus, the CCIA Agreement offered a new approach to ISDS by combining the realities and sensitivities of African states into account as opposed to the BIT traditional approach. For instance, in order to qualify for protection and thereafter obtain the right to dispute settlement under the agreement, the number of jobs created, the impact of the investor on local communities, the length of operation in the country and the amount of investment made in the host State would be assessed.<sup>257</sup>

Furthermore, Part One of CCIA sets out the general obligations of Member States and institutional issues that are not justiciable. Article 10 states that “[n]o investor shall have recourse to dispute settlement for any matter relating to Part One of this Agreement.” Part Two sets out the rights and obligations of a COMESA Investor “with certain rights in the conduct of their business within an overall balance of rights and obligations between investors and Member States.”<sup>258</sup> This includes compliance “with all applicable domestic measures of the Member State in which their investment is made.”<sup>259</sup> However, the consequences for breach are not clearly defined. The CCIA Agreement also departs from traditional IIAs in terms of substantive rights, by for example, providing flexibility in the interpretation of fair and equitable treatment standards to the level of development of the host State.<sup>260</sup> Article 14(2) of the CCIA states that “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.” In addition, Article 14(3) states that “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.”

The CCIA protects national regulatory space by incorporating a general exception clause under Article 22(2) stating that: “[n]othing 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 subparagraphs 1(a) to (c) ....” These include national security and public morals; human, animal or plant life or health and the protection of the environment. Furthermore, Article 22(3)(a) provides a security exception by stating that nothing in the agreement shall be construed to “preclude a Member State from applying measures that it considers necessary for the fulfilment of its obligations under the

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<sup>255</sup> CCIA, “Investment Agreement for the COMESA Common Investment Area” signed 23/05/2007, Article 28.

<sup>256</sup> CCIA, “Investment Agreement for the COMESA Common Investment Area” signed 23/05/2007, Article 27.

<sup>257</sup> CCIA, “Investment Agreement for the COMESA Common Investment Area” signed 23/05/2007, Article 1(II).

<sup>258</sup> CCIA, “Investment Agreement for the COMESA Common Investment Area” signed 23/05/2007, Article 11.

<sup>259</sup> CCIA, “Investment Agreement for the COMESA Common Investment Area” signed 23/05/2007, Article 13.

<sup>260</sup> CCIA, “Investment Agreement for the COMESA Common Investment Area” signed 23/05/2000, Article 14 reads: “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.”

United Nations Charter with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.” The CCIA agreement required ratification by six States and to-date, this has not been achieved. Had it come into force, it would have been an important investment and political statement in Africa’s goal of self-determination in international investment law.

Secondly, the Protocol on Finance and Investment for the SADC Free Trade Area came into force in 2010.<sup>261</sup> The Protocol covers all the areas normally found in IIAs and grants investment protections such as uncompensated expropriation (Article 5) and fair and equitable treatment (Article 6). The Protocol provides that investor-state disputes need 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).<sup>262</sup> In a move designed to harmonise investment policies in the sub-regional, a SADC model BIT was completed in 2012.<sup>263</sup> However, the Model BIT shows a departure from the traditional BIT by not recommending most-favoured nation treatment and in terms of investor-state disputes, it does not recommend giving investors the right to initiate arbitration.

Furthermore, unlike the CCIA, the SADC Model BIT requires exhaustion of local remedies before accessing ISDS: “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 . . .”<sup>264</sup> 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.”<sup>265</sup> The treaty also includes obligations on investors relating to environmental and social impact assessment (Article 13), minimum standard for human rights, environment and labour (Article 15), transparency of contracts and payments (Article 18), corruption (Article 10), compliance with domestic law (Article 11), provision of information (Article 12), investor liability (Article 17) and corporate governance standards (Article 16). Non-compliance would mean that “the tribunal hearing such a dispute shall consider whether [the] breach, if proven, is materially relevant to the issue before it, and if so, what mitigating or offsetting effects this may have on the merits of a claim or on any damages awarded in the event of such

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<sup>261</sup> Treaty of the Southern African Development Community art. 5(1)(a), Aug. 17, 1992, 32 I.L.M. 116; The objectives of the SADC are *inter alia* to “achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration.” Protocol on Finance and Investment for the SADC Free Trade Area [http://www.sadc.int/files/4213/5332/6872/Protocol\\_on\\_Finance\\_Investment2006.pdf](http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance_Investment2006.pdf) (Accessed 18/February 2017).

<sup>262</sup> It should be noted, however that in *Mike Campbell v. Zimbabwe* (Case No SADCT 2/07), the Tribunal found the Government of Zimbabwe in breach of its treaty obligations and ordered it to protect the investments and pay the evicted farm owners a fair compensation. The SADC Tribunal was subsequently suspended.

<sup>263</sup> SADC Model BIT <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (accessed 18 February 2017)

<sup>264</sup> SADC Model BIT <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (accessed 18 February 2017), Article 29.4(b)(i).

<sup>265</sup> SADC Model BIT <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (accessed 18 February 2017) Article 28(2).

award.”<sup>266</sup> Thus, the SADC Model BIT offers a clearer statement on the consequences of non-compliance with the obligations imposed on investors as compared to CCIA.

In addition, the SADC Model BIT contains an exception clause,<sup>267</sup> which includes measures necessary for the protection of national security interests,<sup>268</sup> tax measures<sup>269</sup> and “non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies.”<sup>270</sup> These measures support the States right to regulate provided for under Article 20.1 which confirms that a State “has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.” The goal is to limit the exposure of States to investor-state claims by arming them with certain defences. On compensation, the SADC Model BIT refers to ‘fair and adequate’ rather than ‘prompt, adequate and effective’ compensation,<sup>271</sup> and “shall be based on an equitable balance between the public interest and the interest of those affected, having regards for all relevant circumstances.”<sup>272</sup> Again, this is a clear departure from the traditional BIT approach to compensation based on the Hull Formula.<sup>273</sup> Thus, both CCIA and the SADC model BIT seek to promote Member States’ developmental objectives by departing from the traditional approach while preserving investors’ interests.

Thirdly, the ECOWAS Supplementary Act on the Common Investment Rules for the Community was adopted in 2008.<sup>274</sup> In addition to the customary BIT protections such as fair and equitable treatment and uncompensated expropriation, ECOWAS investors are guaranteed free transfer of assets including payments relating to investment. On dispute resolution, parties may refer their case to the ECOWAS Court of Justice, or to a national court or tribunal.<sup>275</sup> 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 protection of human rights, labour rights (post establishment) and a social and environmental impact (pre-establishment). The Supplementary Act

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<sup>266</sup> SADC Model BIT <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (accessed 18 February 2017) Article 19.1.

<sup>267</sup> SADC Model BIT <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (accessed 18 February 2017) Article 25.

<sup>268</sup> SADC Model BIT <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (accessed 18 February 2017) Article 25.5.

<sup>269</sup> SADC Model BIT <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (accessed 18 February 2017) Article 25.3.

<sup>270</sup> SADC Model BIT <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (accessed 18 February 2017) Article 25.4.

<sup>271</sup> SADC Model BIT <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (accessed 18 February 2017) Article 6.1(c).

<sup>272</sup> SADC Model BIT <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (accessed 18 February 2017) Article 6.2 (Option 1) and art. 6.2 (Option 2)

<sup>273</sup> Lorenzo Cotula, “The Regulatory Takings Doctrine” (2007) International Institute for Environment and Development, at 1.

<sup>274</sup> ECOWAS Supplementary Act A/SA.3/12/08 on the Common Investment Rules. <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3266> (Accessed 18 January 2017).

<sup>275</sup> ECOWAS Supplementary Act A/SA.3/12/08 on the Common Investment Rules.

<http://investmentpolicyhub.unctad.org/Download/TreatyFile/3266> (Accessed 18 January 2017), Article 33.

also calls for Member States to review and renegotiate investment agreements that are not consistent with it.<sup>276</sup>

Last but not least, the East African Community 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.<sup>277</sup> The Code provides traditional investment protection standards such as non-discrimination, national treatment, uncompensated expropriation and the free transfer of assets as a means of improving the business climate in the region. On dispute resolution, the Code requires investors to apply for an investment certificate at a designated national investment agency, which would enable them to submit any disputes with the host State to international arbitration under the ICSID rules.<sup>278</sup> However, the Code does not show a marked departure from the traditional IIAs. The inconsistent approach to investment policy at regional level can be overcome through regulatory harmonisation, a process which can be achieved following the CFTA.

#### **4.3 National regulatory framework**

At national level, African countries have made efforts to improve their investment climate through the signing of BITs and double taxation treaties. The first two African countries to sign a BIT were Egypt and Somalia in 1982, by then 110 BITs had already been signed with non-African states.<sup>279</sup> These first generation BITs with non-African countries were largely motivated by the need to protect strategic economic interests in former colonies. To African countries, the BITs were a form of sovereignty statement as opposed to investment protection to serve the legitimate economic concerns of a newly independent state. Thus, African BITs signed between 1960 and 1980 were largely politicised and only in the 1990s did such agreements gain recognition as a tool for attracting investment and fostering development in the region.<sup>280</sup> Similarly, the signing of double taxation treaties between African countries began in 1956 with an agreement between Zambia and South Africa.<sup>281</sup> These were also viewed a means of newly independent States to assert their sovereignty while allowing for the repatriation of capital without double taxation. Based on the UNCTAD statistics, of 2750 BITs, 783 were concluded in Africa (145 intra-African) as well as 459 double taxation treaties (60 intra-African) out of 2894.<sup>282</sup> Despite that, although Africa commands a large share of the global BIT network, African countries have done little to influence the development of international investment law.

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<sup>276</sup> ECOWAS Supplementary Act A/SA.3/12/08 on the Common Investment Rules.

<http://investmentpolicyhub.unctad.org/Download/TreatyFile/3266> (Accessed 18 January 2017), Article 32(5) states that “[w]here Member States have an international investment agreement with a third party, they shall strive to renegotiate that agreement to make it consistent with the present Agreement.”

<sup>277</sup> East African Community Model Investment Code

<https://www.tralac.org/images/Resources/EAC/EAC%20Model%20Investment%20Code%202006.pdf> (Accessed 18 February 2017).

<sup>278</sup> East African Community Model Investment Code

<https://www.tralac.org/images/Resources/EAC/EAC%20Model%20Investment%20Code%202006.pdf> (Accessed 18 February 2017) part II.

<sup>279</sup> UNECA, “Investment agreements landscape in Africa”, (21 October 2015) E/ECA/CRCI/9/ Addis Ababa, 3.

<sup>280</sup> Michael E. Dickstein, “Revitalizing the International Law Governing Concession Agreements,” (1988) 6 Int'l Tax & Bus. Law. 54, 59.

<sup>281</sup> Generally see Martin Hearson, “Tax treaties in sub-Saharan Africa: a critical review” Tax Justice Network Africa, 2015).

<sup>282</sup> UNECA, “Investment agreements landscape in Africa”, (21 October 2015) E/ECA/CRCI/9/ Addis Ababa, 3.

Having examined the investment regulatory framework in Africa, it is evident that, at regional level, African countries are turning away from the traditional approach to investment protection, by seeking to rebalance international investment agreements in favour of host States. They also command a large share of the global BIT network, containing protections that are designed to promote investment. However, and perhaps the biggest challenge to Africa's reform of international investment law, is the continued reliance on ISDS. It is therefore recommended that Africa's economic goals cannot be achieved while still relying on traditional ISDS mechanisms. Rather, a RIC should be strongly considered as a way forward to accompany regional integration and regulatory harmonisation on the continent. However, such a paradigm shift in international investment policy requires strong justification, especially on the impact the current ISDS system has had on African countries. The relationship between ISDS and African countries is examined next.

## 5. African participation in ISDS

The total number of global ISDS claims crossed the 690 mark in 2015<sup>283</sup> with a majority of new cases brought under BITs pursuant to investment protection standards such as Fair and Equitable Treatment (FET) and expropriation.<sup>284</sup> However, the historical disparity in investment policy between developed and developing countries continues. Of the seventy investment-treaty based cases brought in 2015, less than twenty per cent of the claims were brought by investors from developing countries.<sup>285</sup> Despite a rise in claims against developed countries, the majority of cases (sixty per cent) were brought against developing countries.<sup>286</sup> Between 1972 and 2014, 111 cases accounting for a fifth of all documented investment-treaty based cases were against African countries.<sup>287</sup> In terms of caseload, among African countries, Egypt has been a respondent in the most number of cases (twenty-five, 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 and Electric Power & Other Energy, which attract the most FDI in Africa.<sup>288</sup> 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 interested in choosing Africans as arbitrators.<sup>289</sup> Both the high number of ISDS claims and poor participation in investment arbitration offer support for a new investment dispute settlement mechanism.

Determining the potential liability of a State is also often difficult and subject to discretionary interpretation by the tribunals. A number of high profile cases, where a government's right to regulate

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<sup>283</sup> UNCTAD, "Investor-State Dispute Settlement: Review of Developments in 2015" June 2016, IIA Issue Note No 2) 1.

<sup>284</sup> UNCTAD, "Investor-State Dispute Settlement: Review of Developments in 2015" June 2016, IIA Issue Note No 2) 1.

<sup>285</sup> UNCTAD, "Investor-State Dispute Settlement: Review of Developments in 2015" June 2016, IIA Issue Note No 2) 3.

<sup>286</sup> UNCTAD, "Investor-State Dispute Settlement: Review of Developments in 2015" June 2016, IIA Issue Note No 2) 3.

<sup>287</sup> UNECA, "Investment landscape in Africa", (21 October 2015) E/ECA/CRCI/9/ Addis Ababa, 5.

<sup>288</sup> ICSID, "The ICSID Caseload – Statistics", (Issue 2017-1) 11 (2017), 12.

<sup>289</sup> Uche Ewelukwa Ofodile, "Africa and the System of Investor-State Dispute Settlement: To Reject or Not to Reject?" (2014) TDM 1, 2.2.

in the public interest had been dismissed in favour of private investors' interests, have left a stain on the ISDS system leading to countries such as Ecuador and Venezuela to withdraw their membership of ICSID.<sup>290</sup> This trend is likely to continue. For example, following a governmental review into investment risks, South Africa decided to terminate older BITs to be replaced with domestic legislation on promotion and protection of investment, due to fears that domestic measures would be challenged by foreign investors. These countries argue that arbitral decisions often appear arbitrary and unjustified, thus defeating the underlying objective of the BITs. Thus, there are two substantive issues with the ISDS system; i) the broad investment protection standards that provoke discretionary tendencies; ii) the lack of consideration for national public policy (regulatory space) in the decision making process.

Furthermore, foreign investors can use the threat of a costly investor-state suit to deter States from carrying out policy decisions that conflict with their economic interests.<sup>291</sup> The Republic of South Africa's ICSID case over policy changes in the mining industry provides a canonical example of the unsettling relationship between private interests and national public policy. In 2004, South Africa enacted a Mineral and Petroleum Resources Development Act (MPRDA) bent on redressing historical apartheid-centric inequalities in the mining industry.<sup>292</sup> The new system terminated previously held mining rights and required companies to reapply for licences, and instituted a mandatory twenty-six 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 claims and were ordered to pay £290,000 towards South Africa's legal costs. In the end, South Africa was left with over £3m 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.<sup>293</sup> South Africa's Department of Trade and Industry commented on the growing impetus for change as follows: "[h]undreds of long-ignored investment treaties offer investors access to an investor-state dispute settlement mechanism, allowing them to take their disputes directly to international arbitration – leapfrogging domestic legal systems (and thus, any safeguards designed to

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<sup>290</sup> ICSID, *Venezuela Submits a Notice Under Article 71 of the ICSID Convention* (Press Release, 26 January 2012) <https://icsid.worldbank.org/> (Accessed 22 February 2017); *Impact of Ecuador ICSID Exit*, *Latin Business Chronicle* (June 30, 2009), <http://www.latinbusinesschronicle.com/app/article.aspx?id=3502> (Accessed 18 January 2017).

<sup>291</sup> Steffen Hindelang, "Restitution and Compensation – Reconstructing the Relationship in International Investment Law", in: Hofmann and Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration*, (Baden-Baden, 2011) 161; Loretta Malintoppi, "Provisional Measures in Recent ICSID Proceedings: What Parties Request and what Tribunals Order", in: Binder, Kriebaum, Reinisch, Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, (OUP, 2009) 157.

<sup>292</sup> Piero Foresti, *Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01.

<sup>293</sup> Republic of South Africa, "Bilateral Investment Treaty Policy Framework Review: Government Position Paper" (June 2009).

protect important public goods)."<sup>294</sup> Thus, South Africa has led the African revolt against the international investment law regime.

The lack regulatory space is compounded by a perceived lack of consistency and legitimacy in the arbitral decisions leading to some degree of uneasiness among African states. As a result, African countries are increasingly worried about the potential liability arising from existing agreements especially in the event of conflicts, knowing that they could be sued by investors for changes in economic and regulatory conditions that are necessary or even beyond their control. On that background, African countries need to devise a strategy for investment regulation that would support a balance between investment protection and national regulatory space.

## 6. The international investment law reform pathways

The UNCTAD suggested five alternative paths to reforming the international investment law regime.<sup>295</sup> Firstly, by limiting investor access to ISDS through provisions requiring investors to exhaust local remedies.<sup>296</sup> A small minority of IIAs require foreign investors to use domestic mechanism before bringing an investor-state claim, normally for a limited period of time.<sup>297</sup> This proposal has been widely explored in academic literature with scholars such Tan and Bouchenaki doubting its practicality, especially in Africa, in the absence of viable legally enforceable alternatives to investor-state arbitration.<sup>298</sup> Another academic, Matthew Porterfield, argues that the exhaustion of local remedies requirement could help to improve the decision making of investment tribunals by providing guidance on the relevant domestic law rather than leaving the tribunals to make a subjective judgement on the investors' legitimate expectations.<sup>299</sup> Furthermore, national court experience in settling investment disputes prior to ISDS, coupled with measures to curb abuse of governmental powers, shows that in developed legal systems, the standard of dispute settlement does not fall far below that provided

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<sup>294</sup> Republic of South Africa, "Bilateral Investment Treaty Policy Framework Review: Government Position Paper" (June 2009), 10; Singh, Kavaljit and Ilge Burgard, "*Rethinking Bilateral Investment Treaties. Critical Issues and Policy Choices*" (Both Ends, Madhyam, Somo, 2016).

<sup>295</sup> UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) and the 2012, 2013, 2014 and 2015 *World Investment Reports*, 77-88; UNCTAD, "*Reform of Investor-State Dispute Settlement: In Search of a Roadmap*", IIA Issue Note No. 2 (June 2013); UNCTAD, "*World Investment Report 2012: Towards a New Generation of Investment Policies*", UNCTAD/WIR/2012; UNCTAD, "*Towards a New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policy-Making*", IIA Issues Note No. 5 (July 2013).

<sup>296</sup> David R Mummery, "The content of the duty to exhaust local judicial remedies", *The American Journal of International Law*, (1964) 58 (2); this right is provided under Article 26 of the ICISD Convention: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

<sup>297</sup> Some IIAs require investors to pursue local remedies in the host State for a certain period of time, normally eighteen months, (for example, Belgium/Luxembourg- Botswana BIT and Argentina-Republic of Korea BIT). A small number of agreements require the investor to exhaust the host State's administrative remedies before submitting the dispute to arbitration (for example, China-Côte d'Ivoire BIT). Also see the Decision of the Tribunal on Objections to Jurisdiction in *Maffezini v. Spain*, ICSID Case No.ARB/97/97 (Jan. 25, 2000).

<sup>298</sup> Tan Liang-Ying and Amal Bouchenaki; "*Limiting Investor Access to Investment Arbitration - A Solution without a Problem?*" TDM 1 (2014); See also Daniel Kalderimis, "Back to the Future: Contemplating a Return to the Exhaustion Rule" TDM 1 (2014).

<sup>299</sup> See Matthew C Porterfield, "Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?" (2015) 41, *Yale Journal of International Law Online*, 7.

under international investment law.<sup>300</sup> However, the biggest challenge with funnelling investor-state disputes through domestic courts in Africa is a general lack judicial legitimacy. This is likely to affect investor confidence in the dispute resolution system leading to a backlash against the inclusion exhaustion of local remedies provisions in IIAs with African states.

Another suggested means of limiting investor access to ISDS is by restricting the subject-matter scope of ISDS claims. This has already been incorporated in the CCIA where a denial of benefit clause is used to limit access to ISDS for investors without a track record of job creation, *inter alia*, in the host State. Similarly, States can choose to limit the subject-matter scope for ISDS claims by excluding certain types of claims from international arbitration. For example, the Cameroon-Turkey BIT excludes claims relating to real estate and the Malaysia-Pakistan Closer Economic Partnership Agreement excludes claims relating to national treatment and performance requirements. In the context of Africa, limiting access to ISDS is seemingly unrealistic given the underdeveloped state of most legal systems, a general lack of judicial legitimacy, and a chronic lack of bargaining power during the treaty negotiation process with capital exporting States.<sup>301</sup> On the latter, this might explain why, with the exception of South Africa, other African countries have shown a general reluctance to criticise the system. However, increased regional integration and regulatory harmonisation could improve African States' bargaining power.

Secondly, UNCTAD proposed tailoring the existing system through individual IIAs. This entails tailored modifications to aspects of ISDS in new IIAs. Procedural innovations highlighted in UNCTAD's IPFSD include setting time limits for bringing claims in order to prevent the revival of old claims and to limit State exposure to claims.<sup>302</sup> For example, both the SADC Model BIT and CCIA set a three year time limit for bringing a claim against a host State.<sup>303</sup> Similarly, both CCIA and the SADC Model BIT provide for Fork in the Road clauses. Article 28(3) of the CCIA provides that the "election [of a fora] shall be definitive and the investor may not thereafter submit a claim relating to the same subject matter or underlying measure to other fora."<sup>304</sup> Equally, Article 29.4(c) of the SADC Model BIT provides that an investor must provide "a clear and unequivocal waiver of any right to pursue and/or to continue any claim relating to the measures underlying the claim made pursuant to this Agreement, on behalf of both the Investor and the Investment, before local courts in the host State or in any other dispute settlement forum." These measures are designed to limit State exposure to investor-state claims.

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<sup>300</sup> See Christoph Schreuer, Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration, *The Law & Practice of International Courts and Tribunals*, (2005) 4, 1; Leon Trakman, "Choosing Domestic Courts Over Investor-State Arbitration: Australia's Repudiation of the Status Quo", (2012) 35UNSW Law Journal, 979.

<sup>301</sup> See Andrew T Guzman, "Why LDCs Sign Treaties that Hurt them" (1998) 38 VJIL 639; Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States" (2010) 104 AJIL 179, 186.

<sup>302</sup> For example, Article 15(11) of the China-Japan-Republic of Korea investment agreement); Article 28(9) of the CCIA allows host states to assert counter claims against investors thus discouraging investors from rushing to ISDS; Article 19.3.SADC Model BIT permits a counterclaim for damages or other relief resulting from an alleged breach of obligations.

<sup>303</sup> SADC Model BIT <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (Accessed 18 February 2017) Article 29.4(d); CCIA, "Investment Agreement for the COMESA Common Investment Area" signed 23/05/2007, Article 28(3).

<sup>304</sup> CCIA, "Investment Agreement for the COMESA Common Investment Area" signed 23/05/2007, Article 28(3).

Furthermore, UCTAD proposes supporting contracting parties' role in interpreting IIAs by facilitating for binding joint party interpretations which would require tribunals to refer certain issues to treaty parties for determination, rather than tribunals making their own interpretations that may go against the treaty parties' intentions.<sup>305</sup> For example, the SADC Model BIT preserves Member States interpretive role, stating: "[j]oint decision of the State Parties, each acting through its representative designated for purpose of this Article, declaring their joint interpretation of a provision of this Agreement, shall be binding on any tribunal, and any decision or award issued by a tribunal must apply and be consistent with that joint decision."<sup>306</sup> Another measure is to establish a mechanism for consolidating related claims with the aim of reducing the cost of proceedings and increasing consistency of awards.<sup>307</sup> For example, Article 29.18(a) of the SADC Model BIT states that "[w]here two or more claims have been submitted separately to arbitration ... and the claims have a question of law or fact in common and arise out of the same underlying measure or measures or circumstances." Furthermore, UNCTAD proposes providing a mechanism for an early discharge of unmeritorious claims in order to reduce wastage of resources.<sup>308</sup> In order to increase transparency, parties could consider granting public access to arbitration and the participation of non-disputing (civil society organisation) in the dispute.<sup>309</sup> For example, Article 28(5) of CCIA requires, "[a]ll documents relating to a notice of intention to arbitrate, the settlement of any dispute ..., the initiation of an arbitral tribunal, or the pleadings, evidence and decisions in them, shall be available to the public."<sup>310</sup> Similarly, Article 29.17(a) of the SADC Model BIT obligates states to "promptly publish, or otherwise make publicly available, its laws and regulations of general application as well as international agreements that may affect the investments of Investors of the other State Party." Thus, public involvement in the dispute resolution process could help to infuse the much needed transparency and legitimacy into the ISDS system.

Encouraging public involvement through *amicus curiae* briefs could also provide a means of improving disclosure. For example, Article 28(8) of the CCIA states that "[a]n arbitral tribunal shall be open to the receipt of *amicus curiae* submissions." A similar position is found in Article 29.15 of the SADC Model BIT, stating that the tribunal "shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party."<sup>311</sup> UNCTAD's proposals should accompany changes to the wording of substantive protection provisions in IIAs such as full protection and security and fair and equitable treatment, by including limitations to reflect local realities in Africa. For example, countries such as Canada and USA limit full protection and security requirements to police protection thus reducing scope for liability and misinterpretation of the provision.<sup>312</sup> However,

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<sup>305</sup> UNCTAD, "*Interpretation of IIAs: What States Can Do*," IIA Issues Note, No.3, December 2011, 11.

<sup>306</sup> SADC Model BIT <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (accessed 18 February 2017) Article 29.

<sup>307</sup> For example, Article 26 of the Canada-China BIT.

<sup>308</sup> For example, Article 41(5) ICSID Arbitration Rules (2006) and Article 28 United States-Uruguay BIT. .

<sup>309</sup> For example, Article 28 of the Canada-China BIT.

<sup>310</sup> CCIA, "Investment Agreement for the COMESA Common Investment Area" signed 23/05/2007, Article 28(5).

<sup>311</sup> The SADC Model BIT also provides for use of expert reports in arbitral proceedings. SADC Model BIT <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (accessed 18 February 2017) Article 29.16.

<sup>312</sup> Article 5 (2b) of the 2012 U.S. Model Bilateral Investment Treaty: "full protection and security" requires each Party to provide the level of police protection required under customary international law"; Article 5 (2) of the 2004 Canadian Model Foreign Investment Promotion and Protection Agreement: "[t]he concepts of fair and

the bargaining power often lies with the capital exporting States and most African states would be unwilling to impose limitations that may deter foreign investment.<sup>313</sup> Thus regional integration and regulatory harmonisation promises a unified approach to treaty negotiation and drafting for African countries.

Thirdly, UNCTAD proposes the use of Alternative Dispute Resolution (ADR) such as mediation and conciliation. Thus, African countries could rely on ADR as a means of reducing fully-fledged investor-state arbitrations. This could be achieved through the incorporation of treaty provisions for non-binding ADR methods in a multilateral investment agreement. For example, 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.”<sup>314</sup> Similarly, the CCIA 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.”<sup>315</sup> These methods place little emphasis on legal obligations but rather on reaching a fair position in the view of both parties. In that vein, mediators are responsible for proposing and arranging workable solutions, while conciliators draw up agreements that represent a just compromise between the parties involved in the dispute.

Although ADR methods could help to preserve a workable relationship, there is no guarantee that a solution would be reached. Furthermore, States may not deem ADR suitable for making a determination on national policy decisions, and where it is unsuccessful, the procedure could simply add to the costs of dispute resolution. It would also not stop access to international arbitration or resolve the underlying challenges facing the ISDS system such as lack of legitimacy and consistency.<sup>316</sup> Alternatively, a system of preliminary rulings could be introduced, where unclear questions of law in on-going proceedings are referred to a designated body. This could infuse desired consistency into the system.<sup>317</sup> It is suggested that preliminary rulings are strongly considered in Africa’s reform of international investment law.

Fourthly, UNCTAD proposes the introduction of an appeals facility (such as the one promulgated in the investment chapters of CETA and TTIP).<sup>318</sup> The aim is to increase consistency of awards and enhance predictability of the law, while correcting erroneous decisions of the tribunal of First

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equitable treatment and full protection and security in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”

<sup>313</sup> Anthea Roberts, “Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States” (2010) 104 *AJIL* 179, 186.

<sup>314</sup> SADC Model BIT <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (accessed 18 February 2017) Article 29.3.

<sup>315</sup> CCIA, “Investment Agreement for the COMESA Common Investment Area” signed 23/05/2007, Article 26(4)

<sup>316</sup> See UNCTAD, “*Investor-State Disputes: Prevention and Alternatives to Arbitration*” (United Nations, New York and Geneva, 2010); UNCTAD, “*How to Prevent and Manage Investor-State Disputes: Lessons from Peru*”, Best Practices in Investment for Development Series (United Nations, New York and Geneva, 2011).

<sup>317</sup> See Christoph Schreuer, “Preliminary Rulings in Investment Arbitration”, in Karl P Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (OUP, 2008).

<sup>318</sup> See Article 10.19(10)) of the Chile-US FTA; Annex 10-F of the Dominican Republic-Central America-US FTA.

Instance.<sup>319</sup> 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 appeals tribunal should be staffed with permanent members, appointed by Member States, to make balanced opinions in a bid to overcome the legitimacy concerns facing the current ISDS system. Thus, the appellate body would act as a supervisory body for the First Instance tribunal.

However, it is unlikely that consistency would be achieved in a dispersed legal system consisting of over 3000 IIAs, with dissimilar provisions and regulatory context.<sup>320</sup> At international level, via ICSID for instance, the appeals option would need wide support among signatories through an amendment of the ICSID Convention, which would be difficult to achieve.<sup>321</sup> It also faces a number of practical challenges: i) who elects members of the appellate body (who elects and how); ii) are appeals limited to points of law or are questions of fact included? iii) does the appellate body apply to current IIAs? iv) is it limited to ICSID or does it apply to other arbitration rules?; v) will it signal an end to national court review<sup>322</sup> and the ICSID annulment mechanism? The aforementioned questions over the selections of members, scope of the tribunals' powers and the relevant rules, are somewhat minimised at regional level where a group of countries, subject to a multi-lateral agreement, condition the body to serve and take into account local realities. It should also be emphasised that an appellate body is a core fabric of the proposed RIC for Africa.

Although actions have been taken at regional level in Africa to infuse development-oriented factors in investment agreements, African countries have generally failed to embrace the new generation of investment policies. For example, the CCIA is not operational, the SADC Model BIT is not binding and no country has taken steps to model their BITs on it. Although there are notable attempts to rebalance international investment agreements in favour of host States in both the CCIA and SADC Model BIT, African countries continue to rely on international arbitration as a mean of dispute resolution. These attempts include: (i) clarifying terms such as the meaning 'investment' thus limiting scope for expansive interpretation by the tribunals; ii) limiting access to ISDS by excluding some matters from dispute settlement iii) imposing obligations on investors in bid to achieve a balance of rights and responsibilities. These pro-State measures alone are however unlikely to achieve the desired change. Furthermore, the collapse of the SADC Tribunal following the *Mike Campbell Ltd & others v. Zimbabwe* decision clearly undermines any efforts to project dispute resolution in Africa as an alternative to international arbitration.<sup>323</sup> For Africa to develop a tailored development-oriented investment system, African countries must play a greater role in the international investment law reform process. For

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<sup>319</sup> See ICSID, "Possible Improvements of the Framework for ICSID Arbitration", Discussion paper, 22 October 2004; C. Tams, "An Appealing Option? A Debate about an ICSID Appellate Structure", *Essays in Transnational Economic Law*, No.57, 2006.

<sup>320</sup> The appellate stage also represents another timely and costly proceeding although could be limited as at WTO to 90 days.

<sup>321</sup> Kate M Supnik, "Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law", (2009) 59 *Duke Law Journal*, 343-376.

<sup>322</sup> Domestic court review of investment awards is limited to non - ICSID awards. ICSID awards are not subject to review of domestic courts as per Article 53(1) of the ICSID Convention.

<sup>323</sup> Mike Campbell v. Zimbabwe (Case No SADCT 2/07); See Dunia Zongwe, "The Contribution of Campbell v. Zimbabwe to the Foreign Investment Law on Expropriations" (2009) 2(1), Namibia Law Journal, 26.

example, apart from South Africa, African countries have been absent from on-going debates on the future of ISDS and the reform pathways. Compared to Latin American countries<sup>324</sup> and Asian-Pacific states,<sup>325</sup> African countries appear to be rather content with the system having not criticised it and through the continued ratification of traditional investment treaties.<sup>326</sup> Despite the inaction, the pathways for reform should not be closed off; rather UCTAD's reform proposal on creating a standing international investment court should be pursued.<sup>327</sup> This reform proposal is explored below.

## 7. The proposal for a Regional Investment Court

UNCTAD proposes replacing *ad hoc* arbitral tribunals with an international court.<sup>328</sup> The proposal, if implemented at regional level, is likely to sit well with African states for a number of reasons. First, it rests on the principle that private arbitration is not appropriate for handling matters involving national public policy.<sup>329</sup> This calls for a mechanism that supports independence and impartiality of judges which can be achieved through tenured appointments to insulate judges from outside interests. Thus, the judges would be elected by States on a permanent basis thus saving on costs of searching for potential arbitrators. In doing so, the investment court system would be infusing consistency, transparency and legitimacy into ISDS. However, at international level, such a system requires a coordinated effort from a large number of countries, which would be difficult to achieve.<sup>330</sup> Thus, to encourage participation, the designers of the system would need to include an opt-in mechanism for those States that may wish to join at a later stage. The court is expected to be consistent in interpreting and applying treaty norms as compared to arbitral tribunals.

This proposal should, however, be pursued in a unified Africa rather than at sub-regional level. The recent standstill on the CCIA and SADC Model BIT clearly indicates that African states are unwilling to stand up to the pressures that powerful partners might exert on them if they choose to pursue a different policy direction.<sup>331</sup> However, the CFTA negotiations present a good opportunity for a joint-African position on international investment policy. Essentially, the CFTA represents a new chapter in Africa's endeavours to promote regional integration and competitiveness by overcoming the colonial

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<sup>324</sup> See Nicolas Boeglin, *Argentina: towards a possible new withdrawal from the ICSID?*, The Committee for the Cancellation of the Third World Debt (Cadm) (May 4, 2012); Sébastien Manciaux, *Bolivia's withdrawal from ICSID*, TDM 5 (2007).

<sup>325</sup> Australian Government, Department of Foreign Affairs & Trade, "Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity" (April 2011), [http://www.dfat.gov.au/publications/trade/trading\\_our-way-to-more-jobs-and-prosperity.pdf](http://www.dfat.gov.au/publications/trade/trading_our-way-to-more-jobs-and-prosperity.pdf) (Accessed 17 February 2017). The Department for Industrial Policy and Promotion in India has called for a review of all of the BITs that India has signed (82 in all), The Indian Express (April 13, 2012), <http://www.indianexpress.com/news/govt-to-review-bilateral-treaties-to-avoid-legal-battle-with-telcos/936228/> (Accessed 18 February 2017).

<sup>326</sup> Uche Ewelukwa Ofodile, "Africa-China Bilateral Investment Treaties: A Critique", (2013) 35 *Mich. J. Int'l L.* 131. See also Sao Tome and Principe Ratifies the ICSID Convention, ICSID News Release (May 21, 2013).

<sup>327</sup> A far-reaching option is abandon ISDS altogether and returns to State-State arbitration; See for example the Japan-Philippines Economic Partnership Agreement (2006), the Australia-United States FTA (2004) and the Australia-Malaysia FTA (2012).

<sup>328</sup> UNCTAD, "*Reform of Investor-State Dispute Settlement: In Search of a Roadmap*", IIA Issue Note No. 2 (June 2013) 9.

<sup>329</sup> Gus Van Harten, "A Case for International Investment Court", *Inaugural Conference of the Society for International Economic Law*, (16 July 2008), 5-9.

<sup>330</sup> Edwardo Zuleta, "The Challenges of Creating a Standing International Investment Court" TDM 1 (2014).

<sup>331</sup> Tandon, Yash. *Europe and the Challenge of African Integration*. 2004.

legacy of fragmentation while harnessing the benefits of a large integrated market.<sup>332</sup> Thus, the CFTA proposal presents a platform for a multilateral investment agreement that promises greater trade and intra-African investment.<sup>333</sup> A permanent regional investment court would handle investment disputes among CFTA Member States, but it would also be incorporated in future IIAs, whether bilateral or multilateral, involving CFTA Member States and third States. A common African position on IIAs would eradicate the foregoing practice where individual countries negotiate complex and confusing BITs, leaving themselves exposed to varying claims. Thus, a multilateral agreement on international investment presents African countries a path towards self-determination in international investment law.<sup>334</sup>

However, the idea is not new and has recently begun to manifest in the EU reform of international investment law. In May 2015, the EU Commissioner Cecilia Malmstrom, announced the EU Commission's plans to replace international investment tribunals with a traditional court system.<sup>335</sup> These proposals were formally unveiled by the European Commission in November 2015. They include 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). This mechanism has already been incorporated in CETA and the EU-Vietnam Free Trade Agreement (FTA) and has been touted as the future of ISDS. Article 207 of the TFEU, arms the EU exclusive competence to conclude agreements covering investment with third States.<sup>336</sup> For the proposed RIC to work, the African Union would need to be armed with the same competence. The RIC would be modelled on TTIP and similar approaches in other multilateral institutions as explained below.

## 8. A question of design

The proposal for a neutral and permanent international investment court in Africa calls for careful design in order avoid the mistakes of the SADC Regional Tribunal and learn from the criticism of

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<sup>332</sup> Work Plan for the AU Commission for the Preparatory Phase of the CFTA Negotiations (2014). Bridges Africa, "The Continental Free Trade Area: What's going on?" 3(9) 2014.

<sup>333</sup> Paul Kalenga, "Critical Issues in the Negotiations of the Continental Free Trade Area" (2016) tralac, Working Paper No.S16WP02.; Isabelle Ramdoo, "Upgrading Africa's Participation in Global Value Chains Requires International Rules to Evolve", Great Insights, 4(6) December 2015/January 2016.

<sup>334</sup> Global Agenda Council on Global Trade and FDI, Foreign Direct Investment as a Key Driver for Trade, Growth and Prosperity: The Case for a Multilateral Agreement on Investment(2013), [http://www3.weforum.org/docs/GAC13/WEF\\_GAC\\_GlobalTradeFDI\\_FDIKeyDriver\\_Report\\_2013.pdf](http://www3.weforum.org/docs/GAC13/WEF_GAC_GlobalTradeFDI_FDIKeyDriver_Report_2013.pdf) (Accessed 19 February 2017).

<sup>335</sup> European Commission Conceptual paper "Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court", published on the 5 May 2015.

<sup>336</sup> Article 207 Treaty on the Functioning of the European Union (TFEU) "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action." On the transfer of competence to the EU, see Sven Ljohannson, The competence of the European Union for foreign direct investment under the Treaty of Lisbon (University of Halle-Wittenberg, 2009); Julien Chaisse, Promises and Pitfalls of the European Union Policy on Foreign Investment (2012) *Journal of International Economic Law*, 15 (1): 51-84.

international investment arbitration. Thus, it is imperative to examine how the court would be created, structured, supplied and qualified. Indeed, ICSID's experience, especially in the first two decades, presents a useful guide on how an organisation with few staff and no cases can rise to the centre of international law through educational and informational activities. Thus, the investment court is not expected to be a panacea nor a quick fix measure, rather it is a long-term strategy that would require commitment from all relevant stakeholders.

First and foremost, the RIC should be formed following the CFTA regional block, under a multilateral investment agreement. However, creativeness is needed in order to arrive at solutions that offer fairness and support sustainable development. This includes the potential use of existing legal and institutional settings, whether it is WTO or ICSID, for logistical purposes. Thus, the features of existing arbitral institutions should feed into the design of the RIC for Africa.

Secondly, on the question of jurisdiction, the RIC does not necessarily need to be linked to a certain substantive body of law, rather, like the ICJ, jurisdiction could be based an agreement among all parties involved to submit certain disputes to the court. This jurisdiction could be based on a multilateral agreement, a BIT, say between the UK and Uganda, laws, notifications or presentation of a dispute, in line with the current practice. The Unified Agreement for the Investment of Arab Capital in the Arab States, which created the Arab Investment Court is a good example.<sup>337</sup> Thus, for a RIC for Africa aimed at resolving investment-related disputes between investors and host States to work, it would require Member States to modify their IIAs, or merely provide a general acceptance of the jurisdiction of the court. This would give the investment court jurisdiction over disputes relating to IIAs in Africa. In discharging its duties, the court would need to produce its own rules on arbitration, conciliation and the mediation procedure, as well as codes of conduct or ethics, rules on management and related documents.

Thirdly, the investment courts would consist of publicly appointed judges instead of party appointed arbitrators. Treaty-based establishment of a roster of judges would overcome the problem of having public disputes handled by private arbitrators. The designers could borrow ideas from the Inter-American Commission of Human Rights<sup>338</sup> where members are appointed on a roster for a period of time and cases are allocated in accordance with internal rules. Similarly, under the TTIP investment court proposal, judges would be allocated cases randomly thus disputing parties would have no influence on the three judges hearing their case. In the RIC, the judges would be randomly assigned cases in their subordinated tribunals thus parties would play no role in the appointing of judges. This would help to overcome conflict of interest concern with regards to a subordinate tribunal or judge because, where such issues arise, the case would be assigned to another subordinate tribunal or judge.

Furthermore, given the rise in investor-state claims over breach of treaty commitments due to enactment of public laws and regulations, and not only on commercial matters pertaining to private or State contracts, it makes sense to promote a public dispute settlement mechanism over a private commercial system. The RIC proposal aims to achieve this without denying the right to individual or

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<sup>337</sup> The Unified Agreement was signed on 26 November 1980 in Amman, Jordan, and entered into force on 7 September 1981.

<sup>338</sup> The Inter-American Commission of Human Rights was created by a resolution of the Fifth Meeting of Consultation of Ministers of Foreign Affairs in Santiago, Chile, in 1959.

private action for foreign investors. The designers could learn from the International Tribunal for the Law of the Sea which has several Special Chambers within thus enabling adjudicators to become experts in their own sub-field.<sup>339</sup> This has the potential to create consistency, increased legitimacy and coherence in international investment law.<sup>340</sup> The judges on a roster or designated tribunal would be appointed in advance by the dispute resolution body and called upon when a claim is filed. Article 11(1) of TTIP which requires judges, once appointed to a particular case, to refrain from acting as counsel in any pending or investment protection dispute under TTIP or any other agreement or domestic law, should be implemented in the RIC agreement. Unlike judges in local courts, RIC judges would not receive a monthly wage rather they would be required to charge legal fees for cases they take up.<sup>341</sup> The judges would also need to meet ethical and professional requirements including sufficient knowledge of international economic law.<sup>342</sup> As result, investors would be satisfied with the competency of the judges and States would be satisfied with the transparency and predictability the system is likely to create.

Fourthly, an arbitral award is meant to be final and binding, and perhaps this is the reason why there is no fully-fledged appeal body in our current ISDS system.<sup>343</sup> The available annulment mechanism only deals with the procedural legitimacy of the tribunal's decision while an appeals chamber deals with both any procedural improprieties and the substantive correctness of the decision. The proposed RIC would consist of a Tribunal of First Instance and an Appellate Tribunal. This means that the appeals body would be able to make a determination on whether the Tribunal of First Instance got it wrong.<sup>344</sup> The rationale behind an appeals body modelled along the lines of the WTO Appellate Body is to enhance predictability of investment rules and consistency without lengthening the legal proceedings or forcing investors to incur additional costs.<sup>345</sup>

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<sup>339</sup> The International Tribunal for the Law of the Sea is an independent judicial body established by the United Nations Convention on the Law of the Sea.

<sup>340</sup> Nicolette Butler, "*In Search of a Model for the Reform of International Investment Dispute Resolution: An Analysis of Existing International and Regional Dispute Settlement Mechanisms in Reshaping the Investor-State Dispute Settlement System*", Journeys for the 21st Century (Koninklijke Brill NV / Nijhoff International Investment Law Series, TDM, OGEMID, Feb 2015) 380; Hildegard Rondón de Sansó Vías sustitutivas del arbitraje internacional de inversión (Alternative ways to international investment Arbitration, Venezuelan Newspaper Quinto Día, 8 June 2012).

<sup>341</sup> TTIP proposes paying the judges a monthly retainer fee in order to ensure their availability; a measure that could be considered.

<sup>342</sup> TTIP proposes a Code of Conduct for the judges (in Annex II to the Proposal) with Article 5 stating that judges "shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or disputing party or fear of criticism."

<sup>343</sup> Johanna Kalb, "Creating an ICSID Appellate Body", (2005)*UCLA Journal of International Law and Foreign Affairs*, 10, 179; Santiago Montt, "State Liability in Investment Treaty Arbitration" (Hart Publishing, 2009)137.

<sup>344</sup> Ten Cate, "International Arbitration and the Ends of Appellate Review", *New York University Journal of International Law and Politics*, Vol. 44 (2012), 1109; Andreas Bucher, "Is There a Need to Establish a Permanent Reviewing Body?", in: Gaillard (ed.), *The Review of International Arbitration Awards* (Juris Publishing, Huntington, 2010), 285; See *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1) paragraph 23; *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru* (ICSID Case No. ARB/03/4) , paragraph 97.

<sup>345</sup> David Gaukroger and Gordon Kathryn, "*Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*", OECD Working Papers on International Investment No. 2012/03, <http://dx.doi.org/10.1787/5k46b1r85j6f-en> (Accessed 30 January 2017) 59.

Fifthly, international investment law in its current state, without a multilateral agreement on substantive protection standards, leaves itself open to inconsistency. Both academics and the business community have criticised the ISDS system for its lack of guidance on the obligations under investment agreements due to unpredictable outcomes and chronic inconsistencies.<sup>346</sup> The creation of a single regional investment agreement in Africa, with a large number of BITs and other IIAs falling under its umbrella (provided the relevant treaty signatories mutually grant consent), plus an appeals body to correct substantively wrong awards, could help bring about the much-needed consistency and standards that could be replicated elsewhere. Furthermore, Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT)<sup>347</sup> provide rules and a method of treaty interpretation tantamount to customary international law.<sup>348</sup> Under the RIC, the first tribunal to interpret a given provision would apply the customary rules of interpretation contained in the VCLT. Subsequent decisions would follow the precedent, but there would still be an application of the rules of interpretation, as authoritatively fixed in the first decision.

Sixthly, another advantage of a multilateral treaty on investment is the facilitation of a rights balance. The treaty would contain obligations on parties to seek mediated solutions and exhaust local remedies, in an effort to resolve disputes faster and at low cost. However, this does not overcome the contention that where mediation or local remedies are not successful, parties would incur additional cost. Furthermore, borrowing from the CCIA and the SADC Model BIT, future IIAs with CFTA Member States would contain public policy objectives in a bid to protect the balance between private and public interests.<sup>349</sup> This would allow tribunals to explicitly refer to those objectives without looking beyond the investment agreement for wider interpretation. However, this cannot be achieved without consistency in treaty interpretation. Tribunals have not always adhered-to binding international rules on interpretation but rather, followed a system of *de facto* precedent which is premised on path dependency and makes it easier to repeat mistakes.<sup>350</sup> In such a system, the balance between private and public interests expressed in the relevant investment treaties may be misinterpreted and even replaced by one created by the tribunals. Thus, placing international dispute settlement in the public sphere could help to achieve a rights balance.

Last but not least, on funding, lessons could be learnt from WTO and its dispute settlement body, both of which rely on contributions (gifts, voluntary contributions and donations) from Member States. The

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<sup>346</sup> William Burke-White and Andreas von Staden, "Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations", (2010) *Yale Journal of International Law*, 35, 283.

<sup>347</sup> Lauge S Poulsen, Jonathan Bonnitcha and Jason W Yackee, "Costs and Benefits of an EU–USA Investment Protection Treaty", report prepared for the Department of Business, Innovation and Skills, April 2013 (LSE) 6.

<sup>348</sup> Ten Cate, "The Costs of Consistency: Precedent in Investment Treaty Arbitration", (2013) *Columbia Journal of Transnational Law*, 51, 418; Steffen Hindelang, "Bilateral Investment Treaties, Custom and a Healthy Investment Climate - The Question of Whether BITs Influence Customary International Law Revisited", (2004) *The Journal of World Investment and Trade*, 5, 789; Christoph Schreuer and Mathew Weiniger, "Conversations Across Cases – Is There a Doctrine of Precedent in Investment Arbitration?" [http://www.univie.ac.at/intlaw/conv\\_across\\_90.pdf](http://www.univie.ac.at/intlaw/conv_across_90.pdf) (21 January 2017) 1.

<sup>349</sup> Suzanne Spears, "The Quest for Policy Space in a new Generation of International Investment Agreements", (2010) *Journal of International Economic Law*, 13, 1037.

<sup>350</sup> Gilbert Guillaume, "The Use of Precedent by International Judges and Arbitrators", (2011) *Journal of International Dispute Settlement*, 2, 5; Thomas Wälde, "Confidential Awards as Precedent in Arbitration: Dynamics and Implication of Award Publication", in: Banifatemi and Gaillard (eds.), *Precedent in International Arbitration Law*, (Juris Publishing, 2008) 113.

fact that financing the permanent tribunals could cost less than the amount paid in terms of fees and costs in international investment arbitrations should sit well with Member States. However, it would be necessary that Member States provide initial funding until the system gains a foothold where it is financially self-sustaining in relation to administration and maintenance costs.

Having examined the operational challenges and features of the proposed RIC, it is clear that for the RIC to survive, reform through consensus and a coordinated African voice is vital. The investment court would be expected to compete, as an alternative, with existing dispute resolution options such as UNCITRAL and ICSID, but over time, the tribunal should gain a reputation of attracting cases. At that stage, after bolstering its reputation, States could consider formally granting consent to submit to the investment court only. Such a coordinated policy on investment protection and dispute resolution is likely to enhance Africa's global competitiveness, strengthen Africa's bargaining power in international investment, and ultimately lead to increased investment on the continent.

### **Conclusion**

Since the end of colonial rule, African countries have pursued policies aimed at improving social-economic development to support their goal of self-determination and economic independence. UNCTAD's statistics clearly indicate that Africa lags far behind Europe and Asia in terms of FDI despite commanding a sizeable share of the global BIT network. There is also an increase in the number of investor-state disputes involving African countries, and on a continent still waking up from a colonial legacy, national regulatory space is important to the goal of self-determination and social-economic development. Despite that, only South Africa has been able to place a critical hand on the system, which raises questions on whether other African countries are oblivious to these issues or fear the reprisal of their powerful State partners. At regional level however, both the SADC Model BIT and the CCIA, show evidence of collective discontent over the status quo, as evidenced by the notable departures from traditional BITs. However, individually, African countries have failed to give these progressive developments the mandate needed to spur change on the continent. This pro-regional approach is also evident in the foregoing plans for a CFTA, creating a union of trading blocs encircling fifty four countries.

A RIC, borne out of the proposal for an investment agreement between CFTA Member States, would aim to balance regional realities while offering investors the necessary protection needed to invest on the continent. The investment agreement would incorporate some of the developmental provisions in the CCIA and the SADC Model BIT, with the support of the RIC. This paradigm shift in international investment policy, if pursued, would set African countries on a path to self-determination in international investment law and creates scope for sustainable social-economic development. The intention is to increase predictability through stable bodies and precedents, transparency through increased disclosure, legitimacy through an appeals mechanism and promotion of regulatory space through a centralised treaty negotiation and drafting process. The success of the investment court would be measured by a number of factors. First, the level of participation of African countries and the number of cases resolved, including the speed at which the cases are resolved. Participation and consent to the jurisdiction of the court by foreign investors from developing countries could also be considered a mark of success given Africa's position in the international economic order. However, for Africa to emerge as a credible investment dispute resolution centre, policy, legal, infrastructural and institutional problems must be overcome. It remains to be seen whether African countries would

accompany South Africa in supporting the new generation of investment policies and effectively engage in the process of creating a RIC for Africa.



# Panel 5:

## View from Outside Africa

**Brief:** This panel will share from the experiences of the panellists a comparative view of the attitude of other states/governments towards arbitration and the resultant effect or impact.

**Chair:** Prof Emmanuel Gaillard, Shearman & Sterling LLP

Ms Smrithi Ramesh, Kuala Lumpur Regional Centre, Malaysia

Mr Duncan Bagshaw, Stephenson Harwood LLP

Mr Steven Finizio, WilmerHale LLP

Ms Alexandra (Xander) Kerr Meise, Georgetown University Law Center

Mr Baiju Vasani, Jones Day LLP

Mr Luis Gonzalez Garcia, Matrix Chambers

Professor Antonio Crivellaro, BonelliErede



**Panel 5**

## Panel 5: Chair



### Professor Emmanuel Gaillard

Emmanuel Gaillard founded and heads Shearman & Sterling's 100-lawyers International Arbitration practice. He has advised and represented companies, States and State-owned entities in hundreds of international arbitrations. He also acts as arbitrator and expert witness. Emmanuel Gaillard is universally regarded as a leading authority and a star practitioner in the fields of both commercial and investment treaty arbitration. A Professor of Law in France currently acting as a Visiting Professor of Law at Yale Law School, Emmanuel Gaillard has been appointed by France on the ICSID Panel of Arbitrators. He regularly acts as expert for the OECD, UNCTAD, and UNCITRAL. In 2010, he was appointed as expert by UNCITRAL for the drafting of the forthcoming UNCITRAL Secretariat Guide on the New York Convention. He chairs the International Arbitration Institute (IAI) and was the first President and one of the co-founders of the International Academy for Arbitration Law.

## Panel 5: Speakers



### Ms Smriti Ramesh

Smriti Ramesh is the Assistant Director and Head of Legal Services at the Kuala Lumpur Regional Centre for Arbitration (KLRCA). At the KLRCA, Smriti supervises and manages the administration of all ADR disputes in KLRCA and is involved actively in developing the legal philosophy and strategy of the Institution. She is also involved in spearheading development projects such as revision of the Arbitration Rules, maritime initiatives and other Alternative Dispute Resolution projects within Malaysia and for the region. She completed her LLB in India and thereafter completed an LLM from the University of California, Berkeley with focus on International Dispute Resolution. Prior to joining the KLRCA, Smriti was practicing in India dealing with a variety of transactional, corporate, domestic and international arbitration disputes. She is also the lead contributor for the book "Law, Practice and Procedure of Arbitration ( Lexis Nexis 2<sup>nd</sup> edn) and an expert contributor for the book " Arbitration in Malaysia ( Reuters).

## Panel 5: Speakers



### Mr Duncan Bagshaw

Duncan is a barrister and a member of the international arbitration and Africa groups at Stephenson Harwood LLP. Duncan specialises in international arbitration and litigation in matters related to African, and global, projects and contracts. He joined Stephenson Harwood after spending three years as the Registrar of the LCIA-MIAC Arbitration Centre in Mauritius. He speaks English and French and works on cases relating to Francophone and Anglophone African jurisdictions. He has been recommended for international commercial dispute resolution in Chambers and Partners and the Legal 500 directories, and was named as a leading international arbitration practitioner under 45 in "Who's Who Legal: Future Leaders 2017".



### Mr Steven Finizio

Mr. Steve Finizio is recognized as one of the leading international arbitration lawyers in London in the *Chambers UK Guide*, named in the *Euromoney Guide to the World's Leading Experts in Commercial Arbitration* and recognized for his standing in the field of international arbitration in *Legal 500*, *Chambers Global*, *Chambers Europe*, *Global Arbitration Review's Who's Who in International Arbitration*, *PLC Which Lawyer?* and Legal Media Group's *The Best of the Best*. Mr. Finizio's practice includes international arbitration and alternative dispute resolution, general commercial litigation, and internal investigations, focusing on complex commercial and regulatory issues. Mr. Finizio also serves as an arbitrator.

## Panel 5: Speakers



### Ms Alexandra (Xander) Kerr Meise

Ms. Meise represents and advises sovereign governments and private entities in preventing and resolving international investment, commercial, public international law, and human rights disputes in domestic, international, and ADR fora, including before arbitration tribunals, other local and international tribunals, the PCA, and the ICJ. She also teaches International Human Rights Law at Georgetown University Law Center and serves as a Fellow of the Columbia Center on Sustainable Investment at Columbia University. Before her legal career, Xander worked in finance and international political development.



### Mr Baiju Vasani

Mr Baiju Vasani is an international arbitration lawyer and arbitrator. He has served as counsel and arbitrator in international arbitrations involving ICSID, ICC, LCIA, ICDR, SIAC, UNCITRAL Rules, bilateral investment treaties (BITs), the Energy Charter Treaty, NAFTA, DR-CFTA, and public international law. He also has advised states on the negotiation and drafting of treaties and companies in investment structuring.



### Mr Luis Gonzalez Garcia

Luis specialises in international law, international trade and international dispute resolution, including investment treaty arbitration, international commercial arbitration and the resolution of state-state trade disputes. Luis has been listed in the Who's Who Legal: Arbitration – Future Leaders 2017. Prior to joining Matrix, Luis worked for ten years at the Office of the General Counsel for International Trade Negotiations of the Government of Mexico. As Deputy General Counsel, he appeared as counsel and lead counsel for Mexico in investment treaty arbitrations under the NAFTA and BITs and legal advisor in the negotiation of the bilateral investment treaties with the United Kingdom, China, India, Spain, Panama, Ukraine and Russia. Luis has been an external consultant to UNCTAD and the Organisation of American States (OAS) on dispute settlement policy matters.

## Panel 5: Speakers



### Professor Antonio Crivellaro

International arbitration, as counsel, arbitrator or chairman, with particular focus on: international contracts (construction contracts, joint venture agreements, concessions, oil and gas contracts, contracts for supply of industrial plants, distribution, agency, sales, share purchase agreements, telecommunications contracts)international trade law in general, international investment law and related disputes. Advice to Italian and foreign companies investing abroad in the erection of industrial plants, construction of civil works, supply of machinery and equipment, construction of infrastructures and the like.

# **Panel 6:**

## **Response from Attorney – Generals & Government Ministers**

**Chair:** Chief Bayo Ojo, ICAMA, Abuja

Mr Mostafa El Bahabety, Egyptian Vice Minister of Justice for Arbitration Affairs

Mr Abubakar Malami, SAN, Attorney-General & Minister of Justice, Nigeria

Prof Githu Muigai, SC, Attorney-General , Kenya



**Panel 6**

## Panel 6: Chair

### Chief Bayo Ojo



Bayo Ojo, Senior Advocate of Nigeria was called to the Nigerian Bar in 1978 and later admitted as a Solicitor in England and Wales. He is a former Attorney General and Minister of Justice of Nigeria, during which time he initiated key reforms in the justice sector. He is a past President of the Nigerian Bar Association and past Chairman of the Chartered Institute of Arbitrators Nigeria Branch. He is a member of the Board of Trustees of the Chartered Institute of Arbitrators, London, former member of the ICSID Panel of Arbitrators, Washington, the Permanent Court of Arbitration, Hague and the United Nations International Law Commission in Geneva. He is currently the President of the African Users' Council of LCIA and Alternate Chairperson of the UNESCO Appeals Board in Paris. He is a Chartered Arbitrator who has acted as counsel, sole arbitrator and member of panel in numerous domestic and international commercial arbitrations.

## Panel 6: Speakers

### Judge Mostafa El Bahabety



Judge Elbahabety is currently deputy Minister of Justice for Arbitration and international disputes and head of the Technical secretariat in both, the High Committee International Arbitration and the Ministerial Committee for Settlement of Investment Contract's Disputes in Egypt. He is a court member of the International court of arbitration at the International Chamber of Commerce since 2005 on behalf Egypt.Judge Elbahabety succeeded in the settlement of many international Arbitration disputes on behalf of the Egyptian government, in addition to representing Egypt in cases held before the ICSID.He presided and was member at numerous arbitration panels in private arbitration disputes. He Conducted a lot of research and attended many courses and conferences in the field of arbitration. He started his career as a public prosecutor and promoted to be a chief prosecutor at the supreme public assets prosecution then moved to the judiciary and worked as judge at the court of first instance till he became a chief justice at the court of appeals.Judge Bahabety holds a post graduate degree in Public law, economic and finance from Ain Shams University.

## Panel 6: Speakers



### Mr Abubakar Malami

Mr Abubakar Malami, SAN was sworn in as the Minister for Justice and Attorney-General of the Federation (AGF). In 2014, Malami contested for the governorship ticket of the All Progressives Congress (APC) in Kebbi state but lost to Mr Atiku Bagudu who is now the incumbent governor of the state. Abubakar Malami was conferred with the distinguished rank of the Senior Advocate of Nigeria (SAN) in 2008, about 16 years after he was called to the Nigerian Bar. At 48, he is also presently the youngest member of the federal executive council. Mr Malami, SAN will now have the onerous task of reforming Nigeria's legal system to ensure justice for all and sundry, regardless of their standing in the society.



### Hon. Professor Githu Muigai

Prof. Githu Muigai is the Attorney General of the Republic of Kenya from 2011. Prior to becoming Attorney General, Prof. Githu Muigai served in the defunct Constitution of Kenya Review Commission and at the United Nations as Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance. Prof. Githu Muigai was an associate professor of public law at the University Of Nairobi School Of Law. He also serves as a managing partner in the Kenyan law firm of Mohammed Muigai Advocates, where he specializes in commercial litigation and arbitration, as well as in constitutional and administrative law. Prof. Githu Muigai is a lawyer, Associate Professor at the University of Nairobi. He is currently on leave of Absence in order to serve as the AG. He has researched and published extensively in the areas of international law, constitutional law and human rights and has previously worked as a consultant to various international organizations, including the African Union, UNDP, the World Bank and the ICRC. Hon, Prof. Githu Muigai assumed office 27 August 2011 as the Attorney General of the Republic of Kenya. The Attorney General is the Principal Legal Adviser to Government of the Republic of Kenya.

## Rapporteurs

### Dr Jean-Alain Penda



Dr. Jean Alain Penda, Independent Consultant at Price Waterhouse Coopers LLP, London, United Kingdom and OHADAC Project Manager, headquarters in the French West Indies. He is a Director at the Foundation for a Unified System of Business Law (FUBLA) and a regular consultant for the Association for the Unification of Business Law in Africa (UNIDA) and ACP Legal, both which are non-governmental organisations promoting legal integration in Africa and the Caribbean. Author of several articles on OHADA law, Jean Alain Penda is regularly invited to speak at conferences and represents its association in most events worldwide.

### Dr Councillor Ndudi Olokotor



Dr Councillor Ndudi Olokotor is a Barrister and Solicitor of the Supreme Court of Nigeria. He holds a Bachelor of Laws (LL.B) degree from the University of Benin, Nigeria and, a Master of Laws (LL.M) degree from the University of Glamorgan (now University of South Wales), United Kingdom. In 2012, Prince was appointed a research assistant at SOAS, University of London for a research project on: "The Multi-door Court House (MDC) Scheme in Nigeria – A Case Study of the Lagos MDC". He recently completed his PhD research, on the recognition and enforcement of transnational commercial arbitral awards in England and Nigeria, at SOAS, University of London.



## Report

### Dr Jean-Alain Penda Matipe and Dr Prince Olokotor

The conference started with a welcome reception on the evening of 3 April sponsored by WilmerHale LLP.

#### DAY I

##### Welcome addresses

The conference started with a warm welcome address by **Dr Ismail Selim**, Director of the Cairo Regional Centre for International Commercial Arbitration (CRCICA). Dr Selim introduced the institution and identified the need for the conference to be used as a tool to build bridges and demolish artificial walls by African arbitral institutions connecting and collaborating with each other irrespective of their location and language.

This message was reiterated by the next speaker, **Dr Nabil El Araby**, President of the Board of Trustees of CRCICA. Dr El Araby focused his comments on state-to-state arbitration in boundary disputes in Africa; with a recommendation to African governments to enforce arbitral awards made by arbitrators to whom they have submitted themselves and their disputes.

**Ambassador Mahmoud Nayel**, Egyptian Minister of Foreign Affairs, in his speech, identified Egypt as an arbitration-friendly jurisdiction. He noted that this is an important contributing factor, not only for business and the legal system in Egypt, but also as a tool to form new ties and foster cooperation on the continent.

In her welcome address, **Dr Emilia Onyema** gave an overview of the research project that led to the series of SOAS Arbitration in Africa conferences; introduced the purpose and objectives of the Cairo conference as articulated in the Discussion Paper. She challenged the attendees to join forces to develop the law and practice of arbitration on the continent and promotion of Africans in arbitration. She also mentioned some of the outcomes of these conference series which included the list of arbitration institutions operating in Africa and the book published by Kluwer, *The Transformation of Arbitration in Africa: the Role of Arbitral Institutions*, which will be launched later this evening.

This was followed by the keynote address by **Judge Mohammad Amin El Mahdi**, the Vice President of CRCICA Board of Trustees. Dr Mahdi noted that Africa is the future and we that are in the present should stand for the future we seek for Africa. On foreign direct investment, Dr Mahdi noted that we need more than one method resolving disputes. We cannot therefore only recommend arbitration (even with all its advantages) as the only method for resolving such disputes at the expense of the courts and judiciary. He noted that we need both effective arbitrations and judiciaries since both processes are interlinked. He discussed two examples: (1) of countries that changed their penal code to provide for the imprisonment of arbitrators that lack impartiality. In this situation, he noted that the arbitrator, being a human being, may make mistakes and asked who should decide the issue. (2) is inappropriate judicial intervention in the arbitral process by empowering judges to impose criminal penalties on arbitrators who make an award in the absence of an arbitration agreement. On this, he concluded that support of arbitration is not a goal in itself but supporting its elements to improve the (foreign and domestic) investment climate. Finally, he noted that arbitral institutions need to be

independent of the state/government. Using CRCICA as a model, he advocated for the establishment of sub-regional arbitral institutions as one solution to the threat of interference from states/governments. He concluded by stating that he “sees a prosperous Africa that embraces development; that is safe and peaceful”.

The first panel discussions gathered the following regional arbitration institutions: LCIA-MIAC (Mauritius), AFSA/CAJAC (South Africa), Ghana Arbitration Centre (West Africa), Kigali International Arbitration Centre (East Africa), CRCICA in Egypt and Casablanca International Mediation and Arbitration Centre (CIMAC) in Morocco (North Africa). This panel was chaired by **Ms Alexandra Meise**. After an overview presentation from the previous discussion held at the Lagos conference, the speakers went on to describe their current activities and the concrete support given, or not, by their respective governments in support of arbitration.

**Dr Dalia Hussein** of **CRCICA**, on their recent activities, discussed the set up of the Advisory Committee for collegial decision making on important matters such as arbitrator challenge. She also mentioned CRCICA’s Practice Notes on the basis of the arbitrator challenges; and publication of summaries of awards made under CRCICA for public availability in Arabic with English translations in the works; and their activities to promote diversity of their arbitrators by widening their pool of arbitrators. She also disclosed that in the future they will publish a Practice Note on their initial decision on whether or not to accept a reference. Mr Hicham Zegrary of **CIMAC** noted that CIMAC is part of the Moroccan Financial Centre Initiative of the Moroccan government. The Centre was launched in 2010 and enjoys strong support of the Moroccan government and the King of Morocco. It will launch its new arbitration rules (of 2017) in November and it is developing itself as a hub for arbitration in the region.

The Kigali International Arbitration Centre shared data on the increase of its caseload which has led to the appointment of a higher number of arbitrators. The institution is presently engaging more in marketing its services and partnerships with other arbitration institutions. **Dr Fidele Masengo** acknowledged the support **KIAC** received from the Rwandan government such as facilities related to accessibility and security, the country’s international reputation in the ease of doing business rankings, state leadership and the country’s pro-arbitration regime. He noted that KIAC has now administered 55 cases (with 13 of these international). In the same fashion **Ms Ndanga Kamau** noted the support of the Mauritian government for **LCIA-MIAC** and the wider government initiative of promoting Mauritius as a hub for international business in Africa. She noted that the Centre has administered one adhoc arbitration and one mediation; and continues to conduct trainings. She also disclosed that Mauritius is exploring ways of better engaging with the rest of Africa and making itself more relevant in and to the continent. **Mr Kizito Beyuo** noted that the Ghana Arbitration Centre (**GAC**) is a private initiative without any form of support from the government of Ghana though such support will be welcomed and will help the GAC extend its services and training initiatives. He disclosed that the GAC since June 2015, has organised one arbitration conference, one workshop and launched its Distinguished African Arbitrator Speaker series.

**Ms Deline Beukes** discussed the recent **CAJAC** project (an African-Chinese joint arbitration institution). CAJAC now has a panel of 20 arbitrators from South Africa and 20 arbitrators from China. It has expanded to include institutions in Beijing and Shenzhen in China and Nairobi. They also provide training in arbitration in collaboration with the University of Pretoria; and the long awaited South African International Arbitration Bill has now been published. This partnership is inviting other

institutions in Africa to participate with the expectation that more arbitration institutions across the continent will join the partnership. The institution administers arbitration for disputes emanating from African-Chinese business relationships. Ms Beukes pointed to the inexistence of efforts by the South African government in supporting the partnership initiative, with the hope that the bill presently in parliament will soon pass and that the Johannesburg Action Plan will be honoured and implemented. The entire panel recognised the efforts by the institutions to work and publish in more than one language of the continent. At the question and answer session, the panel rejected the idea of government interference in arbitration institution affairs after receiving their support, but instead recommended that more support be given to help jurisdictions become more efficient arbitration-friendly environments.

**The second panel** was chaired by Judge **Edward Torgbor** and was composed of Ms Maryan Hassan (Somalia), Dr Tunde Ajibade (Nigeria), Dr Nagla Nassar (Egypt), Dr Gaston Kenfack (Cameroon), Prof. David Butler (South Africa) and Mr Bakri Mohammed Abakar (Sudan).

**Professor David Butler** opened the panel discussion by describing the South African (SA) legislative and executive trend in creating a legal environment for arbitration. On the new SA arbitration bill, Prof. Butler noted some peculiarities, for instance, those related to confidentiality where arbitration will systematically be held in public whenever a government agency is involved and kept confidential when it concerns two commercial parties. The new law provides for arbitrator immunity, and also fully implements the New York Convention (1958).

**Dr Tunde Ajibade** brought a practitioner's perspective which basically aimed at encouraging states to help expand arbitration because it takes away the majority of legal costs for private parties; promotes local bar association members and the country's business climate; creates job opportunities and is a direct source of revenue for the country given the impact on tourism and business activities. Dr Ajibade later suggested that the conference should provide benefit-related statistics of arbitration to cities such as London, Paris, Hong Kong and New York to make an economic case to African governments to support arbitration.

**Ms Maryan Hassan** shared her experience as assistant to the government of Somalia in helping them rebuild their legal infrastructure post conflict and the impact of young western-educated returnees and how they can influence the thinking of their governments. **Dr Nagla Nassar** shared from her experience as a legal practitioner both in Egypt and for the World Bank. She gave an overview of the arbitration development trend in Egypt, followed by examples of direct and indirect efforts of the Egyptian government to achieve a pro-arbitration initiative conducive to a stable business environment, a modern legal environment and, therefore, a prosperous economy.

**Dr Gaston Kenfack Douajni**, discussed the position in the OHADA member-states, whose Uniform Act of Arbitration can be said to be a modern arbitration regime. He then delivered a brief and accurate description of the OHADA arbitration regime. Despite the state's pro-arbitration regime, Dr Douajni made it clear that arbitration nevertheless remains the only OHADA subject area lagging behind in terms of capacity development and training both of judges and legal practitioners.

**Mr Bakri Mohammed Abakar** closed this panel discussion with a thorough description of the Sudanese arbitration regime and the support from the government, particularly the legislative branch. The

Sudanese government is presently undertaking progressive reform and change on several levels by reviewing, for instance, international treaties and conventions which need to be equipped with the necessary instruments to modernize the country's arbitration regime, among other things.

Day 1 closed with the launch (and a drink reception) of the recently published edited collection, *The Transformation of Arbitration in Africa: the Role of Arbitral Institutions*, (2016) published by Kluwer Law International. This collection was from the Addis Ababa conference and was edited by Dr Emilia Onyema.

## DAY 2

The day started with an announcement that as a result of the challenge from Dr Onyema to delegates to consider what they can do to support the development of arbitration in Africa, Dr Nagla Nasser offered to host an arbitration graduate for a period of internship in her firm NasserLaw, in the summer in Cairo. Dr Onyema gave our appreciations to Dr Nagla Nasser and promised to announce the offer for selection.

**The 3rd panel** was a roundtable discussion on the engagement of with United Nations Commission on International Trade Law (UNCITRAL) with Africa. **Dr Emilia Onyema** moderated the discussions with Dr Gaston Kenfack Douajni, Mr Timothy Lemay, Dr Mohammed Abdel Raouf, Mrs Doyin Rhodes-Vivour, Dr Kennedy Gastorn and Mr Jonathan Ripley-Evans as panellists. The key questions the panel examined were: how can UNCITRAL better engage with arbitration practitioners in Africa? and is it desirable for African States to engage with UNCITRAL and adopt their arbitration texts?

**Mr Timothy Lemay** started the discussion by briefly outlying what UNCITRAL does, its rules and how African arbitrators can engage with UNCITRAL. He noted that UNCITRAL is made up of 60 member states of which 14 are African countries. Arbitration and dispute resolution is one of the many subjects that UNCITRAL deal with in the sphere of private international law. He then gave some statistics on the adoption of the Model Law and New York Convention (1958). To this end, Mr Lemay made a case for African countries to engage more with UNCITRAL in respect of arbitration legislations. He also noted that UNCITRAL has ways of assisting states, including but not limited to maintaining a body of case law as a global reference to support uniform interpretation and application of UNCITRAL instruments (CLOUT). Unfortunately, he said that, only a small number of those judgments are from African jurisdictions, hence the need for Africa to engage more with UNCITRAL was further stressed. Finally, Mr Lemay noted that UNCITRAL provides technical assistance to states in terms of, but not limited to, reviewing draft legislation, assistance with drafting legislation, treaty ratification and treaty adoption.

**Dr Gaston Kenfack Douajni** commented on the issue of UNCITRAL engaging with African States. He stated that though 14 African States are members of the current composition of UNCITRAL, more needs to be done by African States if Africa is to take its rightful place in international arbitration. Hence, he called on African states to make provisions for delegates to attend the working group sessions of UNCITRAL to bridge the gap of Africa's under-representation in UNCITRAL activities. However, he stated that African's lack of presence has not limited UNCITRAL from engaging with African States. He noted that presently, UNCITRAL has concluded a collaboration agreement with

OHADA aimed at sharing expertise with OHADA in international trade law sphere. Further to that, he also stated that UNCITRAL has decided to create a regional centre/office in Africa as it did in Asia (Korea).

**For Mrs Doyin Rhodes-Vivour**, the UN and its specialised agencies have made some remarkable progress in terms of capacity building in Africa. She recounted how the UN and its specialised agencies, like UNCITRAL and United Nations Centre for Transnational Corporations provided trainings for African arbitrators in order to narrow any knowledge gap in the field of international trade and investment law. However, she questioned what African States with such trained arbitrators have done to improve arbitration regimes in Africa. She identified the lack of political will by various African States and governments as a problem limiting economic development. Mrs Rhodes-Vivour then stated that the way forward is for African governments to appreciate the relationship between economic development and effective means of dispute resolution. To this end, she urged African States and governments to improve their infrastructures and security concerns in order to attract African arbitration to be conducted in Africa. Finally, she made a case for African arbitration institutions to start African arbitration moot as a means of transferring necessary arbitrator skills to young African arbitrators.

**Dr Mohammed Abdel Raouf**, the former director of CRCICA, shared his experiences with regards to arbitration institutions applying UNCITRAL Rules. According to him, at least 8 arbitral institutions in Africa have their rules based on the UNCITRAL Rules. He remarked that the advantages of having an institutional arbitral rules based on UNCITRAL Rules ranges from wider scope of party autonomy to flexibility of the conduct of arbitral proceedings. He added that the UNCITRAL Rules have contributed to the creation of a more favourable climate for amicable dispute resolution because the Rules promote respect for the legitimate expectation of the parties, the award. On the issue of how UNCITRAL can engage with African arbitration practitioners, Dr Raouf proposed that there should be a dialogue between UNCITRAL and African arbitrators, with SOAS as moderator, to share knowledge, and consolidate on their gains. Finally, he also proposed a mentoring programme between UNCITRAL and young African arbitrators to be administered by arbitration institutions in Africa.

**Prof (Dr) Kennedy Gastorn** discussion centred on the activities of the Asian-African Legal Consultative Organisation (AALCO) from an African context. He noted that AALCO is an inter-governmental organisation, with 47 member states across Asia and Africa, with headquarters in New Delhi, India. In terms of activities, he said that AALCO is an external adviser on matters of international law to its member states. Prof Gastorn also stated that AALCO is a platform where matters of common concerns are discussed and communicated to the UN, particularly through the International Law Commission. He further said that through the efforts of AALCO, Afro-Asia concerns are promoted in international law making. He also remarked that the participation of African States is barely present in many international law making bodies. He stated that given the wide range of powers vested on AALCO, it deals with a lot of issues ranging from human rights to business law, arbitration matters inclusive. He noted that the work of UNCITRAL in the field of international trade law, is one of the mandates of AALCO. He also hinted that through engagements with UNCITRAL, AALCO was instrumental in the establishment of regional arbitration centres, like CRCICA and LRCICA. Prof Gastorn then posed the question: "what can these regional arbitration centres do to promote arbitration as an effective way of resolving disputes in Africa?" He concluded by proposing that the regional arbitration centres

should engage and negotiate with multilateral organisations like UNCITRAL to promote arbitration in Africa.

**Mr Jonathan Ripley-Evans** discussed the experience of South Africa in adopting the UNCITRAL Model Law in its new arbitration bill. He noted that if Africa wants to be regarded as a Model Law continent, it needs to be an obvious Model Law continent by adopting the Model Law substantially. Thus he concluded that if African States adopt the Model Law as its sine qua non for international commercial arbitration, the advantages of the UNCITRAL Model Law will attract and promote African States as viable seats for international arbitration.

**Panel 4** examined the legal environment for investment arbitration in Africa. It was chaired by **Ms Rose Rameau** while Mr Tsegaye Laurendeau, Ms Rukia Baruti, Dr Chrisspas Nyombi, Mr Ike Ehiribe, Prof (Dr) Walid Ben Hamida, Dr Jimmy Kodo and Mr Jimmy Muyanja were panellists. The discussions by the speakers focussed on the legal regime for investment arbitration in Africa. This question was approached from the context of the World Bank ease of doing business rankings, the environment for investment and the engagement of African States in investment arbitration. The Chair remarked that the laws regarding the legal environment for investment arbitration in Africa are fragmented. She called on African states to form a common bloc with regards to investment agreements and arbitration laws that will promote the use of African arbitrators and African States as arbitration seats.

**Mr Tsegaye Laurendeau's** presentation focused on 'state-owned enterprises (SOEs) as a tool for African States to engage with and promote the use of arbitration'. He asserted that SOEs are better placed to drive economic growth in Africa because they have direct access to the State, particularly the executive branch of government. He cited Eskom as one of the biggest SOEs in the world, Ethiopian Electric Power which sits on 45,000 megawatts of just hydropower as examples. To this end, Mr Laurendeau reasoned that African SOEs are agents for promoting the use of and Africanising arbitration. This according to him gives African States a further fundamental tool to effect change in Africa.

**Ms Rukia Baruti's** presentation, 'Shaping Investment Arbitration: The Experience of COMESA and SADC', considered the role of African States in shaping the development of international investment arbitration in Africa. Ms She discussed how Member States of the Common Market for Southern and Eastern Africa (COMESA) and Southern African Development Community (SADC) have responded to the issues of arbitral practice in investment treaties. She reviewed the development of international investment arbitration and the experiences of COMESA and the SADC Member States with investment arbitration. Ms Baruti concluded by suggesting that investment arbitration developed in response to the need to protect foreign investors and their investments and not the States. This protection according to her was achieved by establishing ICSID to provide an effective forum for the resolution of investor-state disputes. Furthermore, she asserted that ICSID have not been favourable to COMESA and SADC Member States who have had to defend a relatively high percentage of ICSID arbitrations. In response to the failings of BITs as a tool for attracting FDI and the need to prevent the rise of investment arbitration claims, Ms Baruti posited that COMESA and SADC members concluded regional investment instruments which demonstrates the changing role of African States in international investment regime from mere observers to participants keen on shaping and developing African investment arbitration.

**Dr Chrispas Nyombi's** paper considered "A case for a Regional Investment Court (RIC) for Africa". Dr Nyombi stated that since the end of colonial rule in Africa, African States have sought self-determination, both on national and international spheres. However, their involvement in the international economic order has been, according to him, at best, abysmal. He remarked that in a recent wave of international investment laws, progressive steps have been put in place in Asia, the Latin American States have denounced the Investor-State dispute resolution mechanism, at least to a large measure, while the European Union is working towards establishing an investment court system. He contended that save, South Africa, African States have been largely unmindful to these international investment policy changes. He further stated that Africa's economic aspirations cannot be achieved through inaction, instead by developmental actions which seek to attract Foreign Direct Investment (FDI) and at the same time preserve domestic regulatory spaces. However, he conceded that: (i) Africa has already embraced the new generation of trade and investment policies that strike a balance between investors' interests and domestic public policy, (ii) Africa is also undergoing a process of regionalisation in an effort to promote greater economic collaboration and synchronisation in trade and investment. He cited the African Union's effort for a Continental Free Trade Area as example. After a review of issues ranging from the investment landscape in Africa to African participation in Investor-State Dispute Settlement system, Dr Nyombi suggested that the regional integration and regulatory harmonisation at regional level created a unique opportunity for the establishment of a Regional Investment Court (RIC). After assessing contending reform proposals, Dr Nyombi made a case for RIC as the way forward, stating that RIC serves Africa's current social-economic developmental aspirations particularly now that institutions of international investment law are under increased scrutiny.

Mr Ike Ehiribe presented a paper titled, "The Legal Environments for Investment Arbitration in African States: Identifying and Circumventing Investor Misconduct". Mr Ehiribe's presentation examined the lessons from the jurisprudence of investment treaty cases arising from African States. His discussion focussed on the kind of practices African States and Arbitrators should avoid or embrace for purposes of sustaining attraction of FDI into African States. He gave a judicial definition of investor's misconduct citing Gustav FW Hamester GmbH Co KG v Republic of Ghana, ICSID Case No ARB/07/24, Award dated 18 June 2010, where the arbitrators identified 6 main investor misconducts or investor wrongdoings. The first is lack of good faith, second is corruption, third is fraud, fourth is deceitful conduct, fifth is misuse of the system of investment protection, and lastly violation of the host State law. According to Mr Ehiribe, African States must avoid any investor that engages in any of the 6 identified misconducts, because Africa and its people are the victims that suffer the consequences of such bad practices. He concluded that not only will Africa and its people suffer the effect of such wrong-doing, it also demeans the States as incapable of good governance. With regard to what should be done going forward, Mr Ehiribe proposed that those who advise investors and in-house counsel for host States should be trained on how to identify and stop investors that are likely to engage in investment misconduct from investing in any African State. To this end, he stated that the ICC Guidelines of Agents, Intermediaries and other Third Parties published in 2010 will serve a useful purpose for identifying investors that have tendencies described as investors' misconducts.

**Dr Jimmy Kodo's** presentation focused on OHADA Member States as parties to arbitral proceedings and the examination of the legal framework of the OHADA Member States. With respect to the former, Dr Kodo provided and discussed available statistics relating to arbitral proceedings involving OHADA

Member States, while in the later, he examined OHADA arbitration legal framework. Dr Kodo said that between 2006 and 2015, there were more than 74 arbitration cases conducted under the OHADA arbitration regime. He noted that OHADA arbitration is in two fold; the institutional arbitration which is regulated by the OHADA treaty itself and the general arbitration which is governed by the Uniform Act on Arbitration. He further stated that majority of the arbitration cases, were institutional arbitration. For the claimants, 20 cases were from OHADA non-Member States while 59 cases were from OHADA Member State countries. For the respondent, 7 cases were from non-OHADA Member countries. Regarding arbitral awards, Dr Kodo stated that in 2015, 43 awards were rendered under the OHADA arbitration instrument. 10 cases were withdrawn by the parties themselves and in 12 cases, arbitrators found that they lacked jurisdiction. In 6 cases, arbitrators did not proceed with the arbitration because of lack of payment by the parties. With respect to party appointed arbitrators, 31 arbitrators were appointed from non-OHADA States and 90 from OHADA States. For arbitrators appointed by OHADA Common Court of Justice and Arbitration, 7 were from non-OHADA States and 18 were from OHADA Member States. For annulment cases, the court rejected about 64.4% of setting aside applications, annulled about 24.5% arbitral awards and remitted about 11% cases to the arbitrators. On the issue of conducting investment arbitration under the current OHADA arbitration framework, Dr Kodo was positive the treaty covers this. He concluded that arbitration under the OHADA framework is efficient and friendly.

**Mr Jimmy Muyanja's** presentation was on the submission clause in the arbitration agreement. He discussed investment arbitration from the viewpoint of Uganda. He also examined the Ugandan State contracting process and the impact it has on investment arbitration. Mr Muyanja identified the issue of State (in)capacity as a major problem when it comes to the Ugandan State entering into investment arbitration contract with foreign investors. According to him, because Uganda is not a party to the Vienna Convention on the Law of Traeties, the question of determining State (in)capacity to contract BITs is a constitutional matter in Uganda. He stated that by the Uganda constitution, the mandate to negotiate any agreement which binds the Republic of Uganda is vested in the President of Uganda or a person appointed by the President for that purpose. Mr Muyanja further stated that the 1995 Constitution vested the ratification power of any such agreement on the parliament, or the Attorney General's office, or the cabinet. According to him therefore, the impact of the contracting process is problematic, because there are scarcely any BITs that has been ratified by the authorities designated to do so. He then concluded by suggesting two solutions. First, is for the Ugandan government to review all its current BITs; and secondly, foreign investors should conduct due diligence check to ensure that the State has the capacity to contract BITs.

**Prof. (Dr) Walid Ben Hamida's** discussion focused on investor-state arbitration under the Organisation of Islamic Conference (OIC). He examined the difficulties foreign investors face in initiating arbitration under the OIC instruments. After reviewing the structure and some instruments of the OIC, Prof (Dr) Hamida narrowed his discussion to the Islamic Agreement on Investment (IAI), an instrument created by the OIC for investment protection and investment dispute resolution within its Member States. According to him, one of the problems of the IAI is that it provides for ad hoc arbitration, which sometimes makes it difficult if not impossible for the constitution of arbitrators. Thus, he concluded by suggesting that arbitration under the IAI should be institutional for ease of appointment of arbitrators.

**Panel 5** gathered arbitration practitioners from outside Africa. Members of the panel shared their experiences from a comparative perspective of the attitude of non-African States and governments towards arbitration. The panel was chaired by **Prof Emmanuel Gaillard** and the speakers were Ms Smriti Ramesh, Mr Duncan Bagshaw, Mr Steven Finizio, Ms Alexandra (Xander) Kerr Meise, Mr Baiju Vasani, Mr Luis Gonzalez Garcia and Prof. Antonio Crivellaro.

**Mr Luis Gonzalez Garcia** discussion gave an overview of arbitration frameworks in Central America, Latin America and South America. He discussed various State government efforts in supporting arbitration in those regions. Mr Garcia said that most of the countries in the regions have adopted and modernised their arbitration laws in accordance with the UNCITRAL Model Law 2006. One of the outcomes of such modernisation, he said, is the creation of arbitration courts, and in order to promote arbitration in the regions they have also legislated to include arbitration clauses in public contracts.

**Prof Antonio Crivellaro** shared his experiences of governments' support of arbitration or otherwise from an Italian perspective. After a brief review of arbitration framework in Italy, Prof Crivellaro stated that before 2006, investors had genuine perception of some legal and technical problems regarding the Italian arbitration regime. Nonetheless, the situation has changed considerably after the country reformed its arbitration law in 2006, Prof Crivellaro remarked. He concluded that the court's attitude towards arbitration has also changed significantly, citing as example that between 2005 to 2012, the Milan Court of Appeal heard 38 applications for recognition and enforcement of international arbitral awards, out of which 35 applications were granted, while 3 were refused.

**Ms Alexandra (Xander) Kerr Meise** shared her experience of government support of international arbitration from a United States of America (US) and North American perspectives. She discussed the current US government reform positions on Investor-State Dispute System (ISDS), North American Free Trade Agreement (NAFTA) and the issue of the State protecting its sovereignty. Ms Meise said that though it is still early to determine whether the US President will keep his election promises of denouncing some investment treaties and trade agreements like NAFTA, it seems the US government is stepping back on those promises. However, she said that what may come out from those promises might be a reform of the treaties and ISDS in line with global concerns of those trade and investment instruments, which is not likely to affect the use of arbitration as a dispute resolution tool in the US.

**Ms Smriti Ramesh** related her experiences on the role arbitral institutions play in bringing about change in Kuala Lumpur jurisdiction, in particular, and in Asia, in general. She said that a lot of the positive changes that came about in the Asian arbitration spectrum was because of the role of the arbitral institutions in the region. Citing Kuala Lumpur Regional Centre for Arbitration (KLRCA) as example, she stated that up to 2010, KLRCA had only 22 cases from its establishment in 1978. However, she said that all that changed from 2010 noting that between 2010 and 2016, KLRCA had about 618 cases. She further stated that this happened because of the focus of the KLRCA on the local needs of arbitration users. Ms Ramesh pointed out 3 innovations that brought about the rapid change in the use of arbitration by domestic investors and traders in the region; (i) harmonisation of domestic and international arbitration principles, (ii) engaging with domestic arbitration users to provide solutions to their concerns, and (iii) the need to legitimise arbitral institutions, whether they are set up by government or not. By legitimacy, she said it means the institutions being independent and neutral from those that set them up. She also mentioned capacity building of domestic arbitrators as key to the KLRCA success.

**Mr Duncan Bagshaw** shared his experience as counsel in the recognition and enforcement of international arbitral awards from an English perspective. He stated that the issue of enforcement of awards in England is important in the context of the theme of the conference. According to him, many African awards from African States are usually sought to be enforced in England, or many African States or companies are usually the respondent in enforcement proceedings in England. Citing the case of NNPC v IPCO, Mr Bagshaw said that the question of principle that calls for determination would be: at what point, if ever, should the courts of the jurisdiction where enforcement is sought seek to impose its views on matters that should be properly resolved at the seat, when it is an African seat, in an African case, by African arbitrators applying African law. He stated that the English courts are quite indulgent on such matters, but will in cause of waiting very often order that security should be given either in full or in part under article VI of the NYC. He concluded by questioning whether such practice is right, if yes, where should the court draw the line to balance the interest of the parties.

**Mr Baiju Vasani's** discussion focused on the appointment of African arbitrators. According to him, nearly 25% of ICSID cases have African parties, yet the number of African arbitrators with African passports appointed by parties in those cases is only 5%. Again he said that parties to ICC arbitrations between 2014 and 2015 appointed less than 1% of African arbitrators even when many of those cases involved African parties. He therefore remarked that such trend is unacceptable and thus questioned the objective legitimacy of international arbitration. Mr Vasani then suggested (borrowed from Jan Paulsson) that to fix the anomaly, appointment of arbitrators should be done by institutions rather than by the disputing parties. According to him, this is because parties in appointing arbitrators in cases involving African States or companies usually consider prejudices, like African and non-African, old and young, weak and young or even colour. On the contrary, Mr Vasani said that these prejudices are at least inconsequential or non-existent in institutional appointments of arbitrators. He cited the ICSID annulment committee which is done by the Secretary-General as a model to copy.

**Mr Steven Finizio** focused on developing capacity and shared from the perspective of the USA where the civil justice reform offered ADR in place of litigation, especially in small claims. In addition, was the ADR Act (USA) which forced government agencies to use ADR. He supported the view of Gary Born for bilateral arbitration treaties between states.

**Panel 6** was chaired by **Bajo Ojo** who moderated Mr Mostafa El Bahabety, Egyptian Vice-Minister of Justice for Arbitration Affairs, and the only present panellist. Chief Bajo introduced the panellist and extended the words of regret from absentees.

**Mr Mostafa El Bahabety** described his role in the government, what the government is doing to support arbitration and the CRCICA activities. He made it clear that his department is continuously working to ensuring Egypt's Arbitration Law provide a relatively straightforward and easy to use framework for arbitration in Egypt, which is enacted based on international standards contained in the UNCITRAL Model Law of International Commercial Arbitration. This effort is bearing fruit as Egypt is increasingly used as venue. He shared the steps taken by the Egyptian government, for instance, the Investment Dispute Settlement Ministerial Committee presided by the Minister of Justice was set up since the Arab revolution to ensure effective and efficient arbitration system. This most recent committee is competent to negotiate amicable settlements for disputes arising out of investment contracts to which the government or an affiliated (public or private) government entity are parties. Thus, the 2011 revolution have motivated the Egyptian government to constitute more flexible and

expeditious fora for settling investor-state disputes. As a factual example, the economic difficulties that Egypt has encountered since 2011 have rendered Egypt more susceptible to international claims before the ICSID.

During the Q and A, Mr Mostafa El Bahabety admitted that efforts on the side of the government are needed for an Egyptian arbitrator to be appointed whenever there is a dispute involving the government of Egypt. He also admitted that there is a proliferation of arbitration institutions in Egypt with most, unlawfully operating or unregistered. He confirms that CRCICA is the main and official arbitral centre in Egypt and endorsed by its government.

The day and conference concluded with a closing dinner sponsored by ICAMA (Abuja) which was very well attended.

The 2018 SOAS Arbitration in Africa conference will be hosted by the Kigali International Arbitration Centre (KIAC) from 14 to 16 May 2018 in Kigali.

END

# **Appendix**

## **(List of Tables)**



## Appendix

**Table 1: African Countries: Status of Arbitration Laws and Conventions**

No	Country	National Legislation	New York Convention	ICSID Convention
1	Algeria	Arbitration Law No 08-09, 2008	8 May 1989	22 March 1996
2	Angola	Voluntary Arbitration Law 2003	12 August 2016	-
3	Benin Republic	OHADA UAA	14 Aug 1974	14 Oct 1966
4	Botswana	Arbitration Act, 1959	19 Mar 1972	14 Feb 1970
5	Burkina Faso	OHADA UAA	21 June 1987	14 Oct 1966
6	Burundi	Civil Procedure Code 2004	21 Sept 2014	5 Dec 1969
7	Cameroon	OHADA UAA	19 May 1988	2 Feb 1967
8	Cape Verde	Arbitration Law of 2005	-	26 Jan 2011
9	Central Africa Republic	OHADA UAA	13 Jan 1963	14 Oct 1966
10	Chad	OHADA UAA	-	14 Oct 1966
11	Comoros	OHADA UAA	27 July 2015	7 Dec 1978
12	Congo, Republic of	OHADA UAA	-	14 Oct 1966
13	Cote d'Ivoire	OHADA UAA	2 May 1991	14 Oct 1966
14	Democratic Republic of Congo	OHADA UAA	3 Feb 2015	29 May 1970
15	Djibouti	Code of International Arbitration 1984	27 June 1977	-
16	Egypt	Arbitration Law 1994 (amended 1997)	7 June 1959	2 June 1972
17	Eritrea	Book IV, Civil Procedure Code 1965	-	Signed 21 Sept 1965
18	Ethiopia	Civil Procedure Code of 1991	-	Signed 21 Sept 1965
19	Equatorial Guinea	OHADA UAA	-	19 Nov 1978
20	Gabon	OHADA UAA	15 Mar 2007	14 Oct 1966
21	Gambia	ADR Act 2005	-	26 Jan 1975
22	Ghana	ADR Act 2010	8 July 1968	14 Oct 1966
23	Guinea	OHADA UAA	23 April 1991	4 Dec 1968
24	Guinea-Bissau	OHADA UAA	-	Signed 4 Sept 1991
25	Kenya	Arbitration Act 2005 amended 2009	11 May 1989	2 Feb 1967
26	Lesotho	Arbitration Act No 12 of 1980	11 Sept 1989	7 Aug 1969
27	Liberia	Arbitration Law, Chapter 7 Commercial Code 2010	15 Dec 2005	16 July 1970
28	Libya	Code of Civil Procedure 1953	-	-
29	Madagascar	Arbitration Law 98-019 of 2 Dec 1998	14 Oct 1962	14 Oct 1966
30	Malawi	Arbitration Act of 6 Nov 1967	-	14 Oct 1966
31	Mali	OHADA UAA & Arb Code 2000	7 Dec 1994	2 Feb 1978
32	Mauritania	Code of Arbitration No 2000-06	30 April 1997	14 Oct 1966
33	Mauritius	International Arbitration Act No 37 of 2008	17 Sept 1996	2 July 1969
34	Morocco	Code of Civil Procedure 1947 (modified in 2007)	7 June 1959	10 June 1967

35	Mozambique	Law on Arbitration, Conciliation and Mediation No 11/99 of 8 July 1999	9 Sept 1998	7 July 1995
36	Namibia	Arbitration Act No 42 of 1965	-	Signed 26 Oct 1998
37	Niger	OHADA UAA	12 Jan 1965	14 Dec 1966
38	Nigeria	Arbitration and Conciliation Act 1988	15 June 1970	14 Oct 1966
39	Rwanda	Arb & Conciliation in Commercial Matters Law No 005 of 2008	29 Jan 2009	14 Nov 1979
40	Sao Tome & Principe	Voluntary Arb Law No 9 of 2006	18 Feb 2013	19 June 2013
41	Senegal	OHADA UAA	15 Jan 1995	21 May 1967
42	Seychelles	Commercial Code 1977 & Code of Civil Procedure 1920	-	19 April 1978
43	Sierra Leone	-	-	14 Oct 1966
44	Somalia	Civil Procedure Code, Book III, 1974	-	30 Mar 1968
45	South Africa	Arbitration Act No 42 of 1965	1 Aug 1976	-
46	South Sudan	-	-	18 May 2012
47	Sudan	Arbitration Act 2005	-	9 May 1973
48	Swaziland	Arbitration Act No 24 of 1904	-	14 July 1971
49	Tanzania	Arbitration Act 1931 revised 2002	11 Jan 1965	17 June 1992
50	Togo	OHADA UAA	-	10 Sept 1967
51	Tunisia	Arbitration Code, Law No 93-42, 1993	15 Oct 1967	14 Oct 1966
52	Uganda	Arbitration & Conciliation Act 2000 (amended 2008)	12 May 1992	14 Oct 1966
53	Zambia	Arbitration Act No 19 of 2000	12 June 2002	17 July 1970
54	Zimbabwe	Arbitration Act No 6 of 1996	28 Dec 1994	19 June 1994

OHADA UAA = OHADA Uniform Arbitration Act 11 March 1999

Sources: <https://arbitrationinafrica.com/countries/>;  
[http://www.uncitral.org/uncitral/uncitral\\_texts/arbitration.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html);  
<https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx>; <http://ohada.org/>.

**Table 2a: Sub-Saharan African Countries: World Bank's *Ease of Doing Business* Ranking (2017)**

No	Country	Global Ranking (2016)	Ranking in SS-Africa	Starting a business	Getting Electricity	Protecting minority investors	Trading across borders	Enforcing contracts
1	Mauritius	49 (32)	1	4	4	2	4	1
2	Rwanda	56 (62)	2	8	7	12	6	10
3	South Africa	74 (73)	3	22	5	1	25	16
4	Botswana	71 (72)	4	32	11	5	3	21
5	Kenya	92 (108)	5	19	3	8	9	8
6	Seychelles	93 (95)	6	26	15	13	5	20
7	Zambia	98 (97)	7	15	23	10	31	22
8	Lesotho	100 (114)	8	20	21	15	2	9
9	Ghana	108 (114)	9	17	9	7	29	17
10	Namibia	108 (101)	10	38	10	4	17	11
11	Swaziland	111 (105)	11	33	25	20	1	40
12	Uganda	115 (122)	12	36	28	14	22	4
13	Cape Verde	129 (126)	13	14	17	39	13	2
14	Tanzania	132 (139)	14	25	1	35	40	3
15	Malawi	133 (141)	15	30	33	19	15	27
16	Mozambique	137 (133)	16	24	32	18	10	46
17	Mali	141 (143)	17	16	22	34	7	32
18	Côte d'Ivoire	142 (142)	18	5	13	26	27	13
19	Gambia	145 (151)	19	37	24	42	12	15
20	Burkina Faso	146 (143)	20	7	42	30	8	35
21	Senegal	147 (153)	21	12	29	21	19	24
22	Niger	150 (160)	22	11	31	33	20	29
23	Sierra Leone	148 (147)	23	10	37	9	35	12
24	Togo	154 (150)	24	21	20	36	14	25
25	Comoros	153 (154)	25	35	14	29	11	43
26	Benin	155 (158)	26	6	35	31	21	38
27	Burundi	157 (152)	27	1	44	24	30	28
28	Zimbabwe	161 (155)	28	44	30	11	26	37
29	Mauritania	160 (168)	29	9	19	17	23	7
30	Guinea	163 (165)	30	23	27	32	32	18
31	Ethiopia	159 (146)	31	41	12	43	34	6
32	Madagascar	167 (164)	32	18	46	16	18	33
33	Gabon	164 (162)	33	31	26	38	33	42
34	Sao Tome & Principe	162 (166)	34	2	8	46	16	44
35	Sudan	168 (-)	35	34	6	47	44	26
36	Nigeria	169 (169)	36	27	41	3	41	23
37	Cameroon	166 (172)	37	29	2	25	46	34
38	Guinea Bissau	172 (178)	38	39	43	22	28	36
39	Congo, Republic	177 (176)	39	40	39	28	42	31
40	Liberia	174 (179)	40	3	38	44	45	41
41	Angola	182 (181)	41	28	34	6	43	47
42	Chad	180 (183)	42	43	40	37	36	30
43	Equatorial Guinea	178 (180)	43	46	18	23	38	14
44	Congo, Dem Rep	184 (184)	44	13	36	40	47	39

45	Central African Republic	185 (185)	45	47	45	27	24	45
46	South Sudan	186 (187)	46	42	47	45	39	5
47	Eritrea	189 (189)	47	45	16	41	37	19
48	Somalia	190 (-)	48	45	48	48	30	16

2016 ranking is in bracket.

Source: <http://www.doingbusiness.org/>

**Table 2b: North African Countries: World Bank's *Ease of Doing Business* Ranking (2017)**

No	Country	Global Ranking (2016)	Ranking in MENA Region	Starting a business	Getting Electricity	Protecting minority investors	Trading across borders	Enforcing contracts
1	Morocco	68 (75)	4	3	6	5	3	2
2	Tunisia	77 (74)	5	8	3	10	7	7
3	Egypt	122 (131)	11	2	11	8	15	19
4	Algeria	156 (163)	15	13	14	17	19	8
5	Djibouti	171 (171)	17	19	19	18	12	20
6	Libya	188 (188)	20	20	16	20	9	17

2016 ranking is in bracket. The MENA region comprised of 20 jurisdictions.

Source: <http://www.doingbusiness.org/>

## **7. List of Participants**



## List of Participants

No.	First Name	Surname	Country
1	Timothy	Lemay	Austria
2	Ilham	Kabbouri	Belgium / Morocco
3	Tulio	Di Giacomo Toledo	Brazil / Italy
4	Krystle	Lewis	British
5	Yasmin	Sebah	British
6	Riccardo	Rovati	British
7	Jean Alain	Penda Matipe	Cameroon
8	Gaston	Kenfack Douajni	Cameroon
9	Freddy	Mulamba	Democratic Republic of Congo
10	Louise	Munga Mesozi	Democratic Republic of Congo
11	Mbuy-Mbiye	Tanayi	Democratic Republic of Congo
12	Mohamed	Negm	Egypt
13	Meseret	Seyoum	Egypt
14	Tihut	Kassa	Egypt
15	Mostafa	Abdel Moez	Egypt
16	Steven	Mathate	Egypt
17	Mohamed	Hafez	Egypt
18	Hatem	Gabr	Egypt
19	Mohamed Moustafa	Kamal	Egypt
20	Mohamed Talaat Hussein	El Bolaki	Egypt
21	Sameh	Kamal Abdelaziz	Egypt
22	Samer	Badran	Egypt
23	Sarah Sameh	Abdelaziz	Egypt
24	Yasmeen	Atef	Egypt
25	Yasser	Attia Sayed Attia	Egypt
26	Yousria	El Gamal	Egypt
27	Karim	Ramses	Egypt
28	Omar	El Zorkany	Egypt
29	Abdallah	El Nokaly	Egypt
30	Haytham	Ali	Egypt
31	Ahmed	El Kosheri	Egypt
32	Borhan	Amrallah	Egypt
33	Yasser	Mansour	Egypt
34	Mohamed	El Nokaly	Egypt
35	Heba	Roshudy	Egypt
36	Mona	Roshdy	Egypt
37	Ahmed	Abd El Aziem	Egypt
38	Mohamed	Shoaib	Egypt
39	Soaad	Hossam	Egypt
40	Ali	Rifaah	Egypt
41	Mahmoud	Badran	Egypt

No.	First Name	Surname	Country
42	Dalia	Hussien	Egypt
43	Ismail	Selim	Egypt
44	Mahmoud	Nayel	Egypt
45	Mohamed	Abdel Raouf	Egypt
46	Mohammad	Amin El Mahdi	Egypt
47	Mostafa	El Bahabety	Egypt
48	Nabil	Elaraby	Egypt
49	Nagla	Nassar	Egypt
50	Menna	Sadek	Egypt
51	Tarek	Badawy	Egypt
52	Nadim	Magdy	Egypt
53	Salma	Lotfy	Egyptian
54	Ahmed	Sharaf Eldin	Egyptian
55	Fatma	Khalifa	Egyptian
56	Tsegaye	Laurendeau	Ethiopia / France
57	Rouwaida	Abdou	France
58	Hayet	El Aouadi	France
59	Sarah	El-Gindi de Miollis	France
60	Emmanuel	Gaillard	France
61	Mahutodji Jimmy Vital	Kodo	France
62	Fui Sokpoli	Tsikata	Ghana
63	Matilda Phyllis	Idun-Donkor	Ghana
64	Kizito	Beyuo	Ghana
65	Rose	Rameau	Ghana
66	Edward	Torgbor	Ghana
67	Antonio	Crivellaro	Italy
68	Ali	Al-Khasawneh	Jordan
69	Lawrence	Ngugi	Kenya
70	Wachia	Kilei	Kenya
71	Phyllis	Wangwe	Kenya
72	Collins	Ongore	Kenyan
73	Leyla	Ahmed	Kenyan
74	Smriti	Ramesh	Malaysia
75	Ndanga	Kama	Mauritius
76	Luis	Garcia	Mexico
77	Hicham	El Jazzari	Morocco
78	Olusola	Adegbonmire	Nigeria
79	Olufunke	Adekoya	Nigeria
80	Babajide	Ogundipe	Nigeria
81	Babatunde	Ogunseitan	Nigeria
82	Bayo-Ojo	Busola Oluwakemi	Nigeria
83	Chim	Emuchay	Nigeria
84	Ikpeme	Bassey Nkebem	Nigeria

85	Bayo	Ojo	Nigeria
86	Doyin	Rhodes-Vivour	Nigeria
87	Tunde	Ajibade	Nigeria
No.	First Name	Surname	Country
88	Emilia	Onyema	Nigeria
89	Gakuba Thierry	Ngoga	Rwanda
90	Fidele	Masengo	Rwanda
91	Maryan	Hassan	Somalia
92	David	Butler	South Africa
93	Deline	Beukes	South Africa
94	Jonathan	Ripley-Evans	South Africa
95	Abdelgadir	Mustafa	Sudan
96	Ahmed	Sharf Bannaga	Sudan
97	Bakri Mohamed	Abakar Mohammed	Sudan
98	Nadia	Mahmoud Abdelrahman	Sudanese
99	Moawia Osman	Alhdad	Sudanese
100	Noon	Kashkosh	Sudanese
101	Kennedy	Gastorn	Tanzania
102	Rukia	Baruti	Tanzania
103	Lise	Bosman	The Netherlands
104	Khawla	El Zatogui	Tunisia
105	Walid	Ben Hamida	Tunisia
106	Deo	Kalikumutima	Uganda
107	Jimmy	Muyanja	Uganda
108	Roderick	Cordara	United Kingdom
109	Sandip	Patel QC	United Kingdom
110	Eunice	Shang-Simpson	United Kingdom
111	Ndudi Councillor	Olokotor	United Kingdom
112	Baiju	Vasani	United Kingdom
113	Chrispas	Nyombi	United Kingdom
114	Duncan	Bagshaw	United Kingdom
115	Ike	Ehiribe	United Kingdom
116	Steven	Finizio	United Kingdom
117	César	Ternieden	USA
118	Cole	Agar	USA
119	Alexandra (Xander)	Meise	USA

## **SOAS Arbitration in Africa Conference Series**

### **Extract from Delegates' Feedback at the Conference**

**Below are the verbatim responses from delegates from the question, Please tell us what you will change in your practice as a result of this conference?**

"relationship between arbitration centre and government (win vs win situation)"

"If the opportunity to appoint an arbitrator present itself, I would rather give priority to young arbitrators and African."

"I will strive to bring more vigor and hope in international arbitration practice as an African youth"

"It is early days, as I do not have a practice at the moment, but the learnings will inform my actions as I set off along this Arbitral path."

"I will also have a role model to emulate if I am asked to Chair a Panel discussion."

"Develop skills to promote arbitration in Africa"

"I will research, engage and publish more."

"As stated for day one, it is still early days for me. I will definitely keep in touch with the contacts made and seek to learn from the best whilst carving out a practice for myself, including collaborating when the opportunity arises."

#### **Comments on usefulness of conference**

"It was focused on the view that have specialist from outside of the engagement of the african states to promote international arbitration."

"The topics touched were all relevant."

"I am always interested in perceptions and learning from others."

"Straight to the point."

"They master their topic."

"Very pragmatic and also very progressive in his insistence that Africans should take their place in international arbitration."

#### **General comments**

"Applause to CRCICA & SOAS for this progressive and energetic international cause."

"I also liked the fact that there were papers submitted which gave more background information"

