3 The hidden majority: Investor-state arbitration and the legacy of Kéba Mbaye

*Kehinde Olaoye**

> *For the sake of my conscience, I must emphasize that point. All the better if one day judges in a similar case hear what I have said. They would undoubtedly contribute to the North-South dialogue and to the recognition of the legitimate right to development of the people of countries with social and economic difficulties.*[1]
> Kéba Mbaye, *Société Ouest Africaine des Bétons Industriels v Republic of Senegal*, 1988

Abstract

Legal scholarship on Mbaye's contributions to the development of African perspectives on international law have for the most part focussed on human rights and the right to development. This chapter uncovers Mbaye's early contributions to investor-state arbitration and international investment law by examining his publications and dissenting opinions in early ICSID arbitration cases. It shows that these writings which remain highly relevant today were influenced by Mbaye's expertise and work on African customary law, human rights and the right to development. Overall, this chapter shows that Mbaye's conceptualisation of international investment law was rightly based on a peoples' focused approach. This approach which was inspired by UN resolutions on the rights of peoples to self-determination and Permanent Sovereignty over Natural Resources is central for present day actualisation of Africanisation of international investment law.

1 Introduction

Kéba Mbaye was a legal luminary of many parts – statesman, national and international judge, pioneering legal thinker, and arbitrator. Most

* LLB (Ibadan), BL, LLM (KCL), PhD (City University Hong Kong), Postdoctoral Fellow, City University Hong Kong kfolaoye@cityu.edu.hk

1 *Société Ouest Africaine des Bétons Industriels v Republic of Senegal* ICSID Case No ARB/81/1 Kéba Mbaye dissenting opinion (Attached to the award) 25 February 1988 para 21. References to the *SOABI* dispute in this chapter are based on the full case report in (1994) 2 ICSID Reports 164.

importantly, he believed in a unified Africa bound by respect for rule of law,[2] economic (legal) integration, and full participation in international legal discourse. Literature on his contributions to international law has mostly focussed on the *Organisation pour l'harmonisation en Afrique du droit des affaires* (OHADA), the right to development, sports arbitration, and human rights.[3] His pioneering contributions in international investment law and investor-state arbitration have largely remained overlooked.[4] This is indeed an intellectual oversight. When Judges Kéba Mbaye and Taslim Olawale Elias established the African Association of International Law in 1986, although refugee law, humanitarian law, and human rights law were topics they believed would 'foster the development and dissemination of African perspectives and practices of international law',[5] protection of foreign investment must have lingered in their minds.[6]

2 F Katendi & J Placca '*Savoir accepter la pauvreté*: Interview de Kéba Mbaye 1992' reprinted in *Africa Libré* 28 July 2011 http://www.africa-libre.com/politique/459-senegal/1815-keba-mbaye- (accessed 15 August 2020).
'The concept of the rule of law is not only a political concept. It is also, of course, legal, because it has its roots in constitutional law. But even more specifically, it is an economic concept. You cannot really advance a country if there is no rule of law. I am sure of it' (author's translation).

3 CE Welch *Protecting human rights in Africa: Roles and strategies of non-governmental organizations* (1995) 164; MC Bassiouni 'In memoriam Kéba Mbaye' (2008) 79 *Revue internationale de droit pénal* 299-300; M Mutua 'Typologies of scholarship on Africa' (2013) 107 *Proceedings of the American Society of International Law Annual Meeting* 189 at 191; E Roucounas *A landscape of contemporary theories of international law* (2019) 123.

4 See M Boase & M Boase 'Sundhya Pahuja decolonising international law: Development, economic growth and the politics of universality' (2012) 23 *European Journal of International Law* 887 at 888 (arguing that in her book which focuses on the shift from permanent sovereignty over natural resources to emphasis on investor protection, 'Pahuja's analysis necessarily includes those who do posit a new universality, such as Hernando de Soto and Amartya Sen. Unexplored, however, are the first generation Third World jurists Kéba Mbaye and Mohammed Bedjaoui, whose clarion call was for a 'right to development'. Along with Abi-Saab, who is discussed, their demands for the democratisation of the international economic order were rejected and ignored.') See also, *Colloque international sur la vie et l'œuvre du juge Kéba MBAYE Thème : Kéba Mbaye, une figure de justice* http://www.fondationkebambaye.org/docs/Liste_Communications_Colloques_6_et_7_Juin_2017.pdf (accessed 15 January 2020).

5 'African Association of International Law/*Association africaine de droit international*' (1987) 20 *Law and Politics in Africa, Asia and Latin America* 301-302; AA Yusuf 'Foreword' in AA Yusuf (ed) (1994) *African Yearbook of International Law* xi. Also see 'International African Law Association news (1972) 16 *Journal of African Law* 201-203, for a determination of African private international law priorities.

6 JH Spencer 'International law and African problems conference, Lagos, 14-18 March 1967 under joint auspices of the Nigerian Institute of International Affairs and the Carnegie Endowment for International Peace (New York: Carnegie Endowment for International Peace 1968 iv 106)' (1969) 63 *American Journal of International Law* 373; TO Elias *Africa and the development of international law* (1988 R Akinjide ed) 246;

Investor-state arbitration and international investment law have been described as the most controversial areas of international law.[7] For African states this subject raises very distinct lines of inquiry which are largely overlooked in existing literature.[8] International investment law is the sum of rules and procedures which regulate relationships between host states and foreign investors. It includes customary international law principles on minimum standards of treatment, international investment treaties, national laws, arbitral institution rules, and investment arbitration decisions. The unequivocal right of non-state subjects (including state-owned enterprises) to institute claims against sovereign states before ad hoc tribunals continues to challenge traditional notions of interstate law. Through contracts, national law, and investment treaties, foreign investors have for decades invoked the international responsibility of states to protect foreign investments. A dominant narrative argues that this system of private adjudication is designed to neo-colonise African states.[9] Although criticism of international investment law is made with good intention, what often occurs is an absence of rigorous evidence-based analysis of literature. In this form of scholarship shifts between emotive-laden analysis and fact-based engagement are a challenge.[10] One argument made by critics is that the peoples of the South were excluded from the creation of international investment legal norms.[11] However, history tells

TO Elias *New horizons in international law* 32 (on the contributions of Asia and Africa to contemporary international law).

7 M Sornarajah *The international law on foreign investment* (2010) 1; I Alvik 'The justification of privilege in international investment law: Preferential treatment of foreign investors as a problem of legitimacy' (2020) 31 *European Journal of International Law* 290.

8 W Kidane 'Africa's international investment law regimes' *International Law Oxford Bibliographies* (last modified 22 April 2020).

9 M Sornarajah 'Power and justice in foreign investment arbitration' (1997) 14 *Journal of International Arbitration* 103 at 105; BS Chimni 'Marxism and international law: A contemporary analysis (1999) 34 *Economic and Political Weekly* 337; H Mann 'International investment agreements: Building the new colonialism?' (2003) 97 *American Society of International Law Proceedings* 247; A Anghie *Imperialism, sovereignty and the making of international law* (2007) 223; T Schultz & C Dupont 'Investment arbitration: Promoting the rule of law or over-empowering investors? A quantitative empirical study' (2014) 25 *European Journal of International Law* 1147; D Schneiderman *The coloniality of investment law* (2022); G Van Harten *The trouble with foreign investor protection* (2020) 2.

10 A Shalakany 'Arbitration and the Third World: A plea for reassessing bias under the spectre of neoliberalism' (2000) 41 *Harvard International Law Journal* 419.

11 SKB Asante 'The perspectives of African countries on international commercial arbitration' (1993) 6 *Leiden Journal of International Law* 331 at 335. Compare with OD Akinkugbe 'Reverse contributors? African state parties, ICSID and the development of international investment law' (2019) 34 *ICSID Review-Foreign Investment Law Journal* 434 at 454.

a slightly different story. Re-reading Kéba Mbaye challenges this one-way narrative.

Investment arbitration has been described as a sui generis branch of international law.[12] Unlike other fields of international law and arbitration with which Kéba Mbaye is more closely associated, it raises very distinct issues of state power and sovereignty.[13] To fill the research gap identified in the preceding paragraph, this chapter answers the following question: 'What lessons can we learn, re-learn, or unlearn from Kéba Mbaye's contributions to investor-state arbitration jurisprudence?' Engaging with this legacy we may, for instance, ask what Mbaye would think of the 2018 reforms to the OHADA (an institution he pioneered) Arbitration Uniform Act which essentially transform the *ratione materiae* of the *Cour Commune de Justice et d'arbitrage de l'Organisation pour l'harmonisation en Afrique du droit des affaires* (OHADA CCJA) from exclusively commercial disputes to include investor-state disputes.

This chapter is aimed at distilling the legacy of Kéba Mbaye's jurisprudence and its relevance to contemporary debates. It adopts a chronological format divided into three parts woven around his appointment to ICSID tribunals. This is based on his writings and decisions spanning 25 years from 1975 to 2000. Linking this jurisprudence with international events and key junctures in Mbaye's impressive international legal career allows us to identify recurring themes. It also allows us to contextualise and reimagine the workings of a first-generation African international investment arbitrator.

This chapter does not seek to examine the validity of Mbaye's pronouncements. Rather, its aim is to examine his long-hidden role in providing an alternative approach to international investment law in a field where Africa is often considered a minority player.[14] Consequently, this chapter examines six investor-state arbitration disputes which highlight

12 M Paparinskis 'Analogies and other regimes of international law' in Z Douglas and others (eds) *The foundations of international investment law: Bringing theory into practice* (2014) 73.

13 Compare with K Mbaye '*Le tribunal arbitral du sport, organe principal de l'arbitrage international en matière de sport*' in G Aksen & R Briner (eds) *Global reflections on international law, commerce and dispute resolution: Liber amicorum in honour of Robert Briner* (2005) 519 at 526: '[T]he CAS is no different from an ordinary arbitral tribunal and that is why its independence is guaranteed' (author's translation).

14 MM Mbengue '"Somethin' ELSE": African discourses on ICSID and on ISDS: An introduction' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 259. By the term 'minority', I intend a word play with words in relation to 'majority' in the chapter title. I mean that Africa is usually considered as a rule taker and a player with little influence on law making and jurisprudence.

Mbaye's contributions to investment arbitration law. Substantive issues highlighted include his contributions to the ICSID regime especially on the calculation of damages, consent to arbitration, contractual disputes, transnational public policy and principles of good faith, and indirectly controlled investments. This chapter also considers the legitimacy and power of dissenting opinions. Drawing on insights from Third World Approaches to International Law (TWAIL), it locates Mbaye as a pragmatic Third World scholar who remained committed to the overall interests of African peoples.[15]

2 Legal biography and legal subjects

Prominent legal thinkers are often the subjects of treatises in the fields of international economic law and arbitration.[16] In their lifetimes, friends, students, and colleagues may rightly decide to compile *libri amicorum* to celebrate retirement from active legal service. During his lifetime Mbaye was regularly invited to contribute to books of this nature.[17] What occurs

15 B Rajagopal *International law from below: Development, social movements and Third World resistance* (2003) 292: 'International lawyers have had a particular historical approach to the construction of the main elements of post-war modern international law. That approach has oscillated between a selective and Eurocentric humanism – in the form of human rights – and an ahistorical functional pragmatism – in the form of international economic law.'

16 Examples of *festschriften* written in honour of African scholars include: S Schlemmer-Schulte & K Dong (eds) *Liber amicorum Ibrahim FI Shihata: International finance and development law* (2001); C Barnard and others (eds) *The future of labour law: Liber amicorum Sir Bob Hepple QC* (2004); O C Ruppel & G Winter (eds) *Justice from within: Legal pluralism in Africa and beyond: Liber amicorum Manfred O Hinz in celebration of his 75th birthday* (2012); MM Mbengue & M Kamga (eds) *Liber amicorum Judge Raymond Ranjeva* (2013); R F Oppong & W K Agyebeng (eds) *A commitment to law: Essays in honour of Nana Dr Samuel Kwadwo Boaten Asante* (2016).

17 K Mbaye '*Le droit au développement en droit internationale*' in J Makarczyk (ed) *Essays in international law in honor of Judge Manfred Lach* (1984) 163; K Mbaye & K Vasak (eds) '*Droit international et droit comparé René Cassin (1887-1976)*' *Revue des droits de l'homme* (1985); K Mbaye 'African Commission on Human and Peoples' Rights' in RC Hingorani (ed) *Humanitarian law: A felicitation volume in honour of Professor Jovica Patrnogic* (1987) 9; K Mbaye '*Droits de l'homme et pays en développement*' in R Dupuy (ed) *Humanité et droit international: Mélanges René-Jean Dupuy* (1991) 211; K Mbaye '*La Charte africaine des droits de l'homme et des peuples: de Lagos à Banjul'* in EG Bello & BA Ajibola (eds) *Essays in honour of Judge Taslim Olawale Elias* (1992) 427; K Mbaye in *Federico Mayor liber amicorum: Solidarité, égalité, liberté* (1995); K Mbaye '*Menaces sur l'universalité de droits de l'homme*' in C Llorens (ed) *Boutros Boutros-Ghali amicorum discipulorumque liber: Paix, développement, démocratie* (1998) 1243; K Mbaye '*L'OHADA: Une intégration juridique en Afrique'* in E Yakpo and others (eds) (1999) 585; K Mbaye '*Droits de l'homme et olympisme'* in F Mayor (ed) *Karel Vasak amicorum liber: Les droits de l'homme à l'aube du XXIe siècle* (1999) 1073; K Mbaye '*Les droits de l'homme (définition, fondements, finalités et caractères)*' in CA Armas Barea and others (eds) *Liber amicorum 'In memoriam' of Judge José María Ruda* (2000) 553; K Mbaye '*La contribution de l'OHADA à l'arbitrage commercial international'* in R Briner (ed) *Law of international business and dispute settlement in the 21st*

less often is a posthumous legal writing project which aims to distil the jurisprudence of an adjudicator. This is often inspired by the larger-than-life legacy of a legal colossus which bears upon future generations of legal scholars.[18] It may be argued that this form of scholarship has little place in conservative legal scholarship which tends to focus only on what law is.[19] However, much can emerge from such an enterprise. This is because legal-life writing 'can enhance our understanding of law and society, and the lives of individuals, groups, institutions, and objects, and their relationship to society'.[20] Particularly in relation to Third World scholars, it helps us to examine their roles as 'scholactivists' and understand how 'mediums they use for such advances necessarily require a turn towards internationalisation and leveraging the law in various national and international forums'.[21] It brings us to the realisation that their perceived successes may be constrained by the dynamics of the international legal field and the ability to assimilate within a global cosmopolitan class.[22] In this regard we are able to understand that the paradox of adjudicating is to be as impartial as possible while somehow capitalising on one's life experience and intrinsic values as a guide.[23]

Although scholarship on legal subjects may not be particularly useful in predicting the outcome of an arbitration dispute between a foreign investor and an African state, it can serve a higher purpose.[24] As this chapter shows, Judge Mbaye was a jurist with vision well ahead of his time. When Mbaye sat as arbiter in the second International Centre for Settlement of Investment Disputes (ICSID) investment-treaty dispute

century: Liber amicorum Karl-Heinz Böckstiegel (2001) 535; K Mbaye '*Le tribunal arbitral du Sport, organe principal de l'arbitrage international en matière de sport*' in G Aksen (ed) *Global reflections on international law, commerce and dispute resolution: Liber amicorum in honour of Robert Briner* (2005) 519.

18 Y Seck *Kéba Mbaye: Parcours et combats d'un grand juge* (2009); EO Diop (ed) *Le juge Kéba Mbaye: Une vie au service des droits de l'homme: Textes rassemblés par El Hadji Omar DIOP* (2018); M Badji & EO Diop *Mélanges en l'honneur du juge Kéba Mbaye: Administrer la justice, transcender les frontières du droit* (2018).

19 R Posner 'Judicial biography' (1995) 70 *New York University Law Review* 502 at 509.

20 L Mulcahy & D Sugarman 'Introduction: Legal life writing and marginalized subjects and sources' (2015) 42 *Journal of Law and Society* 1 at 6.

21 C Farid 'Legal scholactivists in the Third World: Between ambition, altruism and access' (2016) 33 *Windsor Yearbook of Access to Justice* 57 at 58; see also G Abi-Saab 'The Third World intellectual in praxis: Confrontation, participation, or operation behind enemy lines?' (2016) 37 *Third World Quarterly* 1957.

22 Farid (n 21) 58.

23 H Rishikof & B Horowitz 'Clues of integrity in the legal reasoning process: How judicial biographies shed light on the rule of law' (2014) 67 *Southern Methodist University Law Review* 763 at 780.

24 Rishikof & Horowitz (n 23) 780.

or the first annulment proceedings under ICSID, he sat not only as an African jurist but also as an impartial and independent jurist who perhaps understood that history would come calling. Forty years after his appointment to the first ICSID annulment proceedings, his contributions continue to live in the pages of the over 1000 investor-state arbitrations which have taken place to date. It is from this early jurisprudence that we must draw inspiration for well-informed interaction with contemporary international law debate.

3 Pre-ICSID years

This section examines Mbaye's writings on international law before his appointment to his first ICSID arbitral panel. It shows how his early writings were primarily shaped by post-colonial agitations for a New International Economic Order (NIEO), African socialism, and notions of African property.

3.1 Permanent sovereignty over natural resources

An appropriate starting point for this chapter is a 1975 essay Mbaye wrote as President of Senegal's Supreme Court on the African path to socialism in the first issue of the journal *Ethiopiques*.[25] Influenced by the Senegalese poet, educator, and first President of Senegal, Léopold Sédar Senghor, this journal focussed on a socialist review of African culture.[26] Although Senghor was known to have rejected wholesale nationalisation arguing that it would serve no purpose since 'to nationalise, one must have national private capital and sufficient numbers of national technicians',[27] he inspired a school of legal self-determination.[28] Mbaye's 1975 essay which focussed on African notions of property, gives an early insight into his views on international economic law. Contemporaneously, on 12 December 1974 the year before Mbaye wrote this essay, the twenty-ninth session of the United Nations General Assembly (UNGA) adopted what was described as 'a new and controversial' Charter of Economic Rights

25 K Mbaye '*Voie africaine du socialisme et propriété*' (1975) *Éthiopiques: Revue socialiste de culture négro-africaine* 1 at 39.

26 See JN Hazard 'Negritude, socialism and the law' (1965) 65 *Columbia Law Review* 778; DM Westley 'A select bibliography of the works of Léopold Sédar Senghor' (2002) 33 *Research in African Literatures* 88.

27 WE Skurnik 'Leopold Sedar Senghor and African socialism' (1965) 3 *Journal of Modern African Studies* 349 at 355.

28 J Summers *Peoples and international law: How nationalism and self-determination shape a contemporary law of nations* (2014) 68.

and Duties of States (CERDS),[29] which 'marked the eclipse of certain principles of international law'.[30]

Even though Mbaye's 1975 essay made no express reference to the CERDS, it is not far-fetched to argue that for Mbaye this resolution reaffirmed the principle of Permanent Sovereignty over Natural Resources (PSNR).[31] In his essay, Mbaye declared as follows:[32]

> Permanent sovereignty over wealth and natural resources, proclaimed for the first time in 1962, is only the corollary of the right of peoples to self-determination. Master of his destiny, each state is also master of the soil and of what it conceals. This sovereignty is today enshrined in the International Covenant on Economic, Social and Cultural Rights. Between the desire of the industrialized States to ensure the security of their capital and the will of the underdeveloped countries to push the principle of the free disposal of wealth and natural resources to its extreme limits, there is room for dialogue in the Socialist States of Africa, which is the prime expression of sincere cooperation. He alone can translate into reality the solidarity to which men are condemned. It is only in the context of a new vision of relations between States, thanks to a resolute desire for solidarity, that the current problems that precipitate the world economy towards chaos, will be able to find a suitable solution. It is at this price that the energy crisis can be solved and that a system for fixing the prices of raw materials can be found and applied, as well as an equitable distribution of wealth.

Clearly, Mbaye recognised PSNR as the foundation of Africa's future engagement with international law. This statement resonated with the socialist vision embraced by Latin American countries.[33] For newly

29 UNGA A/RES/39/163 'Charter of Economic Rights and Duties of States' 17 December 1974; CN Brower & JB Tepe 'The Charter of Economic Rights and Duties of States: A reflection or rejection of international law? (1975) 9 *International Lawyer* 295.

30 C Alexandrowicz 'The Charter of Economic Rights and Duties of States' (1975) 4 *Millennium* 72.

31 Welch (n 3) 274 notes that articulation of the right to development by Mbaye coincided with important UN GA resolutions such as the CEDRS and PSNR.

32 Mbaye (n 25).

33 SKB Asante 'International law and foreign investment: A reappraisal' (1988) 37 *International & Comparative Law Quarterly* 558 at 589. See also Doc 1/18 of AAPSO Nicosia, Cyprus, 6-7 December 1980 https://search.archives.un.org/uploads/r/united-nations-archives/4/7/b/47b9ff28eb295ba4b2896cb1f702c90e4936614a717e9c93a572a88eb25481eb/S-0972-0010-04-00001.pdf: 'The peoples in Asia and Africa appraise very highly the great contribution made by the socialist forces to the tireless struggle of all progressive and peace-loving forces for peace ... an end to the arms race, for freedom and social progress, for a peaceful and equitable

independent African states, even though 'the myth of equality which haunted men's minds within the colonial entities survive(d) at the international level', international law also signalled the 'right to equality in the enjoyment of the wealth of the universe'.[34] This vision for a NIEO which was the source of inspiration for Mbaye's declaration on the right to development, was very focussed on foreign investment protection law from a critical vantage point.[35]

When Mbaye wrote this essay, PSNR had not fully achieved the status of international customary law.[36] Modern international investment arbitration was still at a very embryonic stage. A few arbitrations between developing states and foreign investors had taken place but it was difficult to place these 'exceptional' instances in the existing scholarship which recognised state-based consent to public international law. Thus, for Mbaye and his contemporaries, the real sense of urgency for a revised approach to international law was more about self-determination and economic development than development of international investment law (or Africanisation of international investment law).[37] The group of Third World states at the UN, led by the Organisation of Petroleum Exporting Countries (OPEC), precipitated a system-wide international economic and political crisis, which is generally accepted as the attempt to establish a New International Economic Order (NIEO).[38] In addition, between 1974 and 1977 developing countries sought to negotiate a new

international cooperation on the basis of respect for national independence and sovereignty on the basis of non-interference in others' internal affairs.'

34 K Mbaye & B Ndiaye 'The Organization of African Unity' in K Vasak (ed) *The international dimensions of human rights* (1982) 592.

35 SW Schill and others 'Introduction' in SW Schill and others (eds) *International investment law and development: Friends or foes?* 16. See also S Belaid '*Les transformations du role des Nations unies dans le controle de l'ordre economique mondial'* in D Bardonnet (ed) *L'adaptation des structures et méthodes des Nations unies: Colloque, La Haye, 4-6 novembre 1985* (1986) 319 at 344. Comments by Kéba Mbaye: 'If the reform of the United Nations involves the introduction of a weighted vote, we risk consecrating, with economic inequality, the political inequality of the states. However, the United Nations is based on the principle of political equality of the States. These major problems are no longer treated within the United Nations, because the developed countries no longer accept the domination of the group of seventy-seven. But can we give satisfaction to the countries of the North without destroying one of the essential pillars of the Organisation, which is that of the sovereign equality of the States' (author's translation).

36 See generally, OY Asamoah *The legal significance of the declarations of the General Assembly of the United Nations* (1964) 74; SM Schwebel 'The effect of resolutions of the UN General Assembly on customary international law' (1979) 73 *Proceedings of the ASIL Annual Meeting* 301.

37 UO Umozurike 'Nationalization of foreign-owned property and economic self-determination' (1970) 6 *East African Law Journal* 79.

38 Rajagopal (n 15) 77.

commodity order within the United Nations Conference on Trade and Development (UNCTAD).[39] These events, which gave Mbaye a renewed 'faith' in Third World collectively and the CERDS, represented an attempt to reinforce and 'treatify' the PSNR.[40] The CERDS was an integral part of the resolutions which are collectively known as the New International Economic Order and the Programme of Action.[41]

For Mbaye, Africa's concerns were distinct and clearly revealed in the importance of economic commissions. He stated that 'having long suffered from poverty, they wanted above all to make up for their economic backwardness, protect their fragile independence and help the other peoples of the continent to shake off the colonial yoke'.[42] Mbaye's repeated emphasis on economic development and foreign investment was not misplaced.[43] However, as examined in the following section, while economic development was one of the main justifications for development of international investment law, to date there remains a wide divide between foreign investment and the right to development.[44] It is no surprise that Sornarajah has described the idea of international investment law as development law as the obsolescence of a fraudulent system.[45]

The PSNR can be loosely described as the first successful multilateral attempt at drafting an international investment charter.[46] Although the PSNR focussed on expropriation and disputes relating to compensation for expropriation, it served as a corollary to the right of self-determination. It

39 RL Rothstein *Global bargaining: UNCTAD and the quest for a new international economic order* (1979) 3.

40 G Abi-Saab 'Permanent sovereignty over natural resources and economic activities' in M Bedjaoui (ed) *International law: Achievements and prospects* (1991) 597 at 599; A Anghie 'Whose utopia? Human rights, development, and the Third World' (2013) 22 *Qui parle: Critical Humanities and Social Sciences* 63 at 75.

41 SK Chatterjee 'The Charter of Economic Rights and Duties of States: An evaluation after 15 years' (1991) 40 *International & Comparative Law Quarterly* 669 at 672.

42 Mbaye & Ndiaye (n 34) 592.

43 See generally, N Monebhurrun 'The (mis)use of development in international investment law: Understanding the jurist's limits to work with development issues' (2017) 10 *Law and Development Review* 451.

44 Schill and others (eds) (n 35) 10.

45 M Sornarajah 'International investment law as development law: The obsolescence of a fraudulent system' (2016) *European Yearbook of International Economic Law* 209. This is because international investment law has not lived up to its grand bargain of economic growth in developing countries. Also, there is no proof that international investment agreements result in increased foreign direct investment flows.

46 Resolution 1803XXVII was described by Bulgaria's delegate as 'a charter of foreign investment'. UNGA, Seventeenth Session, Second Committee, Provisional Summary Record of the 859th Meeting, UN Doc A/C.2/SR.859 at 5.

occurred in an era of international economic experimentation marked by the decolonisation of 30 African states and establishment of ICSID which laid the foundations for the emergence of international investment law.[47]

Article 4 of the PSNR resolution provides that in disputes over compensation for expropriation, the national jurisdiction of the state must be exhausted thereby encapsulating the 'Calvo Doctrine' of Latin American states. It however provides that upon agreement by sovereign states and other parties, settlement of disputes could be made through arbitration or international adjudication. The Declaration on the Establishment of a New International Economic Order recognises nationalisation as a sovereign right and provides that disputes over compensation must be resolved in accordance with the domestic laws of each country. But it also recognises the right of states to conclude contrary agreements in free exercise of their sovereign will.[48] The CERDS also recognises the right of states to expropriate foreign-owned property and the duty to provide compensation taking into account relevant laws and regulations. Notably, it provides that disputes over compensation shall be settled under the domestic law of the nationalising state and by its tribunals save where a state agrees to settle a dispute by any other peaceful means.[49] Generally, the CERDS was viewed as the position of the more radical members of the Third World.[50]

As stated above, before 1990 modern international investment law had not fully developed. Even though states began to sign bilateral investment treaties in 1959, the first generation of these treaties which were signed, in the main, between African and European states, only provided for state-to-state dispute settlement.[51] The PSNR and CERDS

47 MG Desta 'Sovereignty over natural resources and international investment law: The elusive search for equilibrium' in Schill and others (n 35) 223 at 236: 'Needless to say, the title of Resolution 1803 – "permanent sovereignty over natural resources" – does not adequately represent its content; in fact, it is a resolution as much about the protection of foreign investment as it is about sovereignty over natural resources.'

48 UNGA 3201 (S-VI) 'Declaration on the Establishment of a New International Economic Order' 1 May 1994 A/RES/3201(S-VI) Art 4(e)(iii).

49 UNGA 'Charter of Economic Rights and Duties of States' A/RES/39/163 17 December 1984 art 2(c).

50 GW Haight 'The new international economic order and the Charter of Economic Rights and Duties of States' (1975) 9 *International Lawyer* 591.

51 Art 4 Treaty between the Swiss Confederation and the Republic of Tunisia on Protection and Encouragement of Capital Investments (1961); Art 5 Convention between the BELGO-Luxembourg Economic Union and Morocco Concerning the Encouragement of Capital Investment and the Protection of Property; Art 14 Agreement on Economic and Technical Co-operation between the Government of the Kingdom of the Netherlands and the Government of the Democratic Republic of the

represented a political and legal challenge to the internationalisation of foreign investment contracts actively promoted by European jurists and states.[52] These principles were tested in a few 'notorious arbitrations'. In the most controversial of these NIEO-era awards, *Texaco Overseas Petroleum Company v Libya*, the sole arbitrator held that the CERDS was not a part of customary international law.[53] Libya argued that based on the CERDS and PSNR, any disputes relating to expropriation had to be settled in Libyan courts.[54]

In effect, the principal post-independence UN resolutions which Mbaye strongly believed in and ascribed to, rejected compulsory international arbitration and represented a Third-World consensus which favoured exhaustion of local remedies and the use of domestic tribunals to settle disputes between host states and foreigners.[55] Even though there is no written evidence documenting Mbaye's participation in deliberations which led to the three UN resolutions, as president of the UN Commission for Human Rights (1972-1981), he must have been thoroughly conversant with the preparatory work which led to these resolutions. It is thus interesting that in the years after Mbaye wrote on the importance of PSNR, he became a prominent figure in international investment arbitration at ICSID. As this chapter shows, this shift from resistance to pragmatic participation in international law marked a turn in his career which must have been informed by a new realisation that to reject traditional rules of international law completely was to reject the economic realities of a neo-liberalised world. A few African states continue to articulate a position which rejects arbitration of foreign disputes but this is no longer a dominant position.[56] Although in the ensuing years, the CERDS and the

Sudan (1970); Art 10 Treaty Concerning the Promotion and Reciprocal Protection of Capital Investment between Mali and the Federal Republic of Germany (1977).

52 M Sornarajah *Resistance and change in the international law on foreign investment* (2015) 98.

53 *Texaco Overseas Petroleum Co and California Asiatic Oil Company v Libya* Award (19 January 1977) para 88.

54 *Texaco* as above, para 90.

55 For an exposition of this position, see GM Abi-Saab 'The newly independent states and the rules of international law: An outline' (1962) 8 *Howard Law Journal* 95 at 117.

56 The United Republic of Tanzania Natural Wealth and Resources (Permanent Sovereignty) Act 5 of 2017. Article 11(2) provides that Tanzanian courts shall have exclusive jurisdiction in disputes arising from the extraction of national resources.

NIEO failed to achieve their stated goals, they represented a new turn in international economic law relations.[57]

3.2 International economic development, protection of alien property, and human rights

In July 1978, Kéba Mbaye attended a colloquium on human rights and economic development in Francophone Africa held in Butare, Rwanda.[58] During the colloquium, considerable attention was paid to the need for a new international economic order and the colloquium concluded that a more equitable distribution of the world's economic power was essential to achieve economic development and guarantee human rights. For Mbaye and other participants, protection of the economic rights of the individual depended ultimately on the economic development of the society as a whole. Thus, this colloquium assumed that the right to development itself must be held to be a fundamental human right implicit in the guarantee of individual economic and social rights.[59]

The preceding section shows the link between Kéba Mbaye's ideas on foreign investment, development, and human rights.[60] This intricate link is established by the widely recognised fact that Mbaye drafted important parts of the African Charter on Human and Peoples' Rights (African Charter) submitted in 1979.[61] This should be of particular interest to

57 Chatterjee (n 41) 683; M Sornarajah *The international law on foreign investment* (1994) 187; ME Salomon 'From NIEO to now and the unfinishable story of economic justice' (2013) 62 *International & Comparative Law Quarterly* 31 at 46.

58 H Hannum 'The Butare colloquium on human rights and economic development in Francophone Africa: A summary and analysis' (1979) 1 *Universal Human Rights* 63.

59 Mbaye & Ndiaye (n 34) 599.

60 Compare with A Anghie 'Inequality, human rights, and the new international economic order' (2019) 10 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 429 who argues that human rights played no role in the NIEO which focused instead on transforming the international investment and trade regimes.

61 C Heyns (ed) *Human rights law in Africa* (2001) 65; R Murray *The African Charter on Human and Peoples' Rights: A commentary* (2019) 2: 'A conference of twenty African experts presided over by Judge Kéba Mbaye was organised in 1979 in Dakar, Senegal. It is important to note that the work of the Expert Committee was greatly influenced by the opening address of the host president, President Senghor, who enjoined the Committee to draw inspiration from African values and tradition and also to focus on the real needs of Africans, the right to development and the duties of individuals. After deliberations for about 10 days, the Committee prepared an initial draft of the Charter. President LS Senghor agreed to present a resolution for the establishment of an African human rights commission at the next session of the OAU and made the President of the Supreme Court of Senegal, president of the Committee, responsible for preparing a draft text. It was the Senghor draft, duly amended by the addition of the peoples' rights that was adopted by the OAU.'

international investment arbitration scholars because inspiration for the 'Mbaye Draft' came from the CERDS and the American Convention on Human Rights.[62] This Draft represented a pivotal shift in the evolution of international development as a human right.[63]

Article 2 of the Mbaye Draft provided as follows:

1. All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources. In no case may a people be deprived of its own means of subsistence.
3. State Parties to the present Charter, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter, of the United Nations, and the OAU.

Without any doubt Mbaye drew inspiration for article 2 from the CERDS and PSNR.[64] For Senghor, the African Charter was not an opportunity to emphasise different categories of right, but an opportunity to emphasise the right to development, the right to enjoy a fair international economic order, and finally, the right to natural wealth and resources.[65]

The final version of the African Charter adopts peoples'-based sovereignty over natural resources as follows:

Article 21

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

62 Mbaye 'Draft African Charter on Human and Peoples' Rights' prepared for the meeting of Experts in Dakar, Senegal from 28 November to 8 December OAU Doc CAB/LEG/67/1 Reprinted in Heyns (n 61) 65.

63 ID Bunn *The right to development and international economic law: Legal and moral dimensions* (2012) 41.

64 Mbaye 1991 (n 17) 1043.

65 LS Senghor 'Address delivered at the Opening of the Meeting of African Experts preparing the draft African Charter' Dakar, Senegal from 28 November to 8 December 1979 reprinted in C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa: A reader* (2016) 49.

3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Notably, neither the original Draft nor the Mbaye Draft included guarantees for adequate compensation. However, as has been rightly argued, article 21(3) which provides for 'international co-operation based on mutual respect, equitable exchange and the principles of international law' implies that nationalisation of foreign property would only be lawful if appropriate international legal standards, including payment of compensation, were complied with.[66] Through Mbaye's influence the African Charter took developments of the preceding decade fully into account when it enshrined the right of peoples to existence, equality, self-determination, and freedom to dispose of their natural wealth and resources.[67]

Today, the place of human rights in international economic law is less blurred than it was decades ago and the willingness or reluctance of international investment arbitral tribunals[68] to recognise PSNR as customary international law can be properly understood in the context of Kéba Mbaye's intellectual history. Although assimilation and cross-pollination of disciplines may provide a foundation for widening international investment law, in the absence of clearly worded treaty texts, investment arbitration tribunals still exercise caution and avoidance.[69] Recognising the force of the assertion made above may be tested in two more recent adjudicatory contexts. First is the decision of the International

66 RM D'Sa 'Human and peoples' rights: Distinctive features of the African Charter' (1985) 29 *Journal of African Law* 72 at 78.

67 RN Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80 at 97.

68 *Antoine Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* Award on Jurisdiction and Liability 27 October 1989; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* ICSID Case No ARB/05/22 Award 14 July 2018 para 392.

69 P Dupuy and others (eds) *Human rights in international investment law and arbitration* (2009).

Court of Justice (ICJ) in *Armed Activities (Democratic Republic of Congo v Uganda)*. Second, is in the interpretation of PSNR by investment arbitration tribunals.[70]

In *Armed Activities*, the Democratic Republic of Congo (DRC) instituted a claim in 1999 against Uganda arguing, inter alia, that by engaging in illegal exploitation of Congolese natural resources, Uganda had violated the customary law principle mandating respect for the sovereignty of states.[71] In its pleadings, the DRC cited General Assembly resolution 1803 (XVII) on PSNR, the Declaration on the Establishment of a New International Economic Order, and the Charter of Economic Rights and Duties of States.[72] Uganda argued that the PSNR was shaped in a specific historical context (that of decolonisation), and has a very specific purpose. It was therefore not applicable in the context of the dispute which bordered on individual acts by 83 members of the Ugandan military forces.[73] The ICJ agreed with Uganda and held that it could not uphold the DRC's contention that Uganda had violated the DRC's sovereignty over its natural resources. While recognising the importance of PSNR as a principle of customary international law, the ICJ noted that nothing in these General Assembly resolutions suggested that they were applicable to the facts in dispute.[74]

It is important to highlight that the ICJ observed that both the DRC and Uganda are parties to the African Charter which, in article 21(2), states that '[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation'. After making this connection, the court held that there was sufficient evidence to support the DRC's claim that Uganda violated its duty of vigilance by not taking adequate measures to ensure that its military forces did not engage in looting, plundering, and exploiting the DRC's natural resources.[75] This is an interesting interpretation of article 21(2). As highlighted above, the Mbaye Draft omitted the wording found in article 21(2) of the African Charter.

Armed Activities is a rare case where the ICJ has, in modern times, examined the customary principle of international law on state

70 A full examination of these awards is beyond the scope of this article.

71 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment ICJ Rep 2005 at 168 para 124.

72 *Armed Activities (DRC v Uganda)* para 226.

73 *Armed Activities (DRC v Uganda)* para 231.

74 *Armed Activities (DRC v Uganda)* para 244.

75 *Armed Activities (DRC v Uganda)* para 246.

responsibility which predates modern international investment law.[76] Importantly, for the first time an international court expressly recognised PSNR as a rule of customary international law binding on all states. However, this decision amounts to a refusal by the ICJ to extend PSNR and the CERDS to disputes over reparations (compensation) which do not exist in relations between a foreign investor and a developing host state.[77] On the other hand, in a decision based on similar facts, the African Commission on Human and Peoples' Rights (African Commission) held that Uganda illegally exploited natural resources of Congo and thereby violated articles 21 and 22 of the African Charter which provide for sovereignty over natural resources.[78] In this case, the DRC alleged that Rwandan and Ugandan forces besieged the Lower Congo province, disrupting the DRC's economic life.[79]

Although the texts of article 21 of the African Charter and resolution 1803 differ slightly, the different decisions reached by the ICJ and the African Commission establish the strong link between resolution 1803 and post-independence foreign investment protection law. Unlike the ICJ, the Commission has acknowledged the origin of article 21 in the colonial era, but has applied it to facts indirectly involving foreign investors.[80]

In cases involving states party to the African Charter and citizens' groups within these countries, the Commission has affirmed that article 21 of the Charter remains applicable in post-colonial Africa, noting that it triggers an obligation on the part of the State Parties to protect their citizens from exploitation by external economic powers and to ensure that groups and communities, directly or through their representatives, are involved in decisions relating to the disposal of their wealth.[81]

Even though the Commission has recognised the right of states to supervise the disposal of wealth in the general interest of the state and its

76 J Zrilic *The protection of foreign investment in times of armed conflict* (2019) 29.

77 See Dissenting opinion of ad hoc Judge Kateka at 378 noting that: 'The PSNR was adopted in the era of decolonization and the assertion of the rights of newly independent States. It thus would be inappropriate to invoke this concept in a case involving two African countries. This remark is made without prejudice to the right of States to own and or dispose of their natural resources as they wish.'

78 African Commission on Human and Peoples' Rights (ACmHPR), Communication 227/99 *DR Congo v Burundi, Rwanda and Uganda* Decision of May 2003 paras 94 & 95.

79 *DR Congo v Burundi* para 3.

80 JE Viñuales *Foreign investment and the environment in international law* (2012) 209.

81 ACmHPR Communication 328/06, *Front for the Liberation of the State of Cabinda v Republic of Angola* para 129; ACmHPR Communication 253/02 *Antoine Bissangou v Republic of Congo* para 82.

communities,[82] it has also noted that it is the state rather than the people which has the right to exploit natural resources in its territory.[83]

The Commission further stated:[84]

> The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the [African] Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African society.

Communications of the African Commission interpreting article 21 of the African Charter confirm the influence of Mbaye and the uniqueness of permanent sovereignty over natural resources as an economic right under the African Charter. The Commission has applied article 21 to a case where the applicant alleged that mining concessions had been granted without giving the indigenous owners of the lands a share in its resources.[85] Notably, it has also been applied in a dispute where it was alleged that the military government of Nigeria had been directly involved in oil production which caused environmental degradation and health problems.[86] These Commission cases, which indirectly involve foreign investors, show that unlike the traditional international investment regime, because of Mbaye's bold approach, the African human rights regime may provide a stronger basis for ensuring that the state exercises its sovereignty over natural resources in the exclusive interests of the people.[87]

The second context for an examination of Mbaye's contributions is a 2011 arbitration award in an ICSID claim instituted by an American foreign investor against Argentina in 2003. In *El Paso v Argentina* the

82 As above.

83 *Front for the Liberation of the State of Cabinda v Republic of Angola* para 132.

84 ACmHPR Communication 155/96, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* para 56.

85 ACmHPR Communication 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* para 120.

86 ACmHPR, Communication 155/96 *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*.

87 This is missing from the Pan African Investment Code which imposes an obligation on investors not to exploit or use local natural resources to the detriment of the rights and interests of the host state. Art 23 Pan African Investment Code (2016).

claimant alleged that various measures taken by Argentina were in violation of the Argentina-USA BIT. In his legal opinion in support of the respondent state, a leading scholar of international investment arbitration, Sornarajah, cited the decision of Manfred Lachs, Kéba Mbaye and Mohammed Bedjaoui in the *Guinea Bissau* case as strong legal authority for recognition of permanent sovereignty over natural resources as a *ius cogens* principle.[88] Sornarajah argued that in times of extreme urgency such as those which characterised the Argentine economic crisis of 2002, investment treaty rights also become defeasible through their subjection to the *ius cogens* principle.[89] Although in its decision on jurisdiction the tribunal considered the necessity of a balanced approach which took into account the sovereignty and responsibility to create an adapted and evolutionary framework for the development of economic activities,[90] it rejected Argentina's defence of necessity and held that Argentina had breached article II(2)(a) of the Argentina-USA BIT.

Like the ICJ's decision in *Armed Activities (DRC v Uganda)*, the *El Paso v Argentina* arbitral tribunal appeared to recognise PSNR but did not analyse its application to investment arbitration disputes in any depth. Together, the two decisions examined above highlight the ambivalence of international tribunals to some of the ideas of international investment law as a right to development and human right in which Mbaye believed.

3.3 The right to development

For Mbaye, PSNR was equivalent to a right to development which he is famously known to have articulated.[91] He conceived that the right to development was a problem of ownership of national natural resources.

88 *El Paso Energy International Company v The Argentine Republic* ICSID Case No ARB/03/15 5 March 2007 Legal Opinion of M Sornarajah para 25; Arbitral Award of 31 July 1989 Judgment ICJ Reports 1991 at 53; *Arbitration Tribunal for the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* Award of 14 February 1985 reported in (1986) 25 *International Legal Materials* 251 para 123: 'The Tribunal can nevertheless not completely lose sight of the legitimate claims by virtue of which economic circumstances are invoked, nor contest the right of the peoples concerned to a level of economic and social development which fully preserves their dignity. The Tribunal is of the opinion that the economic preoccupations so legitimately put forward by the Parties should quite naturally encourage them to consider mutually advantageous cooperation with a view to achieving their objective, which is the development of their countries.'

89 *El Paso Energy* para 25.

90 *El Paso Energy*; *International Company v The Argentine Republic*, ICSID Case No. ARB/03/15 27 April 2006 Decision on Jurisdiction para 70.

91 IG Shivji *The concept of human rights in Africa* (1989) 29; JT Gathii 'Africa and the radical origins of the right to development' (2020) 1 *TWAIL Review* 28 at 29.

He also believed that state sovereignty gave a state the right to nationalise or expropriate foreign-owned property.[92] In addition, Mbaye believed that exercise of the right to development required certain conditions at the international level. These included the creation of a new international economic order based on the principles of justice and equity which aimed at the fullest possible development of each human. He believed that international trade was based on the exploitation of the resources of the South by the North. He called for a change in this situation urging Africans to 'look far ahead, overcome egotisms and tackle today's injustices without delay lest they become the cause of unimaginable difficulties tomorrow'.[93] For Mbaye, a new and just international economic order would require the genuine exercise of the rights of peoples to self-determination and of their rights over their natural resources, equitable remuneration for goods and services in international trade relations, and the stabilisation of the prices of raw materials, real control and effective regulation by treaty of the multinational companies, and explicit recognition of the right of states to participation and nationalisation, the fair transfer of appropriate technology, and a broadening and improvement of trade relations.[94]

Although development was integral to the development of international investment law, in practice there is a considerable gap between international investment law and the notion of development.[95] As the paragraph above shows, although the right to development was embedded in the PSNR, Mbaye conceived of this mainly in terms of international trade law. As mentioned above, at the time Mbaye published his thoughts on PSNR and before his ICSID appointments, international investment law had not crystallised. Thus, while we may look to his writings for inspiration, they fail to provide full engagement with international investment law and development. Indeed, this is one of the blind spots in the right to development.[96] In this regard, Rajagopal argues quite convincingly that as the new international economic order strategy was failing, Third World

92 K Mbaye '*Le droit au développement'* (1980) 21 *Éthiopiques* http://ethiopiques.refer.sn/spip.php?article736 (accessed 24 September 2022).

93 As above.

94 Commission on Human Rights, Working Group of Governmental Experts on the Right to Development, Second Session Geneva, 23 November-4 December 1981 Working Paper Submitted by Senegal Some Points regarding the right to development raised by Mr Kéba Mbaye, head of the delegation of Senegal, at the thirty-sixth session of the Commission on Human Rights Geneva 11 February 1980 ahttps://legal.un.org/avl/pdf/ha/drd/E_CN.4_ AC.34_WP.15_E.pdf 2-2.

95 Schill and others (n 35) 20-27.

96 The author believes that in the immediate post-colonial era, scholars like Mbaye placed too much emphasis on human rights as they failed to understand that underdevelopment in Africa was also a consequence of bad governance and poor economic policies.

intellectuals like Mbaye looked to human rights as the last available tool to counter Western economic and political hegemony.[97] Of course, Mbaye always believed strongly in human rights and thus Rajagopal's argument also highlights the struggles Mbaye faced in articulating principles he considered beneficial to African economic development. As the following section shows, even though Mbaye was originally an African law scholar, during his years as an international investment arbitrator his ideas on the role of economic development in Africa were put to the test.

4 The ICSID years

In 1966 ICSID was established for legal dispute resolution and conciliation between states and nationals (investors) of other states.[98] However, it failed to operate fully until its second decade of existence; its first decade was one of legal experimentation and stagnation. Reeling from a sharply divided world based on ideological differences between developed and developing countries, the founders of ICSID had the difficult task of legitimising an institution they strongly believed in. Although African states readily ratified the ICSID Convention, during this period the full consensual ramifications of ICSID had not been tested. It was during these early years that Kéba Mbaye was appointed as an African first-generation ICSID arbitrator.

It is interesting to note that in the first few decades of ICSID, most African states appointed industrialists rather than legal practitioners as representatives.[99] Pursuant to article 3 of the ICSID Convention, the Centre maintains a Panel of Conciliators and a Panel of Arbitrators. Each contracting state may designate up to four persons to each panel, and the Chairman of the Administrative Council may designate up to ten persons to each panel. Mbaye was one of the first ten arbitrators from developing countries appointed in the first ICSID cases.[100] He was appointed as an arbitrator in *AMT v Zaire* and by Senegal in *Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal*. His other appointments were by the Chairman of ICSID's Administrative Council in the annulment proceedings of *Klöckner Industrie-Anlagen GmbH and others v United Republic*

97 Rajagopal (n 15) 208.

98 Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965.

99 For example, Senegal's first appointees were Abdourahmane Dia, a politician, ambassador and director of the *Société Générale Sénégal* and Ibrahima Tal, a director of the Senegal National Bank for Development. 'First Annual Report 1966/1967 ICSID' https://icsid.worldbank.org/en/Documents/resources/1967%20-%20AR%20-%20Final-%20ENG.pdf (accessed 24 September 2022).

100 AR Parra *The history of ICSID* (2012) 152.

of Cameroon and Société Camerounaise des Engrais, Maritime International Nominees Establishment v Republic of Guinea and *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*.[101] These non-treaty cases were the first cases testing the post-award remedies provided under the ICSID Convention – interpretation, revision, and annulment – and are cited to illustrate the ability of African states to innovate in the juridical sphere.[102] Incidentally, all these disputes were instituted against an African respondent state.

Mbaye's repeated appointments between 1986 and 1994 to a nine-person list of designees of the Chairman, were aimed at creating more geographically balanced panels.[103] Despite these nominations, Mbaye received fewer appointments after 1994. This may have been because, between 1994 and 2000 fewer ICSID cases involved a sub-Saharan Francophone respondent state. In *Goetz v Burundi*, the claimant nominated Andreas Bucher as president,[104] while the Republic of Burundi proposed Mohammed Bedjaoui as arbitrator and Kéba Mbaye as president.[105] On 28 March 1996, the claimants informed the Secretary-General of ICSID that they did not accept the nomination of Mbaye as president of the arbitral tribunal.[106] Following this lack of consensus, the president of the ICSID Administrative Council nominated professor Prosper Weil as president of the tribunal.[107] Had Mbaye been confirmed, this would have been his seventh appointment to an ICSID tribunal and definitely his valedictory appointment.[108] On 17 February 1999, he was appointed as a member of the panel for revision proceedings in *AMT v Zaire* but these proceedings were discontinued.

101 *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais* ICSID Case No ARB/81/2 Ad hoc Committee Decision on Annulment 3 May 1985; *Maritime International Nominees Establishment v Republic of Guinea* ICSID Case No ARB/84/4 Ad hoc Committee Decision on Annulment 22 December1989; *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* ICSID Case No ARB/84/3 Annulment Committee Order Taking Note of the Discontinuance 9 March 1993.

102 P Cannu 'Foundation and innovation: The participation of African states in the ICSID dispute resolution system' (2018) 33 *ICSID Review-Foreign Investment Law Journal* 456 at 465 n 69.

103 Parra (n 100) 180.

104 *Antoine Goetz et consorts v République du Burundi* ICSID Case No ARB/95/3 Award 10 February 1999 translated in (2004) 6 ICSID Reports 3 para 20.

105 *Goetz v Burundi* para 24.

106 *Goetz v Burundi* para 25.

107 *Goetz v Burundi* para 27.

108 See KF Olaoye '*Goetz v Republic of Burundi* I & II: How foreign investors challenge "free-zone regimes"' in J Chaisse & J Hu (eds) *International economic law and the challenges of the free zones – Global regulatory issues and trends* (2019).

Mbaye's repeated appointments to these ad hoc committees was a deliberate decision by Shihata to promote consistency in the jurisprudence through overlapping memberships.[109] These appointments were also aimed at making the panels more geographically diverse.[110] Following the first *Klöckner* annulment proceedings, consideration began to be given to curbing recourse to the annulment remedy. However, fears for finality of the ICSID system aroused by the *Klöckner* and *Amco* annulments were allayed by the ad hoc Committee decision in *MINE*.[111] The decision emphasised that '[a]nnulment is not a remedy against an incorrect decision',[112] and that an ad hoc Committee, therefore, could 'not in fact reverse an award on the merits under the guise of applying article 52' of the Convention.[113] The *MINE* ad hoc Committee decision laid to rest concerns about the annulment process raised by the two earlier decisions, especially as it rejected the 'hair-trigger' approach to annulment and the holding that an award could be annulled if the reasons for it were not 'sufficiently relevant'. Ad hoc Committee decisions during the next three years in the Klöckner and *Amco* cases confirmed this.[114] Indeed, Mbaye believed that appeals should be made only when they did not detract from the effectiveness of arbitration.[115] This section examines Mbaye's contributions to ICSID jurisprudence.

4.1 Practising virtue

Kéba Mbaye is recognised as one of the most distinguished Africans to have sat on an ICSID arbitration[116] ranking high on the list of most frequent African appointees to ICSID arbitral tribunals. This is reflected in a number of studies which focus on arbitral appointments. For example, in a 2016 study on 35 appointments of sub-Saharan Africans the authors show that the highest appointees are Judge Yusuf of Somalia (seven appointments) and Judge Mbaye of Senegal (five).[117] In a 2006 review of 115 concluded ICSID cases, Commission ranked 43 most frequently selected arbitrators.

109 Parra (n 100) 172.

110 Parra (n 100) 207.

111 A Broches *Selected essays: World Bank, ICSID, and other subjects of public and private international law* (1995) 309.

112 Parra (n 100)190.

113 As above.

114 Parra as above.

115 K Mbaye 'Commentary' in ICC, *ICC Court of Arbitration 60th Anniversary: A look at the future* (1984) 293 at 298.

116 Cannu (n 102) 464 n 64.

117 TR Snider and others 'Introduction: Special issue on Africa' (2016) *Transnational Dispute Management* 1 at 5.

With 22 individuals accounting for 115 of the 361 appointments (32%), the only African on this table, Kéba Mbaye, was ranked tenth on this list matching Elihu Lauterpacht.[118] In another empirical study on social capital in the arbitration market, Puig identifies Mbaye as one of the early arbitrators who, at one point, served as 'important intergenerational links or "transmission belts" within the network'.[119] In fact, Mbaye was the third national from a developing country making up a small number of developing state nationals appointed as arbitrators. In another study, carried out in 2006 on 54 appointments to ICSID ad hoc annulment committees, in 18 annulment proceedings arbitration practitioners show that Mbaye was part of a small pool of 37 individuals, 26 of whom had appeared in only one annulment case. This data may support the view that Mbaye belonged to the exclusive 'gentleman's club' of ICSID appointees.[120] To date, even after more than 900 ICSID cases, more than three decades after his last arbitral appointment and fifteen years after his death, Mbaye still ranks among the highest appointments from sub-Saharan Africa.

In recent years, the appointment and reappointment of arbitrators has become a recurring theme in academic discourse.[121] If the empirical studies above are to be taken on face value, during his lifetime Mbaye was a member of the arbitration 'mafia', and a selected group of grand old men.[122] For example, in their seminal book on transnational arbitration, Dezalay and Garth report an interview with a Paris-based US lawyer as follows:[123]

> It is not an accident that, when asked how to find leading arbitrators from outside of the developed Western World, one US lawyer in Paris stated, 'There are people who've become well known, like …You see the ICJ, and it does have some possibilities. You have – I think he's from Kenya –

118 JP Commission 'Precedent in investment treaty arbitration: A citation analysis of a developing jurisprudence' (2007) 24 *Journal of International Arbitration* 129 at139.

119 S Puig 'Social capital in the arbitration market' (2014) 25 *European Journal of International Law* 387 at 416.

120 N Rubins and others 'ICSID Arbitrators: Is there a club and who gets invited?' (2006) *Global Arbitration Review* 1 November 2006 https://globalarbitrationreview.com/article/1028223/icsid-arbitrators-is-there-a-club-and-who-gets-invited (accessed 24 September 2022).

121 W Kidane 'The culture of investment arbitration: An African perspective' (2019) 34 *ICSID Review-Foreign Investment Law Journal* 411 at 413; E Onyema 'African participation in the ICSID system: Appointment and disqualification of arbitrators' (2020) 34 *ICSID Review - Foreign Investment Law Journal* 365.

122 Y Dezalay & BG Garth *Dealing in virtue: International commercial arbitration and the construction of a transnational legal order* (1996) 10.

123 Commission (n 118) 141.

> [Kéba]Mbaye.' The career that leads to appointment to the World Court is a career that has paid attention to the universals of international law-contributing to the distance necessary also for success in the internal market of international commercial arbitration. The cosmopolitan arbitrator is thus often the most French of the Egyptians, or the most British of the Lebanese.[124]… regular encounters on tribunals, at conferences, esprit de corps amongst arbitrators in investment treaty cases (emphasis added).

Although this statement incorrectly refers to Mbaye as Kenyan, it speaks of a cosmopolitan accepted in the parallel worlds of Anglophone and Francophone arbitration lawyers. This idea that appointment to the ICJ is an appropriate pool for international investment arbitrators (which has been challenged in recent years[125]) is, of course, testament to the high esteem in which the ICJ's judges are held by the international community.[126] Between 1983 and 1992, during his tenure as an ICJ judge and vice-president, Mbaye 'moonlighted' and was appointed as an arbitrator.[127] Interestingly, in comments at a 1983 arbitration event, Mbaye stated that international judges like him had limited functions in the efficacy of international commercial arbitration as they were restricted to the formation of the arbitral tribunal.[128] Elsewhere in their book, Dezalay and Garth use Mbaye as a reference for general arguments to show that 'the lawyers of the Third World take little more than crumbs'.[129] He is used to support their arguments that Third World countries have only a very small number of notable legal scholars with the linguistic competence and cosmopolitan experience required for arbitral appointment, and that men like Mbaye belonged to a generation during which a small fraction of the elite benefited from a cosmopolitan education.[130] They argue that this

124 Dezalay & Garth (n 122) nn 66 & 297.

125 N Bernasconi-Osterwalder & MD Brauch 'Is "moonlighting" a problem? The role of ICJ judges in ISDS' (2007) International Institute for Sustainable Development https://www.iisd.org/sites/default/files/publications/icj-judges-isds-commentary.pdf 10 (accessed 24 September 2022).

126 Speech by HE Abdulqawi A Yusuf, President of the International Court of Justice, on the occasion of the seventy-third session of the United Nations General Assembly 25 October 2018 https://www.icj-cij.org/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf (accessed 24 September 2022).

127 Bernasconi-Osterwalder & Brauch (n 125). Mbaye was elected to the ICJ in 1981. S Rosenne 'The election of five members of the International Court of Justice in 1981' (1982) 76 *American Journal of International Law* 364-370.

128 Mbaye (n 115) 293.

129 Dezalay & Garth (n 122) 95.

130 PR Sabatier 'Educating a colonial elite: The William Ponty School and its graduates' PhD thesis University of Chicago 1977; T Hodgkin & R Schachter 'French-speaking West Africa in transition' (1960) 33 *International Conciliation* 375 at 385: 'Admission to Ponty was severely limited. Between 1918 and 1945, when the educational system

education typically commenced in the best local establishments, frequented by the heritiers of the colonial bourgeois, and continued in the universities of the metropolis. This elite generation, they point out, was in the process of disappearing.[131] The book's title, *Dealing in virtue,* sarcastically alluded to a very select and elite group of individuals, purportedly selected for their virtue, judgement, neutrality, and expertise, but rewarded as if they were participants in international deal-making.

For Dezalay and Garth, the special crop of international lawyers to which Mbaye belonged held a status of symbolic capital which had been acquired through a career of public service or scholarship translating into a substantial cash value in international arbitration.[132] To the wider world, Mbaye remained the man who from 'a small Senegalese village to the Halls of justice at the Hague carried with him the determination to provide justice in the world'.[133] Although Mbaye was well respected by his peers and accepted into the world of international arbitration, his dissenting opinions in two ICSID disputes provide a rare opportunity to identify distinct principles which he considered paramount. The next subsection examines his opinions, first in perhaps one of the longest, and second, in one of the shortest, dissenting opinions in the history of ICSID.[134]

4.2 Perpetual dissent and personal conscience

The ICSID Convention sets no formal requirements for individual opinions. Therefore, arbitrators are free to choose how to structure and present their separate opinions. Mbaye once stated that before exercising his powers, the arbitrator must compel himself to forget who appointed him.[135] In practice, a party-appointed arbitrator may lean towards the party which appointed him or her. There is no specific requirement that an arbitrator

became much more closely assimilated to that of France, only about 2,000 students achieved the Ponty diploma. The importance of this elite within the elite can hardly be exaggerated. At Ponty the student body built up connections which transcended territorial or ethnic boundaries. They mastered the French language and learned to evaluate European ideas. They conceived of themselves as Africans rather than as Ivory Coasters... For the rest of his life a Ponty major enjoyed a status which enabled him to deal with his fellow political leaders with special confidence.'

131 Dezalay & Garth (n 122) 96.

132 Dezalay & Garth (n 122) 8.

133 'Kéba Mbaye, IOC Ethics Chairman, 82' '*Around the rings'* 1 December 207 http://aroundtherings.com/site/A__26633/Title__Keba-Mbaye-IOC-Ethics-Chairman-82/292/Articles (accessed 15 January 2020).

134 Compare with A Redfern 'Dissenting opinions in international commercial arbitration: The good, the bad and the ugly' (2004) 20 *Arbitration International* 223 at 242.

135 Mbaye (n 115) 295.

must append his or her individual opinion after the signature page of an award. Mbaye is known for his dissenting opinions including his opinion in *Senegal v Guinea*. Unlike judgments at the ICJ, it was uncommon for arbitrators to write separate judgments and thus his full-length opinion provides very valuable insights. The credibility of dissenting opinions by party-appointed arbitrators has been criticised and arguments have been made for doing away with dissenting opinions.[136] However, dissents are important.

4.2.1 *SOABI v Senegal*

The *Societe Ouest Africaine des Betons Industriels (SOABI) v Senegal* dispute was the twelfth dispute registered by ICSID. On 3 February 1983, SOABI and Senegal nominated Kéba Mbaye and Jean van Houtte as arbitrators by mutual agreement. This appointment took place two years after Mbaye's appointment to the ICJ. This dispute stemmed from a 1975 agreement between Senegal and Naikida, a Panamanian joint-stock company, for the construction of a prefabrication of reinforced concrete elements plant and 15 000 units of low-income housing within five years. Naikida, which was owned by a Belgian businessman Jean Baudoux, was to establish a company under Senegalese law which would own the prefabrication plant required for constructing the housing units. In September 1975, a new agreement for an investment amounting to CFA francs 900 million with the same objectives was signed between Senegal and SOABI which was registered under Senegalese law. In November 1975, an establishment agreement was signed between SOABI and Senegal. It was this agreement which included an ICSID arbitration clause.

The factory was built by Senegal at the cost of 2 billion CFA francs. On the other hand, none of the housing units was ever erected. In 1977, Senegal decided that it would not give the company permission to secure the loan on its behalf, and did not make the prepared and serviced lots on which the housing units were to have been built available.[137] SOABI submitted an application for arbitration seeking compensation for losses it had suffered following the alleged breach by the government of the contract for the construction of the 15 000 housing units.

136 AJ Van den Berg 'Dissenting opinions by party-appointed arbitrators in investment arbitration' in MH Arsanjani and others (eds) *Looking to the future: Essays on international law in honour of W Michael Reisman* (2010) 821.

137 *SOABI v Senegal* (n 1) Mbaye Dissenting Opinion para 16. Subsequent references to this case are, unless otherwise specified, to the Mbaye Dissenting Opinion.

On 25 February 1988 Mbaye delivered the third dissenting opinion in the history of ICSID and refused to sign the majority award. Mbaye's opinion was premised on three main grounds. At the beginning of his opinion he expressed deep regret that his nationality could be misinterpreted as 'the manifestation of two totally different sensitivities on problems highlighting the conflictual relationship between developing countries and foreign investors'.[138] First, he opined that SOABI could not be regarded as an investor which had risked its capital.[139] He believed that as the dispute concerned interpretation of a contract which claimed to be part of a poor country's development programme, resolving the dispute involved not only finding legal solutions but also ensuring that justice was done. For him, the nature of investment by SOABI was inconsistent with the objective of the ICSID Convention to contribute to economic growth by reassuring companies.[140] He based this on the report by SOABI's executive directors which formed the basis for establishment of ICSID.[141] Mbaye made this statement on the basis that SOABI had been incorporated with an insignificant capital of CFA francs 3 million (FF 60 000) and had taken no risks as Senegal was expected to guarantee the loan required for the project. He also queried the fact that SOABI had sold the factory to the government for more than CFA francs 2 billion, even though, according to the consultant architect of the Senegalese government it was worth only CFA francs 500 million.[142] For him, the award of CFA francs 150 million as damages for loss of profits, offended every sense of justice and should not be encouraged. This question of what qualifies as an 'investment' remains central to Africa's participation in the international investment law regime. Subsequent ICSID tribunals have developed the 'Salini test' which encapsulates some of the questions raised by Mbaye in his dissenting opinion.[143] The Salini test has been incorporated in newly concluded African international investment treaties.[144]

Fundamentally, Mbaye was of the view that the Tribunal assumed powers it did not have when it decided that all agreements signed by the

138 *SOABI v Senegal* (n 1) para 2.

139 As above.

140 *SOABI v Senegal* (n 1) para 4.

141 As above.

142 *SOABI v Senegal* (n 1) para 19.

143 *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* Decision on Jurisdiction 31 July 2001.

144 Pan African Investment Code (2016) art 4(4); ECOWAS Community Investment Code (2018) art 1(h). These provide that covered investments must meet the following requirements: substantial business activity; commitment of capital or other resources; the expectation of gain or profit; the assumption of risk; and a significant contribution to the host state's economic development.

parties, other than the establishment agreement, were by implication covered by the establishment agreement. He stated that even though the ICSID secretariat registered the dispute, the bold – possibly *ultra vires* – position taken by the majority ran contrary to all doctrine.[145] After making this declaration on lack of jurisdiction, Mbaye stated that he had 'little intention to re-open a debate which, today, while not quite considered out of date, is certainly of less importance than in the past, about the significance of arbitration clauses in "State contracts"'. He did state that he agreed with the widely-held doctrine that contracts between states and private persons were agreements between equals.[146] However, he stated that in this kind of dispute, tribunals should be more circumspect when interpreting the clause consenting to arbitration.[147] To support this position, he stated that even though Senegal had signed the ICSID Convention, under Senegalese law the state would consent to arbitration in exceptional cases only.[148] In effect, while he believed that international arbitration deserved to be developed and promoted, he considered that the principle of free will must remain sacrosanct.[149]

With regard to the breach of contract, he stated that even though the government was misguided in invoking the termination remedy provided for in the agreement, SOABI had, nevertheless, committed some defaults which the Tribunal ought to have taken into account in considering the government's liability with respect to the unilateral breach of the contract.[150] The issue of state contracts remains fundamentally important for African states even though foreign investments are now, in the main, protected by international investment treaties.[151] As Mbaye stated, in the 1970s and 1980s ideological battles over the international status of contracts between developing states and foreign investors appeared to be on the wane. Mbaye's pronouncement that state contracts are agreements between equals helps us understand how contracts are used by developing states to maintain control over foreign investors.

145 *SOABI v Senegal* (n 1) para107.

146 *SOABI v Senegal* (n 1) para 115.

147 *SOABI v Senegal* (n 1) para 116.

148 *SOABI v Senegal* (n 1) para 126.

149 *SOABI v Senegal* (n 1) para 143.

150 *SOABI v Senegal* (n 1) para 270.

151 See KF Olaoye 'State responsibility for breaches of investment contracts (book review)' (2020) 23 *Journal of International Economic Law* 293; L Cotula 'Investment contracts and international law: Charting a research agenda' (2020) 31 *European Journal of International Law* 353.

The second issue raised by Mbaye was SOABI's shareholding. He considered that it was unreasonable to subject a state to so difficult and sometimes impossible an enquiry into the mazes constantly being invented by ingenious financiers in order to escape taxes and take refuge in tax havens. Next, Mbaye dealt with the nationality of the investor. He stated that a Senegalese company controlled by Panamanian shareholders (Panama was not a contracting state to ICSID) could not be considered as a national of Switzerland, an ICSID contracting state.[152]

During the hearings, Senegal showed that, contrary to the claims by SOABI, Flexa, the principal shareholder of SOABI, did not have its head office in Switzerland as had been falsely claimed by the founders of SOABI in Flexa's notarised Act of Incorporation, but in Panama.[153] For Mbaye this amounted to concealment and fraud of the true nationality of the juridical person controlling SOABI and against which the Tribunal had a duty to draw all inferences.[154] He stated that 'in a world where more and more it is to be feared that shrewd "professionals" will take advantage of the naivety of their "clients", tribunals, whether arbitral or otherwise, have a duty to instil a sense of morality into business transactions'. For Mbaye, the duty to act in good faith required each party to provide accurate information.[155] The majority held that it fell to the government to refute SOABI's evidence on the nationality of its foreign controlling interests.[156] However, Mbaye believed that good faith required that each party give to the other, in all sincerity, accurate information. In reply to this point, Broches repeated the tribunal's conclusion that this had had no impact on Senegal's consent to ICSID jurisdiction, as the state was undoubtedly aware that SOABI was controlled by Belgian investors – who represented Flexa in signing the agreement.

The Tribunal's conclusions here are notable as it was among the first to interpret article 25 of the ICSID Convention as it applies to locally incorporated companies that are under 'foreign control'. Mbaye believed that article 25(2)(b) – which was specifically aimed at allowing a state to contract with a juridical person having its nationality – should be applied taking into account the concern for simplification which inspired its drafters. He stated that an inquiry into the effective control assumed by

152 *SOABI v Senegal* (n 1) para 60.

153 *SOABI v Senegal* (n 1) para 59.

154 *SOABI v Senegal* (n 1) para 65.

155 *SOABI v Senegal* (n 1) para 66.

156 *Société Ouest Africaine des Bétons Industriels v Republic of Senegal* ICSID Case No ARB/81/1 Decision on jurisdiction 1 August 1984 para 43.

a juridical or natural person was inconsistent with the spirit underlying article 25(2)(b) of the ICSID Convention.[157]

For Asouzu, indirect control of SOABI by nationals of a contracting state through Flexa which was incorporated in Panama (non-party to the ICSID Convention), should have resulted in the tribunal declining jurisdiction.[158] Indirect control remains a very thorny issue in international investment arbitration, and tribunals still struggle to draw clear lines between indirect control as a covered investment, and indirect control as illegal forum shopping.

Mbaye believed the fundamental question was whether international tribunals, seized of a particular type of case, could appropriately continue to content themselves with the cold application of ready-made legal formulae, or rather seize the opportunity offered to them in certain cases to use their powers of judgement not simply to state the law but also to ensure that justice is done. Thus, while he recognised the role of the ICSID Convention in protecting developers using their capital and skill to contribute (while making money as is their purpose) to a development project in a Third World country, he believed in a balancing act. For Mbaye, is it not normal that tribunals should discourage practices where businessmen, who, while not taking any financial risk and using personal local acquaintances to secure contracts (and that is often the essential point), use legal artifice to place liability on their partners when a dispute arises.[159]

His succinct and progressive analysis of the question of 'investment' is important. A modern reader may wonder how the tribunal reached its decision without even considering whether the dispute had risen from an investment. While this has become a thorny issue in investment arbitration jurisprudence, the definition of an investment was not as important in ICSID jurisprudence when SOABI was decided.[160]

The third issue raised by Mbaye bordered on the validity of the establishment agreement. Pursuant to article 6 of the Senegalese Investment Code, only a decree could have given SOABI the benefit of

157 *SOABI v Senegal* (n 1) para 77.

158 AA Asouzu *International commercial arbitration and African states: Practice, participation and institutional development* (2001) 284 n 96.

159 *SOABI v Senegal* (n 1) para 20.

160 C McLachlan and others *International investment arbitration: Substantive principles* (2017) 167.

the regime relating to contractual ventures.[161] Thus, even though the agreement had been signed by the Senegalese Prime Minister, Abdou Diouf, conferral of special status by decree had not been granted.[162] The majority held that although this issue was raised, the tribunal had no authority to require compliance with municipal law, and thus releasing the state from contractual obligations which it had itself recognised. Mbaye stated that a tribunal was never obliged to choose the way of wisdom if it considered that its decision was legally correct.[163] Mbaye believed that as article 44 of the Code of Governmental Obligations specified that a contract which has not been approved by a government authority could produce a legal effect only from the date of the approval, this rule of public order was binding on the tribunal. He stated that in default of declaring the establishment agreement a nullity, the tribunal should at least have made this point and then allowed SOABI to claim compensation only on the basis of state assent.

Four months after the SOABI award, in his 1988 lecture during the Hague Academy of International Law titled '*L'Intérêt pour agir devant la Cour internationale de justice*', Mbaye addressed state action in diplomatic protection. The subject of his lecture was locus standi interest before the ICJ including the 1970 judgment in *Barcelona Traction Light and Power Company Limited (Belgium v Spain)*. Mbaye emphasised that the ICJ must evolve with prudence and greater certainty in an area of great sensitivity.[164] *Barcelona Traction* is notable in that the ICJ ruled that Belgium could not exercise diplomatic protection on behalf of Belgian shareholders over a Catalonia-managed company incorporated in Canada. Mbaye believed that Belgium had an interest in taking action because 88 per cent of the shares in Barcelona Traction was owned by Belgians. For him, even though this position was economic, it corresponded to the meaning of the ordinary course of international law and, in particular, international economic law. He found that this would have been more aligned with the reality that the economic world today presents phenomena of intervention and responsibility of the State in the economic activities of its nationals on the national territory and abroad, of such a frequency and intensity that the separation of the interests of individuals from the interests of the State no longer corresponds to reality.[165]

161 *SOABI v Senegal* (n 1) para 38.

162 *SOABI v Senegal* (n 1) para 35.

163 *SOABI v Senegal* (n 1) para 44.

164 K Mbaye '*L'intérêt pour agir devant la Cour internationale de justice'* (1988) 209 *Recueil des cours, de l'Académie de droit international* 229 at 312.

165 Mbaye (n 164) 315.

Consistent with Mbaye's approach, ICSID tribunals recognise indirect control where foreigners own majority shares in the enterprise. This is distinguishable from the SOABI dispute, where there were allegations of fraud.

Mbaye also faulted the award of damages in SOABI. He stated that as proceedings were pending before a Senegalese court which had complete jurisdiction, it was wrong for the tribunal to award damages in favour of SOABI. He stated, that the tribunal's approach reflected an unjustified suspicion toward a national court.[166] He also faulted the expert's contact with SOABI[167] and the tribunal's failure to interrogate the expert.[168] He considered that by granting SOABI damages totalling CFA francs 552 989 664, an amount in excess of the damages claimed, the tribunal had acted *ultra petita*.[169] He stated further that the tribunal had skilfully avoided addressing the difficult problem of post-judgment interest under Senegalese law, which explained why it had used the term '*compensatory interest'* although the term did not feature in SOABI's submissions.[170] Calculation of damages remains a contested issue in international investment arbitration especially because for African states, arbitral awards can result in significant economic cost. Mbaye's opinion on calculation of damages is relevant in contemporary times and a reminder that structure and transparency must be adopted in calculating damages.

4.2.2 *American Manufacturing & Trading, Inc v Republic of Zaire*

AMT v Zaire is the first case to have been instituted under a United States bilateral investment treaty, the second treaty-based claim to be heard at ICSID, and the third treaty-based arbitration to have been initiated under any procedural rules. Mbaye was appointed as an arbitrator by the chairman of the administrative council in 1993.[171] This dispute was instituted by AMT, a Delaware company which produced and sold automotive and dry-cell batteries in Zaire. In its memorial AMT argued that when members of Zaire's armed forces broke into its commercial complex and looted its stores, the respondent had breached the USA-Zaire BIT (1984). On the basis of a financial report, AMT declared its direct

166 *SOABI v Senegal* (n 1) para 285.

167 *SOABI v Senegal* (n 1) para 293.

168 *SOABI v Senegal* (n 1) para 295.

169 *SOABI v Senegal* (n 1) para 303.

170 *SOABI v Senegal* (n 1) para 307.

171 *American Manufacturing & Trading, Inc v Republic of Zaire* ICSID Case No ARB/93/1 Award 21 February 1997 para 2.03.

losses to be approximately USD 10 500 000.[172] It requested USD 21 574 405 compensation and additional USD 305 368 interest.[173]

Although concurring with the reasoning of the tribunal, Kéba Mbaye was convinced that the sum of USD 9 000 000 awarded to the claimant exceeded the damages it actually sustained and the profits it could have reasonably expected. In his separate opinion dated 5 February 1997, he stated that the total amount of compensation should not exceed USD 4 000 000.[174] His signature does not appear on the final page of the final award. Notably, the tribunal appointed an independent expert – a former World Bank civil servant – to evaluate the damages. In his report, the expert set the value of the losses at USD 4 452 500. This notwithstanding, the tribunal simply held that it would use its 'discretionary and sovereign power' to determine that the final damages to be paid would be UDS 9 000 000 plus interest at 7,5 per cent per annum.

The *AMT v Zaire* case is recognised as precedent in the ICSID system that for purposes of constituting a majority what matters is not the reasoning of majority members but their votes.[175] Lending some credence to Mbaye's opinion, the tribunal's analysis of damages has been described as quite flimsy to the modern reader as the tribunal offered no proper explanation for the final sum awarded – other than to cite the tribunal's sovereign discretion.[176] Notably, in an early harbinger of a long-standing doctrinal debate, the tribunal suggested that it could not value the assets and any interest and lost profits in the same way as it would investments in a politically stable country like Switzerland or Germany. Almost two years after the award, Zaire sought its revision invoking article 52 of the ICSID Convention which provides for possible revision in case of the discovery of some new fact that could have a decisive effect on the award. An application for revision was registered on 29 January 1999 and Mbaye

172 *AMT v Zaire* (n 171) para 1.06.

173 *AMT v Zaire* (n 171) para 3.06.

174 *American Manufacturing & Trading, Inc v Republic of Zaire*, ICSID Case No ARB/93/1 Statement of Individual Opinion and Declaration 5 February 1997 in (1997) 36 *International Legal Materials* 1534.

175 *Alapli Elektrik Besloten Vennootschap v Turkey* ICSID Case No ARB/08/13 Decision on Annulment (10 July 2014) para 171.

176 LE Peterson 'Looking back: In second ICSID case arising out of an investment treaty, arbitrators held Zaire liable for US investor's losses during soldiers' rampage' *Investment Arbitration Reporter* 18 January 2017 https://www-iareporter-com./articles/looking-back-in-second-icsid-case-arising-out-of-an-investment-treaty-arbitrators-held-zaire-liable-for-u-s-investors-losses-during-soldiers-rampage/ (accessed 24 September 2022).

was appointed to the review panel. However, these proceedings were discontinued.

Like his dissenting opinion in *SOABI*, Mbaye's separate opinion is still important today as regards the calculation of damages and expected profits. Even though tribunals have now developed a discounted-flow methodology, calculation of damages remains a major concern for all stakeholders.[177] The awards examined above show that well before issues surrounding the calculation of damages, indirect control, fraud, and good faith led to a backlash against international investment arbitration, Mbaye had already articulated the importance of these principles to the legitimacy of the system. As an African scholar who had witnessed the failure of the NIEO, he was able to distinguish perception from reality and contribute to a system which appeared antithetical to the development of an African international law.[178] As the next section shows, Mbaye's intellectual history teaches us the importance of history and the importance of context in examining Africa's participation in the international investment law regime.

5 Mbaye and African approaches to international investment arbitration

During the height of Mbaye's career in international investment arbitration, African states and scholarship in general viewed arbitration with suspicion.[179] Mbaye's most frequently cited passage in investment arbitration literature is a comment made during the sixtieth anniversary of the Court of Arbitration of the International Chamber of Commerce (ICC) in 1983. Mbaye (who was a deputy-president of the ICC court) was one of four commentators asked to comment on Berthold Goldman's presentation which focussed on the complementary role of judges in the efficacy of international commercial arbitration. At this time scholarship still viewed disputes between states and foreign investors as commercial arbitration rather than as a branch of public international law.[180] Also, the ICC had been the arbitral institution for some of these state-contract

177 A Saldarriaga & M Kantor 'Calculating damages: Arbitrators, counsel, and experts can do better than they have in the past' in KU Lu and others *Investing with confidence: Understanding political risk management in the 21st century* (2009) 196.

178 D Vagts 'Forward to the backlash against investment arbitration' in M Waibel and others (eds) *The backlash against investment arbitration: Perceptions and reality* (2010) xxiii.

179 Asante (n 11); A Agyemang 'African states and ICSID arbitration' (1988) 21 *Comparative and International Law Journal of Southern Africa* 177.

180 SL Sempasa 'Obstacles to international commercial arbitration in African countries' (1982) 41 *International and Comparative Law Quarterly* 387.

disputes.[181] Berthold Goldman is best known as one of the reinventors of the *lex mercatoria*. He showed how, in the field of international economic relations, a spontaneous law appeared made up of professional usage, legal arrangements, contractual clauses, arbitral awards, and the true legal order of the international society of merchants.[182]

In his comments made five years before his dissenting opinion in *SOABI v Senegal*, Mbaye stated:[183]

> For a long time, the French-speaking countries of Africa, following the French example, had thought that they could avoid arbitration, by citing procedural rules forbidding them to agree to internal arbitration. Today ICSID is helping to modify this situation that was sapping the confidence of the economic partners of these countries. It is a question of pure good faith. A State must not be allowed to cite the provisions of its law in order to escape from an arbitration that it has already accepted.

This statement has been reproduced and cited in different contexts by prominent international arbitration lawyers like Jan Paulsson as authority for the argument that good faith should prevail in cases where a developing-state entity relies on the *ultra vires* doctrine to resile from its agreement to arbitrate.[184] For Lalive, Mbaye's authoritative words were a good basis for the argument that states could not, in bad faith, raise ploys such as illegality to challenge the jurisdiction of arbitral tribunals.[185]

181 K Böckstiegel 'Arbitration of disputes between states and private enterprises in the International Chamber of Commerce' (1965) 59 *American Journal of International Law* 579.

182 B Goldman *Lex Mercatoria* (1983).

183 Mbaye (n 115) 296.

184 J Paulsson 'May a state invoke its internal law to repudiate consent to international commercial arbitration?: Reflections on the *Benteler v Belgium* Preliminary Award' (1986) 2 *Arbitration International* 90 n 2; J Paulsson 'Third World participation in international investment arbitration' (1987) 2 *ICSID Review* 19 at 61; H Van Houtte & M Hudson 'The arbitration agreements concluded between Arab and European commercial partners' (1990) *International Business Law Journal* 65 at 76; A Yesilirmak 'Jurisdiction of the International Centre for Settlement of Investment Disputes over Turkish concession contracts' (1999) 14 *ICSID Review* 390 at 414 n 138; J Paulsson *Denial of justice in international law* (2005) 263; J Paulsson 'What authority do international arbitrators have over states' in AJ van den Berg (ed) *New Horizons in international commercial arbitration and beyond* (2005)132 at 163; J Paulsson 'The power of states to make meaningful promises to foreigners' (2010) 1 *Journal of International Dispute Settlement* 341 at 348; D Chamlongrasdr 'Tension in domestic and international law on capacity to enter into arbitration agreements: A survey on legal restrictions' (2005) 16 *European Business Law Review* 275 at 287.

185 P Lalive 'Some threats to international investment arbitration' (1986) 1 *ICSID Review - Foreign Investment Law Journal* 26 at 31.

At the other end of the spectrum, Sornarajah describes Mbaye's words as 'a cautionary statement of an eminent African jurist [which] is cited in favour of the rule that a state entity should not rely on the *ultra vires* doctrine to resile from its agreement to arbitrate'.[186] For Sornarajah, who is a prominent 'Third World' international investment scholar, there are cogent policy justifications against the acceptance of the rule stated by Mbaye. He argues that as state entities in developing countries are constituted to achieve certain goals, there is no good reason why a tribunal should condone deliberate breach of the host country's law by a foreign multinational corporation by articulating a rule that the state entity cannot plead provisions of its national law to establish the invalidity of the agreement.[187] In practice, however, arbitral tribunals have favoured Mbaye's approach.

Illegality and jurisdiction of arbitral tribunals has proved to be a very thorny issue for African states.[188] For example, in a recent award which is currently before an annulment committee, an ICSID tribunal held that the claimants' failure to obtain an environmental impact assessment licence was a violation of Kenyan law which warranted the proportionate response of a denial of treaty protection under the BIT and the ICSID Convention.[189] In its application for annulment, Cortec Mining described the tribunal's decision on jurisdiction as a 'black swan' with potentially severe consequences for many investors.[190]

Fali Nariman describes Mbaye's contributions during the ICC sixtieth anniversary quite differently. He reports:[191]

> In Paris, way back in 1983, at the 60th anniversary celebrations of the ICC Court of International Arbitration, I was eyewitness to a clash between a distinguished proponent, and an equally distinguished opponent, of international arbitration. During one of the sessions, Judge Howard Holtzmann (arbitrator emeritus from the United States), confident that he was expressing a widely-accepted view, stressed the idea of Judge and

186 M Sornarajah *The settlement of foreign investment disputes* (2000) 108.

187 Sornarajah (n 186) 109.

188 *Securiport v Benin* Judgment of the Paris Court of Appeal 27 October 2020.

189 *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya* ICSID Case No ARB/15/29 22 October 2018 Award of the Tribunal para 365.

190 *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*, ICSID Case No ARB/15/29 22 October 2018 15 February 2019 Application for Annulment para 21.

191 F Nariman 'Investment arbitration under the spotlight: What next for Asia' 2010 Herbert Smith Freehills-SMU Arbitration Lecture Series' https://ink.library.smu.edu.sg/hsmith_lect/33 (accessed 24 September 2022).

> Arbitrator being 'partners in a system of international justice'. But Judge Kéba Mbaye, [*sic*] differed. He said that 'the notion that there is a system of international justice will not be shared by some countries notably those in Africa, Asia and Latin America who still see arbitration as a "foreign" judicial institution imposed upon them'. Mbaye recalled the hostility of African courts to arbitrators by foreign tribunals, and said: (I quote) 'as everybody knows, arbitration is seldom freely agreed to by the developing countries. It is often included in contracts of adhesion, the signature of which is essential to the survival of these countries'. He also complained (at the time, a valid complaint) that developing countries were rarely the venue of an international arbitration, and, even more rarely, produced arbitrators. Kéba Mbaye was a jurist – but he was a jurist with a vision. At the Paris Conference he expressed the hope that 'international arbitration' would gradually gain Third World acceptance – and ultimately secure Third World confidence (sic).

In the ICC's publication of the proceedings, the exchange involving Mbaye differs from Nariman's report above. In particular, Mbaye sought to draw the attention of the conference participants to examples which were relevant to Africa.[192] He highlighted that international commercial arbitration was a victim of its success.[193] Foreshadowing his dissenting opinion in *SOABI* a few years later, he welcomed the growth of international arbitration but stressed that this must be through the arbitrator's scrupulous respect of the pre-eminence of justice over arbitration.[194] He considered that surrender of jurisdiction by national judges to international arbitration was a very important question for newly independent African countries. It was after this comment that he stated that the right of legal persons in public law to conclude arbitration agreements was not yet known to or embraced by African states.[195] He stated that ICSID would shape the confidence of the economic partners of African states by modifying consent to national sovereignty arbitration avoided by French-speaking states.

In the *SOABI* award, which was five years after his ICC Commentary, Mbaye described the ICSID (Washington) Convention in the following words:[196]

> The Washington Convention is a contribution to the development of poor countries. To this effect it tends, in particular, to establish the legal certainty needed by investors who participate in the socio-economic development

192 Mbaye (n 115) 293.

193 As above.

194 Mbaye (n 115) 295.

195 Mbaye (n 115).

196 *SOABI v Senegal* (n 1) para 308.

> of Third World countries in order that they will invest their capital in such operations. Indeed, the acceptance by States of an arbitration clause allows enterprises contracting with them to avoid the difficulties that can arise from recourse to national tribunals.

Mbaye concluded his comments on the power of arbitrators during the ICC's anniversary by stating that there was an embryonic, autonomous, transnational law governing commercial arbitration and that it was extremely important to develop this Praetorian law by appealing to different sources. He however stated that the guiding principle was that this autonomous transnational law is not an independent law but law limited by the duties of the arbitrator and, notably, respect for public policy.[197] Fundamentally, he emphasised the role to be played by the arbitrator in curbing corruption in developing counties through transnational public policy.[198] This declaration of transnational public policy has been developed by arbitral tribunals in recent jurisprudence.[199] Overall, we can conclude that Mbaye held the view that international arbitration was beneficial for the development of Africa. In recent times, arbitrators tread with caution when making public statements about their personal or dissenting opinions for fear that their comments may be an obstacle to future arbitral appointments.[200] However, as the preceding paragraphs show, however difficult, African arbitrators participating in arbitral proceedings can make important (unbiased) contributions even when they consider that existing international law rules do not favour African states.

6 Conclusion

In the years after his final ICSID appointment, Mbaye remained an active member of the international arbitration community. He was appointed president of an arbitration tribunal under article 29 of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Headquarters Agreement.[201] In 2003, he was appointed to preside over a

197 Mbaye (n 115) 296.

198 Mbaye (n 115) 297.

199 E Gaillard 'The emergence of transnational responses to corruption in international arbitration' (2019) 35 *Arbitration International* 1.

200 SW Schill 'Editorial: The new journal of world investment and trade; arbitrator independence and academic freedom' (2014) 15 *Journal of World Investment & Trade* 1.

201 *La question du régime fiscal des pensions versées aux fonctionnaires retraités de l'UNESCO résidant en France (Sentence) (Tribunal arbitral constitué par le Gouvernement de la République française et l'Organisation des Nations unies pour l'éducation, la science et la culture* 14 January 2003) (2003) 107 *Revue générale de droit international public* 221; *La question du régime fiscal des pensions versées aux fonctionnaires retraités de l'UNESCO résidant en France (Opinion individuelle de M. Nicolas Valticos sur la sentence arbitrale) (Tribunal arbitral constitué par le*

dispute between Air France and Libyan Airlines on the interpretation of paragraph 8 of UNSC resolution 883.[202] Air France had argued that this resolution prevented an arbitrator from considering any claim concerning a contract affected by an embargo imposed by the Security Council, if the claim concerned the period during which the sanction applied to the contract.[203] The arbitral tribunal presided over by Mbaye held that UNSC resolution 883 was not to be interpreted as creating a non-arbitrable case.[204] This decision confirmed the broad approach in interpreting the provisions relating to arbitration in the Civil Code of Quebec and the pro-arbitration stance taken by Québec courts.[205]

One of Mbaye's lasting legacies is the creation of OHADA. Mbaye had always believed that harmonisation of commercial law was a central concern for Africa.[206] In a 1981 symposium on the harmonisation of commercial law he reminded participants that as African states were development-oriented, investment was integral to development and implementation of capital. He believed that in the absence of public investment, private investment required legal certainty and security through harmonisation of national laws. For him, it was impossible to speak of harmonisation in trade without first addressing harmonisation of investment law.[207] Mbaye remained a firm believer in the principles of PSNR which favoured dispute settlement in domestic courts. He believed that the creation of the OHADA Common Court of Justice and Arbitration (CCJA) would cure the anomaly of having to resolve conflicts in Paris, London, or New York.[208] He was a pragmatist, noting that in

Gouvernement de la République française et l'Organisation des Nations unies pour l'éducation, la science et la culture, 14 January 2003) (2003) 107 *Revue générale de droit international public* 256; See *La Compagnie nationale Air France v Son Excellence Monsieur le juge Kéba Mbaye, Professeur Mohamed Bennouna, Monsieur le juge Gilbert Guillaume, Monsieur Ousmane Diallo and Libyan Arab Airlines,* 31 March 2003 CA No 500-09- 009391-004.

202 UNSC Res 883 (1993) [Libyan Arab Jamahiriya] 11 November 1993 S/RES/883 (1993).

203 *Compagnie nationale Air France v Mbaye* [2000] RJQ 717.

204 G Burdeau & B Stern 'France' in V Gowlland-Debbas & DL Tehindrazanarivelo (eds) *National implementation of United Nations sanctions: A comparative study* (2004) 195 at 219.

205 R Boivin & N Mariani 'International arbitration in Canada: Highest court rules in favour of broad interpretation of arbitrability' (2003) 20 *Journal of International Arbitration* 507 at 513 n 31.

206 K Mbaye 'Droit et développement en Afrique francophone de l'Ouest': Les aspects juridiques du développement économique' (1967) 1 *Revue sénégalaise de droit* 23.

207 K Mbaye '*L'harmonisation du droit privé et du droit international privé en matière commerciale dans les* états *de l'Afrique occidentale, equatoriale et orientale*' (1981) 26 *Africa: Rivista trimestrale di studi e documentazione dell'Istituto Italiano per l'Africa e l'Oriente* 139 at 148.

208 Katendi & Placca (n 2).

reality investment was deterred by legal and judicial insecurity.[209] In his words: '[T]he entrepreneur in Washington, who intends to do business in Libreville, must be able to know the law that will be applied to him. And if, in Libreville, things are not going well, or if he intends to expand his activities in the Congo, the same law must be applied to him.'[210]

In 2018, the OHADA Uniform Arbitration Act was amended to give the CCJA jurisdiction over investment disputes arising from investment treaties, national law, and state contracts.[211] If Mbaye were alive, I am sure he would have welcomed this development, but of course with the usual caveats we find in his speeches.[212] Recent OHADA amendments belong to a series of developments in Africa which have been described as the Africanisation of international investment law.[213] Another African development is the African Continental Free Trade Area Agreement (ACFTA) which will include a chapter on investment.

In his last major speech, Mbaye expressed his fears for an unethical world in which the conduct of men is guided by money, power, strength, and position.[214] Although this speech was to students and faculty of the Cheikh Anta Diop University, his message was to all of Senegal and indeed the rest of Africa. Reflecting on the spectre of an unjust world economic order and African underdevelopment, he dared to say that he would speak from beyond the grave. In the years since his death, the ills he highlighted in his writings and opinions remain. In the international investment regime, the greatest challenge for African states is no longer solely the injustice of Eurocentric international law but includes the artificiality of sovereignty under which peoples who are the true sovereigns and hidden majority are deprived of Africa's rich natural resources. This peoples-centred conception of international investment law which is

209 As above.

210 As above.

211 MW Bühler 'Out of Africa: The 2018 OHADA arbitration and mediation law reform' (2018) 35 *Journal of International Arbitration* 517.

212 WB Hamida '*L'intégration imparfaite de l'arbitrage d'investissement dans le droit de l'OHADA*' (2019) *Revue de l'arbitrage: Bulletin du Comité français de l'arbitrage* 1109.

213 MM Mbengue & S Schacherer 'Evolution of international investment agreements in Africa: Features and challenges of investment law "Africanization"' in Chaisse and others (eds) *Handbook of international investment law and policy* (2020); MM Mbengue & S Schacherer 'The 'Africanization' of international investment law: The Pan-African Investment Code and the reform of the international investment regime' (2017) 18 *Journal of World Investment & Trade* 414; MM Mbengue 'Africa's voice in the formation, shaping and redesign of international investment law' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 455.

214 See generally Sornarajah (n 9) 103.

'Africanisation', is still missing from mainstream international investment law jurisprudence.[215]

This chapter has examined Mbaye's important contributions to investment arbitration jurisprudence.[216] It has highlighted his struggles with personal virtue and strict application of international law. It is hoped that by scratching beneath the surface, this narrative has succeeded in exposing Mbaye's enduring legacies to which we can turn for more critical engagement on African approaches to international law.

215 *SOABI v Senegal* (n 1) para 21.

216 M Sornarajah 'On fighting for global justice: The role of a Third World international lawyer' (2016) 37 *Third World Quarterly* 1972.