10 African states and the settlement of investment disputes: *Quo vadis*?

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1 Introduction

Investor-state dispute settlement (ISDS)[1] is undergoing a process of reform taking place at national, bilateral, regional, continental and multilateral levels.[2] The need for these reforms has been iterated by United Nations Conference on Trade and Development (UNCTAD) according to which '[t]he question is not about *whether* to reform or not, but about the *what*, *how* and *extent* of such reform'.[3] These reforms are meant to deal with the dissatisfaction about and the criticisms levelled against the current ISDS system, which is the most used mechanism for the settlement of investment disputes,[4] and to suggest some features that might help ISDS to adapt to the ever-evolving environment.

Against this backdrop, this contribution discusses the participation of African countries in this reshaping process. More specifically, it looks at the question of what the lessons are that can be learned from decades of African involvement in ISDS, and how this African experience can contribute to ongoing debates about the future of ISDS. It should be recalled that ISDS and the appropriateness of its alternatives continue to be controversial among African countries: If some aspects of international investment law to some extent have been 'Africanised',[5] this is not the case with the settlement of investment disputes. This is evidenced by the fact that the Pan-African Investment Code (PAIC), which was supposed to present 'the African consensus on the shaping of international investment

1 Investment arbitration is the most used mechanism for the settlement of investment disputes between investors and states.

2 UNCTAD World investment report 2015, reforming international investment governance (2015) 164-170.

3 UNCTAD (n 2) 120 (my emphasis).

4 According to the Investor Dispute Settlement Navigator, there are almost 1 200 known treaty-based ISDS cases; see https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed 22 August 2022).

5 MM Mbengue 'Africa's voice in the formation, shaping and redesign of international investment law' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 455-481.

law',[6] did not solve the issue but rather left this important matter up to the discretion of national governments.[7]

Hence, this chapter reflects on the possible future of ISDS in Africa. It begins with an historical account of the origin of ISDS in Africa through the discussion of African participation on the setting up of ISDS system. The chapter proceeds to assess the almost 60 years of African actors' involvement in the ISDS regime and by examining some aspects of ISDS that have crystallised the dissatisfaction some African countries have had *vis-à-vis* the international investment regime. Finally, the chapter reflects on the future of the settlement of investment disputes in Africa through a critical examination of current trends regarding the ISDS system (both inside and outside Africa) and a discussion of proposals that African countries may consider in their forthcoming negotiations.

2 African countries and the settlement of investment disputes: Chronicles of the original sin

The independence of many African states, in 1960, coincided with the setting up of the dispute settlement mechanism under the Convention on the settlement of investment disputes between states and nationals of other states (International Centre for Settlement of Investment Disputes (ICSID) Convention), in which they played an important role.[8] One author claimed that Africa can even be considered as the 'birthplace of investment arbitration' given the fact that the first of four regional conferences, organised by the World Bank, took place in Africa, and gathered 29 out of the 32 African countries, independent at that time.[9] Without the participation of African states, it is doubtful whether the ICSID Convention would have come into existence: They provided three-

6 MM Mbengue & S Schacherer 'Africa and the rethinking of international investment law: About the elaboration of the Pan-African Investment Code' in A Roberts et al (eds) *Comparative international law* (2018) 547.

7 According to PAIC art 42 (1), '[m]ember states may, in line with their domestic policies, agree to utilise the investor-state dispute settlement mechanism'.

8 P-J le Cannu 'Foundation and innovation: The participation of African states in the ICSID dispute resolution system' (2018) 33 *ICSID Review - Foreign Investment Law Journal* 456-500; AR Parra 'The participation of African states in the making of the ICSID Convention' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 270-277; Mbengue (n 5) 455-481.

9 T Naud, B Sanderson & AL Veronelli 'Recent trends in investment arbitration in Africa' *GAR, The Middle Eastern and African Arbitration Review 2019* 11 April 2019, https://globalarbitrationreview.com/benchmarking/the-middle-eastern-and-african-arbitration-review-2019/1190119/recent-trends-in-investment-arbitration-in-africa (accessed 26 August 2022).

quarters of the 20 ratifications needed for the ICSID Convention to come into existence[10] and, in many respects, had contributed to the development of the then new system.[11] Although the ICSID Convention has become 'the main piece of ISDS infrastructure',[12] the settlement of investment disputes did not start with the ICSID system but earlier.

This part puts this African participation into the broad context of the evolution of the international investment law regime and discusses some of the lessons that can be learned. It is important to correctly recount the historical engagement of African states with the current international investment law regime as it may provide guidance on what the future should be. This historical account will be made through a discussion of the origins of ISDS, as well as a discussion of the reasons behind the massive adherence of African states to the ICSID Convention.

2.1 Establishing an international investment dispute settlement system: A revolution or evolution?

Discussing the contribution of African states to the establishment of the ISDS system may recall the debate and discussions around African participation in the evolution of international law. There are two major schools of which the thoughts are opposed on this issue: The contributionists emphasise Africa's contributions to international law while the critical theorists examine Africa's subordination in its international relations as a legacy that is traceable to international law.[13]

In the specific context of international investment regime, it is commonly acknowledged that this regime was the result of an evolution and not a revolution. While some authors, such as Pauwelyn, describe the evolution as an organic process,[14] others, such as Kidane, contest

10 See the list of contracting states and other signatories of the ICSID Convention, https://icsid.worldbank.org/sites/default/files/ICSID-3.pdf (accessed 26 August 2022).

11 See part 2.2 below.

12 UNCTAD (n 2) 121.

13 JT Gathii 'Africa and the history of international law' in B Fassbender & A Peters (eds) *The Oxford handbook of the history of international law* (2012) 407. One of the proponents of the contributionists' school of thought, Elias Tobias, participated in the Addis Ababa meeting where the ICSID Draft Convention was discussed. He described this meeting as an opportunity to 'engage in the progressive development of international law', ICSID *History of ICSID Convention* (1968) 244.

14 According to him, this regime has emerged through an 'an organic process of small increments and accidents: centuries old rules on diplomatic protection and treatment of aliens, treaties on friendship, commerce and navigation (FCN treaties) and evolving generations of BITs and FTAs, UN resolutions, ILC reports and draft articles, World

the organic growth approach and claim that 'it is organic only to North-South and perhaps in the distant past, North-North relations, but never to South-South relations'.[15] Be that as it may, the establishment of the ICSID system was part of this evolution and can be viewed as a 'landmark development' of the investment regime, preceded by some other important developments such as the conclusion of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958 (New York Convention) and the conclusion of the first bilateral investment treaty (BIT) in 1959 (between Germany and Pakistan).[16]

During the colonial era (between the eighteenth and nineteenth centuries) investment was primarily made in the context of the colonial expansion and did not need specific protection since 'the colonial legal systems were integrated with those of the imperial powers and the imperial system gave sufficient protection for the investments which went into the colonies'.[17] It was only after independence that the 'need for a system of protection of foreign investment came to be felt by the erstwhile imperial powers which now became the exporter of capital to the former colonies and elsewhere'.[18]

At the same time, and between Western powers and countries, which were not concerned by the colonial system (notably from central and

Bank, Organisation for Economic Co-operation and Development (OECD) and International Bar Association (IBA) guidelines and codes of practice, rulings and awards by the Permanent Court of International Justice (PCIJ), International Court of Justice (ICJ), Iran-US, mixed claims, ICSID and UNCITRAL tribunals, studies and critiques by academics, NGOs and influential organisations'; J Pauwelyn 'At the edge of chaos? Foreign investment law as a complex adaptive system, how it emerged and how it can be reformed' (2014) 29 *ICSID Review* 379.

15 W Kidane 'The China-Africa factor in the contemporary ICSID legitimacy debate' (2014) 35 *University of Pennsylvania Journal of International Law* 537.

16 The drafting of these agreements' provisions was influenced by the treaties on friendship, commerce, and navigation. That is why some authors consider these BITs as 'less a push forward than an attempt … to prevent backsliding of customary international law'; Pauwelyn (n 14) 34-35. The current investment regime is composed of three mains elements which are the ICSID Convention, the investment agreements (notably BITs) and the New York Convention; see UNCTAD (n 2) 122.

17 M Sornarajah *The international law on foreign investment* (2004) 19; D Collins *An introduction to international investment law* (2017) 7-10.

18 Sornarajah (n 17) 22. In the same vein, it should be recalled the EU statement according to which international investment rules were invented 'in Europe' (and maybe, for Europe); see European Union 'Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court' concept paper, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (accessed 26 August 2022). For one author, 'international investment law is not made *by Africa*, it was made *for Africa* as a replacement for colonial rules for the protection of capital'; Kidane (n 15) 526.

Latin America), the protection and regulation of aliens' properties, rights and interests were organised around the principle of diplomatic protection with sometimes the threat or the use of force to protect overseas nationals and their investments: the gunboat diplomacy.[19] This period was also characterised by the frequent recourse to arbitration administrated by mixed claims tribunals to resolve claims 'espoused by the home state of an injured foreign national'.[20] The mixed claims tribunals were mostly used by the United States and Great Britain, either against each other (for example, in the context of the Alabama arbitration)[21] or against Latin American states.[22] These arbitrations contributed to the development of international law[23] and to the establishment of international arbitration as a means for the resolution of international disputes.[24] This is evidenced by the fact that many international agreements concluded between the end of the nineteenth century and the first quarter of the twentieth century included the recourse to arbitration for the settlement of investment disputes.[25] This is the case of the Treaty of Versailles of 1919, which contains some articles related to the settlement of disputes (including investment disputes) such as articles 297 and 304, as well as some agreements adopted by the League of Nations.[26]

19 OT Johnson & J Gimblett 'From gunboats to BITs: The evolution of modern international investment law' in KP Sauvant (ed) *Yearbook on international investment law and policy 2010-2011* (2012) 652-657.

20 Johnson & Gimblett (n 19) 653.

21 T Bingham 'Alabama arbitration' *Max Planck Encyclopedia of Public International Law* (2006) https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e89 (accessed 26 August 2022).

22 Johnson & Gimblett (n 19) 653-654.

23 Bingham (n 21) paras 10-12.

24 The Alabama arbitration helped to 'fuel the subsequent movement to place international arbitration on a more permanent footing'. Johnson & Gimblett (n 19) 654.

25 Eg, arbitration was recognised as 'the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle'; see art 16 of 1899 Convention for the Pacific Settlement of International Disputes, https://docs.pca-cpa.org/2016/01/1899-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf (accessed 26 August 2022). The same idea is to be found in art 38 of 1907 Convention for the pacific settlement of international disputes, https://docs.pca-cpa.org/2016/01/1907-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf (accessed 26 August 2022). The two treaties are also the founding treaties of the Permanent Court of Arbitration (PCA).

26 See notably the Geneva Protocol on arbitration clauses, adopted on 24 October 1923, entered into force on 28 July 1924, https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-6.en.pdf (accessed 26 August 2022); see also the Geneva Convention on the execution of foreign arbitral awards, signed on 26 September 1927, http://www.arbitrations.ru/userfiles/file/Law/Treaty/Geneva%20convention%20on%20execution%20of%20foreign%20awards.pdf (accessed 26 August 2022).

Arbitration clauses were also included in concession contracts between foreign companies and countries in which they operate so that, in an event of a dispute, the case was brought before an arbitral tribunal.[27] This was the case, for example, in the Lena Goldfields arbitration where the concession was granted for the exploitation of gold-fields business.[28] Some other cases were related to oil and gas concessions.[29] These arbitration cases played an important role in the theory of internationalisation of foreign investment contracts[30] and in the creation of the ICSID, which was originally designed to deal with cases arising from concession agreements and other investment contracts.[31] Although there has been a shift toward treaty-based arbitration, notably after the *AAPL v Sri Lanka* case,[32] contract-based arbitration continues to have a certain relevance nowadays.[33]

This historical background reveals that ISDS was nothing new or revolutionary and could be seen as a 'logical progression'.[34] Despite its

27 Eg, such arbitration clauses were included in certain public service concession contracts in Greece in 1925; see *Syndicat d'études et d'entreprises v Gouvernement grec*, explained by JG Wetter & SM Schwebel 'Some little- known cases on concessions' (1964) *British Yearbook of International Law* 94, cited by C Leben 'La théorie du contrat d'Etat et l'évolution du droit international des investissements' (2003) 302 *Collected Courses of the Hague Academy of International Law* 215-228. An arbitration of this kind can even be traced back to the *Compagnie universelle du Canal de Suez v Vice-Roi d'Égypte,* sentence of 21 April 1864, cited by C Leben 'L'évolution du droit international des investissements: un rapide survol' in C Leben (ed) *Le contentieux arbitral transnational relatif à l'investissement, nouveaux développements (*2006) 9-21.

28 A Ernst 'Lena Goldfields arbitration' (2014) *Max Planck Encyclopedia of Public International Law*, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e158 (accessed 31 January 2021); see also VV Veeder 'The Lena Goldfields arbitration: The historical roots of three ideas' (1998) 47 *International and Comparative Law Quarterly* 747-792.

29 See *Cheikh of Abu Dhabi v Petroleum Development Ltd* Award, 28 August 1951 (1953) *AJIL* 156; see also *Saudi Arabia v Arabian American Oil Company (Aramco*) Award, 23 August 1958. For a discussion of the last case, see B Suzanne 'Le droit international public dans la sentence de l'Aramco' (1961) 7 *Annuaire français de droit international* 300-311.

30 M Sornarajah *The international law on foreign investment* (2010) 289-299; see also M Sornarajah *Resistance and change in the international law on foreign investment* (2015) 99-130; Leben 'La théorie du contrat d'Etat' (n 27) 215-228; Leben 'L'évolution du droit international des investissements' (n 27) 9-21.

31 'Though much of the jurisprudence generated by ICSID is based on jurisdiction obtained on the basis of investment treaties, it is important to remember that ICSID was originally fashioned to deal with cases arising from investment contracts'; Sornarajah (n 30) 300.

32 *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka* ICSID Case ARB/87/3, Final Award, 27 June 1990; see Pauwelyn (n 14) 42-44.

33 Sornarajah (n 30) 300-302.

34 Investment arbitration should be viewed as 'a logical progression of the PCA's founding purpose … [A] majority of the PCA's early inter-state arbitrations precisely involved

many innovative features, the ICSID Convention 'formalised' some practices and forms of dispute settlement already in use, before the independence of many African countries.[35] This is also confirmed by some statements such as that of Gardiner, the then Executive Secretary of the Economic Commission for Africa, who claimed that the ICSD system was designed to fill a gap in international law through the universal recognition and the international binding character of direct conciliation or arbitration for the settlement of investment disputes between the host state and the foreign corporations, which were already in use at that time.[36] This prompts a certain prudence when talking about the 'decisive' participation of countries in the setting up of a system that in part, if not its very core, existed before their independence. As Leben has declared, 'the novelty of a notion is rarely absolute and historical research often reveals the ancient existence of certain ideas that were believed to be quite recent' (author's translation).[37]

private interests (of the type that would typically now be dealt with through investor-state arbitration), espoused by the state in question through diplomatic protection. The *Norwegian Shipowners* and the *Lighthouses* cases, eg, primarily involved the interests of private parties'. J Paulsson 'Confronting global challenges: From gunboat diplomacy to investor-state arbitration' in PCA Peace Palace Centenary Seminar, 11 October 2013 3, https://docs.pca-cpa.org/2016/01/Confronting-Global-Challenges_-From-Gunboat-Diplomacy-to-Investor-State-Arbitration-by-Jan-Paulsson.pdf (accessed 31 January 2021).

35 'ICSID confirmed the model of commercial-style arbitration for the settlement of investor-state disputes (party-appointed arbitrators, confidential proceedings, quick and final decisions without appeal, focus on money damages rather than compliance), thereby embedding the system with the competing analogies of private commercial arbitration and public international law'; Pauwelyn (n 14) 36.

36 'In traditional international law a wrong done to a national of one state for which another state was internationally responsible was actionable not by the injured national, but by his state. *In practice that principle had been superseded in a number of cases in which provision had been made for the settlement of investment disputes by direct conciliation or arbitration between the host state and the foreign investor*. The internationally binding character of such arrangements had not, however, been universally recognised hitherto, and the Convention was designed to fill that gap' (my emphasis); ICSID *History of ICSID Convention* (1968) 241. In the same vein, Taslim Olawale Elias, the then Attorney General and Minister of Justice of Nigeria, described the draft project as 'an attempt … to *codify certain principles of customary law* and to engage in the progressive development of international law, and he warmly recommended it' (my emphasis); ICSID, *History of ICSID Convention* (1968) 244.

37 Original French reads as follows: 'La nouveauté d'une notion est rarement absolue et des recherches historiques révèlent souvent l'existence ancienne de certaines idées que l'on croyait toutes récentes'. Leben (n 27) 212.

Additionally, the discussion of the reasons for which African countries have adhered to this Convention gives a fuller picture of African countries' participation in the establishment of the ISDS system.

2.2 The ICSID Convention, foreign investments, and the development of African countries: An uneasy equation

The question of why African countries had massively adhered to the ICSID Convention needs to be addressed, namely, why these countries, asserting their newly-gained economic and territorial sovereignty,[38] accepted to delegate a part of the much venerated sovereignty through their accession to the ICSID Convention.[39] Surprisingly, African countries did not emphasise the impact that the ICSID Convention and other related agreements would have on their sovereignty.[40] They rather focused on the claimed positive consequence of accessing to the ICSID Convention, that is the attraction of foreign investments Africa needed for its development.[41]

38 African states are often seen as being rather 'jealous' of their own sovereignty. See HB Jallow *The law of the African (Banjul) Charter on Human Rights and Peoples' Rights (1988-2006)* (2007) 58. These countries had massively adhered to the Declaration on Permanent Sovereignty over Natural Resources, United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962.

39 'The proposed Convention was intended to give *internationally binding effect to the limitation of sovereignty* inherent in an agreement by a state pursuant to the Convention to submit a dispute with a foreign investor to arbitration' (my emphasis); ICSID *History of ICSID Convention* 241-242. This question was addressed from the general perspective of developing countries by, among others, A Guzman 'Why LDCs sign treaties that hurt them: Explaining the popularity of bilateral investment treaties' (1997-1998) 38 *Virginia Journal of International Law* 639-688. See also Pauwelyn (n 14) 372-418.

40 Exceptionally, the representative of Cameroon underlined the tension that may exist between the limitation on the exercise of state's sovereign rights and the need to reassure investors so that they can invest without fear. He described this as an 'attempt to conciliate the unconciliable'; ICSID, *History of ICSID Convention* (1968) 245. According to Aaron Broches, the then General Counsel of the International Bank for the Reconstruction and the Development (IBRD) and Chairperson of the meeting, 'African experts had shown less interest in conceptual problems of sovereignty and had taken a pragmatic approach being concerned, however, to establish a balance between an admitted need for and desire to encourage private foreign investment, and the degree in which adherence to the Convention might limit a State's freedom of action'; ICSID *History of ICSID Convention* (1968) 311. On the contrary, many Latin American countries (such as Jamaica, Argentina, Bolivia, Ecuador) expressed fear and were reluctant given the potential limitation on their sovereignty; see ICSID *History of ICSID Convention* (1968) 306, 308, 310.

41 Many African countries, such as Ethiopia, Guinea, Central African Republic, Tunisia and Tanganyika, made statements in that regard. For one author, they 'had to do so in order to attract private foreign investment to develop their ailing post-colonial economies'. See Kidane (n 15) 585-586 while others assert that 'in addition to recognising their need to attract investment, African officials acknowledged that offering a neutral and international dispute resolution mechanism was a key factor for the deal'. CN Brower & MP Daly 'A study of foreign investment law in Africa:

However, a question arises as to whether there is a genuine link between the accession to the Convention and the attraction of the investment, which also recalls the economic theories of foreign investment.[42] There thus are two conflicting theories: On the one hand, the classical theory on foreign investment is focused on the positive effects of investments and claims that they are 'fully' beneficial to the host state. On the other hand, the dependency theory asserts that foreign investments cannot bring any meaningful economic development.[43]

The first theory (the classical view on foreign investment) predominated at the Addis-Ababa meeting:[44]

> International investment was universally recognized as a factor of crucial importance in the economic development of the less developed parts of the world and had become one of the major features of the partnership between the richer and poorer nations; its promotion was a matter of urgent concern to capital-importing and capital-exporting countries alike. That was particularly true of private foreign investment which, if wisely conducted, could make great contributions to the development of the economies of the recipient countries.

Surprisingly, hoewever, the ICSID Convention did not mention the link between the ICSID Convention and the development; it put it as a goal to be achieved in its corpus.[45]

Opportunity awaits' in A Menaker (ed) *International arbitration and the rule of law: Contribution and conformity* (2017) 510.

42 It should be recalled that, to some extent, these theories shape or influence the shaping of legal attitudes to foreign investment.

43 There are some nuances and variations in the formulation of these theories as well as a middle path theory, which is an intermediary between these two extreme theories. For an in-depth discussion of these theories, see Sornarajah (n 30) 47-60.

44 ICSID *History of ICSID Convention* (1968) 240.

45 It seems that the Convention has been 'carefully drafted to avoid exactly that implication'; see Kidane (n 15) 562. Later on, an investment tribunal, in a case involving an African country, stated that the contribution to economic development of the host state can be added as an additional condition when defining investment; *Salini & Others v Morocco* ICSID Case ARB/00/4, decision on Jurisdiction, 23 July 2001, 152 para 52. However, such reasoning has been rejected by some other tribunals arguing that economic development is a goal of investment, not an inherent characteristic of it. For an analysis of those cases, see A Grabowski 'The definition of investment under the ICSID Convention: A defence of Salini' (2014) 15 *Chicago Journal of International Law* 298-299.

Were African countries aware of the effects of signing investment agreements?[46] In some respects there are grounds for doubt. Even if some countries on the continent had domestic legislation for foreign investments, they did not have prior experience in all the issues regarding the regulation of foreign investments. Therefore, '[w]hen the World Bank asked the newly-independent African states to join ICSID in 1964, they were rather unsure of what it meant for them beyond the promise of increased foreign investment'.[47] Almost half a century later, some countries and institutions have underscored the absence of a connection between the signing of investment agreements and the attraction of foreign investments.[48] According to the United Nations (UN) Economic Commission for Africa's Committee on Regional Cooperation and Integration, '[t]he impact of bilateral investment treaties on economic and social development in Africa remains debatable. There is no conclusive evidence regarding the effect of these treaties on foreign investment.'[49] This absence was also highlighted by the South African government as a reason to terminate some of its bilateral investment treaties (BITs).[50]

46 The example of Latin American countries.

47 W Kidane 'Contemporary international investment law trends and Africa's dilemmas in the Draft Pan-African Investment Code' (2018) 50 *George Washington International Law Review* 533. He further adds that 'most joined the ICSID system with enthusiasm when their Latin American counterparts refused. Then, predictably, many African states appeared before ICSID tribunals over the years, accused of unlawful expropriation and denial of justice (violations of the fair and equitable principle), to mention just a few. With almost no participation in the decision-making process … the African states continued to accept the "creditors' interpretation" of the investment treaties with their wealthier and more powerful partners.' This echoed to the argument made by Poulsen, according to which it was due to ignorance and that these countries did not realise what they were committing themselves to. LNS Poulsen *Bounded rationality and economic diplomacy: The politics of investment treaties in developing countries* (2017).

48 A recent analysis by Dominic Npoanlari Dagbanja shows that, in the specific context of Ghana, most foreign direct investments in Ghana come from countries with which it does not have BITs and that these BITs do not play any statistically significant role in attracting FDI from Ghana's contracting parties to BITs when compared to FDI inflows to Ghana from other countries; DN Dagbanja 'Can African countries attract investments without bilateral investment treaties? The Ghanaian case' (2019) 40 *Australasian Review of African Studies* 71-89.

49 UN Economic Commission for Africa, Committee on Regional Cooperation and Integration, Investment Agreements Landscape in Africa, 7-9 December 2015, E/ECA/CRCI/9/5, http://www.uneca.org/sites/default/files/uploaded-documents/RITD/2015/CRCI-Oct2015/report-on-investment-agreements.pdf1. By contrast, Latin American countries, with prior experience, raised many concerns related to the impact of this new convention, and rejected the proposed draft.

50 The three-year review of its BITs, conducted by the South African government, revealed that, although foreign direct investment has been central to the economic development, the system opens the door for 'narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration that may constitute direct challenges to legitimate, constitutional and democratic policy-making'. X Carim

Based on the foregoing, can the assumption that signing the ICSID Convention helps to attract foreign investment be seen as a 'plausible folk theory'?[51] This last expression refers to the fact that many of the rules and regulations, passed at the global level, are based on assumptions that have not been empirically verified.[52] Assumptions made, far from being necessarily wrong, are simply not verified. Some authors argue that the investment treaty system is based on many plausible folk theories that include the increase of foreign investment because of concluding investment agreements:[53]

> If asked why states sign investment treaties, most people in the field historically would have answered 'because it depoliticises investment disputes' or 'because it increases foreign investment' or 'because it contributes to the rule of law'. These arguments sound right. They are plausible. They have the sound of truth to them. Yet, as the field has evolved, these claims have come under scrutiny in the academic literature, and some have not stood up well. But is this evidence used in global governance debates? If not, why?

Finally, all the above developments questioned the 'capacity' of the newly-independent countries to significantly contribute to the establishment of the ISDS system. How can they be at the forefront of the adoption of the ICSID Convention while having a rather passive role in the drafting of investment rules and substantive standards of protection (BITs) that are

'Lessons from South Africa's BITs review' (2013) 109 *Columbia FDI Perspectives*. According to the President of Commission for a Comprehensive Citizens' Audit of Investment Protection Treaties and of the International Investment Arbitration System (CAITISA), set up by the government of Ecuador '[i]t is absolutely logical for Ecuador to move forward with the denunciation of its investment protection treaties, because, as our report will reveal, they have been very onerous for the country. *BITs do not contribute to attract foreign investment and have deviated millions of dollars of the public treasury to fight against million-dollar claims*. In turn, they have systematically undermined social and environmental regulation' (my emphasis); C Olivet '*Auditing Commission to release report as Ecuador moves to terminate investment agreements'* 4 May 2017, https://www.tni.org/en/node/23493?content_language=en (accessed 26 August 2022).

51 TC Halliday 'Plausible folk theories: Throwing veils of plausibility over zones of ignorance in global governance' (2018) 69 *British Journal of Sociology* 936-961.

52 A Roberts & TS John *UNCITRAL and ISDS reforms: Plausible folk theories*, *Ejiltalk* 13 February 2020, https://www.ejiltalk.org/uncitral-and-isds-reform-plausible-folk-theories/#_ftn1 (accessed 26 August 2022).

53 Roberts & John (n 52).

applicable before ICSID tribunals?[54] This is one of the 'dilemmas' these countries faced in the post-colonial period.[55]

However, this ambiguous and overemphasised role in the establishment of the ISDS system should not foreclose the possibility of accounting for subsequent contributions of African states in the settlement of investment disputes. The next part will discuss these contributions.

3 African actors in ISDS: What lessons after almost 60 years of African participation?

The participation of African states in the settlement of investment disputes has been extensively investigated.[56] In 2019, for example, the ICSID Review launched a special issue on Africa and the ICSID dispute resolution system to offer a 'comprehensive and complete overview of Africa's contribution to ISDS and, in particular, to the ICSID system'.[57] So far, 49 African countries have either signed or ratified the ICSID Convention.[58] From a statistical point of view, the continent has been

54 It should be recalled that until 2000, very few African states had an 'investment treaty model of their own, let alone an investment policy strategy or a negotiating framework'. H El-Kady & M De Gama 'The reform of the international investment regime: An African perspective' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 486.

55 Kidane (n 47) 523-579.

56 For an overview of these studies, see WB Hamida, JB Harelimana & A Ngwanza *Un demi-siècle africain au CIRDI, Regards rétrospectifs et prospectifs* (2019); MM Mbengue & S Schill (eds) 'Africa and the reform of the international investment regime' (2017) 18 *Journal of World Investment and Trade* 367-584; MF Qumba 'South Africa's move away from international investor-state dispute: A breakthrough or bad omen for investment in the developing world?' (2019) 52 *De Jure* 358-379; AA Agyemang 'African states and ICSID arbitration' (1988) 21 *Comparative and International Law Journal of Southern Africa* 177-189; PMDS Rosário & O Ajayi 'Investments in sub-Saharan Africa: The role of international arbitration in dispute settlement' (2009), https://ssrn.com/abstract=1426823; AA Asouzu *International commercial arbitration and African states practice, participation and institutional development* (2001); K Daele 'Investment arbitration involving African states' in L Bosman (ed) *Arbitration in Africa: A practitioner's guide* (2013) 403-467; UE Ofodile 'Africa and international arbitration: From accommodation and acceptance to active engagement' (2015) 4 *Transnational Dispute Management*; AA Yusuf 'From reluctance to acquiescence: The evolving attitude of African states towards judicial and arbitral settlement of disputes (2015) 28 *Leiden Journal of International Law* 605-621; A Telesetsky 'A new investment deal in Asia and Africa: Land leases to foreign investors' in C Brown & K Miles (eds) *Evolution in investment treaty law and arbitration* (2011) 539-569.

57 https://academic.oup.com/icsidreview (accessed 26 August 2022). See special focus section: 'Africa and the ICSID dispute resolution system' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 259-551.

58 https://icsid.worldbank.org/about/member-states/database-of-member-states (accessed 26 August 2022).

involved in between 15 and 26 per cent of the whole ICSID cases (15 per cent for sub-Saharan Africa and 11 per cent for Middle East and North Africa).[59] A closer look reveals that the continent has played a pioneering role in many respects:[60] It was involved, among others, in the first ICSID case registered,[61] the first ICSID award rendered,[62] the first ICSID case in which a counterclaim was successful,[63] and the first ICSID case in which a host state lodged a claim against a foreign investor.[64]

Despite this important contribution, much dissatisfaction has been voiced by African countries against the current system established for the settlement of investment disputes. The ongoing discussions at the UN Commission on International Trade Law (UNCITRAL) Working Group III offer an excellent platform for the analysis of these dissatisfactions, as many participants have pointed to some of the flaws that are affecting the current system. As a reminder, the UNCITRAL entrusted its Working Group III with a broad mandate to work on the possible reform of investor-state dispute settlement (ISDS).[65] The dissatisfactions or concerns on African countries can be grouped into four categories: concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; concerns pertaining to arbitrators and decision makers; concerns pertaining to cost and duration of ISDS cases; and concerns pertaining to third-party funding.[66] They can be also viewed as concerns related to the arbitral process, concerns related to the arbitral outcomes and concerns related to arbitrators and decision makers.[67]

59 ICSID *The ICSID caseload-statistics* 12.

60 Le Cannu (n 8) 463-467.

61 *Holiday Inns SA & Others v Morocco* ICSID Case ARB/72/1.

62 *Adriano Gardella SpA v Côte d'Ivoire* ICSID Case ARB/74/1 Award, 29 August 1977.

63 *Maritime International Nominees Establishment v Republic of Guinea* ICSID Case ARB/84/4, Award, 6 January 1988.

64 *Gabon v Société Serete SA* ICSID Case ARB/76/1, order taking note of the discontinuance issued by the Tribunal (27 February 1978).

65 For the sake of precision, the mandate given to the Working Group contained three stages: '(i) to identify and consider concerns regarding ISDS; (ii) to consider whether reform was desirable in light of any identified concerns; and (iii) if the Working Group were to conclude that reform was desirable, to develop any relevant solutions to be recommended to the Commission' United Nations Commission on International Trade Law (UNCITRAL), Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session (Vienna, 27November–1December 2017), A/CN.9/WG.III/WP.142, 5.

66 UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 36th Session (Vienna, 29 October-2 November 2018), A/CN.9/964, 6-19.

67 UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 34th session (Vienna, 27 November - 1 December 2017), A/CN.9/WG.III/WP.142, 5-9.

An analysis of submissions by African states puts the spotlight on a common concern that is related to the issue of legal expertise in the context of ISDS. In this regard, Morocco noticed that

> [o]wing to their limited financial resources and *lack of legal professionals with significant experience in ISDS*, developing countries need assistance in that area. It would therefore be highly desirable to establish a mechanism for supporting and assisting those countries in dealing with ISDS cases so as to enable them to better prepare for, handle and manage disputes relating to international investment.[68]

Additionally, the submission of Mali points out the lack of expertise and preparation of African countries in ISDS, saying that 'African states find themselves involved in arbitral proceedings, often without being sufficiently prepared, given the lack of a strategy document for negotiations, *with only limited expertise in complex legal issues*'.[69] Furthermore, the intersessional regional meeting, held in Conakry and attended by almost 30 African countries, underlined the need to develop '"ISDS awareness" guided by an approach of demystification, democratisation and "domestication" and by appropriate actions, including capacity-building'.[70] Although African countries were not unfamiliar with the European legal cultures that 'underpinned' the creation of the ICSID system, they had to 'acquire working knowledge of the rules, and acclimate better to the Eurocentric cultures of the institutions'.[71] The question, therefore, arises as to whether they have been able to do so. Also, was the participation of African actors limited only to providing support and cases or were they able to contribute to the decision making? If yes, how? If no, why not?

Analysing the issue of African legal expertise is of particular importance since it helps also in addressing some of the most important criticisms voiced against the current ISDS. For example, it is acknowledged

68 UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 37th session (New York, 1–5 April 2019), Submission from the Government of Morocco, A/CN.9/WG.III/WP.161, 4, para 18 (my emphasis).

69 UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 37th session (New York, 1–5 April 2019), Submission from the Government of Mali, (Vienna, 14–18 October 2019), A/CN.9/WG.III/WP.181, 2 (my emphasis).

70 UNCITRAL, Summary of the intersessional regional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the Republic of Guinea, (Vienna, 14–18 October 2019), A/CN.9/WG.III/WP.183, 7 para 25.

71 W Kidane 'The culture of investment arbitration: An African perspective' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 413.

that investment arbitration incurs important costs.[72] However, a large proportion of these costs is comprised of the costs for parties' legal representation (fees and expenses for counsel, experts and witnesses).[73] Under these circumstances, can the use of more African legal expertise help in reducing the costs of ISDS? Additionally, the issue of legal expertise in ISDS is related to concerns pertaining to arbitrators and decision makers. As a reminder, and according to ICSID Convention article 14(1), '[c]ompetence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators'. Against this backdrop, one might wonder whether the lack of diversity in arbitrators can be due, among others, to a lack of expertise in the field of law of some countries, such as African countries.

This part will look at all the issues related to African legal expertise in ISDS with a particular focus on the case of African arbitrators and African agents, counsel and advocates.

3.1 African arbitrators in ISDS

Statistically, 59 sub-Saharan African arbitrators, conciliators and *ad hoc* committee members (hereinafter designed as arbitrators) have been appointed, so far, either by ICSID or the litigant parties.[74] In addition, 107 other arbitrators appointed are from 'Middle East and North Africa'.[75] This amounts to 166 out of a total population of 2 731 arbitrators in ICSID cases. A detailed analysis reveals that African arbitrators come from countries such as Egypt (39); Morocco (13); Nigeria (10); Somalia (8); Senegal (7); Algeria (4); South Africa (3); Togo (3); Benin (2); Cameroon (2); Gabon (2); Ghana (2); Madagascar (2); Malawi (2); Burundi (1); Cabo Verde (1); Central African Republic (1); Sudan (1); and Zambia (1).[76] Of these arbitrators, a number hold dual nationalities from Mauritius and France (2); Malta and South Africa (2); Algeria and France (1); United Kingdom and Uganda (1); and United Kingdom and Ghana (1). Based on this information, it is safe to say that African arbitrators are

72 G Bottini et al 'Excessive costs and recoverability of costs awards in investment arbitration' (2020) 21 *Journal of World Investment and Trade* 251-299; SD Franck *Arbitration costs, myths and realities in international treaty arbitration* (2019).

73 UNCITRAL Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its 34th session (Vienna, 27 November–1 December 2017), https://undocs.org/en/A/CN.9/930/Rev.1, 7 para 36.

74 ICSID Statistics 17.

75 As above.

76 ICSID Statistics 18-19.

underrepresented in ISDS.[77] The reasons of such underrepresentation are to be found at many levels.

First, at the level of African countries themselves which, as litigant parties and contracting states, are playing an important role in this regard. According to article 37 of ICSID Convention, litigant parties determine the number and the method of arbitrators' appointment. When the ICSID default mechanism applies, because of a lack of agreement, litigant parties are also appointing two out of the three arbitrators.[78] In addition, each contracting state, according to article 13 of the ICSID Convention, has the right to appoint up to four persons each to ICSID's official Panel of Conciliators and its Panel of Arbitrators. However, some countries do not fully take advantage of this opportunity. In fact, the list of persons provided by many African countries is either not up to date[79] or includes political figureheads who, according to some authors, 'are guaranteed never to be accepted as neutral arbitrators'.[80]

Second, the ICSID Centre also bears a portion of responsibility since article 13(2) of the ICSID Convention empowers the Chairperson of the ICSID Administrative Council to appoint 10 persons of different

77 This underrepresentation was also discussed at the intersessional regional meeting, held in Conakry; UNCITRAL, Summary of the intersessional regional meeting on investor-state dispute settlement (ISDS) reform submitted by the government of the Republic of Guinea, (Vienna, 14–18 October 2019), A/CN.9/WG.III/WP.183, 8, para 31; UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 37th session (New York, 30 March-3 April 2020); submission from the government of Morocco, A/CN.9/WG.III/WP.195, 3; L Young & A Ross 'Africa must have more representation on tribunals, says somali judge' *Global Arbitration Review* 15 October 2015, https://globalarbitrationreview.com/article/1034844/africa-must-have-more-representation-on-tribunals-says-somali-judge (accessed 26 August 2022).

78 This provision is completed by Rules 2 and 3 of The Rules of Procedure for Arbitration Proceedings (Arbitration Rules) of ICSID were adopted by the Administrative Council of the Centre pursuant to art 6(1)(c) of the ICSID Convention.

79 The list of arbitrators provided by the following countries is not updated: Burundi (expired in 2016); Burkina Faso (expired in 2010); Central African Republic (expired in 1986); Comoros (expired in 1987); Democratic Republic of the Congo(expired in 2019); Gabon (expired on 4 September 2020); Guinea (expired in 1987); Kenya (expired in 2018); Lesotho (expired in 1989); Liberia (expired in 1991); Malawi (expired in 2012); Niger (expired in 1997); Senegal (expired in 2004); Tanzania (expired in 2005); Uganda (expired in 2016); Zimbabwe (expired in 2019). The list of some other African countries contains two categories of people: some whose term has ended while the term of other arbitrators is still valid. This is the case of countries such as Sierra Leone and Seychelles.

80 Brower & Daly (n 41) 23.

nationalities.[81] In this regard, the ICSID Administrative Council has appointed three sub-Sahara African arbitrators in 2020.[82] Some authors believe that the Centre should not be held responsible for such underrepresentation. Rather, it is helping to fulfil the demands of these countries that want arbitrators with a high level of expertise.[83] However, the ICSID Centre (its Administrative Council and the Secretary General) can play a role in promoting diversity among arbitrators and have started to do so.[84]

Third, the lack of African arbitrators seems to be associated with the low representation of African counsel and advocates in ISDS (which is discussed under part 3.2.). It appears that litigant parties tend to appoint arbitrators based on the recommendation of their counsel. One author even claims that 'there appears to be a connection between the counsel representing the parties and the nationality of arbitrators appointed by the parties'.[85] For example, in *AngloGold Ashanti (Ghana) Limited v Republic of Ghana*, where both parties appointed Ghanaian law firms as counsel, one of the arbitrators was African.[86] On the contrary, in *Gustav FW Hamester GmbH & Co KG v Republic of Ghana* none of the parties retained a local law firm and none of the arbitrators was African.[87]

What can be the impact of lacking African arbitrators and African arbitral institutions involved in the settlement of investment disputes? In *SOABI v Senegal* Kéba M'Baye described the mission of the adjudicator as being one of finding legal solutions for the settlement of disputes and doing justice. In his dissenting opinion, he wondered whether it was not time for international tribunals to no longer merely coldly apply ready-made formulas but to use the discretionary power they have in certain areas to

81 Among these 10 persons, three are from Africa; see https://icsid.worldbank.org/about/arbitrators-conciliators/database-of-icsid-panels (accessed 26 August 2022).

82 ICSID *The ICSID Caseload -Statistics* 2 (2020) 28.

83 Brower & Daly (n 41) 24.

84 It seems like 'the increase in the appointment of African arbitrators and conciliators on ICSID panels is driven primarily by the ICSID Secretariat itself and not by the African states or investors appearing before ICSID panels as parties'. E Onyema 'African participation in the ICSID system: Appointment and disqualification of arbitrators' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 374.

85 Onyema (n 84) 375.

86 The arbitrator concerned is Muna B Ndulo, from Zambia. *AngloGold Ashanti (Ghana) Limited v Republic of Ghana* ICSID Case ARB/16/15, Order of the Tribunal taking note of the discontinuance of the proceedings, 7 August 2018.

87 *Gustav F W Hamester GmbH & Co KG v Republic of Ghana* ICSID Case ARB/07/24, Award, 18 June 2010.

say what the law is and to achieve justice.[88] While calling on arbitrators to discourage the legal artifices that can be used to promote injustice, M'Baye encouraged them to 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.[89] The absence of African arbitrators can be detrimental to this dialogue and the quest for justice and development.

Such an absence also impacts the legitimacy of the investment regime: The lack of adjudicator diversity has been considered as an area of concern for the legitimacy of the ISDS system, but also for international adjudication in general.[90] It is not surprising that the representation of principal legal systems (in the world) as well as the equitable geographical distribution are of particular importance in the composition of many international adjudicative bodies.[91] Even though international arbitration does not have a single cultural root,[92] it can easily be noticed that African cultural practice and legal traditions are not well represented. This can be seen through the absence of African expert in the working committee of the International Bar Association (IBA) Rules on the Taking of Evidence, which is supposed to be representative of 'over 2 300 members from over 90 countries'.[93] This absence of African arbitrators can also lead to cultural

88 It reads in French as follows: 'Cette remarque conduit à se demander s'il n'est pas temps pour les tribunaux internationaux, siégeant dans des affaires d'un type particulier, de ne plus se contenter d'appliquer froidement des formules toutes faites mais de saisir l'occasion que leur offre leur pouvoir d'appréciation dans certains domaines pour non pas seulement dire le droit mais rendre la justice? La Convention de Washington protège fort opportunément les entrepreneurs qui apportent leur capitaux et leur industrie pour contribuer (tout en faisant des profits, puisque c'est leur vocation) à une entreprise de développement dans un pays du tiers-monde. Quand, profitant de relations personnelles locales, des hommes d'affaires *(sans* risque financier) réussissent à faire signer un contrat, ce qui souvent est l'essentiel, et en cas de différend arrivent par des artifices juridiques à mettre les torts du côté de leurs partenaires, n'est-il pas normal que les tribunaux s'emploient à décourager de tels agissements et usent à cette fin (dans le cadre de la loi) de leurs pouvoirs d'appréciation s'ils existent?'. *Société Ouest Africaine des Bétons Industriels v Republic of Senegal* (ICSID Case ARB/82/1), Dissenting Opinion of Kéba M'Baye, 25 February 1988, 240 para 20.

89 M'Baye (n 88) 241 para 21.

90 AK Bjorklund et al 'The diversity deficit in international investment arbitration' (2020) 21 *Journal of World Investment and Trade* 410-440; F Baetens (ed) *Identity and diversity on the international bench, who is the judge?* (2020).

91 See, eg, art 2(2) of the Statute of the International Tribunal for the Law of the Sea (Annex VI of the United Nations Convention on the Law of the Sea).

92 For an author, it is an 'imperfect amalgamation of cultures that compete for dominance'. Kidane (n 71) 414.

93 IBA 1.

misunderstanding, as evidenced in the *Duty Free v Kenya*.[94] In another case, the arbitral tribunal composed of three British lawyers interpreted the respect and deference shown by an African witness to an elder as a tacit agreement with the elder while the witness was politely expressing his disagreement, as his culture requires, but the tribunal just did not get it.[95]

Moreover, the lack of African arbitrators might influence the perception other regions have on the ability of African lawyers and institutions to effectively settle disputes. Recently, in the context of the China-Africa Joint Arbitration Centre, China refused that the third arbitrator (the one appointed arbitrator by the two arbitrators appointed by the parties to the dispute) be an African[96] as if an arbitral tribunal (exclusively or in majority) composed of African arbitrators cannot be sufficiently neutral or experienced to adjudicate a case that took place in Africa while arbitrators from other continents can. If it is for the sake of neutrality, why are African arbitrators not appointed in cases involving actors from other continents?

Admittedly, some cases that have involved African regional institutions and arbitration centres were not well handled. The case between Mr Josias van Zyl (South Africa), the Josias van Zyl Family Trust (South Africa), the Burmilla Trust (South Africa) and the Kingdom of Lesotho was first brought before the Tribunal of the Southern African Development Community (SADC) on 12 June 2009. Following the suspension of the SADC tribunal's operations indefinitely and, ultimately, the restriction of its jurisdiction to state-state disputes,[97] the claimants instituted, under the SADC Protocol on Finance and Investment, arbitration proceedings against Lesotho. This arbitration was seated in Singapore, governed by the UNCITRAL Rules, and administered by the Permanent Court of

94 Kidane (n 71) 426-432.

95 According to an anecdote told by a counsel who did not want to disclose the nationality nor the case, because of confidentiality requirements. O Holmey 'Droit des affaires: L'arbitrage international dans le box des accusés' *Jeune Afrique* 28 January 2020, https://www.jeuneafrique.com/mag/885737/economie/droit-des-affaires-larbitrage-international-dans-le-box-des-accuses/ (accessed 26 August 2021).

96 O Holmey 'Chine-Afrique: une nouvelle alliance en droit des affaires face à l'Occident' 28 janvier 2020, https://www.jeuneafrique.com/mag/885723/economie/chine-afrique-une-nouvelle-alliance-en-droit-des-affaires-face-a-loccident/ (accessed 26 August 2022).

97 https://www.sadc.int/about-sadc/sadc-institutions/tribun (accessed 26 August 2022).

Arbitration.[98] In *Getma v Republic of Guinea*[99] the arbitration was governed by the provisions of the Title IV of the Organisation for the Harmonisation of Business Law in Africa (OHADA) Treaty, the Rules of Arbitration of the Common Court of Justice and Arbitration of the OHADA of 11 March 1999, the Rules of Procedure of the Court, and their annexes. However, a controversy arose regarding arbitrators' fees, between the arbitrators and the CCJA.[100] This is why some authors consider that many African countries unfortunately have 'a reputation as an arbitration-unfriendly venue'.[101] Fortunately, this is not a generalised tendency, and some African arbitral institutions are building a strong reputation, such as the Kigali International Arbitration Centre,[102] the Cairo Regional Centre for International Commercial Arbitration[103] and the Arbitration Foundation of South Africa.[104]

3.2 African agents, counsel, and advocates in ISDS

According to Rule 18(1) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) '[e]ach party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party'. The issue of legal representation is closely linked to states' capacity which, according to Sharpe, is 'an integral part of the legitimacy and viability of international investment arbitration'.[105] Given the public interests involved in ISDS, states are

98 See *Swissbourgh Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust & Others v The Kingdom of Lesotho* PCA Case 2013-29 (First Case); *Josias Van Zyl, The Josias Van Zyl Family Trust & The Burmilla Trust v The Kingdom of Lesotho* PCA Case 2016-21 (Second Case); the Singapore Court of Appeal decision in *Swissbourgh Diamond Mines Pty Limited & Others v Kingdom of Lesotho* 2018 SGCA 81 Decision CA-CA 149-2017, 27 November 2018.

99 *Getma International v Republic of Guinea* (I) CCJA Case 001/2011/ARB.

100 See the judgment of CCJA, 19 November 2015, annulling the arbitral award of 29 April 2014, https://jusmundi.com/en/document/decision/en-getma-international-v-republic-of-guinea-i-award-tuesday-29th-april-2014#decision_4081 (accessed 26 August 2022) and the response of the arbitrators in *Jeune Afrique*, https://www.jeuneafrique.com/285543/societe/affaire-getma-guinee-les-arbitres-repondent/ (accessed 26 August 2022). An ICSID arbitration took place and involved the same litigants but based on other grounds; see *Getma International & Others v Republic of Guinea [II]* ICSID Case ARB/11/29.

101 Brower & Daly (n 41) 18.

102 https://kiac.org.rw/new/ (accessed 26 August 2022).

103 https://crcica.org (accessed 26 August 2022).

104 https://arbitration.co.za (accessed 26 August 2022).

105 JK Sharpe 'Control, capacity, and legitimacy in investment treaty arbitration' (2018) 112 *AJIL Unbound* 265. He further adds that '[t]he legitimacy (and utility) of the

encouraged to appoint an agent whose role is 'indispensable' in investment arbitration.[106] However, many African countries tend not to appoint agents nor include officials in their legal teams but, rather, to outsource their legal representation. In fact, few states have a specific department dedicated to the representation of their interests in international disputes, in general, and in investment arbitration, more specifically. Egypt has, within its Egyptian State Lawsuits Authority (ESLA),[107] a department called the Foreign Disputes Department (FDD), exclusively dedicated to the representation of Egypt in international disputes, including investment arbitration.[108] This can be explained by the fact that this country is the most active African country, in ISDS with, so far, 38 ICSID cases.[109] A country such as Senegal also has such a specific department, Agence Judiciaire de l'État, of which the mission is to represent the Senegalese government in the settlement of all contentious cases in which this state is a party, be it before national and international judicial or arbitration bodies.[110] Given the financial implications of having such a specific department, and due to the small numbers of cases in which they are involved, some

system rests in part upon states' ability to understand and comply with their legal obligations, effectively defend against investor claims, and keep the law on a sensible track. Capacity thus is an integral part of the legitimacy and viability of international investment arbitration. We should welcome, and encourage, reform efforts that help states build the capacity required to achieve these goals.'

106 JK Sharpe 'The agent's indispensable role in international investment arbitration' (2018) 33 *ICSID Review - Foreign Investment Law Journal* 675-701.

107 https://www.sis.gov.eg/Story/83642/State-Lawsuits-Authority?lang=en-us (accessed 31 January 2021).

108 This department was involved in cases such as *CTIP Oil & Gas International Limited v Arab Republic of Egypt* ICSID Case ARB/19/27); *Petroceltic Holdings Limited and Petroceltic Resources Limited v Arab Republic of Egypt* ICSID Case ARB/19/7); *International Holding Project Group & Others v Arab Republic of Egypt* ICSID Case ARB/18/31); *Future Pipe International BV v Arab Republic of Egypt* ICSID Case ARB/17/31); *LP Egypt Holdings I, LLC, Fund III Egypt, LLC and OMLP Egypt Holdings I, LLC v Arab Republic of Egypt* ICSID Case ARB/16/37).

109 https://icsid.worldbank.org/cases/case-database (accessed 31 January 2021).

110 http://www.finances.gouv.sn/aje/ (accessed 31 January 2021). This department was involved in cases such as *Société Ouest Africaine des Bétons Industriels v Republic of Senegal* ICSID Case ARB/82/1); *VICAT v Republic of Senegal* ICSID Case ARB/14/19); *Menzies Middle East and Africa SA and Aviation Handling Services International Ltd v Republic of Senegal* ICSID Case ARB/15/21); *African Petroleum Senegal Limited v Republic of Senegal* ICSID Case ARB/18/24). So did the Republic of Côte d'Ivoire, which was represented by its 'agent judiciaire du Trésor' in ICSID cases such as *Société Resort Company Invest Abidjan, Stanislas Citerici and Gérard Bot v Republic of Côte d'Ivoire* ICSID Case ARB/16/11); *Wise Solutions CDI, SA v Republic of Côte d'Ivoire* ICSID Case . ARB/17/48). Currently, Burkina Faso, according to the Law 008-2019/AN portant statut de l'Agent judiciaire de l'Etat (AJE) of 23 April 2019, is recruiting its Agent Judiciaire de l'Etat; see https://lefaso.net/spip.php?article98529 (accessed 31 January 2021).

other countries prefer to outsource this task to outside counsel on the grounds that 'it is not viable to set up a dedicated defence team when states are dealing with only one or two ongoing cases'.[111] However, the absence of state employees in the legal team can lead to counterproductive results as evidenced in *Oded Besserglik v Republic of Mozambique*,[112] where this government wasted US $2 million in a case that should have never 'been brought before a tribunal … approved and registered … heard … and untimely defended'.[113]

In general, there are three models of legal representation that are used by litigant states: They can hire in-house counsel, outside counsel or a combination of the two.[114] Like arbitrators, the participation of African counsel and law firms in ISDS in not significant.[115] Very few African law firms and counsel have participated in ISDS. In general, they appear in cases involving their home states or some other African states[116] but, to the best of the author's knowledge, not in cases involving non-African countries.[117]

The reasons for the above situation are to be found at many levels. First, this has to do with what Gathii calls the 'insularity of international law', which is characterised by a 'limited set of locales and ideas'.[118] Gathii has found that 'practitioners in OECD states do not practice before

111 Anna Joubin-Bret 'Establishing an International Advisory Centre on Investment Disputes?' (2015) *E15Initiative* 2, https://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Joubin-Bret-Final.pdf (accessed 26 August 2022).

112 *Oded Besserglik v Republic of Mozambique* ICSID Case ARB(AF)/14/2, Award, 28 October 2019.

113 JC Herrera *'Oded Besserglik v Mozambique:* The BIT was not in force, who's to blame?*' Kluwer Arbitration Blog* 6 January 2020*,* http://arbitrationblog.kluwerarbitration.com/2020/01/06/oded-besserglik-v-mozambique-the-bit-was-not-in-force-whos-to-blame (accessed 26 August 2022). See also https://www.afronomicslaw.org/2020/06/01/oded-besserglik-v-republic-of-mozambique-or-when-a-victory-is-pyrrhic/ (accessed 26 August 2022).

114 ICSID Practices Notes for Respondent in ICSID Arbitration, 2015, https://icsid.worldbank.org/sites/default/files/Practice%20Notes%20for%20Respondents%20-%20Final.pdf (accessed 26 August 2022).

115 According to one study, African countries were represented exclusively by African counsel only in 16%; Kidane (n 15) 594.

116 Eg, in *Getma International & Others v Republic of Guinea*, the respondent state retained, in addition to a French law firm, another firm from Burkina Faso; see *Getma International & Others v Republic of Guinea* ICSID Case ARB/11/29) Award, 16 August 2016.

117 The opposite is true since, in most of the cases involving African states, they have appointed outside counsel.

118 JT Gathii 'The promise of international law: A Third World view (including a TWAIL bibliography 1996-2019 as an appendix)' (2020) 114 *Proceedings of the ASIL Annual Meeting* 168.

international courts in places like Arusha and neither do those who practice in places like Arusha practice in the courts based in the global capitals of international law'.[119] In the context of investment arbitration and given the fact that arbitration tribunals very often sit in non-African places,[120] most counsel and advocates involved in investment proceedings also come from Western countries. For some scholars, the field of investment arbitration operates as a close community with many unwritten rules without which lawyers from outside may feel disoriented. As stated by one author, what international arbitration lawyer knows is not written down.[121] However, such views are contested by those who consider it to be a 'mythology of specialised knowledge in international arbitration'.[122]

The marginal role played by African counsel in ISDS, also, has to do with the poor case management of some African lawyers. In *CDC Group PLC v Seychelles,*[123] for example, the counter-memorial, produced by the prosecutor of Seychelles, was 'sloppily drafted and had to be redrafted and refiled, it made strange jurisdictional arguments that were later withdrawn, and it called witnesses at the oral hearing who gave testimony adverse to its own case'.[124] In *Piero Foresti, Laura de Carli & Others v South Africa* one of the South African counsel was involved in corruption.[125] However,

119 Gathii (n 118) 168. He further argues saying the fact that 'the practising bars in places like The Hague, rather than in places like Arusha, are the places we look up to understand international law, has an uncanny continuation of the dominance of former colonial metropolitan centers over sub- regional and regional courts in Africa, and the non-West in general, in the production of international legal knowledge that our discipline celebrates as the benchmark'. In the same vein, the former president of the ICJ, judge Abdulqawi Yusuf, stated that '[t]here is no longer justification to continue delocalizing arbitration involving an African party be it a corporation or a state. By delocalizing the process, the ability of arbitration to contribute to the rule of law is greatly diminished.' AA Yusuf 'The contribution of arbitration to the rule of law – The experience of African countries' in A Menaker (ed) *International arbitration and the rule of law: Contribution and conformity* (2017) 34.

120 Very few investment arbitrations have taken place in an African capital or have involved African regional arbitration centres: See, eg, *Mr Josias van Zyl (South Africa), (2) The Josias van Zyl Family Trust (South Africa), (3) The Burmilla Trust (South Africa) v The Kingdom of Lesotho;* see also *Getma International v Guinea* ICSID Case ARB/11/29 & CCJA Case 001/2011/ARB; *Benin Control v Benin*.

121 *Global Arbitration Review* (2012) Global Arbitration Review 100. The guide to specialist arbitration firms 2012, 3.

122 Kidane (n 71) 239-262.

123 *CDC Group PLC v Seychelles* ICSID Case ARB/02/14, Award, 17 December 2003.

124 A Sarvarian *Professional ethics at the International Bar* (2013) 168.

125 *Piero Foresti, Laura de Carli & Others v The Republic of South Africa* ICSID Case ARB(AF)/07/01, Award, 4 August 2010 8-11, paras 30-45.

unethical attitudes are not to be found among African lawyers alone given the ubiquitousness of conflicts of interest in investment arbitration.[126]

This brief assessment of the 60 years reveals that African legal expertise in ISDS remains problematic. It is not surprising that UNCITRAL has included among its five first reforms the establishment of an advisory centre on investment law to help in the building of this expertise. Equally, African countries should put this issue at the centre of their discussions regarding the reforms of ISDS in Africa.

4 Future of ISDS in Africa

The settlement of investment disputes is at a crossroads, both outside and inside Africa. Outside Africa, the European Union (EU) is pushing for the establishment of an international court of investment.[127] At the same time, and following the *Achmea* decision which recalled that an investment arbitration clause contained in intra-EU BITs is incompatible with EU law,[128] and the signing by 23 European countries of an agreement for the termination of intra-EU BITs,[129] cases between European investors and European countries will be reported to the Court of Justice of the EU.

Inside Africa, there is not a clear position as to whether to reject or accept ISDS. At the domestic level, most countries have included a provision related to ISDS in their legislation. The only African country that has abandoned ISDS is South Africa.[130] The case of Tanzania is also worth mentioning, which prohibits ISDS for the settlement of disputes

126 A Reinisch & C Knahr 'Conflict of interest in international investment arbitration' in A Peters & L Handschin (eds) *Conflict of interest in global, public and corporate governance* (2012) 103-124; KF Gómez *Key duties of international investment arbitrators: A transnational study of legal and ethical dilemmas* (2019) 79-121.

127 This option, for example, is included in the CETA Agreement between the EU and Canada and in the BIT between EU and Vietnam. This option was also discussed in the negotiations of the (abandoned) Transatlantic Trade and Investment Partnership (TTIP) between EU and USA.

128 Case C-284/16 *Achmea*, ECLI:EU:C:2018:158, 6 March 2018. For a discussion of the impact of this decision on ISDS, see HP Hestermeyer 'The autonomy of EU law meets investment arbitration: Case C-284/16 Achmea' in D Sarmiento, H Ruiz-Fabri & B Hess (eds) *Yearbook on procedural law of the Court of Justice of the European Union – 2019* (2020) 77-94.

129 Agreement for the termination of bilateral investment treaties between the member states of the European Union, 29 May 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01) (accessed 26 August 2022).

130 Protection of Investment Act 22 of 2015, https://www.gov.za/sites/default/files/gcis_document/201512/39514act22of2015protectionofinvestmentact.pdf (accessed 26 August 2022).

arising from the exploitation of natural resources.[131] At regional level, there are different approaches. The majority of the eight regional economic communities (RECs)[132] have adopted legal instruments regarding the regulation of foreign investment. On the one hand, rules regulating investment within the Economic Community of Western African States (ECOWAS) are to be found in texts such as the ECOWAS Treaty (revised in 1993);[133] the ECOWAS Protocol on Movement of Persons and Establishment;[134] the ECOWAS Energy Protocol;[135] and the ECOWAS Supplementary Act on Investments.[136] Article 33 of the Supplementary Act allows the Court of Justice of the Economic Community of West African States (ECCJ) to function as a 'default mechanism' for the settlement of investor- state disputes under the ECOWAS Supplementary Act.[137] Also, the recent ECOWAS Common Investment Code (ECOWIC) contains a provision related to ISDS.[138] On the other hand, it is safe to say that there

131 In July 2017 the Tanzanian National Assembly adopted many laws such as Written laws (Miscellaneous Amendment Act) of 2017; The Natural Wealth and Resources (Permanent Sovereignty) Act 2017; the Tanzania's Wealth and Resources Act (Review and Re-negotiations of unconscionable terms) of 2017.

132 https://au.int/en/organs/recs (accessed 31 January 2021).

133 Adopted on 28 May 1975 and revised 24 July 1993, https://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf (accessed 31 January 2021).

134 Protocol A/P1/5/79 on free movement of persons, right of residence and establishment, signed on 25 May 1979, entered into force on 8 April 1980, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3269/download (accessed 31 January 2021).

135 Ecowas Energy Protocol, A/P4/1/03, signed 31 January 2003 (not yet into force), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5477/download (accessed 31 January 2021).

136 Supplementary Act A/SA.3/12/08 Adopting Community Rules on investment and the modalities for their implementation with ECOWAS, signed on 19 December 2008, entered into force 19 January 2009, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3266/download (accessed 31 January 2021).

137 Supplementary Act A/SA.3/12/08 Adopting Community Rules on investment and the modalities for their implementation with ECOWAS, into force 19 January 2009, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3547/ecowas-supplementary-act-on-investments (accessed 31 January 2021); see also M Happold & R Radovic 'The ECOWAS Court of Justice as an investment tribunal' (2017) 19 *Journal of World Investment and Trade* 95-117; M Happold 'Investor-state dispute settlement using the ECOWAS Court of Justice: An analysis and some proposals' (2019) 34 *ICSID Review - Foreign Investment Law Journal* 496-518.

138 According to art 54: '(1) Any dispute between a Member State and an investor or between investors may be resolved through the use of consultations, good offices, mediation, conciliation, arbitration or any other agreed dispute resolution mechanism. (2) Where recourse is made to arbitration, the arbitration may be conducted at any established public or private alternative dispute resolution centres or the arbitration division of the ECOWAS Court of Justice. Member States and investors are encouraged to utilise regional and national alternatives dispute settlement institutions.

is an opposition to ISDS in the Southern Africa Development Community (SADC). Initially, article 28 of Annex 1 of the 2006 SADC Protocol on Finance and Investment expressly included a provision on ISDS. However, and following several investment claims filed against some SADC members (such as Lesotho[139] and Zimbabwe),[140] this Annex 1 was amended to remove the ISDS mechanism.[141] In addition, this Community released a Model BIT of which the goal was to 'develop a comprehensive approach from which member states can choose to use all or some of the model provisions as a basis for developing their own specific Model Investment Treaty or as a guide through any given investment treaty negotiation'.[142] Although the 2012 Model contained a provision on ISDS (article 29), '[t]he Drafting Committee was of the view that the preferred option is not to include investor-state dispute settlement'.[143] This Model was updated and, among other changes, has removed the ISDS provision.[144] In the same vein, the East African Community Model Investment Treaty 2016 expressly mentioned its preference for the exclusion of ISDS.[145] At the continental level, the formulation of article 42 of PAIC reveals the lack

(3) Where recourse is made to arbitration, the rules of procedure of the relevant forum shall be applicable, including rules for the submission of claims, selection of arbitrators and conduct of the arbitration. (4) Except where the investment contract between a Member State and an Investor provides for the use of international mechanisms such as ICSID or UNCITRAL, parties to the investment contract shall exhaust all local remedies including the ECOWAS Court of Justice or national dispute settlement systems, before resorting to the international mechanisms.' Adopted in July 2018 but not yet entered into force, https://nipc.gov.ng/wp-content/uploads/2019/12/ecowiccode.pdf? (accessed 26 August 2022).

139 *Swissbourgh Diamond Mines (Pty) Limited, Josias van Zyl, The Josias van Zyl Family Trust & Others v The Kingdom of Lesotho* PCA Case 2013-29 (First Case); see also *Josias van Zyl, The Josias van Zyl Family Trust & The Burmilla Trust v The Kingdom of Lesotho* PCA Case 2016-21 (Second Case).

140 *Mike Campbell (Pvt) Ltd & Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008).

141 See arts 25 & 26 of the Agreement Amending Annex 1 (Cooperation on Investment) of the SADC Protocol on finance and investment, 2016, https://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf (accessed 26 August 2022).

142 SADC Model Bilateral Investment Treaty Template with Commentary, 3 July 2012, https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf accessed 26 August 2022.

143 SADC Model Bilateral Investment Treaty Template with Commentary, July 2012 55.

144 It seems that some SADC members have requested and obtained the inclusion of an ISDS provision to the updated Model. See Mbengue (n 5) 470.

145 See East African Community, East African Community Model Investment Treaty 2016 (EAC Model Investment Treaty), February 2016 23, https://www.eac.int/documents/category/key-documents (accessed 26 August 2022).

of agreement among African countries *vis-à-vis* ISDS, that are either pro-ISDS or anti-ISDS.[146]

Generally, there are three main trends in current discussions about the future of ISDS. The first is to keep the current system and improve it through some adjustments; the second is a profound redesigning of the ISDS system with some innovative features; and the third trend is focused on the alternatives to investment arbitration.[147]The focus of this part is threefold: First, it is focused on ISDS and the reforms aiming at improving the current ISDS; second, it examines the reforms of which the goal is to redesign ISDS, notably through the creation of a regional investment court for Africa; third, the alternatives to ISDS will be analysed.

4.1 Improving the current ISDS

Many African countries are involved in the multilateral processes of reforming ISDS, be it at the level of ICSID or UNCITRAL. In this regard, eight African countries, and the African Union (AU), have submitted comments on the proposed amendments to the ICSID rules.[148]

146 MM Mbengue & S Schacherer 'The Africanisation of international investment law: The Pan-African Investment Code and reform of the international investment regime' (2017) 18 *Journal of the World Investment and Trade* 442.

147 In the ISDS reforms' discussions, there are incrementalists, systemic reformers and paradigm shifters: *'1. Incrementalists* view the criticisms of the current system as overblown and argue that investor-state arbitration remains the best option available. Hence, they favor retaining the existing dispute resolution system but instituting modest reforms that would redress specific concerns. *2. Systemic reformers* see merit in retaining investors' ability to file claims directly on the international level, but view investor-state arbitration as a seriously flawed system for dealing with such claims. They champion more significant, systemic reforms, such as replacing investor-state arbitration with a multilateral investment court and appellate body. *3. Paradigm shifters* dismiss the existing system as irrevocably flawed and in need of wholesale replacement. They reject the utility of investors' making international claims against states, whether before arbitral tribunals or international courts. They embrace a variety of alternatives, such as domestic courts, ombudsmen, and state-to-state arbitration'. A Roberts 'Incremental, systemic, and paradigmatic reform of investor-state arbitration' (2018) 112 *American Journal of International Law* 410. See also A Roberts 'The shifting landscape of investor-state arbitration: Loyalists, reformists, revolutionaries and undecideds' *Ejiltalk* 15 June 2017, https://www.ejiltalk.org/the-shifting-landscape-of-investor-state-arbitration-loyalists-reformists-revolutionaries-and-undecideds/ (accessed 26 August 2022); S Puig & GC Shaffer 'Imperfect alternatives: Institutional choice and the reform of investment law' (2018) 112 *American Journal of International Law* 361-409; AJIL Symposium on Sergio Puig and Gregory Shaffer, 'Imperfect alternatives: Institutional choice and the reform of investment law' and Anthea Roberts 'Incremental, systemic, and paradigmatic reform of investor-state arbitration' (2018) 112 *AJIL Unbound* 228-265.

148 https://icsid.worldbank.org/amendments/state-input (accessed 26 August 2022).

Several others have also submitted proposals to UNCITRAL WG III.[149] Additionally, a meeting was held in Conakry and attended by government officials from 29 African states as well as a few intergovernmental organisations that are active on the continent.[150] These processes are taking an incremental approach and aim at dealing with some of the flaws of the current ISDS system.[151]

In this way, the two institutions have recently released a draft code of conduct for adjudicators that provides guidance and principles addressing matters related to arbitrators' independence and integrity or their duty to conduct proceedings with integrity, fairness, and efficiency.[152] It should be recalled that the arbitrators' conduct has been widely criticised.[153] This code might lead to an increased diversity among arbitrators though the prohibition of multiple roles and, maybe, lead also to the appointment of more African arbitrators, even if this aspect is still disputed.[154]

149 These are Morocco, Mali, Guinea and South Africa; see https://uncitral.un.org/en/working_groups/3/investor-state (accessed 26 August 2022).

150 https://undocs.org/en/A/CN.9/WG.III/WP.183 (accessed 26 August 2022).

151 This approach was criticised by South Africa, according to which '[w]e cannot divorce the procedural from substantive concerns as they are intricately related … Only systemic reform will allow addressing concerns with ISDS in a comprehensive fashion. Piecemeal approaches will only have limited effects as "old" IIAs continue to exist and investors are able to structure their investments to benefit from those treaties.' UNCITRAL Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its 38th session(Vienna, 14-18October 2019), Submission from the Government of South Africa, A/CN.9/WG.III/WP.176, 5 paras 20-21.

152 https://icsid.worldbank.org/news-and-events/news-releases/icsid-and-uncitral-release-draft-code-conduct-adjudicators (accessed 26 August 2022).

153 UNCITRAL 'Possible reform of investor-state dispute settlement (ISDS), Note by the Secretariat' A/CN.9/WG.III/WP.142, 9.

154 Eg, Vanina Sucharitkul thinks that this code could negatively impact gender and regional diversity; 'ICSID and UNCITRAL Draft Code of Conduct: potential ban on multiple roles could negatively impact gender and regional diversity, as well as generational renewal', 20 June 2020 *Kluwer Arbitration Blog* http://arbitrationblog.kluwerarbitration.com/2020/06/20/icsid-and-uncitral-draft-code-of-conduct-potential-ban-on-multiple-roles-could-negatively-impact-gender-and-regional-diversity-as-well-as-generational-renewal (accessed 26 August 2022).

Another important innovation is the establishment of an advisory centre on investment law, which may help in building African states' legal capacity and allow them to fully participate in ISDS.[155] This is in line with the proposal made by the government of Mali, regarding the 'establishment of a pool of arbitrators and counsel for Africa, consisting of each country's leading experts, available to assist countries and investors at any time'.[156]

A further reform is the exhaustion of local remedies, which already exists under certain BITs[157] and regional agreements.[158] According to UNCTAD,

> [t]his reform option aims to promote recourse by foreign investors to domestic courts while retaining the option for investor-state arbitration, as a remedy of last resort. In so doing, it would respond to some of the concerns arising from the steep rise in ISDS cases over the last decade. Domestic resolution of investment disputes is available in virtually every jurisdiction.[159]

This option, which is also included in the PAIC,[160] offers benefits such as 'preventing frivolous claims, protecting host nations against high international arbitration costs, and fostering sound and properly functioning domestic judiciaries'.[161] This option is of particular importance for host states and can provide them with the opportunity to correct some

155 UNCITRAL *Possible reform of investor-state dispute settlement (ISDS)* Advisory Centre, Note by the Secretariat, A/CN.9/WG.III/WP.168. See also the scoping study on securing adequate legal defence in proceedings under international investment agreements, prepared by the Columbia Centre on Sustainable Investment for the Ministry of foreign affairs of The Netherlands, http://ccsi.columbia.edu/files/2020/04/Securing-Adequate-Legal-Defense-in-Proceedings-Under-International-Investment-Agreements.pdf (accessed 26 August 2022).

156 A/CN.9/WG.III/WP.181, 3.

157 See, eg, art 9(3), 2002 China-Côte d'Ivoire BIT, https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/885/china---c-te-d-ivoire-bit-2002 (accessed 26 August 2022).

158 Draft of the Revised Investment Agreement for the COMESA Common Investment Area (n 131) art 36(3): 'COMESA investor or its investment may submit a claim to arbitration pursuant to this Agreement, provided that the COMESA investor or investment, as appropriate.' See also art 29 of the Southern African Development Community (SADC) Model Bilateral Investment Treaty Template (adopted 2012); art 26 al 5 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Federal Government of Nigeria (Morocco-Nigeria BIT) (Adopted on 3 December 2016).

159 UNCTAD *World Investment Report, 2015, Reforming international investment governance* (2015) 149.

160 Art 42(1)(c).

161 UNCTAD *World Investment Report 2015* (n 161) 149.

misconducts at the domestic level and avoid the costs associated with the use of ISDS. According to ICSID Caseload-Statistics 2020-1, 35 per cent of ISDS cases were resolved 'during' the arbitral process.[162] This suggests that some of these cases could have been settled at domestic level if the exhaustion of local remedies was mandatory.

However, these reforms sound like treating the symptom rather than the problems. That is why the (revolutionary) idea of creating a regional court of investment has been put forward.

4.2 Creating a regional investment court for Africa?

The idea of such a standing court for the resolution of investment disputes has been advanced by the EU and has been included in some of its recent agreements.[163] Even if this proposal has, mainly, sought to solve a 'European' problem,[164] it is possible to adapt it to the African context and tailor it so that it can meet African needs, by creating a regional investment court.[165] A regional court could help in addressing the problem of African arbitrators' lack in the field of investment law: The election (or the appointment) of arbitrators, especially on a permanent or full-time basis, could lead to the establishment of 'a pool of arbitrators and counsel for Africa … available to assist countries and investors at any time' as wished by the government of Mali.[166] It could also address the issue of conflicts of interests through, notably, the 'exclusivity' of the function: 'In fact, judges would not be permitted to wear multiples hats or to play multiple roles (as arbitrators and counsel, or arbitrators and experts, etc) as it is currently the case with arbitrators'.[167]

162 https://icsid.worldbank.org/en/Documents/resources/The%20ICSID%20Caseload%20Statistics%202020-1%20Edition-ENG.pdf (accessed 26 August 2022).

163 See, eg, the CETA agreement between EU and Canada or the EU-Vietnam. It was also included in the (abandoned project of) TTIP. In its submission to UNCITRAL WGIII, the EU is also advocating this option; see UNCITRAL Possible reform of investor-State dispute settlement (ISDS), Submission from the European Union and its member states, A/CN.9/WG.III/WP.159/Add.1.

164 W Kidane 'Alternatives to investor-state dispute settlement: An African perspective' (2018) *GEG Africa*, discussion paper 15-18, http://www.gegafrica.org/item/644-alternatives-to-investor-state-dispute-settlement-an-african-perspective (accessed 26 August 2022).

165 This idea has been analysed by C Nyombi 'A case for a regional investment court for Africa' (2018) 43 *North Carolina Journal of International Law* 66-109.

166 A/CN.9/WG.III/WP.181, 3.

167 UNCTAD *World Investment Report 2015* (n 161) 149. According to Chrispas Nyombi, 'The proposal, if implemented at a regional level, is likely to sit well with African states for a number of reasons. First, it rests on the principle that private arbitration is not appropriate for handling matters involving national public policy. This calls for

The African Court of Justice (ACJ), referred to by the PAIC, can play a role in this regard.[168] It is true that the ACJ is expected to intervene in state-to-state disputes (article 41(2) of PAIC) but it is possible to extend its competence to include ISDS as well. However, as appealing as this idea might be, it is not without challenges, including at institutional and practical levels.

At the institutional level, the multiplicity of courts on the continent (or the multiplicity of levels of jurisdiction within the same court) can undermine the efficiency of such regional court on investment. Currently, the main continental court is the African Court on Human and Peoples' Rights (African Court).[169] It is true that the Protocol of the Court of Justice of the African Union entered into force,[170] but this Court of Justice of the African Union (CJAU) still is not yet operational. This did not prevent the AU from merging the two courts into a single court: the African Court of Justice and Human Rights (ACJHR) which is not effective.[171] Furthermore, at its twenty-third ordinary session, held in Malabo, Equatorial Guinea, on 27 June 2014, the AU Assembly decided to amend the Protocol on the Statute of the ACJHR and to convert it into the African Court of Justice and Human and Peoples' Rights (ACJHPR).[172] It is against this background that the PAIC extends the jurisdiction of the continental court to investment disputes. What can be the efficiency of such an African Court of Justice, acting as a regional court of investment, or a new African court of investment within this inextricable tangle of courts (African Court, CJAU, ACJHR, ACJHPR) which can be seen also as the

a mechanism that supports the independence and impartiality of judges which can be achieved through tenured appointments to insulate judges from outside interests.' Nyombi (n 165) 100.

168 Art 41 PAIC.

169 Established by virtue of art 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted in June 1998, entered into force 25 January 2004.

170 Protocol of the Court of Justice of the African Union, adopted 1 July 2003, entered into force 11 February 2009.

171 The Protocol on the Statute of the African Court of Justice and Human Rights was adopted on 1 July 2008. It shall enter into force after ratifications by, at least, 15 countries. So far, only, eight states have ratified it; see https://au.int/sites/default/files/treaties/36396-sl-PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf (accessed 26 August 2022).

172 So far, 15 countries have signed the Protocol and none of these have ratified it; see https://au.int/sites/default/files/treaties/36398-sl-PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf (accessed 26 August 2022).

same court but with different levels of jurisdiction and different names? The tensions exist not only at the continental level but also between the regional and the continental layers.[173]

Scepticism grows more when considering some recent experiences of certain African countries with regional courts. It should be recalled that the SADC tribunal was dismantled after *Mike Campbell v Republic of Zimbabwe*, in which the tribunal found that the Zimbabwean government unlawfully expropriated some owners from their property without compensation. This has led to the suspension of the tribunal and its redesigning to exclude individual access to the tribunal. As mentioned above, the *Lesotho* case was brought before the SADC tribunal and later was submitted to investment arbitration. Could it be different with a continental court on investment? Additionally, the recent leave of some countries from the AfCHPR, as a response to its decisions, does not inspire optimism.[174] This option now seems unsatisfactory as it might lead to replacing an unfair system by another unfair system.[175]

In response, many are pushing for an exit of ISDS and promoting its alternatives.

4.3 Exiting ISDS in Africa?

Some authors are of the view that the only way out for African countries is to 'exit' the current system of ISDS as none of proposed solutions can lead to a significant change. In this regard, an author claimed that reforms and proposals, discussed above, are merely 'palliative (symptoms oriented) and not curative (root cause/problem oriented) (that) do not deal with deep rooted historical, sociological, and normative causes

173 See, eg, the ECOWAS system and the AU system.

174 SH Adjolohoun 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 1-40. Even if these are examples from one sub-region that cannot be generalised given that some other REC courts have been significantly more active (and sometimes even rather successful), they are illustrative of some hurdles that need to be overcome for such investment court to be efficient.

175 As suggested by one scholar, the 'core pillar of such a reform effort must aim at creating a fair and just system, rather than replacing one unjust system with another'; Kidane (n 164) 19.

of the rot in ISDS'.[176] However, exiting ISDS might be easier said than done. As recalled by the AU, African countries 'are signatories to over 900 Bilateral Investment Treaties, which prescribe Investor-State Dispute Settlement (ISDS) as a means of resolving disputes between investors of the home state and the host state'.[177] For these countries to effectively disengage from ISDS, these countries would have to withdraw from or terminate all their investment treaties in order 'to prevent foreign investors from structuring or restructuring their investments so as to come under the scope of protection of any remaining investment treaty'.[178] This was done by the EU, for intra-European disputes, with the adoption of the agreement for the termination of BITs between the member states of the EU,[179] which entered into force on 29 August 2020.[180] This requires a valid alternative which, as discussed above, currently is not yet available on the continent.

Another alternative is the Brazilian Model of Dispute Settlement for Investment which is contained in its recent Cooperation and Facilitation Investment Agreements (CFIAs) signed with countries such as Angola,[181]

176 HO Mbori 'Exit is the only way out: A polemic response to John Nyanje's "Hegemony in investor state dispute settlement: How african states need to approach reforms"' *Afronomics blogpost* 10 September 2020, https://www.afronomicslaw.org/2020/09/10/exit-is-the-only-way-out-a-polemic-response-to-john-nyanjes-hegemony-in-investor-state-dispute-settlement-how-african-states-need-to-approach-reforms (accessed 26 August 2022).

177 African Union 'Training on the settlement of disputes: The African Continental Free Trade Area', https://au.int/sw/node/36360 (accessed 26 August 2022).

178 Mbengue (n 5) 473.

179 This was signed on 5 May 2020 by the 23 EU member states, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01) (accessed 26 August 2022).

180 For a discussion of this agreement, see HSF '23 EU member states sign an agreement for the termination of Intra-EU BITs; European Commission initiates infringement action against non-signatories UKand Finland' 21 May 2020, https://hsfnotes.com/publicinternationallaw/2020/05/21/23-eu-member-states-sign-an-agreement-for-the-termination-of-intra-eu-bits-european-commission-initiates-infringement-action-against-non-signatories-uk-and-finland (accessed 26 August 2022); N Lavranos 'The EU Plurilateral draft termination agreement for all intra-EU BITs: An end of the post-Achmea saga and the beginning of a new one' *Kluwer Arbitration Blog* 12 December 2019, http://arbitrationblog.kluwerarbitration.com/2019/12/01/the-eu-plurilateral-draft-termination-agreement-for-all-intra-eu-bits-an-end-of-the-post-achmea-saga-and-the-beginning-of-a-new-one/?doing_wp_cron=1598260187.5631339550018310546875 (accessed 26 August 2022).

181 Acordo de Cooperação e Facilitação de Investimentos entre O Governo da República Federativa do Brasil e o Governo da República de Angola, signed on 1 April 2015.

Mozambique,[182] Morocco,[183] Ethiopia[184] and Malawi.[185] This model was initiated in 2015 and aims at establishing 'a mechanism for technical dialogue and government initiatives that may contribute to a significant increase of mutual investment'. Also, it emphasises the amicable settlement of disputes notably with the creation of the Joint Committee and the Focal Point (or Ombudsman),[186] which are intended to 'address any issues or differences concerning investments in order to avoid litigation'.[187] The dispute resolution mechanism, under CFIA, has two steps: In case of an alleged breach of CFIA, there is an initial dispute prevention phase, handled by the Joint Committee and, if the dispute has not been resolved, arbitration can be initiated but only state-to-state arbitration.[188] This latter option, an alternative to ISDS, could help in reaching balance between' investor and host state: 'The aggrieved investor shall persuade its home state that a damage was caused to the investment, so it may initiate an arbitration against the host state. It would be expected that only robust claims would proceed under this situation, avoiding adventurous litigators.[189]

182 Acordo de Cooperação e Facilitação de Investimentos entre O Governo da República Federativa do Brasil e o Governo da República de Moçambique, signed on 30 March 2015.

183 Accord de coopération et de facilitation en matière d'investissements entre le royaume du Maroc et la république fédérative du Brésil, signed on 13 June 2019.

184 Agreement between the Federativo Republic of Brazil and the Federal Democratic Republic of Ethiopia on Investment Cooperation and Facilitation, signed on 11 April 2018.

185 Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi, signed on 25 June 2015.

186 Arts 14 & 15 Morocco CFIA; arts 17 & 18 of the Ethiopian CFIA; arts 3 7 & 4 Malawi CFIA; arts 4 & 5 Angola CFIA; arts 4 & 5 Mozambique CFIA).

187 Articles 14 & 15 Morocco CFIA; arts 17 & 18 of the Ethiopian CFIA; arts 3 & 4 Malawi CFIA; arts 4 & 5 Angola CFIA; arts 4 & 5 Mozambique CFIA. See F Hees, PM Cavalcante & P Paranhos 'The Cooperation and Facilitation Investment Agreement (CFIA) in the context of the discussions on the reform of the ISDS system' (2018) 11 *South Centre Investment Policy Brief*.

188 'The settlement approach, followed by this type of arbitration, may be seen as favourable to host state protection. No litigation is initiated unless several steps are taken in order to avoid the dispute itself. Both parties are invited to discuss their arguments and reach a settlement, while a preliminary report on the case, with the conclusions of the Joint Committee on their claims, is issued and made available. The fact both parties may discuss their arguments and even be provided with a first analysis of the case may avoid a lengthy and costly litigation, leading to an amicable settlement. NC Moreira 'Cooperation and Facilitation Investment Agreements in Brazil: The path for host state development' *Kluwer Arbitration Blog* 1 September 2018, http://arbitrationblog.kluwerarbitration.com/2018/09/13/cooperation-and-facilitatio n-investment-agreements-in-brazil-the-path-for-host-state-development/ (accessed 26 August 2022).

189 Moreira (n 188).

Last, but not least, the recourse to mediation for the settlement of investment has recently gained in importance as evidenced by, among others, the signature of the 2019 Singapore Mediation Convention of the United Nations Commission on International Trade Law (UNCITRAL) which aims at ensuring enforcement of international commercial settlement agreements resulting from mediation.[190] At the UNCITRAL Working Group III, some states are pushing for alternatives to investment treaty arbitration and national courts. In this regard, South Africa claimed that mechanisms such as conciliation or mediation can 'narrow down' the actual extent of the dispute by concentrating on a fact-finding exercise: 'The advantage of these alternative approaches is to provide for a faster and less costly settlement, the more so when the problem is tackled at an early stage and with the specific goal of avoiding escalation.'[191] The same idea is put forward by some scholars who think that mediation could become the mode of dispute resolution *par excellence* with regard to disputes involving an African party, in view of its speed and low cost per report to arbitration.[192] The example of countries such as Burkina Faso is a cause for optimism.[193] However, it may be too early to draw firm conclusions.

5 Conclusion

This chapter discussed the participation of African countries in the reforms of ISDS. It started by an historical account of the of African participation in the setting up of the system for the settlement of investment disputes.

190 United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (Singapore Convention on Mediation) adopted 20 December 2018, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf (accessed 31 January 2021). The ICSID recently established Mediation rules for investment disputes; see https://icsid.worldbank.org/sites/default/files/ICSID_Mediation_Rules.pdf (accessed 26 August 2022). For an analysis of the recourse to mediation for the settlement of investment disputes, see C Titi & KF Gomez (eds) *Mediation in international commercial and investment disputes* (2019).

191 UNCITRAL Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its 38th session (Vienna, 14-18October 2019), Submission from the government of South Africa, A/CN.9/WG.III/WP.176, 8.

192 W Pydiamah & A Fouchard *Médiation des litiges en Afrique : quels défis à l'ère du Covid-19?* https://www.eversheds-sutherland.com/documents/global/france/Mediation_des_litiges_en_Afrique_et_defis_a_l_ere_du_covid.pdf (accessed 26 August 2022).

193 So far, the Centre d'arbitrage, de médiation et de conciliation de Ouagadougou (Ouagadougou Arbitration, Mediation and Conciliation Centre) has managed 446 cases, including 265 mediations (and an amount of 2 024 billion FCFA in mediation cases); see https://camco.bf (accessed 31 January 2021). This centre is described as a 'success story'; see Pydiamah & Fouchard (n 192). It is worth mentioning also the Acte Uniforme relatif à la médiation (Uniform Act relating to Mediation) which is applicable in the OHADA area, http://www.ohada.com/actes-uniformes.html (accessed 31 January 2021).

This marginal role played by these countries was further confirmed by a critical assessment of the, almost 60 years of Africa's involvement in ISDS where their contribution was mainly limited to providing support and cases without a significant contribution in the decision-making process. This is why these countries should use the current discussions to advance proposals or reforms that can help them to significantly contribute in the decision-making process, notably through the building of African legal expertise in ISDS: strengthening state agencies' capacity in dealing with ISDS; use (or implication) of African venues for the settlement of these disputes and a more frequent recourse to African experts (arbitrators, counsel, and so forth). This can be done by some adjustments to the current system (establishing an advisory centre on investment law, adopting a code of conduct for arbitrators, exhausting local remedies) or through a profound redesigning of the ISDS, notably with the establishment of a regional investment court. For this last option to be successful, these countries need to overcome a number of inconsistencies and hurdles and avoid the replacement of an unfair system they have criticised, by another unfair system.[194] A combination of many features may be a good compromise for them.

194 As suggested by a scholar, the 'core pillar of such a reform effort must aim at creating a fair and just system, rather than replacing one unjust system with another'. Kidane (n 164) 19.