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Afolabi Oluwatomiwa Adekemi

Attracting African States Participation in a Multilateral Investment Court

Reforming Substantive and Procedural
Law through an MIC

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Dedication

This work is dedicated to the glory of the Lord Almighty! (*1 Corinthians 3:6-7*).

Preface

This book is the culmination of my doctoral thesis, which I successfully defended at the Faculty of Law of Saarland University, Germany, in the winter semester of 2023/2024. The journey to this point has been both challenging and rewarding, and I owe a great debt of gratitude to many exceptional individuals who have supported and guided me along the way.

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This work is as much theirs as it is mine, and I so declare with all my love and gratitude.

Saarbrücken, Germany

Afolabi Oluwatomiwa Adekemi

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Abbreviations

ADP	Articles on Diplomatic Protection
ADR	Alternative Dispute Resolution
AfCFTA	African Continental Free Trade Area
AJT	Administrative and Judicial Treatment
BEE	Black Economic Empowerment
BIT(s)	Bilateral Investment Treaties
BLEU	Belgium-Luxembourg Economic Union
CETA	Comprehensive and Economic Trade Agreement
CIL	Customary international law
CJEU	Court of Justice of the European Union
ECOWAS	Economic Community of West African States
ELR	Exhaustion of Local Remedies
EU	European Union
f/ff	Following (page or paragraph)/Following (pages or paragraphs)
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FMV	Fair Market Value
Fn.	Foot Note
FPS	Full Protection and Security
FTC	Free Trade Commission (NAFTA)
GNTI	Guiding Note on Treaty Interpretation
HDSAs	Historically Disadvantaged South Africans
IAReporter	Investment Arbitration Reporter
ICS	Investment Court System
ICSID	International Centre on the Settlement of Investment Dispute
IIA(s)	International Investment Agreement(s)
IIL	International Investment Law

ILC Draft Articles	International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts
ISDS	Investor-State Dispute Settlement
MFN	Most Favoured Nation
MIC	Multilateral Investment Court
MN (mn)	Marginal Note
MST	Minimum Standard of Treatment
NAFTA	North-American Free Trade Agreement
NDP	Non-Disputing Parties
OECD	Organisation for Economic Cooperation and Development
p/pp	Page/Following Pages
PAIC	Pan-African Investment Code
para(s)	Paragraph/Following Paragraphs
PCA	Permanent Court of Arbitration
R2R	Right to Regulate
SCC	Stockholm Chamber of Commerce
SD	Sustainable Development
SIAC	Singapore International Arbitration Centre
SIDS	State-Investor Dispute Settlement
SSDS	State-to-State Dispute Settlement
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCITRAL	United Nations Commission On International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WLC	War Loss Clause
WWII	World War Two

Chapter 1

General Introduction: African States’ Introduction to the International Investment Law System



Upon the emergence from colonial rule that began in the second half of the twentieth century, newly independent African states inherited one common goal, that is, the driving of economic growth and development within their respective borders. The race towards economic development had begun with each state setting its deadline towards economic emergence.¹ The abundance of human and natural resources offered great hope to the new sovereigns that with the right economic and investment policies—African states would, in time, equal the imbalance in economic relations between the developed industrialised nations of the West² and the developing post-colonial states of Africa.

Certainly, one important factor for economic advancement in any given state is the availability of capital needed to finance projects that can stimulate economic growth and development. In this regard, Foreign Direct Investments (‘FDI’) become a must-have to fulfil the African states’ developmental agenda. According to the United Nations Conference on Trade and Development (‘UNCTAD’), FDI is ‘an investment reflecting a lasting interest and control by a foreign direct investor, resident in one economy, in an enterprise resident in another economy (foreign affiliate)’.³ The Organisation for Economic Cooperation and Development (‘OECD’) defines FDI as:

[A] category of cross-border investment in which an investor resident in one economy establishes a lasting interest in and a significant degree of influence over an enterprise resident in another economy. Ownership of 10 percent or more of the voting power in an

¹Kamto (2020), p. 7.

²The West (western states), in this context and for the purpose of this thesis, primarily refers to developed capital-exporting nations of Europe and North America, e.g., the United Kingdom, France, Germany, the United States of America, Canada, etc.

³UNCTAD (2023).

enterprise in one economy by an investor in another economy is evidence of such a relationship.⁴

Given its commercial attributes, FDI can catalyse economic growth and development in any given state because it *inter alia* provides the 'needed capital for investment, increases competition in the host country industries, and aids local firms to become more productive by adopting more efficient technology or by investing in human and/or physical capital'.⁵

To attract the needed FDI to complement domestic investment activities, African nations primarily sought private investors from Western states capable of financing capital-intensive projects that stimulate economic growth. This moment in African history, beginning in the 1960s, marked the continent's first contact with the international investment protection regime and its dispute settlement system.

Pre-decolonisation, a foreign investment protection regime had been in existence providing a set of rules for the protection of investment in host economies abroad. In seeking FDI, a state cannot welcome foreigners into its territory to trap them.⁶ Once accepted, a state is expected to protect foreign nationals as if they were its citizens and offer them full security to the greatest extent possible.⁷ It is on these basic principles, informed by European neo-liberal ideas, that certain legal norms were developed for the protection of foreign investors and their investments in host territories abroad.⁸

Although international investment law has evolved in many different ways in the past three centuries,⁹ its primary focus largely remains unchanged—that is, the imposition of certain legal obligations on host states aimed at protecting foreign investors and their investments in the host's territory. Today, those legal obligations are extensively codified in International Investment Agreements ('IIAs'). These IIAs are investment treaties contracted at various levels of state-to-state relations, mostly bilaterally,¹⁰ but now also included in regional and plurilateral agreements.¹¹ Also, states now unilaterally take on investment protection obligations parallel to those typically found in IIAs, by enacting them under domestic legislation.¹²

Despite the divergent background of the IIAs in existence, the substantive guarantees contained therein are quite often similar, if not identical, in language.¹³

⁴OECD iLibrary, FDI, <https://www.oecd-ilibrary.org/finance-and-investment>

⁵Ajayi (2006) p. 11 f.

⁶de Nanteuil (2020), p. 2.

⁷*Ibid.*

⁸See further on this, Miles (2010), p. 1.

⁹See on evolution of IIL, Subedi (2020), p. 28 ff; Cameron (2014), p. 1355 ff.

¹⁰See, UNCTAD IIA Database, <https://investmentpolicy.unctad.org/international-investment-agreements>

¹¹Schefer (2020), p. 33 ff.

¹²Born (2021), p. 497.

¹³UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform)* of 26/2/2018, A/CN.9/930/Add.1/Rev.1, para. 27.

The similarity in substantive obligations contained in today's multiple networks of IIAs can be attributed to the fact that a vast majority of them were inspired by common sources.¹⁴ For example, a notable source are the legal norms on the protection of foreign investments developed in the late eighteenth century through the commerce and navigation treaties entered into by the United States and some European governments.¹⁵ Also, the 1959 *Hermann Abs* and *Lord Shawcross* draft on the protection of foreign investment proposed certain rules that later became a blueprint for negotiating European BITs post-1959.¹⁶ Likewise in 1967, the OECD published a Draft Convention on the Protection of Foreign Property.

All these models went on to inspire the drafting of IIAs post-1960s, mostly finalised in the form of Bilateral Investment Treaties ('BITs'). The most common substantive obligations derived from these models include the duty to afford the foreign investor and its investment: full protection and security ('FPS'); fair and equitable treatment ('FET'); guarantees against expropriation; non-discriminatory treatment, including the most favoured nations ('MFN') and national treatment guarantee.

Significantly, the BITs that evolved post-decolonisation did not just offer substantive guarantees on the protection of foreign investment. They included a procedural mechanism for the enforcement of these guarantees, known as the investor-state dispute settlement ('ISDS') system. Customarily, investor-state disputes were settled through the process of diplomatic protection¹⁷ or were brought before the local courts of the host state by the affected investor.¹⁸ Even the first generation of BITs involving African states did not integrate ISDS but adopted a state-to-state dispute settlement ('SSDS') mechanism.¹⁹ However, as more BITs came into force, given the upsurge in independent states seeking to attract FDI, investors began to lobby their home states to contract BITs, which gave private parties more control over the dispute settlement process.²⁰ By 1968, the first BIT with an ISDS provision came into light in Article 11 of the Indonesia-Netherlands BIT (1968).²¹ The following year, the ISDS clause was found in Article 7 of the Chad-Italy BIT (1969),²² marking its earliest incorporation into a BIT involving an African state.

¹⁴Subedi (2020), p. 34.

¹⁵See, Treaty of Amity and Commerce between the United States and Kingdom of Prussia, 10 September 1785; Treaty of Amity, Commerce and Navigation between His Britannic Majesty and the United States of America, 19 November 1794.

¹⁶Abs, Herman and Hartley Shawcross, Draft Convention on Investments Abroad (1959).

¹⁷Choudhury (2013), p. 486; Bishop et al. (2014), p. 998.

¹⁸See Bray (2018), p. 102.

¹⁹Article 11, Germany-Togo BIT (1961), signed 16 May 1961; Article 8, Niger-Switzerland BIT (1962), signed 28 March 1962.

²⁰Schefer (2020), p. 475.

²¹Article 11, Indonesia-Netherlands BIT (1968), signed 7 July 1968.

²²Article 7, Chad-Italy BIT (1969), signed 11 June 1969.

By design, the ISDS system differed from SSDS as it offered private investors direct recourse against a host state before an **investment arbitration tribunal**—to enforce the guaranteed rights and protections afforded under the relevant BIT.²³ Today, investment arbitration is the most common ISDS procedure, with a majority of the cases administered by the International Centre on the Settlement of Investment Dispute ('ICSID').²⁴ Like the substantive guarantees in BITs, consent to the jurisdiction of ICSID by post-colonial African states was motivated by the same need. As argued by *Kidane*:

[t]he historical record clearly indicates that the only reason that the African states accepted ICSID is because they thought that they had to do so in order to attract private foreign investment to develop their ailing post-colonial economies.²⁵

Ultimately, the desire to attract FDI for economic development impelled post-colonial African states to consent to substantive and procedural guarantees in numerous IIAs. Between January 1960 and December 2000, three hundred and twenty-four (324) extra-African IIAs had been in force.²⁶ The first of this kind was the France-Chad BIT of 1960.²⁷ This was followed by the Germany-Togo BIT of 1961 and the Niger-Switzerland BIT of 1962.²⁸ By December 2023, this number had risen to four hundred and ninety-nine (499).²⁹ In terms of the geographical distribution of extra-African BITs, the majority in force as of December 2023 are with European countries, totaling three hundred and seven (307).³⁰ This is followed by Asia with one hundred and sixty-one (161),³¹ North America with eighteen (18),³² Latin America and the Caribbean with twelve (12), and lastly Oceania with one (1).³³ Also, as of the aforementioned date, forty-nine (49) intra-African BITs were in force.³⁴

Significantly, a vast majority of these IIAs, especially those preceding the year 2000, were based on pre-drafted models from developed western states, inherently not tailored to meet the socio-economic and developmental needs of the contracting African states. They were merely a conduit to increase FDI flows into Africa,³⁵ with

²³ Born (2021), p. 491.

²⁴ ICSID, Caseload – Statistics, <https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics>

²⁵ Kidane (2014), p. 585 f.

²⁶ See, UNCTAD IIA Database, <https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search>

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Mbengue (2019), p. 458.

less thought put in by earlier African governments on the effects of the Western-modelled IIAs they contracted to their peculiar developmental needs. For the purpose of the foregoing analysis, IIAs preceding the year 2010 contracted by African states predominantly on Old-European and North American models are characterised as old-generation IIAs.

Unlike the African governments in the early years of decolonisation, the twenty-first-century African states have evolved from being just rule-takers to rule-makers, charting a new course on the protection of foreign investment.³⁶ Fundamentally, for FDI to promote meaningful development, the economic activity the investor fuels must be sustainable. On this basis, Africa's investment protection policy, as observed in some recent bilateral and regional investment treaties now demands the core objective of IIAs to be on the protection of FDIs that foster sustainable development ('SD').³⁷ While there is no universal definition for the term 'sustainable development', for the purpose of this thesis, the United Nations ('UN') delineation of its core components is employed.

Specifically, the UN recognises three **interdependent pillars** upon which the notion of sustainable development must stand in any given society, i.e. environmental protection, economic development, and social development.³⁸ Hence, in the context of recent investment protection policies originating from Africa, any investment activity that strengthens one of these pillars at the expense of the others is not sustainable and unworthy of protection.

The new African approach to investment protection is a significant departure from the old Western-styled IIAs that maintained a structure of dominance by investors.³⁹ The old-generation IIAs predominantly impose substantive obligations on states towards the protection of foreign investments, without a countervailing investor obligation to engage in economic activities that promote sustainable development, nor offer certainty regarding the regulatory space afforded to states to protect such interests without breaching their IIA commitments, even when there is harm to a covered investor.

As demonstrated by the case examples later analysed in this thesis, attempts to safeguard SD interests through domestic regulations have encountered fierce resistance from foreign investors against such government regulations that conflict with their IIA guarantees. This, in turn, has exposed multiple African states to significant financial damages in ISDS proceedings (→ Sect. 3.1.1). As argued by *El-Kady and De Gama*, African countries had '*built a wall of legally binding international*

³⁶El-Kady and De Gama (2019), p. 483; Akinkugbe (2021), p. 26.

³⁷See for examples, Article 1 (definition of investment), Draft Pan-African Investment Code ('PAIC') (2016); Article 1(3) Nigeria-Morocco BIT (2016), signed 3 December 2016; Article 1 (definition of investment), Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (2023).

³⁸UN Documents, *Johannesburg Declaration on Sustainable Development* of 4/9/2002, UN DOC A/CONF.199/20, para. 5.

³⁹Akinkugbe (2021), p. 18.

commitments without having sufficiently analysed the implications of these treaties on their right to regulate'.⁴⁰

Admittedly, the shortcomings and adverse effects of the 'substantive' and 'procedural' guarantees in old-generation IIAs are not unique to Africa. This is a global challenge that ultimately triggered the beginning of ISDS reform discussions at UNCITRAL Working Group III in late 2017. This working group was mandated to identify the concerns and challenges associated with the current ISDS system and explore potential reforms to ensure a more balanced and transparent framework for resolving investment disputes.⁴¹ It is against this background that a plethora of procedural reform options are currently under consideration in UNCITRAL Working Group III, and African states have contributed their distinctive perspectives to these discussions.⁴² However, it is not within the scope of this thesis to delve into the multiple reform proposals under consideration. Rather, this thesis is focused on the Multilateral Investment Court ('MIC') proposal—chiefly put forward by the European Union ('EU') as a suitable alternative to traditional ISDS.⁴³

Unlike the traditional ISDS system rooted in multiple arbitration forums set up under different institutional and non-institutional (*ad-hoc*) bodies that are independent of one another,⁴⁴ the MIC is contemplated as a centralised investment dispute resolution body, comprised of full-time judges (both in the first and second instance court), divided into several chambers in the court, and with long term appointments.⁴⁵

While recognising that the backlash against traditional ISDS and attempts to address the challenge is a global concern, this thesis specifically addresses the African disenchantment with the traditional ISDS system and the propriety of an MIC as a suitable alternative. To become an acceptable alternative, an MIC must necessarily be free from the negative vices that plague the traditional ISDS system. However, there is currently no guarantee that this will be the case.

As critiqued by the South African government in its submission to the UNCITRAL Working Group III, the establishment of an MIC does not address the concerns against traditional ISDS because the problem does not lie in the procedure itself but rather originates from the substantive guarantees underlying ISDS claims

⁴⁰El-Kady and De Gama (2019), p. 486 f.

⁴¹UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform)* of 19/12/2017, A/CN.9/930/Rev.1, para. 6.

⁴²See generally, UNCITRAL, ISDS Reform Elements, https://uncitral.un.org/en/working_groups/3/investor-state

⁴³See in general, UNCITRAL, *Submission from the European Union and its Member States* of 24/1/2019, A/CN.9/WG.III/WP.159/Add.1.

⁴⁴Schefer (2020), p. 371 ff, (detailing the ICSID and Non-ICSID forums available for investor-state arbitration).

⁴⁵EI – IILCC Study Group on ISDS Reform (2022), p. 27; for further discussions on the MIC, see *infra* (Sect. 4.1).

widely adopted in old-generation IIAs.⁴⁶ As valid as the South African criticism is, the current UNCITRAL Working Group III mandate is exclusively limited to addressing procedural concerns.⁴⁷ This raises a legitimate scepticism that an MIC will still not protect its members from the undesirable effects of the old-generation IIAs any better than the traditional ISDS system, where the substantive inequities in old-generation IIAs remain unaddressed.

The central question then is, how can an MIC be designed to attract African states' participation, in light of the exclusion of substantive law reform from the ongoing UNCITRAL Working Group III reform debates? To answer this question, this thesis argues that there is a viable pathway to address the substantive and procedural law concerns of African states, even within the limited procedural reform discussions regarding an MIC.

To establish this conclusion, this thesis will proceed by introducing the substantive standards of treatment commonly invoked against African states in ISDS (Chap. 2). Subsequently, it will delve into the dilemma faced by African states within the existing ISDS system, focusing on the adverse effects of both the substantive standards of treatment and the ISDS clauses in old-generation IIAs as applied by arbitral tribunals (Chap. 3). These preceding chapters would provide the historical context necessary to understand the pitfalls that triggered the backlash against traditional ISDS and the call for reform from an African perspective. The following chapter, which is the core of this thesis, introduces the MIC and outlines crucial considerations for its attractiveness as a suitable alternative to traditional ISDS for African states. Subsequently, this chapter provides recommendations on how those crucial considerations may be addressed within the constitutional framework of an MIC to attract African states' participation (Chap. 4). Finally, this thesis concludes with an overview of the recommendations developed within its pages. While it acknowledges that the final decision to join an MIC rests with the individual African nations, nonetheless, the recommendations put forward offer a promising path towards attracting African states' participation in a future MIC (Chap. 5).

Other Documents

UN Documents, Johannesburg Declaration on Sustainable Development of 4/9/2002, UN DOC A/CONF.199/20

UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) of 26/2/2018, A/CN.9/930/Add.1/Rev.1

⁴⁶UNCITRAL, *Submission from the Government of South Africa* of 17/7/2019, A/CN.9/WG.III/WP.176, para. 19 ff.

⁴⁷UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform)* of 19/12/2017, A/CN.9/930/Rev.1, para. 20.

UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) of 19/12/2017, A/CN.9/930/Rev.1

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