Chapter 4.6
Innovative Bilateral and Multilateral Treaties in Africa

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A. INTRODUCTION

The introduction of international investment agreements (IIAs) into the African legal landscape began in the second half of the 20th century, precisely the 1960s when decolonisation took full swing in Africa. Recognising the need to retain existing foreign investments and attract new ones for economic development, newly independent African states began signing IIAs mainly in the form of bilateral investment treaties (BITs) based on Western[1] templates.[2] These BITs provide specific substantive guarantees to protect foreign investments between the contracting parties. The most common of these guarantees include the fair and equitable treatment (FET) standard, the full protection and security standard, guarantees against expropriation, and non-discriminatory treatment, such as the most favoured nation (MFN) and national treatment guarantees, etc. Furthermore, these BITs offer a procedural guarantee popularly known as the investor-state dispute settlement (ISDS) system, which most importantly allows foreign investors to enforce the BIT guarantees directly against the host state through an international arbitration process.[3]

Given the perception that post-colonial domestic legal regimes were inadequate to provide the necessary levels of protection for foreign investments,[4] African states in the quest for foreign capital contracted hundreds of these BITs to guarantee foreign investors a certain and stable foreign investment protection regime. Between 1960 and 1990, one hundred and forty-three (143) extra-African BITs (excluding other treaties with investment provisions) had been contracted, the majority of which are with Western states.[5] By the year 2000, that number had surged significantly to four hundred and thirty-nine (439).[6] As of December 2023, African states had been involved in a total number of seven hundred and ninety-five (795) extra-African BITs.[7]

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1 For the purpose of this chapter, the reference 'Western' primarily refers to developed capital-exporting states of Europe and North America, e.g. Germany, Switzerland, United Kingdom, France, United States of America, Canada, etc.

2 Mbengue, *Africa's Voice in the Formation, Shaping and Redesign of International Investment Law* (2019) 34(2) *ICSID Rev.,* p. 455-481 (458).

3 Stegmann, *Responsibility of the EU and the Member States under EU International Investment Protection Agreements: Between Traditional Rules, Proceduralisation and Federalisation* (2018), p. 2; Schefer, *International Investment Law: Text, Cases and Materials* (2020), p. 472 ff.

4 Kidane, *Africa's International Investment Law Regimes* (2023), p. 4.

5 See UNCTAD, IIA Database, available at: https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search.

6 Ibid.

7 Ibid.

As stated earlier, the vast majority of these BITs were contracted based on Western templates that are now outdated even by current Western standards. This is predominantly the case with BITs preceding the year 2010. For the foregoing analysis, these BITs will be referred to as "old generation" IIAs. While these old-generation IIAs were contracted with the motive of attracting foreign capital, the responsible African governments failed to question whether they simultaneously protected their peculiar public interests while safeguarding the private interests of foreign investors. Over time, hard lessons have been learned, particularly in ISDS, that this is not the case.

It is noteworthy that the inequities present in old-generation IIAs, as revealed through ISDS over time and the subsequent public backlash,[8] are not unique to Africa. This is a global challenge significant enough to trigger reform discussions within the United Nations Commission on International Trade Law (UNCITRAL) Working Group III.[9] However, it is not within the scope of this chapter to delve into the UNCITRAL Working Group III ISDS reform discussions. Instead, the focus here is on the African response to the global backlash against the current ISDS system, as seen in recent IIAs emerging from the continent.

Based on the foregoing background, the following discussion will show how, unlike early post-colonial governments, 21st-century African governments have transitioned from being just rule-takers to rule-makers, shaping new standards for the protection of foreign investments.[10] Accordingly, this chapter's focus is on highlighting the new approaches adopted by African states in reforming their foreign investment protection regime, marking a departure from the traditional Western models which maintained an asymmetry that fostered investor dominance.[11]

B. NEW APPROACHES TO IIA REFORM IN AFRICA

With relevant IIA examples, the following discussion reveals how African states are departing from the old Western-modeled IIAs they once embraced by introducing provisions that ensure: clearer and more limited IIA guarantees (I); promotion of investor accountability; (II) participation of domestic courts in ISDS (III); and the promotion of alternative dispute resolution (IV).

I. Clearer and More Limited IIA Guarantees

In recent years, African states have been increasingly redefining their approach to IIA formulation by introducing provisions that ensure clearer and more limited guarantees. This shift represents a move away from the broad and often ambiguous terms that characterised the old Western-modeled IIAs. For example:

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8 See on the global public backlash against ISDS, Polanco, *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection* (2018), p. 229 ff; Berge, *Dispute by design? Legalization, Backlash, And The Drafting of Investment Agreements* (2020) 64(4) *ISQ*, p. 919-928 (920 ff).

9 See, UNCITRAL Working Group III, available at: https://uncitral.un.org/en/working_groups/3/investor-state.

10 El-Kady and De Gama, *The Reform of the International Investment Regime: An African Perspective* (2019) 34(2) *ICSID Rev*, pp. 482-495 (483); Akinkugbe, *Africanization and the Reform of International Investment Law* (2021) 53 *CWRJI L*., pp. 7-34 (26).

11 Akinkugbe, (Ibid.), p. 18.

1. FET

Due to its vaguely and broadly worded nature, the FET guarantee has been one of the most inconsistently interpreted IIA guarantees in ISDS.[12] One major controversy with this standard's ambiguous formulation in old generation IIAs is whether it should be equivalent to or autonomous from the customary international law (CIL) minimum standard of treatment (MST). If equivalent, it aligns with the CIL FET standard, covering extreme cases such as gross denial of justice, manifest arbitrariness, and blatant unfairness, setting a high threshold for breaching the FET guarantee under CIL-MST.[13] Conversely, if treated as autonomous from CIL, the FET interpretation can exceed CIL standards,[14] making tribunal interpretations unpredictable as to the extent to which the FET content can exceed CIL.

However, unlike the FET guarantee found in most Western-modelled old generation IIAs, particularly of European origin, African states have adopted a much clearer and limited FET guarantee in their new generation IIAs, to avoid the unintended risks and liabilities associated with ambiguously worded FET guarantees. The Nigeria-Morocco BIT (2016) is a good bilateral example. This BIT explicitly clarifies that the FET guarantee scope is limited to CIL.[15]

Furthermore, it specifies the FET content as:

> The obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of a Party.[16]

This specification, including the explicit FET limitation to CIL, ensures that the standard is clearly defined and limited to established principles of customary international law. This clarity helps reduce the ambiguity and inconsistency often seen in the application of the FET standard in ISDS, providing a more predictable and stable framework for adjudicating disputes.

Another notable example of the African new approach to FET can be drawn from the African Continental Free Trade Area ('AfCFTA') Protocol on Investment.[17] The Protocol on Investment aims to establish a harmonized framework for protecting intra-African investments, replacing existing intra-African IIAs upon its entry into force.[18] Hence the Protocol on Investment represents the

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12 See in this regard, UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters*: Note by the Secretariat of 28/8/2018, A/CN.9/WG.III/WP.150, para. 16.

13 *Glamis Gold, Ltd. v. United States*, UNCITRAL, Award (8 June 2009), para. 627.

14 See, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), para. 591.

15 Article 7(2), Nigeria – Morocco BIT (2016), signed 03 December 2016.

16 Article 7(2)(a), Nigeria – Morocco BIT (2016), signed 03 December 2016.

17 AfCFTA Protocol on Investment (Final Draft), adopted February 2023, available at: https://www.bilaterals.org/IMG/pdf/en_.

18 See Article 49, AfCFTA Protocol on Investment; See also Lamprou and Iluezi-Ogbaudu, *The AfCFTA Investment Protocol – A Potential Game Changer for the African Continent?,* available at:

African consensus on a fairly balanced investment protection regime. Notably, to address the concern of unintended FET interpretation, rather than limit the application of FET as seen in the Nigeria-Morocco BIT example, the AfCFTA parties decided to exclude the FET guarantee from the Protocol on Investment. Rather, they adopted the 'Administrative and Judicial Treatment' (AJT) standard.[19] This provision provided an exhaustive list of measures that may constitute an AJT breach.[20] While the AJT content bears similarities to the FET content provided in other new generation IIAs that have clarified and limited the scope of FET, including new Western IIAs,[21] the AfCFTA Protocol on Investment explicitly clarifies that the AJT shall not be treated as FET.[22] Another African IIA that replaces the FET in this manner is the COMESA Investment Agreement which adopted the 'fair judicial and administrative treatment,'[23] with an identical scope to the AJT incorporated in the AfCFTA Protocol on Investment.

2. Expropriation

Two types of expropriation are generally recognised in ISDS jurisprudence i.e. direct and indirect expropriation. While the former is generally acknowledged as the forceful transfer of an investor's asset title to the state,[24] or outright physical seizure of an investor's property,[25] the latter is not without contention due to its nature as it does not involve physical seizure or title transfer to the state, but rather a regulatory measure that diminishes the benefits an investor derives from its investment.[26] Since indirect expropriation involves a regulatory measure, a tribunal must determine whether the measure falls within the sovereign's regulatory authority without constituting expropria-

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https://www.linklaters.com/en/insights/blogs/.

19 See, Article 17, AfCFTA Protocol on Investment.

20 See, Article 17(1), AfCFTA Protocol on Investment.

21 See, 8.10(2) Canada-EU, Comprehensive Economic and Trade Agreement ('CETA'), signed 30 October 2016 (CETA).

22 See, Article 17(2), AfCFTA Protocol on Investment, stating: ('For greater certainty, Paragraph 1 shall not be interpreted as equivalent to fair and equitable treatment').

23 Article 14, Common Market for Eastern and Southern Africa (COMESA), Revised Investment Agreement for the COMESA Common Investment Area, adopted November 2017, available at: https://www.comesa.int/wp-content.

24 *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award (24 December 2007), para. 259; *National Grid P.L.C. v. Argentina Republic*, UNCITRAL, Award (3 November 2008), para. 145; *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009), para. 427; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability (30 July 2010), para. 132.

25 *Caratube International Oil Company LLP and Devincci Salah Hourani* v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Award (27 September 2017), para. 822; *JSC Tashkent Mechanical Plant and others v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/16/4, Award (17 May 20239), para. 546.

26 *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability (30 July 2010), paara. 132; *National Grid P.L.C. v. Argentina Republic*, UNCITRAL, Award (3 November 2008), para. 149.

tion or exceeds this right, thereby amounting to expropriation by diminishing an investor's investment benefits. It is this distinction that is not clear from the plain texts of old-generation IIAs.

Past tribunals have approached this question by applying one of the following tests:

- the sole effect doctrine, which focuses on the impact of the state regulation on the investor, irrespective of the reason why it was adopted;[27]
- the police power doctrine, which focuses on the public interest, due process, and non-discriminatory nature of the measure;[28] and lastly
- the balancing approach, which basically involves a proportionality test, weighing the government's public measure against the sole effect on the investor.[29]

The lack of clarity in old-generation IIAs makes it impossible to predict which tests a tribunal will apply. This uncertainty has led to inconsistent interpretations of what regulatory actions constitute indirect expropriation.

However, unlike old generation IIAs, African parties under the AfCFTA Protocol on Investment provide specific factors to be taken into account by tribunals to establish an indirect expropriation. These include:

- the economic impact of the measure with an **equivalent effect of a direct expropriation**;[30]
- the **duration of the measure**;[31] and
- **character of the measure**, particularly the object, context and intent.[32]

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27 *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 116; *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (30 June 2009), para. 133; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007), para. 270.

28 *Saluka Investments BV (The Netherlands) v Czech Republic*, UNCITRAL Partial Award (17 March 2006), para 255; *Methanex Corporation v. United States of America*, UNCITRAL, Final Award (3 August 2005), part iv – para. 15; *Crompton (Chemtura) Corp. v. Government of Canada*, PCA Case No. 2008-01, Award (2 August 2010), para. 266.

29 *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 122; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006), para. 195; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006), para. 311 f.

30 Article 19(2)(b) AfCFTA Protocol on Investment.

31 Article 19(2)(c)(i) AfCFTA Protocol on Investment.

32 Article 19(2)(c)(ii) AfCFTA Protocol on Investment.

Additionally, it is clarified that the sole fact a state measure harms the economic value of an investment does not establish indirect expropriation.[33] Further, non-discriminatory measures aimed at protecting certain legitimate public policy objectives will not constitute an indirect expropriation.[34]

By outlining specific factors for tribunals to consider, such as the economic impact, duration, and character of the measure, and by explicitly excluding non-discriminatory public policy measures, this approach reduces the ambiguity that plagued old-generation IIAs, which fostered conflicting and controversial outcomes. It also ensures a more consistent and fair evaluation of state measures, balancing the protection of investors' rights with the legitimate public policy objectives of African states.

II. The Right to Regulate

A major criticism of the current ISDS system, as discussed above regarding indirect expropriation, is its impact on the regulatory autonomy of sovereign states,[35] particularly hindering their ability to implement public interest measures for sustainable development goals. While CIL protects states' right to enact public interest measures without compensating every adversely impacted investor,[36] treaty commitments may prevail due to their *lex specialis* nature.[37] Consequently, investors protected by broadly worded IIA guarantees can challenge domestic public interest policies, potentially leading to financial liabilities for the states. The *Foresti, et al v. South Africa*[38], and *von Pezold v. Zimbabwe*[39] cases exemplify this vulnerability of African states to pecuniary liabilities under old

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33 Article 19(2)(b) AfCFTA Protocol on Investment.

34 Article 20(2), AfCFTA Protocol on Investment, ('Non-discriminatory regulatory actions by a State Party designed to protect legitimate public policy objectives, **such as** public morals, public health, prevention of diseases and pests in animals or plants, climate action, essential security interests, safety and the protection of the environment, labour rights or to comply with other international obligations, shall not constitute indirect expropriation').

35 See further, Langford et al., *UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions: An Introduction* (2020) 21 *JWIT*, pp. 167-187 (169).

36 *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002), para 103; *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04, Partial Award (17 March 2006), para. 255; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (26 June 2009), para. 498.

37 *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006), para. 481; *Titi*, ICLRC 18/2022, p. 11, 64.

38 See in general, *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award (4 August 2010). (Claimant challenged the state with a 350 million U.S. dollars ISDS claim for implementing a legislation aimed at fostering socio-economic inclusiveness for its historically disadvantaged citizens. Claim later discontinued after the state reviewed the challenged legislation to a degree that significantly ameliorated the claimant's concern, but significantly cut back on the benefits earlier intended for the citizens).

39 See in general, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015). (Here, the claimant successfully challenged the respondent's land reform policy intended to promote socio-economic inclusion for historically disadvantaged citizens).

generation IIAs when pursuing their legitimate public interest objectives. To eliminate this vulnerability, new generation IIAs now include specific provisions clarifying the states' right to regulate for legitimate public interest purposes without incurring treaty liability. For example, unlike old-generation IIAs that focus solely on investment protection, the AfCFTA Protocol on Investment has an investment protection chapter,[40] balanced with a dedicated chapter on sustainable development-related issues.[41] The latter includes *inter alia* a detailed provision on the 'right to regulate' for sustainable development objectives.[42] To underscore this intention, the protocol provides the necessary qualifications to the substantive guarantees owed to covered investors such as non-discrimination and protections against expropriation,[43] ensuring states retain the regulatory space to promote their sustainable development agenda. For greater certainty, the Protocol on Investment clarifies that the exercise of the right to regulate pursuant to the agreement cannot give rise to a claim for compensation by an investor.[44]

Like the AfCFTA, a dedicated provision on the right to regulate for sustainable development purposes can also be found in the Nigeria-Morocco BIT (2016).[45] This dedicated provision on the right to regulate marks a significant shift from old generation IIAs by incorporating balanced provisions that protect not only investments but equally the states' rights to pursue their sustainable development objectives without fear of incurring financial liability in ISDS.

The clarified provisions in new African IIAs represent a significant shift from the traditional focus on investment protection alone to a more balanced approach that also considers state interests. Besides the discussed examples above, other notable examples in the AfCFTA include limiting the FPS clause to physical security under CIL,[46] and clarifying that the MFN treatment does not extend to procedural guarantees.[47] These clarifications collectively address the ambiguities and conflicting outcomes prevalent in old-generation IIAs, paving the way for a more predictable and balanced investment protection environment that aligns with the sustainable development goals of African states.

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40 Chapter 3, AfCFTA Protocol on Investment.

41 Chapter 4, AfCFTA Protocol on Investment.

42 Article 24, AfCFTA Protocol on Investment.

43 See for instance, Article 13, 15 and 20, AfCFTA Protocol on Investment (exceptions to: national treatment; most-favoured nation; and expropriation).

44 Article 24(3), AfCFTA Protocol on Investment.

45 See, Article 23 Nigeria-Morocco BIT (2016), signed 03 December 2016.

46 Article 18, AfCFTA Protocol on Investment.

47 See, 14(3) AfCFTA Protocol on Investment.

III. Promotion of Investor Accountability

The AfCFTA also reflects the African consensus to depart from the asymmetry[48] prevalent in old generation IIAs by promoting a more balanced approach that incorporates investor accountability alongside investment protection. This shift acknowledges the necessity of creating an equitable framework where foreign investments contribute positively to the host countries' sustainable development goals. For over three decades, achieving consensus on a legal framework requiring host states to safeguard foreign investments under specific standards while obliging foreign investors to engage in sustainable investment activities has been an unsettled issue.[49]

Significantly, in an unprecedented IIA example emanating from Africa, the AfCFTA Protocol abandoned the asymmetric form IIAs typically take by including a whole chapter on "investor obligations" towards responsible investment in the host state.[50] Chapter five of the protocol incorporates investors' obligations pertaining to compliance with both national and international law,[51] human rights and labour standards,[52] environmental protection,[53] rights of Indigenous peoples and local communities,[54] socio-political obligations,[55] anti-corruption,[56] corporate social responsibility,[57] corporate governance,[58] and taxation and transfer pricing obligations.[59]

Notably, the AfCFTA emergence is not the first time African states have shown their preference for a fairly balanced IIA by introducing investor obligation aimed at ensuring investor accountability. Although earlier treaties did not include a whole chapter on investor obligations, African treaties such as the SADC Protocol on Finance and Investment (2006),[60] the Investment Agreement for the Common Market for Eastern and Southern Africa (2007),[61] the Supplementary Act of the Economic

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48 See, Baltag, *Reforming the ISDS system: in search of balanced approach* (2019) 12(2) *CAAJ*, pp. 279-312 (288); Papazoglou, *The Good, The Bad and The Ugly 'of ISDS Reforms: Rebalancing the System?*, pp 46, available at: https://blogs.kcl.ac.uk/kslr/files/2019/10/Stephanie-P-.pdf.

49 See, Perrone and Vásquez, *Bridging the Gap Between Investor Rights and Obligations: How Academics can Contribute to a Fairer International Law on Foreign Investment*, available at: https://www.iisd.org/itn/en/2023/07/01.

50 See generally, Chapter 5, AfCFTA Protocol on Investment.

51 Article 32, AfCFTA Protocol on Investment.

52 Article 33, AfCFTA Protocol on Investment.

53 Article 34, AfCFTA Protocol on Investment.

54 Article 35, AfCFTA Protocol on Investment.

55 Article 36, AfCFTA Protocol on Investment.

56 Article 37, AfCFTA Protocol on Investment.

57 Article 38, AfCFTA Protocol on Investment.

58 Article 39, AfCFTA Protocol on Investment.

59 Article 39, AfCFTA Protocol on Investment.

60 Article 10, SADC Protocol on Finance and Investment (2006).

61 Article 13, Investment Agreement for the COMESA Common Investment Area (2007).

Community of West African States,[62] and the Morocco-Nigeria BIT (2016),[63] all collectively highlight the African preference for guaranteeing investor accountability through explicit provisions on investor obligations.[64] By embedding provisions that emphasize the obligations and responsibilities of investors, African states are paving the way for a new era of investment treaties that prioritize mutual benefits and shared prosperity.

IV. Participation of Domestic Courts in ISDS

Although ISDS through investment arbitration aimed to depoliticize disputes by removing them from intergovernmental control and local court influence,[65] this system now faces growing criticism for excluding investment disputes from local court jurisdiction.[66] As highlighted by the South African government in its submission to UNCITRAL Working Group III on ISDS reform, international arbitration was never intended to eliminate the role of domestic courts in ISDS. Instead, arbitration was meant to serve as a stopgap in cases of governmental maladministration where local remedies are unviable.[67]

However, even when local courts are well placed to offer effective remedies, the ISDS provisions in the majority of IIAs in force today permit investors to bypass the domestic legal system for international arbitration.[68] This is due to the lack of an explicit provision demanding the CIL rule on the exhaustion of local remedy ("ELR") or local litigation within a stipulated timeframe. While these two provisions have a different meaning that is not the focus of this chapter,[69] the essential takeaway is that they serve the same purpose, which is to obligate investors to seek remedies in local courts before resorting to international arbitration. This aligns with the CIL rule that a state be allowed to redress its wrongdoing before international proceedings can be instituted,[70] except when

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62 Chapter 3, Supplementary Act of the Economic Community of West African States (2008).

63 Article 17-19, Morocco-Nigeria BIT (2016), signed 03 December 2016.

64 Kern and Assefa, *Investor Obligations: Africa Leads the Way*, available at: https://arbitrationblog.kluwerarbitration.com/2020/06/14.

65 Kaufmann-Kohler and Potestà, *Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options* (2020), para. 30 ff., p. 17 ff.

66 *Ibid.*, p. 8 ff.

67 UNCITRAL, *Submission from the Government of South Africa* of 17/7/2019, A/CN.9/WG.III/WP.176, para. 37

68 Harten, *Five Justifications for Investment Treaties: A Critical Discussion* (2010) 2 TLD, pp. 19-58 (34); Republic of South Africa, *Bilateral Investment Treaty Policy Framework: Government Position Paper*, p. 45, available at: https://static.pmg.org.za/docs/090626trade-bi-lateralpolicy.pdf.

69 For an understanding of the distinction between the ELR rule and the local litigation requirement, see – *Kaufmann-Kohler and Potestà* (fn. 65), para. 84 ff, p. 43 ff.

70 *Interhandel Case (Switzerland. v. United States of America)*, Judgment [1959] ICJ Rep 6, p. 27; *Apotex Inc. v. The Government of the United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (14 June 2013), para. 280; Brauch, *Exhaustion of Local Remedies in International Investment Law*, IISD 2017, p. 2., available at: https://www.iisd.org/system/files.

doing so would be futile.[71] However, most IIAs, including those contracted by African states are silent on the ELR rule.[72] Unless explicitly mandated in an IIA, there is no generalised ELR or local litigation requirement applicable in investment arbitration.[73]

Recognising the importance of local courts in ISDS, African states are now including explicit provisions on local remedies in their new IIAs before granting access to international arbitration. For example, the Nigeria-Morocco BIT explicitly requires the exhaustion of local remedies before resorting to international arbitration.[74] This requirement is also present in the COMESA treaty,[75] and the Pan African Investment Code (PAIC) of 2016.[76] Furthermore, countries like Morocco and South Africa have expressed support for this approach in their submissions to UNCITRAL Working Group III on ISDS reform.[77]

Although the ELR rule is not a new IIA provision, it has been commonly excluded in the past to depoliticize ISDS from national jurisdictions. However, African states are increasingly returning to this rule, which is rooted in CIL. As the default forum for ISDS,[78] an unrestricted bypass of local courts in favour of international arbitration undermines the development of local judicial capacity in the field of ISDS. Therefore, by incorporating explicit ELR provisions in their new IIAs, African countries are emphasizing the importance of local courts in the dispute resolution process, underscoring a renewed commitment to balancing the investor's right to international arbitration with respect for domestic legal systems.

V. Promotion of Alternative Dispute Resolution

Alternative dispute resolution (ADR) is the intervention of a third party who assists the disputants in reaching an **amicable settlement** of their dispute.[79] Within the context of ISDS, it is an alternative because it does not involve any of the adversarial dispute resolution modes already

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71 Article 15(a) International Law Commission, Draft Articles on Diplomatic Protection (2006); *Swissbourgh Diamond Mines (Pty) Limited and others v. Lesotho*, PCA Case No. 2013-29, Judgment of the Singapore Court of Appeal (27 November 2018), para. 211.

72 Brauch (fn. 70), p. 7.

73 *PL Holdings S.A.R.L. v. Republic of Poland*, SCC Case No V2014/163, Partial Award (28 June 2017), para. 441; *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award (26 July 2018), para. 889.

74 Article 26(5), Nigeria-Morocco BIT, signed 03 December 2016.

75 Article 36(3), Common Market for Eastern and Southern Africa (COMESA), Revised Investment Agreement for the COMESA Common Investment Area, adopted November 2017.

76 Article 42(1)(c), PAIC (2016),available at: https://au.int/sites/default/files/documents/.

77 UNCITRAL, *Submission from the Government of South Africa* of 17/7/2019, A/CN.9/WG.III/WP.176, paras. 43-46; UNCITRAL, *Submissions from the Government of Morocco* of 11/2/2020, A/CN.9/WG.III/WP.161, para. 9.

78 *Kaufmann-Kohler and Potestà*, (fn. 65), p. 36, para. 68.

79 UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, p. 50, available at: https://unctad.org/system/files/official-document/diaeia200911_en.pdf.

discussed i.e., international arbitration or domestic court litigation, but rather involves negotiation, mediation, conciliation, or any other amicable settlement process agreed by the parties.[80]

Like the ELR requirement discussed above, ADR is not a strange provision in IIAs, in fact, IIAs commonly include a **cooling-off period** requiring disputants to attempt an **amicable settlement** of their dispute within a specified period of time before recourse to arbitration.[81] However, despite its common incorporation in IIAs, this provision remains largely underutilised in ISDS. One of the major reasons for this is the interpretation of the ADR clause by tribunals. Several ISDS tribunals have interpreted the ADR clause as a mere directory rather than a mandatory jurisdictional requirement.[82] Although some have given it a mandatory effect.[83] Notably, one cannot rule out the role that imprecise treaty language plays in determining whether or not the ADR clause will be treated as mandatory or optional. Indeed, inconsistencies in the interpretation of the ADR clause have been recognised by states as a concern worth addressing in UNCITRAL Working Group III.[84]

Notably, the Nigeria-Morocco BIT (2016) introduced a unique ADR mechanism that leaves no doubt as to its mandatory nature and also provides a model for amicable dispute settlement that goes beyond the typical ADR provisions seen in many IIAs. Particularly, Article 26 of the Nigeria-Morocco BIT (2016) incorporates a dispute prevention mechanism according to which a dispute can only be brought to arbitration after it has been "assessed through consultations and negotiations by the Joint Committee".[85] This joint committee is comprised of representative designates of both parties whose institutional function includes the amicable settlement of investment disputes.[86]

The advantage of this unique process is that it involves the state parties themselves – those who know their treaty best – meeting with the concerned investor to find an amicable solution to disputes related to treaty guarantees. This approach ensures a deeper understanding of the treaty's

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80 ICSID, *Other Alternative Dispute Resolution Mechanisms*, available at: https://icsid.worldbank.org/services-arbitration-other-adr-mechanisms.

81 See, Ganesh, *Cooling-Off Period (Investment Arbitration)*, p.2, available at: https://www.mpi.lu/fileadmin/mpi/.

82 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Award on Jurisdiction (6 August 2003), para. 184; *Republic of Italy v. Republic of Cuba*, Preliminary Award (15 March 2005), paras. 70 f; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan I*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), para. 102.

83 *Noble Energy Inc. and MachalaPower Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction (5 March 2008), para. 212; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004), para. 88; *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Final Award (16 September 2003), para. 14.3.

84 UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters*: Note by the Secretariat of 28/8/2018, A/CN.9/WG.III/WP.150, para. 18.

85 Article 26(1), Nigeria-Morocco BIT, signed 3 December 2016.

86 Article 4(2) and 4(4)(d), Nigeria-Morocco BIT.

provisions and a more tailored resolution to the issues at hand, fostering a cooperative and less adversarial environment for investment dispute resolution.

This dispute prevention process is expected not to exceed six months.[87] If the investor's grief cannot be addressed within this period, then the investor is free to seek local court remedies, or by CIL exception proceed directly to international arbitration if the local remedy would be futile or ineffective.[88]

C. CONCLUSIONS

The conclusion of this analysis emphasizes the new approaches African states have undertaken in reforming their IIAs. The reforms discussed in this chapter mark a significant departure from traditional Western-modeled IIAs to avoid transplanting the identified gaps in old generation IIAs into the new ones emanating from the continent.

Crucially, it must be noted that the discussed reforms in this chapter are currently confined to intra-African agreements and have not been replicated in extra-African IIAs.[89] Therefore, the broader international landscape of IIAs involving African states remains largely unchanged. The majority of existing IIAs with non-African countries continue to reflect the outdated, one-sided models that prioritize investor protection without adequate safeguards for the sovereign's sustainable development interest. Until such safeguards are guaranteed on a global scale, the vulnerability of African states to investor claims under old-generation treaties persists.

Finally, the discussion in this chapter is by no means exhaustive of all the new investment protection approaches being implemented in African IIAs, the chapter has only highlighted some of the most notable developments as the African IIA landscape continues to evolve.

87 Article 26(5), Nigeria-Morocco BIT, signed 03 December 2016.

88 See (fn. 71).

89 Cf, *Akinkugbe*, (fn. 10) p. 12 f.