SECURING THE FUTURE OF THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM IN INTERNATIONAL INVESTMENT LAW*[1]

Abstract

The Investor-State Dispute Settlement (ISDS) system is presently at a watershed moment, calling for a need to appraise the entire system and consider its (continued) relevance in Investment Treaties and even International Investment Law (IIL) in general. The ISDS mechanisms embodied in most investment treaties provide rights to foreign investors to seek redress for damages arising out of alleged breaches of investment-related obligations by host governments. The use of international arbitration to resolve investor-state disputes has increased dramatically over the past two decades. According to UNCTAD's July 2022 Report on Investor-State Arbitration, as at the end of 2021, the total number of publicly known ISDS claims is 1,190. Many developing countries, after a long "honeymoon" with foreign investors, have been re-considering the pros and cons of the ISDS mechanism and have become more cautious in their negotiations of international investment agreements. This paper argues that a complete abandonment of the ISDS system instead of working on its reform would be a case of throwing the baby out with the bath water. It is further argued that radical proposals such as the multilateral investment court and a return to the state-state dispute settlement, to overthrow the established ISDS system are ill-advised as they do not guarantee a fair dispute settlement system. There should be more focus on incremental reforms on the existing ISDS by addressing the concerns raised by the stakeholders in the investment regime. This paper is predominantly analytical as it is based on an extensive review of the relevant literature in international investment law.

Keywords: ISDS System, Investment treaties, Stakeholders, Multi;ateral investment court, dispute settlement

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Introduction

The growth in international trade and investment as a means of creating new economic opportunities in the global economy has led to the rise of international investment agreements (IIAs) that seek to regulate a range of issues related to foreign investment. The Investor-State Dispute Settlement (ISDS) mechanism has been included in these IIAs over several decades and under these rules, foreign investors can legally challenge host state policies before international tribunals. The system provides rights to foreign investors to seek redress for damages arising out of alleged breaches of investment-related obligations by host governments. The ISDS mechanism was designed for depoliticizing investment disputes and creating a forum that would offer investors a fair hearing before an independent, neutral, and qualified tribunal.[2] Since the early 2000s, a lot of issues have been raised about the ISDS as the system is seen to be ad-hoc, fragmented, lacking in transparency and prone to inconsistent and diverging interpretations in cases addressing the same provisions and similar facts. Inconsistent interpretations by panels lead to uncertainty about the meaning of key treaty obligations compounding problems of unpredictability of treaties. There is also the concern that the system is too investor oriented.

In the last couple of years, the several conflicts between obligations of host states to protect foreign investments and their other international and domestic law obligations have led to concerns being raised about the International Investment Regime (IIR), particularly the ISDS system. Over the past year, the public discourse about the pros and cons of ISDS has continued to gain momentum, and an increasing number of investor-state disputes has placed ISDS high-up on the list of issues for attention The collective submissions reflect a wide spread opposition to the inclusion of the ISDS provisions in future investment treaties. Thus, the debate about the crisis in the ISDS has birthed three main schools of thought. The first school of thought argues that the ISDS is still the best option available as such; the existing dispute settlement system should be retained but with necessary reforms on the concerns raised. The second school of thought is of the view that the ISDS system be replaced with a multilateral investment court while the third school of thought

[2] Investor-State Dispute Settlement, UNCTAD series on issues in International Investment Agreements II page 13. Available at https://unctad.ord/system/files/official-document/diaeia2013d2_en.pdf Accessed on 22nd July 2022.

calls for a replacement of the ISDS with other alternatives such as domestic courts or state-state dispute settlement.[3]

This paper is structured into four main parts. The first part will discuss how the ISDS system has evolved over the years. The second part discusses the deficiencies in the present ISDS system. The third part focuses on the global reactions to the crisis within the ISDS system. The last part discusses how Africa, through the African Continental Free Trade Area (AfCFTA) could provide a legal basis to rewrite the international investment rules in a way that better integrates the interests of African nations while also providing a fair and balanced investment regime for foreign investors and host states. This paper argues that radical proposals such as the multilateral investment court and a return to the state-state dispute settlement, to overthrow the established ISDS system are ill-advised as they do not guarantee a fair dispute settlement system. Furthermore, this paper contends that the root of the crisis in the ISDS lies in the provisions of the traditional IIAs. The investment treaties signed several decades ago and which are still in force allowed the imposition of foreign investors' rights over local people or host states. The treaties did not give enough policy space to host states. It allowed the inconsistent interpretations given to the provisions because of their ambiguous meanings. Therefore, for a dispute settlement system to be legitimate, the root of the problem must be taken care of. That is, a reorientation of the international investment regime as a whole and not the abandonment of the ISDS system will address these concerns.

History of The Investor-State Dispute Settlement (ISDS)

ISDS is a legal instrument in Bilateral Investment Treaties (BITs), or BIT-like bilateral and international agreements that grants investors the right to call for arbitration in the event they believe that a government has violated such an agreement.[4] In contrast to a mechanism to resolve disputes between states, such as the World Trade Organisation's dispute-settlement mechanism, it is not an instrument that "puts on trial" laws and regulations in a host country, with the consequence that a government has to change a law or a regulation in the event they lose a case.[5]

[3] A. Roberts, "The Shifting Landscape of Investor-State Arbitration: Loyalists, Reformists, Revolutionaries and Undecideds," (2017) *EJIL: TALK!* Available at https://www.ejiltalk.org/the-shifting-landscape-of-investor-state-arbitration-loyalists-reformists-revolutionaries-and-undecideds/ accessed on 6th June 2022.
[4] R. Abbott et al, "Demystifying Investor-State Dispute Settlement (ISDS)." Available at http://www.ecipe.org/media/publication_pdfs/OCC52014__1.pdf accessed on 6th June 2022.
[5] Ibid.

Nor do investment protection agreements demand that a country fully transpose the general principles of such an agreement into national laws and regulations.[6] It was designed as a mechanism for rendering final and enforceable decisions through a swift, cheap, and flexible process, over which disputing parties would have considerable control.[7]

The Investor-State Dispute Settlement (ISDS) has been described as a means to enforce promises governments give to each other in a treaty about how they will treat investors from the other country.[8] The promises include:

i) they will not discriminate against an investment because of the nationality of the investors
ii) they will provide the minimum level of treatment required under international law, including "fair and equitable treatment" such as access to courts and due process
iii) they will only expropriate an investment on a non-discriminatory basis, with due process and against prompt, adequate and effective compensation they will allow the free transfers of funds related to the investment.

An investor can only bring a case before neutral international tribunal under ISDS if it believes the host government has violated one of these four promises. They cannot take cases against general laws of the land, which is the national treatment they have been promised. Thus, arbitration of investment disputes was not once as widely used as it is now. This was primarily because the traditional principles of customary international law regulating foreign investment subjected foreign investors to various barriers in their home courts as well as in the courts of the host State of their investments. In those days, foreign investors lacked legal standing under international law in host States.[9] Since States are the traditional subject of international law, foreign investors had to go through their home States' and host States' legal systems to settle foreign investment disputes.[10] Also, as aptly stated by Judge Tomka, under customary international law, a "State is only responsible for a breach of an international obligation occasioned by an unlawful act inimical

[6] Ibid.
[7] Ibid.
8 H.kuehl, "ISDS Provides Necessary Protection, not a New Avenue to Corporate Profit," available at http://www.atlantic-community.org/-/isds-provides-necessary-protection-not-a-new-avenue-to-corporate-profit, accessed on 6th June 2022.
9 F O. Okpe, "Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States," (2014) 13 *Rich. J. Global L. & Bus*. 217. Available at: http://scholarship.richmond.edu/global/vol13/iss2/3 accessed on 6th June 2022.
[10] Ibid.

to the principles of customary international law."[11] Consequently, private disputes between foreign investors and State Parties became very difficult to settle. Under customary international law, a State often asserts sovereign immunity to restrict the jurisdiction of a foreign court with respect to claims against the State or to protect that State's property against foreign enforcement measures.[12] In those situations, a foreign investor had limited options to pursue foreign investment claims. Similarly, a foreign investor may also be denied legal process to assert investment claims based on the "act of state doctrine." Under this doctrine, the home State of the foreign investor could deny the investor access to its court system on the ground that the cause of action is the act of a foreign state not subject to the jurisdiction of the investor's home state.

Therefore, the only clear avenue for the foreign investor to pursue investment claims against foreign states was through diplomatic intervention, or what is generally referred to as "gunboat diplomacy." Diplomatic intervention, or gunboat diplomacy, exists because of the international law obligation of States to protect alien property for the development of trade and investment in developing countries.[13] Gunboat diplomacy allowed foreign investors to obtain relief in respect of foreign investment claims through their government's diplomatic intervention or the use of armed force.[14] However, gunboat diplomacy brought limited succor to some foreign investors. Recourse to gunboat diplomacy in order to settle foreign investment disputes required foreign investors to prove that they exhausted all local remedies to no avail.[15] A foreign investor may also have to prove citizenship to his home government.[16] The exhaustion of local remedies subjected foreign investors to the jurisdiction of the legal system of the host State.[17]

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[11] P. Tomka, "Are States Liable for the Conduct of Their Instrumentalities?" (2008) Introductory Remarks, in State Entities in International Arbitration 7, 8-9 (IAI Ser. on Int'l Arbitration No. 4) (Emmanuel Gaillard and Jennifer Younan eds., 2008) as cited in F. Okpe, "Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States."

[12] F. Okpe, "Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States," supra note 9.

[13] F J. Nicholson, "The Protection of Foreign Property under Customary International Law, (1965) *3 B.C. L. REV.* 391-93, 39, cited in F. Okpe, "Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States," supra note 9.

[14] Christopher K. Dalrymple, "Politics and Foreign Investment: The Multilateral Investment Guarantee and the Calvo Clause, (1996) 29 *CORNELL INT'L L.J.* 161, 164 cited in F. Okpe, "Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States," supra note 9.

[15] Ibid.

[16] Ibid.

[17] Ibid.

On the exhaustion of local remedies, Borchard explains that "the government of the complaining citizen must give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoid, if possible, all occasion for international discussion."[18] The foreign investor's home State often refused to directly seek relief on behalf of an investor for political reasons, regardless of whether or not the foreign investor had a good claim under international law. From the perspective of the foreign investor, subjecting investment claims to the jurisdiction of the host government may lead to a conflict of interest between the host government, the home government, and the foreign investor, thereby creating an institutional bias.[19] The conflict of interest between the foreign investor and the home State may also arise because of political expediency in the diplomatic relationship between the home State and the host State.[20]
However, limited options to settle investor-state disputes present difficulties which made foreign investors wary and skeptical about the prospects of their investments abroad. Eventually, the protection of foreign investment became a problematic issue in the international efforts aimed at promoting foreign investment for economic development. The economic development of the host State and the home State of the foreign investor could have been gravely affected if something was not done to address the legitimate concerns of foreign investors.
On the one hand, foreign investors from developed countries desired bigger foreign markets for investment in order to maximize Foreign Direct Investment (FDI) and repatriate profits that contribute to economic development in their home States. On the other hand, developing countries want to attract foreign investments through private international investment for economic development. Therefore, there arose a potential peril to the variables of foreign investment and economic development because there was no effective mechanism to protect foreign investment nor overcome its limitations vis a vis the settlements or adjudication of foreign investment claims.

The ISDS system was therefore designed to replace a flawed political process with an apolitical, legally-based arbitration system with respected, independent experts adjudicating disputes. It was essentially designed to “avoid parochialism and bridge a perceived maturity gap in judiciaries

[18] E. M Borchard, *Diplomatic Protection of Citizens abroad to the Law of International Claims* 817 (1925). cited in F. Okpe, “Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States,” 229 (supra note 9).
[19] J W. Salacuse, *The Law of Investment Treaties*, Oxford University Press (2010), 40-41.
[20] Ibid.

around the world."[21] Another reason behind the design of the ISDS mechanism was the belief that foreign investors from the developed countries would not get justice in the developing countries, and as such, there was need for moderation and even monitoring by the home state of the investor.[22] Since the introduction of the ISDS, arbitration has been the most widely used form of dispute settlement between foreign investors and host state, particularly because of the flexibility and neutrality it offered.[23] Foreign investors have been noted to choose from a menu of arbitration options which include the Stockholm Chamber of Commerce (SCC), The London Court of International Arbitration (LCIA), Cairo Regional Centre for International Commercial Arbitration (CRCICA), and ICSID (the most popular institution for the resolution of investor-State dispute).[24]International arbitration to resolve investor-state disputes has increased dramatically over the past two decades, with some developed states as defendants.[25] As at the end of 2021, the total number of publicly known ISDS cases is 1,190.[26]

According to Alvarez and Park, arbitration was justified as a way to level the playing field and to reduce the prospect of host state "home town justice," thereby safeguarding assets from expropriation without compensation.[27] This is based on the notion that "the real or imagined bias of host country judges" can create an anxiety that inhibits wealth-creating transactions and discourages cross-border economic cooperation, and will inevitably either thwart cross-border

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[21]W. Kidane, "Alternatives to Investor-State Dispute Settlement: An African Perspective." Available at https://www.africaportal.org/publications/alternatives-investor-state-dispute-settlement-african-perspective/ . accessed 15 July 2022.

[22] Ibid. see also M. Latek, "Members' Research Service, European Parliamentary Research Service, Investor State Dispute Settlement (ISDS) State of play and prospects for reform." Available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS_BRI(2015)545736_EN.pdf accessed 15 July 2022.

[23]See E. Schwartz, "International Conciliation and the ICC," (1995) 10 *ICSID Rev. –Foreign Inv. L.J*. 98, 99 and G. A. Alvarez & W. W. Park, "The New Face of Investment Arbitration: NAFTA," (2003) 28 (11) *Yale J. Int'l L*. 366-367 at 365.

[24] N. Rubins and A. Nazarov, "Investment Treaties and the Russian Federation: Baiting the Bear?" (2008) 29 *Business Law International* 101.

[25] UNCTAD' s May 2019 IIA Issues Note No 2 on Investor-State Dispute Settlement: Fact sheet on investor-state dispute settlement cases in 2018. Available at https://unctad.org/system/files/official-document/diaepcbinf2019d4_en.pdf accessed on 22 July 2022.

[26] UNCTAD's July 2022 IIA Issues Note 1 on facts Investor-State Arbitrations in 2021: with a special focus on tax-related ISDS cases. Available at https://unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf accessed 27 July 2022.

[27] G. A. Alvarez & W. W. Park, "The New Face of Investment Arbitration: NAFTA," (2003) 28 (11) *Yale J. Int'l L.* 366-367 at 365.

economic cooperation or add to its cost.'[28] Arbitration responds to this fear by providing a forum that is more neutral than host country courts, both politically and procedurally.[29]The relative impartiality of international tribunals bolsters investor confidence and inspires greater certainty that the contract will be interpreted in line with the parties' shared ex ante expectations.[30]

The first investor-State arbitration under a BIT took place in 1987[31] and the reports suggest that prior to this, most of the investment disputes that referred to the international tribunals were either brought in pursuance to contractual agreements by the private parties or were State-to-State arbitrations.[32] There is no doubt that the idea of investment treaties and "international dispute resolution" is a solid and positive one. Also, it can be argued that ISDS has proved its usefulness in increasing foreign direct investment and curbing gunboat diplomacy. However, the deficiencies in the system need to be addressed to better fit the needs of both investors and states.

Main Concerns about The Systemic Deficiencies in The ISDS Regime

A critical analysis of the investor-State arbitration reveals that it is one of the facets of international investment regime that has not been wholly beneficial particularly to developing countries. Developing countries perceive this mechanism as a "device" introduced by the developed countries to undermine their interests in the global economy.

Most BITs were signed by developing countries, with little experience and weak legal capacity to effectively defend the foreign investors' claims. More specifically, during the dispute resolution process, there is some degree of bias towards foreign investors. For example, Van Harten examined jurisdiction issues which by definition could be interpreted either way and litigated precisely because parties cannot readily anticipate the outcome.[33] He finds a bias towards expanding investor' rights of interpreting jurisdictions that applies to 76 percent of the cases (out of 140 cases as of 2010).[34]

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[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Asian Agricultural Products Ltd V Republic of Sri Lanka (Award) 4 ICSID Rep 245.
[32] Nathalie Bernasconi -Osterwalder et al, "Investment Treaties and Why They Matter to Sustainable Development: Questions and answers. Available at http://www.iisd.org/sites/default/files/pdf/2011/investment_treaties_why_they_matter_sd.pdf accessed 6 June 2022.

[33] See generally, G. Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication," (2012) 50 (1) *Osgoode Hall Law Journal* 211–68.
[34] Ibid

Another major concern is the way tribunals interpret international investment principles to ensure developing countries honor their obligations to investors but ignore States' local obligations.[35] The increasing number of investor-state disputes has, particularly in the recent period of economic crisis, created a significant burden on host countries, both developed and developing ones. However, developing countries feel the burden more due to their limited resources and experience. The amounts claimed by investors in 2016 alone ranged from $10 million[36] to $16.5 billion.[37]A damage of $2 billion was awarded against Egypt in 2018.[38] In 2019, Pakistan had to pay $6 billion as compensation.[39] Furthermore, criticisms from developing countries also arise from the fact that they have been the respondent in major claims by foreign investors involving measures taken in response to financial crises,[40] or legislative reforms in the renewable energy sector,[41] to protect the environment as was in the cases involving Peru and Ecuador[42] or the right to regulate to protect public health under the FET and indirect expropriation clauses.[43]

The recent covid-19 pandemic has forced governments to take necessary steps such as lockdowns and travel bans as well as measures to mitigate the economic impact of the pandemic to protect their citizens. Such measures, as expected, have also affected the operations of foreign investors. As a result, host states may be exposed to investor-state disputes wherein foreign investors may

[35] I. T. Odumosu, "The Law and Politics of Engaging Resistance in Investment Dispute Settlement," (2007) 26 *Penn State International Law Review* 251.
[36] Grot and others v. Moldova and Görkem Insaat v. Turkmenistan (ICSID Case No. ARB/16/30).
[37]Cosigo Resources, Ltd., Cosigo Resources Sucursal Colombia, Tobie Mining and Energy, Inc. v. Republic of Colombia. Available at http://investmentpolicyhub.unctad.org/ISDS/Details/726 accessed 6 June 2022.

[38] See the case of Union Fenosa v Egypt. Award date 31st August 2018.
[39] Tethyan copper Company Pty Limited Pakistan, ICSID Case No. ARB/12/1, award, 12 July 2019.
[40] When Argentina froze utility rates (energy, water, etc.) and devalued its currency in response to its 2001-02 financial crises, it was hit by over 40 lawsuits from investors. Big companies like CMS Energy (US), Suez and Vivendi (France), Anglian Water (UK) and Aguas de Barcelona (Spain) demanded multimillion compensation packages for revenue losses.
[41] UNCTAD' May 2017 IIA Issues Note on Investor-State Dispute Settlement: Review of Developments in 2016. Available at http://investmentpolicyhub.unctad.org/Upload/Documents/diaepcb2017d1_en.pdf accessed on 6th June 2022.
[42] In 2003 and 2006, due to local communities' complaints in Peru and Ecuador respectively, about the pollution caused by some foreign investments, the local authorities set up some measures to address the problem, and as a result, the investor ended up suing the host state. Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru (ICSID Case No. ARB/03/4). Decided in favour of State; Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I) (PCA Case No. 34877). Decided in favour of Investor.
[43] Philip Morris v. Uruguay, ICSID Case No. ARB/10/7.

seek compensation worth millions or billions of dollars through ISDS system. This would, without a doubt create huge challenges for governments, particularly the developing countries as they take steps to fund the necessary recovery programs.

Global Reactions to The ISDS Crisis

As stated above, the inclusion of ISDS mechanisms in future international investment agreements has attracted a lot of debate among a range of stakeholders with many voices opposing its inclusion in the agreements. This next section analyses the 3 main options for dispute settlement in the international investment regime.

STATE-STATE COOPERATION AND DISPUTE SETTLEMENT MECHANISMS

State-state dispute settlement allows states to initiate claims against their treaty-partners with respect to harm to investors. This clause already exists in many investment treaties, sometimes alone, but more commonly alongside ISDS and its aim is to narrow the role of ISDS and put more control over designated issues or policy areas into the hands of states for political and/or legalized dispute resolution by domestic officials and/or treaty bodies. While the incorporation of ISDS into IIAs was based, in large part, on the desire to "depoliticize" investment disputes and remove the home-state from involvement, the reality and desirability of this premise is increasingly being questioned and some very recent treaties have incorporated new thinking on the role for states in investment disputes. Brazil, for example, has been promoting and signing a breed of investment treaties (Cooperation and Investment Facilitation Agreements (CIFAs)) that rely entirely on inter-state mechanisms to identify, avoid, and resolve barriers to cross-border investment and disputes between investors and states.[44] The state-state dispute settlement system has the potential to address concerns over lack of consistency, coherence, and predictability of awards. It could also improve outcomes of arbitral decisions when there is a conflict between the protection of foreign investments and other host states obligations relating to human rights, environments, labour and governance related treaty provisions. However, it is argued that it also has the potential to politicize

[44] J. Martins, "Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments," (2017) *Investment Treaty News, IISD Report* of 12th June, 2017. Available at https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/ accessed 6 June 2022.

dispute settlement processes to the detriment of foreign investors. By denying foreign investors the right to institute claims against erring host states, the state might have solved its own problem of dissatisfaction with ISDS but it does not resolve the other half of the problem, which had necessitated the creation of the ISDS system in the first place. The then-standard practice of state-to- state negotiations, was clearly not working to resolve investment disputes. The states allowed intransigence and power politics to frustrate efforts to resolve those disputes. Therefore, this paper argues that a return to state-state negotiations and dispute settlement may be a return to the days of gunboat diplomacy and politicization of dispute settlement to the detriment of foreign investors.

MULTILATERAL INVESTMENT COURT (MIC)

As stated above, legitimacy concerns regarding the ISDS system, such as lack of coherence and predictability of awards, and biased arbitrators, have been at the center of debates since early 2000s. Initially, it was perceived that only the developing countries had great concerns about the ISDS system since most of the claims were brought against them but in recent times, the developed countries have also felt the heat of the system when foreign companies started initiating arbitral claims against them. Hence, the global crisis in the IIR particularly in relation to the ISDS. To fix the problems with the ISDS, the European Union (EU) proposed to replace the ISDS with a system that could guarantee transparency, consistency, predictability, and the possibility of appeal.[45] Accordingly, in 2015, the European Commission proposed to include in future trade and investment negotiations an investment court system ("ICS") such as the one negotiated with Canada and Vietnam.[46] The ICS was announced as the template for a proposed multilateral investment court ("MIC"). Under the EU's proposal, ad hoc arbitrators would be replaced by permanent members of an investment court. Although the imposition of a MIC has the potential to resolve some of the problems like conflict of interest of arbitrators and lack of appeals, it would not resolve questions concerning independence and impartiality of judges, cost of dispute settlement, fragmentation within the international investment regime, interpretive consistency,

[45] See Directorate-General for Trade, Inception Impact Assessment: Establishment of a Multilateral Investment Court for Investment Dispute Resolution, EUROPEAN COMM'N, at 2 (Jan. 8, 2016), http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf accessed 6 April 2022.

[46] According to the European Commission, CETA "is the EU's most comprehensive FTA to date," and future modernization of trade agreements with Mexico and Chile "should be comparable to, and compatible with, our FTA with Canada . . . ." EUROPEAN COMM'N, TRADE FOR ALL: TOWARDS A MORE RESPONSIBLE TRADE AND INVESTMENT POLICY 30, 33 (2015), http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf accessed 6 April 2022.

regulatory chill, or the risk of legislating from the bench, as its undertakings do not address such issues. It also has the potential to bring about lost expertise among judges, politicization of judge selection, and a potential built-in pro government bias among judges seeking reappointment.

Furthermore, it also does not guarantee that foreign investors will not be given more rights than domestic investors. These issues could adversely affect small and medium economies ("SMEs") in Latin America, Africa, Asia, and eastern Europe, which despite being a majority of members in any international organization, do not have the means to influence multilateral negotiations or appoint impartial members of the proposed MIC.[47] In addition, the proposed investment court system may even lock in the legal interpretations and types of damage awards that threaten to unduly increase the cost of public interest regulation, or shift those costs to the public in ways inconsistent with the "polluter pays" principle or other equitable considerations.[48] In fact, without resolving the underlying substantive issues in the international investment regime, an investment court runs the risk of legitimizing and further entrenching the risks and impacts of ISDS. Also, based on the history of international investment regime and the inability of states to sign a multilateral investment treaty to regulate foreign investments due to ideological differences, it is doubtful whether the proposal for a multilateral court will attract enough signatories, or the right signatories, to make a difference for countries defending claims.

Although a multilateral investment court might be desirable, the current political and international conditions are not appropriate to trust the state policy space and to protect legitimate public interest concerns of every country to a few judges. The judges could be politically influenced by the powerful states, or may have negative incentives that prevent them from having the required neutrality and independence to impartially solve the cases presented before them. The ISDS framework as it is today with many of its own problems and criticisms that are widely agreed upon still might be better for SMEs and investors than a multilateral system.[49] To some critics, the

[47] E-J Grenness, "Let's Have Soufflé Instead: Selective Reform of the Investor-State Dispute Settlement Regime," (2018) 6 (1) *University of Baltimore Journal of International Law* Article 7. Available at: https://scholarworks.law.ubalt.edu/ubjil/vol6/iss1/7 Accessed 6 June 2022.

[48] Ibid.

[49] J-M, Zárate, Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible? 59 B.C.L. Rev. 2765 (2018), https://lawdigitalcommons.bc.edu/bclr/vol59/iss8/9 accessed 6 June 2022.

investment regime is a complex and contested area in international law.[50] Their opinion may be partly based on the fact that unlike other areas of international law which is covered by a single multilateral treaty, there is no single multilateral investment treaty covering the investment regime.[51] Rather, the investment regime is governed by a large number of bilateral and regional investment treaties, customary international law, jurisprudence developed by international tribunals and some soft law instruments adopted under the United Nations.[52] For a multilateral investment court to work, it would have to be created at an institutional level through a multilateral effort because "institution building is not simply an exercise on paper."[53] An investment court would be like creating another ICSID because the existing fragmented institutions are not suitable for a multilateral investment court.[54] Therefore, until the states sign a multilateral investment treaty, an investment court would merely reinvent the existing crisis in the ISDS system.

Retention of ISDS but with Necessary Reformations

A major contention in this paper is that the root of the crisis in the ISDS lies in the provisions of the traditional IIAs. The old and existing treaties allowed the imposition of foreign investors' rights over local people or host states. The treaties did not give enough policy space to host states and the developmental needs of (developing) host states were not loud enough in these IIAs. The treaties gave room for the inconsistent interpretations given to the provisions because of their ambiguous meanings. Therefore, to have a legitimate dispute settlement system, the root of the problem in the investment regime must be addressed. Despite the shortcomings of the ISDS, its inherent benefit in increasing foreign direct investment, and curbing gunboat diplomacy remains undoubted. It can be argued therefore that rather than a complete overhaul of the system, reformations should be made to address the shortcomings of the ISDS especially in the area of promoting the principles of democratic good governance and the rule of law i.e., transparency, impartiality, accountability and consistency. According to Elihu Lauterpacht, arbitration is "an

[50] M. Sornarajah, *The International Law on Foreign Investment* (Cambridge, England: Cambridge University Press, 2004) 1 ; R. Dolzer & M. Stevens*, Bilateral Investment Treaties* (The Hague: Kluwer Law International Law, 1995) 108.As cited in I.T Odumosu, ICSID, Third World Peoples and the Re-construction of the Investment Dispute Settlement System page 1.
[51] S.P Subedi, "International Investment law" in Malcolm D. Evans (ed), International Law (Oxford University Press 2014) 727; S.P Subedi, *International Investment Law: Reconciling Policy and Principle* (2nd ed, Oxford University Press (2012) 2.
[52] Ibid.
[53] E-J Grenness, supra note 47.
[54] Ibid.

important component of the international system and cannot be done away with. We should contemplate the possibility that its value may be enhanced if it is linked to a system of appeal."[55] The response of the stakeholders in the investor-state arbitration to its shortcomings will shape how the process and the ISDS system in general moves forward.

This paper recommends that there is no need to completely discard the current ISDS system because the main concerns like arbitrator independence, impartiality, and consistency are fixable issues. Before abandoning an institution that existed and has worked quite well, stakeholders should consider a few alternative solutions.

i. Policy makers in the investment regime should work at unifying the language of substantive treaty provisions in IIAs through a multilateral treaty to ensure consistency in the interpretations.
ii. Introducing an appellate system to correct erroneous awards thereby giving more credence to the arbitration system.
iii. Making changes regarding controlling arbitrators' powers and duties, such as clarifying that the creation of obligations is within states' power, and that arbitrators that are chosen for the appellate proceedings do not hear cases in the first-tier proceedings.
iv. Providing a clearer set of rules that guarantee the independence and impartiality of arbitrators, and adopt better rules for arbitrator disqualification.
v. Implementing clear interpretative directives to avoid legislation from the bench and stricter arbitrator's qualifications.

Furthermore, it is argued that a reorientation of the investment regime as a whole and not the abandonment of the ISDS system will address these concerns. Policy makers are to ensure that the new treaties will consider the different socio - economic conditions of developing host states. To do this, the regulatory freedom of the host states to pursue measures for welfare or legitimate public policy purposes must not be compromised. In addition, the new treaties should reflect national policy priorities enshrined in the body of national investment-related laws and regulations

[55] E Lauterpacht, *Aspects of the Administration of International Justice* (1991) 112 cited by S. Frank, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public international Law through Inconsistent Decisions," (2005) 73 (4) *Fordham Law Review* 1606.

of the host states while also ensuring that they strike the right balance between the interests of investors and the public interest.

Recommendations

The international investment regime is at a watershed moment and a lot of changes are being carried out globally to address the crisis. As far as Africa is concerned, the African Continental Free Trade Area (AfCFTA) could provide a legal basis to rewrite the rules in a way that better integrates the interests of African nations while also providing a fair and balanced investment regime for foreign investors and host states. Thus, the ongoing negotiation of the Phase II protocols of the AfCFTA seeks to facilitate, promote and protect intra-Africa investors and investments. It will also encourage investors and investments from outside Africa. The extent to which the AfCFTA will attract investment depends on how its commitments and legal instruments will be implemented, and how it creates a balance between investment protection and the developmental needs of Africa. The AfCFTA does not exclusively focus on trade in goods; it also covers a broader spectrum of issues critical to FDI strategies and activities including trade in services, competition policy, intellectual property rights, investment and dispute settlement. Such an approach allows for greater policy coherence within the AfCFTA.

The AfCFTA protocol on investment should endeavour to address barriers to investment entry in Africa, reduce time and costs of investment approvals, enhance transparency, improve efficiency, and promote investment-related cooperation and coordination across the continent, and also address the imbalance between investment protection and the developmental needs of Africa. More importantly, investors should have direct access to effective dispute settlement mechanisms and access to remedies when their rights are violated by the host governments rather than placing reliance on their home governments to initiate dispute settlement proceedings on their behalf. Therefore, policy makers should consider the inclusion of ISDS as a dispute settlement mechanism as it would go a long way in assuring foreign investors of a means of redress that is devoid of political interference.

Conclusion

This paper has stated briefly the reason for the emergence of the ISDS as a dispute settlement in foreign investment disputes. It has also attempted to analyze the three main options for resolving the crisis in the investment regime particularly, the dispute settlement system. The paper calls for a retention of the ISDS system but with necessary reformations carried out rather than replacing the system as a whole.

Having stated this, it is also important to remember that while trade disputes affect all interested parties, investment disputes are often the result of individual and targeted discrimination, therefore, the dispute settlement must be established accordingly. Investors ought to fight their own battles, and not rely on the defense of their home government. Investors should also carry their own costs, where the losing party is made liable for all arbitration expenses. Also, taking a step back to consider the basis for the evolution of the ISDS, the system was introduced in order to prevent political interference in the dispute settlement between a foreign investor and a host state. A return to state-state dispute settlement system or the introduction of a multilateral investment court does not guarantee a fair dispute settlement, rather it could be a step backward to the era of gunboat diplomacy or diplomatic intervention and its deficiencies.

Abandoning the ISDS system totally instead of working on its reform would be a case of throwing the baby out with the bath water. In sum, reforming the system by addressing all the concerns that have been raised against the ISDS rather than jettisoning it would go a long way in bringing legitimacy to the international investment regime.