A CRITICAL ANALYSIS OF THE SECURITY OF FOREIGN INVESTMENTS IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) REGION

by

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I declare that the above study is my own work, that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references, and that all direct quotations from such sources have been clearly and correctly indicated.

12 SEPTEMBER 2018

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DEDICATION

To my father Samuel Ngobeni, who tragically did not live to see me go to school.

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ABBREVIATIONS/ACRONYMS

The following abbreviations/acronyms are used in the text unless the context in which they are used indicates otherwise:

ACIA	ASEAN Comprehensive Investment Agreement
ACIA	African Continental Investment Area
ACFI	Agreement on Cooperation and Facilitation of Investment
ACJ&HR	African Court of Justice and Human Rights
ACHPR	African Commission on Human and Peoples' Rights
ACJ	African Court of Justice
ACH&PR	African Court on Human and Peoples' Rights
AEC	African Economic Community
AfDB	African Development Bank
AfCFTA	African Continental Free Trade Agreement
ASEAN	Association of South-East Asian Nations
AIO	African Investment Ombud
AJS	African Justice Scoreboard
ARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
AU	African Union
IACCIA	Investment Agreement for the COMESA Common Investment Area
CAMEX	Brazilian Chamber of Foreign Trade
CCJ	COMESA Court of Justice
CETA	EU-Canada Comprehensive Economic and Trade Agreement

COMESA	Common Market for Eastern and Southern Africa
CP	Contact Point
CPTTP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CSF	Civil Society Forum
DAG	Domestic Advisory Groups
EAC	East African Community
EACJ	EAC Court of Justice
ECT	Energy Charter Treaty
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIP	SADC Protocol on Finance and Investment
GTEX	Technical Group for Strategic Studies on Foreign Trade
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICSID	International Centre for Settlement of Investment Disputes
ICJ	International Court of Justice
ICS	Investment Court System
ISDS	Investor State Dispute Settlement
ILC	International Law Commission
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
NEPAD	New Partnership for Africa's Development

NT	National Treatment
OFIO	Office of Foreign Investment Ombud
OECD	Organisation for Economic Co-operation and Development
PAIC	Pan African Investment Code
PCA	Permanent Court of Arbitration.
REC	Regional Economic Community
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SGDs	Sustainable Development Goals
SSA	State-State arbitration
SWC	Specialised Working Committees
SWG	Specialised Working Groups
TFEU	Treaty on the Functioning of the European Union
T-FTA	COMESA-EAC-SADC Tripartite Free Trade Agreement
TRF	Transatlantic Regulators Forum
TTIP	EU-U.S. Transatlantic Trade and Investment Partnership
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
UNECA	United Nations Economic Commission for Africa

SUMMARY OF THESIS

Foreign investments in SADC are regulated by Annex 1 of the SADC Protocol on Finance and Investments (SADC FIP), as well as the laws of SADC Member States. At present, SADC faces the challenge that this regime for the regulation of foreign investments is unstable, unsatisfactory and unpredictable. Furthermore, the state of the rule of law in some SADC Member States is unsatisfactory. This negatively affects the security of foreign investments regulated by this regime. The main reasons for this state of affairs are briefly explained below.

The regulatory regime for foreign investments in SADC is unstable, due to recent policy reviews and amendments of key regulatory instruments that have taken place. Major developments in this regard have been the suspension of the SADC Tribunal during 2010, the amendment of the SADC Tribunal Protocol during 2014 to bar natural and legal persons from access to the Tribunal, and the amendment of Annex 1 during 2016 to remove investor access to international investor-state arbitration, better known as investor-state dispute settlement (ISDS).

The regulation of foreign investments in SADC has been unsatisfactory, among others because some SADC Member States have failed or neglected to harmonise their investment laws with both the 2006 and the 2016 Annex 1. Furthermore, SADC Member States such as Angola, Democratic Republic of Congo (DRC), Malawi, Mauritius, Seychelles, Eswatini, Tanzania, Zambia, and Zimbabwe have multiple Regional Economic Community (REC) memberships. This places these Member States in a position whereby they have conflicting interests and treaty obligations.

Finally, the future of the regime for the regulation of foreign investments in SADC is unpredictable, due to regional integration efforts such as the recent formation of the COMESA-EAC-SADC Tripartite Free Zone (T-FTA) and the African Continental Free Trade Area (AfCFTA). The T-FTA is entitled to have its investment protocol, while the AfCFTA investment protocol will be negotiated from 2018 until 2020. These developments entail that the 2016 Annex 1 will soon be replaced by an investment protocol at either the T-FTA or AfCFTA levels, thereby ushering a new regime for the regulation of foreign investments in SADC. The unknown nature of the future regulations create uncertainty and instability among foreign investors and host states alike.

This study analyses the regulation of foreign investments in terms of Annex 1 and selected laws of SADC Member States. In the end, it makes the three findings mentioned above. In order to address these findings, the study makes four recommendations. The first is that foreign investments in SADC must be regulated at African Union (AU) level, by means of an AfCFTA investment protocol (which incidentally is now the case). Secondly, investor-state disputes must be referred to the courts of a host state, optional ISDS, the African Court of Justice and Human Rights (ACJ&HR) or other agreed forum. Thirdly, an African Justice Scoreboard (AJS) must be established. The AJS will act as a gateway to determine whether an investor-state dispute shall be referred to the courts of a host state, ISDS, the ACJ&HR or other forums. Fourthly, the office of an African Investment Ombud (AIO) must be created. The AIO shall facilitate the early resolution of investor-state disputes, so as to reduce the number of disputes that may end-up in litigation or arbitration.

KEY TERMS

African Continental Free Trade Area; African Court for People and Human Rights; ACH&PR; African Court of Justice and Human Rights; African Justice Scoreboard; African Union; COMESA-EAC-SADC Tripartite Free Trade Agreement; Expropriation; ICSID Arbitration Rules; Investor-State Dispute Settlement; SADC Protocol on Finance and Investments; State Responsibility; UNCITRAL Arbitration Rules.

CHAPTER 1

INTRODUCTION

1.1 PROBLEM STATEMENT

African states need vast financial resources to achieve their African Union Commission (AUC) *Agenda 2063* Objectives[1] as well as the United Nations (UN) Sustainable Development Goals (SDGs).[2] Key sectors in this regard are power generation, transport, telecommunications, water and sanitation, food security and agriculture, climate change mitigation, health, and education.[3] The objectives of *Agenda 2063*[4] converge with those of the SDGs, thus the two are equally relevant to this study.[5] *Agenda 2063* is a 50-year

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1 Agenda 2063 is the African Union (AU)'s plan to transform and develop Africa by 2063. For further information see African Union (Commission) "Agenda 2063 Framework Document" (Addis Ababa 2015) http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017); African Union (Commission) "Agenda 2063 Popular Version" *(*Addis Ababa 2015) http://www.un.org/en/africa/osaa/pdf/au/agenda2063.pdf (Date of use: 15 November 2017); African Union (Commission) "Agenda 2063 First Ten-Year Implementation Plan 2014-2023" (Addis Ababa 2015), at 37, 63 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf (Date of use: 16 November 2017); African Union (Commission) "African Agenda 2063 General Briefing Kit Presentation" (Addis Ababa 2015) http://www.un.org/en/africa/osaa/pdf/au/agenda2063-presentation.pdf (Date of use: 16 November 2017).

2 SDGs emanate from the United Nations (General Assembly) "Transforming Our World: The Agenda 2030 for Sustainable Development*"* (New York 2015) https://www.un.org/pga/wp-content/uploads/sites/3/2015/08/120815_outcome-document-of-Summit-for-adoption-of-the-post-2015-development-agenda.pdf (Date of use: 24 August 2017).

3 United Nations Conference on Trade and Development "Investment Policy Framework For Sustainable Development 2015" (United Nations New York and Geneva 2015) at 18 http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf (Date of use: 20 August 2017).

4 African Union (Commission) "Agenda 2063 Framework Document" at 2-19, 131-180 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017).

5 African Union (Commission) "African Agenda 2063 General Briefing Kit Presentation" at para 4 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-presentation.pdf (Date of

continental programme for the socio-economic transformation and development of Africa and its people.[6] It was conceived on the occasion of the Golden Jubilee of the Organisation for African Unity (OAU) during May 2013, where AU Heads of State and Government (AU Assembly) tasked the AUC to prepare a 50-year continental agenda for the socio-economic development of Africa through a people-driven process.[7]

Some of *Agenda 2063*'s objectives[8] are the establishment of a continental road network,[9] a continental high-speed rail network,[10] an air and maritime transport network,[11] a continental TV channel network,[12] a Pan African University with 25 satellite centres,[13] and modern communication, education, sanitation and health facilities in all

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use: 16 November 2017.

6 African Union (Commission) "Agenda 2063 Framework Document" at iii http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017).

7 African Union (Commission) "Agenda 2063 Framework Document" at iii, 1 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017).

8 The Agenda 2063 objectives are summarised in African Union (Commission) "Agenda 2063 Framework Document" at 94-99 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017).

9 African Union (Commission) "Agenda 2063 Framework Document" at 11 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017).

10 African Union (Commission) "Agenda 2063 Framework Document" at 11, 172 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017).

11 African Union (Commission) "Agenda 2063 Framework Document" at 11 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017).

12 African Union (Commission) "Agenda 2063 Framework Document" at 172 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017).

13 African Union (Commission) "Agenda 2063 Framework Document" at 167 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017).

communities in Africa.[14] *Agenda 2063*'s objectives such as the high-speed rail network and the Pan African University must be achieved by 2023.[15] They will no doubt cost billions of rands to implement.[16]

It cannot be disputed that public sector funding alone will be insufficient to meet the cost of achieving *Agenda 2063*'s objectives and SDGs.[17] The AUC admits this fact, and stipulates the areas of *Agenda 2063* that will require funding, as well as the sources of the funding.[18] Foreign direct investment (FDI) and portfolio investments are some of the sources of private funding that will be required to make *Agenda 2063* a reality.[19] A report by the AUC, the United Nations Economic Commission for Africa (UNECA) and the African Development Bank (AfDB) also states that private funding helps African states to upgrade their infrastructure faster than would otherwise be possible.[20] The report states

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14 African Union (Commission) "Agenda 2063 Framework Document" at 3-6 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017).

15 African Union (Commission) "Agenda 2063 First Ten-Year Implementation Plan 2014-2023" at 43, 44, 65 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf (Date of use: 16 November 2017).

16 For a discussion of the Agenda 2023 goals see African Union (Commission) "Agenda 2063 First Ten-Year Implementation Plan 2014-2023" at 40-42, 47-84 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf (Date of use: 16 November 2017).

17 United Nations Conference on Trade and Development "Investment Policy Framework For Sustainable Development" at 17 http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf (Date of use: 20 August 2017).

18 African Union (Commission) "Agenda 2063 Framework Document" at 113-116 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017.

19 African Union (Commission) "Agenda 2063 Framework Document" at 113-116 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017).

20 African Union (Commission) "Assessing Regional Integration VIII: Bringing the Continental Free Trade Area About ECA" (AUC Printing and Publishing Unit Addis Ababa) at 33

that during 2015, 44 African states had jointly committed USD 28 Billion towards infrastructure development, while China committed USD 20 Billion, the private sector invested USD 7 Billion, the World Bank committed USD 6 Billion, the AfDB committed USD 4 Billion, and other banks and states committed more Billions.[21] The bulk of the funds, therefore, came from private and foreign sources.

A picture that emerges is that there is a vast shortage of FDI in SDG sectors, since only a fraction of investments by transnational corporations and institutional investors, private equity funds, sovereign wealth funds etc. is directed at these sectors, as compared to commercial investments.[22] The AUC, UNECA and the AfDB acknowledge that the deficit in the funding of infrastructure projects is delaying the development of Africa.[23]

Foreign investors are wary of SDG sectors for reasons such as the political nature of SDG sectors,[24] as well as issues of low risk-return relating thereto.[25] Investment in these

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https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (date of use 15 December 2017).

21 African Union (Commission) "Assessing Regional Integration VIII: Bringing the Continental Free Trade Area About" at 34 https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017).

22 United Nations Conference on Trade and Development "Investment Policy Framework For Sustainable Development 2015" at 17 http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf (Date of use: 20 August 2017).

23 African Union (Commission) "Assessing Regional Integration VIII: Bringing the Continental Free Trade Area About" at 2 https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017.

24 United Nations Conference on Trade and Development "Investment Policy Framework For Sustainable Development" at 19-20 http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf (Date of use: 20 August 2017).

For example, health and sanitation projects are sensitive because the services in these sectors are seen as basic needs. This can limit returns that an investor can make in the

sectors may also be discouraged by an unwelcoming investment climate and regulatory, administrative or policy-related challenges.[26] Hence a stable and supportive macroeconomic and regulatory environment is a necessary driver for the attraction and retention of private investment.[27]

The need for private funding in order to advance the socio-economic development of SADC Member States as contemplated in *Agenda 2063* brings the effective security of the required investments to the fore.

As already indicated in the summary of this study above and further explained below, the challenge that underpins this study is that the regime for the regulation of foreign investments in SADC is currently unstable, unsatisfactory and its future is unpredictable. Furthermore, the state of the rule of law in some SADC member States is

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sector, as it may be necessary to keep prices low. Furthermore, these sectors are by nature exposed to the intervention of host states. The dispute in *Biwater Gauff (Tanzania) v United Republic of Tanzania* (ICSID Case No. ARB/05/22) Award of 24 July 2008, is one example that shows the sensitivity of water and sanitation projects. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Decision on Jurisdiction of 14 November 2005, *Desert Line Projects L.L.C v The Republic of Yemen* (ICSID Case No. ARB/05/17) Award of 6 February 2008, *and Walter Bau AG (In Liquidation) v The Kingdom of Thailand* (Ad hoc UNCITRAL Tribunal) Award of 1 July 2009 are similar examples relating to road construction projects.

25 United Nations Conference on Trade and Development "Investment Policy Framework For Sustainable Development" at 19-20 http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf (Date of use: 20 August 2017).

26 United Nations Conference on Trade and Development "Investment Policy Framework For Sustainable Development" at 20 http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf (Date of use: 20 August 2017).

27 See for example Department of Trade and Industry (South Africa) "InvestSA Investment Insights", Issue 1 October 2017 at 18 http://www.investsa.gov.za/wp-content/uploads/2017/03/InvestSA-newsletter.pdf (Date of use 15 December 2017).

unsatisfactory.[28] This affects the security of foreign investments in SADC, and does not bode well for the creation of a conducive climate for the attraction and regulation of foreign investment by the Member States.

This status quo is a result of recent developments in SADC, which are described below.

Firstly, the regulatory regime for foreign investments in SADC is unstable, due to recent policy reviews and the amendment of key regulatory instruments that have taken place.

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[28] See the discussion of each Member State in Chapter 4 below under the discussion of each state, where comments are made regarding the rule of law. The quality of the rule of law is essential, hence it is one of the priorities of *Agenda 2063*. See for example African Union (Commission) "Agenda 2063 First Ten-Year Implementation Plan 2014-2023" at 68-70 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf (Date of use: 16 November 2017).
For a discussion of the rule of law in general see Adler J *Constitutional and administrative law* 6th ed (Palgrave Macmillan Basingstoke 2007) at 124-144; Bingham TH *The rule of law* (Allen Lane London 2010); Bradley AW and Ewing KD *Constitutional and administrative law* 13th ed (Longman Harlow 2003) at 90-102; Brand-Ballard J *Philosophy of law: introducing jurisprudence* (Bloomsbury Academic London 2013) at 23-29; Costa P and Zolo D (eds) *The rule of law: history, theory and criticism* (Springer Dordrecht 2007); Fletcher GP *Basic Concepts of legal thought* (Oxford University Press New York 1996) at 11-60; Hatchard J *Combating corruption: legal approaches to supporting good governance and integrity in Africa* (Edward Elgar Cheltenham 2013); Head JW *Great Legal Traditions: civil law, common law, and Chinese law in historical and operational perspective* (Carolina Academic Press Durham, N.C 2011); Isanga JM "The Rule of Law and African Development" 2016 (42) North Carolina Journal of International Law and Commercial Regulation 1-59; Mujuzi JD "The Rule of Law: Approaches of the African Commission on Human and People's Rights and Selected States" 2012 (12) African Human Rights Law Journal 89-111; Ntephe P *Does Africa Need Another Kind of Law: Alterity and the Rule of Law Subsaharan Africa* (PhD Thesis SOAS University of London 2012); Ramcharan BG *The fundamentals of international human rights treaty law* (Martinus Nijhoff Publishers Leiden 2011) at 63-79; Sannerholm Z *Rule of law after war and crisis: ideologies, norms, and methods* (Intersentia Cambridge 2012); Saunders C and Le Roy C (eds) *The rule of law* (Federation Press Sydney 2003); Shapiro I *The Rule of law* (New York University Press New York 1994); Slapper G *How the law works* 2nd ed (Routledge London 2011) at 1-43; Shivute P "The Rule of Law in Sub-Sahara Africa- An Overview"
http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/shivute2.pdf (undated) (Date of use 10 April 2018).

Major developments in this regard have been the suspension of the SADC Tribunal during 2010, the amendment of the SADC Tribunal Protocol during 2014 to bar natural and legal persons from access to the Tribunal, and the amendment of Annex 1 during 2016 to remove investor access to ISDS. These developments will now be briefly discussed.

The SADC Tribunal, which was opened during 2005, was suspended during 2010.[29] The suspension of the tribunal has prejudiced cases that were pending at the tribunal, such as *Swissbourgh Diamond Mines (Pty) Limited, Mr. Josias Van Zyl (South Africa), The Josias Van Zyl Family Trust (South Africa) and Others v The Kingdom of Lesotho*.[30] In addition, the SADC Tribunal Protocol was amended in 2014 to remove access to the Tribunal by natural and legal persons.

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29 http://www.sadc.int/about-sadc/sadc-institutions/tribun/ (Date of use: 17 January 2017).

30 Permanent Court of Arbitration (PCA) Case No. 2013-29 (*Josias Van Zyl* 1). This case proceeded as *Mr Josias Van Zyl (South Africa), The Josias Van Zyl Family Trust (South Africa) and The Burmilla Trust (South Africa) v The Kingdom of Lesotho* (PCA) Case No. 2016-21 (*Josias Van Zyl* 2). See *Josias Van Zyl* 2 Procedural Order No.1 of 3 November 2016 that details the background to the case; *Josias Van Zyl and Others v Kingdom of Lesotho*, Singapore High Court Case No. (2017) SGHC 104 — Originating Summons No 95 of 2017 (Registrar's Appeal No 91 of 2017) Grounds of Decision of 8 March 2017 at para 6-10 http://www.supremecourt.gov.sg/search-judgment?q=Kingdom%20of%20lesotho;http://kluwerarbitrationblog.com/2017/05/09/booked-singapore-post-on-lesotho-matter-on-service-of-process-olga-boltenko-9th-may/ (Date of use: 25 July 2017). See also Procedural Order No. 2 at para 4, 16.2. However, the Singapore High Court annulled the arbitral decision on jurisdiction on 14 August 2017 (see judgment at https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/170814---lesotho-judgment---final-clean-pdf.pdf (Date of use: 03 October 2017). For the South African background to the case see *Van Zyl and Others v Government of Republic of South Africa and Others* (170/06) [2007] ZASCA 109; [2007] SCA 109 (RSA); [2008] 1 All SA 102 (SCA); 2008 (3) SA 294 (SCA) (20 September 2007). For the SADC Tribunal background of the case see *Van Zyl and Others v The Kingdom of Lesotho* Case No. SADC (T) 04/2009.

During 2016, the SADC Agreement Amending Annex 1[31] repealed the 2006 Annex 1 of the SADC FIP and introduced a 2016 Annex 1.[32] A noteworthy change that the 2016 Annex 1 introduced was the removal of investor access to ISDS. This amendment has further weakened the protection of foreign investments in SADC, since investor-state disputes that are not protected by Bilateral Investment Treaties (BITs), Treaties with Investment Provisions (TIPs) or investment agreements must henceforth be referred to local courts of host states, whose state of rule of law may be unsatisfactory.[33]

Secondly, the regulation of foreign investments in SADC is unsatisfactory, among others because some SADC Member State have failed or neglected to harmonise their investment laws with Annex 1. The investment laws of some SADC Member States are in conflict with 2006 or 2016 Annex 1, as the case may be.[34] This is despite the fact that Articles 17 and 19 of the 2016 and 2006 Annex 1 respectively require that the Member States must harmonise their foreign investment laws with the relevant version of Annex 1. Despite this, SADC Member States have failed to harmonise their laws with Annex 1, as shown in Chapter 4 below.

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31 *Southern African Development Community Agreement Amending Annex 1 (Co-Operation on Investment) of the Protocol on Finance and Investment*, (Date of signature 31 08 2016, in force 24 August 2016) (2016 Annex 1) http://investmentpolicyhub.unctad.org/Download/TreatyFile/5527 (Date of use: 15 October 2017).

32 See http://www.sadc.int/documents-publications/show/5000 (Date of use: 20 August 2017). According to the Trade Law Centre (Tralac), the 2016 Annex 1 came into force on 24 August 2017, see https://www.tralac.org/discussions/article/12350-the-first-international-arbitration-case-under-the-sadc-finance-and-investment-protocol-lesotho-v-swissbourgh-diamond-mines-case.html (Date of use: 03 October 2017).

33 The state of the rule of law in each SADC Member state is discussed in Chapter 4 below.

34 See Chapter 4 below; Ngobeni L and Fagbayibo B "The Investor-State Dispute Resolution Forum under the SADC Protocol on Finance and Investment: Challenges and Opportunities for Effective Harmonisation" 2015 (19) Law, Democracy and Development 175-192 at 184-185.

Furthermore, the regulation of foreign investments by RECs,[35] as well as the multiple REC membership that some SADC Member States have, create multiple challenges.[36] Multiple REC memberships make regional integration costly, inefficient and ineffective.[37] Furthermore, multiple REC memberships cause challenges of divided loyalty, conflicting

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35 There are eight RECs in Africa that are recognised by the AU. Including SADC, these are: Community of Sahel-Sahara States (CEN-CAD); The Common Market for Eastern and Southern Africa (COMESA); East African Community (EAC); Economic Community of Central African States (ECCAS); Economic Community of West African States (ECOWAS); Intergovernmental Authority on Development (IGAD); Arab Maghreb Union (AMU). For more information see http://www.uneca.org/oria/pages/african-union-au-regional-economic-communities-recs-africa (Date of use: 19 November 2016); African Union (Commission) "African Union Handbook 2017" (Addis Ababa 2016) at 128-140 https://au.int/sites/default/files/pages/31829-file-african-union-handbook-2017-edited.pdf (Date of use: 08 April 2017); *Gesellschaft fur Technische Zusammenarbeit* (GTZ) "Regional Economic Communities in Africa: A Progressive Overview" (Nairobi 2009) at 11-12 https://www2.giz.de/wbf/4tDx9kw63gma/RECs_Final_Report.pdf (Date of use: 31 October 2017); Mbengue MM and Schacherer S "The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime" *Journal of World Investment and Trade* 2017 (18) 414–448 at 417; Ngobeni and Fagbayibo 2015 (19) Law, Democracy and Development 175 at 186; United Nations Conference on Trade and Development "Intra-Africa Trade: Unlocking Private Sector Dynamism" (United Nations New York and Geneva 2013) at 9-10 http://uctad.org/en/PublicationsLibrary/aldcafrica2013_en.pdf (Date of use: 31 October 2017).

36 SADC Member States with cross-membership are: Angola (ECCAS, SADC), the Democratic Republic of Congo (DRC) (COMESA, ECCAS, SADC), Malawi (COMESA, SADC), Mauritius (COMESA, SADC), Seychelles (COMESA, SADC), Kingdom of Eswatini (formerly Swaziland) (COMESA, SADC), Tanzania (EAC, SADC), Zambia (COMESA, SADC) and Zimbabwe (COMESA, SADC). See United Nations Conference on Trade and Development "Intra-Africa Trade: Unlocking Private Sector Dynamism" at 9-10 http://unctad.org/en/PublicationsLibrary/aldcafrica2013_en.pdf (Date of use: 31 October 2017); Gathii JT "African Regional Trade Agreements as Flexible Legal Regimes" 2010 (35) North Carolina Journal of International Law and Commercial Regulation 571-668 at 642-656.

37 GTZ "Regional Economic Communities in Africa: A Progressive Overview" at 12 https://www2.giz.de/wbf/4tDx9kw63gma/RECs_Final_Report.pdf (Date of use: 31 October 2017).

treaty obligations, competition for resources, and legal complexities relating to projects that are undertaken in RECs with conflicting legal systems.[38]

Finally, the future of the regime for the regulation of foreign investments in SADC is unpredictable, due to the recent formation of the T-FTA[39] and the AfCFTA.[40] The T-FTA agreement provides for the conclusion of a protocol on investments,[41] while the AfCFTA Agreement also provides for an investment protocol will be negotiated during the second phase of AfCFTA negotiations between 2018 and 2020.[42] There is therefore no doubt that the 2016 Annex 1 will soon be replaced by an investment protocol at either the T-FTA or AfCFTA levels. The big unknown here is what the contents of either investment protocol shall be. In dealing with the above challenges, the historical evolution of international economic law, and in particular of investor-state dispute resolution, must not be lost. According to Gathii, international economic law serves as a tool by which capital-exporting states access resources in developing states.[43] As a result, the rules of

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38 GTZ "Regional Economic Communities in Africa: A Progressive Overview" at 12 https://www2.giz.de/wbf/4tDx9kw63gma/RECs_Final_Report.pdf (Date of use: 31 October 2017); Gathii 2010 (35) North Carolina Journal of International Law and Commercial Regulation 571 at 656-663.

39 *Agreement Establishing a Tripartite Free Trade Area Among the COMESA, EAC and SADC*, (date of signature 10 June 2015, in force) https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html (Date of use: 15 October 2017).

40 *Agreement Establishing the African Continental Free Trade Area* (date of signature 21 March 2018, not in force) https://www.tralac.org/documents/resources/african-union/1964-agreement-establishing-the-afcfta-consolidated-text-signed-21-march-2018-1/file.html (Date of use 30 April 2018).

41 Article 45(1) (b) T-FTA.

42 Article 7(1)(iii) AfCFTA Agreement; African Union (Assembly) (Tenth Extraordinary Session, 21 March 2018) "Decision on the Draft Agreement Establishing the African Continental Free Trade Area (AfCFTA") Doc. Ext/Assembly/AU/2(X) at para 12(iii), 13 https://www.tralac.org/documents/resources/african-union/1834-au-decision-on-the-draft-agreement-establishing-the-african-continental-free-trade-area-21-march-2018-1/file.html (Date of use, 28 March 2018).

43 Gathii JT "War's Legacy in International Economic Law" 2009 (11) International

international economic law are skewed in favour of capital-exporting states, thereby encroaching upon the sovereignty of developing states.[44] It is in this context that BITs have come to be referred to as the "bills of rights of foreign investors.[45]

It cannot be disputed that for historical reasons, the majority of BITs and TIPs are designed to protect foreign investors, irrespective of any other stated objective such as the development of host states.[46] A factor that lends credibility to this argument is that BITs and TIPs are in general designed to allow investors to sue host states, not the other way round. For example, in the first seven months of 2017 alone, investors used BITs and TIPs to open 35 ISDS cases against 32 host states.[47]

1.2 RESEARCH QUESTION

This study will seek to answer the following question, against the background of the Problem Statement as described above:

"Are foreign investments in the SADC region effectively secured, in view of the challenges identified in the Problem Statement?"

The main research question will be broken down into the following sub-questions:

Community Law Review 353-386 at 354, 385.

44 Gathii 2009 (11) International Community Law Review 353 at 363-370.

45 Gathii 2009 (11) International Community Law Review 353 at 368.

46 A database of BITs and TIPs is available at http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu (Date of use: 30 March 2018).

47 United Nations Conference on Trade and Development "International Investment Agreement Issues Note", Issue 3 November 2017 (United Nations New York 2017) at 1 http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf (Date of use: 30 March 2018).

1.2.1 In the event of an expropriation, can a state rely on its internal law to avoid compliance with its international obligations?

1.2.2 What are the consequences of an unlawful expropriation? Must an expropriating state pay compensation in terms of applicable treaty, investment contract or law, or must it pay damages in the form of reparation?

1.2.3 Does the definition of an investment as applied in International Centre for Settlement of Investment Disputes (ICSID) arbitration cases such as *Salini Construttori S.P.A and Italstrade S.P.A v Kingdom of Morocco*[48] apply to non-ICSID tribunals? If so, what are the implications for Annex 1?

1.2.4 Are the remedies that are available to an investor based on the 2006 and 2016 Annex 1 and the laws of SADC Member States in the event of expropriation, satisfactory?

1.2.5 If the regulation of foreign investments by Annex 1 and SADC Member States' laws is not satisfactory, what options does SADC have for the regulation of foreign investments, as well as the mechanism for the resolution of investor-state disputes, based on the recent developments in Brazil, the European Union (EU) and India?

1.3 RESEARCH OBJECTIVES

The high-level objective of this study is to analyse the security of foreign investments in SADC, with a view to make recommendations regarding some of the regulatory defeciencies that may be identified.[49] The sub-objectives of this study are to analyse:

[48] (ICSID Case No. ARB 00/4) Decision on Jurisdiction of 16 July 2001.

[49] See in particular, the findings made in Chapters 3 and 4 below.

1.3.1 The basis on which a state may incur international responsibility towards an investment or investor for an expropriation;

1.3.2 The consequences of unlawful expropriations, such as those that are in breach of a treaty, contract, international law or the internal law of a state;

1.3.3 The definition of an investment as applied in ICSID tribunal decisions such as *Salini,* with a view among others to determine if the definition may be applied by non-ICSID tribunals, and what the implications thereof for Annex 1 are;

1.3.4 The remedies available to an investor in terms of the 2006 and 2016 Annex 1 and the laws of SADC Member States, in the event of expropriation, so as to determine if they are satisfactory or not; and

1.3.5 The options open to SADC in addressing the challenges identified in the Problem Statement regarding the regulation of foreign investments and the mechanism and forum for the resolution of investor-state disputes, in view among others of developments in Brazil, the EU, and India.

1.4 LITERATURE REVIEW

Following upon the last two objectives of this study, there are two areas that are central to this literature review. These are the level at which foreign investments in SADC must be regulated, as well as the mechanism and forum in which investor-state disputes must be resolved. The level at which foreign investments in SADC must be regulated is important, particularly in view of the findings made in Chapters 3 and 4 below, as well as the formation of the African Economic Community (AEC), AfCFTA and the T-FTA. This is a critical area for discussion, as the T-FTA provides for the conclusion of its investment protocol,[50] while the AfCFTA will also have an investment protocol that will

[50] Article 45(1) (b) T-FTA Agreement.

be negotiated from the second half of 2018 until 2020.[51] The mechanism and forum in which investor-state disputes must be resolved are also relevant, given among others the suspension of the SADC Tribunal, the removal of ISDS from the 2016 Annex 1, and the poor state of the rule of law in some SADC Member States. Despite the challenges stated in the Problem Statement, there has not been a robust literary discussion on these issues. This study endeavours to contribute towards the discourse and the body of knowledge in this regard.

For now the selected literature on the abovementioned issues will now be briefly considered. The conceptual framework will be discussed in the next chapter.

With regard to the level at which foreign investments in SADC ought to be regulated, there is limited scholarly critique of the two main instruments that regulate foreign investments in SADC, namely the SADC Treaty[52] and Annex 1.[53] However, scholars have made extensive comments on the prospects and challenges of regional integration efforts in general.[54]

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51 Article 7(1)(iii) AfCFTA Agreement; African Union (Assembly) "Decision" at para 12(iii), 13 https://www.tralac.org/documents/resources/african-union/1834-au-decision-on-the-draft-agreement-establishing-the-african-continental-free-trade-area-21-march-2018-1/file.html (Date of use, 28 March 2018).

52 In Particular Articles 4 and 6 thereof. The SADC Treaty and its background are discussed in Chapter 3 below.

53 Two articles that analyse Annex 1 are Kondo T "A Comparison with Analysis of the SADC FIP before and after Its Amendment" 2017 (20) Potchefstroom Electronic Law Journal 1- 47; Ngobeni and Fagbayibo 2015 (19) Law, Democracy and Development 175-192.

54 See for example Mapuva J and Muyengwa-Mapuva L "The SADC regional bloc: what prospects for regional integration?" 2014 (18) Law, Democracy and Development 22-36; Saurombe A "Regional integration agenda for SADC "Caught in the winds of change" Problems and Prospects" 2009 (4) (2) Journal of International Commercial Law and Technology 100-106; Saurombe A "The role of SADC institutions in implementing SADC treaty provisions dealing with regional integration" 2012 (15) (2) Potchefstroom Electronic

Three proposals have emerged from the available literature that was reviewed with regard to the level at which foreign investments in Africa ought to be regulated. The proposals can be classified as regionalism, and two variants of continentalism. These proposals will be briefly discussed, so as to set the basis for the options that are open to SADC as discussed in Chapter 5 below, and subsequent proposals that will be made in Chapter 6.

Firstly, Denters and Gazzini propose regionalism what they term the "third alternative" to bilateralism and multipluralism.[55] This proposal promotes the use of RECs to regulate foreign investments. This is similar to the status quo, where Annex 1 regulates foreign investments in SADC. The challenge with this proposal is that it will perpetuate the status *quo*, where a "spaghetti bowl" of conflicting BITs, state investment laws, REC laws, and TIPs regulate foreign investments.[56]

Law Journal 453-485; Saurombe A "The European Union as a model for regional integration in the Southern African Development Community: a selective institutional comparative analysis" 2013 (17) Law, Democracy and Development 457-470.

55 Denters E and Gazzini T "The Role of African Regional Organizations in the Promotion and Protection of Foreign Investment" 2017 (18) Journal of World Investment and Trade 449-492 at 472-478, 491-492.

56 Denters and Gazzini 2017 (18) Journal of World Investment and Trade 449 at 452-472; Mbengue and Schacherer 2017 (18) Journal of World Investment and Trade 414 at 416-419; Gathii 2010 (35) North Carolina Journal of International Law and Commercial Regulation 571 at 642-656; Paez L "Bilateral Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment Area?" 2017 (18) Journal of World Investment and Trade 379–413 at 381-401.

At the moment, each of the AU-recognised eight RECs has an instrument that regulates foreign investments in one way or another.[57] This practice does not contribute to the harmonisation of investment regulation in Africa, since it promotes diverse practices rather than uniformity. It is shown in Chapters 3 and 4 below that the regulation of foreign investments in SADC by means of Annex 1 has failed, as Member States fail to harmonise their foreign investment laws with Annex 1.[58] The regulation of foreign investments by means of RECs stands to replicate the challenges that SADC is experiencing. Therefore the challenges identified with regard to the regulation of foreign investments by RECs in Chapters 3, 4 and 5 below apply to this approach. This also applies to the resolution of investor-state disputes at REC level.

Secondly, Mbengue and Schacherer suggest that the Pan African Investment Code (PAIC)[59] has the potential to bring an end to the conflicts caused by varying foreign investment regulatory instruments that exist throughout the continent.[60] Mbengue argues that Africa is not ready for a binding legal instrument such as a multilateral investment treaty, and thus according to him, a soft law instrument such as the PAIC is ideal.[61] The AU and its Member States support this view, as can be seen from the PAIC's Preamble. However, the same AU has now concluded the AfCFTA Agreement, with its own investment protocol. One can therefore conclude that the AU has moved beyond the

57 Mbengue and Schacherer 2017 (18) Journal of World Investment and Trade 414 at 416-419.

58 See also Ngobeni and Fagbayibo 2015 (19) Law, Democracy and Development 175 at 182-185.

59 *Pan African Investment Code* (PAIC) https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf (Date of use: 15 October 2017).

60 Mbengue and Schacherer 2017 (18) Journal of World Investment and Trade 414 at 446.

61 Mbengue MM "Africa and the Reform of the International Investment Regime: An Introduction" 2017 (18) Journal of World Investment and Trade 371-378 at 376.

PAIC. It is difficult to see how the PAIC can bring uniformity in the regulation of foreign investments in Africa, when it is only a guiding instrument that has no binding legal effect.[62] Strangely, Mbengue and Schacherer also admit this fact.[63] Without being a binding instrument, the PAIC cannot have the effect of harmonising the regulation of foreign investments in Africa.

Furthermore, in order for the PAIC to have the desired effect, it relies on Member States to adopt its contents when they conclude BITs. However, there is no proof that AU Member States will sign BITs that follow the PAIC in numbers that are high enough to accelerate and spread the recommendations of the PAIC. Presently, there are only 159 intra-Africa BITs, out of 881 BITs entered into by African states.[64] Therefore African states enter into more BITs with other states than they do among themselves. Furthermore, it cannot be ignored that states such as South Africa are moving away from the conclusion of BITs.[65]

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62 Article 2 PAIC; Preamble PAIC (last sentence). For a discussion of the challenges of using soft law instruments, see Paez 2017 (18) Journal of World Investment and Trade 379 at 400-402.

63 Mbengue and Schacherer 2017 (18) Journal of World Investment and Trade 414 at 420, 446.

64 Mbengue and Schacherer 2017 (18) Journal of World Investment and Trade 414 at 416.

65 See General Notice 961 of 209, Government Gazette 32386 of 7 July 2009; Department of Trade and Industry (Republic of South Africa) (June 2009) "Bilateral Investment Policy Review Framework Review, Government Position Paper" https://archive.opengazettes.org.za/archive/ZA/2009/government-gazette-ZA-vol-529-no-32386-dated-2009-07-07.pdf (Date of use: 18 January 2018); Department of Trade and Industry (South Africa) (February 2011) "Policy Statement: The South African Government's Approach to Future International Investment Treaties; Department of Trade and Industry (South Africa) (February 2011): "A review Framework for cross-border direct investment in South Africa, Discussion Document" http://www.treasury.gov.za/documents/national%20budget/2011/A%20review%20framework%20for%20cross-border%20direct%20investment%20in%20South%20Africa.pdf (Date of use: 18 January 2018)

In addition to the above, the PAIC cannot foster uniformity in BIT practice in Africa as intended, since it encourages diverse practices rather than uniformity with regard to investor-state dispute settlement. For example, the PAIC allows Member States to resolve investor-state disputes as they see fit, rather in a uniform and consistent way.[66] The consistency it promotes is in fact diversity, not harmonisation or uniformity. Furthermore, the PAIC provides that disputes under investment agreements shall be resolved under the terms provided in such agreements.[67] The PAIC also provides that ISDS in the form of arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules[68] may only take place if a host state agrees to an investor's request to commence it, and in line with its domestic laws and policies.[69] This situation is a compromise position that reflects the need for ISDS by some Member States, while regions such as SADC do not want ISDS.[70]

In recognition of the necessity for such compromise in SADC, Ngobeni and Fagbayibo proposed that the 2016 Annex 1 provide that the SADC Member States may delay consent to ISDS until after an investor-state dispute arises.[71] This is similar to the position adopted by the PAIC as shown above.

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66 Article 42(1) PAIC.

67 Article 42(1) PAIC.

68 United Nations Conference on Trade and Development "Arbitration Rules" (United Nations New York 2013) www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf (Date of use: 15 November 2017).

69 Article 42(1) PAIC; Mbengue and Schacherer 2017 (18) Journal of World Investment and Trade 414 at 444.

70 Mbengue and Schacherer 2017 (18) Journal of World Investment and Trade 414 at 443-444.

71 Ngobeni and Fagbayibo 2015 (19) Law, Democracy and Development 175 at 189.

The overall result is that even if AU Member States widely adopted the PAIC, this will not lead to uniformity with regard to the regulation of the resolution of investor-state disputes. The PAIC is therefore not an ideal instrument for the creation of a harmonised, Africa-wide regime for the regulation of foreign investments. It is incapable of harmonising the regulation of foreign investments in Africa, and will in practice be overtaken by the upcoming AfCFTA investment protocol.

The third view, proposed by Paez, is that foreign investments in Africa should be regulated by means of an African Continental Investment Area (ACIA) treaty. Paez correctly opines that requiring the Member States to comply with soft law (such as the PAIC) adds to the mixture of conflicting instruments and further complicates the situation.[72] Paez therefore proposes that an ACIA treaty is the ideal solution to the problem.[73] The ACIA would comprise of sectoral agreements dealing with areas such as infrastructure, energy, agriculture, and industry.[74] Furthermore, Paez proposes that investor-state disputes should be referred to the ACJ&HR.[75] Paez's position is thus the total opposite of Mbengue and Schacharer's proposal.

Paez's proposals resonate with those recommended in Chapter 6 of this study, to the extent that it proposes that foreign investments be regulated by a continental treaty. Indeed, this is the direction being adopted by the AfCFTA, which will have an investment protocol as indicated above. However, Paez does not provide details motivating the proposal, nor how the proposal can be implemented. Therefore, it is difficult to analyse

72 Paez 2017 (18) Journal of World Investment and Trade 379 at 402.
73 Paez 2017 (18) Journal of World Investment and Trade 379 at 403-407.
74 Paez 2017 (18) Journal of World Investment and Trade 379 at 406.
75 Paez 2017 (18) Journal of World Investment and Trade 379 at 404-405.

the proposal further. This study takes this issue further with the discussions made in Chapter 5, and proposals made in Chapter 6.

With regard to the mechanism and forum for the resolution of investor-state disputes, there has as stated above been a dearth of literature. This is hardly surprising, since SADC only commenced the regulation foreign investments by means of Annex 1 during 2010. Furthermore, the SADC Tribunal functioned from August 2005 to August 2010,[76] and it only delivered one significant judgment in *Mike Campbell v Zimbabwe.*[77] Most scholars have focused their commentary on the suspension of the SADC Tribunal, and the amendment of the SADC Tribunal Protocol to deny natural and legal persons access to the SADC Tribunal.[78]

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76 http://www.sadc.int/about-sadc/sadc-institutions/tribun/ (Date of use: 11 January 2018).

77 *Mike Campbell Pvt Ltd and 78 Others v Republic of Zimbabwe* (2/2007) (2008) SADCT 2 (28 November 2008).

78 See for example Banda F "The Constitution of Zimbabwe 2013 – Constitutional Curate's Egg" 2014 The International Survey of Family Law 491-506; Beukes M "Zimbabwe in the Dock: the Southern Africa Development Community (SADC) Tribunal's First Decision" 2008 (33) South African Yearbook of international Law 228-243; Cohen DF "A President, an International Tribunal and a Band of Farmers Walk into a Constitutional Court - The Last Laugh: Mike Campbell v. the Government of the Republic of Zimbabwe" 2014 (28) Emory International Law Review 29-42; De Wet E "The Case of Government of the Republic of Zimbabwe v Louis Karel Fick: A First Step towards Developing a Doctrine on the Status of International Judgments within the Domestic Legal Order" 2014 (17) Potchefstroom Electronic Law Journal 553-565; Du Plessis M and Forere M "Enforcing the SADC Tribunal's Decisions in South Africa: Immunity" 2010 (35) South African Yearbook of International Law 265-269; Ebobrah ST and Nkhata MJ "Is the SADC Tribunal under Judicial Siege in Zimbabwe – reflections on Etheredge v Minister of State for National Security Responsible for lands, Land Reform and Resettlement and Another" 2010 (43) Comparative and International Law Journal of Southern Africa 81-92; Hemel D and Schalkwyk A "Tyranny on Trial: Regional Courts Crack down on Mugabe's Land Reform" 2010 (35) Yale Journal of International Law 517-524; Mkandawire MCC "The SADC Tribunal Perspective on enforcement of Judgments: State Support and Cooperation" 2010 (36) Commonwealth Law Bulletin 567- 574; Moyo A "Defending Human Rights and the Rule of Law by the SADC Tribunal: Campbell and beyond" 2009 (9) African Human Rights Law Journal 590-614; Naldi GJ "Mike Campbell (Pvt) Ltd et al v the Republic of Zimbabwe: Zimbabwe's Land Reform Programme Held in Breach of the SADC Treaty" 2009 (53) Journal of African Law 305-320; Ndlovu L "Following the NAFTA

Phooko calls for the amendment of the SADC Tribunal Protocol, with a view to again grant natural and legal persons access to the SADC Tribunal.[79] This proposal would be easy to support, if one focused on SADC in isolation from the formation of the AEC, AfCFTA, and the T-FTA. However, the view adopted in this study is that the use of sub-regional courts as a forum for investor-state disputes will lead to forum shopping, and is not efficient or cost-effective, in view of the resource limitations that face RECs in Africa.[80]

In other words, the revitalisation of the SADC Tribunal would be good for foreign investors, if SADC was a closed system, if other RECs also had similar courts, and if all the sub-regional courts were equally efficient. At present, there are 3 sub-regional courts in the T-FTA, namely the COMESA[81] Court of Justice (CCJ),[82] the East African Court of

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Star: SADC Land Reform and Investment Protection after the Campbell Litigation" 2011 (15) Law, Democracy and Development 59-89; Ndlovu PN "Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal" 2011 (1) SADC Law Journal 63-79; Phooko MR "No Longer in Suspense - Clarifying the Human Rights Jurisdiction of SADC Tribunal" 2015 (18) Potchefstroom Electronic Law Journal 531- 568; Phooko MR "Legal Status of International Law in South Africa's Municipal Law: *Government of the Republic of Zimbabwe v. Fick and Others* (657/11)[2012] ZASCA 122" 2014 (22) African Journal of International and Comparative Law 399-419; Scholtz W and Ferreira G "Much Ado About Nothing? The SADC Tribunal's Quest for the Rule of Law Pursuant to Regional Integration" 2011 (71) *Zao RV* 331-358; Swart M "Extending the Life of the SADC Tribunal" 2013 (38) South African Yearbook of International Law 253-262.

79 Phooko MR *The SADC Tribunal: Its Jurisdiction, the Enforcement of its Judgments and the Sovereignty of its Member States* (LLD Thesis UNISA 2016) at para 6.2.1.

80 See the discussion in this regard in Chapter 5 below.

81 The Common Market for Southern Africa (COMESA) was formed in terms of the *Treaty Establishing the Common Market for Southern Africa* (date of signature 05 November 1993, in force 08 December 1994) (COMESA Treaty) http://investmentpolicyhub.unctad.org/Download/TreatyFile/2422 (Date of use: 15 October 2017)

82 http://comesacourt.org/ (Date of use: 11 January 2018).

Justice (EACJ)[83] and the SADC Tribunal.[84] The caseload and resources for the efficient and full-time operation of CCJ, EACJ and SADC Tribunal are non-existent. Furthermore, the fact that these sub-regional courts do not have the same level of resources means that they will not have the same level of efficiency. This issue is discussed in detail in Chapter 5 below.

It is against this background that this study aims to fill the gaps identified in the literature review, and to answer the research questions posed above. In so doing, the study aims to contribute to the body of literature on the subject matter by means of the recommendations made in Chapter 6.

1.5 METHODOLOGY

The methodology applied in this study is a desktop literature review. It entails an analysis of the investment laws of SADC Member States, Annex 1, selected treaties, BITs, Model Bilateral Treaty Templates and TIPs, decisions of national and international courts, ISDS tribunals, international documents, and academic writings.

1.6 LIMITATIONS

The scope of this study is by design very wide, as it covers all SADC Member States except the Union of Comores, which joined SADC during 2017 towards the end of this study. It is not feasible to conduct an in-depth analysis of all the laws that regulate

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83 http://eacj.org/ (Date of use: 11 January 2018). The EACJ is the judicial organ of the East African Community (EAC), which was formed in terms of the *Treaty Establishing the East African Community* (date of signature 30 November 1999, in force 07 July 2000) (EAC Treaty) http://investmentpolicyhub.unctad.org/Download/TreatyFile/2487 (Date of use: 15 October 2017).

84 The CCJ and EACJ are discussed in Chapter 5 below.

foreign investments in all sectors of SADC Member States. This study therefore analyses the 2006 and 2016 Annex 1's, as well as selected laws that regulate foreign investors in general sectors only, so as to gauge the general level of the security of foreign investments in SADC. It is noteworthy that investors can, and do by-pass the Member State laws discussed herein, by accessing applicable BITs, TIPs or investment contracts in order to litigate or arbitrate against host states. Therefore, this study analyses risks to investors who are not such instruments.

This study was written over several years. Therefore, ISDS statistics, case law, legislation and events are up to date at the different timeframes indicated in the relevant references. The reader is advised to follow the appropriate sources provided herein for updated information. The Trade Law Centre ((Tralac), website https://www.tralac.org/) provides useful updates regarding the signature, ratification and further negotiation of protocols to the AfCFTA and T-FTA. Other websites and organisations cited herein also provide updated information with regard to issues they deal with.

1.7 CHAPTER OUTLINE

This study is comprised of six chapters, which can be summarised as follows:

Chapter 1 introduces the problem statement, research questions, research objectives, literature review, methodology and limitations of this study.

Chapter 2 introduces the concepts that underlie this study, namely state responsibility, expropriation, investment, and investor-state dispute resolution methods.

Chapter 3 discusses the regulation of foreign investments at SADC level in terms of the 2006 and 2016 Annex 1. The chapter analyses selected provisions thereof insofar as they affect the security of foreign investments in SADC. In the analysis, the 2016 Annex 1 is compared with the SADC Model BIT, as well as TIPs from other selected jurisdictions.

Chapter 4 analyses the remedies that an investor may have in terms of the selected investment laws of each SADC Member State, in the event of the expropriation of an investment.

Chapter 5 is a comparative discussion that shows how Brazil, the EU, and India have dealt with the challenges arising from ISDS. It indicates the lessons that SADC can learn from these jurisdictions, as well as SADC's options regarding the future regulation of foreign investments, and the resolution of investor-state disputes.

Chapter 6 provides a summary of findings made by the study, and makes normative recommendations regarding the future regulation of foreign investments in SADC, as well as with regard to the forum to which investor-state disputes must be referred.

CHAPTER 2

THE ORIGIN AND SETTLEMENT OF INVESTMENT DISPUTES: A THEORETICAL FRAMEWORK

2.1 INTRODUCTION

This chapter introduces the concepts that form the pillars of this study, namely state responsibility, expropriation, an investment, and investor-state dispute resolution forums and mechanisms. It lays the foundation for the fulfillment of the first three objectives of this study.[85]

The discussion of state responsibility outlines the basis on which a host state may be liable for damage or loss suffered by an investor or an investment, such as in the event of expropriation of an investment. The discussion shows how the duty of host states to honour treaties, contracts and the laws of a host state create the international responsibility of a host state. Most important is that the duty of host states to honour treaties and contracts has given immense power to BITs, TIPs, and investment contracts, which in turn have provided investors with the right to commence ISDS cases and litigation against host states. The takeaway from this section is that investors have a wide and deep arsenal of ammunition that they can, and they do use against host states.

The discussion of expropriation lays the basis for the discussion that is undertaken in Chapter 4, where the remedies available to an investor in the event of expropriation of an investment in terms of the laws of SADC Member States are discussed. This

[85] See Objectives 1.3.1 – 1.3.3 in Chapter 1 above.

discussion, coupled with those undertaken in Chapters 3 and 4, enables conclusions to be drawn regarding the effective security of foreign investments in SADC in the event of the alleged expropriation of an investment.

The discussion of the definition of an investment is equally important, because an investment is the subject matter of an investor-state dispute. This section analyses the definition of an investment as applied by ICSID arbitral tribunals. The discussion lays the basis for the discussion of an investment that is undertaken in Chapters 3 and 4. It shows that in the event of non-ICSID arbitration being brought against a SADC Member State, the criteria that an investment must meet as outlined in *Salini* may apply to the definition of an investment, with the result that some assets that are defined as investments by the 2006 Annex 1 or the laws of SADC Member States may not qualify as investments after all.

The discussion of investor-state dispute resolution forums and mechanisms (or methods) is in line with the fourth objective of this study.[86] It lays the basis for the discussions of investor-state dispute resolution methods that follow in Chapters 3, 4 and 5, as well as the recommendations that are made in this regard in Chapter 6. This discussion outlines the pros and cons of the different mechanisms and the forums for the resolution of investor-state disputes, namely alternative dispute resolution (ADR), arbitration and litigation. The discussion concludes that all the investor-state dispute resolution methods are important, albeit to different extents.

[86] See Objectives 1.3.4 in Chapter 1 above.

2.2 STATE RESPONSIBILITY

2.2.1 Introduction

The area of state responsibility consists of the rules of international law that are used to determine the general conditions under which a state can be held responsible for wrongful acts or omissions, as well as the legal consequences of the breach.[87] These rules are known as the secondary rules of international law, in contrast to the primary rules of international law that set out the contents of obligations that states must adhere to.[88] The rules of state responsibility are used among others to determine the circumstances under which an act of state may be wrongful, the attribution of a wrongful act to a state, as well as the consequences of wrongful acts.

A state may incur international responsibility as a result of one or more internationally wrongful acts that are attributable to it. The Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) describe the sources of state responsibility as follows:

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87 United Nations (International Law Commission) "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001" (adopted on 31 May 2001, 3 August 2001, 6-9 August 2001) UN Doc A/56/10 http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017).
For a discussion of ARSIWA and state responsibility see Anton D, Mathew P and Morgan W *International Law Cases and Materials* 1st ed (Oxford South Melbourne Victoria 2005) at 259-275; Crawford J *State Responsibility: The General Part* Reprint (Cambridge University Press Cambridge 2014); Crawford J "Investment Arbitration and the ILC Articles on State Responsibility" in Reinisch A (ed) *Classics in International Investment Law Volume II* (Edward Elgar Cheltenham 2014) at 3-11; Dixon MJ *Cases and Materials on international law* 5th ed (Oxford University Press Oxford 2011) at 394-441; Wittich S "State Responsibility" in Bungenberg M *et al* (eds) *International Investment Law: A Handbook (*Nomos Baden-Baden 2015) at 23-45.

88 United Nations (International Law Commission) "ARSIWA" at para 1 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017).

> State responsibility can arise from breaches of bi-lateral obligations or of obligations owed to some States or to the international community as a whole. It can involve relatively minor infringements as well as the most serious breaches of obligations under peremptory norms of general international law.[89]

In customary international law, a state is responsible to observe its obligations under a treaty, contract, or international law.[90] On this basis, a state may incur international responsibility towards an investor[91] through the commission of one or more of the following acts, namely:

(a) Breach of a rule of customary international law by a host state;

(b) Breach of a treaty obligation by a host state;

(c) Breach of an investment contract between a host state and a foreign investor; and/or

(d) Breach or the enactment of legislation by a host state.

These breaches will now be briefly discussed, so as to indicate their connection to the origins of investor-state disputes and the responsibility of host states.

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89 United Nations (International Law Commission) "ARSIWA" at 55 para 6. http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017).

90 Dugard CJ *International Law: A South African Perspective* 4th ed (Juta Cape Town 2011) at 269. Sornarajah M *The International Law on Foreign Investment* 3rd ed (Cambridge University Press Cambridge 2010) at 136.

91 A claim against a host state can be brought by an investor (e.g. a shareholder) or an investment (i.e. the legal entity that holds an investment). Therefore, reference to a claim that can be brought by investor includes a claim that can be brought by an Investment, vice versa. Whether an entity qualifies to be an investor or an investment differs from state to state, depends on the legal instrument that regulates the relevant foreign investment.

2.2.2 Breach of customary international law

As indicated above, a state must observe its obligations under a treaty, contract, or international law, failing which it may be responsible for the consequences thereof.[92] Articles 1, 2, 3 and 12 of ARSIWA provide the basis on which a state may be held accountable for the consequences of internationally wrongful acts.[93] Whether an act is wrongful in terms of international law or not is to be determined in terms of international law, and not the internal law of the host state.[94]

ARSIWA provides that an act must have two elements in order to be an internationally wrongful act.[95] Firstly, the act must be attributable to the accused state.[96] Secondly, it must be a breach of an international obligation.[97] The four bases of these obligations are indicated in the preceding section.

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92 United Nations (International Law Commission) "ARSIWA" Article 1 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017). ARSIWA Commentary at 32-34; *Biwater Gauff* at para 773-775.

93 United Nations (International Law Commission) "ARSIWA" http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); Crawford (2014) *State Responsibility: The General Part* at 93.

94 United Nations (International Law Commission) "ARSIWA" Articles 3, 32 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); ARSIWA Commentary at 36 para 1, 38 para 9; Crawford (2014) *State Responsibility: The General Part* at 101; Article 27 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 1969 (8) ILM 679 (adopted 23 May 1969, entered into force 27 January 1980) https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf (Date of use: 31 October 2017); *Mike Campbell* at 67.

95 United Nations (International Law Commission) "ARSIWA" Article 2 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); ARSIWA Commentary at 34 para 1; 34-36; Anton, Mathew and Morgan *International Law Cases and Materials* at 261-262; Aust A *Handbook of International Law* 2nd ed (Cambridge University Press Cambridge UK 2010) at 410; Rothwell DR *et al International Law: Cases and Materials with Australian Perspectives* 2nd ed (Cambridge University Press Port Melbourne Victoria 2014) at 504-454.

96 United Nations (International Law Commission) "ARSIWA" Articles 2(a) http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); ARSIWA Commentary at 35 paras 3, 6.

97 United Nations (International Law Commission) "ARSIWA" Articles 2(b)

Attribution is the process by which international law establishes whether or not the conduct of a natural person or other entity can be considered an act of a state.[98] If an act is not attributable to a state, then an inquiry as to the responsibility of the state for the act must end.[99] Two of the rules of attribution of the conduct of organs and entities of a state will now be briefly discussed in order to indicate their operation.[100]

Firstly, Article 4 of ARSIWA provides that the conduct of an organ of a state is attributable to the state.[101] International law, not the internal law of a host state,

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http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017);
ARSIWA Commentary at 35 para 5-8. For a discussion of the attribution of conduct to a state, see ARSIWA Commentary at 43-54; Anton, Mathew and Morgan *International Law Cases and Materials* at 263-266; Aust *Handbook of International Law* at 410-414; Bishop RD, Crawford J and Reisman W (eds*) Foreign Investment Disputes* 2nd ed (Kluwer Law International Alphen aan den Rijn Netherlands 2014) at 548-576; Crawford (2014) *State Responsibility: The General Part* at 113-211; Henkin L *et al International Law: cases and materials* 3rd ed (West Publishing Company St. Paul Minnesota 1993) at 546-550; Rothwell *et al International Law: Cases and Materials with Australian Perspectives* at 455-464; *Bayindir* at para 257-261; *Bosh International, Plc. v Ukraine* (ICSID Case No. ARB/08/11) Award of 25 October 2012 at para 141–49; *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/02) Award of 31 October 2012 at para 401-407; *Eastern Credit Limited, Inc and A.S Baltoil v Republic of Estonia (*ICSID Case No. ARB/99/2) Award of 25 June 2001 at para 327; *Helnan International Hotels A/S v The Arab Republic of Egypt* (ICSID Case No. ARB/05/19) Decision on Jurisdiction of 17 October 2006 at para 29 and 95; *Hulley Enterprises Limited* (Cyprus) *v The Russian Federation* (PCA Case No. AA 226) Final Award of 14 July 2014 at para 1465-1480; *Ioannis Kardassopoulos and Ron Fuchs v The Republic of Georgia* (ICSID Case No. ARB 05/18 and 07/15) Award of 3 March 2010 at para 189-194, 275, 280; *Jan de Nul N.V and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No ARB/04/13) Award of 6 November 2008 at para 155-162; *Tulip Real Estate Investment and Development Netherlands B.V. v Republic of Turkey* (ICSID Case No. ARB/11/28) Award of 10 March 2014 at para 276-328.

98 Crawford (2014) *State Responsibility: The General Part* at 113.

99 United Nations (International Law Commission) "ARSIWA" Commentary at 38, 39 para 9 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017).

100 Due to space constraints the attribution of acts in terms of Article 6-9 of ARSIWA will not be discussed here.

101 United Nations (International Law Commission) "ARSIWA" Commentary at 40-42

determines how acts of organs and agents can be attributed to a state.[102] The general rule in this regard is that the conduct of an organ of state may be attributable to a state, irrespective of the functions performed by the organ, the position occupied by the organ, and the character or nature of the organ as a part of the state or territorial unit.[103] This rule follows upon the principle that a state is viewed as a single unit that is comprised of all its organs.[104] For the purposes of attribution, it is irrelevant whether an organ acted in a governmental capacity (*ius imperii*) or in a commercial capacity.[105] Furthermore, a state is liable for the acts of its municipalities and provinces.[106]

Secondly, Article 5 of ARSIWA deals with the attribution of the acts of state entities that are authorised to exercise governmental authority and functions, such as state-owned entities, public agencies, semi-public entities, central banks, stock exchanges, privately-run prisons and the like.[107] A state entity must be authorised to exercise governmental authority by the internal law of a state, even if details regarding the exercise of the

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http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); *Bernhard Von Pezold and Others v Republic of Zimbabwe* (ICSID Case No.ARB/10/15) Award of 28 July 2015 at para 443.

102 United Nations (International Law Commission) "ARSIWA" Commentary at 38 para 4 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017).

103 United Nations (International Law Commission) "ARSIWA" Article 4(1) http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); Crawford (2014) *State Responsibility: The General Part* at 117.

104 United Nations (International Law Commission) "ARSIWA" Commentary at 40 para 5, 40(1)-42(13) http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); Crawford (2014) *State Responsibility: The General Part* at 117.

105 United Nations (International Law Commission) "ARSIWA" Commentary at 41 para 6 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017).

106 Crawford (2014) *State Responsibility: The General Part* at 123-124; Rothwell *et al International Law: Cases and Materials with Australian Perspectives* at 464.

107 Crawford (2014) *State Responsibility: The General Part* at 127-128; United Nations (International Law Commission) "ARSIWA" Article 8 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017) deals with the attribution of entities that do not have delegated authority.

authority are not stated.[108] The act(s) in question must have been performed by an entity in the exercise of the delegated governmental authority.[109]

The test with regard to whether a state entity falls within the ambit of Article 5 or not is a functional one.[110] Unlike with acts of organs of a state, the acts of a state entity are attributable to a state when the entity acted *ius imperii* only. For example, the tribunal in *Bosh* held that a state is responsible for a state-owned university's acts that are *ius imperii*, but not for its private or commercial activities.[111]

It is a necessary condition of state responsibility that a person must have suffered an injury to itself as a result of a wrongful act of a state.[112] Otherwise, in the absence of injury, there can be no cause for complaint. Article 31 of ARSIWA provides that injury includes any damage caused, whether the damage is material or moral.[113] Material damage means damage that can be assessed in financial terms, while moral damage includes pain and suffering, for example, the loss of loved ones.[114] However, damage is not a pre-requisite for a claim based on state responsibility, but injury is.[115] Nonetheless,

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108 Crawford (2014) *State Responsibility: The General Part* at 127; *EDF Services Limited v Romania* (ICSID Case No. ARB/05/13) Award of 8 October 2009 at para 191.

109 *EDF Services* at para 191,193.

110 *EDF Services* at para 193.

111 *Bosh* at para 175-176; See also *Emilio Agustin Maffezzini v The Kingdom of Spain* (ICSID Case No. ARB/97/7) Award of 9 November 2000, at para 52; *EDF Services* at para 195-198; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia* (Ad hoc UNCITRAL Tribunal) Award of 28 April 2011 at para 574-576, 592.

112 Henkin *et al International Law: Cases and Materials* at 553-558.

113 United Nations (International Law Commission) "ARSIWA" Commentary at 91 para 3 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); Crawford (2014) *State Responsibility: The General Part* at 485-491.

114 United Nations (International Law Commission) "ARSIWA" Commentary at 92 para 5 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017).

115 Crawford (2014) *State Responsibility: The General Part* at 485.

the nature of the damage suffered may affect the quantum and form of the reparation that can be obtained.[116]

It is necessary that there must be a connection between a wrongful act and the injury complained of. Thus an internationally wrongful act that is attributable to a state, and which is alleged to have caused injury, must be the proximate cause of the injury complained of.[117] ARSIWA connects an injury to a wrongful act by stating that a wrongful act must be the cause of the injury.[118] For example, the tribunal in *Biwater Gauff* applied this rule and declined to award compensation because there was no causal link between the expropriation that was found to have taken place, and the compensation claimed.[119] Also, in *Guinea v Democratic Republic of Congo*, the International Court of Justice (ICJ) held that the DRC could not be held responsible for the loss of Diallo's property, when it

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116 Crawford (2014) *State Responsibility: The General Part* at 486.

117 See for example *Factory at Chorzow (Merits)*, *Judgment No. 13, 1928, P.C.I.J., Series A, No. 17* at 30. For tribunal practice on this issue see example: *Achmea B.V. (Formerly known as Eureko B.V.) v The Slovak Republic* (PCA case No. 2008-13) Final Award of 7 December 2012 at para 320; *CME Czech Republic B.V. (The Netherlands) v The Czech Republic* (Ad hoc UNCITRAL Tribunal) Partial Award of 13 September 2001 at para 575-585, 602, 615; *Desert Line Projects* at para 282; *Gemplus S.A, SLP S.A, Gemplus Industrial S.A de C.V, Talsud S.A v The United Mexican States* (ICSID Case No. ARB (AF) 04/3 and ARB (AF) 04/04) Award of 16 June 2010 at para 11.8-11.16; *Hulley Enterprises Limited* at para 1770-1775; *Ioan Micula and Others v Romania* (ICSID Case No. ARB/05/20) Award of 11 December 2013 at para 1154*; Khan Resources Inc., Khan Resources B.V., CAUC Holding Company Ltd. v The Government of Mongolia (*PCA Case No. 2011-09) Award on Merits of 2 March 2015 at para 376-382; *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v Argentine Republic* (ICSID Case No. ARB/02/1) Decision on Liability of 3 October 2006 at para 256; *Swisslion DOO Skopje v The Former Yugoslav Republic of Macedonia* (CSID Case No ARB/09/16) Award of 6 July 2012 at para 350; *Yukos Universal Limited (Isle-of-Man Of Man) v The Russian Federation*, (PCA Case No. AA 227) Final Award of 18 July 2014 at para 1770-1775; *Veteran Petroleum Limited (Cyprus) v The Russian Federation (*PCA Case No. AA 228) Final Award of 18 July 2014 at para 1770-1775.

118 See United Nations (International Law Commission) "ARSIWA" Articles 31(1), 34 and 37(1) http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); ARSIWA Commentary at 91 para 1-14, 95 para 1, 96 para 6, 107 para 8.

119 *Biwater Gauff* at 239 para 805-807; *Ioan Micula* at para 922-924.

was not proven that the loss of the property was caused by the DRC's unlawful conduct.[120]

According to ARSIWA, causation is a necessary, but not sufficient factor. In addition to causation, the remoteness, directness or proximity of an injury may be relevant.[121] Thus if there is an intervening event, the causal link between the original act and the injury should not be too remote.[122] The test in this regard is whether an intervening event is so compelling that it interrupts the causal link, thus making the initial event too remote.[123]

The commission of an internationally wrongful act creates a new set of international relations or legal consequences.[124]

Firstly, a state comes under an international obligation to cease the conduct complained of.[125] Secondly, a state has a duty to make full reparation to the victim of its conduct.[126] Thirdly, an injured and non-injured state (if any) may invoke the responsibility of the

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120 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of The Congo), Compensation, Judgment, I.C.J Reports* 2012, p. 324 at 13 para 31.

121 United Nations (International Law Commission) "ARSIWA" Commentary at 93 para 10 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); *Ioan Micula* at para 924-927*; Yukos Universal Limited* at para 1770-1775.

122 United Nations (International Law Commission) "ARSIWA" Commentary at 93 para 10 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); *Ioan Micula* at para 925.

123 *Ioan Micula* at para 926-927.

124 United Nations (International Law Commission) "ARSIWA" Commentary at 33(3) http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); Aust *Handbook of International Law* at 417-418.

125 United Nations (International Law Commission) "ARSIWA" Article 30 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); ARSIWA Commentary at 88-91; Aust *Handbook of International Law* at 418.

126 United Nations (International Law Commission) "ARSIWA" Article 31(1) http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); ARSIWA Commentary at 91. The obligation to make reparation arises automatically and is not dependent on a demand by the injured state (ARSIWA Commentary at 91 para 5).

breaching state.[127] In appropriate cases, an affected state(s) can take countermeasures against the breaching state.[128] Fourth, when the conduct of a state is wrongful and therefore attracts international responsibility, such responsibility may be such that it is owed to all states, rather than to the wronged state only.[129] An obligation owed to all states is called an obligation *orga omnes*.[130] Finally, being part of the international community entails that every state has a legally enforceable interest in the protection of certain rights, as well as the upholding of certain obligations by itself and other states.[131]

2.2.3 Breach of treaty obligations

The Vienna Convention on the Law of Treaties defines a treaty as a written agreement concluded between states that is governed by international law.[132]. Aside from state laws, treaties are the main instruments that regulate foreign investments. As a result, they are also the main source of investor-state disputes. Historically, BITs and TIPs

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127 United Nations (International Law Commission) "ARSIWA" Article 43 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017) sets out the process to be observed when invoking the responsibility of a state pursuant to Articles 42 and 48 (see ARSIWA Commentary at 119-120). Article 44 provides for circumstances where the responsibility of a state may not be invoked (see ARSIWA Commentary at 120-121). Article 45 provides for circumstances where the responsibility of a state may not be invoked (ARSIWA Commentary at 121-123).

128 United Nations (International Law Commission) "ARSIWA" Articles 49-53 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); ARSIWA Commentary at 130-137; Aust *Handbook of International Law* at 425-428; Rothwell *et al International Law: Cases and Materials with Australian Perspectives* at 480-484.

129 United Nations (International Law Commission) "ARSIWA" Commentary at 33(4) http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017).

130 United Nations (International Law Commission) "ARSIWA" Commentary at 33(4) http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017).

131 United Nations (International Law Commission) "ARSIWA" Commentary at 33 para 4 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017).

132 Article 2(1) (a) Vienna Convention on the Law of Treaties. See also Anton, Mathew and Morgan *International Law Cases and Materials* at 276-388; Henkin *et al International Law: cases and materials at* 420-425; Dorr O and Schmalenbach K (eds) *Vienna Convention on the Law of Treaties: A Commentary* (Springer Heidelberg 2012) at 131-133; Fitzmaurice M and Elias O *Contemporary Issues In The Law of Treaties (*Eleven International Publishing Utrecht 2005) at 1-3, 7-25.

respectively contributed 60 percent and 29 percent of opened under the ICSID.[133] On an annualised basis, during 2017 BITs contributed 62 percent of new cases, while TIPs contributed 29 percent of new cases.[134] When non-ICSID cases are added, BITs and TIPs respectively contributed 80 and 20 percent of new cases opened during 2017.[135]

The first modern BIT was the Promotion and Protection of Investments Germany and Pakistan of 25 November 1959 (Germany-Pakistan BIT).[136] This BIT referred investor disputes to the ICJ or international arbitration, depending on the agreement of the

133 International Centre for Settlement of Investment Disputes "The ICSID Caseload Statistics", Issue 2017-2 (New York 2017) at 10 https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf (Date of use: 10 March 2018). For details of cases opened under various BITs and TIPs see http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia (Date of use: 30 March 2018).

134 International Centre for Settlement of Investment Disputes "The ICSID Caseload Statistics", Issue 2017-2 at 25 https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf (Date of use: 10 March 2018).

135 United Nations Conference on Trade and Development "International Investment Agreement Issues Note", Issue 3 at 3 http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf (Date of use: 30 March 2018).

136 English version is available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1387 (in force 28 April 1962) (Date of use 23 April 2018); Aust *Handbook of International Law* at 373. For a history of investment treaties see Salacuse JW "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries" in Beveridge F (ed) *Globalization and International Investment* (Ashgate Publishing Limited 2005) at 25-45; Salacuse JW and Sullivan NP "Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" 2005 (46) Harvard International Law Journal 67-130 at 73; Salacuse JW *The Law of Investment Treaties* (Oxford University Press Oxford 2010) at 78-125; Tietje C and F Baetens "The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership": Study prepared for Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, 26 June 2014 at para 10-39 http://media.leidenuniv.nl/legacy/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf (Date of use: 17 April 2018); Vandenvelde KJ "A Brief History of International Investment Agreements" 2005 (12) University of California Davis Journal of International Law and Policy 157-194.

parties.[137] After this BIT was concluded, the use of BITS grew gradually, such that at 1 April 2018 there were 2947 BITs, of which 2364 were in effect.[138] The number of TIPs was 379, of which 309 were in force.[139]

The Vienna Convention on the Law of Treaties provides that every treaty in force is binding upon the parties thereto, and that the parties must comply with their treaty obligations in good faith.[140] The basis of the obligation to honour treaties is the maxim *pacta sunt servanda.*[141] *Pacta sunt servanda* emanates from private law, and means that treaties must be honoured.[142] The maxim has been codified as Article 2(b) of ARSIWA.[143]

A state may not rely on its internal law to avoid compliance with a treaty.[144] This is an important pillar for the observance and existence of treaties because in its absence treaties could be easily avoided, given that a state would be able to rely on its internal law to avoid responsibility for breach of the treaty.[145] This rule enables international law

137 Article 11(2) Germany-Pakistan BIT.

138 http://investmentpolicyhub.unctad.org/IIA (Date of use: 1 April 2018).

139 http://investmentpolicyhub.unctad.org/IIA (Date of use: 1 April 2018).

140 Article 26; Henkin *et al International Law: cases and materials* at 463.

141 Fitzmaurice and Elias *Contemporary Issues In The Law of Treaties* at 3.

142 Dorr and Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* at 428-429.

143 United Nations (International Law Commission) "ARSIWA" Commentary at 35-36 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017).

144 Article 27 Vienna Convention on the Law of Treaties; Dorr and Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* at 453-473. This rule was codified as Article 32 of United Nations (International Law Commission) "ARISWA" http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017), see ARSIWA Commentary at 94 para 2-3. Article 27 is also a codification of international customary law (Dorr and Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* at 454; *Azurix Corp. v The Argentine* Republic (ICSID Case No. ARB/01/12) Decision on Annulment of 1 September 2009 at para 146).

145 Dorr and Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary*

to "turn a blind eye" to a state's internal law, thus rendering it irrelevant for the purpose of determining state responsibility.[146] Hence a provision such as that found in Zimbabwe to the effect that in the event of the expropriation of agricultural land, compensation shall only be paid for improvements but not for the land, is invalid under international law.[147]

A state may in the compliance with its internal law act in violation of a treaty, or it may, while acting in compliance with a treaty obligation, violate its internal law.[148] In the former case, the state's conduct will be an internationally wrongful act because as already stated, a state may not rely on its internal law to avoid compliance with its treaty obligations. A state may also not argue that its consent to be bound by a treaty is invalid by virtue of the fact that the consent was given contrary to its internal law, unless the granting of the consent was manifest, and it concerned a rule of its internal law of fundamental importance.[149]

The sum of the above is that breach of a treaty is an internationally wrongful act,[150] and it attracts the consequences outlined in Part Two of ARSIWA,[151] as well as in international customary law.[152] This consequence is the power behind BITs and TIPs, as it compels

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at 453.

146 Dorr and Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* at 460.

147 See the discussion relating to Zimbabwe in Chapter 4 below.

148 *Case Concerning Electtronica Sicula S.p.A (USA v Italy)* I.C.J. Reports 1989 *(ELSI),* at 40 para 73.

149 Article 46 Vienna Convention; Dorr and Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* at 776-804.

150 United Nations (International Law Commission) "ARSIWA" Commentary at 54(2), 55(3) http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); *ELSI* at 70 para 136; *Factory at Chorzow (Merits)*, *Judgment No. 7, 1926, P.C.I.J., Series A, No. 7* of 25 May 1926 at 34; *Chorzow* (*Merits*) Decision of 13 September 1928 at 46-48.

151 United Nations (International Law Commission) "ARSIWA" Articles 28-41 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017).

152 Article 60(2) (b) of the Vienna Convention. A party affected by material breach can

host states to honour their obligations in terms thereof.[153] In this regard, it is noteworthy that recent arbitral awards in the amounts of USD 39 Billion,[154] USD 8 Billion,[155] USD 1.8 Billion,[156] and USD 1.7 Billion,[157] were based on breach of investment treaty.[158] In SADC,

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suspend its obligations in terms of A treaty, See Fitzmaurice and Elias *Contemporary Issues In The Law of Treaties at* 164-171.

153 For a breakdown of ISDS cases per BIT or TIP, see http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia (Date of use: 1 April 2018).

154 *Hulley Enterprises Limited* at para 1888. The awards were annulled by The Hague District Court under (Chamber for Commercial Affairs) under case number C/09/477160/HA ZA 15-1, Judgment of 20 April 2016 https://www.italaw.com/sites/default/files/case-documents/italaw7255.pdf (Date of use: 10 April 2018). This decision is pending appeal before The Hague Court of Appeal under case number Case No. 200.197.079/01 (see Russia's defence at https://www.italaw.com/sites/default/files/case-documents/italaw9633.pdf) (Date of use: 10 June 2018). The basis of the annulment was that there was no valid consent to arbitration by the Russian Federation (Decision of the District Court at para 5.95 - 5.97).

155 *Veteran Petroleum Limited* at para 1888. Russia was successful in setting aside the award, what was said in the preceding note applies in this case as well.

156 *Yukos Universal Limited* at para 1888. Russia was successful in setting aside the award, what was said in the preceding note applies in this case as well.

157 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador* (ICSID Case No. ARB/06/11) Award at para 876.

158 See also the following cases where the host states were held liable for breach of treaty: *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary* (ICSID Case No. ARB03/16) Award of the Tribunal of 2 October 2006 at para 483, 499; *Alpha Projektholding GMBH v Ukraine* (ICSID Case No. ARB/07/16) Award of 8 November 2010 at para 413-416; *American Manufacturing & Trading Inc v Republic of Zaire* (ICSID Case No. ARB/93/1) Award of 10 February 1997 at para 6.01-6.24; *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan* (ICSID Case No. ARB/08/02) Award of 18 May 2010 para 121, 129; *Bernhard Hendricus Funekkotter v Republic of Zimbabwe* (ICSID Case No. ARB/05/6) Award of 24 July 2008 at 32 para 107; *Biwater Gauff* at para 814(b); *Cargill Incorporated v United Mexican States* (ICSID Case No. ARB (AF)/05/02) Award of 18 September 2009 at para 554 – 561; *CMS Gas Transmission Company v The Argentine Republic* (ICSID Case No, ARB/01/8) Decision on Objections to Jurisdiction of 17 July 2003 at para 281, 303; *Desert Line Projects* at para 193-194, para 3 of the tribunal's order; *Duke Energy* at para 325, 361, 364, para 2 of tribunal's order; *Eureko* at para 234, 243, 260, 262; *Gemplus* at para 7-76, 8-25- 8-27; *Ioannis Kardassopoulos* at para 541-452; *Metalclad Corporation v United Mexican States* (ICSID Case No. ARB (AF)/97/1) Award of 30 August 2000 at para 112; *Middle East Cement Shipping and Handling Co. S.A v Arab Republic of Egypt* (ICSID Case No. ARB/99/6) Award of 12 April 2002 at para 144; *OKO Pankki OYJ, VTB Bank (Deutschland) AG and Sampo Bank Plc. v The Republic of Estonia* (ICSID Case

the highest known arbitral award of USD 194 Million based on breach of treaty was made in *Bernhard Von Pezold*.[159]

2.2.4 Breach of contract

A state may enter into an investment agreement with an investor[160] when the latter envisages making an investment.[161] A contract and rights relating thereto are assets that can be expropriated.[162] Investment contracts are binding on a state because of the maxim *pacta sunt servanda*.[163] Like BITs, TIPs and investment laws of host states, investment contracts may provide for an investor to refer an investor-state dispute to ISDS. As a result, 16.8 percent of ICSID arbitration cases opened up to 30 June 2017

No. ARB04/6) Award of 19 November 2009 at para 283, 376; *Tecnicas Medioambienta Tecmed S.A v The United Mexican States* (ICSID Case No. ARB (AF)/00/2) of 29 May 2003 *(Tecmed)* at para 201; *Wena Hotels Limited v Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Award of 8 December 2000 at para 131 and 134.

159 *Bernhard Von Pezold* at para 521. The annulment of this award was pending at the time of writing.

160 Or a state may contract with an investment (i.e. the entity that will hold an investment), depending on the circumstances and provisions of the applicable regulatory instrument.

161 For a discussion of international investment contracts see Dumberry P "International Investment Contracts" in Gazzini T and Brabandere E (eds) *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff Publishers Leiden 2012) at 215-243; Von Walter A "Investor-State Contracts in the Context of International Investment Law" in Bungenberg M *et al* (eds) *International Investment Law: A Handbook* at 80-92; Salacuse *The Law of Investment Treaties* at 60-62.

162 See for example *Azurix* at 112 para 314; *Biwater Gauff* at para 453; *Emmis International Holding, B.V and Emmis Radio Operating, B.V and Mem Maygar Electronic Media Kereskedelmi Es Szolgaltato KFT. V Hungary* (ICSID Case No. ARB/12/2) Award of 16 April 2014 at para 163, 221; *White Industries Australia v The Republic of India* (Ad hoc UNCITRAL Tribunal) Final Award of 30 November 2011; *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (ICSID Case No. ARB/84/3) Award 20 May 1992 para 164-165; *Vivendi* award of 2010 at para 7.5.4, 7.5.5 – 7.5.34; Schreuer C (2005) "The Concept of Expropriation under the ECT and other Investment Protection Treaties" at para 65 http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf (Date of use: 20 October 2017).

163 *Desert Line Projects* at para157. This principle is in line with Article 26 of the Vienna Convention on the Law of Treaties.

were based on consent to ISDS provided in investment contracts.[164] It is also noteworthy that the arbitral award of USD 935 million made in *Al-Khafira v Libya* was based on breach of contract.[165]

However, unlike with breach of treaty, breach of an investment contract by a state does not automatically amount to an internationally wrongful act.[166] Something additional is required to elevate breach of contract to the international plane, as explained below. An investor faced with a breach of a contract by a host state must first exhaust local remedies, if any are provided for in a contract or the internal law of the host state.[167] Only if the alleged breach of contract is followed by the denial of justice in the host state, if the breach of contract amounts to breach of a treaty, if the contract is protected by an umbrella clause in a treaty,[168] or if a state acted in its *jus imperii* capacity when it

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164 International Centre for Settlement of Investment Disputes "The ICSID Caseload Statistics", Issue 2017-2 at 10 https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf (Date of use: 10 March 2018).

165 *Mohamed Abdulmohsen Al-Kharafi and Sons Co. Kuwaiti Company v The Government of The State of Libya and Others (*PCA Case No. 2011-09) Award on Merits of 2 March 2015. An earlier decision of 2004 that was also based on breach of contract by a state is *Ceskoslovenska Obchodni Banka, A.S. v Slovak Republic* (ICSID Case No. ARB/97/4) Decision of the Tribunal on Objections to Jurisdiction of 24 May 1999 *(CSOB).*

166 *Abaclat and Others (Case Formerly known as Giovanna A Beccara And Others) v The Argentine Republic* (ICSID Case No. ARB/07/05) Decision on Jurisdiction and Admissibility of 4 August 2011 para 316; *Biwater Gauff* at para 457; *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (ICSID Case No. ARB/02/6) Decision on Jurisdiction of 29 January 2004 at para 161; United Nations (International Law Commission) "ARSIWA" Commentary at 41 para 6 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017).

167 The decision in *Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Annulment of 10 August 2010 at para 96 entails that a dispute regarding breach of contract must first be resolved according to the internal law of the host state.

168 An umbrella clause is a treaty provision in terms whereof state parties agree to honour their contractual obligations towards investors, default of which renders breach of a contract to be breach of treaty. For a definition, history and application of an umbrella clause see Sinclair AC "The Origins of the Umbrella Clause in the International Law of Investment Protection" in Reinisch (ed) *Classics in International Investment Law* Vol I

committed the breach,[169] will the breach create an international responsibility for a host state.[170] In such an event, ICSID or other international arbitration, or other remedies such as diplomatic protection can in qualifying instances be brought.[171]

The same facts that found an alleged breach of contract may also found a claim for breach of a treaty.[172] Whether breach of a contract also amounts to a breach of treaty or not depends on the facts of each case. As the tribunal in *Vivendi v Argentine* held, a state may commit a breach of the treaty without breaching a contract, and *vice versa*.[173] The fact that an alleged breach is the result of a state having exercised a contractual right or remedy does not exclude the fact that such conduct could be a breach of a treaty or an expropriation.[174] Furthermore, where as a result of an alleged breach an investor

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(Edward Elgar Cheltenham 2014) at 619-642; Salacuse *The Law of Investment Treaties* at 271-283. The first umbrella clause was contained in the Germany-Pakistan BIT of 1959 (Sinclair "The Origins of the Umbrella Clause in the International Law of Investment Protection" at 641). The first tribunal to consider an umbrella clause was *Fedax N.V. v The Republic of Venezuela* (ICSID Case No. ARB/96/3) Decision of the Tribunal on Objections to Jurisdiction of 11 July 1997.

169 Schreuer "The Concept of Expropriation under the ECT and other Investment Protection Treaties" at 24 para 65-77 http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf (Date of use: 20 October 2017).

170 United Nations (International Law Commission) "ARSIWA Commentary at 41(6) http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017). For examples of denial of justice see United Nations Conference on Trade and Development "Fair and Equitable Treatment", UNCTAD Series on Issues in International Investment Agreements II (United Nations New York and Geneva 2012) at 80-81 http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017). In the SADC context see *Mike Campbell* at 26-41. In *Biwater Gauff* the tribunal held that denial of justice need not be proved before the breach of contract can amount to expropriation. The tribunal said that it must first be determined whether a state acted as an ordinary party to a contract, or whether it used its powers as a sovereign (at para 458).

171 Booysen H *Principles of International Trade Law As A Monistic System* 1st ed Revised Reprint (Interlegal Monument Park South Africa 2007) at 506.

172 *Bandiyir* at para 148.

173 *Vivendi* (Decision on Annulment) at para 95-96.

174 *Bandiyir at* para 157. In this case Pakistan terminated the contract in question, and used

has a right of recourse against a host state in terms of both a treaty and a contract, it may pursue its rights in terms of the treaty, in addition to those in terms of a contract.[175] Even when an investor has elected to pursue its remedies in terms of a contract, it still has the right to pursue those in terms of the treaty, and can abandon the former.[176] Where it is alleged that breach of a contract is also a breach of a treaty, it must be shown that the host state concerned acted as a sovereign ('*puissance publique*'), and not as an ordinary party to a commercial transaction, when it committed the alleged act.[177]

Breach of contract entails that a host state must pay compensation for the consequences thereof.[178] Breach refers to breach in the general sense of the failure, neglect or refusal by a host state to adhere to an agreement.

Whether or not a contract was breached is assessed in terms of the internal law of the relevant host state, not international law.[179] Thus where a contract was breached, and the breach amounts to a breach of an international obligation as discussed above, then

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the military to force *Bandiyir* from the construction site, alleging that this was a termination of contract and not expropriation.

175 *Bandiyir* at para 167.

176 This is what the claimant did in *Bandiyir*, and the tribunal found that it was not an abuse of process (at para 171-173).

177 *Azurix* at para 53; *Biwater Gauff* para 492, 494, 500 para 106; para 502; *Impregilo S.p.a v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3) Decision on Jurisdiction of 22 April 2005, confirmed in *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v Republic of Paraguay* (ICSID Case No. ARB/07/9) Further Decision on Jurisdiction of 9 October 2012 at para 211, 241-242; *Mr Frank Charles Araf v Republic of Moldova* (ICSID case No. ARB/11/23) Award of 8 April 2013 at para 536; *Tulip Real Estate* at para 354-356; Schreuer "The Concept of Expropriation under the ECT and other Investment Protection Treaties" para 66 http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf (Date of use: 20 October 2017).

178 Booysen *Principles of International Trade Law as a Monistic System* at 508.

179 *Vivendi* (Decision on Annulment) at para 96.

the consequences of the breach will follow the rule of international law to the effect that reparation is payable.[180]

2.2.5 Enactment of, and non-compliance with internal laws

Legislation is typically made by a legislature, or by decree of a minister, president or another member of the executive of a state.[181] In this regard it must be noted that both the legislature and the executive are organs of state, and, therefore in terms of Article 4 of ARSIWA a state is responsible for the acts of these organs. As a result, almost ten percent of all ICSID arbitrations were opened on the basis of the consent provided in the laws of host states.[182]

Whether the mere passing of legislation will amount to a breach of an international obligation or not, depends on the facts of a case. Thus, the mere passing of legislation without more, may not amount to a breach, while in some cases it may amount to a breach.[183] A few examples will suffice here. In *Santa Elena v Costa Rica* the tribunal found that Costa Rica incurred international responsibility by enacting a decree that expropriated the claimant's property without agreeable compensation.[184] In *Metalclad*

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180 See also United Nations (International Law Commission) "ARSIWA" Article 31 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017).

181 For a discussion of national legislation as a source of international investment law see Mbengue MM "National Legislation and Unilateral Acts of States" in Gazzini T and Brabandere E (eds) *International Investment Law: The Sources of Rights and Obligations* at 183-213.

182 International Centre for Settlement of Investment Disputes "The ICSID Caseload Statistics", Issue 2017-2 at 10 https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf (Date of use: 10 March 2018). For a database of the investment laws of various states see http://investmentpolicyhub.unctad.org/InvestmentLaws (Date of use: 1 April 2018).

183 United Nations (International Law Commission) "ARSIWA" Commentary at 57 para 12 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017).

184 *Compania del Desarrollo De Santa Elena S.A v Republic of Costa Rica* (ICSID Case No.

the tribunal found that a decree that declared a Metalclad waste disposal site to be an ecological site amounted to expropriation.[185] Recently, the tribunal in R*usoro Mining Limited v The Bolivarian Republic of Venezuela* found that Venezuela had breached the relevant BIT by enacting a law that restricted the sale of gold produced by Rusoro Mining.[186] In *Mike Campbell,* the SADC Tribunal found that the constitutional amendment by Zimbabwe that denied victims of farm expropriations compensation and access to local courts was a wrongful violation of Article 4 of the SADC Treaty.[187]

A state can also incur international responsibility by failing to adhere to its laws. For example, in *Duke Energy v Ecuador* the tribunal held that Ecuador had failed to comply with its own laws as well as agreements between the parties, and by so doing it breached an umbrella clause contained in the relevant BIT in that matter.[188]

2.2.6 Conclusion

It was shown above that the rules of state responsibility lay the foundation on which host states may be exposed to claims by investors. The result of the application of these rules is the high number of ISDS cases that are opened every year by investors, which at the time of writing were 855.[189] It is therefore no surprise that among others, SADC's repeal of the 2006 Annex 1 is meant to mitigate the international responsibility of Member States by reducing the exposure of host states to ISDS claims. How the 2016 Annex 1 achieves this is discussed in Chapter 3.

ARB/96/1) Final Award of 17 July 2000 at para 68, 74.

185 *Metalclad* at para 109-110, 111-112.

186 *(*ICSID Case (AF)/12/5) Award of 22 August 2016 at para 597.

187 *Mike Campbell* at 40-41.

188 *Duke Energy Electroquil Partners and Electroquil S.A v Republic of Ecuador* (ICSID Case No. ARB/04/19) Award of 18 April 2008 at para 325.

189 http://investmentpolicyhub.unctad.org/ISDS (date of use: 8 June 2018).

However, the 2006 or 2016 Annex 1 are not the only bases on which investors can sue SADC Member States. BITs, TIPs, investment contracts and the laws of host states also provide access to ISDS. Hence in practice, major investors negotiate investment contracts that will ensure that they obtain the maximum level of security the can, while capital-exporting states negotiate BITs and TIPs so as to secure maximum protection for their national abroad. Without the rules of state responsibility discussed above, investors would have little protection in international law, and similarly, states would be less exposed to international responsibility.

2.3 EXPROPRIATION

2.3.1 Introduction

Expropriation is the mandatory taking of property by a state, ostensibly in the public interest.[190] Public international law does not create property rights that are capable of being expropriated.[191] Therefore, property rights must first exist in terms of the internal law of a host state, before an inquiry can be made in terms of international law as to whether the property was expropriated or not.[192] A person who alleges that its property was expropriated must show that the expropriated property vests in it, whether directly or indirectly.[193] In addition to the expropriation of individual assets, a state may take property in two other ways, namely, nationalisation or confiscation.[194] Nationalisation is the expropriation of an entire sector or an industry of an economy.[195] Confiscation is the

190 Booysen *Principles of International Trade Law as a Monistic System* at 72.

191 Booysen *Principles of International Trade Law as a Monistic System* at 72; *Emmis* at para 162.

192 *Emmis* at para 162, 170.

193 *Emmis* at para 168-169.

194 Booysen *Principles of International Trade Law As A Monistic System* at 72; Sornarajah *The International law on foreign investment* at 345.

195 Sornarajah *The International law on foreign investment* at 346, 348.

taking of property by a ruler or head of state for his personal gain, although this may include the benefit of persons close to the ruler, such as senior military personnel.[196]

Expropriation may be direct or indirect. Direct expropriation refers to the mandatory taking or seizure of property by a state, with the resultant loss of possession and title to the property.[197] This is the original form of expropriation.[198] Unlike direct expropriation, indirect expropriation is complex, as it is not always clear if indeed it has taken place. Indirect expropriation is discussed below.

2.3.2 Forms of indirect expropriation

When property is indirectly expropriated, it nominally remains in the hands of its owner, but the use, economic value or benefit thereof gets diminished or neutralised by virtue of the actions of a host state.[199] Despite the manner in which an indirect expropriation takes place, the effect of an indirect expropriation must be the same as that of a direct expropriation.[200] It is not always easy to determine whether an indirect expropriation took

196 Sornarajah *The International law on foreign investment* at 346.

197 United Nations Conference on Trade and Development "Fair and Equitable Treatment" at 6 http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017).

198 Sornarajah *The International law on foreign investment* 349; *Cargill* at para 372.

199 For a discussion of indirect expropriation see Sornarajah *The International law on foreign investment* at 350; United Nations Conference on Trade and Development "Expropriation", UNCTAD Series on Issues in International Investment Agreements II (United Nations New York and Geneva 2012) at 7, 63 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017); *Bernhard Von Pezold* at para 507; Dolzer R "Indirect Expropriation of Alien Property" in Reinisch (ed) *Classics in International Investment Law* Vol I at 389-413; Dolzer R and Bloch F "Indirect Expropriation: Conceptual Realignments" 2003 (5) International Law Forum Du Troit International 155-165; Fortier LY and Drymer SL "Indirect Expropriation in the Law of International Investment: I Know It When I see It, or *Caveat Investor*" in Reinisch (ed) *Classics in International Investment Law* Vol I at 414-448.

200 United Nations Conference on Trade and Development "Fair and Equitable Treatment" at 63-64 http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017).

place or not.[201] According to UNCTAD, the following must occur to confirm that an indirect expropriation took place:[202]

(a) The expropriatory measure must have resulted in a total or near total destruction of the investment's economic value;[203]

(b) An investor must have been deprived of the control over the investment e.g. by being deprived of management control, detention or deportation etc.;[204] and

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See also OECD "Indirect Expropriation" and the "Right to Regulate" in International Investment Law", OECD Working Papers on International Investment, 2004/04 (OECD Publishing 2004) http://dx.doi.org/10.1787/780155872321 (Date of use: 15 October 2017).

201 Schreuer "The Concept of Expropriation under the ECT and other Investment Protection Treaties" at 3 http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf (Date of use: 20 October 2017).

202 See also United Nations Conference on Trade and Development "Fair and Equitable Treatment", UNCTAD Series on Issues in International Investment Agreements II (New York and Geneva 2012) at 65 http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017); *BG Group Plc. v The Argentine Republic* (Ad hoc UNCITRAL Tribunal) Award of 24 December 2007 at 259-271; *LG&E Energy Corp* (Decision on Liability) at para 188; *CME* at para 603-604; *GAMI Investments Inc. v The Government of The United Mexican States* (Ad hoc UNCITRAL Tribunal) Final Award of 15 November 2004 para 123-126; *Telenor* at para 63-67; *Sempra Energy International v The Argentine Republic* (ICSID Case No. ARB/02/16) Award of 28 September 2007 at para 284-285; *Parkerings-Compagniet AS v Republic of Lithuania* (ICSID case No. ARB/05/08) Award of 11 September 2007 at para 455; *Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd. and Others v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27) Award of 9 October 2014 at para 286.

203 United Nations Conference on Trade and Development "Fair and Equitable Treatment" at 65 http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017). See for example *Alpha Projektholding* at para 408-410; *AES Summit Generation Limited and AES-Tisza Eromu KFT v The Republic of Hungary* (ICSID Case No. ARB/07/22) Award of 23 September 2010 at para 14.3.2 - 14.3.3; *Cargill* at para 360; *Electrabel S.A v The Republic of Hungary* ICSID Case No. RB/07/19 (Decision on Jurisdiction) at para 6.53; *Glamis Gold Ltd v United Sates of America* (Ad hoc UNCITRAL Tribunal) Award of 8 June 2009 at para 14-17; *Tecmed* at para 115-116.

204 United Nations Conference on Trade and Development "Fair and Equitable Treatment" at

(c) The effect of the expropriatory action or measure must be permanent.[205]

Indirect expropriation comes in various forms, such as creeping expropriation, breach of contract, and regulatory takings. These will now be briefly discussed.

Creeping expropriation has been described as:

> …the incremental encroachment on one or more of the ownership rights of a foreign investor that eventually destroys (or nearly destroys) the value of his or her investment or deprives him or her of control over the investment.[206] (Emphasis added).

As can be seen from the above definition, creeping expropriation is premised on the idea that property ownership consists of a bundle of rights relating to the use and enjoyment of property, and that the expropriatory act(s) of a state interfere with these rights.[207] The fact that creeping expropriation takes place over a period of time, and not by means of a single act, makes it potentially difficult to identify the point in time or in the chain of

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67 http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017); *Biwater Gauff* at para 510.

205 United Nations Conference on Trade and Development "Fair and Equitable Treatment" at 69 http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017); *Achmea B.V* at para 292-293; *Alpha Projektholding* at para 409-410; *Tecmed* at para 116.

206 United Nations Conference on Trade and Development "Fair and Equitable Treatment" at 11 http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017); *Biwater Gauff* at para 455; *Rousallis* at para 329.

207 Sornarajah *The International law on foreign investment* at 352; United Nations Conference on Trade and Development "Fair and Equitable Treatment" at 1 http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017).

events at which expropriation took place.[208] This makes creeping expropriation difficult to prove in practice.

Creeping expropriation has been codified into Article 15 of ARSIWA. In terms of this Article, a series of incidents can cumulatively amount to creeping expropriation.[209] Hence the tribunal in *Biwater Gauff* found that a series of actions taken by Tanzania amounted to expropriation.[210] These actions were: the repudiation of the lease, the occupation of City Water's facilities, usurpation of management control and deportation of City Water's senior managers. The tribunal in *Walter Bau v Thailand* also affirmed previous tribunal decisions on creeping expropriation, as well as the application of Article 15 of ARSIWA to a series of actions.[211]

Where it is alleged that a host state has committed expropriation by breach of a contract, it must be borne in mind that not every breach of contract by a state amounts to expropriation.[212] For breach of contract create international responsibility, a state must

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208 Schreuer "The Concept of Expropriation under the ECT and other Investment Protection Treaties" at para 34, 37 http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf (Date of use: 20 October 2017). For a discussion of the process by which indirect expropriation is distinguished from non-expropriatory regulatory measures see United Nations Conference on Trade and Development "Fair and Equitable Treatment" at 81-105 http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017). One of the notable cases of creeping expropriation in SADC is *Biwater Gauff* (at para 501– 519).

209 See also *Biloune and Marine Drive Complex Ltd v Ghana Investment Centre and Government of Ghana* (UNCITRAL *Ad hoc* Tribunal) Award of 30 June 1990.

210 *Walter Bau AG (In Liquidation) v The Kingdom of Thailand* (Ad hoc UNCITRAL Tribunal) Award of 1 July 2009 at para 814(b).

211 *Walter Bau* at para 10.1-10.10; *Yukos Universal Limited* at para 1580; *Pater A. Allard v The Government of Barbados* (UNCITRAL) Award of 27 June 2016 at para 254.

212 United Nations Conference on Trade and Development "Fair and Equitable Treatment" at 25 http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017);

have acted as a sovereign in committing the breach.[213] Thus a mere refusal to pay a debt due in terms of a contract does not amount to expropriation.[214]

Non-performance, including the late payment or failure to pay a debt under a contract, does not amount to expropriation.[215] Where an investment has as its basis a contract acquired after a successful tender process, and the tender and subsequent contract are declared invalid by a court after due process, such invalidation is not expropriation. Thus the tribunal in *Frank Charles Araf* found that the setting aside of a tender, as well as the the subsequent tender agreement between the state and the claimant by the courts, was not an expropriation of the claimant's rights by the courts.[216]

A state's regulatory measures can amount to indirect expropriation, as discussed below. A state by virtue of its sovereign powers has the right to regulate all activities in its territory.[217] These regulatory powers are also known as public order or police powers.[218]

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213 Salacuse *The Law of Investment Treaties* at 303.
United Nations Conference on Trade and Development "Fair and Equitable Treatment" at 25
http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017);
Salacuse *The Law of Investment Treaties* at 303.

214 *SGS v Philippines (Decision on Jurisdiction*) at para 161.

215 *Waste Management, Inc. v United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award of 30 April 2004 at para 174-175.

216 *Frank Charles Araf* at para 415-417.

217 United Nations Conference on Trade and Development "Expropriation" at 80-85 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf
(Date of use: 15 October 2017); UNCTAD "Investment Policy Framework For Sustainable Development" at 30 http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf (Date of use: 20 August 2017). For a discussion of the right to regulate in general see also Titi The *right to regulate in international investment law* 1st ed (Hart Publishing Oxford 2014).

218 Schreuer "The Concept of Expropriation under the ECT and other Investment Protection Treaties" at 28 para 78 http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf
(Date of use: 20 October 2017). For a brief history of police powers see *Philip Morris Brand SARL, Philip Morris Products S.A, Abal Hermanos S.A v Oriental Republic of Uruguay* (ICSID Case No. ARB10/7) Award of 8 July 2016 at para 292-307.

Regulatory acts of general application are presumed to be valid because states are presumed to act in good faith until the contrary is proved.[219] The onus is on a state to show that a measure is in the public interest, is non-discriminatory, and was implemented according to due process.[220]

Thus the tribunal in *Ioannis Kardassopoulos* found that the expropriation in that matter was not a result of the state's bona fide use of its police powers.[221] In this case, the state of Georgia had in bad faith passed a decree that extinguished the exclusive rights that and investor, GTI held in an oil pipeline and related facilities.[222] No compensation was paid for the expropriation. The expropriated rights were then given to a Georgian state entity, which in turn licensed them to another private entity in return for a fee.[223] The tribunal found that the issuing of the decrees was not bona fide regulation, but was a means to expropriate the claimant's rights.

In order to determine whether a regulatory act is expropriatory and, therefore, compensable, a distinction must first be drawn between regulatory acts which are expropriatory, in the sense that compensation must be paid for the acts, and those which are not.[224]

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219 United Nations Conference on Trade and Development "Expropriation" at 92 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017).

220 United Nations Conference on Trade and Development "Expropriation" at 93 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017).

221 *Ioannis Kardassopoulos* at para 387.

222 *Ioannis Kardassopoulos* at para 351.

223 *Ioannis Kardassopoulos* at para 356.

224 Salacuse *The Law of Investment treaties* at 307-318*;* Schreuer "The Concept of Expropriation under the ECT and other Investment Protection Treaties" at 28 http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf (Date of use: 20 October 2017).

The criteria used to assess whether a regulatory measure is expropriatory or not are: lack of public purpose, discrimination, lack of due process, lack of proportionality, lack of fair and equitable treatment, abuse of rights and direct benefit to a state.[225] These criteria must be taken together in making an assessment, considering the context in which the measure is adopted and applied.[226]

The tribunal in *Philip Morris Brand SARL* undertook a succinct review of the authorities on the issue, and affirmed that in order for a state's exercise of police powers not to amount to indirect expropriation, the measure must be *bona fide*, non-discriminatory and proportionate.[227] It held that in order to amount to indirect expropriation, a state's regulatory measure must amount to a substantial deprivation of its value, use or enjoyment.[228] The tribunal added that where sufficient value remains in an investment, there is no indirect expropriation.[229] The tribunal concluded that the general rule with regard to police powers is that a state is not liable for any loss suffered by a person due to the bona fide and non-discriminatory use of such power.[230]

Scholars have proposed two methods that can be used to differentiate between expropriatory and non-expropriatory regulatory measures.[231] The first method considers

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225 United Nations Conference on Trade and Development "Expropriation" at 94-104 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017); *EDF Services* at para 286; *Philip Morris Brand SARL* at para 292-392.

226 United Nations Conference on Trade and Development "Expropriation" at 94-95 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017).

227 *Philip Morris Brand SARL* at para 305-306.

228 *Philip Morris Brand SARL* at para 192.

229 *Philip Morris Brand SARL* at 286.

230 *Philip Morris Brand SARL* at para 292-392.

231 For a discussion of these approaches see Salacuse *The Law of Investment treaties* at

the intention of a state in passing the regulatory measure. Measures in this category include those within the scope of police powers for which a state cannot be held accountable, despite the negative economic consequences of the measure. An example thereof is legislation that affects property by regulating aspects such as the planning, safety, health and environmental aspects of the property.[232]

The second method considers the effects of the regulatory measure (effects doctrine). For example, in *Metalclad,* the Mexican federal government had authorised Metalclad to establish a landfill in the municipality of Guadalcazar, but thereafter, the municipality refused to issue a permit for the construction of the landfill. The tribunal found that the actions of the municipality had the effect of expropriating Metalclad's right to operate the landfill.[233] Schreuer and other scholars conclude that the majority of tribunal decisions analysed indicate that the effects doctrine is the dominant approach.[234] This position was recently affirmed in *Philip Morris Brand SARL.*[235] It is submitted that this is correct and in line with the rule that an indirect expropriation must have the same effect as a direct expropriation.[236]

316-318; Schreuer "The Concept of Expropriation under the ECT and other Investment Protection Treaties" at 80-118 http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf (Date of use: 20 October 2017).

232 United Nations Conference on Trade and Development "Expropriation" at 79 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017).

233 *Metalclad* at para 103-107. For more examples see Schreuer "The Concept of Expropriation under the ECT and other Investment Protection Treaties" at para 84-117 http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf (Date of use: 20 October 2017).

234 Schreuer "The Concept of Expropriation under the ECT and other Investment Protection Treaties" at 81-83, 119 http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf (Date of use: 20 October 2017).

235 *Philip Morris Brand SARL* at para 192.

236 United Nations Conference on Trade and Development "Expropriation" at 63 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017).

2.3.3 Requirements for expropriation

Expropriation is not in itself illegal because, under international law, states have a sovereign right to expropriate property, subject to meeting the requirements of public purpose, non-discrimination, compliance with due process and payment of compensation.[237] Under international law, all four requirements for expropriation must be present, or else the expropriation will be unlawful. For example, the tribunals in *Ioannis Kardossopoulos*[238] and *Bernhard Von Pezold*[239] held that there was no need to consider the other requirements for expropriation, since the requirement for the payment of compensation was not met. The four requirements for expropriation will now be briefly discussed.

Firstly, an expropriation must have a public interest purpose or objective.[240] The relevant time for the determination of whether the public purpose requirement was met or not is the time of the expropriation.[241] When an expropriation was not for a public purpose, but it subsequently achieved a public purpose, this requirement will not have been met.[242] It is immaterial whether the public purpose was subsequently met or not after the

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237 See Article 2(2)(c) of the Charter of Economic Rights and Duties of States, A/RES/39/163, (resolution adopted by the General Assembly, 17 December 1984) http://www.refworld.org/docid/3b00eff474.html (Date of use: 15 October 2017); Salacuse *The Law of Investment treaties* at 320-328; United Nations Conference on Trade and Development "Expropriation" at 2 para 1 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf

238 *Ioannis Kardossopoulos* at para 389-390.

239 *Bernhard Von Pezold* at para 498.

240 United Nations Conference on Trade and Development "Expropriation" at 29 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017); ADC at 78 para 429-433.

241 United Nations Conference on Trade and Development "Expropriation" at 31 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017).

242 United Nations Conference on Trade and Development "Expropriation" at 31 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017).

expropriation was effected, provided there was originally a *bona fide* public purpose.[243] It is generally left to a state's discretion to decide whether an expropriation is for a public purpose or not. Once a state has decided that an expropriation is for a public purpose, its decision is respected, but there are cases where tribunals have held that this requirement was not met.[244]

In *Bernhard Von Pezold* the tribunal held that an expropriation without compensation in order to "right the wrongs" of a colonial past does not serve a public purpose.[245] In *Valeri Belokon v Kyrgyzstan,* the tribunal found that the placement of the claimant's bank under administration, seizure of its assets and the placement of the bank under indefinite sequestration for four years did not serve a public purpose other than the narrow political interests of the government.[246] In this case, the seizure was motivated by the bank's suspected connections to a previous regime.

The public purpose requirement is found in Annex 1,[247] ASEAN Comprehensive Investment Agreement (ACIA),[248] Investment Agreement for the COMESA investment

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243 United Nations Conference on Trade and Development "Expropriation" at 31 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017).

244 United Nations Conference on Trade and Development "Expropriation" at 32-34 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017).

245 *Bernhard Von Pezold a*t para 502.

246 *Valeri Belokon v The Kyrgyz Republic* (Ad hoc UNCITRAL Tribunal) Award of 24 October 2014 at para 215.

247 Article 5 2006 Annex 1; Article 5 2016 Annex 1.

248 Article 14(1) of the *ASEAN Comprehensive Investment Agreement* (date of signature 26 02 2009, in force 24 02 2012) http://investmentpolicyhub.unctad.org/Download/TreatyFile/3095 (Date of use: 15 October 2017).

Area (IACCIA),[249] Energy Charter Treaty (ECT),[250] and the North American Free Trade Agreement (NAFTA).[251]

The second requirement is that an expropriation must not be discriminatory. This requirement may be best presented by a quotation from *ADC* where the tribunal said that:

> …in order for a discrimination to exist, particularly in an expropriation scenario, there must be different treatments to different parties. However and unfortunately, the Respondent misses the point because the comparison of different treatments is made here between that received by the Respondent-appointed operator and that received by foreign investors as a whole.[252]

International treaties such as the United Nations Charter,[253] the Universal Declaration of Human Rights (UDHR),[254] the International Covenant on Civil and Political Rights

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249 Article 20(1) of the *Investment Agreement for the COMESA investment Area* (date of signature 23 May 2007, not in force) http://investmentpolicyhub.unctad.org/IIA/treaty/3225 (Date of use: 15 October 2017).

250 Article 13(1)(a) *Energy Charter Treaty* 2080 UNTS 95 34 ILM 360 (1995) (date of signature 17 December 1994, in force 16 April 1998) http://www.ena.lt/pdfai/Treaty.pdf#search=%22energy%20charter%20treaty%22 (Date of use: 21 November 2017).

251 Article 1110(1)(a) of the *North American Free Trade Agreement* 32 ILM 289, 605 (1993) (date of adoption 17 December 1992, in force 01 January 1994) http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78 (Date of use: 31 October 2017).

252 *ADC Affiliate* at para 442.

253 *Charter of the United Nations* (date of signature 26 June 1945, in force 24 October 1945) 1 UNTS XVI, Article 1(3) https://treaties.un.org/doc/publications/ctc/uncharter.pdf (Date of use: 31 October 2017).

254 *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) (adopted 10 December 1948), Article 2 http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (Date of use: 21 October 2017).

(ICCPR),[255] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[256] the African Charter on Human and Peoples' Rights (African Charter),[257] the European Convention on Human Rights (ECHR),[258] and the SADC Treaty[259] prohibit discrimination in various forms. Where the discrimination is on racial grounds, the discrimination will be unlawful because it violates the Convention on the Elimination of All Forms of Racial Discrimination, among other conventions.[260]

A generalised way to state the requirement against discrimination is that an expropriation is discriminatory if the property in question was expropriated on the grounds that the owner of the expropriated property had certain characteristics (e.g. nationality, race, gender, religion etc.) on the basis of which they were targeted by the host state. An important criterion here is that the person must have been treated differently compared to others, based on some discriminatory criteria. Recently, the

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255 *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16), UN Doc A/6316 (1966), 999 UNTS 171 (date of signature 16 December 1966, in force 23 March 1976) https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf (Date of use: 31 October 2017).

256 *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3 (date of signature 19 December 1966, in force 3 January 1976) http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf (Date of use: 31 October 2017).

257 Article 2 *African Charter on Human and Peoples' Rights* (date of signature 01 June 1981, in force 21 October 1986) https://au.int/en/treaties/african-charter-human-and-peoples-rights (Date of use: 15 October 2017).

258 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 14 (date of signature 4 November 1950, in force 3 September 1953) http://www.echr.coe.int/Documents/Convention_ENG.pdf (Date of use: 21 October 2017).

259 Article 6(2) SADC Treaty.

260 *Mike Campbell* at 47. The convention is the *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, UNTS vol. 660, p. 195 (date of signature 21 December 1965, in force 4 January 1969) http://www.refworld.org/docid/3ae6b3940.html (Date of use: 21 October 2017).

tribunal in *Bernhard Von Pezold* found that the claimants' investments were targeted for expropriation because of their skin colour.[261]

There are conflicting views as to whether the targeting of persons on the grounds that they are foreigners *per se* amounts to discrimination.[262] One view is that there will be discrimination if foreigners are targeted on the basis of their nationality, not just because they are foreigners. [263] However, a contrary view was adopted in *Eureko* where the tribunal found that the measures adopted by Poland in that matter were intended to prevent a consortium led by a foreigner from having control of the company in question.[264] It submitted that the correct view is that discrimination against foreigners of any nationality is unlawful because discrimination against foreigners is discrimination nonetheless. UNCTAD describes non-discrimination against foreign investors as follows:

> The non-discrimination requirement implies the diffusiveness of the impact on different actors and constituencies and serves to prevent singling out or targeting a foreign investor. It primarily concerns nationality-based differentiation but it also seems to cover racial, religious, ethnic and other types of discrimination prohibited under customary international law. It appears that a non-discriminatory regulation that is enforced in a discriminatory manner will also fit the description. Where a formally non-discriminatory regulation is designed in a way that it only

261 *Bernhard Von Pezold* at para 501.

262 United Nations Conference on Trade and Development "Expropriation" http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf at 34 (Date of use: 15 October 2017).

263 United Nations Conference on Trade and Development "Expropriation" http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf at 34 (Date of use: 15 October 2017).

264 *Eureko* Partial Award of August 2005 at para 242.

covers certain foreign investor or investors, other indicators need to be examined to decide whether the measure is bona fide.[265]

The requirement of non-discrimination is found in the ACIA,[266] ACCIA,[267] Annex 1,[268] ECT,[269] NAFTA,[270] and the SADC Treaty.[271]

Thirdly, an expropriation must be in terms of due process.[272] The tribunal in *ADC Affiliate* held that in the context of an expropriation, due process demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it.[273] Due process in relation to expropriation entails three things: the expropriation must be in terms of internal procedures provided for that purpose e.g. in terms of a law providing for such expropriation; a person affected by the expropriation must have access to proceedings for review of the expropriation before an impartial forum, either in terms of its legality, compensation or other aspects, and the expropriation must not be arbitrary. [274]

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265 United Nations Conference on Trade and Development "Expropriation" http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf at 96 (Date of use: 15 October 2017); *Mike Campbell* at 41-54.

266 Article 14(1) ACIA.

267 Article 20(1) IACCIA.

268 Article 5 2006 Annex 1; Article 5 2016 Annex 1.

269 Article 13(1)(b) ECT.

270 Article 1110(1)(b) NAFTA.

271 Article 6(2) SADC Treaty.

272 See also United Nations Conference on Trade and Development "Expropriation" http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf at 36-40 (Date of use: 15 October 2017).

273 *ADC Affiliate* at para 435.

274 United Nations Conference on Trade and Development "Expropriation" http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf at 36 (Date of use: 15 October 2017); *ADC Affiliate* at para 434, 440; *Ioannis and Fuchs* at para 408.

The tribunal in *Rusoro* held that a party who does not utilise due process provisions that are provided by the internal law of a state cannot later complain that it was denied due process.[275] While it is submitted that this is correct, it must be noted that due process in the form of local remedies need not be followed if doing so would be futile,[276] a respondent state systematically ignores the judgments of its courts,[277] there are no effective remedies,[278] the respondent state has waived the requirement,[279] there is undue delay caused by the respondent state,[280] or the injured person is manifestly precluded from exhausting local remedies.[281]

The due process requirement is found in Annex 1,[282] ACIA,[283] IACCIA,[284] ECT,[285] and NAFTA.[286]

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275 *ADC Affiliate* at 386-393.

276 See Ngobeni L "*Barcelona Traction* and *Nottebohm* Revisited: Nationality as a Requirement for Diplomatic Protection of Shareholders in South African Law" 2012 (37) South African Yearbook of International Law 169-186 at note 23.

277 Ngobeni 2012 (37) South African Yearbook of International Law 169 at note 23.

278 See Article 15(a) United Nations (International Law Commission) "Draft Articles on Diplomatic Protection", in Report of the International Law Commission Fifty-eighth session (1 May-9 June and 3 July-11 August 2006) at p.13 para 34, General Assembly Official Records Sixty-first Session Supplement No. 10 (A/61/10) http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf (Date of use: 04 September 2017); *Mike Campbell* at 21.

279 United Nations (International Law Commission) "Draft Articles on Diplomatic Protection" Article 15(e) http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf (Date of use: 04 September 2017).

280 United Nations (International Law Commission) "Draft Articles on Diplomatic Protection" Article 15(b) http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf (Date of use: 04 September 2017).

281 United Nations (International Law Commission) "Draft Articles on Diplomatic Protection" Article 15(d) http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf (Date of use: 04 September 2017).

282 Article 5 2006 Annex 1; Article 5 2016 Annex 1.

283 Article 14(1) 2006 Annex 1.

284 Article 20(1) IACCIA.

285 Article 13(1)(c) ECT.

286 Article 1110(1)(c) NAFTA.

Finally, compensation must be paid for an expropriation.[287] There is no universally agreed standard for compensation for expropriation in international law. In practice, BITs, TIPs, investment contracts and laws provide the quantum of compensation that will be payable in the event of expropriation.[288] In international law, compensation can be either for the capital value of property, for loss of profits there from, or both.[289] The determination of compensation involves choosing a compensation standard and a method to be used to quantify the compensation.[290] On the latter, Chinen describes the methods used to assess the loss of capital value as follows:

> The loss to capital is often assessed by its fair market value and the fair market value itself is assessed according to the nature of the asset involved. The task is relatively straightforward if there are comparable assets on the open market; it becomes more complicated if a business is privately held. With regard to businesses, the attempt is to value the company's assets and to allow for good will and profitability as appropriate. Another method for evaluating capital loss is net book value, the difference between the company's assets and liabilities as

287 See United Nations Conference on Trade and Development "Expropriation" at 40-52 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017).

288 In SADC, Article 5 2006 Annex 1, Article 5 2016 Annex 1, as well as the laws of Member States, provide for the quantum of compensation (see Chapter 4 below).

289 United Nations (International Law Commission) "ARSIWA" Commentary at 103-105 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); Chinen M "The Standard of Compensation for Takings" 2016 (25) (2) Minnesota Journal of International Law 335-380 at 372, 378-379.

290 For a discussion of the valuation of compensation see Chinen 2016 (25) (2) Minnesota Journal of International Law 335-380 at 337, 357; Marboe I "Compensation and Damages in International Law: The Limits of 'Fair Market Value'" in Reinisch (ed) *Classics in International Investment Law* Volume II at 24-60; Simmons JB "Valuation in Investor-State Arbitration: Toward A More Exact Science" 2012 (30) Berkeley Journal of International Law 196-250.

they appear on its books. If the business is not a going concern, sometimes "dissolution" value is used. This is the value of the assets if the company is broken up and the assets are sold separately.[291]

On the other hand, lost profits are usually paid if a business is not destroyed, while both loss of capital and profits are payable if an expropriated business was impaired for a significant period, and then subsequently destroyed.[292]

Three compensation standards have been selected for discussion due to their prevalence in SADC Member States' investment laws. These are full compensation, appropriate compensation, and just and equitable compensation. These standards reflect a clash of interests between investors and host states, since investors would typically ask for full compensation in all situations, while host states would prefer to pay less compensation.[293] The standards will now be briefly considered.

The prompt, adequate and effective compensation standard was introduced by former United States Secretary of State Cordell Hull in 1938, hence it is known as the Hull formula or the "full compensation standard".[294] This standard was inherited from the early American treaties.[295] It is associated with Article 34 of ARSIWA and the *Factory at*

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291 Chinen 2016 (25) (2) Minnesota Journal of International Law 335 at 372.

292 Chinen 2016 (25) (2) Minnesota Journal of International Law 335 at 373.

293 Chinen 2016 (25) (2) Minnesota Journal of International Law 335 at 369.

294 United Nations Conference on Trade and Development "Expropriation" at 40 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017).

295 For example, between 1946 and 1966, the USA entered into at least 20 FCN treaties. See Vandenvelde 2005 (12) University of California Davis Journal of International Law and Policy 157 at 162,172.

Chorzow case.[296] In terms of this standard, "prompt" means that the compensation must be paid immediately or provision for the payment must have been made when the expropriation takes place. In short, there must not be a delay in making the payment.[297] "Adequate" means that an investor is paid the full value of his investment,[298] or that the compensation has a "reasonable relationship with the market value of the property."[299] "Effective compensation" means that the payment must be in useful currency, typically in a form that is capable of being expatriated.[300] For example, in *Rusoro*, the tribunal agreed with the claimant that the compensation which Venezuela was ordered to pay, be declared to be net of taxes in order to prevent Venezuela from withholding the compensation on the basis that tax was due on it, thus defeating the effective nature thereof.[301] Dugard is of the view that this standard is no longer accepted by international law.[302]

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296 Chinen 2016 (25) (2) Minnesota Journal of International Law 335 at 338.

297 United Nations Conference on Trade and Development "Expropriation" at 41 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017); Dolzer and Schreuer *Principles of International Investment Law* at 101.

298 Comeaux PE and Kinsella NS *Protecting Foreign Investment Under International Law* (Oceana Publications New York 1997) at 82.

299 United Nations Conference on Trade and Development "Expropriation" at 40 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017); Dolzer and Schreuer *Principles of International Investment Law* at 296.

300 Comeaux and Kinsella *Protecting Foreign Investment Under International Law* at 82; Dolzer and Schreuer *Principles of International Investment Law* at 101.

301 *Rusoro* at para 855.

302 Dugard *International Law: A South African Perspective* at 305. Sornarajah *The International law on foreign investment* at 435-488. However, Sornarajah says that full compensation is payable for illegal expropriations i.e. those in violation of a treaty (at 482), and when a small business is expropriated (at 482). He says that only partial compensation need be paid in the event of large scale nationalizations (at 484), as well as "where past practices of the foreign investor were harmful to the host state", or "where there had been inordinate profits made from the investment" (at 485).

Furthermore, Vandenvelde says that the United States of America deliberately flooded the BITs landscape with BITs that contain the full compensation standard, in order to create the impression that the standard was a norm of customary international law.[303] Chinen observes that this standard may prevent states from engaging in economic reform.[304]

In SADC, eight Member States provide for full compensation in their investment laws.[305] The 2006 Annex 1 also provides for full compensation, while the 2016 Annex 1 provides for a fair and adequate compensation.[306] The ECT also provides for "prompt, adequate and effective" compensation.[307] NAFTA provides for "fair market value", which is close to full compensation.[308]

Article 4 of the General Assembly Resolution 1803 of 1962 introduced the appropriate compensation standard.[309] This standard was then incorporated in Article 2(c) of the Charter of Economic Rights and Duties of States. Appropriate compensation, unlike full

303 Vandenvelde 2005 (12) University of California Davis Journal of International Law and Policy 157 at 171.

304 Chinen 2016 (25) (2) Minnesota Journal of International Law 335 at 339.

305 These are Botswana ("adequate and prompt"), Lesotho ("full'), Mauritius ("adequate), Seychelles ("full"), Eswatini ("adequate and fair"), Tanzania ("prompt, fair and adequate"), Zambia ("market value") and Zimbabwe ("fair and adequate"). Of the remaining states, 5 apply the just or fair standard, namely Angola ("just"), DRC ("fair and equitable"), Mozambique ("fair"), Namibia ("prompt and just"), and South Africa (just and equitable"). Only Malawi uses the "appropriate" compensation standard. For the purpose of this classification, investment codes include the constitution of a state to the extent that it deals with expropriation.

306 Article 5 2006 Annex 1; Article 5 2016 Annex 1.

307 Article 13(1)(d) ECT.

308 Article 1110(2) NAFTA.

309 United Nations (General Assembly) "Resolution on Permanent Sovereignty over Natural" Resources 1803(XVII) of 1962 http://www.ohchr.org/Documents/ProfessionalInterest/resources.pdf (Date of use: 20 November 2016); Chinen 2016 (25) (2) Minnesota Journal of International Law 335 at 339.

compensation, is not prescriptive.[310] Instead, it allows for flexibility in deciding what would be fair compensation to an investor.[311] It ranges in scope from payment of full compensation to no compensation at all.[312] It appears that in the SADC region, the appropriate standard of compensation is applied in the investment code of Malawi.[313]

The just and equitable standard of compensation provides room for the balancing of public and private interests.[314] Therefore, the amount of compensation will depend on the outcome of the considerations taken into account in each particular case. This standard is used in the investment codes of five SADC member states, namely Angola, DRC, Mozambique, Namibia and South Africa.[315]

2.3.4 The consequences of an unlawful expropriation

The distinction between lawful and unlawful expropriation necessitates that there must be different consequences for a state as to whether it expropriates property lawfully or not. Otherwise, the distinction does not serve a purpose.[316] Therefore, if an expropriation

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310 United Nations Conference on Trade and Development "Expropriation" at 41 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017).

311 United Nations Conference on Trade and Development "Expropriation" at 41 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017).

312 Sornarajah *The International law on foreign investment* at 480; United Nations Conference on Trade and Development "Expropriation" at 41 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017).

313 See Table 1 in Chapter 4 below.

314 United Nations Conference on Trade and Development "Expropriation" at 41 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017).

315 Table 1 in Chapter 4 below.

316 Chinen 2016 (25) (2) Minnesota Journal of International Law 335 at 367-370; *Tidewater* at para 132.

is lawful, compensation ought to be due by the state, while reparation, as anticipated by Article 31 of ARSIWA, ought to be due if an expropriation is illegal.[317]

There are at least four main differences between the consequences of a lawful and an unlawful expropriation, as explained briefly below.

Firstly, in an unlawful expropriation, the value of the property taken is assessed as at the date of the award, rather than the date of taking.[318] Furthermore, in the event of an unlawful expropriation, a claimant has a choice of claiming damages as at the date of expropriation or date of the award.[319] The shift in the date of valuation to the date of award entails that a state is liable for the increase in value during the intervening period.[320] Secondly, a state is liable for consequential damages arising from an unlawful expropriation.[321] Thirdly, in the event of an unlawful expropriation, a state's first duty is to undertake restitution, an obligation that does not apply to a lawful expropriation.[322] Finally, an expropriating state must make restitution, or if this is not possible, it must pay reparation that must place an investor in the position it should be, but for the expropriation.[323] If an investor has contributed to its loss, such will be taken into consideration in assessing the damages due to the investor.[324]

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317 Marboe I "Compensation and Damages in International Law: The Limits of 'fair Market Value'" in Reinisch (ed) *Classics in International Investment Law* Volume II at 26-27.

318 Dolzer and Schreuer *Principles of International Investment Law* at 296; *ADC Affiliate* at para 497; *ConocoPhillips* at para 343.

319 *Hulley Enterprises Limited* at para 1763, 1769, 1826; *Yukos Universal Limited* at para 1763, 1769; *Veteran Petroleum Limited* at para 1763, 1769.

320 Dolzer and Schreuer *Principles of International Investment Law* at 296; *Hulley Enterprises* at para 1767.

321 Dolzer and Schreuer *Principles of International Investment Law* at 295; *Occidental* at para 792-798.

322 *Hulley Enterprises Limited* at para 1766; *Yukos Universal Limited* at para 1766; *Veteran Petroleum Limited* at para 1766.

323 *Factory at Chorzow (Merits)*, *Judgment No. 13, 1928,* at 47.

ISDS tribunals differ as to whether compensation in terms of a treaty standard of compensation or reparation in terms of Article 31 ARSIWA is payable for an unlawful expropriation. One group of decisions is of the view that compensation in terms of a treaty compensation standard is payable. This group includes *Wena Hotels,*[325] *Middle East Cement*,[326] and *Occidental*,[327] and *Guaracachi America Inc and Rurelec Plc. v Bolivia*.[328] Another group adopts the position that reparation, as contemplated by Article 31 of ARSIWA, is payable in the event of an unlawful expropriation. This group includes *Anatolie Stati and Others* v Kazakhstan,[329] *ADC Affilliate*,[330] *CME*,[331] *Gemplus*,[332] *Hulley Enterprises Limited*,[333] *Metalclad*,[334] *Veteran Petroleum Limited*,[335] *Ioannis Kardassopoulos*,[336] *ConocoPhillips,*[337] and *Yukos Universal Limited.*[338] These decisions are based on the view that an unlawful expropriation is an internationally wrongful act,

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See also Dolzer and Schreuer *Principles of International Investment Law* at 100, 294-295.

324 *MTD* at para 242; *Hulley Enterprises Limited* at para 1637; *Veteran Petroleum* Limited at para 1637; *Yukos Universal Limited* at para 1637; Dolzer and Schreuer *Principles of International Investment Law* at 295.

325 *Wena Hotels* at para 95, 118.

326 *Middle East Cement* at para 144.

327 *Occidental* at para 790-798.

328 *Guaracachi Inc and Rurelec Plc. v The Plurinational State of Bolivia* (PCA case No. 2011-17) Award of 31 January 2014 at para 441-444.

329 *Anatolie Stati, Gabriel Stati, Ascom Group S.A, Terra Raf Trans Trading Ltd.* v *The Republic of Kazakhstan* (SCC Arbitration V (116/2010)) Award of 19 December 2013 at para 1527. The award and its enforcement continue to be contested, see https://www.italaw.com/cases/2358 (Date of use: 11 June 2018).

330 *ADC Affiliate* at para 476, 480-485.

331 *CME* Partial Award at para 609, 615-618, Final award at 501.

332 *Gemplus* at para 7-76, 7-77, 8-27, 12-51, 12-52, 12-53.

333 *Hulley Enterprises Limited* at 1585, 1765-1769.

334 *Metalclad* at para 107, 109, 118, 122.

335 *Veteran Petroleum Limited* at para 1585; 1765-1769.

336 *Ioannis Kardassopoulos* at para 387, 501-517.

337 *ConocoPhillips* at para 342.

338 *Yukos Universal Limited* at para 1585-1591, 1765-1769.

which attracts reparation as a consequence. It is submitted that the latter decisions are correct and reflect the position in international law as stated in Article 31 of ARSIWA.

With regard to the non-payment of compensation, tribunals disagree as to whether an expropriation that lacks compensation only is legal or not. One view is to the effect that such an expropriation is legal, since all that remains is for compensation to be agreed between the parties or to be determined by a tribunal and thereafter be paid.[339] Another view is to the effect that failure to pay compensation is a breach of customary international law,[340] a factor that renders the expropriation illegal.[341] The correct position ought to be that, in line with the view expressed above that all four requirements of an expropriation must be met, an expropriation that lacks compensation or any one requirement is unlawful under international law.

2.3.5 Conclusion

Expropriation will always be a controversial measure, given among others its threat to the regulatory powers of host states, its effect on investments and investors, complications regarding the quantification of compensation, and the difficulty of proving indirect expropriation. In SADC, the laws that will apply in the event of expropriation are those that are provided in Annex 1 and the laws of host states. These are discussed in Chapters 3 and 4 below.

339 *Tidewater Investment SRL and Tidewater Cabire, CA v Bolivarian Republic of Venezuela* ICSID (Case No. ARB/10/5) Award of 13 March 2015 at para 136-141.

340 *Santa Elena* at para 68.

341 *Tidewater* at para 136; *Gemplus* at para 12-59.

2.4 THE MEANING OF AN INVESTMENT IN ISDS

2.4.1 Introduction

The definition of an investment is central to investor-state disputes, because an investment must exist in order for an arbitral tribunal or court of law to have jurisdiction *ratione materiae*.[342] Locally, this point was recently driven home in the long-running case

[342] See Schreuer C *The ICSID Convention: A Commentary Second Edition* (Cambridge University Press Cambridge 2009) at 114 para 113. For ISDS cases relating to jurisdiction *ratione materiae* see *Al-Kharafi; Alex Genin, Eastern Credit Limited, Inc. and A.S Baltoil v Republic of Estonia* (ICSID Case No. ARB/99/2) Award of 25 June 2001; *Generation Ukraine Inc. v Ukraine* (ICSID Case No. ARB/00/9) Award of 16 September 2003; *H&H Enterprises Investments Inc. v Arab Republic of Egypt* (ICSID Case No. ARB/09/15) Decision on Jurisdiction of 5 June 2012; *Jan De Nul* (Jurisdiction, Award); *Nordzucker AG v The Republic of Poland* (Ad hoc Tribunal) Partial Award of 10 December 2008; *Joy Mining v Arab Republic of Egypt* ((ICSID Case No. ARB/03/11) Award on Jurisdiction of 6 August 2004; *Nova Scotia Power Incorporated (Canada) v Bolivarian Republic of Venezuela* (ICSID Case No. ARB (AF)/11/1) Excerpts of Award of 30 April 2014; *Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) Decision of the Tribunal on Objections to Jurisdiction of 6 August 2003*; Société Generale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v The Dominican Republic* (UNCITRAL Arbitration, LCIA Case No. UN 7927) Award on Preliminary Objections to Jurisdiction of 19 September 2008; *Standard Chartered Bank v United Republic of Tanzania* (ICSID Case No. ARB/10/12) Award of 2 November 2012; *Wena Hotels*; *First Arbitration Proceeding and First Annulment Proceeding Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Award of 21 November 2000 and Decision on Annulment of 3 July 2002; *Second Arbitration Proceeding Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* (ICSID Case No. ARB/97/3) Award of 20 August 2007 and Decision on Annulment of 10 August 2010. Decisions which followed *Vivendi* on contracts and treaties *are Aguas del Tunari S.A v The Republic of Bolivia* (ICSID Case No. ARB/02/3) Decision on Respondent's Objections to Jurisdiction of 21 October 2005; *AWG Group Ltd. v The Argentine Republic* (ICSID Case No. ARB/03/19) Decision on Jurisdiction of 3 August 2006; *Azurix*; *Camuzzi International S.A v the Argentine* Republic (ICSID Case No. ARB/03/2) Decision on Objections to Jurisdiction of 11 May 2005; *CMS Gas Transmission Company; Enron Corporation and Ponderosa Assets LLP v The Argentine Republic* (ICSID Case No. ARB01/3) Decision on Jurisdiction (Ancillary Claim) of 2 August 2004; *Eureko; Helnan*; *IBM World Trade Corporation v Republic of Ecuador* (ICSID Case No. ARB/02/10) Decision on Jurisdiction of 22 December 2003; *Sempra Energy International v The Argentine Republic* (ICSID Case No. ARB/02/16) Decision on Objections to Jurisdiction of 11 May 2005; *Siemens AG v The Argentine Republic* (ICSID Case No. ARB/02/8) Decision on Jurisdiction of 3 August 2004.

of *Kingdom of Lesotho v Swissbourgh Diamond Mines*[343] where the Singapore High Court annulled the arbitral decision on jurisdiction, on the grounds that the claimants did not have a qualifying investment under the 2006 Annex 1.[344] Hence in ICSID arbitration, the requirement for jurisdiction *ratione materiae* is that there must be a legal dispute,[345] which must arise directly out of an investment.[346] The same applies in non-ICSID arbitration, the only difference being the method applied to determine the existence of an investment, as shown below.

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343 Singapore High Court (2017) SGHC 195, Originating Summons 492 of 2016, Decision on Annulment of 14 August 2017.

344 At para 194-228, 237-252.

345 A full discussion of this requirement is beyond the scope of this study. For further information see Dolzer R and Schreuer C *Principles of International Investment Law* at 245-246; Schreuer *The ICSID Convention: A Commentary* at para 41-82 – 76-82; *Abaclat* at para 254-256, 301-331; *AES Corporation* at para 43- 47; *Alpha Projektholding* at para 250-253; *Azurix* at para 58-66; *Daimler Financial Services AG v Argentine Republic* (ICSID Case No. ARB/05/1) Award of 22 August 2012 at para 62-64; *El Paso Energy International Company v The Argentine Republic* (ICSID Case No. ARB/03/15) Decision on Jurisdiction of 27 April 2006 at para 60-65; *Fedax* at para 15; *Jan de Nul* (Jurisdiction) at para 74; *Lao Holdings N.V. v Lao People's Democratic Republic* (ICSID Case No. ARB (AF)/12/6) Decision on Jurisdiction of 21 February 2014 at para 120-121; *Mavrommatis Palestine Concessions Case* 1924 P.C.I.J. Ser. A, No. 2, at 11-12; *M.C.I. Power Group, L.C. and New Turbine, Inc. v Republic of Ecuador* (ICSID Case No. ARB/03/6) Award of 31 July 2007 at para 63; *Noble Energy Inc. and Machala Power Cía. Ltd. v Republic of Ecuador and Consejo Nacional de Electricidad (*ICSID Case No. ARB/05/12) Decision on Jurisdiction of 5 March 2008 at para 123; *Société Générale de Surveillance S.A. v Republic of the Philippines* (ICSID Case No. ARB/02/6) Order of the Tribunal on Further Proceedings of 17 December 2007 at para 19; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v Argentine Republic* (ICSID Case No. ARB/09/1) Decision on Jurisdiction of 21 December 2012 at para 117-125; *Tokios Tokelés v Ukraine* (ICSID Case No. ARB/02/18) Decision on Jurisdiction of 29 April 2004 at para 15.

346 A full discussion of this requirement is beyond the scope of this study. For further information see *Abaclat; AES. Alpha Projektholding; Camuzzi; CMS Gas Transmission; CSOB; Enron; Fedax; LG&E; SAIPEM; Suez, Barcelona and Interagua; Tokios Tokeles.*

At present, the definition of an investment depends on the arbitration rules and laws that will apply to the dispute. Article 25(1) of the ICSID Convention places an investment at the center of jurisdiction *ratione materiae* when it states that:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State…[347] (Emphasis added).

Unlike with ISDS in terms of the UNCITRAL Arbitration Rules, the process of defining an investment in ICSID arbitration is complicated, because a tribunal must conduct a two-step, "double barrelled", or "double keyhole" process in order to determine if there is an investment in terms of Article 25(1) of the ICSID Convention.[348] The first step determines if a transaction, project, business etc. is an investment in terms of a treaty, law or contract on which an investor relies to commence arbitration.[349] If the transaction, project, business etc. qualifies as an investment at this stage, then the tribunal moves to

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347 See also Fellenbaum J "GEA v Ukraine and the Battle for Treaty Interpretation Principles over the Salini Test" 2011 (27) Journal of Arbitration International 249-266; Grabowski A "The Definition of Investment under the ICSID Convention: A Defence of Salini" 2014 (15) (1) Chicago Journal of International Law Article 13 http://chicagounbound.uchicago.edu/cjil/vol15/iss1/13 (Date of use: 20 October 2017); Schreuer (2009) *The ICSID Convention: A Commentary* at 71-347; Timmer LJE "The Meaning of Investment as a Requirement for Jurisdiction Ratione Materiae of the ICSID Centre" 2012 (29) International Arbitration 363-373.

348 See Schreuer (2009) *The ICSID Convention: A Commentary* at 117-118.

349 *Alpha Projektholding* at para 254; *Ambiente Ufficio S.P.A and Others (Case Formerly known as Giordano Alpi and Others) v The Argentine Republic* (ICSID Case No. ARB/08/9) Decision on Jurisdiction and Admissibility of 8 February 2013 at para 435; *Malaysian Historical Salvors Sdn, BHD v The Government of Malaysia* (ICSID Case No. ARB/05/10) Award on Jurisdiction of 17 May 2007 at para 55; *Millicom International Operations B.V. and Sentel GSM Claimants v The Republic of Senegal* (ICSID Case No. ARB/08/20) Decision on Jurisdiction of 16 July 2010 at para 76-78.

the second stage. At this stage, an assessment is made as to whether the transaction, project, business etc. is an investment in terms of Article 25(1) of the ICSID Convention.[350]

However, in UNCITRAL and other non-ICSID arbitration, a tribunal need only assess whether a transaction, project, business etc. is an investment in terms of the applicable treaty, law or contract etc. This is because non-ICSID tribunals do not use a two-stage process like that applied in ICSID arbitration.

There are three other factors that make the determination of whether an investment exists in terms of Article 25(1) difficult in practice. The first is that the drafters of the ICSID Convention deliberately abstained from defining what an investment is.[351] Therefore, the ICSID Convention is of no use in this regard. Secondly, ICSID arbitral tribunals do not agree on what an investment is. This is further complicated by the fact that the doctrine of judicial precedent does not apply in ISDS, with the result that no tribunal can make a final ruling on the matter.[352] Thirdly, it is not settled whether an ICSID arbitral tribunal is bound by the definition of an investment provided for in a treaty. There are at least three views on this issue. One view is to the effect that an ICSID tribunal is not limited or bound by the definition of an investment contained in a treaty.

350 *Salin*i at para 44; *Alpha Projektholding* at para 254, 264, 303, 309-310, 332.

351 See for example *Philip Morris Brand SARL* at para 197-198; *Alpha Projektholding* at para 311; *Ambiente* at para 439; *Frank Charles Araf* at para 362; *Ioannis Kardassopoulos at* para 116; *Inmaris Perestroika Sailing Maritime Services GMBH v Ukraine* ICSID Case No. ARB/08/8 (Decision on jurisdiction) of 8 March 2010 at para 128; *Malaysian Historical Salvors* at para 56.

352 See for example *Burlington Resources Inc v Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Jurisdiction of 2 June 2010 at para 100; *Enron Corporation and Ponderosa Assets LLP v The Argentine Republic* (ICSID Case No. ARB01/3) Decision on Jurisdiction (Ancillary Claim) of 2 August 200 at para 25, 170-171; *Malaysian Historical Salvors* at para 56; *Romak S.A (Switzerland) v Republic of Uzbekistan* (PCA Case No. AA280) Award of 26 November 2009 at para 171.

Joy Mining,[353] *Fedax*,[354] *Alex Genin*,[355] *Helnan*,[356] *Ioannis Kardassopoulos*,[357] *Patrick Mitchell*,[358] *RFCC*[359] and *Salini*[360] support this view. The second view is to the effect that the definition of an investment in a treaty is authoritative. This view is supported by *Alpha Projektholding*,[361] *Inmaris,*[362] *M.C.I Power,*[363] *Parkerings*,[364] *SGS v Paraguay.*[365] A third, flexible view emanates from *Ambiente.* In this case, the tribunal suggested that the term "investment" is to be given a broad meaning.[366]

The characteristics of an investment as applied in selected ICSID and UNCITRAL arbitrations will now be discussed. The discussion is deliberately technical, as it is meant to show the responses of the various tribunals to the *Salini* criteria.

2.4.2 Characteristics of an investment

As will be seen from the discussion that follows, there is no fixed set of characteristics or attributes that a transaction, project, business etc. must meet in order to qualify as an investment in terms of the ICSID Convention. Schreuer laid the basis for the current debate on what an investment ought to be when he said that:

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353 *Joy Mining* at para 50.
354 *Fedax* at para 20-30.
355 *Alex Genin* at para 324.
356 *SGS Société Générale de Surveillance S.A. v The Republic of Paraguay* (ICSID Case No. ARB/07/29) Award of 10 February 2012 at para 80.
357 *Ioannis Kardassopoulos* at para 113.
358 *Mr Patrick Mitchell v The Democratic Republic of Congo* (ICSID Case No. ARB/99/7) Decision on Annulment of Award of 1 November 2006 at para 31.
359 *RFCC* at para 50-66.
360 *Salini* at para 43-44, 45-58.
361 *Alpha Projektholding* at para 314.
362 *Inmaris* Decision on Jurisdiction at para 130.
363 *M.C.I Power* at para 160.
364 *Parkerings* at para 254.
365 *SGS v Paraguay* at para 83.
366 *Ambiente* at para 470.

> …a qualifying project must show a certain duration, a regularity of profit and return, an element of risk, a substantial commitment, and a significant contribution to the host State's development. [367] (Emphasis added).

Fedax and *CSOB* were the first two cases to consider the above criteria.[368] Thereafter *Salini* discussed the criteria, and accepted all but the requirement of profit, as did subsequent cases.[369] The tribunal in *Salini* held that an investment must meet the following requirements (*Salini* criteria): there must be a contribution by an investor, the investment must be of qualifying (but unspecified) duration, the investment must involve a risk taken by the investor, and the investment must be of economic benefit to the host state.[370] *Salini* thus set the scene for the current debate about what an investment is or ought to be.[371] The *Salini* criteria will now be briefly discussed in order to show how subsequent decisions responded thereto, and to indicate how it was applied in subsequent cases.[372] Of further importance is that based on the conclusion drawn at the

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367 *Fedax at* para 43; Schreuer *The ICSID Convention: A Commentary* at 128 para 153.

368 *Fedax* at para 25; *Biwater Gauff* at para 310; Schreuer *The ICSID Convention: A Commentary* at 129 para 154.

369 *Salini* at para 52-58; *Malaysian Historical Salvors* at para 108. However, in *Achmea* the tribunal held that the making of an investment "necessarily implied the right to enjoy the profitability of a return on the investment, if it proves profitable" (at para 281).

370 *Salini* at para 52. Schreuer *The ICSID Convention: A Commentary* at 129 para 157 says that the profit requirement was not adopted by most tribunals.

371 See the discussion in Schreuer *The ICSID Convention: A Commentary* at 129-134.

372 For a critique of *Salini* see Andreeva Y "Salvaging or Sinking the Investment - MHS v. Malaysia Revisited," 2008 (7) The Law and Practice of International Courts Tribunals 161-176; Bechky PS "International Adjudication of Land Disputes: For Development and Transnationalism" 2014 (7) The Law and Development Review 313-327; Burger L "The Trouble with Salini (Criticism of and Alternatives to the Famous Test)" 2013 (31) ASA Bulletin 521-536; Demirkol B "The Notion of Investment in International Investment Law" 2015 (1) The Turkish Commercial Law Review 41-49; Desierto DA "Development as an International Right: Investment in the New Trade-Based IIAs" 2011 (3) Trade Law and Development 296-333; Dupont P "The Notion of ICSID Investment: Ongoing Confusion or

end of this section,[373] it is highly probable that an investment in SADC that is covered by Annex 1 or the investment laws of a Member State as discussed in Chapters 3 and 4 below, must have the characteristics that are described below.

(a) Contribution

This requirement entails that an investor must bring resources towards an investment. This can be in the form of know-how, personnel, funds, expertise, equipment etc. Based on this approach, if an investor is found not to have contributed anything to a project or a transaction, a tribunal may rule that it did not make an investment. For example, in *KT Asia v Kazakhstan,* where the investment was a shareholding acquired via loans that did not have to be paid, the tribunal held that the acquisition of the shares did not amount to an investment.[374] In *Salini*, where the project undertaken was the construction of a

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Emerging Synthesis" 2011 (12) Journal of World Investment and Trade 245-272; Engfeldt HJ "Should ICSID Go Gangnam Style in Light of Non-Traditional Foreign Investments Including Those Spurred on by Social Media - Applying and Industry-Specific Lens to the Salini Test to Determine Article 25 Jurisdiction" 2014 (32) Berkeley Journal of International Law 44-63; Exelbert JM "Consistently Inconsistent: What Is a Qualifying Investment under Article 25 of the ICSID Convention and Why the Debate Must End" 2016 (85) *Fordham Law Review* 1243-1279; Garay J "Abuse of Process through Corporate Restructuring of Assets: The Legal Standard for the Multinational Investor" 2017 (35) Boston University International Law Journal 397-424; Grabowski "The Definition of Investment under the ICSID Convention: A Defense of Salini" at 287-309; Martin A "Definition of Investment: Could a Persistent Objector to the Salini Tests Be Found in ICSID Arbitral Practice" 2011 (11) (2) Global Jurist 1-19; Musurmanov IU "The Implications of Romak v Uzbekistan for Defining the Concept of Investment" 2013 (20) Australian International Law Journal 105-129; Okpe FO "The Definition of Investment and the ICSID Convention: Matters Arising under the Nigerian Investment Promotion Act and International Investment Law" 2017 (8) Journal of Sustainable Development Law and Policy 133-154; Vargiu P "Beyond Hallmarks and Formal Requirements: A Jurisprudence Constante on the Notion of Investment in the ICSID Convention" 2009 (10) The Journal of World Investment and Trade 753-768; Yala F "The Notion of "Investment" in ICSID Case Law: A Drifting Jurisdictional Requirement?" in Reinisch (ed) *Classics in International Investment Law* Volume II at 112-123.

373 The conclusion is that these characteristics are applicable to non-ICSID arbitration and litigation cases.

374 *KT Asia Investment Group B.V v Republic of Kazakhstan* (ICSID Case No. ARB 09/8)

motorway, the tribunal found that the investors' contribution of funds and expertise was acceptable.[375] In *Bayindir,* the project that had to be undertaken by the investor was also the construction of a motorway. The tribunal found that Bayindir had contributed financial resources, equipment, personnel and expertise in the project.[376]

In *Helnan,* the tribunal found that the investment of funds to upgrade and operate a hotel was a contribution.[377] In *Malaysian Historical Salvors*, the tribunal found that in the salvaging of an old shipwreck, the investor had contributed funds, expertise, and knowledge.[378] The respondent did not dispute that the claimant made an investment.[379] In *Millicom*, the tribunal found that Millicom's establishment of and financing of a mobile phone network was a sufficient contribution.[380]

Where there is more than one investor involved in a project, a tribunal will look at their combined investment to see if the group as a whole made an investment. Hence in *Inmaris* the tribunal concluded that the combined contributions by companies in the Inmaris group amounted to an investment.[381] Similarly, in *Ambiente*, where the investments in question were bonds issued by the Argentine government to foreign investors, the tribunal held that what mattered is the total bonds issued to the group of investors.[382] In *Phoenix Action*, the tribunal held that the payment of a nominal price to acquire an investment is not a bar to meeting the requirement of a contribution, provided

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Award of 17 October 2013 at para 204, 206.

375 *Salini* at para 53.

376 *Bayindir* at para 116, 120 and 131.

377 *Helnan* at para 77.

378 *Malaysian Historical Salvors* at para 109.

379 *Impregilo* at para 78.

380 *Millicom* at para 80.

381 *Inmaris* Decision on Jurisdiction at para 96.

382 *Ambiente* at para 483.

the investor has a bona fide intention of undertaking economic activities through the investment.[383]

(b) Duration

In terms of this criterion, an investment should be held for a medium to long-term duration, although there is no specific period that is agreed among tribunals.[384] In *Salini*, where the duration of the contract was three years, the tribunal said that this duration met the criteria "according to the doctrine", which was said to be two to five years.[385] In *Bayindir*, the construction period of three years was found to be acceptable.[386] In *Jan de Nul*, the tribunal also held that an investment period of three years was sufficient.[387] In *Malaysian Historical Salvors*, where the original contract was for 18 months, the tribunal said that this original period did not meet the duration requirement in a "qualitative sense".[388] In *Helnan,* the tribunal accepted the investment duration of 26 years.[389] In *Ioannis Kardassopoulos*, the tribunal accepted a period of three years as sufficient.[390] In *Millicom*, the tribunal found that the mobile phone concession period of 20 years was a sufficient duration.[391]

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383 *Phoenix Action, Ltd v The Czech Republic* (ICSID Case No. ARB/06/05) Award of 15 April 2009 at para 122.

384 *KT Asia* at para 207, 216.

385 *Salini* at para 54

386 *Bayindir* at para 133.

387 *Jan de Nul* Decision on Jurisdiction at para 95; *Malaysian Historical Salvors* at para 101-102.

388 *Malaysian Historical Salvors* at 37 para 111(b).

389 *Helnan* at para 77.

390 *Ioannis Kardassopoulos* at para 117.

391 *Millicom* at para 80.

(c) Risk

In terms of this criterion, an investment must have a measure of risk to qualify as an investment.[392] In the case of an equity investment, the risk is that the value of the equity may depreciate.[393] Hence in *KT Asia,* the tribunal found that no investment was made because there was no risk involved in the transaction.[394] In *Bayindir*, Bayindir had to issue bank guarantees for huge sums of money in favor of the host state, risking an unlawful call of these sums by the state.[395] Furthermore, Bayindir was liable for defects for a certain period, and also had to maintain the roads for four years. The tribunal found that the investor did undertake a risk in the project.[396] The tribunal in *Malaysian Historical Salvors* found that the risk assumed by the investor was an ordinary commercial risk and, therefore, qualitatively it was not the risk envisaged in ICSID jurisprudence.[397] The tribunal concluded that the risk was only superficially met.[398] In *Helnan*, the tribunal found that the refurbishing of a hotel to five-star quality amounted to taking a risk of commercial success.[399] In *Ioannis Kardassopoulos,* the tribunal found that the mere conduct of the claimant's operation under the prevailing economic and political circumstances amounted to a risk.[400] The tribunal in *Alpha Projektholding* also agreed that conducting business under adverse political and economic climate amounted to a risk.[401] In *Saipem*, the tribunal found that the work stoppages and the necessity to renegotiate the contract amounted to a risk.[402] In *Fedax*, the tribunal found that the

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392 *Salini* at para 217.
393 *KT Asia* at para 218.
394 *KT Asia* at para 206, 217-219.
395 *Bayindir* at para 135.
396 *Bayindir a*t para 136.
397 *Malaysian Historical Salvors* at para 39.
398 *Malaysian Historical Salvors* at para 39.
399 *Ioannis Kardassopoulos* at para 77.
400 *Ioannis Kardassopoulos* at para 117.
401 *Alpha Projektholding* at para 320.
402 *Saipem* at para 109.

existence of a dispute relating to the payment of the capital and interest was sufficient proof of risk.[403] The tribunal in *Phoenix Action* found that the fact that the claimant invested in businesses that were financially distressed was sufficient risk.[404]

(d) Benefit to host state

In terms of this criterion, an investment must make a significant contribution to the economy of a host state. The tribunals in *Fedax*,[405] S*alini*[406] and *CSOB*[407] were early adopters of this requirement. The requirement has since been adopted in subsequent cases, with varying emphasis on the scale of the economic contribution to the host state, as can be seen in the analysis of tribunal decisions conducted in *Malaysian Historical Salvors*.[408] In *Bayindir*, the tribunal found that the construction of the motorway was of benefit to Pakistan.[409] In *Helnan*, the tribunal found that the investment in the hotel was of benefit to tourism in Egypt.[410] The tribunal in *Malaysian Historical Salvors* also acknowledged this requirement after an in-depth analysis.[411] In *Inmaris*, the tribunal found that the combined investment benefitted Ukraine's development because Ukraine obtained the renovation of a ship, as well as the training of its cadets.[412] In *Alpha Projektholding*, the tribunal found that the significant taxes paid by the hotel business contributed to the economy of Ukraine.[413] Although the UNCITRAL tribunal in *Bernhard Von Pezold* declined to apply the *Salini* criteria, it found that Zimbabwe's economy

403 *Fedax* at para 40.
404 *Phoenix Action* at para 127.
405 *Fedax* at para 40.
406 S*alini* at para 52.
407 *CSOB* at para 97.
408 *Bayindir* at 39 para 113, 145.
409 *Bayindir* at para 137.
410 *Helnan* at para 77.
411 *Malaysian Historical Salvors* at para 68, 105, 113, 124; 125.
412 *Inmaris* Decision on Jurisdiction at para 96, 132.
413 *Alpha Projektholding* at para 330.

benefited from job creation and the injection of know-how.[414] Similarly, the UNCITRAL tribunal in *White Industries* declined to follow *Salini*, yet it applied the same criteria and found that the investment in that case contributed to India's development.[415]

However, some tribunals did not agree with *Salini*. In *Phoenix Action,* the tribunal held that the development of economic activities by the investment need not be successful, especially when the acts of the host state destroyed the investment. What matters most is that an investor intended to undertake economic activities, and that it made good faith efforts to achieve them.[416] The tribunal in *KT Asia* held that the requirement of economic development of the host state cannot be mandatory.[417] The tribunal in *L.E.S.I v Algeria* was also not keen on the requirement.[418] In *Patrick Mitchel*, the Ad hoc Committee in the annulment proceedings acknowledged the requirement, with a cautionary.[419] The tribunal in *Quiborax* held that the economic development criterion is not part of the objective criteria for an investment, because an investment may fail and, therefore, not contribute to the development of a state.[420] In *Alpha Projektholding,* the tribunal said that the criterion makes a tribunal to engage in a *post hoc* evaluation of the business, economic, financial and/or policy assessments that prompted the claimant's activities and thus leads to second-guessing. The tribunal in *Deutsche Bank* also held that this

414 *Bernhard Von Pezold* at para 286.

415 *White Industries* at para 7.4.18.

416 *Phoenix Action* at para 133.

417 *KT Asia a*t para 171-173.

418 *Consorzio Goupemente L.E.S.I-DIPENTA (Italy) v Peoples Democratic Republic of Algeria* ICSID Case No. ARB/03/08 (Award) of 10 January 2005 at para 13(iv); *Malaysian Historical Salvors* at para 89.

419 *Patrick Mitchel* at para 28, 32 - 33.

420 *Quiborax S.A, Non-Metallic Minerals S.A and Alan Fosk Kaplun v Plurinational State of Bolivia* (ICSID Case No. ARB/06/02) Decision on Jurisdiction of 27 September 2012 at 76 para 220, 225.

requirement should not be part of the criteria for an investment.[421] Expectedly, the UNCITRAL tribunals of *Bernhard Von Pezold* and *White Industries* are among those that declined to follow *Salini*.

As can be seen from the above discussion, some tribunal decisions differed with *Salini*, while others agreed with *Salini* wholly or in part. What follows is a summary of what various tribunals said about the *Salini* criteria.

The tribunal in *Alpha Projektholding* refused to follow *Salini* because it opined that the *Salini* criteria are not contained in Article 25(1) of the ICSID Convention.[422] The tribunal in *Global Trading v Ukraine also* distanced itself from the *Salini* criteria.[423] In *Hassan Awdi v Romania*, the tribunal held that the *Salini* criteria cannot override the will of the parties in terms of what they wanted to amount to an investment or not.[424] The tribunal in *Malaysian Historical Salvors* held that the *Salini* "test" is "not a punch list of items which, if completely checked off, will automatically lead to a conclusion that there is an "investment."[425] In *Biwater Gauff*, the tribunal held that there is no basis for a strict application of the *Salini* criteria since international law or the ICSID Convention does not prescribe it.[426] The tribunal in *Phillip Morris Brand SARL* followed *Biwater*.[427] In *Phoenix Action,* the tribunal added the criteria that an investment must be made in terms of the

421 *Deutsche Bank* at para 295.
422 *Alpha Projektholding* at para 311.
423 *Global Trading Resource Corp. and Globex International, Inc v Ukraine* (ICSID Case No. ARB/09/11) Award of 1 December 2011 at para 55.
424 *Hassan Awdi, Enterprise Business Consultants, Inc, And Alfa El Corporation v Romania* (ICSID Case No. ARB/10/13) Award of 2 March 2015 at para 197.
425 *Malaysian Historical Salvors* at para 106(e).
426 *Biwater Gauff* at para 312-316.
427 *Phillip Morris Brand SARL* at para 201-206.

laws of the host state and must be bona fide.[428] In *GEA v Ukraine* the tribunal declined to apply the *Salini* test, and said that the *Salini* test is problematic if its criteria are taken as inflexible.[429] The tribunal in *Ambiente* cautioned that the *Salini* criteria must not be taken as expressing jurisdictional requirements *stricto sensu*.[430] In *Abaclat* the tribunal held that it would be wrong to disqualify an investment which was intended to be protected by the Argentina-Italy BIT simply because it did not meet the *Salini* criteria.[431] Similarly, in *Deutsche Bank* the tribunal held that there is no basis for the strict application of the *Salini* criteria.[432] The tribunal in *Bernhard Von Pezold* also held that *Salini* was not authoritative.[433]

Schreuer revisited the debate, and clarified his original view of what an investment ought to be, as follows:

> These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention…The development in practice from a descriptive list of typical features towards a set of mandatory legal requirements is unfortunate. The First Edition of this Commentary cannot serve as authority for this development.[434] (Emphasis added).

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428 *Phoenix Action* at para 101-144.

429 *GEA Group AktienGesellschaft v Ukraine* (ICSID Case No. ARB/08/16) Award of 31 March 2011 at para 314.

430 *Ambiente* at 161 para 479.

431 *Abaclat* at para 364.

432 *Deutsche Bank* at para 294.

433 *Bernhard Von Pezold* at para 285.

434 Cited in *Ambiente* at para 480-481; Schreuer *The ICSID Convention: A Commentary* at 128 para 153.

The tribunal in *Philip Morris Brand SARL* accepted Schreuer's proposal above.[435]

It is submitted that the views expressed by Schreuer as well the cases above to the effect that the *Fedax* and *Salini* criteria should be taken as guidelines only, find acceptance. In any event, in the absence of judicial precedent in ISDS, it is impossible for *Salini* to be authoritative. This is also supported by the fact that the drafters of the ICSID Convention deliberately refrained from defining an investment so as to allow flexibility in the determination of an investment. Therefore, tribunals will have to decide on a case-by-case basis whether an investment exists or not.

2.4.3 Conclusion

For the reasons that follow, it is submitted that in SADC, the criteria for an investment discussed above are applicable to non-ICSID arbitrations and even courts of law that adjudicate investor-state disputes. The tribunal in *Grupo Francisco Hermando Contreras v Republic of Ecuador* held that the *Salini* criteria can be applied to an ICSID Additional Facility arbitration,[436] while the tribunal in *Romak* held that the *Salini* criteria can be applied in UNCITRAL arbitration. The tribunal therefore applied the criteria, and concluded that the claimant did not make a qualifying investment.[437]

Furthermore, a trend is emerging in terms whereof states and regions are adopting the *Salini* criteria into their model treaties. For example, the following instruments adopt the

435 *Philip Morris Brand SARL* at para 206.

436 *Grupo Francisco Hermando Contreras v Republic of Ecuador* ICSID Case No. ARB/ (AF)/12/2 Award on Jurisdiction of 4 December 2015. The award is in Spanish. For a summary see https://www.iisd.org/itn/2016/05/16/the-only-known-investment-treaty-arbitration-against-equatorial-guinea-fails-on-jurisdictional-grounds-grupo-francisco-hernando-contreras-sl-v-republic-of-equatorial-guinea-icsid-case-no-arb-af-12-2-m/ (Date of use: 10 April 2017).

437 *Romak* at para 191-208.

Salini criteria: Article of 1.2.1 of the India Model Bilateral Treaty 2015,[438] Article 4(4) of the PAIC, and Article 1(10) of the SADC Model Bilateral Treaty Template of 2012.[439] The adoption of the *Salini* criteria into regulatory instruments is commendable, and will serve to pre-empt costly disputes with regards to whether the criteria are applicable to non-ICSID arbitrations or not. It will also create consistency and add to the jurisprudence relating to the interpretation of the criteria.

2.5 INVESTOR-STATE DISPUTE RESOLUTION METHODS

2.5.1 Introduction

The purpose of this section is to briefly discuss the processes by which investor-state disputes are resolved. These are negotiation and mediation (alternative dispute resolution (ADR)), arbitration and litigation.[440] These processes form a continuum, and proceed from left to right from ADR through to arbitration and/or litigation.[441] The parties to a dispute gradually lose control over the resolution of a dispute as it progresses through these stages.[442] This is because, by not resolving the dispute themselves, the parties pass the adjudication thereof to a third party, who may be an arbitrator or a judge, as the case may be. However, the reality is that not every dispute can be resolved via ADR. This makes arbitration and litigation relevant to investor-state dispute resolution.

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438 The India Model BIT is discussed in Chapter 5 below.

439 Southern African Development Community (2012) *Model Bilateral Treaty Template*, available at http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf (Date of use: 18 January 2018).

440 See for example Carneiro D *Conflict resolution and its context: from the analysis of behavioural patterns to efficient decision-making* (Springer Cham 2014); Salacuse JW "Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution" 2007 (31) Fordham International Law Journal 138-185 at 154; Salacuse *The Law of Investment treaties* at 357-374.

441 Salacuse 2007 (31) Fordham International Law Journal 138 at 154.

442 See Salacuse 2007 (31) Fordham International Law Journal 138 at 154-155.

According to International Court of Justice (ICJ) and tribunal decisions, a dispute is a disagreement over a point of law or fact, a conflict of legal views or interests between two persons. [443] There must have been some communication between the parties, leading to a difference in the position of the parties.[444] The dispute between the parties must be practical, not theoretical or academic.[445] Schreuer says that a dispute is legal if remedies such as restitution or damages are claimed, and if the claim is based on a contract, treaty, legislation and other source of law.[446]

Investor-state disputes are unique and vastly different from normal commercial disputes. Salacuse attributes the uniqueness of investor-state dispute to various factors, as indicated below[447]

Firstly, investor-state disputes are typically regulated by public international law instead of the laws of a host state, in that they are often regulated by treaties and rules of

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443 *Fedax* at para 15; Schreuer C "What is a Legal Dispute? International Law between Universalism and Fragmentation" in Buffard I, Crawford J, Pellet A, and Wittich S (eds) *International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner* (Koninklijke Brill NV. Netherlands 2008) 959-980, at 960-961 http://www.univie.ac.at/intlaw/wordpress/pdf/95.pdf (Date of use: 7 October 2017); Schreuer *The ICSID Convention: A Commentary* at 93 para 42 (see the authorities cited at notes 44-45).

444 Schreuer *The ICSID Convention: A Commentary* at 94 para 43.

445 Schreuer *The ICSID Convention: A Commentary* at 94 para 44-45.

446 Schreuer "What is a Legal Dispute? International Law between Universalism and Fragmentation" at 978; Schreuer *The ICSID Convention: A Commentary* at 99 para 60.

447 See also Maupin JA "Differentiating Among International Investment Disputes" in Douglas Z, Pauwelyn J and Vinuales JE (eds) *The Foundations of International Investment Law* (Oxford University Press Oxford 2014) at 467-498; Salacuse *The Law of Investment treaties* at 354-356.

international law.[448] Secondly, investor-state disputes involve public policy, in that they involve a challenge to a state's sovereign right to regulate its affairs.[449] Thirdly, investor-state disputes are political in nature, since they involve a challenge on the public policy of a state.[450] Fourth, investor-state disputes often have a bearing on a long-term relationship between an investor and a host state, wherein the parties need each other.[451] This makes the relationship difficult to unravel.[452] Fifth, the amounts being claimed in ISDS can be significant, and do run into hundreds of millions of US Dollars and in some cases, billions.[453] In addition, the costs of the ensuing ISDS are significant for a host state as well.[454] Sixth, investor-state disputes are a rare type of disputes that allow a private party to sue a state for its sovereign acts under international law.[455] Finally, investor-state disputes are unique, since it is usually an investor who can sue a host state (usually via ISDS), not the other way round.[456]

Currently, the resolution of investor-state disputes is controversial due to the fact that the majority of BITs and TIPs refer investor-state disputes to ISDS, which often bypasses the courts of host states.[457] This has created the impression that ISDS is the main mechanism for the resolution of these disputes.

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448 Salacuse 2007 (31) Fordham International Law Journal 138 at 140. This is due to BITs, TIPs, investment contracts etc. that make international law applicable to investments.

449 Salacuse 2007 (31) Fordham International Law Journal 138 at 140.

450 Salacuse 2007 (31) Fordham International Law Journal 138 at 141.

451 Salacuse 2007 (31) Fordham International Law Journal 138 at 141.

452 Salacuse 2007 (31) Fordham International Law Journal 138 at 141.

453 Salacuse 2007 (31) Fordham International Law Journal 138 at 142.

454 Salacuse 2007 (31) Fordham International Law Journal 138 at 142.

455 Salacuse 2007 (31) Fordham International Law Journal 138 at 144.

456 Salacuse 2007 (31) Fordham International Law Journal 138 at 145.

457 For a database of BITs and TIPs see http://investmentpolicyhub.unctad.org/IIA (Date of use: 10 April 2018).

For example, in North America, NAFTA refers investor-state disputes directly to ISDS.[458] In Europe, the ECT refers investor-state disputes to ISDS or the courts of host states, at the option of an investor.[459] Still in Europe, the European Union (EU) is championing an Investment Court System (ICS) that will refer investor-state disputes directly to an ICS tribunal.[460] The recently concluded Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) also provides investors with direct access to ISDS.[461] In Asia, ACIA also refers investor-state disputes directly to ISDS.[462] The India Model Bilateral Investment Treaty of 2015 refers investor-state disputes to ISDS, albeit after the exhaustion of local remedies.[463] In SADC, the 2006 Annex 1 referred investor-state disputes to ISDS after the exhaustion of local remedies.[464] The laws of some SADC Member States also refer investor-state disputes to ISDS, while others refer them to the courts of host states.[465]

2.5.2 Alternative Dispute Resolution

ADR refers to informal, amicable means of the settlement of a dispute. ADR can therefore be defined as the settlement of a dispute by means other than binding decisions made by courts or arbitral tribunals.[466] ADR processes include negotiation,

458 Article 1120 NAFTA.

459 Article 26(2)-(3) ECT.

460 See the discussion of the ICS in Chapter 5 below.

461 Article 9.19 CPTPP http://wtocenter.vn/tpp/full-text-comprehensive-and-progressive-agreement-trans-pacific-partnership-cptpp (Date of use: 3 April 2018. The parties to the agreement are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

462 Article 32 ACIA.

463 See the discussion of the India Model BIT in Chapter 5 below.

464 Article 28 2006 Annex 1.

465 See Table 1 in Chapter 4 below; Ngobeni and Fagbayibo 2015 (19) Law Democracy and Development 175 at 182-185.

466 For further reading see DeMarr BJ and de Janasz SC *Negotiation and dispute resolution* 1st ed (Pearson/Prentice Hall Boston 2013); D'Ambrumenil P *What is dispute resolution?* (LLP London 1998); Fenn PF *Commercial conflict management and dispute resolution*

mediation, conciliation, and arbitration.[467] These processes are taken as alternatives to litigation.[468] However, in the context of investment disputes, ADR consists of negotiation, mediation, and conciliation, which then become alternatives to arbitration.[469] ADR may be invoked before a conflict becomes a dispute, in which event it is referred to as preventative ADR.[470] If ADR is invoked after a conflict has become a dispute, it is referred to as resolutive ADR.[471] Both forms of ADR are used in conjunction with ISDS and litigation, and are therefore useful.

ADR has various advantages. Firstly, ADR takes less time than arbitration or litigation to conclude.[472] Secondly, ADR allows the parties, and not a third party such as a judge or an arbitrator, to reach the decision they desire.[473] Thirdly, ADR allows parties to focus on

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(Spon Press Abingdon 2012); Goldberg SB *et al Dispute resolution: negotiation, mediation and other process* 4th ed (Aspen Law & Business Gaitherburg 2003); Hames DS *Negotiation: closing deals, settling disputes and making team decisions* (SAGE Publications Thousand Oaks California 2012); Ho-Won J *Conflict management and resolution: an introduction* (Routledge London 2010); Lewiki RJ, Saunders DM and Barry B N*egotiation* 7th ed (McGraw-Hill/Irwin New York 2015); Moffit ML and Bordone *RC The Handbook of Dispute Resolution* 1st ed (Jossey-Bass San Francisco CA 2005); Mayer BS *The dynamics of conflict: a guide to engagement and intervention* 2nd ed (Jossey-Bass San Francisco 2012); Nolan-Haley JM *Alternative Dispute Resolution in a nutshell* (West Publishing Company St. Paul Minnesota 2013); Partridge MVB *Alternative Dispute Resolution: an essential competency for lawyers* (Oxford University Press Oxford 2009); Stefek F and Unberath H (eds) *Regulating dispute resolution: ADR and access to justice at the crossroads* (Hart Publishing Oxford 2013).

467 See Salacuse *The Law of Investment treaties* at 357-368.

468 Salacuse 2007 (31) Fordham International Law Journal 138 at 157.

469 Salacuse 2007 (31) Fordham International Law Journal 138 at 157.

470 United Nations Conference on Trade and Development "Investor-State Disputes: Prevention and Alternatives to Arbitration"
UNCTAD Series on International Investment Policies for Development (United Nations New York and Geneva 2010) at xii http://unctad.org/en/Docs/diaeia200911_en.pdf (Date of use: 18 January 2018).

471 United Nations Conference on Trade and Development "Investor-State Disputes: Prevention and Alternatives to Arbitration" at xii http://unctad.org/en/Docs/diaeia200911_en.pdf (Date of use: 18 January 2018).

472 Salacuse 2007 (31) Fordham International Law Journal 138 at 157.

473 Salacuse 2007 (31) Fordham International Law Journal 138 at 157.

their non-legal interests in addition to their rights.[474] Fourthly, by virtue of its amicable nature, ADR allows the parties to preserve their relationship.[475] Fifth, even after commencement of litigation or arbitration, resolutive ADR still has a role to play to bring a matter to a close. For example, ISDS statistics indicate that 36 percent of all ICSID cases up to December 2017 were settled or discontinued after commencement.[476]

However, ADR takes place in private, and there is no empirical evidence to support the claims regarding its low cost, efficiency or speed of resolution. Nonetheless, there can be no doubt that ADR saves parties time, money and even their relationship if a dispute is settled. ADR should be embraced in investor-state disputes.

2.5.3 Arbitration

Arbitration is a process whereby one or more private individuals (the arbitrators) decide a dispute which parties have voluntarily agreed to refer to them.[477] ISDS is a special form of

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474 Salacuse 2007 (31) Fordham International Law Journal 138 at 158; Welsh NA and Schneider AK "The Thoughtful Integration of Mediation into Bilateral Treaty Arbitration" 2013 (18) Harvard Negotiation Law Review 71-144 at 91.

475 Salacuse 2007 (31) Fordham International Law Journal 138 at 157, 176.

476 International Centre for Settlement of Investment Disputes "The ICSID Caseload Statistics" Issue 2017-2 https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf (Date of use: 10 March 2018).

477 Booysen *Principles of International Trade Law As A Monistic System* 767; Salacuse 2007 (31) Fordham International Law Journal 138 at 154; Salacuse *The Law of Investment treaties* at 369-374. For ISDS tribunal decisions see http://investmentpolicyhub.unctad.org/ISDS, https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx, https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx https://www.italaw.com/, https://pca-cpa.org/en/home/ (all Date of use: 07 October 2017). For further reading see Born G *International commercial arbitration* 2nd ed (Wolters Kluwer Law & Business New York 2014); Carbonneau TE *Arbitration in a nutshell* 3rd ed (Thomas/West St. Paul Minnesota 2012); Merrills JG *International dispute settlement* 5th ed (Cambridge University Press Cambridge 2011).

arbitration that was primarily brought into being by BITs and TIPs.[478] Arbitration can be international or national. National arbitration is arbitration that takes place in a particular state and according to the laws of that state.[479] International arbitration takes place in terms of international law. Due to its prevalence, ISDS is generally the main mechanism for the resolution of investor-state disputes.[480]

The majority of ISDS cases take place under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),[481] followed by the UNCITRAL Arbitration Rules.[482] The ICSID Convention established ICSID, which administers arbitration cases under the convention as well as those in terms of the UNCITRAL Arbitration Rules.[483] ICSID handles the highest ISDS caseload, followed by the Permanent Court of Arbitration (PCA).[484]

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478 See for example Vandenvelde 2005 (12) University of California Davis Journal of International Law and Policy 157 at 161-175.

479 Booysen *Principles of International Trade Law as a Monistic System* at 770.

480 Salacuse 2007 (31) Fordham International Law Journal 138 at 155.

481 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (with Rules and Regulations) 1965, amended to 2006 (ratified 14 September 1966, in force 14 October 1966) https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf (Date of use: 15 November 2017).

482 Salacuse 2007 (31) Fordham International Law Journal 138 at 157; United Nations Commission on International Trade Law 'Arbitration Rules" United Nations, New York 2014 https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf (Date of use: 15 November 2017).

483 Article 1 ICSID Convention.

484 https://pca-cpa.org/en/home/ (Date of use: 15 November 2017). For cases decided under other arbitration rules see http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution (Date of use: 05 November 2017). By 30 March 2018, 467 cases were opened under the ICSID Rules, plus 54 that were begun under the ICSID Additional Facility Rules, while 262 cases were opened under the UNCITRAL Arbitration Rules. The ICSID handled 542 cases, while the PCA handled 118. See http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution (Date of use: 30 March 2017).

When the ICSID was launched, there was much optimism about its potential to resolve investor-state disputes.[485] This optimism encouraged many states to become members of the ICSID Convention.[486] From the 1970s until the early 1990s, there were few ISDS cases.[487] Thus, from 1972 to 1996, the ICSID had less than five ISDS cases per year.[488] However, this lull was short-lived, as the caseload increased gradually, up to recent peaks of 77 cases per year in 2015.[489] In total, from 1972 until the end of June 2017, 619 ISDS cases were registered with the ICSID.[490] When non-ICSID cases are added, on 18 March 2018 the global number of known ISDS cases was 855, of which 548 were concluded, and 297 were pending.[491]

Proponents of ISDS argue that it has various benefits. Firstly, it provides an impartial, cheap and quick forum for the resolution of an investor-state dispute.[492] Secondly, ISDS

485 See Report of the Executive Directors, in the ICSID Convention at 40.

486 For a database of ICSID member states see https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (Date of use: 04 September 2017).

487 International Centre for the Settlement of Investor-state Disputes "The ICISD Caseload Statistics", Issue 2017-2 at 7 https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf (Date of use: 10 March 2018).

488 International Centre for the Settlement of Investor-state Disputes "The ICSID Caseload Statistics", Issue 2017-2 at 7 https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf (Date of use: 10 March 2018)

489 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 3 at 1-2 http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf (Date of use: 30 March 2018).

490 International Centre for the Settlement of Investor-state Disputes "The ICSID Caseload Statistics" Issue 2017-2 at 7 https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf (Date of use: 10 March 2018).

491 http://investmentpolicyhub.unctad.org/ISDS (Date of use: 18 March 2018). Please note that these statistics change as they are continually being updated.

492 Salacuse 2007 (31) Fordham International Law Journal 138 at 157.

provides an additional avenue of legal redress to covered foreign investors.[493] Thirdly, ISDS allows foreign investors to avoid national courts of a host State if they have little trust in their independence, efficiency, or competence.[494] Fourth, ISDS avoids recourse to diplomatic protection of investors. Fifth, ISDS ensures the adjudication of claims by a qualified and neutral tribunal.[495] Sixth, ISDS removes any State immunity obstacles that may complicate domestic legal claims in some States.[496] Finally, ISDS allows for the recognition of awards in terms of the ICSID Convention and the New York Convention.[497]

Despite its touted benefits, ISDS has many challenges.[498] Firstly, ISDS is costly, at least from a developing state point of view.[499] Secondly, ISDS cases take a long time to

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493 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 9 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

494 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 9 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

495 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 9 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

496 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 9 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

497 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 9 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

498 See for example Mbengue and Schacherer 2017 (18) Journal of World Investment

conclude.[500] Thirdly, ISDS lacks an appeal mechanism, and therefore it fails to provide for the correction of wrong decisions.[501] Fourth, ISDS lacks judicial precedent, and therefore it suffers from inconsistent tribunal rulings.[502] Fifth, as a private process, ISDS is perceived as lacking legitimacy, and there are concerns about arbitrator bias.[503] In this

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and Trade 414 at 441-442; For a discussion of ISDS and its challenges, see for example Schwieder RW "TTIP and the Investment Court System: A New (and Improved) Paradigm for Investor-State Adjudication 2016 (55) Columbia Journal of Transnational Law 178-227 at 184-189; United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 3 November 2017 at 2 http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf (Date of use: 30 March 2018). For the challenges that face arbitrations in Africa, see Namachanja C "The challenges facing Arbitral Institutions in Africa" CIArb Centenary Conference Paper, 15-17 July 2015 https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/collins-namachanja.pdf?sfv (Date of use: 30 January 2018).

499 See ICSID and PCA fees at https://icsid.worldbank.org/en/Pages/icsiddocs/Schedule-of-Fees.asp, https://pca-cpa.org/fees-and-costs/ (Date of use: 3 April 2018; United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 9 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

500 For information regarding the opening and conclusion dates of cases see https://icsid.worldbank.org/en/Pages/cases/PendingCases.aspx?status=p; https://www.italaw.com/; http://investmentpolicyhub.unctad.org/ISDS; https://pca-cpa.org/en/cases/ (Date of use: 30 January 2018).

501 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 9 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018). For a record of ISDS annulment decisions, see http://investmentpolicyhub.unctad.org/ISDS/FilterByFollowUpProceedings (Date of use: 05 November 2017).

502 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 9 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018). See also Garay 2017 (35) Boston University International Law Journal 397 at 400; Schwieder 2016 (55) Columbia Journal of Transnational Law 178 at 195-196. For a discussion of judicial precedent in international law see Schreuer C "The Development of International Law by ICSID Tribunals" 2016 (31) ICSID Review 728-739.

503 Luttrell SR *Bias Challenges in ISDS: The Need for a 'Real Danger' Test* (PhD Thesis

regard, a recent study has exposed the extent of "double hatting", in terms whereof some arbitrators act as counsel in some matters, and as arbitrators and even professional experts in others.[504] Sixth, ISDS provides an exclusive forum for foreign investors to sue host states, and therefore it discriminates against local and other foreign investors.[505] Seventh, there are complications regarding the enforcement of arbitral awards, especially those from non-ICSID tribunals, in that a court of a host state may refuse to enforce an award.[506] Finally, ISDS exposes host states to additional legal and financial risks, without giving them additional benefits beyond the expectation of incoming investments.[507]

Van Harten argues that the fact that only investors can commence ISDS claims, provides arbitrators with an incentive to favour investors, so as to advance the interests of the ISDS industry.[508] Furthermore, Van Harten argues that the fact that arbitrators are

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Murdoch University 2008); United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 9 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

504 Langford M, Behn D and Lie RH "The Revolving Door in International Arbitration" 2017 (20) Journal of International Economic Law 301-331 at 320 Table 6, 325 Figure 5.

505 See Salacuse 2007 (31) Fordham International Law Journal 138 at 145 note 25.

506 Article III, V *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, (date of signature 10 June 1958, in force 7 June 1959) (New York Convention) https://treaties.un.org/doc/Treaties/1959/06/19590607%2009-35%20PM/Ch_XXII_01p.pdf (Date of use: 18 January 2018). For statistics on the enforcement of awards by national courts see http://investmentpolicyhub.unctad.org/ISDS/FilterByFollowUpProceedings (select "Judicial review by national courts") (Date of use: 30 January 2018).

507 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 9 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

508 Van Harten G "Investment Treaty Arbitration, Procedural Fairness, and The Rule of Law"

appointed on a case-by-case basis provides them with an incentive to appease those who appoint them.[509] Van Harten concludes that the lack of institutional safeguards to protect ISDS from the above possibilities undermines the normative basis for ISDS.[510]

In addition to the above challenges, ISDS data provides empirical proof of why SADC is moving away from it.[511] This is explained below.

BITs, TIPs, investment contracts and host state laws are the primary sources of ISDS cases since these contain the consent of host state to ISDS.[512] Of these sources, BITs and TIPs contribute over 70 percent of all ICSID cases opened to date.[513] There are other factors that also contribute to the increase in ISDS cases, such as the growing availability of ISDS as a remedy, and the perceived lack of satisfactory alternatives to ISDS for the settlement of investor-State disputes.[514]

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in Schill SW (ed) *International Investment Law and Comparative Law* (Oxford University Press Oxford 2010) at 628; 643-657.

509 Van Harten "Investment Treaty Arbitration, Procedural Fairness, and The Rule of Law" at 628 in Schill (ed) *International Investment Law and Comparative Law.*

510 Van Harten "Investment Treaty Arbitration, Procedural Fairness, and The Rule of Law" at 628 in Schill (ed) *International Investment Law and Comparative Law.*

511 The other part of the story relates to the challenges facing ISDS. See for example Schwieder 2016 (55) Columbia Journal of Transnational Law 178 at 184-189.

512 See for example Gazzini T "Bilateral Investment Treaties" in Gazzini T and Brabandere E (eds) *International Investment Law: The Sources of Rights and Obligations* at 99-131; International Centre for Settlement of Investment Disputes "The ICISD Caseload Statistics" Issue 2017-2 at 10 https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf (Date of use: 10 March 2018).

513 International Centre for Settlement of Investment Disputes "The ICSID Caseload Statistics" Issue 2017-2 at 10 https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf (Date of use: 10 March 2018).

514 Salacuse 2007 (31) Fordham International Law Journal 138 at 147-153.

As of July 2017, 114 states had been sued in ISDS by investors.[515] Of these, developing states comprised over 65 percent of all countries sued.[516] Despite the popularity of ISDS, investors were successful in only 29.7 percent of all ICSID claims, while 34 percent were dismissed, and the rest were either discontinued or settled.[517] Furthermore, 68 percent of all arbitrators appointed in ICSID cases are from Western Europe and North America, ten percent were from South America and six percent were from Africa and the Middle East.[518] From 1987 to 31 July 2017, of the more than 500 arbitrators ever appointed to known ISDS cases, only thirteen were appointed in 545 cases, with French arbitrator Bridgitte Stern being appointed in 87 cases, while the remaining twelve had no less than 31 appointments each.[519] All these arbitrators are from developed nations.[520] Therefore,

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515 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 3 at 2 http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf (Date of use: 30 March 2018).

516 See United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 3 at 3 http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf (Date of use: 30 March 2018); http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry (Date of use: 18 March 2018). For updated statistics per host state see http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry (Date of use: 30 March 2018).

517 International Centre for Settlement of Investment Disputes "The ICSID Caseload Statistics" Issue 2017-2 at 14 https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf (Date of use: 10 March 2018). For statistics including non-ICSID cases see United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 3 at 4 http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf (Date of use: 30 March 2018), where the patterns are similar.

518 International Centre for Settlement of Investment Disputes "The ICSID Caseload Statistics" Issue 2017-2 at 14 https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-2%20(English)%20Final.pdf (Date of use: 10 March 2018). The total cases to which these arbitrators were appointed is 128.

519 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue at 6 http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf (Date of use: 30 March

the most-used regions are under-represented in ISDS cases and only a handful of arbitrators handle the majority of cases.

Another challenge that ISDS faces is that investors rely on controversial breaches to open cases,[521] namely fair and equitable treatment (FET),[522] and expropriation.[523] FET, together with the minimum standard of treatment and denial of justice, was used to open almost half of all known ISDS cases, namely 412 cases.[524] Under this category, investors were successful in 105 cases.[525] 366 cases were opened based on alleged indirect expropriation, while 94 claims were based on alleged direct expropriation.[526] Investors were successful in 55 cases of indirect expropriation and 28 cases of direct expropriation cases.[527]

2018); Langford, Behn and Lie 2017 (20) Journal of International Economic Law 301-331 at 313 Table 2.

520 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 3 at 6 http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf (Date of use: 30 March 2018).

521 For updated statistics in this regard see http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches (Date of use; 3 April 2018.

522 FET is controversial because it is difficult to define. See United Nations Conference on Trade and Development "Fair and Equitable Treatment" at 1-15 http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017) For a discussion of FET see Chapter 3 below at 133.

523 Indirect expropriation is controversial because its scope can be difficult to define. See Schreuer "The Concept of Expropriation under the ECT and other Investment Protection Treaties" at 3 http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf (Date of use: 20 October 2017); United Nations Conference on Trade and Development "Expropriation" at 7, 63 http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf (Date of use: 15 October 2017); *Bernhard Von Pezold* at para 507.

524 http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches (Date of use: 10 April 2018).

525 http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches (Date of use: 10 April 2018).

526 http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches (Date of use: 10 April 2018).

527 http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches (Date of use: 10 April

The size of ISDS claims and awards is concerning, especially for developing states. Historically, investors claimed compensation in excess of USD 90 Billion in more than 90 cases.[528] Of these, awards in excess of USD 1 Billion each were made in six cases, while three settlements in excess of USD 1 Billion each were made.[529] The *Yukos Universal Limited* group of cases[530] tops the list with a combined award of USD 50 Billion, while regarding settlements *Repsol v Argentina* tops the list with USD 5 Billion.[531] The highest recent arbitral award against a SADC Member state is for USD 194 million against Zimbabwe in *Bernadus Von Pezold.*[532]

It is generally accepted that the influx of ISDS claims has resulted in a phenomenon called regulatory chill. Although there is no uniform definition of regulatory chill,[533] the

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2018).

528 http://investmentpolicyhub.unctad.org/ISDS/FilterByAmounts (Date of use: 10 April 2018).

529 http://investmentpolicyhub.unctad.org/ISDS/FilterByAmounts (Date of use: 10 April 2018).

530 *Yukos Universal Limited, Hulley Enterprises Limited*, and *Veteran Petroleum Limited*. The awards were annulled by The Hague District Court (Chamber for Commercial Affairs) under case number C/09/477160/HA ZA 15-1, Judgment of 20 April 2016 https://www.italaw.com/sites/default/files/case-documents/italaw7255.pdf (Date of use: 10 April 2018). This decision is pending appeal before The Hague Court of Appeal under case number Case No. 200.197.079/01 (see Russia's defence at https://www.italaw.com/sites/default/files/case-documents/italaw9633.pdf) (Date of use: 10 June 2018). The basis of the annulment was that there was no valid consent to arbitration by the Russian Federation (Decision of the District Court at para 5.95 - 5.97).

531 *Repsol S.A and Repsol Butano S.A v Argentine Republic* (ICSID Case No. ARB/12/38).

532 *Bernadus Von Pezold* at para 1020. The award in this matter is being challenged.

533 For a discussion of regulatory chill see Bartl M "Regulatory Convergence through the Back Door: TTIP's Regulatory Cooperation and the Future of Precaution in Europe" 2017 (18) German Law Journal 969-992; Brown JG "International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?" 2013 (3) (1) Western Journal of Legal Studies Art. 3, 1-25; Brower CN and Schill SW "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?" Chicago Journal of International Law 2009 (9) 471-498; Chriki D "Investment arbitration liability insurance: a possible solution for concerns of a regulatory chill?" Columbia FDI Perspectives on Topical Foreign Direct Investment Issues, No. 223 April 9, 2018 http://ccsi.columbia.edu/files/2016/10/No-223-Chriki-FINAL.pdf (Date of use: 17 April 2018); Cote C "Is it Chilly Out there? International Investment Agreements and Government Regulatory Authority" AIB Insights (16) (1) https://pdfs.semanticscholar.org/8500/f21dbe97deaa15c6e7e2b370f09c0d4cde3a.pdf

preferred definition herein is that when regulatory chill occurs, "a State actor will fail to enact or enforce bona fide regulatory measures because of a perceived or actual threat of investment arbitration."[534] A brief discussion of regulatory chill will suffice.

(Date of use: 17 April 2018); Cotula L "Do investment treaties unduly constrain regulatory space?" 2014 (9) Questions of International Law 19-31; Glinavos I "Investor Protection v. State Regulatory Discretion: Definitions of Expropriation and Shrinking Regulatory Competence" 2011 (13) European Journal of Law Reform 97-114; Gross SG "Inordinate Chill: Bits, Non-NAFTA MITs, and Host-State Regulatory Freedom - An Indonesian Case Study" 2003 (24) Michigan Journal of International Law 893-960; Gruszxzynski L "Australian Plain Packaging Law, International Litigations and Regulatory Chiling Effect" 2014 (5) European Journal of Risk Regulation 242-247; Hazzaa H "Silke Noa Kumpf, Egypt's Ban on Public Interest Litigation in Government Contracts: A Case Study of Judicial Chill" 2015 (51) Stanford Journal of International Law 147-171; Korzun C "The Right to Regulate in Investor- State Arbitration: Slicing and Dicing Regulatory Carve-Outs" 2017 (50) Vanderbilt Journal of Transnational Law 355-414; Langalanga A "Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context " South African Institute of International Affairs Occasional Paper 214, 2015 https://www.saiia.org.za/occasional-papers/848-imagining-south-africa-s-foreign-investment-regulatory-regime-in-a-global-context/file (Date of use: 17 April 2018); Matveev A "Investor-State Dispute Settlement: The Evolving Balance Between Investor Protection and State Sovereignty" 2015 (40) The University of Western Australia Law Review 348-386; Shekhar S "'Regulatory Chill': Taking Right to Regulate For a Spin" Working Paper, Centre For WTO Studies, September 2016 http://wtocentre.iift.ac.in/workingpaper/%27REGULATORY%20CHILL%E2%80%99%20TTAKING%20RIGHT%20TO%20REGULATE%20FOR%20A%20SPIN%20(September%202016).pdf (Date of use: 17 April 2018); McKenzie S *Resolving the Conflict Between The Protection of International Investments and The State's Right and Responsibility to Regulate* (LLM dissertation University of the Witwatersrand 2017); Schill SW "Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review" 2012 (3) (3) Journal of International Dispute Settlement 577-607; Salazar ARV "NAFTA Chapter 11, Regulatory Expropriation, and Domestic Counter-Advertising Law" 2010 (27) Arizona Journal of International and Comparative Law 31-82; Soloway J "NAFTA's Chapter 11: Investor Protection, Integration and the Public Interest" 2003 (9) (2) IRPP, http://www.envireform.utoronto.ca/conference/nov2002/tollefson-soloway.pdf (Date of use: 17 April 2018); Tienhaara K "Regulatory chill and the threat of arbitration: a view from political science" (October 28 2010) in *Evolution In Investment Treaty Law and Arbitration* Chester Brown, Kate Miles, (eds) (Cambridge University Press Cambridge 2011) https://ssrn.com/abstract=2065706 (Date of use: 17 April 2018).

534 Tietje and Baetens "The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership" at para 68, 74-85 http://media.leidenuniv.nl/legacy/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf (Date of use: 17 April 2018).

Tietje and Baetens identify three kinds of regulatory chill. The first is "anticipatory chill".[535] This occurs when policy-makers take into account potential disputes with foreign investors before they begin taking regulatory measures.[536] The second kind is "specific response chill".[537] It stems from actual, threatened or perceived disputes, which regulators begin to identify as a risk.[538] As a result, regulators may cease the relevant measures, or they may make changes thereto in order to avoid the risk.[539] Finally there is "precedential chill", which occurs when regulators change a measure in response to a settled or resolved investor-state dispute, due to fear of facing a repeat of a damages award (in the case of a losing state party), or of facing a similar dispute (in the case of other states).[540]

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535 Tietje and Baetens "The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership" at para 69 http://media.leidenuniv.nl/legacy/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf (Date of use: 17 April 2018).

536 Tietje and Baetens "The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership" at para 69 http://media.leidenuniv.nl/legacy/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf (Date of use: 17 April 2018).

537 Tietje and Baetens "The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership" at para 69-70 http://media.leidenuniv.nl/legacy/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf (Date of use: 17 April 2018).

538 Tietje and Baetens "The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership" at para 70 http://media.leidenuniv.nl/legacy/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf (Date of use: 17 April 2018).

539 Tietje and Baetens "The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership" at para 70 http://media.leidenuniv.nl/legacy/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf (Date of use: 17 April 2018).

540 Tietje and Baetens "The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership" at para 71 http://media.leidenuniv.nl/legacy/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf (Date of use: 17 April 2018).

However, there are arguments against the existence of regulatory chill.[541] Irrespective of whether regulatory chill exists or not, there is no denying that the challenges of ISDS discussed above have made states to review their position towards it, as exemplified by the states and regions discussed herein. Furthermore, ISDS is not the only factor that regulators consider when taking regulatory measures. Therefore regulatory chill alone may not always deter states from taking measures they deem necessary.[542] Furthermore, the lack of judicial precedent in ISDS, as well as the low investor success rate of approximately 30 percent may give states optimism when anticipating disputes.

2.5.4 Litigation

Litigation is the resolution of a dispute before a court of law. The court may be that of a host state, a sub-regional court such as the SADC Tribunal, a continental court such as the ACH&PR,[543] or an international tribunal such as the ICJ.[544] In the absence of consent to arbitration by a host state, local litigation is the default forum for the resolution of investor-state disputes.[545]

According to UNCTAD, there are five benefits to the use of the courts of host states.[546] Firstly, such use puts foreign investors on equal footing with domestic investors, as well

541 Tietje and Baetens "The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership" at para 74-85 http://media.leidenuniv.nl/legacy/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf (Date of use: 17 April 2018).

542 Tietje and Baetens "The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership" at para 86 http://media.leidenuniv.nl/legacy/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf (Date of use: 17 April 2018).

543 See http://www.african-court.org/en/ (Date of use: 18 January 2018).

544 See http://www.icj-cij.org/homepage/ (Date of use: 13 October 2015).

545 See for example Salacuse 2007 (31) Fordham International Law Journal 138 at 154 at 163.

546 United Nations Conference on Trade and Development "International

as with other foreign investors from States that do not have BITs or TIPs with a host state.[547] Secondly, this helps to establish a level playing field among foreign investors.[548] Thirdly, local courts are well suited to applying and interpreting domestic laws.[549] Fourthly, ISDS is less critical in countries with well-developed and efficient legal systems.[550] Finally, the use of local courts enables and brings to the fore the development of legal and judicial institutions of a host state.[551]

However, local litigation also has its downside. Firstly, there is a possibility that a host state may not guarantee an efficient and independent judicial system, or that local courts

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Investment Agreements Issues Note", Issue 4 at 11 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

547 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 11 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

548 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 11 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

549 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 11 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

550 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 11 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

551 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 11 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

may lack independence, or be subject to political control.[552] Secondly, local litigation may take long to conclude (e.g. due to high caseloads), thereby resulting in costly litigation.[553] Thirdly, local courts may be subject to political interference.[554] Fourth, they may be biased towards foreigners.[555] Fifth, they may lack the expertise to deal with complex international law principles applicable to investment transactions.[556] Sixth, local courts may suffer from backlogs and inefficient procedures.[557] However, local courts may, depending on the state of their rule of law, be an attractive forum for the adjudication of investor-state disputes.[558] Furthermore, the extent of these challenges will differ from one host state to another.[559] Therefore the above challenges are not global, and will vary from state to state. On the other hand, the challenges of ISDS are global in nature. Recommendations regarding their future use of litigation are made in Chapter 6.[560]

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552 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 11 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

553 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4 at 11 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

554 Salacuse 2007 (31) Fordham International Law Journal 138 at 163.

555 Salacuse 2007 (31) Fordham International Law Journal 138 at 163.

556 Salacuse 2007 (31) Fordham International Law Journal 138 at 163.

557 Salacuse 2007 (31) Fordham International Law Journal 138 at 163.

558 Salacuse 2007 (31) Fordham International Law Journal 138 at 163.

559 Salacuse 2007 (31) Fordham International Law Journal 138 at 163.

560 See Recommendations 6.2.2 and 6.2.3 in Chapter 6.

2.5.5 Conclusion

All the mechanisms for the resolution of investor-state disputes discussed above are important. Host states will always have different policies on foreign investment, and their socio-economic positions will always vary as well. Therefore, a one-size-fits-all approach towards the choice dispute resolution mechanism is not ideal. The failure of the PAIC in providing a single mechanism for African states is testament to these differences. SADC's options with regard to the resolution of investor-state disputes are analysed in Chapter 5.

2.6 SUMMARY

This chapter introduced the concepts of state responsibility, expropriation, investment as well as the processes, mechanisms or methods by which investor-state disputes are resolved.

With regard to state responsibility, it was shown that a state can incur international responsibility from the breach of international law, breach of treaty, breach of contract, or the enactment or failure to comply with its own laws. This international responsibility, especially which is underpinned by the duty to honour treaties, has enabled BITs, TIPs and investment agreements to spawn the ISDS industry.

Expropriation will always be contentious between host states and investors, due to the potential cost it has to both parties. The thin distinction between regulatory measures that are acceptable, and those that are expropriatory, the open-ended nature of key aspects such as indirect expropriation, the quantum for compensation, varying tribunal decisions, etc. adds to this controversy.

With regard to the concept of an investment, it was noted that there is no universal definition of an investment. Furthermore, it was noted the *Salini* criteria and subsequent ICSID tribunal decisions are not prescriptive. Instead, they are guidelines with regard to the characteristics which a transaction or business should have in order to qualify as an investment for the purpose of Article 25(1) of the ICSID Convention. Based on the decisions in *Romak* and *Grupo Francisco Hermando Contreras*, these criteria may be applied to non-ICSID arbitrations. The *Salini* criteria (or variations thereof) are being gradually incorporated into BITs, TIPs, human rights treaties, sub-regional court practice, and model treaties such as the Brazil-Malawi Agreement on Cooperation and Facilitation of Investment (ACFI), India Model BIT, the SADC Model BIT and the PAIC.

With regard to investor-state dispute resolution methods, it was noted that both ISDS and litigation have challenges. Therefore, neither ISDS nor litigation is inherently better than the other. The circumstances of a host state or region are the best determinants of the appropriate method for the resolution of investor-state disputes. As Salacuse opines, litigation may be an attractive option for the resolution of investor-state disputes, if the rule of law in a state is satisfactory. In other circumstances such where there no rule of law in a host state, ISDS may be a better option for an investor. This issue is discussed further in Chapter 5 below.

The next chapter will analyse selected provisions of the 2006 and 2016 Annex 1, which regulate foreign investments at SADC level.

CHAPTER 3

THE REGULATION OF FOREIGN INVESTMENTS UNDER SADC LAW

3.1 INTRODUCTION

It will be recalled that one of the research sub-questions of this study is whether the remedies that are available to an investor based on Annex 1 in the event of expropriation are satisfactory or not.[561] Furthermore, one of the sub-objectives of this study is to analyse the options that are open to SADC with regard to the regulation of foreign investments, with regard to the mechanism and forum for the resolution of investor-state disputes.[562]

This chapter will address the above sub-question and sub-objective, and lays the basis for the discussion of the second issue that is undertaken in Chapter 5, and the recommendations made in Chapter 6. It commences with a historical background of SADC, followed by an analysis of selected provisions of the 2006 and 2016 Annex 1 insofar as they relate to the resolution of investor-state disputes in the event of expropriation. The chapter concludes with a discussion of SADC Member States' ISDS experience. Together with Chapter 4, this chapter will lay the basis for a view to be adopted, as to whether the regulation of foreign investments in terms of Annex 1 and Member State laws is satisfactory or not.

In the course of the analysis, the 2006 and 2016 Annex 1s will be compared to similar BITs and TIPs such as ACIA, the Brazil-Malawi ACFI,[563] IACCIA, ECT, the EU-U.S.

561 This is sub-question 1.2.4 in Chapter 1.

562 This is objective 1.3.5 in Chapter 1.

563 The ACFI is discussed in Chapter 5 below.

Transatlantic Trade and Investment Partnership (TTIP),[564] the India Model BIT,[565] NAFTA, and the SADC Model BIT. The Annex 1s have both differences and similarities with these instruments, as will be shown during the analysis. These provide a context against which to interpret and analyse the Annex 1s.

The ECT and NAFTA are useful in the analysis because they have produced a vast body of international arbitral decisions, which can aid in the interpretation and application of the relevant provisions of the Annex 1's.[566] On 8 April 2018, the ECT was the most invoked TIP (113 ISDS cases),[567] followed by NAFTA (61 ISDS cases).[568] The IACCIA is relevant herein as it reflects the foreign investment regulatory policy approach within COMESA, SADC's partner in the T-FTA. The DRC, Madagascar, Malawi, Mauritius, Seychelles, Eswatini, Zambia, Zimbabwe are members of both SADC and COMESA.[569]

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564 The TTIP is discussed in Chapter 5 below.

565 The India Model BIT is discussed in Chapter 5 below.

566 For a list of NAFTA ISDS cases opened against Canada see http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng (Date of use: 10 April 2018), http://investmentpolicyhub.unctad.org/ISDS/CountryCases/35?partyRole=2 (Date of use: 10 April 2018); For cases opened against the USA see https://www.state.gov/s/l/c3741.htm (Date of use: 25 March 2017), http://investmentpolicyhub.unctad.org/ISDS/CountryCases/223?partyRole=2 (date of use: 10 April 2018); for cases opened against Mexico see https://www.state.gov/s/l/c3742.htm (Date of use: 10 April 2018), http://investmentpolicyhub.unctad.org/ISDS/CountryCases/136?partyRole=2 (Date of use: 17 January 2018). For access to cases opened in terms of the ECT see http://www.energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/ (Date of use: 10 April 2018), http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia (Date of use: 10 April 2018).

567 http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia (Date of use: 8 April 2018).

568 http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia (Date of use: 8 April 2018).

569 http://www.comesa.int/comesa-members-states/ (Date of use: 01 April 2017).

The ACIA has produced only two ISDS cases,[570] but it is still relevant to show an Asian perspective to the issues herein. The ACFI, TTIP and India Model BIT are relevant herein because they are used as case studies in Chapter 5 below, to demonstrate among others the lessons that SADC can learn therefrom.

The SADC Model BIT is used herein because it is reflects SADC's BIT policy at the time of its conclusion.[571] It does not have the force of a legal instrument, and is a recommended template for the Member States that wish to enter into BITs, as permitted under Annex 1.[572] According to the introduction to the Model BIT, the Model BIT came into being in support of the requirement of the 2006 Annex 1, which required the harmonisation of investment laws and practices in SADC.[573] The Model BIT project was funded by the EU FIP Project and the *Deutsche Gesellschaft fur Internationale Zusammenarbeit* (GIZ) on behalf of the German government.[574]

The PAIC is used herein because it is the recommended Model BIT template for AU Member States. It therefore has a similar legal status to the SADC Model BIT, except that its scope is continent-wide. Being a recent instrument from 2016 just like the 2016 Annex 1,[575] the PAIC shows the current BIT policy direction of combined AU Member States, especially with regard to the resolution of investor disputes. For the same

570 http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia (date of use: 10 April 2018).

571 For a brief discussion of the Model BIT see Ngobeni and Fagbayibo 2015 (19) Law Democracy and Development 175 at 179-182.

572 SADC Model BIT at 3; Article 26 2006 Annex 1; Article 24 2016 Annex 1; Mbengue and Schacherer 2017 (18) Journal of World Investment and Trade 414 at 419.

573 SADC Model BIT at 3.

574 SADC Model BIT at 4.

575 The version of the PAIC used here was circulated on 8 February 2017.

reason, the PAIC could be a guide as to what can be expected with regard to dispute resolution from the upcoming AfCFTA investment protocol.

3.2 SADC: A GENERAL OVERVIEW

SADC is one of the recognised eight RECs of the African Union (AU).[576] It is comprised of 16 Member States situated in Sub-Saharan Africa, as well as four Indian Ocean Islands neighboring Eastern Africa.[577] SADC's roots can be traced to the activities of the Frontline States (FLS), namely Angola Botswana, Lesotho, Mozambique, Eswatini and Tanzania and Zambia.[578] The idea of the Front Line States was born out of the Liberation Committee of the Organisation for African Unity (OAU) in the 1960s. This initiative used Tanzania as a base for the support of the liberation of other Southern African states, such as Angola, Mozambique, Namibia, South Africa and Zimbabwe.[579] Zambia and Botswana joined the initiative, the latter covertly so by accepting refugees

576 https://au.int/en/organs/recs (Date of use: 18 January 2018).

577 SADC Member States are: The Republic of Angola; The Republic of Botswana, The Democratic Republic of Congo, the Kingdom of Lesotho, the Republic of Madagascar, the Republic of Malawi, The Republic of Mauritius; the Republic of Mozambique, The Republic of Namibia, The Republic of Seychelles, the Republic of South Africa, The Kingdom of Eswatini, The United Republic of Tanzania, The Union of Comoros, The Republic of Zambia; and The Republic of Zimbabwe, available at http://www.sadc.int (Date of use: 09 October 2017).

578 SADC "Regional Indicative Strategic Development Plan" (2004) at 1 http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf (Date of use: 09 October 2017); SADC "Major Achievements and Challenges: 25 Years of Regional Cooperation and Integration" (2005) at 8 http://www.sadc.int/files/7713/5826/4978/Achievements_booklet.pdf (Date of use: 28 February 2017). For a historical background of SADC see also Peters W *The quest for an African economic community: regional integration and its role in achieving African unity-the case of SADC* (Lang Frankfurt 2010) at 129-152.

579 SADC "Major Achievements and Challenges" at 8 http://www.sadc.int/files/7713/5826/4978/Achievements_booklet.pdf (Date of use: 28 February 2017).

from Angola, Namibia, South Africa and Zimbabwe.[580] Nigeria also played a supporting role for the liberation of Southern African states by supporting the FLS.[581]

The focus on the FLS was the political liberation of the region.[582] The FLS coordinated their efforts, resources, and strategies in the fight against colonialism, racism and white minority-rule.[583] The idea was that since the States had common challenges of poverty and economic woes, they needed to work together to survive and achieve economic and social development. They also defended themselves against military attacks by the regime of the then apartheid South Africa.[584] Once each State gained independence, it joined the FLS.[585] After most of the states in the region achieved their main objective of political liberation from colonial rule, the focus of the FLS moved to the economic and social development of the region through co-operation and integration.[586]

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580 SADC "Major Achievements and Challenges" at 8 http://www.sadc.int/files/7713/5826/4978/Achievements_booklet.pdf (Date of use: 28 February 2017).

581 SADC "Major Achievements and Challenges" at 8 http://www.sadc.int/files/7713/5826/4978/Achievements_booklet.pdf (Date of use: 28 February 2017).

582 SADC "Regional Indicative Strategic Development Plan" at 1 http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf (Date of use: 09 October 2017).

583 SADC "Regional Indicative Strategic Development Plan" at 1 http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf (Date of use: 09 October 2017).

584 SADC "Regional Indicative Strategic Development Plan" at 1 http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf (Date of use: 09 October 2017); SADC "Major Achievements and Challenges" at 8 http://www.sadc.int/files/7713/5826/4978/Achievements_booklet.pdf (Date of use: 28 February 2017).

585 Botswana joined in 1975, Mozambique and Angola joined in 1975, and Zimbabwe joined in 1980 and Namibia joined in 1990.

586 SADC "Regional Indicative Strategic Development Plan" at 1 http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf (Date of use: 09 October 2017).

In 1977, the FLS held consultations that led to a meeting of their respective Foreign Ministers in 1979.[587] They agreed to convene an international conference at Arusha, Tanzania.[588] This conference of Economic Ministers of the FLS and international participants took place during July 1979 at Arusha, Tanzania. The conference resolved to form a structure that will coordinate and promote regional cooperation efforts.[589] The leaders of the then nine independent states met in Lusaka, Zambia on the 1st April 1980, where they formed the Southern African Development Coordination Conference (SADCC).[590] The Summit adopted a Declaration titled 'Southern Africa: Toward Economic Liberation' as well as a Programme of Action covering areas of Transport and Communications, Food and Agriculture, Industry, Manpower Development and Energy.[591] SADCC was formally constituted on the 20th July 1981.[592] The aim of the

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587 SADC website (http://www.sadc.int/about-sadc/overview/history-and-treaty/) (Date of use: 28 February 2017).

588 SADC "Major Achievements and Challenges" at 9 http://www.sadc.int/files/7713/5826/4978/Achievements_booklet.pdf (Date of use: 28 February 2017).

589 SADC "Major Achievements and Challenges" at 9 http://www.sadc.int/files/7713/5826/4978/Achievements_booklet.pdf (Date of use: 28 February 2017).

590 The founding states were Angola, Botswana, Lesotho, Malawi, Mozambique, Eswatini, United Republic of Tanzania, Zambia and Zimbabwe SADC "Regional Indicative Strategic Development Plan" at 2 http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf (Date of use: 09 October 2017); SADC "Major Achievements and Challenges" at 9 http://www.sadc.int/files/7713/5826/4978/Achievements_booklet.pdf (Date of use: 28 February 2017); SADC 35th Summit Brochure (2015) at 36 https://www.sadc.int/files/1914/5019/1522/35th_SADC_Summit_Brochure.pdf (Date of use: 18 February 2017); (http://www.sadc.int/about-sadc/overview/history-andtreaty/ (Date of use: 28 February 2017).

591 SADC "Regional Indicative Strategic Development Plan" at 2 http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf (Date of use: 09 October 2017); SADC "Major Achievements and Challenges" at 9 http://www.sadc.int/files/7713/5826/4978/Achievements_booklet.pdf (Date of use: 28 February 2017).

592 SADC website http://www.sadc.int/about-sadc/overview/history-and-treaty/ (Date of use: 28 February 2017).

SADCC was to create regional economic integration, to mobilise resources for implementing national and interstate policies, and to secure international co-operation within the framework of the strategy of economic liberation.[593] In 1989, a summit of the Heads of State and Government held in Harare, Zimbabwe resolved that SADCC be transformed into an international organisation by treaty.[594]

When Namibia attained independence in 1990, and the end of apartheid in South Africa was imminent, the SADCC region moved from war and fighting colonialism to attaining peace and stability.[595] At the continental level, the Heads of State and Government of the OAU signed the Treaty Establishing the African Economic Community (AEC Treaty) during 1991, thereby setting the course for the establishment of the AEC.[596] This treaty made RECs the building blocks of the continent.[597] Based on these events as well as the decision of the summit of Heads of State and Government of SADCC held in Harare as stated above, the SADCC Heads of State and Government signed the SADC Treaty on 17 August 1992 at Windhoek, Namibia.[598]

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593 SADC "Regional Indicative Strategic Development Plan" at 2 http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf (Date of use: 09 October 2017).

594 SADC "Major Achievements and Challenges" at 24 http://www.sadc.int/files/7713/5826/4978/Achievements_booklet.pdf (Date of use: 28 February 2017); SADC website http://www.sadc.int/about-sadc/overview/history-and-treaty/) (Date of use: 28 February 2017.

595 SADC "Regional Indicative Strategic Development Plan" at 2 http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf (Date of use: 09 October 2017).

596 *Treaty Establishing the African Economic Community* (date of signature 3 June 1991, in force 12 May 1994 (AEC Treaty) http://www.wipo.int/edocs/trtdocs/en/aec/trt_aec.pdf (Date of use: 28 February 2017).

597 Article 6 AEC Treaty.

598 SADC "Regional Indicative Strategic Development Plan" at 3 http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_P

A recent regional integration milestone with major implications for SADC is the formation of the AfCFTA. The AU launched the negotiations towards the formation of the AfCFTA during January 2012.[599] The first phase of the negotiations was concluded at the Tenth Extraordinary Session of the AU Assembly, where the agreement establishing the AfCFTA, the Protocol on Trade in Goods, the Protocol on Trade in Services and the Protocol on Rules and Procedures on the Settlement of Disputes on were adopted on 21 March 2018.[600] 44 out of the 55 AU Member States signed the AfCFTA agreement at this stage.[601] The next round of negotiations, which will commence during the second

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lan.pdf (Date of use: 09 October 2017); SADC "Major Achievements and Challenges" at 10 http://www.sadc.int/files/7713/5826/4978/Achievements_booklet.pdf (Date of use: 28 February 2017); SADC 35th Summit Brochure at 36 https://www.sadc.int/files/1914/5019/1522/35th_SADC_Summit_Brochure.pdf (Date of use: 18 February 2017); SADC website http://www.sadc.int/about-sadc/overview/history-and-treaty/ (Date of use: 28 February 2017). The founding members of SADC are: Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Eswatini, Tanzania, Zambia and Zimbabwe. South Africa joined SADC in 1994, Mauritius joined in 1995, The DRC and Seychelles joined in 1998, and Madagascar joined in 2005 (SADC website http://www.sadc.int/about-sadc/overview/history-and-treaty/) (Date of use: 28 February 2017).

599 African Union (Assembly) (Eighteenth Ordinary Session, 29-30 January 2012) "Decision on Boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area" Doc.EX.CL/700(XX), Assembly/AU/Dec.394(XVIII) https://au.int/sites/default/files/decisions/9649-assembly_au_dec_391_-_415_xviii_e.pdf (Date of use: 18 December 2017).

600 African Union (Assembly) "Decision" at para 5-6 https://www.tralac.org/documents/resources/african-union/1834-au-decision-on-the-draft-agreement-establishing-the-african-continental-free-trade-area-21-march-2018-1/file.html (Date of use: 28 March 2018).

601 See African Union (Assembly) (Tenth Extraordinary Session, 21 March 2018) "INDICATION OF LEGAL INSTRUMENTS SIGNED AT THE 10TH EXTRAORDINARY SESSION OF THE ASSEMBLY ON THE LAUNCH OF THE AFCFTA" https://www.tralac.org/documents/resources/african-union/1831-legal-instruments-signed-at-10th-extraordinary-summit-on-afcfta-21-march-2018/file.html (Date of use: 22 March 2018).

half of 2018 and conclude in 2020, will focus on competition policy, investment and intellectual property rights.[602]

The AfCFTA is a flagship programme of *Agenda 2063*,[603] and is also a milestone towards the formation of the AEC, as contemplated in Articles 1 and 6(2) (c) of the AEC Treaty.[604] In order to lay a basis for the formation of the AfCFTA, the AU resolved that each of the eight RECs must establish their Free Trade Areas (FTAs) by 2014.[605] However, only COMESA, EAC, and SADC managed to achieve this by forming the T-FTA. The T-FTA Agreement was signed by 15 of the member states on 10 June 2015.[606] It was thereafter going to be signed by the remaining 11 states, and then await

602 African Union (Assembly) "Decision" at para 12(iii), 13 https://www.tralac.org/documents/resources/african-union/1834-au-decision-on-the-draft-agreement-establishing-the-african-continental-free-trade-area-21-march-2018-1/file.html (Date of use: 28 March 2018).

603 African Union (Commission) "Agenda 2063 Framework Document" at viii, 97 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017): African Union (Commission) "Agenda 2063 First Ten-Year Implementation Plan 2014-2023" at 15, 37, 63, 120 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf (Date of use: 16 November 2017). For a detailed background to the AfCFTA see African Union (Commission) "Assessing Regional Integration VIII: Bringing the Continental Free Trade Area About" at 51-152.

604 African Union (Commission) (2017) "Assessing Regional Integration VIII: Bringing the Continental Free Trade Area About" at 2,3,15, 118 and 149 https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017).

605 African Union (Commission) "Assessing Regional Integration VIII: Bringing the Continental Free Trade Area About" at 14-16, 123 https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017).

606 The states which signed the treaty at that point are: Angola, Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Kenya, Malawi, Namibia, Rwanda, Seychelles, Sudan, the United Republic of Tanzania, Uganda and Zimbabwe. Eswatini. See SADC (2015) 35th Summit Brochure at 30. For an analysis of the T-FTA see Angweyi V "The Tripartite Free Trade Area: A Step Closer to the African Economic Community?" 2016 European Yearbook of International Economic Law 589-613.

ratification by at least 14 member states in order to come into effect.[607] Thereafter, and in line with the aims, objectives, and principles in Articles 2, 3, 4 and 6 of the AEC Treaty, the eight regional FTAs would be consolidated to form the AfCFTA. States that are not members of regional FTAs will join the AfCFTA directly.[608]

The 26-member T-FTA is the biggest economic regional block in the AfCFTA. It represents 59 percent (USD 1.3 Trillion) of African GDP, 57 percent of Africa's population, and half of AU Member States.[609] SADC, as a member of the T-FTA, is an important and active player in the formation of the AfCFTA. South Africa was the 19th state to sign the T-FTA during July 2017, in preparation for the formation of the AfCFTA.[610] Thereafter, South Africa hosted the 3rd Meeting of the AfCFTA Technical Working Groups from 22 August 2017 to 01 September 2017.[611] SADC and the T-FTA are therefore active in the formation of the AfCFTA.

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607 The remaining states were: Botswana, Ethiopia, Eritrea, Libya, Lesotho, Madagascar, Mauritius, Mozambique, South Africa, South Sudan and Zambia. See SADC 35th Summit Brochure at 30 https://www.sadc.int/files/1914/5019/1522/35th_SADC_Summit_Brochure.pdf (Date of use: 18 February 2017).

608 SADC 35th Summit Brochure at 2 https://www.sadc.int/files/1914/5019/1522/35th_SADC_Summit_Brochure.pdf (Date of use: 18 February 2017); African Union (Assembly) (undated) "Draft Framework, Road Map and Architecture for Fasttracking the CFTA at 4 https://www.tralac.org/images/Resources/Continental_FTA/Draft_framework_for_the_CFTA.pdf (Date of use: 08 April 2017).

609 Communiqué of the Third COMESA-EAC-SADC Summit: "Towards a Single Market" (10 June 2015) at para 1(b) https://www.tralac.org/documents/resources/tfta/1079-communique-third-tripartite-summit-june-2015-english/file.html (Date of use: 10 April 2018).

610 http://www.sabc.co.za/wps/portal/news/main/tag?tag=TFTA (Date of use: 09 September 2017); https://www.tralac.org/news/article/11860-the-tripartite-free-trade-area-a-breakthrough-in-july-2017-as-south-africa-signs-the-tripartite-agreement.html (Date of use: 09 September 2017); http://www.spoor.com/en/News/the-tfta-and-your-trade-marks/ (Date of use: 09 September 2017).

611 https://www.tralac.org/images/docs/12091/summary-update-on-the-outcomes-of-the-

The main objective of the AfCFTA is to reduce trade protectionism and to liberalise and boost intra-Africa trade.[612] The AfCFTA will comprise of 55 AU Member States, a population of 1.2 Billion people, and a combined GDP of USD 3.4 Trillion.[613] The milestones for the formation of the AEC are as follows:[614]

(a) The creation and strengthening of RECs in regions where such do not yet exist (to be completed in 1999);

(b) The strengthening of intra-REC integration and inter-REC harmonisation, and the gradual removal of tariff and non-tariff barriers (to be completed in 2007);

(c) The creation of a free trade area (AfCFTA) and customs union in each REC (to be completed in 2017);

(d) The coordination and harmonisation of tariff and non-tariff systems among RECs to create the continent-wide Customs Union, and a Free Trade Area (to be completed in 2019);

(e) The creation of a continent-wide African Common Market (to be completed in 2023);

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third-meeting-of-the-cfta-twgs-durban-september-2017.pdf (Date of use: 07 September 2017).

612 African Union (Assembly) (undated) "Draft Framework, Road Map and Architecture for Fasttracking the CFTA at 3 https://www.tralac.org/images/Resources/Continental_FTA/Draft_framework_for_the_CFTA.pdf (Date of use: 08 April 2017); https://www.tralac.org/news/article/12252-chief-negotiators-conclude-the-7th-round-of-continental-free-trade-area-cfta-negotiations.html (Date of use: 06 November 2017).

613 https://au.int/en/ti/cfta/about (Date of use: 10 April 2018).

614 African Union (Commission) "Assessing Regional Integration VIII: Bringing the Continental Free Trade Area About" at 15 https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017).

(f) The creation of a continent-wide Economic and Monetary Union, a Currency Union and Pan-African Parliament (to be completed in 2028).

The AfCFTA aims to build on RECs' achievements and structures. As the building blocks of the AfCFTA, RECs are integral to the AfCFTA. Hence RECs will remain relevant, and they will be intensely involved in the architecture and operations of the AfCFTA.[615] RECs shall be involved through their participation in the AfCFTA architecture.[616] Among others, RECs will coordinate and administer Regional Technical Working Groups, Regional Steering Committees, and Regional Ministerial Oversight Committees for the implementation of the AfCFTA.[617] The RECs will also administer the Regional Monitoring and Evaluation Committee for the AfCFTA.[618] The REC institutional structures for the AfCFTA will then link-up with those at the continental level.[619]

615 African Union (Commission) "Assessing Regional Integration VIII: Bringing the Continental Free Trade Area About" at 122-124 https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017).

616 African Union (Commission) "Assessing Regional Integration VIII: Bringing the Continental Free Trade Area About" at 121 https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017).

617 African Union (Commission) "Assessing Regional Integration VIII: Bringing the Continental Free Trade Area About" at 122 https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017).

618 African Union (Commission) "Assessing Regional Integration VIII: Bringing the Continental Free Trade Area About" at 122 https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017).

619 African Union (Commission) "Assessing Regional Integration VIII: Bringing the Continental Free Trade Area About" at 122 https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017).

Agenda 2063 also includes RECs extensively in its implementation. Thus RECs shall be involved in the implementation of *Agenda 2063* by means of their participation in the Ministerial Committee on Agenda 2063.[620] The roles of RECs in *Agenda 2063* include:[621]

(a) The provision of leadership at inception in the regional and national consultative process with respect to the implementation of Agenda 2063;
(b) Participation in continental level operational oversight in Agenda 2063 implementation;
(c) The adaptation and alignment of continental long and medium term Agenda 2063 10-Year Plans;
(d) The issuing plan guidelines to the Member States;
(e) The coordination of preparation and implementation of regional programs;
(f) The integration of regional monitoring and evaluation reports and provision of leadership in resource mobilisation for Agenda 2063.

One hopes that as the AfCFTA and *Agenda 2063* programmes and initiatives are implemented, the AU, RECs and Member States heed the advice of Fagbayibo with regard to the obstacles that hinder the realisation of supranationalism in Africa. Fagbayibo notes in this regard that the following factors hinder regional organisations from exercising supranational powers: weak institutional machinery, non-integration of

620 African Union (Commission) "Agenda 2063 Framework Document" at 111 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017).

621 African Union (Commission) "Agenda 2063 Framework Document" at 122 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017).

key integration initiatives, crowded integration landscape, skewed distribution of benefits and hegemonic threats, policies, instability and a democracy deficit.[622]

It is also noteworthy that one of *Agenda 2063* objectives is to achieve full gender parity in public and private institutions.[623] Hope suggests that the AfCFTA should contribute towards this objective in one way or another.[624]

In terms of Article 3 of the SADC Treaty, SADC is an international organisation with a separate existence independent of its members. It has the power to enter into contracts, acquire property, and to sue and be sued in its own capacity. The headquarters of SADC are in Gaborone, Botswana.[625] SADC's Vision is:

> … one of a Common Future, a future within a regional community that will ensure economic wellbeing, improvement of the standards of living and quality of life, freedom and social justice, and peace and security for the people of Southern Africa.[626]

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622 Fagbayibo B "Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview" 2013 (16) (1) Potchefstroom Electronic Law Journal 32-68 at 47-58.

623 African Union (Commission) "Agenda 2063 First Ten-Year Implementation Plan 2014-2023" at 23, 37, 45, 77, 79 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf (Date of use: 16 November 2017.)

624 See Hope A "A gender Responsive AfCFTA" Tralac Newsletter, 8 March 2018 available at https://us2.campaign-archive.com/?u=3bfd093b3611382763c2c1a5e&id=99767baa0e (Date of use: 10 March 2018).

625 Article 2(2) SADC Treaty.

626 SADC 35th Summit Brochure at 3 https://www.sadc.int/files/1914/5019/1522/35th_SADC_Summit_Brochure.pdf (Date of use: 18 February 2017).

SADC's Mission is:

> …to promote sustainable and equitable economic growth and socio-economic development through efficient, productive systems, deeper cooperation and integration, good governance, and durable peace and security; so that the region emerges as a competitive and effective player in international relations and the world economy**.** [627]

SADC's main objectives are:

> …to achieve economic development, peace, and security, and growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa, and support the socially disadvantaged through Regional Integration. These objectives are to be achieved through increased Regional Integration, built on democratic principles, and equitable and sustainable development.[628]

The SADC Treaty enshrines human rights, democracy, and the rule of law.[629] These provisions, especially that relating to the rule of law, facilitate investment protection. In the context of an expropriation, the rule of law forms part of the requirement of due process, in that an affected person must be entitled to access to the courts or relevant tribunals in order to challenge the expropriation.

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627 SADC 35th Summit Brochure at 23 https://www.sadc.int/files/1914/5019/1522/35th_SADC_Summit_Brochure.pdf (Date of use: 18 February 2017).

628 Article 5 SADC Treaty; SADC 35th Summit Brochure at 5 https://www.sadc.int/files/1914/5019/1522/35th_SADC_Summit_Brochure.pdf (Date of use: 18 February 2017).

629 Article 4 SADC Treaty.

The SADC Tribunal recognised this principle in *Mike Campbell*.[630] The quality of the rule of law is important in SADC, because Annex 1 requires investor-state disputes to be referred to the courts of a host state.[631] This means that an investor may be prejudiced (e.g. by being exposed to denial of justice), if it is compelled to refer a dispute to a court in a country that has a poor state of rule of law.

The SADC Treaty has policies and strategies that guide the organisation in its quest for regional development and integration.[632] The policies are listed in Article 5(1), while the strategies are in Article 5(2). Together, these are known as the SADC Common Agenda.[633] The SADC Common Agenda can be traced to the founding declaration of SADC.[634] Under the heading, "A Shared Future", the SADC Declaration of August 1992 (also known as the Windhoek Declaration)[635] states that Southern Africa needs to arrange its affairs in such a way that it creates opportunities for its people, and to elevate them to become participants in regional and international markets.[636] The Declaration also notes that the countries of Southern Africa are individually weak and underdeveloped. They must, therefore, come together in order to be a "serious player in international relations".[637]

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630 *Mike Campbell* at 26.

631 Article 27 2016 Annex 1.

632 http://www.sadc.int/sadc-secretariat/directorates/office-deputy-executive-secretary-Regional-integration/ (Date of use: 15 July 2017).

633 http://www.sadc.int/about-sadc/overview/sadc-common-agenda/ (Date of use: 25 September 2015).

634 http://www.sadc.int/files/8613/5292/8378/Declaration__Treaty_of_SADC.pdf (Date of use: 10 January 2018)

635 SADCC Declaration "A Shared Future", the Windhoek Declaration" at 1-10 http://www.sadc.int/files/8613/5292/8378/Declaration__Treaty_of_SADC.pdf (Date of use: 18 January 2018).

636 SADCC Declaration at 4 http://www.sadc.int/files/8613/5292/8378/Declaration__Treaty_of_SADC.pdf (Date of use: 18 January 2018).

637 SADCC Declaration at 4

The Common Agenda overlaps with the regional and continental economic integration objectives of the AU and the New Partnership for Africa's Development ("NEPAD").[638] Some of the AU's objectives that are relevant to the Common Agenda in terms of regional and continental economic integration are the promotion of sustainable development at the economic, social and cultural levels, the economic integration of African economies,[639] and the coordination and harmonisation of policies between existing and future RECs for the gradual attainment of the objectives of the Union. NEPAD also has regional and continental integration as one of its objectives.[640] NEPAD's founders saw RECs as the building blocks of continental integration.[641] Hence SADC, the AU, and NEPAD all share the same objective of continental integration, which is encompassed in the Common Agenda.

The SADC Tribunal is the judicial organ of SADC.[642] It was officially established on the 18th of August 2005. Its headquarters are in Windhoek, Namibia.[643] The 2006 Annex 1

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http://www.sadc.int/files/8613/5292/8378/Declaration__Treaty_of_SADC.pdf (Date of use: 18 January 2018).

638 http://www.sadc.int/about-sadc/continental-interregional-integration/sadc-African-Union/. Article 24(1) allows SADC to cooperate with other organizations in the achievement of its objectives.

639 Article 3(j) *Constitutive Act of the African Union*, OAU Doc CAB/LEG/23.15, (date of signature 7 November 2000, in force 26 May 2001) https://au.int/sites/default/files/treaties/7758-treaty-0021_-_constitutive_act_of_the_african_union_e.pdf (Date of use: 18 January 2018).

640 United Nations Regional Coordination Mechanism Africa "Challenges and Prospects in the Implementation of NEPAD" (RCM-Africa Secretariat 2007) at 3 http://www1.uneca.org/Portals/rcm/2009/reports/Challenges%20and%20Prospects.pdf (Date of use: 10 April 2017).

641 UN RCM-Africa "Challenges and Prospects in the Implementation of NEPAD" at 8 http://www1.uneca.org/Portals/rcm/2009/reports/Challenges%20and%20Prospects.pdf (Date of use: 10 April 2017).

642 Article 9(7), 16 SADC Treaty.

643 http://www.sadc.int/about-sadc/sadc-institutions/tribun/ (Date of use: 20 August 2017).

enabled investors to refer investor-state disputes to the SADC Tribunal.[644] However, the tribunal's tenure was short-lived, as its operations were effectively suspended in 2010 by the SADC Summit[645] after the tribunal handed down its decision in *Mike Campbell.* Thereafter, the SADC Tribunal Protocol was amended in 2014 to remove access to the court by natural and legal persons.[646]

As of 2014, SADC had a total population of approximately 426,249 million,[647] and a total landmass of 7 774 166 square kilometers.[648] Based on 2015 data, SADC had an aggregate Gross Domestic Product (GDP) of approximately USD 725 Billion.[649]

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644 Article 28(2)(a) 2006 Annex 1.

645 The SADC Tribunal is the judicial organ of the SADC region. It was formed in terms Article 9 of the SADC Treaty.

646 Article 15(1) of the SADC Tribunal Protocol of 2000 as amended. For a discussion the Jurisdiction of the Tribunal see Zenda F *The SADC Tribunal and the Judicial Settlement of International Disputes* (LLD Thesis UNISA 2010); Phooko (2016) *The SADC Tribunal: Its Jurisdiction, Enforcement of Its Judgments and The Sovereignty of Its Members.*

647 See Table 2, Appendix hereto. The DRC is the most populous state in SADC, with a population of 79 million, followed by South Africa (55 million), Tanzania (55 million), Mozambique (28 million), Madagascar (25 million) and Angola (25 million), Namibia (2.5 million), Botswana (2.3 million), Lesotho (2.1 million), Mauritius (1.3 million), (1.3 million), and Seychelles (100 000).

648 See Table 2, Appendix hereto. The DRC is the largest SADC state, with a landmass of 2 344 858 Km, followed by Angola (1 246 700 Km2), South Africa (1 2221 037 Km2), Tanzania (947 303 Km2), Namibia (824 268 Km2), Mozambique (799 380 Km2) and Zambia (752 612 Km2). The smallest states are the islands of Seychelles (457 Km2), and Mauritius (1 969 Km2).

649 See Table 2, Appendix hereto. During this period, South Africa had the largest GDP in SADC (USD 349 Billion).[649] The state with the second largest GDP was Angola (USD 146 Billion), followed by Tanzania (USD 48 Billion), Democratic Republic of Congo (USD 35 Billion), Zambia (USD 27 Billion), and Zimbabwe (USD 14 Billion).[649] Seychelles had the lowest GDP (USD 1.5 Billion), followed by Lesotho (USD 2 Billion) and Eswatini (USD 4.4 Billion). Zambia had the highest GDP growth at 10% per annum, followed DRC (9.5%), Seychelles (8.7%), Tanzania (7%), Mozambique (7%), Malawi (6.5%), Botswana (4.4%), Angola (4.8%), Namibia (4.5%), Lesotho (4.5%), Botswana (4.4%), Eswatini (2.6%) and South Africa (1.5%). Due to their low populations, Seychelles and Mauritius had the highest per capita income at USD 15 758 and USD 9 945 respectively.[649] They were followed by Botswana (USD 7 123), South Africa (USD 6 481), Angola (USD 6 054), Namibia (USD 5 588), Eswatini (USD 3 531), Zambia (USD1 715), Zimbabwe (USD 965),

SADC attracts a fair amount of FDI, both from within Africa and from abroad. Hence SADC Member States rank on *par* with other African states in terms of the size of FDI inflows. For example, during 2015, SADC states were among the top Ten African States that received 75 percent of the total African FDI inflows. These were Egypt (USD 14.5 Billion), Nigeria (USD 8.6 Billion), Mozambique (USD 5.1 Billion), South Africa (USD 4.7 Billion), Morocco (USD 4.5 Billion), Cote d'Ivoire (USD 3.5 Billion), Angola (USD 2.7 Billion), Kenya (USD 2.4 Billion), Senegal (USD 1.9 Billion), and Cameroon (USD 1.8 Billion).[650] Angola, Mozambique, South Africa represented SADC in this group, and together they received 19 percent of African FDI inflows for the year.[651]

In terms of the top ten for incoming FDI projects in Africa, South Africa led with 118 projects, followed by Kenya (85), Morocco (71), Egypt (59), and Nigeria (51).[652] Mozambique and Tanzania were the two other SADC states to feature in the top ten, with 29 and 20 FDI projects respectively.[653] The leading sectors that received FDI in 2015 are Coal, Oil & Natural Gas (USD 15.7 Billion; 24 percent), Alternative/Renewable Energy (USD 12.2 Billion; 18 percent), Real Estate (USD8.7 Billion; 13 percent), Communications (USD 5.1 Billion), and Metals (USD 3.8 Billion; 6 percent).[654]

Tanzania (USD 952), Lesotho (USD 986), Mozambique (USD 627), Madagascar (USD 452), and Malawi (USD 342).

650 FDI Intelligence "The Africa Investment Report 2016" at 4 http://www.casafrica.es/casafrica/Agenda/2016/11_Africa-Investment-Report_Klassa-Presentation.pdf (Date of use: 18 January 2018).

651 FDI Intelligence "The Africa Investment Report 2016" at 4 http://www.casafrica.es/casafrica/Agenda/2016/11_Africa-Investment-Report_Klassa-Presentation.pdf (Date of use: 18 January 2018).

652 FDI Intelligence "The Africa Investment Report 2016" at 4 http://www.casafrica.es/casafrica/Agenda/2016/11_Africa-Investment-Report_Klassa-Presentation.pdf (Date of use: 18 January 2018).

653 FDI Intelligence "The Africa Investment Report 2016" at 4 http://www.casafrica.es/casafrica/Agenda/2016/11_Africa-Investment-Report_Klassa-Presentation.pdf (Date of use: 18 January 2018).

654 FDI Intelligence "The Africa Investment Report 2016" at 10

FDI inflows into the SADC Member States during 2015 can be summarised as follows. Angola received USD 8.6 Billion, which was by far the highest FDI of all SADC States.[655] Mozambique received the second highest FDI of USD 3.7 Billion, followed by South Africa (USD 1.7 Billion), DRC (USD 1.6 Billion), Zambia (USD 1.6 Billion), Tanzania (USD 1.5 Billion), and Namibia (USD 1 Billion).[656] The rest of the States received less than USD 1 Billion.[657] Eswatini is the only State whose net FDI inflows was negative, meaning that its FDI outflows exceeded its inflows. Lesotho, Malawi, and Eswatini have consistently received the lowest FDI since 2005. Each of these States never received over USD 200 Million in any one year.[658] Zimbabwe ranked slightly above these States, and the most FDI it received in any one year is USD 544 Million.[659] Mauritius has received a maximum of USD 589 in a year over the ten-year period.[660] South Africa received less FDI in 2014 (USD 5.6 Billion) and 2015 (USD 1.7 Billion) than it did it in 2013 (USD 8.3 Billion).[661] Mozambique has consistently received over USD 3 Billion since 2011.[662] Tanzania and Zambia have also consistently increased their FDI since 2005.[663] Madagascar also recovered from a low of USD 86 Million in 2005 to a high of USD 1 Billion in 2008 and 2009.[664] Botswana's FDI inflows have been flat, with an average of approximately USD 400 Million each year.[665]

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http://www.casafrica.es/casafrica/Agenda/2016/11_Africa-Investment-Report_Klassa-Presentation.pdf (Date of use: 18 January 2018).

655 See Table 3, Appendix hereto.

656 See Table 3, Appendix hereto.

657 See Table 3, Appendix hereto.

658 See Table 3, Appendix hereto.

659 See Table 3, Appendix hereto.

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663 See Table 3, Appendix hereto.

664 See Table 3, Appendix hereto.

665 See Table 3, Appendix hereto.

3.3 THE REGULATION OF FOREIGN INVESTMENTS IN SADC

This section will discuss the selected provisions of the 2006 and 2016 Annex 1's as indicated in the introduction above.

Annex 1 is contained in the FIP, a multilateral TIP that seeks to harmonise the regulation of finance and investments in SADC.[666] The FIP was concluded in terms of Articles 21 and 22 of the SADC Treaty. Article 21 of the SADC Treaty requires the Member States to cooperate in all areas necessary to foster regional development and integration, while Article 22 requires the Member States to conclude such protocols as may be necessary for each area of co-operation. The FIP therefore discharges the mandate of Member States to integrate the SADC community in the areas covered by the FIP, of which foreign investments is the area covered by Annex 1. Article 19 of the 2006 Annex 1 and Article 17 of the 2016 Annex 1 contribute towards regional integration by requiring Member States to harmonise their laws, policies and practices in line with the Annex.[667]

The FIP was signed on 18 August 2006, and it came into effect on 16 April 2010.[668] However, Annex 1 had a short tenure, since the SADC Summit at its 36th session on 31 August 2016 approved the Draft Agreement Amending Annex 1 to the SADC Protocol on Finance and Investment, which repealed the 2006 Annex 1 and introduced the 2016

666 The scope of investments covered by the Protocol is described in Article 1(2) of the SADC FIP. For an analysis of the 2006 Annex 1 see Ngobeni and Fagbayibo 2015 (19) Law, Democracy and Development 175 at 175-92. For a comparative analysis of 2006 and 2016 Annex 1 see Kondo 2017 (20*)* Potchefstroom Electronic Law Journal 1- 47.

667 See Ngobeni and Fagbayibo 2015 (19) Law, Democracy and Development 175 at 178.

668 http://www.sadc.int/documents-publications/show/1009. Article 29 of the SADC FIP stipulates that the FIP shall come into force after ratification by two-thirds of Member States.

Annex 1.[669] The 2016 Annex 1 is supposed to come into effect upon ratification by three quarters of Member States,[670] although according to Chidede, the 2016 Annex 1 is in effect.[671]

In a nutshell, Annex 1 seeks to reduce the exposure of SADC Member States to investor claims, by among others narrowing the scope of covered investments, and reducing investor rights.

Annex 1 seeks to create a favorable investment environment within SADC, with the aim of attracting and promoting foreign investment.[672] It envisages the creation of a SADC-wide investment zone with a common Regional Investment Policy Framework.[673] This is done through Article 19 of the 2006 Annex 1 and Article 17 of the 2016 Annex 1, which require that Member States' investment policies, laws, and practices be harmonised into a single investment regime applicable across the anticipated SADC investment zone.[674] The Baseline Study on the implementation of the FIP describes the harmonisation process as follows:

669 See Communiqué of the SADC 36th Summit at para 37 https://www.sadc.int/files/4914/7274/8383/Communique_of_the_36th_SADC_Summit_Eswatini__31_August_2016.pdf) (Date of use: 15 October 2017).

670 Article 3 of the Agreement Amending Annex 1 (attached to the beginning of the new Annex 1).

671 See Chidede T "Amendments of Annex 1 to the SADC Finance and Investment Protocol: Are they in force yet?" https://www.tralac.org/discussions/article/11875-amendments-of-annex-1-to-the-sadc-finance-and-investment-protocol-are-they-in-force-yet.html (Date of use: 15 October 2017); Kondo 2017 (20) Potchefstroom Electronic Law Journal 1 at 5.

672 Article 2(2) (a) 2006 Annex 1. The other ways of achieving this objective are listed in Article 2(2) (c)-(n) of 2006 Annex 1. See also Article 2 of the 2016 Annex 1.

673 Ngobeni and Fagbayibo 2015 (19) Law, Democracy and Development 175 at 178.

674 See also Article 17 2016 Annex 1.

> Focus shifts from the individual Member States to the region. The agreement is reached on harmonized standards, systems, and policies. Through domestic adoption of these, individual domestic frameworks start to look and function the same. At the end of this phase, all domestic frameworks are harmonized to a regional standard.[675] (Emphasis added)

In order to make harmonisation a reality, Member States agree to co-operate to create a favorable investment climate in the SADC region, as envisaged by Annex 1.[676] Selected provisions of 2006 and 2016 Annex 1 that relate to the resolution of investor-state disputes will now be considered.

3.3.1 Definition of an investment

It was shown in Chapter 2 above that there is no universally agreed definition of an investment in ISDS. In SADC, the 2006 and 2016 Annex 1's provide the definitions of an investment, while investments at Member State level are defined in investment laws. The 2006 Annex 1 defines an investment as:

> …the purchase, acquisition or establishment of productive and portfolio investment assets, and in particular, though not exclusively, includes:
>
> (a) Movable and immovable property and any other property rights such as mortgages, liens or pledges;
>
> (b) Shares, stocks and debentures of companies or interest in the property of such companies;

675 Ngobeni and Fagbayibo 2015 (19) Law, Democracy and Development 175 at 178.

676 Article 3 2006 Annex 1; Article 2 2016 Annex 1.

(c) Claims to money or to any performance under contract having a financial value, and loans;

(d) Copyrights, know-how (goodwill) and industrial property rights such as patents for inventions, trademarks, industrial designs and trade names;

(e) Rights conferred by law or under contract, including licenses to search for, cultivate, extract or exploit natural resources. [677]

It must be borne in mind that the *Salini* criteria may apply to the above definition, as explained above.[678] The effect of this is that some of the categories of assets that are in the definition of investments above, such as shares, claims to money, copyright, may not meet the *Salini* criteria should a dispute arise.[679] This will is a realistic risk, as shown by the decision in *Romak*.

The definition above is similar to that of an investment under Article 4(c) of the ACIA, Article 159(2) of the COMESA Treaty and Article 1(9) of the IACCIA.

On the other hand, the 2016 Annex 1 defines an investment as:

… an enterprise within the territory of one Member State established, acquired or expanded by an investor of the other Member State, including through the constitution, maintenance or acquisition of a juridical person or the acquisition of shares, debentures or other ownership instruments of such an enterprise,

677 Article 1(2) 2006 Annex 1.

678 See the Conclusion in Chapter 2 above.

679 In fact, all the investment categories stated may not meet the *Salini* criteria, by virtue of their nature i.e. the 2006 Annex 1 uses an open-list asset-based definition and not an enterprise-based one.

provided that the enterprise is established or acquired in accordance with the laws of the Host State and registered in accordance with the legal requirements of the Host State.[680] (Emphasis added)

This definition is the same as that provided in the SADC Model BIT[681] and the PAIC.[682] The definition is most likely to meet the *Salini* criteria, as it requires the establishment of a business, unlike the definition in the 2006 Annex 1 that requires an investor to hold an asset only.

The main difference between the old and new definitions is that while the old definition requires the acquisition of the assets specified in the definition as a pre-requisite (open-list asset-based definition), the new definition requires that there must be an enterprise, which may possess assets in the normal course (enterprise-based definition).[683]

The other noticeable change brought by the 2016 Annex 1 is that the new definition excludes the following from the definition of an investment (the definition in the 2006 Annex 1 did not have exclusions):

(a) Debt securities issued by a government or loans to a government;

(b) Portfolio investments;

(c) Claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Member State to

680 Article 1(2) 2016 Annex 1.

681 SADC Model BIT at 9.

682 Article 4(4) PAIC.

683 Article 1(2) 2016 Annex 1. See also Kondo 2017 (20) Potchefstroom Electronic Law Journal at 6-8.

> an enterprise in the territory of another Member State, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in subparagraphs (a) through (g) above.[684]

Except for the exclusion of portfolio investments, these exclusions are similar to those contained in Article 1139 of NAFTA, Article 4(c) of the ACIA,[685] and Article 1(9) of the IACCIA. The ECT does not provide exclusions and its definition of an investment is very broad.[686] The new definition requires the existence of an enterprise, which must be incorporated in terms of the laws of and be located in a host state. An enterprise must have been established, acquired or expanded by investors "of another Member State".

The implications of the compulsory registration of an enterprise in a Host State is that the Home State of a shareholder can exercise diplomatic protection against a Host State[687] if a shareholder suffers injury in the hands of the Host State.[688]

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684 Article 1(2) 2016 Annex 1 FIP.

685 Article 4(c), footnote 3 ACIA.

686 Article 1(6) states that an investment means "every kind of asset, owned or controlled directly or indirectly by an Investor".

687 United Nations (International Law Commission) "Draft Articles on Diplomatic Protection" http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf (Date of use: 04 September 2017) Article 2 defines diplomatic protection as:

> … the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

688 United Nations (International Law Commission) "Draft Articles on Diplomatic Protection" Article 11 http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf (Date of use: 04 September 2017). This article is specifically aimed at the protection of shareholders.

While it is acceptable for SADC to set nationality requirements for enterprises and investors who will be covered by Annex 1,[689] company ownership structures can be complex, and a group of companies may involve hundreds of subsidiaries, especially when dealing with multinational enterprises.[690] Often, the ultimate owners of a subsidiary of a multinational enterprise incorporated in a particular locality are based in foreign jurisdictions. UNCTAD questions the effectiveness of restricting the ownership of local operating entities to locals. It states that:

> The fact that corporate structures are complex and that consequently investor nationality is becoming less and less clear in practice has important implications for national and international investment policies. The effectiveness of foreign ownership restrictions, for example, is called into question if a domestic majority owner is itself owned by other foreign investors.[691]

UNCTAD further notes that globally, 41 percent of foreign subsidiaries are owned by their corporate parents through an ownership structure with at least one intermediate subsidiary based in a country different from that of the ultimate owner.[692] UNCTAD

689 See for example the legitimate reasons which are often used to limit investments to nationals of a state at UNCTAD "World Investment Report 2016" (United Nations New York and Geneva 2016) at 159-160 http://www.unctad.org/Templates/Download.asp?docid=6087&lang=1&intItemID=3489 (Date of use: 15 October 2017).

690 UNCTAD "World Investment Report 2016" at 134 http://www.unctad.org/Templates/Download.asp?docid=6087&lang=1&intItemID=3489 (Date of use: 15 October 2017).

691 UNCTAD "World Investment Report 2016" at 126 http://www.unctad.org/Templates/Download.asp?docid=6087&lang=1&intItemID=3489 (Date of use: 15 October 2017).

692 UNCTAD "World Investment Report 2016" at 125 http://www.unctad.org/Templates/Download.asp?docid=6087&lang=1&intItemID=3489 (Date of use: 15 October 2017).

furthermore notes that financial institutions, institutional investors, founding families and governments often own publicly listed MNEs. These are the ultimate beneficial owners who benefit from the activities of an MNE. [693] In this regard, it is noteworthy that while the 2016 Annex 1 requires that an enterprise must be owned by an investor who is from a Member State as discussed above, it does not require that an investor which is a juristic entity be owned by persons who are from a Member State.[694] Therefore, nothing prevents a shareholder who is from outside SADC from ultimately owning an entity that is an investor in terms of the above definition.

Despite the above definition of an investment, if an investor-state dispute arose, and an investor commenced ICSID arbitration based on the 2006 Annex 1, a tribunal would in addition to assessing whether an investment in question met the definition of an investment provided in the 2006 Annex 1, also assess if the investment met the criteria for an investment in terms of Article 25(1) of the ICSID Convention. It is during this process that a tribunal would determine if the investment in question meets the *Salini* criteria. It was shown above that the *Salini* criteria can be applied to non-ICSID arbitration, and thus it is ideal if an investment meets the stated criteria so that a tribunal can have jurisdiction *ratione materiae*.

Depending on the policy objectives of a state, investments can be given a narrow or restricted definition, or an all-encompassing or wide definition, as discussed below. The SADC Model BIT deals with the options available in this regard and recommends a

693 UNCTAD "World Investment Report 2016" at 131 http://www.unctad.org/Templates/Download.asp?docid=6087&lang=1&intItemID=3489 (Date of use: 15 October 2017).

694 The definition of an investor does not prescribe that the owner (e.g. a shareholder of an investor be from a SADC Member State. See the discussion in this section under subparagraph (c) below.

restricted definition that describes an investment as an enterprise.[695] The Model BIT explains that a restricted approach is ideal from a developing country perspective.[696] UNCTAD notes in this regard that a wide definition of an investment exposes a host state to unexpected liabilities.[697]

Recent examples of restricted definitions of an investment in developing states can be found in the India Model BIT[698] and the PAIC.[699] These instruments first restrict the scope of an investment by providing that an investment must be in the form of an enterprise, and nothing else. They further exclude debt securities issued by governments, loans to governments, portfolio investments, and claims to money arising from commercial contracts for the sale of goods or services by a natural or legal entity, or claims relating thereto.[700]

The India Model BIT further narrows the definition of an investment by providing that an enterprise must have real and substantial business operations.[701] In a novel move, the TTIP proposal,[702] India Model BIT[703] and the PAIC[704] define an investment by reference to the *Salini* criteria. They provide that a business must have: made substantial and long-term investment in a host state, employed a substantial number of employees in the host state, assumed a business risk, made a substantial contribution to the development

695 SADC Model BIT, commentary at 13.
696 SADC Model BIT, commentary at 13.
697 UNCTAD "Investment Policy Framework for Sustainable Development 2015" at 90 http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf (Date of use: 20 August 2017).
698 Article 1(6) India Model BIT.
699 Article 4(4) PAIC.
700 See Article 1(2), 1(7) India Model BIT; Article 4(4) PAIC.
701 Article 1.2 India Model BIT.
702 Article x.2 TTIP.
703 Article 1.2(1) India Model BIT.
704 Article 4(4) Draft PAIC.

of a host state through its operations, e.g. through the transfer of skills and know-how, and the business must have been conducted in accordance with the law of the host state.[705] The ACIA (whose definition of an investment is similar to that provided in the 2006 Annex 1) provides that an investment that consists of a single asset that does not meet the requirements of an investment (as in the *Salini* criteria) shall not be an investment.[706] The Brazil-Malawi ACFI also requires an investment to have real and substantial business operations, and provides that an investment must be an enterprise established with a "long-lasting economic relation with a view to producing goods and services".[707] The 2016 Annex 1 fails to specify that investments must meet the *Salini* criteria. This leaves room for shell companies to obtain the protection of the 2016 Annex 1.

The TTIP,[708] India Model BIT,[709] and the PAIC[710] provide that an investment that was obtained by means of corruption, fraud and the like shall not be covered. This provision ensures that only legitimate investments are protected, and is a deterrent against corruption. The 2016 Annex 1 does not have such a provision. This is a significant omission that misses the opportunity to deter corruption by foreign investors.

Finally, the India Model BIT[711] and the PAIC[712] provide that investments must be made in terms of the laws of a host state. This further restricts the scope of protected

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705 Article 1.2.2 India Model BIT. The requirement that the business must have been conducted in terms of the law of the host state is not part of the *Salini* criteria.

706 Article 4(c) footnote 2 ACIA.

707 Article 2(1) Brazil-Malawi ACFI.

708 Article 6(6) TTIP Proposal.

709 Article 9 India Model BIT.

710 Article 20(2), 20(3), 21 PAIC. The latter provision is in the form of a prohibition on investors not to partake in bribery activities in their Host States.

711 Article 1.6 India Model BIT.

investments by excluding non-compliant investments. The Annex 1 does not have such provisions.

By contrast, developed states use wide definitions of an investment. For example, the ECT[713] and the TTIP[714] provide the widest possible definitions of an investment, which include every conceivable asset class. The TTIP goes even further to cover investments that existed prior to the coming into effect of the TTIP.[715] The rationale for this wide definition is probably that because the EU is a leading capital exporter, a wider definition is in the interests of its nationals, as more of their investments abroad will be protected by the wide definitions. In North America, the NAFTA also provides a wide definition,[716] though not as wide as that provided by the ECT or TTIP. Again, the rationale should be similar to that of the EU. Brazil, as a developing capital exporter also adopts a wide definition of an investment that an investment shall be any type of property or right, directly or indirectly owned or controlled by an investor.[717] Based on the above, SADC as a developing region is on the right track by adopting a restricted definition of an investment. This will reduce the scope of covered investments, and thus reduces the scope of potential claims against host states.

3.3.2 Definition of an enterprise

As discussed in the preceding section, the 2016 Annex 1 requires an investment to be in the form an enterprise, while the 2006 Annex 1 does not have this requirement. This definition will be briefly considered. The 2016 Annex 1 defines an enterprise as:

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712 Article 4(4) PAIC.
713 Article 1(6) ECT.
714 Article x2 TTIP Proposal.
715 Article x1 TTIP Proposal.
716 Article 1139 NAFTA.
717 Article 2(1) Brazil-Malawi ACFI.

> … Any entity constituted or organized under the applicable laws of any State, whether or not for profit, and whether privately or governmentally owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association, or other such organization (Emphasis added).[718]

It is immediately apparent that this definition does not provide that an enterprise must be constituted under the laws of a SADC Member State. Rather it refers to "any State", which is ambiguous. On the other hand, as shown above, the definition of an investment provides that an enterprise must be established or acquired in accordance with the laws of the host state, and be registered in accordance with the legal requirements of the host state.

The definition of an investment discussed above makes it clear that an enterprise must be incorporated in a SADC host state in order to qualify as an investment. Therefore, the above definition of an enterprise does not align with this requirement. It ought to state unequivocally that an enterprise must be constituted or organised under the applicable laws of a SADC Member State.

By contrast, the PAIC's definition of an enterprise is properly drafted, and requires that an enterprise be constituted or incorporated in terms of the applicable laws and

[718] Article 1 2016 Annex 1.

regulations of a Member State.[719] The India Model BIT also requires that an enterprise be incorporated in terms of the laws of a Host State.[720]

3.3.3 Definition of an investor

The definition of an investor is equally important as that of an investment, as it defines who may be a potential claimant in an investor-state dispute with a host state (i.e. it determines jurisdiction *ratione personae*). A wide definition of an investor enables more potential claimants to sue a host state, while a restricted definition limits the number of potential claimants. Hence UNCTAD cautions in this regard that a wide definition of an investor can result in unanticipated coverage of persons.[721]

The 2006 Annex 1 provides a nationality-neutral definition of an investor, and states that an investor is a person who has "been admitted to make or has made an investment,"[722] On the other hand, the 2016 Annex 1 introduces the nationality of an investor as well as the legality of an investment as a pre-requisite. It defines an investor as:

> … a natural or a juridical person of a State Party making an investment in another State Party, in accordance with the laws and regulations of the State Party in which the investment is made. [723] (Emphasis added)

719 Article 4(1) PAIC.
720 Article 1.2(i) India Model BIT.
721 UNCTAD "Investment Policy Framework for Sustainable Development" at 90 http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf (Date of use: 20 August 2017).
722 Article 1(2) 2006 Annex 1.
723 Article 1(2) 2016 Annex 1.

Therefore, the definition of an investor in the 2016 Annex 1 contemplates four requirements. Firstly, an investor can be a natural or juristic person. Secondly, the investor must be from a SADC Member State. Thirdly, the investor must make an investment in another Member State, i.e. not in the investor's home state. Fourth, the investment must be made in terms of the laws and regulations of the host state.

The above definition of an investor is similar to that provided by the IACCIA.[724] The ACIA also has a similar definition, but it does not require that an investment be made in terms of the laws of a Member State.[725] The ECT,[726] TTIP Proposal,[727] India Model BIT,[728] NAFTA,[729] and the PAIC[730] also require that an investor be a national of a Member State.[731]

The requirement that an investor be "of a Member State" necessarily implies that a person who is not "of a Member State" will not qualify as an investor. [732] However, this provision is vague and open to interpretation since the 2016 Annex 1 does not define what "of a State Party" means. It is submitted that if "of a State Party" means that an investor must be a national of a host state, then an investor who is a national of a host state will possibly have the dual nationality of his/her home state (unless same was

724 Article 1(4) IACCIA.
725 Article 4(d) ACIA.
726 Article 1(7) ECT.
727 Article 1(1)(a) Chapter 1 (General Provisions) Trade in Services, Investment and E-Commerce http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf) (Date of use: 10 October 2017).
728 Article 1.9 India Model BIT.
729 Article 1139 NAFTA. However, the definition also defines a non-national of a member state as an investor.
730 Article 4(5) PAIC.
731 Article 1(7).
732 See also Kondo 2017 (20*)* Potchefstroom Electronic Law Journal 1 at 9.

relinquished) as well as that of the host state.[733] This will also mean that an investor's home state can exercise diplomatic protection in the event that the investor suffers injury at the hands of the host state. In that event, the home state must demonstrate that it has predominant nationality with regard to the investor, vis-à-vis the host state.[734]

However, if a natural person who is not a national of a host state is allowed to be an investor, the investor's home state can exercise diplomatic protection in the ordinary course in event that the investor suffers injury at the hands of the host state.[735] It is therefore important that clear language is used to define who may be an investor, with the implications for diplomatic protection in mind as indicated above.

Nonetheless, nationality and not residence is a common criterion used to determine who can be an investor.[736] The key is to use the appropriate language to define this, as stated above. In order to prevent the abuse of nationality for the purpose of obtaining the protection of BIT or other instrument, other criteria can be added to determine who may be an investor.

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733 Kondo 2017 (20) Potchefstroom Electronic Law Journal 1 at 9 notes that the new definition does not address the issue of dual nationality that may arise as discussed here.

734 Article 7 United Nations (International Law Commission) "Draft Articles on Diplomatic Protection" http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf (Date of use: 04 September 2017). See also Ngobeni 2012 (37) South African Yearbook of International Law 169-186.

735 See Article 3 United Nations (International Law Commission) "Draft Articles on Diplomatic Protection" http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf (Date of use: 04 September 2017). For recent international case of diplomatic protection involving SADC Member State see *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* ICJ General List No.103, Judgment of 30 November 2010 and Judgment of 19 June 2012.

736 See for example Article 2(1) Brazil-Malawi ACFI, Article 4(e) ACIA, Article 2(1) ECT, Article 1.9 India Model BIT, and Article 1139 NAFTA.

Other TIPs deal with this issue as follows. The TTIP Proposal provides that a covered investment is one that is owned or controlled by investors of one Member State, and made in the other Member State.[737] It emphasises this requirement by providing that a party can deny the benefits of the agreement to an investor if investors from a non-Member State own or control the investor.[738] The India Model BIT provides that an investor must be a natural person from a state party, or a legal entity incorporated in terms of the laws of a state party, that is owned or controlled by persons from a state party, and having real and substantial business operations in the home state.[739] The Brazil-Malawi ACFI is similar to the TTIP Proposal and the India Model BIT. It provides that for an investor to be covered in terms of the ACFI, it must be incorporated in a Member State, and it must establish a long-lasting economic relationship with a view to producing goods and services.[740] The ACFI adds that persons who are nationals or permanent residents of a Member State must own an investor.[741]

The practice of requiring an investor to have real and substantial business operations is good for the prevention of the use of shell companies and treaty shopping.[742] A recent

737 Article x1 TTIP Proposal.

738 Article 9 TTIP Proposal.

739 Article 1(6) India Model BIT.

740 Article 2.1 Brazil-Malawi ACFI.

741 Article 2.1 Brazil-Malawi ACFI.

742 For further reading on treaty shopping see Chaisse J "The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration" 2015 (11) Hastings Business Law Journal 225-305; Lee E "Treaty Shopping in International Investment Arbitration: How often has it occurred and how has it been perceived by tribunals?" LSE Working Paper Series 2015 No. 15-167, 1-54 http://www.lse.ac.uk/internationalDevelopment/pdf/Dissertations/WP167.pdf) (Date of use: 23 February 2017); Kirtley WL "The Transfer of Treaty Claims and Treaty-Shopping in Investor-State Disputes" 2009 (10) (3) Journal of World Investment and Trade 427-461; Primec J *Enemy of the State: Is Treaty Shopping in Contradiction with The Rationale of Investment Law?* (Master's Thesis University of Amsterdam 2015) http://dare.uva.nl/cgi/arno/show.cgi?fid=621905) (Date of use: 24 February 2017);

study found that treaty shopping targets developing states in 80 percent of arbitration cases studied.[743] Another study found that treaty shopping exposes a host state to claims by companies to which it would otherwise not allow entry.[744] As a result of treaty shopping, a host state can find it difficult to regulate in the public welfare.[745]

Australia was recently exposed to a case based on treaty shopping in *Philip Morris Asia v Australia*.[746] In this case, the claimant had changed its corporate structure in order to access ISDS under the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments. The change was done in anticipation of disputes that were to arise from the new regulation of cigarette packaging introduced by the Tobacco Plain Packaging Act 2011 and the Tobacco Plain Packaging Regulations 2011.[747] The claimant's alleged rationale for the restructuring was to improve efficiencies, while taking into account political risk in Australia among other countries. However, the tribunal rejected this argument and found that the case was based on treaty shopping.[748]

Shreuer C "Nationality of Investors: Legitimate Restrictions v.s. Business Interests" 2009 (24) (2) ICSID Review Foreign Investment Law Journal 521-527; Wilske S "Protection of Taiwanese Investors under Third Party Bilateral Investment Treaties - Ways, Means and Limits of Treaty Shopping" 2011 (4) Contemporary Asia Arbitration Journal 145-177; Zhang X "Proper Interpretation of Corporate Nationality under International Investment Law to Prevent Treaty Shopping" 2013 (6) Contemporary Asia Arbitration Journal 49-73.

743 At 25, 28.

744 Prime J *Enemy of the State: Is Treaty Shopping in Contradiction with The Rationale Of Investment Law?* at 18.

745 Primec J *Enemy of the State: Is Treaty Shopping in Contradiction with The Rationale Of Investment Law?* at 19.

746 *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No. 2012-12) Award on Jurisdiction and Admissibility of 17 December 2015.

747 *Philip Morris Asia Limited* at para 585-588. The tribunal summarized the case law on the issue at para 538ff. The corporate structure is described in para 95-98.

748 *Philip Morris Asia Limited* at para 98.

The tribunal in *Phoenix Action* [749] also found that the investment in that matter was not *bona fide*, as it was made purely for the purpose of bringing ISDS proceedings against the Czech Republic.[750]

It is clear from the above discussion that the 2016 Annex 1 fails to address the possible abuse of nationality by investors. It therefore does not curb the use of shell companies and treaty shopping. As indicated earlier, the 2016 Annex 1 also fails to unequivocally deny protection to investments that were secured via corrupt means.

3.3.4 Expropriation

As shown in the preceding chapter, a state has a sovereign right to expropriate property, provided certain internal law requirements as discussed in this section are met.[751] However, states and regions are to some extent at liberty to vary the international law requirements,[752] and they do stipulate their own requirements to be met for an expropriation to be valid, as Annex 1 does. One such requirement is the quantum of compensation that an investor may obtain in the event of expropriation.[753] The 2006 Annex 1 provides that a Member State may not expropriate an investment unless the expropriation is for a public purpose, is non-discriminatory, is in terms of due process, and is accompanied by prompt and adequate compensation.[754] However, the 2016 Annex 1 adopts a cautious approach, and changes the standard of compensation from

749 *Phoenix Action* at para 101, 113, 134, 135 and 144.

750 *Phoenix Action* at para 142.

751 See the discussion of expropriation in Chapter 2 above.

752 An example here is that a state cannot change the requirements to provide that no compensation shall be paid for an expropriation, because this will violate the rule that compensation must be paid. Instead, a state can vary the quantum of compensation.

753 The various standards of compensation are discussed in Chapter 2 above.

754 Article 5 2006 Annex 1.

"prompt, adequate and effective" to "fair and adequate".[755] In addition, it provides a framework for the determination of fair compensation, as follows:

> Fair and adequate compensation shall be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place … and shall not reflect any change in value occurring because the intended expropriation had become known earlier. However, where appropriate, the assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard to all relevant circumstances and taking account of:
>
> (a) The current and past use of the property;
>
> (b) The history of its acquisition;
>
> (c) The fair market value of the investment;
>
> (d) The purpose of the expropriation;
>
> (e) The extent of previous profit made by the foreign investor through the investment; and
>
> (f) The duration of the investment.[756]

This provision is the same as Article 6.2 of the SADC Model BIT. The first sentence of Article 5(2)[757] is similar to Articles 14(2) of the ACIA, 1110(2) of the NAFTA,[758] and 13(1)

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755 Article 5(1) 2016 Annex 1.

756 Article 5(2) 2016 Annex 1. See also Kondo 2017 (20) Potchefstroom Electronic Law Journal 1 at 15-16.

757 Article 5(2) 2016 Annex 1 provides that

of the ECT.[759] Therefore, tribunal decisions that applied NAFTA Article 1110(2)[760] and ECT Article 13(1)[761] will among other sources be valuable in the application of Article 5(2).

By comparison, the ACIA,[762] ECT,[763] and the TTIP Proposal[764] provide for the payment of prompt, adequate and effective compensation, while NAFTA provides for the payment of fair market value.[765] The IACCIA, [766] India Model BIT[767] and the PAIC provide for the payment of adequate compensation.[768] The ACFI provides for payment of effective compensation.[769]

> Fair and adequate compensation shall be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation") and shall not reflect any change in value occurring because the intended expropriation had become known earlier.

758 Article 1110(2) of NAFTA provides that

> Fair and adequate compensation shall be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation") and shall not reflect any change in value occurring because the intended expropriation had become known earlier.

759 Article 13(1) of the ECT provides that

> Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known…

760 See for example *Metalclad* at para 118 – 131.

761 See for example *Anatolie Stati* at para 314 – 406; *Yukos Universal Limited* at para 1758-1829; *Hulley Enterprises Limited* at para 1758-1829.

762 Article 14(1) (c) ACIA.

763 Article 13(1) (d) ECT.

764 Article 5(1) (d) TTIP Proposal.

765 Article 1110(2) NAFTA.

766 Article 20(1) (c) and Article 159(3) *Investment Agreement for the COMESA Investment Area* (date of signature 23 May 2007, not in force) http://investmentpolicyhub.unctad.org/IIA/treaty/3225 (Date of use: 15 October 2017).

767 Article 5.1 India Model BIT.

768 Article 11(1) (c) PAIC.

769 Article 8(2)(c) Brazil-Malawi ACFI

Like the 2016 Annex 1, the India Model BIT[770] and the PAIC provide guidelines for the determination of compensation.[771]

The 2016 Annex 1 has also relaxed the international law requirement that payment of compensation must be prompt. It allows a host state to settle a judgment for the payment of compensation obtained by an investor in annual installments over a period of three years, or over such period as the parties may agree upon.[772] The judgment will also bear interest at a rate to be agreed upon by the parties.[773] The IACCIA also provides for the payment of compensation in installments over a period agreed between the parties.[774] The PAIC does not have a similar provision.

It must be noted that the standard of compensation for expropriation provided in Annex 1 and the other TIPs discussed in this Chapter will in all probability not apply in the event that an expropriation is found to be illegal. This is because reparation in terms of Article 31 of ARSIWA may be payable in such event.

3.3.5 FET

The 2016 Annex 1 has abandoned the right to FET, which was provided for in the 2006 Annex 1.[775] The ACIA[776], ECT,[777] NAFTA[778] also provide for FET. In ISDS, there is no

770 Article 5.7 India Model BIT.
771 Article 12 PAIC.
772 Article 5(4) 2016 Annex 1; Kondo 2017 (20) Potchefstroom Electronic Law Journal 1 at 16.
773 Article 5(4) 2016 Annex 1.
774 Article 20(5) IACCIA.
775 Article 6(1) 2006 Annex 1.
776 Article 11.
777 Article 10(1).
778 Article 1105(1).

consensus on what FET is.[779] Neither is there an acceptable legal test that can be used to determine breach of FET.[780] Probably due to these reasons, FET is one of the most common grounds for claims against states, since its vague nature makes it difficult for a state to defend itself.[781] According to UNCTAD, investors use FET as a basis to sue host

779 UNCTAD "Fair and Equitable Treatment", UNCTAD Series on Issues in International Investment Agreements II, (New York and Geneva 2012) http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017) at 2-3, 7-8. For a brief discussion of FET see also at 5-15.

780 UNCTAD "Fair and Equitable Treatment" at 11-12 http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017).

781 See http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches (Date of use 10 April 2018); Kondo 2017 (20) Potchefstroom Electronic Law Journal 1 at 17-19; UNCTAD "Fair and Equitable Treatment" at 39-92 http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017). For selected tribunal decisions on FET see *ADF Group v United States of America* ICSID Case No. ARB(AF)00/1 Award of 9 January 2003, *Cargill Incorporated*, *CMS Gas Transmission Company*, *Desert Line Projects*, *Duke Energy*, *EDF*, *Enron Corporation and Ponderosa Assets, LLP v Argentine Republic* ICSID Case No. ARB/01/3 Award of 22 May 2007, *GAMI Investments*, *Alex Genin, Glamis Gold*, *Grand River Enterprises Six Nations Ltd et al v United States of America* UNCITRAL Award of 12 June 2011, *International Thunderbird Gaming Corporation v The United Mexican States* UNCITRAL Award of 26 January 2006, *Jan de Nul, LG&E Energy Corp (*Decision on Jurisdiction), *Merrill & Ring Forestry L.P v The Government of Canada* UNCITRAL Award of 31 March 2010, *Metalpar S.A and Buen Aire v The Argentine Republic* ICSID Case No. ARB/03/5 Award of 6 June 2008, *Mondev International Ltd v United States of America* ICSID Case No. ARB(AF)/99/2 Award of 11 October 2002, MTD Equity Sdn. Bhd. and MTD Chile v Republic of Chile ICSID Case No. ARB01/7 Award of 25 May 2004, *L.F.H Neer (USA) v United Mexican States* Reports of Awards Vol IV pp60-66 Decision of 15 October 1926, *Occidental v Petroleum Corporation and Occidental Petroleum Exploration and Production Company v The Republic of Ecuador* ICSID Case No. ARB/06/11 Award of 05 October 2012, *Pope v Talbort Inc v The Government of Canada* NAFTA Award on Merits of Phase 2 of 10 April 2001, Award in Respect of Damages of 31 May 2002, *PSEG Global and Another v Republic of Turkey* ICSID Case No. ARB/02/5 Award of 19 January 2007, *Saluka Investments B.V. v The Czech Republic* UNCITRAL Decision on Jurisdiction over the Czech Republic's Counterclaim of 7 May 2004, *S.D. Myers Inc. v The Government of Canada* UNCITRAL Partial Award of 13 November 2000, *Tecmed*, *Waste Management Inc. v United Mexican States* ICSID Case No. ARB (AF)/00/3 Award of 30 April 2004.

states in all arbitration matters based on BITs.[782] FET was used to commence at least 412 ISDS by 8 April 2018.[783] Of these cases, 105 were successful.[784]

After an extensive analysis of ISDS tribunal decisions, UNCTAD summarises the content of the FET obligation as among others:[785]

(a) Manifest arbitrariness in decision-making, that is, measures taken purely on the basis of prejudice or bias without a legitimate purpose or rational explanation;

(b) The denial of justice and disregard of the fundamental principles of due process;

(c) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;

(d) Abusive treatment of investors, including coercion, duress, and harassment.

UNCTAD adds that the broad nature of FET threatens governmental administrative action and policy-making.[786] This is not far-fetched, considering FET is a leading basis for the opening of ISDS cases against host states as discussed above, as well as FET's

782 UNCTAD "Fair and Equitable Treatment" at 39 http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017).

783 http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches (Date of use: 8 April 2018). Please note that these cases are mixed with those that are based on Most Favoured Nation and denial of justice.

784 http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches (Date of use: 8 April 2018).

785 UNCTAD "Fair and Equitable Treatment" at xvi http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017).

786 UNCTAD "Fair and Equitable Treatment" at 1-2. http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017).

potential financial impact on states. Awards based on FET can also be very high, as Ecuador was recently ordered to pay USD 1.7 Billion in damages for breach of FET obligations.[787]

The TTIP Proposal provides for FET, but seeks to avoid the challenges of its ambiguity by defining it in terms of parameters such as denial of justice and a fundamental breach of due process etc.[788] While the majority of investment treaties contain FET provisions, a trend of excluding FET is emerging.[789]

Even if the 2016 Annex 1 does not have FET obligations, Article 6(1) of the 2016 Annex 1 contains a national treatment (NT) clause. This clause obliges a Member State to treat foreign investors no less favorably than it treats domestic businesses in like circumstances.[790] However, Member States can, as an exception, treat domestic businesses differently, on the basis of legislation that grants preferential treatment to domestic businesses in order to achieve national developmental objectives.[791] The objective of NT in a business context is to ensure that foreigners who do business in a

787 This took place in *Occidental Petroleum Corporation.*

788 Art 3(2) TTIP Proposal.

789 See UNCTAD "Fair and Equitable Treatment" at xiv, 18-20. http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (Date of use: 20 October 2017). The Brazilian ACFI, India Model BIT, and the PAIC also do not provide for FET. The SADC Model BIT recommends its exclusion (at 22).

790 For a discussion of national treatment see Galea I and Biris B "National Treatment in International Trade and Investment Law" 2014 (55) Acta Juridica Hungary 174-183; UNCTAD "International Investment Agreements: Key Issues" Vol. 1 (2004) (New York, United Nations 2004) at 161-189, available at HeinOnline; UNCTAD (1999) "National Treatment" United Nations, New York and Geneva http://unctad.org/en/Docs/psiteiitd11v4.en.pdf, (Date of use: 15 October 2017); Salacuse *The Law of Investment treaties* at 245-250.

791 Article 6(3) 2016 Annex 1.

state are treated similarly to their domestic counterparts who are in like circumstances. The tribunal in *Parkerings* said in this regard:

> *National treatment* and *Most-Favoured-Nation treatment* are treaty clauses that have the same substantive effect as the international treatment standard: foreigners should be afforded treatment no less favorable than the one granted to local citizens. The international law requirement, in fact, acts as a minimum requirement as it would be useless for the States party to a treaty to grant benefits less sweeping than customary law. In other words, all the requirements, be they national treatment, most favored- nation-treatment or non-discrimination at large, will in effect bar discrimination against foreign nationals investing in the country concerned...[792] (Emphasis added)

The ACIA,[793] ECT,[794] and IACCIA[795] India Model BIT[796] and NAFTA,[797] all provide for NT.

3.3.6 Most-Favoured-Nation Treatment (MFN)

Just as it did with FET, the 2016 Annex 1 also abandoned MFN treatment.[798] The Draft Articles on Most-Favoured-Nation Clauses define an MFN clause as a treaty provision in terms whereof a state undertakes an obligation towards another State to accord most-

792 *Parkerings* at para 367.
793 Article 5 ACIA.
794 Article 10(3), 10(7) ECT.
795 Article 17 IACCIA.
796 Article 4 India Model BIT.
797 Article 1102 NAFTA.
798 See also Kondo 2017 (20) Potchefstroom Electronic Law Journal 1 at 10.

favored-nation treatment to investors in an agreed sphere of relations.[799] Most-Favoured-Nation treatment is defined as:

[799] Article 4 of the United Nations (International Law Commission) "Draft Articles on most-favoured-nation clauses with commentaries" (Yearbook of the International Law Commission 1978 Vol. II Part Two, Report of the Commission to the General Assembly on the work of its Thirtieth Session at 8, UN General Assembly Official Records, UN Doc A/CN.4/SER.A/1978/Add.l (Part 2) (1979) http://legal.un.org/ilc/texts/instruments/english/commentaries/1_3_1978.pdf (Date of use: 19 February 2017). A comprehensive discussion hereof is beyond the scope of this study. The following sources are useful on the subject: United Nations (International Law Commission) "Final Report: Study Group on the Most-Favoured-Nation Clause" Sixty-seventh session Geneva, 4 May – 5 June and 6 July – 7 August 2015, A/CN.4/L.852 http://legal.un.org/docs/?symbol=A/CN.4/L.852 (Date of use: 18 January 2018); Organisation for Economic Co-operation and Development "Most-Favoured-Nation Treatment in International Investment Law" (OECD Working Papers on International Investment, 2004/02, OECD Publishing) http://dx.doi.org/10.1787/518757021651 (Date of use: 15 October 2017); United Nations Conference on Trade and Development "Most Favored Nation Treatment" *(*United Nations, New York) http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=353, (Date of use: 15 October 2017); Cole T "The Boundaries of Most Favored Nation Treatment in International Investment Law" 2012 (33) Michigan Journal of International Law 537-585 http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1021&context=mjil) (Date of use: 19 February 2017); Thulasidhass PR "Most-favoured Nation Treatment in International Investment Law: Ascertaining the Limits Through Interpretative Principles" 2015 (7) (1) Amsterdam Law Forum, VU University Amsterdam http://amsterdamlawforum.org/article/view/346/512 (date of use: 18 January 2018); Parker SL "A BIT at a Time: The Proper Extension of the MFN Clause to Dispute Settlement Provisions in Bilateral Investment Treaties" 2012 (2) (1) The Arbitration Brief 30-63 http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1027&context=ab (Date of use: 18 January 2018); Radi Y "The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the Trojan Horse" 2007 (18) (4) European Journal Of International Law 757−774 http://www.ejil.org/article.php?article=232&issue=9 (Date of use: 19 February 2017); Salacuse *The Law of Investment treaties* at 251-254; Schill SW "Mulitilateralizing Investment Treaties through Most-Favored-Nation Clauses" 2009 (27) Berkeley Journal of International *Law* 496-566 http://scholarship.law.berkeley.edu/bjil/vol27/iss2/5); Jakobson PN *Most Favoured Nation Treatment Application in International Investment Arbitration A Study on Conflicting Precedence in International Dispute Settlement Procedure* (Master's Thesis University of Oslo Faculty of Law 2011) https://www.duo.uio.no/bitstream/handle/10852/22714/Master_thesis.pdf?sequence=1 (Date of use: 19 February 2017).

> ...treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favorable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.[800]

Depending on the wording of an MFN clause, an MFN clause in an investment treaty is usually for the benefit of the investors and investments of the parties to the treaty.[801] MFN clauses are controversial in that they give foreign investors rights, which they would otherwise not have, since MFN clauses allow them to claim better treatment that a Host State provides to investors from third-party states.[802] MFN clauses by their nature can be problematic for developing states with limited financial resources, as they can lead to unexpected litigation.

The ACIA,[803] ECT,[804] IACCIA,[805] NAFTA[806] and the PAIC have MFN clauses, while the SADC Model BIT recommends its exclusion.[807]

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800 Article 5 United Nations (International Law Commission) (1978) "Draft Articles on most-favoured-nation clauses with commentaries" (Yearbook of the International Law Commission 1978 Vol. II Part Two, Report of the Commission to the General Assembly on the work of its Thirtieth Session at 8, UN General Assembly Official Records, UN Doc A/CN.4/SER.A/1978/Add.l (Part 2) (1979)) http://legal.un.org/ilc/texts/instruments/english/commentaries/1_3_1978.pdf (Date of use: 19 February 2017

801 Article 8 United Nations (International Law Commission) "Draft Articles on most-favoured-nation clauses with commentaries" http://legal.un.org/ilc/texts/instruments/english/commentaries/1_3_1978.pdf (Date of use: 19 February 2017.

802 Kondo 2017 (20) Potchefstroom Electronic Law Journal 1 at 10.

803 Article 6 ACIA.

804 Article 10(3) ECT.

805 Article 19 IACCIA.

806 Article 1103 NAFTA.

807 At 22-23 SADC Model BIT.

3.3.7 Investor-State dispute resolution

The 2006 Annex 1 provides that in the event of an investor-state dispute,[808] an investor must be given access to the courts, judicial and administrative tribunals in a host state.[809] Furthermore, investor-state disputes that have not been amicably settled shall after local remedies have been exhausted,[810] and after the expiry of a period of six months from the declaration of a dispute, be submitted to ISDS if either an investor or host state so requires.[811] Where the parties choose ISDS, the parties may agree to refer the dispute to the ICSID, or to arbitration in terms of the UNCITRAL Arbitration Rules.[812] If upon expiry of a period of three months from the date of declaration of a dispute the parties do not agree on a choice of arbitration forum, then the dispute shall be settled by arbitration in terms of the UNICTRAL Arbitration Rules.[813]

However, the 2016 Annex 1 has removed investor access to ISDS, and only provides for the resolution of investor-state disputes in the local courts of host states.[814] Other jurisdictions deal with the resolution of investor-state disputes as follows.[815]

The ACIA provides that in the event of a dispute, an investor may litigate in the local courts of a host state, or it may commence ICSID, UNCITRAL, ASEAN or such other

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808 Article 27 Annex 1. See also Kondo 2017 (20) Potchefstroom Electronic Law Journal 1 at 28-30.

809 For a discussion of this requirement as applied by the SADC Tribunal see *Mike Campbell* at 26-41.

810 The requirement regarding exhaustion of local remedies is subject to the proviso that the remedies need not be exhausted if to do so will be futile.

811 Article 28(1) 2006 Annex 1.

812 Article 28(2) 2006 Annex 1.

813 Article 28(3) 2006 Annex 1.

814 Article 25 2016 Annex 1. The use of local courts as a forum for investor-state disputes in SADC is discussed in the next Chapter and will therefore not to be discussed herein.

815 A detailed discussion of recent developments in this regard in Brazil, the EU and India is undertaken in Chapter 5 below.

arbitration as the parties may agree upon.[816] These options come with a fork-in-the-road (or a no u-turn) provision, in terms whereof once an investor selects a forum, then other options are no longer available.[817] Claims are also subject to a prescription period of three years,[818] and there are mandatory consultations before arbitration or litigation can commence.[819]

In COMESA, the IACCIA imposes a six-month cooling-off period calculated from the issue of a notice to initiate a claim.[820] During this period, a party shall seek a mediator to assist in resolving the dispute.[821] If the parties fail to choose a mediator after three months, then the President of COMESA makes the choice for them.[822] If the dispute is not settled, then an investor may litigate in the host Member State or the CCJ.[823] Alternatively, the investor may commence ICSID, UNCITRAL or such arbitration as the parties may agree to.[824] Claims are subject to a three-year prescription period,[825] and a fork-in-the-road provision.[826]

The ECT requires investor-state disputants to settle a dispute within three months from the date of request for such settlement.[827] If the dispute cannot be resolved, then an

816 Article 33(1) ACIA.
817 Article 33(1) proviso ACIA.
818 Article 34(1) (a) ACIA.
819 Article 31 ACIA.
820 Article 26(2) IACCIA.
821 Article 26(4) IACCIA.
822 Article 26(5) IACCIA.
823 Article 28(1) (a)-(b) IACCIA.
824 Article 28(1) (c) IACCIA.
825 Article 28(2) IACCIA.
826 Article 28(3) IACCIA.
827 Article 26(1)-(2) ECT.

investor may commence litigation in the courts of the host state.[828] Alternatively, an investor may commence ICSID, UNCITRAL or ICC arbitration.[829]

NAFTA requires an investor to adhere to a cooling off period of three months prior to the commencement of arbitration.[830] An investor has a choice of either ICSID or UNICTRAL arbitration.[831] Claims are subject to a three-year prescription period,[832] as well as a fork-in-the-road provision.[833] Claims are not presented to the local courts of the host state on the basis that an impartial party must instead adjudicate such claim.[834]

The PAIC provides that each AU Member State may resolve investor-state disputes according to its own laws and policies.[835] It does not prescribe any particular method for the resolution of these disputes.

The provisions of the ACFI, India Model BIT and the TTIP Proposal regarding the resolution of investor-state disputes are discussed in Chapter 5 below and will not be repeated here.

3.3.8 SADC's ISDS experience

The above discussion would not be complete without a discussion of the extent to which SADC Member States have been, and continue to be exposed to ISDS claims. At the

828 Article 26(3) ECT.
829 Article 26(3)-(4) ECT.
830 Article 1118 NAFTA.
831 Article 1120(1) NAFTA.
832 Article 1116(2), 1117(2), 1121(1) (b), 1121(2) (b) NAFTA.
833 Article 1121(1) (b) NAFTA.
834 Article 1115 NAFTA
835 Article 42(1) PAIC.

time of writing, there are major ISDS cases against some SADC Member States.[836] These disputes validate the necessity to revisit and analyse the security of foreign investments in SADC in view of recent developments.

Historically, there has been a handful of ISDS cases against the following SADC Member States: DRC (4), Lesotho (2), Madagascar (3), Mauritius (2), Mozambique (2), South Africa (1), Tanzania (2) (plus recent two cases discussed below), and Zimbabwe (3, plus one recent case discussed below).[837]

Nationals of SADC have also initiated ISDS against SADC and non-SADC host states. Mauritian investors take the lead in terms of the number of ISDS commenced by them (6 cases),[838] followed by South Africans (1),[839] and nationals of Seychelles (1).[840]

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836 For a database of ISDS cases per host state and other criteria, see http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry (Date of use: 05 November 2017).

837 See http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry (Date of use: 12 November 2017).

838 See http://investmentpolicyhub.unctad.org/ISDS/CountryCases/134?partyRole=1 (Date of use: 12 November 2017). The cases concerned are (in descending chronological order): *Astro All Asia Networks and South Asia Entertainment Holdings Limited v India* (UNCITRAL), *Courts (Indian Ocean) Limited and Courts Madagascar S.A.R.L v Republic of Madagascar* (ICSID Case No. ARB/13/34), *Khaitan Holdings Mauritius Limited v India* (UNCITRAL), CC/Devas (Mauritius) Ltd., *Devas Employees Mauritius private Limited, and Telcom Devas Mauritius Limited v Republic of India* (PCA Case No. 2013-09), *Progas Energy Ltd v Pakistan* (INCITRAL), and *Bechtel Enterprises Holdings, Inc. and GE Structured Finance (GESF) v The Government of India* (UNCITRAL).

839 See http://investmentpolicyhub.unctad.org/ISDS/CountryCases/195?partyRole=1 (Date of use: 12 November 2017). The cases concerned are *Burmilla Trust, The Josias Van Zyl Family Trust and Josias Van Zyl v The Kingdom of Lesotho (*PCA Case No. 2016-21), *Oded Besserglik v Republic of Mozambique* (ICSID Case No. ARB (AF)14/2), and *Swissbourgh Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust and others v The Kingdom of Lesotho* (PCA Case No. 2013-29).

840 See http://investmentpolicyhub.unctad.org/ISDS/CountryCases/188?partyRole=1 (Date of use: 12 November 2017). The case concerned is *Consolidated Exploration Holdings Ltd. And others v Kyrgyz Republic* (ICSID Case No. ARB (AF) 13/1).

Recently, Madagascar,[841] Mauritius,[842] Mozambique[843] and Tanzania[844] faced a barrage of new international investor-state arbitration claims,[845] while Tanzania and South Africa are being challenged for legislative amendments to their mining laws, as explained below.

Tanzania recently made legislative amendments to its natural and mining resources legislation.[846] The amendments entitle the government to have a minimum of 16 percent "non-dilatable, free carried" interest in mining companies, which can be increased to 50 percent, commensurate with the value of tax benefits provided to the owner of that asset by the government of Tanzania.[847] They also prohibit investor-state disputes relating to the extraction, exploitation, acquisition, and use of natural wealth and resources from being adjudicated in foreign jurisdictions and forums.[848] Finally, the amendments enable

841 *(DS)2, S.A, Peter de Sutter and Kristof de Sutter v Republic of Madagascar* (ICSID Case No. ARB/17/18), opened on 14 June 2017*; LTME Mauritius and Madamobil Holdings Mauritius Limited v Republic of Madagascar* (ICSID Case No. ARB/17/28), opened on 9 August 2017).

842 *Thomas Gosling and others v Republic of Mauritius* (ICSID Case No. ARB/16/32), opened on 26 January 2017.

843 *CMC Muratori Construction CMC Di Ravenna SOC. Coop, CMC MuratoriCementisti CMC Di Ravenna SOC. Coop A.R.L Maputo Branch and CMC Africa, CMC Africa Austral, LDA v Republic of Mozambique* (ICSID Case No. ARB/17/23), opened 14 July 2017.

844 *Eco Development in Europe AB & others v United Republic of Tanzania* (ICSID Case No. ARB/17/33), opened on 11 September 2017.

845 See http://www.iareporter.com/news-and-analysis/ (Date of use: 25 October 2017). Unfortunately, details of these arbitrations are not yet public.

846 The legislation is: The Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act, 2017, The Natural Wealth and Resources (Permanent Sovereignty) Act, 2017, and The Written Law (Miscellaneous Amendments) Act, 2017.

847 Section 10(1) - (2) The Written Law (Miscellaneous Amendments) Act.

848 Section 11 The Natural Wealth and Resources (Permanent Sovereignty) Act.

the government to review and terminate agreements that expose Tanzania among others to foreign laws and forums.[849]

As if to complicate the situation, one law firm has encouraged investors to mount legal challenges to Tanzania's actions.[850] Large mining companies were quick to challenge the above amendments. On 4 July 2017, Acacia Mining announced that it was commencing ISDS against Tanzania relating to the Bulyanhulu Mine and Uzwagi Mine, based on these amendments.[851] After ten days, AngloGold Ashanti announced that it too had commenced ISDS against Tanzania, relating to its Geita Mine.[852]

A similar situation is unraveling in South Africa, where the Chamber of Mines of South Africa is locked in an acrimonious litigation with the South African government. The Chamber of Mines has applied to the High Court of South Africa, North Gauteng Division (Pretoria) for an order reviewing and setting aside a Mining Charter that was recently launched by the Minister of Mineral Resources.[853] The grounds for review are too numerous to state here, suffice to say that one key objection is that mining companies

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849 Section 6(2)(i) The Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act.

850 http://www.kwm.com/en/knowledge/insights/tanzania-natural-resources-mining-Legislative-reform-changes-20170710 (Date of use: 25 October 2017).

851 See Acacia "Announcement" 4 July 2017 http://www.acaciamining.com/~/media/Files/A/Acacia/press-release/2017/update-on-developments-in-tanzania-20170704.pdf (Date of use: 25 October 2017).

852 See AngloGold Ashanti "Press Release", 13 July 2017 https://thevault.exchange/?get_group_doc=143/1501167539-PR20170713Geita.pdf (Date of use: 25 October 2017).

853 See Chamber of Mines "Media Statement", 18 October 2017 http://www.chamberofmines.org.za/ (Date of use 27 October 2017). The Notice of Motion detailing the relief sought, and the Founding Affidavit in support of the application, can be found at https://goo.gl/xiBsR4 and https://goo.gl/h7cbML (Date of use 27 October 2017). The Mining Charter that is being challenged is attached to the Founding Affidavit (Annexure FA5 thereof).

must have a 30 percent Black Economic Empowerment ownership, up from 26 percent.[854] It is impossible to speculate on the direction that this dispute may take, as the relationship between the parties has broken down so much that the Chamber of Mines once said that it will only talk to the Minister of Mineral Resources via the courts.[855]

Another key development that may lead to protracted legal disputes is the decision of the Parliament of the Republic of South African of 27 February 2018, which mandated the Constitutional Review Committee to review Section 25 of the Constitution so as to enable the expropriation of property without compensation.[856] The Constitutional Review Committee is expected to report back on 30 August 2018. Despite assurances that the investor community needs not be concerned about this development, it is unlikely that all affected persons will accept expropriation without compensation.[857]

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854 The grounds for review are stated at para 3-6 of the Founding Affidavit.

855 See Chamber of Mines "Media Statement", 25 October 2017 http://www.chamberofmines.org.za/component/jdownloads/send/29-2017/491-chamber-of-mines-statement-on-minister-gibaba-s-inaugural-mtbps (Date of use: 27 October 2017).

856 See Parliament of the Republic of South Africa "Press Release", 27 February 2018 https://www.parliament.gov.za/press-releases/national-assembly-gives-constitution-review-committee-mandate-review-section-25-constitution (Date of use: 4 March 2018; https://www.fin24.com/Economy/ramaphosa-were-going-ahead-with-land-expropriation-without-compensation-20180216; https://www.news24.com/SouthAfrica/News/breaking-national-assembly-adopts-motion-on-land-expropriation-without-compensation-20180227 (Date of use: 4 March 2018).

857 See https://www.news24.com/SouthAfrica/News/international-community-should-not-panic-over-land-reform-sisulu-20180304; https://www.fin24.com/Companies/Agribusiness/ramaphosa-says-no-one-should-be-nervous-over-land-20180115; https://www.news24.com/SouthAfrica/News/eff-on-land-expropriation-no-one-will-lose-their-house-20180227; https://www.news24.com/Columnists/GuestColumn/land-expropriation-without-compensation-what-does-it-mean-20180304-5; https://www.fin24.com/Economy/expropriation-could-cause-widespread-bankruptcy-banker-20180302-2; https://www.fin24.com/Economy/move-towards-land-expropriation-could-have-unintended-results-warn-farm-bodies-20180228; https://www.agrisa.co.za/media-release-motion-land-political-populism-trumps-national-interest/ (Date of use: 4 March 2018).

In Zimbabwe, on 16-17 August 2017, some of the farmers who were involved in the *Mike Campbell* case issued notices to commence ISDS against Zimbabwe in terms of the 2006 Annex 1.[858] However, developments in this matter are not yet public. Zimbabwe is attempting to annul the award in *Bernhard Von Pezold*. In this matter, Zimbabwe was ordered to return the expropriated farms to the claimants plus damages of USD 56 million, failing which Zimbabwe had to pay compensation of USD 194 million.[859] At the time of writing, Zimbabwe was still seeking to have the award annulled, and in the interim, an agreement was reached that Zimbabwe will pay the awarded damages into an escrow account, pending the conclusion of the annulment proceedings.[860]

It is clear from the pattern in the cases discussed above that investors will not always lightly allow reform socio-economic programmes that negatively impact on their investments, while at the same time host states will not fear to implement reforms that they deem necessary to develop themselves. These cases reflect the conflict between the right of host states to regulate their affairs, versus investors' expectations that such regulation will not threaten their investments in one way or another. It is inevitable that more cases will be initiated in response to host states' development efforts.

Although SADC has taken the decision to remove ISDS from Annex 1 in order to avoid cases such as those mentioned above, investors have other gateways through which to

858 See http://www.politicsweb.co.za/news-and-analysis/dispossessed-zimbabwean-farmers-launch-new-legal-I (Date of use: 27 October 2017). Details regarding this case are not yet publicly available.

859 At para 1020.

860 Decision on Stay of Enforcement of the Award of 24 April 2017 at para 97-99; Decision on the Applicant's Urgent Application for Provisional Measures Regarding the Temporary Stay of Execution and the Escrow Arrangement of 22 August 2017 at para 30.

access ISDS. Common among these are BITs, TIPs and investment agreements, which are being used in the cases discussed above. Despite the conclusion of the 2016 Annex 1, some recent BITs concluded by the SADC Member States continue to provide for ISDS.[861] Therefore, closing the door to ISDS via Annex 1 alone is not a solution as Member States have already opened new doors via BITs, TIPs, investment agreements, and other instruments.[862] This lack of uniformity and consistency with regard to the practice of resolution of investor-states is the Achilles heel of SADC Member States, as shown in the next chapter.

3.4 CONCLUSION

SADC has succeeded in curtailing investor rights by means of Annex 1, including the removal of access to ISDS. Nonetheless, there has not been a publicised uproar from the investor community with regard to this decision. Whether this means that investors have accepted this change, remains to be seen.

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861 See for example the Agreement Between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments (date of signature 17 May 2013, in force 09 December 2013) http://investmentpolicyhub.unctad.org/Download/TreatyFile/636 (Date of use: 15 October 2017); http://investmentpolicyhub.unctad.org/Download/TreatyFile/636 (date of use: 12 November 2017); Agreement Between the Government of Japan and The Republic of Mozambique On the Reciprocal Liberalization, Promotion and Protection of Investments, (date of signature 01 June 2013, in force 29 August 2014) http://investmentpolicyhub.unctad.org/Download/TreatyFile/3114 (Date of use: 15 October 2017); http://investmentpolicyhub.unctad.org/Download/TreatyFile/3114 (Date of use: 12 November 2017).

862 For access to BITs concluded by SADC Member States select the relevant state at http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu (Date of use: 12 November 2017).

Technically, the 2016 Annex 1 lags behind similar instruments in terms of the way it regulates foreign investments, as indicated in the preceding discussion.

The regulation of foreign investments by means of either version of Annex 1 is not satisfactory, due to the failure of Member States to harmonise their laws and practices therewith. SADC's challenge with regard to the regulation of foreign investments by means of Annex 1 is that Member States fail to harmonise their laws and BIT practices with it. Among others, this encourages treaty shopping, whereby foreign investors may seek to bypass Annex 1 by locating themselves in foreign states that have favourable BITs or TIPs with SADC Member States, or in SADC Member States that have favourable BITs with other SADC Member States.

Despite the challenges identified herein, a review of Annex 1 by SADC will be academic, given that the AfCFTA (or even the T-FTA) will have an investment protocol that will in all likelihood replace the 2016 Annex 1. SADC's challenge is therefore to evaluate the positions that it will advance during the AfCFTA (or T-FTA) investment protocol negotiations, in view of the analysis undertaken herein, as well as the lessons that SADC can learn from Brazil's ACFTA, the EU's ICS and India's Model BIT that are discussed in Chapter 5. Furthermore, proposals are made in Chapter 6 with regard to the level at which foreign investments in SADC should be regulated, and the nature of the instrument that should be used.

The next chapter will analyse the laws of SADC Member States in order to determine if they provide satisfactory security to foreign investments in the event of expropriation.

CHAPTER 4

THE REGULATION OF FOREIGN INVESTMENTS IN TERMS OF THE LAWS OF SADC MEMBER STATES

4.1 INTRODUCTION

This chapter will discuss the provisions of the investment laws of the Member States, which apply in the event of the expropriation of an investment. It lays the foundation for the fulfilment of the fourth objective of this study.[863] Expropriation is chosen for discussion herein is due to its prevalence as a leading cause of action in ISDS claims, as well as its serious implications for host states and investors alike.[864] The discussion will cover the following areas: the dispute resolution forum, the compensation standard in the event of expropriation, and the enforcement of court orders and arbitral awards.

The discussion will be benchmarked by reference to the findings of selected rule of law surveys (also known as rule of law indices or scoreboards), namely the African Peer Review Mechanism (APRM),[865] the 2017 Ibrahim Index of African Governance (IIAG),[866]

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863 See Objective 1.3.4 in Chapter 1 above.

864 See http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches (Date of use: 18 January 2018).

865 For the foundation of the APRM see African Union (Assembly) (Thirty-Eighth Ordinary Session of the Organization of African Unity, 8 July 2002 Durban, South Africa) "NEPAD Declaration on Democracy, Political, Economic and Corporate Governance" AHG/235 (XXXVIII) Annex I at para 28 http://www.aprmtoolkit.saiia.org.za/official-documents/item/607-declaration-on-democracy,-political,-economic-and-corporate-governance; African Union (Assembly) (Thirty-Eighth Ordinary Session of the Organization of African Unity 8 July 2002 Durban, South Africa) "African Peer Review Mechanism (APRM) Base Document" AHG/235 (XXXVIII) Annex II http://www.un.org/en/africa/osaa/pdf/aprm-basedoc.pdf (Date of use: 10 April 2018); African Union (Assembly) (Eighth Ordinary Session, 20 January 2007, Addis Ababa, Ethiopia) *African Charter on Democracy, Elections and Governance* at para 36 http://archive.ipu.org/idd-E/afr_charter.pdf (Date of use: 15 April 2018); *Statute of the APRM* 2016V11082016 https://aprm-au.org/st_car/statute-of-the-aprm/ (Date of use: 8

the World Bank's 2016 Worldwide Governance Index (WGI),[867] the World Justice Project Rule of Law Index 2016 (WJP),[868] and the U.S. Department of State's 2016 Climate

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April 2018); NEPAD "Standards, Objectives, Criteria and Indicators For the African Peer Review Mechanism (APRM)" NEPAD/HSGIC-03-2003-/APRM/Guideline/OSCI 9 March 2003 https://aprm-au.org/wp-content/uploads/2014/11/Objectives-Standards-Criteria-and-Indicators.pdf (Date of use: 10 April 2018).

For further information and key documents see https://aprm-au.org/; https://www.au.int/en/organs/aprm; https://aprm-au.org/layout-search-result-pub/?taxonomy%5Bst_cars_pickup_features%5D=121&orderby=ID (Date of use: 8 April 2018).

For APRM country review reports see http://www.aprmtoolkit.saiia.org.za/country-reports-and-experiences (Date of use: 15 April 2018). At the time of writing only six SADC states have conducted their APRM assessments so far, namely Lesotho, Mauritius Mozambique, South Africa, Tanzania and Zambia. As a result, the APRM reviews are of limited significance in SADC.

The APRM's main objective is to foster the adoption of policies, values, standards and practices of political and economic governance that lead to political stability, accelerated sub-regional and continental economic integration, economic growth and sustainable development. See African Union (Assembly) "APRM Base Document" at para 3 http://www.un.org/en/africa/osaa/pdf/aprm-basedoc.pdf (Date of use: 10 April 2018); Article 4(2) Statute of the APRM. Member States that join the APRM agree to voluntarily and independently review their compliance with African and international governance commitments (Article 6(2) Statute of the APRM). The APRM measures performance and progress in four thematic areas: democracy and political governance, economic governance and management, corporate governance, and socio-economic development. See NEPAD "Standards, Objectives, Criteria and Indicators for the African Peer Review Mechanism (APRM)" at para 1.12 https://aprm-au.org/wp-content/uploads/2014/11/Objectives-Standards-Criteria-and-Indicators.pdf (Date of use: 10 April 2018).

866 See http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017). The Mo Ibrahim Foundation launched the IIAG in 2006.[866] It aims measure and monitor selected areas of governance in every African State, with a view to determine and debate government performance, and to be a decision-making instrument with which governments can govern.[866] The IIAG measures and monitors states in four categories, namely Safety and Rule of Law, Participation and Human Rights, Sustainable Economic Opportunity, and Human Development. The Rule of Law sub-category measures and monitors five indicators. Only three of these are relevant for this study, namely Judicial Independence, Judicial Process and Property Rights.[866] The IIAG covers all SADC Member States, and is therefore useful in this study.

867 http://info.worldbank.org/governance/wgi/#home (Date of use 14 December 2017). The

Statements.[869] These surveys are used in order to enable a balanced Western and African perspective on the rule of law, efficiency, and independence in the judiciaries of Member States. The surveys bring a practical perspective to the rule of law in these states, which may indicate areas of concern and potential improvement.

4.2 AN OVERVIEW OF SELECTED DISPUTE RESOLUTION PROVISIONS OF THE INVESTMENT LAWS OF SADC MEMBER STATES

4.2.1 KINGDOM OF ESWATINI

Based on 2015 data, Eswatini had a population of 1.2 million, and a landmass of 17 200 square kilometres (sq. km).[870] She had a Gross Domestic Product (GDP) of USD 4 Billion, with an annual growth rate of two percent.[871] Per capita income was USD 3

WGI is an initiative of the World Bank. The WGI has been published since 1996 and covers 215 countries. The WGI measures six indicators, but only the Rule of Law indicator is relevant herein. The WGI survey covers all SADC Member States, and is therefore useful

868 https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016 (Date of use: 14 December 2017). The WJP is an independent American non-profit organization whose aim is to study the Rule of Law patterns around the world. The version utilised here is the 6th edition of the WJP index. This index is a result of feedback from 110 000 households and 2700 experts in 113 countries. The WJP hopes that the index will help policy debates within and outside each country surveyed (WJP 2016 report at 4). The SADC Member States covered by the survey are Botswana, Madagascar, Malawi, Namibia, South Africa, Tanzania, Zambia, and Zimbabwe). The WJP claims to be the world's largest survey of original, independent data on the rule of law, but unfortunately it has limited application herein as it only covers 8 SADC states (WJP 2016 report at 4). Therefore, the WJP is useful in SADC, but only to a limited extent.

869 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/#wrapper (Date of use: 10 April 2017). The U.S. Department of State Climate Statements are prepared from information supplied by embassies and diplomatic staff based abroad. They aim to capture the state of investment laws and practices in the country where the contributing staff are based. The Climate Statements cover all SADC Member States.

870 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/748/index.html (Date of use: 10 April 2017).

871 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/748/index.html (Date of use: 10 April 2017).

120.[872] Eswatini received FDI of USD 719 Million between 2005 and 2012.[873] The main economic sectors in Eswatini are manufacturing and processing, agribusiness and agro-processing (sugar cane, citrus fruit, cotton, beef, vegetables, forestry, maize, energy, mining (gold, diamonds, coal, iron ore, quarry etc.), information and communications technologies, tourism and recreation (major attractions are Umhlanga Reed Dance, Incwala, Bushfire Festival, Simunye Fun Fair, East3Route, Eswatini International Trade Fair etc.).[874] Manufacturing (food and beverages, timber, textiles, and engineering) contributes 40 percent towards GDP.[875]

(a) Applicable regime

The Constitution of the Kingdom of Eswatini[876] and the Eswatini Investment Promotion Act[877] regulate the expropriation of investments in Eswatini.

(b) Dispute resolution forum

Should a dispute arise between an investor and the government of Eswatini with regard to an investment, the investor may at its option, and subject to any written agreement reached between the parties (if any) commence:

(i) Proceedings in the High Court of Eswatini;[878]

(ii) Local arbitration;[879]

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872 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/748/index.html (Date of use: 10 April 2017).

873 Table 3, Appendix hereto.

874 Eswatini Investment Promotion Agency www.sipa.sz/index.php/en/investment-opportunities/) (Date of use: 10 April 2017).

875 Eswatini Investment Promotion Agency www.sipa.sz/index.php/en/investment-opportunities/) (Date of use: 10 April 2017).

876 2005 version.

877 Act 1 of 1998.

878 Section 21(a) Investment Promotion Act.

(iii) Under UNCITRAL Arbitration Rules;[880] or

(iv) Arbitration under the auspices of the ICSID.[881]

Eswatini is a member of the ICSID.[882] This means that ICSID arbitration can be brought against her, including proceedings under Additional Facility Rules (AF)[883]. AF Rules enable an investor whose home state is not a member of ICSID to bring ICSID arbitration against an ICSID member state. Membership of ICSID also obliges a member state to recognise and enforce an award obtained against it.[884] The ICSID Convention does not apply to ICSID AF arbitration.

(c) Expropriation and compensation Standard

Property, or an interest or right in a property that forms part of an investment, may not be expropriated unless the expropriation is:

(i) In accordance with applicable legal procedures;[885]

(ii) In pursuance of a public purpose;[886]

(iii) Not discriminatory on the basis of nationality;[887]

(iv) Adequate and fair compensation is promptly paid;[888]

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879 Section 21(b) Investment Promotion Act.

880 Section 21(c) Investment Promotion Act.

881 Section 21(d) Investment Promotion Act.

882 https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (Date of use: 01 April 2017).

883 See https://icsid.worldbank.org/en/Documents/icsiddocs/AFR_English-final.pdf (Date of use: 6 August 2018).

884 See Article 53-55 ICSID Convention.

885 Section 20(1) (a) Investment Promotion Act.

886 Section 20(1) (b); Article 19(2(a) Constitution of the Kingdom of Eswatini.

887 Section 20(1) (c) Investment Promotion Act.

888 Section 20(1)(d) Investment Promotion Act; Article 19(2)(b)(i) Constitution of the Kingdom of Eswatini.

(v) Such that a right of access to a court of law is provided for by the law under which the expropriation is undertaken;[889] and

(vi) By order of the court.[890]

(d) Enforcement of awards and orders

A court order or an arbitral award (e.g. for the payment of damages or compensation for expropriation) obtained by an investor against Eswatini must be enforced via the courts. The IIAG ranks Eswatini under Rule of Law as follows: an overall Rule of Law score of 55.8 (all scores out 100), 21.3 points for judicial independence, 70.8 for the judicial process and 68.9 for property rights.[891] Eswatini ranks 22nd out of 54 African states and 10th in SADC in terms of the Rule of Law.[892]

The WGI gives Eswatini a score of 46.6 under the Rule of Law indicator.[893]

The U.S. Department of State states that Eswatini does not have a history of expropriation, and the courts enforce property rights.[894]

Eswatini is not a member of the New York Convention. This means that an investor may have difficulty in enforcing a foreign arbitral award against Eswatini. The New York

889 Section 20(1)(d) Investment Promotion Act; Article 19(2)(b)(ii) Constitution of the Kingdom of Eswatini.

890 Article 19(2) (c) Constitution of the Kingdom of Eswatini.

891 IIAG "Eswatini Scores, Ranks and Trends" http://mo.ibrahim.foundation/iiag/downloads/ (Date of use: 14 December 2017).

892 IIAG Report 2017 at 26 See http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017).

893 WGI http://info.worldbank.org/governance/wgi/index.aspx#reports (Date of use: 17 April 2017).

894 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?dlid=254169&year=2016#wrapper (Date of use: 01 April 2017).

Convention obliges a member state to recognise and enforce an arbitral award obtained against it, as follows:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.[895] (Emphasis added)

The New York Convention applies to awards obtained outside the state wherein enforcement is sought, and therefore it does not apply to awards classified as domestic awards in the state where enforcement is sought.[896] The Convention makes provision for an application for the recognition of an award to be made to a competent authority, which is usually a court of law in the state where enforcement is sought.[897] Provision is also made for a party against whom an award was obtained, to challenge the award and have it set aside.[898]

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895 Article III New York Convention.

896 Article I (1) New York Convention.

897 Article IV New York Convention. For an update on applications of this nature see (select "Judicial review by national courts") http://investmentpolicyhub.unctad.org/ISDS/FilterByFollowUpProceedings (date of use: 6 August 2018).

898 Article V New York Convention . For statistics on applications of these nature see (select "Judicial review by national courts") http://investmentpolicyhub.unctad.org/ISDS/FilterByFollowUpProceedings (Date of use: 6 August 2018).

4.2.2 KINGDOM OF LESOTHO

Based on 2015 data, Lesotho had a population of 2.1 million, and a landmass of 30 360 sq. km.[899] During 2015 GDP was USD 1.8 Billion, with an annual growth rate of 1.91 percent.[900] Per capita income was USD 872.[901] Lesotho received FDI ranging from USD 51 Million to USD 194 Million between 2005 and 2015.[902] Between 2005 and 2012, Lesotho's main economic sectors were agribusiness (crops, aquaculture, horticulture, livestock farming, and food processing), manufacturing (textile and garments, leather and footwear, consumer electronic goods, packaging materials, automotive components etc.), renewable energy, infrastructure and construction, mining (water bottling, diamond mining), services (information communications and technologies, financial services), and tourism (accommodation, health and wellness resorts, water sports and recreation, high altitude training facilities etc.).[903]

(a) Applicable regime

Lesotho does not have legislation regulating foreign investments. The Constitution of the Kingdom of Lesotho contains the provisions relating to expropriation.[904]

899 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/426/index.html (Date of use: 10 April 2017).

900 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/426/index.html (Date of use: 10 April 2017).

901 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/426/index.html (Date of use: 10 April 2017).

902 http://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx (Date of use: 27 February 2017).

903 Lesotho National Development Corporation at www.lndc.org.ls/Investor-kit) (Date of use: 10 April 2017).

904 Constitution of 1993 as amended to 2001.

(b) Dispute resolution forum

With regard to disputes relating to expropriation, an investor or a person with an interest or right over expropriated property has a right of direct access to the High Court.[905] Such right includes an appeal after the aggrieved person has approached a lower competent tribunal or authority.[906] The High Court or other lower competent tribunal or authority may determine the rights of the aggrieved person, the legality of the expropriation, the amount of compensation due, and it may also issue an order enforcing the payment of the compensation.[907]

Lesotho is a member of the ICSID Convention.[908]

(c) Expropriation and compensation standard

An owner of, or a person having an interest or right in a property has, irrespective of their nationality, a right not to be arbitrarily deprived of its property.[909] The state may expropriate, or otherwise, take possession of or acquire the rights or interests in a property for a variety of reasons.[910] An expropriation must meet the following requirements, namely that it must be:

(i) In the public interest;[911]

(ii) Justifiable in terms of the hardship caused to the person(s) who had an interest or right in the matter;[912] and

905 Article 17(2) Constitution of Lesotho.
906 Article 17(2) proviso Constitution of Lesotho.
907 Article 17(2) (a)-(b) Constitution of Lesotho.
908 https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (Date of use: 01 April 2017).
909 Articles 4(1) (m) and 17 Constitution of Lesotho.
910 Article 17 Constitution of Lesotho.
911 Article 17(1) (a) Constitution of Lesotho.

(iii) Accompanied by prompt and full compensation.[913]

The High Court or another tribunal authorised to do so may review an expropriation.[914]

(d) Enforcement of awards and orders

As was stated above, the High Court or other competent tribunal or authority has jurisdiction to enforce the payment of compensation, or any order that may have been made.[915] The IIAG ranks Lesotho as follows under the Rule of Law: an overall Rule of Law score of 64.1 (all scores out of 100), 64.6 for judicial independence, 58.3 for judicial process and 67.7 for property rights.[916] Lesotho ranks 8th out of 54 African states and 6th in SADC in terms of the Rule of Law.[917]

The WGI gives Lesotho a score of 50 under the Rule of Law indicator.[918] The 2010 APRM Review did not make any adverse findings on the state of the rule of law in Lesotho. It however found systematic lack of capacity, corruption, and lack of accountability in the public service in general.[919]

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912 Article 17(1) (b) Constitution of Lesotho.

913 Article 17(1) (c) Constitution of Lesotho.

914 Article 17(2) Constitution of Lesotho.

915 Article 17(2(b) Constitution of Lesotho.

916 IIAG "Lesotho Scores, Ranks and Trends" http://mo.ibrahim.foundation/iiag/downloads/ (Date of use: 14 December 2017).

917 IIAG 2017 Report at 26 See http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017).

918 WGI http://info.worldbank.org/governance/wgi/index.aspx#reports (Date of use: 17 April 2017).

919 APRM "Lesotho Country Review Report No. 12", June 2010 at para 112-115 http://www.aprmtoolkit.saiia.org.za/country-reports-and-experiences (Date of use: 10 February 2018).

The U.S. Department of State states that Lesotho courts are overburdened and slow.[920] The Department also states that a commercial court was established in 2010 to address some of these challenges. This court had decided only 63 cases by July 2015, with a maximum of 15 cases per year at a rate of between one and five cases per month.[921] It appears from these figures that this court has a light caseload.

Lesotho is a member of the New York Convention.[922]

4.2.3 REPUBLIC OF ANGOLA

Based on 2015 data, Angola had a population of 25 million, and a landmass of 1.2 million sq. km.[923] Angola is the second largest economy in SADC in terms of GDP (USD 146 Billion), and is second only to South Africa (USD 349 Billion).[924] GDP growth was 2.96, and per capita income was USD 5 450.[925] During 2015 Angola was the 7th largest recipient of FDI in Africa,[926] and the top FDI recipient in SADC (USD 8.6 Billion) during the same period.[927] Angola's economy is driven by its oil sector.[928] Oil production and related activities account for approximately 50 percent of GDP, which contributes more

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920 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?dlid=254169&year=2016#wrapper (Date of use: 01 April 2017).

921 http://www.lesotholii.org/content/high-court-commercial-division (Date of use: 10 April 2017).

922 http://www.newyorkconvention.org/countries (Date of use: 01 April 2017).

923 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/024/index.html (Date of use: 10 April 2017).

924 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/024/index.html (Date of use: 10 April 2017).

925 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/024/index.html (Date of use: 10 April 2017).

926 FDI Intelligence at 4 http://www.casafrica.es/casafrica/Agenda/2016/11_Africa-Investment-Report_Klassa-Presentation.pdf (Date of use: 18 January 2018).

927 See Table 3, Appendix hereto.

928 Summary extracted from http://www.theodora.com/wfbcurrent/angola/angola_economy.html (Date of use: 10 April 2017).

than 70 percent of government revenue, and more than 90 percent of Angola's exports. Angola is the second biggest exporter of oil in Africa after Nigeria. Diamonds contribute another five percent towards exports. Subsistence farming provides the main livelihood for most of the people, although there are food shortages and half of the country's food is imported.

(a) Applicable regime

The new Private Investment Law regulates the expropriation of investments in Angola.[929]

(b) Dispute resolution forum

The Private Investment Law provides that investor-state disputes shall be referred to the Angolan courts for adjudication.[930] Disputes may optionally be referred to arbitration in terms of the Arbitration Act of 2003, but it is reported that such arbitration is not widely used.[931] In 2014, the Ministry of Justice opened the Centre for Human Rights and Legal Alternatives for Conflict Resolution, but again it is reported that the facility is not being utilised.[932] Among other functions, the Centre provides consultation, mediation, and arbitration of contract disputes for both Angolan and foreign businesses.[933]

Angola is not a member of the ICSID Convention.

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929 Law No. 14/15 of 11 August 2015.

930 Article 20(1) Private Investment Law.

931 Law No. 16/03. See https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/#wrapper (Date of use: 01 April 2017).

932 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/#wrapper (Date of use: 01 April 2017).

933 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/#wrapper (Date of use: 01 April 2017).

(c) Expropriation and compensation standard

The Private Investment Law provides that in the event of the expropriation of an investment, fair, prompt and effective compensation shall be paid to an investor.[934]

(d) Enforcement of awards and orders

Any order issued by a court, or an arbitral award issued by a tribunal, must be enforced via the courts. This raises the issue of the efficiency, partiality, and costs of using the local courts. The IIAG ranks Angola's rule of law as follows: an overall Rule of Law score of 42.2 (all scores out of 100), 23.4 for judicial independence, 12.5 for judicial process and 33 for property rights.[935] Angola ranks 39th out of 54 African states and 14th in SADC in terms of the rule of law.[936]

The WGI gives Angola a score of 12 out of 100 under the Rule of Law Indicator.[937]

The United States Department of State Report indicates that the Angolan court system is not always impartial, that it takes approximately four years for a commercial case to be concluded, and the costs of the proceedings are approximately 44 percent of the value of a claim.[938]

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934 Article 20(2) Private Investment Law.

935 IIAG "Angola Scores, Ranks and Trends" http://mo.ibrahim.foundation/iiag/downloads/ (Date of use: 14 December 2017).

936 IIAG 2017 Report at 26 http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017).

937 WGI http://info.worldbank.org/governance/wgi/index.aspx#reports (Date of use: 17 April 2017).

938 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/#wrapper (Date of use: 01 April 2017).

Angola is not a member of the New York Convention.[939]

4.2.4 REPUBLIC OF BOTSWANA

Based on 2015 data, Botswana had a population of 2.2 million, and a landmass of 566 730 sq. km.[940] Her GDP was USD 14 Billion, with an annual growth rate of 0.32 percent. Per capita income was USD 6365.[941] Botswana FDI inflows fluctuated from USD 208 Million to 515 Million between 2005 and 2015.[942] Botswana is the second-largest diamond producer in the world by value.[943] Botswana and De Beers formed Debswana Diamond Mining Company (Pty) Ltd in 1969. Botswana gradually increased its shareholding from 15 percent, and by 1975 the parties were equal partners.[944] During 2014, the partnership generated USD 6.9 Billion, of which Botswana received 32 percent. The partnership also contributed 34 160 jobs.[945] The partnership has contributed to Botswana's stable political and regulatory environment. It is therefore no

939 Membership confirmed at http://www.newyorkconvention.org/countries (Date of use: 01 April 2017).

940 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/072/index.html (Date of use: 10 April 2017).

941 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/072/index.html (Date of use: 10 April 2017).

942 Available under Botswana country profile at http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/072/index.html (Date of use: 10 April 2017).

943 De Beers Group "Turning Finite Resources into Enduring Opportunity: The economic contribution to Botswana of the Partnership between the Government of the Republic of Botswana and De Beers" at 16 http://www.debeersgroup.com/en/reports/impact/country/botswana-and-cut-8/the-principles-of-partnership.html (Date of use: 10 April 2017).

944 De Beers Group "Turning Finite Resources into Enduring Opportunity" at 13 http://www.debeersgroup.com/en/reports/impact/country/botswana-and-cut-8/the-principles-of-partnership.html (Date of use: 10 April 2017).

945 De Beers Group "Turning Finite Resources into Enduring Opportunity" at 35 http://www.debeersgroup.com/en/reports/impact/country/botswana-and-cut-8/the-principles-of-partnership.html (Date of use: 10 April 2017).

surprise that Botswana ranked 1st under the Safety and Rule of Law component of the IIAG.[946]

(a) Applicable regime

The Constitution of the Republic of Botswana[947] and The Acquisition of Property Act[948] regulate the expropriation of investments in Botswana.

(b) Dispute resolution forum

The Constitution of the Republic of Botswana provides that the High Court shall be the competent but not the only forum for disputes relating to expropriation.[949] The Constitution makes provision for proceedings to be commenced at a lower authority.[950] Issues that may be brought before the High Court include the determination of the interests or rights of an affected person, the legality of an expropriation, and the amount of compensation to be paid, and the enforcement of the payment of compensation.[951]

Botswana is a member of the ICSID.

(c) Expropriation and compensation standard

The Constitution of the Republic of Botswana provides that no property may be expropriated unless the expropriation will benefit the development of mineral resources. It provides that:

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946 IIAG 2017 Index Report at 26 http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017).

947 Constitution of 1966 as amended by Act 12 of 2002.

948 Chapter 32:10 of 28 January 1955 as amended.

949 Article 8(1) (b) (ii) Constitution of the Republic of Botswana.

950 Article 8(1)(b)(ii) Constitution of the Republic of Botswana.

951 Article 8(1) (b) (ii) Constitution of the Republic of Botswana.

(i) The expropriation must be in the interest of public order, public defense and the like;[952]

(ii) The expropriated property must be used for public benefit;[953]

(iii) The expropriation must aim to or will secure the development of mineral resources;[954]

(iv) The law providing for the expropriation must provide for the prompt payment of adequate compensation;[955] and

(v) The law providing for the expropriation must provide for access to the High Court, either directly or on appeal from a lower competent authority.[956]

Section 3 of the Acquisition of Property Act also provides for the expropriation of land and certain real rights if the acquisition of such property is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement; or in order to secure the development or utilisation of that or other property for a purpose beneficial to the community, paying such compensation therefore as may be agreed upon or determined under the provisions of the Act.

A person seeking to challenge the legality of an expropriation under the Acquisition of Property Act must approach the High Court for relief.[957] A Board of Assessment

952 Article 8(1) (a) (i) Constitution of the Republic of Botswana.

953 Article 8(1) (a) (ii) Constitution of the Republic of Botswana.

954 Article 8(1) (a) (iii) Constitution of the Republic of Botswana.

955 Article 8(1) (b) (i) Constitution of the Republic of Botswana. The payment of royalties *in lieu* of a lump sum is deemed to be sufficient for the purpose of this provision (Article 8(3) Constitution of the Republic of Botswana.

956 Article 8(1) (b) (ii) Constitution of the Republic of Botswana.

appointed for each dispute adjudicates disputes relating to compensation.[958] The decision of the Board is final as against the persons who participated in the assessment process, but any person aggrieved by the decision of the Board may appeal the decision before the High Court.[959]

(d) Enforcement of awards and orders

The High Court of Botswana or other competent authority shall be entitled to order the enforcement of an order made by it.[960] The IIAG ranks Botswana as follows under the Rule of Law: an overall rule of law score of 92.8 (all scores out of 100), 74 points for judicial independence, 100 for judicial process and 85 for property rights.[961] Botswana ranks 2nd out of 54 African states and 2nd in SADC in terms of the Rule of Law.[962]

The WGI gives Botswana a score of 73 under the Rule of Law indicator.[963] The WJP Index gives Botswana a score of 58.[964]

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957 Section 9 Acquisition Act.

958 Section 11 Acquisition Act. The Board will consider the factors listed in Section 16 in order to reach its decision.

959 Section 20 Acquisition Act.

960 Article 8(1)(b)(ii) Constitution of the Republic of Botswana makes the High Court the competent Court to deal with expropriation disputes.

961 IIAG "Botswana Scores, Ranks and Trends" http://mo.ibrahim.foundation/iiag/downloads/ (Date of use: 14 December 2017).

962 IIAG 2017 Report at 26 http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017).

963 WGI http://info.worldbank.org/governance/wgi/index.aspx#reports (Date of use: 17 April 2017).

964 WJP Rule of Law Index 2016 at 21 https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016 (Date of use: 14 December 2017).

The U.S. Department of State notes that the courts of Botswana do enforce judgments, and can be regarded as fair.[965] However, the Department states that it can take up to two years to enforce a judgment in a commercial dispute.

Botswana is member of the New York Convention.[966]

4.2.5 DEMOCRATIC REPUBLIC OF CONGO

Based on 2015 data, the DRC is the SADC's largest state in terms of landmass, with an area of 2.2 million sq. km, which is almost double the size of South Africa.[967] It also has the highest population in SADC of 77 million.[968] The DRC received stable FDI since 2007, which ranged from USD 663 Million to USD 3.3 Billion at its peak.[969] The DRC had a GDP of USD 38 Billion in 2015, with a GDP growth of 7.17 percent.[970] Per capita income was USD 504.[971] The DRC has vast natural resources, and, therefore, has great potential as an investment destination. However, political instability, illegal mining, smuggling of mineral resources and the presence of armed groups plague the DRC and cost it its true investment potential.[972] A report of the Group of Experts on the Democratic

965 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?dlid=254169&year=2016#wrapper (Date of use: 01 April 2017).

966 http://www.newyorkconvention.org/countries (Date of use: 01 April 2017).

967 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/180/index.html (Date of use: 10 April 2017).

968 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/180/index.html (Date of use: 10 April 2017).

969 Available at (http://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx (Date of use: 27 February 2017).

970 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/180/index.html (Date of use: 10 April 2017).

971 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/180/index.html (Date of use: 10 April 2017).

972 See United Nations (Security Council) "Final Report of the Group of Experts on the Democratic Republic of Congo", S/2014/42 (23 January 2014)

Republic of Congo commissioned by the United Nations found that illegal mining and the smuggling of minerals are so prevalent that 98 percent of gold worth approximately USD 400 Million produced during 2013 was smuggled out of the country.[973]

(a) Applicable regime

The legislation regulating the expropriation of investment in the general economy of the DRC is the Constitution of the Democratic Republic of Congo,[974] and the Investment Code.[975] The Investment Code does not apply to the following sectors: mining and hydrocarbons, banking, assurance and insurance, arms production and related military activities, production of explosives, and assembly of military, paramilitary and security equipment.[976]

(b) Dispute resolution forum

The Investment Code states that disputes that may arise regarding the interpretation or application of the Code are to be settled according to the procedure set out in the Code on Congolese Civil Procedure.[977] This includes disputes between an investor and the DRC government, and allegations of violation of the rights of the investor or of the investment.[978] The parties to a dispute are given three months from the date of the

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https://monusco.unmissions.org/sites/default/files/n1421515.pdf (Date of use: 10 April 2017).

973 UN (Security Council) "Final Report of the Group of Experts on the Democratic Republic of Congo" at 32 https://monusco.unmissions.org/sites/default/files/n1421515.pdf (Date of use: 10 April 2017).

974 Constitution of the Democratic Republic of Congo of 2005.

975 Law No. 004 of 21 February 2002. Mining, hydrocarbons, finance, and other sectors are covered by other legislation (https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?dlid=254169&year=2016#wrapper) (Date of use: 01 April 2017).

976 Article 3(1) Investment Code.

977 Article 37 Investment Code.

978 Article 38 Investment Code.

declaration of a dispute to resolve it amicably.[979] If the dispute is not resolved, then the matter goes into the ISDS stage.[980] At this stage, an investor has the option of ICSID arbitration (including Additional Facility arbitration) or International Chamber of Commerce (ICC) arbitration.[981]

The DRC consents to ICSID arbitration by virtue of Article 38 of the Investment Code, while an investor consents to arbitration by virtue of having a qualifying investment in terms of the Investment Code.[982] If a foreign investor is operating through a company of Congolese nationality that he controls or supervises, then it is presumed that the company is of the foreign nationality of the investor.[983]

The DRC is a member of the ICSID Convention.[984]

(c) Expropriation and compensation standard

The DRC Constitution provides that the right to property is protected.[985] However, it provides that property may be expropriated for a public purpose and against payment of just compensation under conditions determined by law.[986] The Constitution further provides that no property may be seized except by order of a competent tribunal.[987] In line with the Constitution, the Investment Code provides that the property of an investor cannot be expropriated except:

979 Article 38 Investment Code.
980 Article 38 Investment Code.
981 Article 38 Investment Code.
982 Article 38 Investment Code.
983 Article 38 Investment Code.
984 https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (Date of use: 01 April 2017).
985 Article 34 Constitution of the DRC.
986 Article 34 Constitution of the DRC.
987 Article 34 Constitution of the DRC.

(i) As provided for by law or order of a court;[988]

(ii) For a public purpose;[989] and

(ii) Against payment of fair and equitable compensation.[990]

(d) Enforcement of awards and orders

Any order issued by a court, or an arbitral award issued by a tribunal, must be enforced via the courts. This raises the issue of the efficiency, partiality, and costs of using the local courts. The IIAG ranks the DRC as follows under the Rule of Law: an overall Rule of Law score of 32.1 (all scores out of 100), 20 for judicial independence, 41.7 for the judicial process and 39 for property rights.[991] The DRC ranks 48th out of 54 African states and 15th in SADC in terms of the Rule of Law.[992]

The WGI gives the DRC a score of 3.3 under the Rule of Law indicator.[993]

However, the U.S. Department of State states that the courts of the DRC are marked by a high degree of corruption, public administration is not reliable, and both expatriates and nationals are subject to the selective application of a complex legal code.[994] The

988 Article 26 Investment Code.

989 Article 26 Investment Code.

990 Article 26 Investment Code. Compensation is fair if it is based on the market value of the property (Article 26). Note that Article 34 Constitution of the DRC requires "just compensation".

991 IIAG "DRC Scores, Ranks and Trends" http://mo.ibrahim.foundation/iiag/downloads/ (Date of use: 14 December 2017).

992 IIAG 2017 Report http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017).

993 WGI http://info.worldbank.org/governance/wgi/index.aspx#reports (Date of use: 17 April 2017).

994 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?dlid

Department notes, however, that modern commercial courts are being set up in parallel with the existing court system.

The DRC is a member of the New York Convention.[995]

4.2.6 REPUBLIC OF MADAGASCAR

Based on 2015 data, Madagascar had a population of 24 million, and a landmass of 581 700 sq. km.[996] GDP for 2015 was USD 9.7 Billion, with an annual growth rate of 3.2 percent. Per capita income was USD 401.[997] Madagascar received FDI of USD 169 Million from South Africa between 2005 and 2012.[998] The main investment sectors in Madagascar are agribusiness, tourism, mining, information communications and technologies, light industries and renewable energy.[999] Madagascar's main exports are agricultural products. During 2014, Madagascar exported 999 000 tons of product.[1000] Madagascar has a 50 percent share of the global vanilla market, and 70 percent of the European market for Litchis.[1001] She produces more rice than the rest of SADC

=254169&year=2016#wrapper (Date of use: 01 April 2017).

995 http://www.newyorkconvention.org/countries (Date of use: 01 April 2017).

996 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/450/index.html (Date of use: 10 April 2016).

997 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/450/index.html (Date of use: 10 April 2016).

998 Table 4 at http://unctad.org/Sections/dite_fdistat/docs/webdiaeia2014d3_ZAF.pdf (Date of use: 10 April 2017).

999 Economic Development Board of Madagascar "Madagascar Investment Guide" (undated) (www.edbm.gov.mg/content/downlaod/1025/5177/file/Investor's%20Guide%20 Madagascar-en.pdf (Date of use: 10 November 2017).

1000 Economic Development Board of Madagascar "Madagascar Investment Guide" at 3 (www.edbm.gov.mg/content/downlaod/1025/5177/file/Investor's%20Guide%20 Madagascar-en.pdf (Date of use: 10 November 2017).

1001 Economic Development Board of Madagascar "Madagascar Investment Guide" at 15 (www.edbm.gov.mg/content/downlaod/1025/5177/file/Investor's%20Guide%20 Madagascar-en.pdf (Date of use: 10 November 2017).

combined.[1002] Being surrounded by ocean, Madagascar has a thriving fishery and aquaculture sector.[1003] Madagascar's unique fauna and flora are a major tourist attraction, with between 180 000 and 240 000 tourists visiting per year since 2010.[1004]

The mining sector has potential for investment in marble, ruby, sapphire, emerald, aquamarine, topaz, coal, uranium, quartz, gold, platinum, silver, copper, iron and many others.[1005] Madagascar's connection to the East African Submarine System and LION high-speed internet networks makes it ideal for technology parks, manufacture and assembly of electronic parts, call centers, mobile telephone providers, and other technology related opportunities.[1006] Madagascar's abundant rivers, sunshine, and constant winds are ideal for hydropower, solar and wind energy generation.[1007]

1002 Economic Development Board of Madagascar "Madagascar Investment Guide" at 15 (www.edbm.gov.mg/content/downlaod/1025/5177/file/Investor's%20Guide%20Madagascar-en.pdf (Date of use: 10 November 2017).

1003 Economic Development Board of Madagascar "Madagascar Investment Guide" at 15 (www.edbm.gov.mg/content/downlaod/1025/5177/file/Investor's%20Guide%20Madagascar-en.pdf (Date of use: 10 November 2017).

1004 Economic Development Board of Madagascar "Madagascar Investment Guide" at 16 (www.edbm.gov.mg/content/downlaod/1025/5177/file/Investor's%20Guide%20Madagascar-en.pdf (Date of use: 10 November 2017).

1005 Economic Development Board of Madagascar "Madagascar Investment Guide" at 17 (www.edbm.gov.mg/content/downlaod/1025/5177/file/Investor's%20Guide%20Madagascar-en.pdf (Date of use: 10 November 2017).

1006 Economic Development Board of Madagascar "Madagascar Investment Guide" at 18 (www.edbm.gov.mg/content/downlaod/1025/5177/file/Investor's%20Guide%20Madagascar-en.pdf (Date of use: 10 November 2017).

1007 Economic Development Board of Madagascar "Madagascar Investment Guide" at 20 (www.edbm.gov.mg/content/downlaod/1025/5177/file/Investor's%20Guide%20Madagascar-en.pdf (Date of use: 10 November 2017).

(a) Applicable regime

The primary legislation regulating the expropriation of foreign investments in Madagascar is the Madagascar Investment Law.[1008]

(b) Dispute resolution forum

Investor-state disputes must be submitted to the local courts for adjudication.[1009]

Madagascar is a member of the ICSID.[1010]

(c) Expropriation and compensation standard

The Investment Law provides that property may not be expropriated except in public interest cases.[1011] These cases include infrastructure works, the establishment of nature reserves, or military sites, among others, requiring expropriation of private property.[1012] In the event of such expropriation fair compensation is payable.[1013]

(d) Enforcement of awards and orders

Any order issued by a court, or an arbitral award issued by a tribunal, must be enforced via the courts. This raises the issue of the efficiency, partiality, and costs of using the local courts. The IIAG ranks Madagascar as follows under the Rule of Law: an overall Rule of Law score of 55.8 (all scores out of 100), 30 points for judicial independence,

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1008 Law No. 036 of 2007.

1009 Article 21 Madagascar Investment Law.

1010 https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (Date of use: 01 April 2017).

1011 Article 4 Madagascar Investment Law.

1012 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/#wrapper (Date of use: 01 April 2017).

1013 Article 4 Madagascar Investment Law.

58.3 for judicial process and 41.1 for property rights.[1014] Madagascar ranks 29th out of 54 African states and 11th in SADC in terms of the Rule of Law.[1015]

The WGI gives Madagascar a score of 28 under the Rule of Law indicator.[1016] The WJP gives her a score of 45 under the Rule of Law indicator.[1017] Madagascar is not a member of the APRM.

The U.S. Department of State states that the Malagasy courts are nominally independent, they appear open to influence from the executive and other players, the judges lack proper training, cases take about three years to conclude, costs are high and can take about 42 percent of the value of a claim, there are complaints that they avoid dealing with the merits of some cases and dismiss them on technical grounds.[1018] The Department adds that corruption and slow pace affects the enforcement of judgments and awards.[1019]

Madagascar is a member of the New York Convention.[1020]

1014 IIAG "Madagascar Scores, Ranks and Trends" http://mo.ibrahim.foundation/iiag/downloads/ (Date of use: 14 December 2017).

1015 IIAG 2017 Report at 26 http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017).

1016 WGI http://info.worldbank.org/governance/wgi/index.aspx#reports (Date of use: 17 April 2017).

1017 WJP 2016 Rule of Law Index at 21 https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016 (Date of use: 14 December 2017).

1018 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/#wrapper (Date of use: 01 April 2017).

1019 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/#wrapper (Date of use: 01 April 2017).

1020 http://www.newyorkconvention.org/countries (Date of use: 01 April 2017).

4.2.7 REPUBLIC OF MALAWI

Based on 2015 data, Malawi had a population of 17 million and a landmass of 94 280 sq. km.[1021] GDP was USD 6 Billion, with an annual growth rate of three percent.[1022] Malawi's FDI levels are similar to those of Lesotho, with a low of USD 35 Million and a maximum of 195 Million between 2005 and 2015.[1023] Malawi's main economic sectors are energy (hydropower, solar energy, fuel storage, wind energy, thermal power, biomass stoves, services (financial, real estate, healthcare), food and beverage production, processing and packaging, information communications and technologies, infrastructure construction and rehabilitation, tourism (hotels, casinos, water and lake sports, camps and lodges, eco-tourism), mining (bauxite, corundum, limestone, titanium, vermiculite, coal, phosphate, pyrite etc.), manufacturing (light manufacturing, textile and garments) and forestry.[1024]

(a) Applicable regime

The Investment and Export Promotion Act,[1025] and the Constitution of the Republic of Malawi[1026] regulate the expropriation of investments in Malawi.

(b) Dispute resolution forum

The Constitution of Malawi provides that if a person is aggrieved by the alleged infringement of a constitutional right, including the right not to be arbitrarily deprived of

1021 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/454/index.html (Date of use: 10 April 2017).

1022 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/454/index.html (Date of use: 10 April 2017).

1023 Table 3, Appendix hereto.

1024 Malawi Investment and Trace Centre (MITC) www.mitc.mw/index.php?option=com-content & view=article&id=299&Itemid=611 (Date of use: 10 April 2017).

1025 Act 11 of 2012.

1026 Constitution of 18 May 1994.

one's property, then such person must approach the competent court to protect or enforce the right.[1027] A competent court may make such order as it sees fit, including the award of compensation to the complainant.[1028]

Malawi is a member of the ICSID Convention.[1029]

(c) Expropriation and compensation standard

The Constitution of Malawi provides that there is a right not to be arbitrarily deprived of property.[1030] However, the Constitution allows for the expropriation of property, provided that:

(i) The expropriation is in the public interest;[1031]

(ii) Adequate notice of the intention to expropriate was given to the interested party;[1032]

(iii) Appropriate compensation is paid;[1033] and

(iv) An interested party shall have a right of appeal to a court of law.[1034]

(d) Enforcement of awards and orders

Any order issued by a court, or an arbitral award issued by a tribunal, must be enforced via the courts. This raises the issue of the efficiency, partiality, and costs of using the

1027 Article 46 Constitution of the Republic of Malawi.
1028 Article 28(1) and (2) Constitution of the Republic of Malawi.
1029 https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (Date of use: 01 April 2017).
1030 Article 28(1) and (2) Constitution of the Republic of Malawi.
1031 Article 44(4) Constitution of the Republic of Malawi.
1032 Article 44(4) Constitution of the Republic of Malawi.
1033 Article 44(4) Constitution of the Republic of Malawi.
1034 Articles 46(3) and (4) Constitution of the Republic of Malawi.

local courts. The IIAG ranks Malawi as follows under the Rule of Law: an overall Rule of Law score of 73.2 (all scores out of 100), 60 points for judicial independence, 83.3 for judicial process and 55.5 for property rights.[1035] Malawi ranks 17th out of 54 African states and 9th in SADC in terms of the Rule of Law.[1036]

The WGI gives Malawi a score of 44 under the Rule of Law indicator.[1037] The WJP gives Malawi a score of 41 under the Rule of Law indicator.[1038]

The U.S. Department of State states that the courts of Malawi have long backlogs, staff shortages, and it can be difficult to enforce judgments.[1039] However, the courts are not biased, and there seems to be little political interference in cases.

Malawi is not a signatory to the New York Convention.

4.2.8 REPUBLIC OF MAURITIUS

Based on 2015 data, during 2015 Mauritius had a population of 1.2 million, and a landmass of 2000 sq. km.[1040] GDP was USD 11 Billion, with an annual growth rate of 3.5

1035 IIAG "Malawi Scores, Ranks and Trends" http://mo.ibrahim.foundation/iiag/downloads/ (Date of use: 14 December 2017).

1036 IIAG 2017 Report at 26 http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017).

1037 WGI http://info.worldbank.org/governance/wgi/index.aspx#reports (Date of use: 17 April 2017).

1038 WJP 2016 Rule of Law Index at 21 https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016 (Date of use: 14 December 2017).

1039 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?dlid=254169&year=2016#wrapper (Date of use: 01 April 2017).

1040 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/480/index.html (Date of use: 10 April 2017).

percent. Per capita income was USD 9 075.[1041] Mauritius offers investment in agro-industry, education, financial services, healthcare, hospitality and property development, smart-cities, Information communications and technologies, life sciences, logistics, manufacturing, media and creative industry, ocean economy, renewable energy and seafood.[1042] Mauritius is a renowned tourism hotspot, and the government has taken steps to increase FDI in the hospitality and property sector by encouraging non-citizens to acquire property and live there too. The Property Development Scheme enables a non-citizen to acquire resident status if they buy property worth at least USD 500 000.[1043]

(a) Applicable regime

The Constitution of the Republic of Mauritius[1044] and the Investment Promotion Act[1045] regulate the expropriation of investments in Mauritius. Regulations made under the Act are also applicable.[1046]

(b) Dispute resolution forum

The Constitution provides that the Supreme Court of Mauritius, or a competent lower authority or court, is the forum for the determination of the interests of persons affected by expropriation.[1047] The Investment Promotion Act does not provide for the settlement

1041 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/480/index.html (Date of use: 10 April 2017).

1042 Invest Mauritius at www.investmauritius.com/investment-opportunities.aspx (Date of use: 10 April 2017).

1043 Invest Mauritius at www.investmauritius.com/investment-opportunities/property-development.aspx (Date of use: 10 April 2017).

1044 Constitution of 1968 as amended to 2015.

1045 Act 42 of 2000, as amended to 2009.

1046 Regulations in terms of sections 12 and of the Act, made under Government Notice No. 128 of 2015.

1047 Section 8(1) (c) (ii) and 17 Constitution of the Republic of Mauritius.

of disputes. However, parties can choose arbitration, which can take place in terms of the International Arbitration Act.[1048]

There are two main arbitration institutions in Mauritius. The first is the LCIA-MIAC Arbitration Centre.[1049] The LCIA-MIAC Arbitration Centre was established by the Government of Mauritius, the London Court of Arbitration and the Mauritius Centre during July 2011. The second is the Arbitration and Mediation Centre.[1050] The centre was created by the Mauritius Chamber of Commerce and Industry in 1996 (then as the MCCI Permanent Court of Arbitration).

Mauritius is a member of the ICSID Convention.[1051]

(c) Expropriation and compensation standard

The Constitution of Mauritius provides that property may be expropriated, provided that:

(i) The expropriation is necessary or expedient in the interests of defense, public safety, public order, public morality, public health, town, and country planning;[1052]

(ii) There is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property;[1053] and

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1048 Act 37 of 2008 as amended by Act 8 of 2013. Section 4 of the Act allows parties to consent to arbitration in writing.

1049 http://www.lcia-miac.org/ (Date of use: 01 April 2017).

1050 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?dlid=254169&year=2016#wrapper. The MARC website is https://www.mcci.org/en/our-services/arbitration-mediation/arbitration/introduction-to-marc-arbitration/ (Date of use: 01 April 2017).

1051 https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (Date of Use: 01 April 2017).

1052 Section 8(1) (a) Constitution of the Republic of Mauritius.

1053 Section 8(1) (b) Constitution of the Republic of Mauritius.

(iii) The law authorising the expropriation makes provision:

(i) for the payment of adequate compensation;[1054] and

(ii) Guarantees to a person with an interest or right over the affected property a right of access to the Supreme Court, to determine his interest or right, or the validity of the expropriation, and the quantum of compensation to which he is entitled, and for the purpose of obtaining payment of that compensation.[1055]

(d) Enforcement of awards and orders

Any order issued by a court, or an arbitral award issued by a tribunal, must be enforced via the courts. This raises the issue of the efficiency, partiality, and costs of using the local courts. The IIAG ranks Mauritius as follows under the Rule of Law: an overall Rule of Law score of 92.5 (all scores out of 100), 88.4 points for judicial independence, 100 for judicial process and 80.9 for property rights.[1056] Mauritius ranks 1st out of 54 African, and 1st in SADC in terms of the Rule of Law.[1057]

The WGI gives Mauritius a score of 77.4 under the Rule of Law indicator.[1058] The 2010 APRM Review found that Mauritius has independent democratic institutions, and that constitutional provisions are respected.[1059]

1054 Section 8(1) (c) (i) Constitution of the Republic of Mauritius.

1055 Section 8(1) (c) (ii) Constitution of the Republic of Mauritius. The access to the Supreme Court may be by way of appeal from a lower court or authority.

1056 IIAG "Mauritius Scores, Ranks & Trends" http://mo.ibrahim.foundation/iiag/downloads/ (Date of use: 14 December 2017).

1057 IIAG 2017 Report at 26 http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017).

1058 WGI http://info.worldbank.org/governance/wgi/index.aspx#reports (Date of use: 17 April

The U.S. Department of State states that the Mauritian judiciary is efficient, independent, non-iscriminatory and transparent.[1060]

Mauritius is a member of the New York Convention.[1061]

4.2.9 REPUBLIC OF MOZAMBIQUE

Based on 2015 data, Mozambique has a population of 27 million, and a landmass of 786 380 sq. km.[1062] Her GDP was USD 14 Billion, with an annual growth rate of 6.1 percent. Per capita income was USD 526.[1063] Mozambique's FDI has grown significantly since 2005 when it was USD 107 Million, up to a peak of USD 5.6 Billion in 2012.[1064] Mozambique's leading sectors for investment are in the energy sector, oil and gas, mining and tourism.[1065]

(a) Applicable regime

The Constitution of the Republic of Mozambique[1066] and the Law on Investment[1067] regulate the expropriation of investments in Mozambique.

2017).

1059 APRM "Mauritius Country Review Report No. 13", July 2010 at 144 http://www.aprmtoolkit.saiia.org.za/country-reports-and-experiences (Date of use: 10 February 2018).

1060 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?dlid=254169&year=2016#wrapper (Date of use: 01 April 2017).

1061 http://www.newyorkconvention.org/countries (Date of use: 01 April 2017).

1062 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/508/index.html (Date of use: 10 April 2017).

1063 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/508/index.html (Date of use: 10 April 2017).

1064 Table 3, Appendix hereto.

1065 http://www.theevent.co.za/2018/03/five-reasons-to-invest-in-mozambique/ (Date of use: 20 Aril 2018).

1066 Constitution of 16 November 2004.

1067 No. 3/93 of 24 June 1993.

(b) Dispute resolution forum

In general, investor-state disputes may, if not amicably resolved, be referred to competent local courts.[1068] A dispute between the Mozambican state and an investor that is not resolved amicably or via local courts shall if the parties so agree, be submitted to either ICSID or ICC arbitration.[1069] There is also an optional of referring the dispute to the Centre for Commercial Arbitration, Conciliation and Mediation, a state institution that caters for commercial arbitration to which the state can be a party.[1070]

Mozambique is a member of the ICSID Convention.[1071]

(c) Expropriation and compensation standard

The Constitution guarantees the right to ownership of property.[1072] Nonetheless, the state may expropriate property, provided that the expropriation is in the public interest.[1073] Fair compensation must be paid for the expropriation.[1074]

(d) Enforcement of awards and orders

Any order issued by a court, or an arbitral award issued by a tribunal, must be enforced via the courts. This raises the issue of the efficiency, partiality, and costs of using the local courts. The IIAG ranks Mozambique as follows under the Rule of Law: an overall

1068 Section 25(1) Law on Investment.
1069 Section 25(2) Law on Investment.
1070 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?dlid=254169&year=2016#wrapper (Date of use: 01 April 2017).
1071 https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (Date of Use: 01 April 2017).
1072 Section 82(1) Constitution of the Republic of Mozambique; Section 13(1) Law on Investment.
1073 Section 82(2) Constitution of the Republic of Mozambique.
1074 Section 82(1) Constitution of the Republic of Mozambique. However, section 13(2) of the Law on Investment provides for just and equitable compensation.

Rule of Law score of 54.6 (all scores out of 100), 38.1 points for judicial independence, 41.7 for judicial process and 46.1 for property rights.[1075] Mozambique ranks 31st out of 54 African states, and 12th in SADC in terms of the Rule of Law.[1076]

The WGI gives Mozambique a score of 19 under the Rule of Law indicator.[1077] The 2010 APRM review found that constitutionally protected rights are not getting the necessary enforcement, the institutions which are designed to protect these rights either do not function well, or their functions are severally curtailed,[1078] the functioning of the courts was inadequate, the public did not even know about the Constitutional Council, the Administrative Court was found to be inaccessible and was rarely used, with citizens not even knowing about the existence of the court, and there was widespread corruption in the judicial system.[1079] With regard to judicial independence, the executive is seen as having excessive powers vis-à-vis the judiciary.[1080]

1075 IIAG "Mozambique Scores, Ranks and Trends" http://mo.ibrahim.foundation/iiag/downloads/ (Date of use: 14 December 2017).

1076 IIAG 2017 Report at 26 http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017).

1077 WGI http://info.worldbank.org/governance/wgi/index.aspx#reports (Date of use: 17 April 2017).

1078 APRM "Mozambique Country Review Report No. 11", June 2009 at para 276 http://www.aprmtoolkit.saiia.org.za/country-reports-and-experiences (Date of use: 10 February 2018).

1079 APRM "Mozambique Country Review Report" at para 277 http://www.aprmtoolkit.saiia.org.za/country-reports-and-experiences (Date of use: 10 February 2018).

1080 APRM "Mozambique Country Review Report" at para 280 http://www.aprmtoolkit.saiia.org.za/country-reports-and-experiences (Date of use: 10 February 2018).

The U.S. Department of State states that the Mozambican judicial system is slow, inconsistent, and largely ineffective in resolving commercial disputes, and that Magistrates are overloaded with work.[1081]

Mozambique is a member of the New York Convention.[1082]

4.2.10 REPUBLIC OF NAMIBIA

Based on 2015 data, Namibia had a population of 2.4 million and a landmass of 823 290 sq. km.[1083] GDP was USD 12 Billion, with an annual growth rate of 4.3 percent.[1084] Per capita income was USD 5 122.[1085] Namibia's FDI has gradually grown from USD 385 Million in 2005 to a peak of USD 1.1 Billion in 2011, 2012 and 2015.[1086] Namibia's main economic sectors are agri-business, aquaculture, energy generation (biomass, solid waste, solar energy, electricity from landfills), infrastructure, manufacturing (bricks, soap, safety equipment, mining and exploration equipment, chlorine and caustic soda etc.), mining, services (emergency health services, marketing and communication, mobile vending and payment services etc.), and tourism (lodges, camp sites, caravan sites, waterfront rest camps, conference and accommodation facilities etc.).[1087]

1081 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?dlid=254169&year=2016#wrapper (Date of use: 01 April 2017).

1082 http://www.newyorkconvention.org/countries (Date of use: 01 April 2017).

1083 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/516/index.html (Date of use: 10 April 2017).

1084 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/516/index.html (Date of use: 10 April 2017).

1085 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/516/index.html (Date of use: 10 April 2017).

1086 Table 3, Appendix hereto.

1087 Ministry of Industrialization and Trade (MTI) at www. Mti.gov.na/investment-opprtunity.html) (Date of use: 10 April 2017).

(a) Applicable regime

The Constitution of the Republic of Namibia[1088] and the Namibia Investment Promotion Act[1089] regulate the expropriation of investments in Namibia.

(b) Dispute resolution forum

The local courts of Namibia have exclusive jurisdiction over disputes relating to the Namibia Investment Promotion Act.[1090] However, the state (represented by the Minister responsible for investment) and an investor may (by written agreement) agree to local arbitration in terms of the Arbitration No. 42 of 1965.[1091]

(c) Expropriation and compensation standard

The Constitution protects the right to own and dispose of property, but foreigners may be prohibited from owning immovable property.[1092] The Constitution provides that the state or its organs may expropriate private property provided that the expropriation is:

(i) For a public purpose;[1093]

(ii) Accompanied by prompt and just compensation;[1094] and

(iii) In accordance with the procedures and requirements of an Act of Parliament.

The Namibia Investment Promotion Act provides that investments may be expropriated in terms of the provisions of the Constitution described above, subject to the payment of

1088 1998 version.
1089 Act No. 9 of 2016.
1090 Section 28(4) Namibia Investment Promotion Act.
1091 Section 28(4) Namibia Investment Promotion Act.
1092 Article 16(1) Constitution of the Republic of Namibia.
1093 Article 16(2) Constitution of the Republic of Namibia.
1094 Article 16(2) Constitution of the Republic of Namibia; Section 22(1) Namibia Investment Promotion Act.

just compensation.[1095] The Namibia Investment Promotion Act sets out factors that must be considered in the determination of just compensation. These include the fair market value of the investment, profits made by the investor to date of expropriation, the capital cost of the investment, the current and past use of the investment etc.[1096] The Agricultural Land Reform Act also allows the state to expropriate agricultural land for purposes of land reform, subject to payment of compensation.[1097]

(d) Enforcement of awards and orders

Any order issued by a court, or an arbitral award issued by a tribunal, must be enforced via the courts. This raises the issue of the efficiency, partiality, and costs of using the local courts. The IIAG ranks Namibia under Rule of Law as follows: an overall Rule of Law score of 87.1 (all scores out of 100), 94 points for judicial independence, 100 for judicial process and 60 for property rights.[1098] Namibia ranks 3rd out of 54 African states and 3rd in SADC in terms of the Rule of Law.[1099]

The WGI gives Namibia a score of 61.54 under the Rule of Law indicator.[1100]

The U.S. Department of State states that Namibia has an independent, effective judiciary.[1101] However, the Department says that the court processes are slow.

1095 Section 21(1) Namibia Investment Promotion Act.

1096 Section 22(2) Namibia Investment Promotion Act.

1097 No. 6 of 1995. Sections 19-35 deal with expropriation.

1098 IIAG "Namibia Scores, Ranks and Trends" http://mo.ibrahim.foundation/iiag/downloads/ (Date of use: 14 December 2017).

1099 IIAG 2017 Report at 26 http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017).

1100 WGI http://info.worldbank.org/governance/wgi/index.aspx#reports (Date of use: 17 April 2017).

1101 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?

Namibia is not a member of the New York Convention.

4.2.11 REPUBLIC OF SEYCHELLES

Seychelles is the smallest SADC state. During 2015 Seychelles had a population of 96 000 and a landmass of 455 sq. km.[1102] GDP was USD 1.5 Billion, with an annual growth rate of 3.5 percent. Due to her small population, Seychelles had the highest per capita income in SADC of USD 16 145.[1103] Seychelles received FDI of between USD 85 million and USD 261 million per year between 2005 and 2015.[1104] The main economic sectors in Seychelles are agriculture (crops and livestock such as poultry, pigs, cattle, goats and rabbits), energy generation (wind farms, oil, solar energy), international financial services, (international companies, trusts, foundations, limited partnerships, mutual hedge funds, insurance etc.), tourism services (accommodation establishments, car hire, restaurants, tour operations, yachting), and fisheries (tuna fishing, long-line fishing, marine and aquaculture, fish processing and storage, retail and distribution of marine fishing equipment).[1105]

(a) Applicable regime

The Constitution of the Republic of Seychelles of 1993[1106] and the Seychelles Investment Act[1107] regulate the expropriation of investments in Seychelles.

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dlid=254169&year=2016#wrapper

1102 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/690/index.html (Date of use: 10 April 2017).

1103 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/690/index.html (Date of use: 10 April 2017).

1104 Table 3, Appendix hereto.

1105 Seychelles Investment Board at www.sib.sc/index-php/sectors) (Date of use: 10 April 2017).

1106 As amended by Act 14 of 1996.

1107 Act 31 of 2010.

(b) Dispute resolution forum

The Constitution of the Republic of Seychelles provides that in the event of expropriation, a person with an interest in expropriated property shall be given access to the Supreme Court.[1108] In addition, the Seychelles Investment Act provides that an investor may have recourse to other remedies provided by law, or to dispute settlement measures contained in an agreement between the government of Seychelles and the investor.[1109]

Seychelles is a member of the ICSID Convention.[1110]

(c) Expropriation and compensation standards

The right to own, use and dispose of property in Seychelles is protected by the Constitution.[1111] However, this right is subject to certain limitations.[1112] Private property may be expropriated by law, provided that:

(i) The law allows for reasonable notice to be given to any person who has an interest in the property, informing it of the intention to expropriate;[1113]

(ii) The expropriation is for a public purpose;[1114]

(iii) The expropriation is non-discriminatory;[1115]

1108 Article 26(3) (e) Constitution of the Republic of Seychelles.

1109 Section 5(3) Seychelles Investment Act.

1110 https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (Date of use: 01 April 2017).

1111 Article 26(1) Constitution of the Republic of Seychelles of 1993 as amended by Act 14 of 1996.

1112 Article 26(2) Constitution of the Republic of Seychelles.

1113 Article 26(3) (a) Constitution of the Republic of Seychelles.

1114 Article 26(2)(b) Constitution of the Republic of Seychelles; Section 5(1) Seychelles Investment Act.

1115 Section 5(1) Seychelles Investment Act.

(iv) There is a reasonable justification for causing hardship to any person who has an interest in the property;[1116]

(v) Prompt and full compensation is paid for the expropriation;[1117] and

(vi) Provision is made for access to the Supreme Court of Seychelles for the determination of the rights or interest of an interested person, to determine the legality of the expropriation, to determine the amount of compensation to be paid, or to enforce the payment of the compensation.[1118]

(d) Enforcement of awards and orders

The Constitution of the Republic of Seychelles provides that the Supreme Court may be the forum for the enforcement of payment of compensation.[1119] The IIAG ranks Seychelles under the Rule of Law as follows: an overall Rule of Law score of 76.3 (all scores out of 100), 67.2 points for judicial independence, 37 for judicial process and 66.7 for property rights.[1120] Seychelles ranks 7th out of 54 African states and 4th in SADC in terms of the Rule of Law.[1121]

The WGI gives Seychelles a score of 62 under the Rule of Law indicator.[1122]

1116 Article 26(3) (c) Constitution of the Republic of Seychelles.

1117 Article 26(3)(d) Constitution of the Republic of Seychelles; Section 5(1) Seychelles Investment Act. Section 5(2) Seychelles Investment Act provides that the value of the property shall be the market value immediately before the expropriation. The compensation shall bear interest from date of dispossession to date of payment.

1118 Article 26(3) (e) Constitution of the Republic of Seychelles.

1119 Article 26(3)(e) Constitution of the Republic of Seychelles.

1120 IIAG "Seychelles Scores, Ranks and Trends" http://mo.ibrahim.foundation/iiag/downloads/ (Date of use: 14 December 2017).

1121 IIAG 2017 Report at 26 http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017).

1122 WGI http://info.worldbank.org/governance/wgi/index.aspx#reports (Date of use: 17 April 2017).

The United States Department of State states that court processes in Seychelles are slow, and they can take up to five years before a judgment is granted.[1123] Resources are also insufficient and the system has multiple appeals, both of which contribute to a slow pace. The government encourages the referral of investor-state disputes to an Investment Appeal Panel.

Seychelles is not a member of the New York Convention.

4.2.12 REPUBLIC OF SOUTH AFRICA

South Africa is the third largest state in SADC in terms of landmass, behind the DRC and Angola.[1124] During 2015 South Africa had a population of 54, 490 million, and a landmass of 1 213 090 sq. km.[1125] During 2015 South Africa had the highest GDP in SADC (USD 314 Billion).[1126] The GDP had an annual growth rate of 0.6 percent. South Africa had a per capita income of USD 5773.[1127] South Africa received FDI of between USD 6.6 Billion and USD 1.7 Billion per year between 2005 and 2015.[1128] South Africa is an ideal investment destination for a variety of reasons ranging from location, stage of development, political stability, the presence of natural and mineral resources etc.[1129]

1123 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?dlid=254169&year=2016#wrapper

1124 See Table 2, Appendix hereto.

1125 See Table 2, Appendix hereto.

1126 See http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/710/GeneralProfile710.pdf (Date of use: 21 November 2017).

1127 See http://unctadstat.unctad.org/CountryProfile/Ge”neralProfile/en-GB/710/GeneralProfile710.pdf (Date of use: 21 November 2017). See also http://www.statssa.gov.za/publications/P0441/Press_statement_1_4q_2015.pdf (Date of use: 22 November 2017).

1128 Table 3, Appendix hereto.

1129 See Department of Trade and Industry (South Africa) “South Africa: Investors Handbook 2014/2015” at 1-8, 39-52

The main economic sectors in South Africa during the 2015 reporting year were finance, real estate and business services, Government services, wholesale, retail and motor trade, Manufacturing, mining, transport, storage and communication, personal services, construction, electricity and water, and agriculture.[1130]

South Africa's top ten investment projects are bio fuels, business outsourcing, the Centurion Aerospace Village, the COEGA Industrial Development Zone, manufacturing, the Dube Tradeport, the East London Industrial Development Zone, Green Economy Industries, the Richards Bay Industrial Development Zone, and the Saldanha Bay Industrial Development Zone.[1131]

(a) Applicable regime

The Constitution of the Republic of South Africa lays the basis on which property may be expropriated.[1132] An Expropriation Bill is in existence and is presently before Parliament.[1133] The Protection of Investment Act regulates the protection of foreign investments but does not contain provisions for expropriation.[1134] The Act defers the right to property to Section 25 of the Constitution.[1135]

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https://www2.deloitte.com/content/dam/Deloitte/za/Documents/tax/ZA_DTI-InvestinginSA_2014-15.pdf (Date of use: 19 November 2017); Webber Wentzel "Investing in South Africa Charting the Legal Landscape with Webber Wentzel 2015/16" http://www.investinginsouthafrica.co.za/downloads/en/Webber_Wentzel_Investing_in_South_Africa_complete.pdf (Date of use: 19 November 2017).

1130 Department of Trade and Industry (South Africa) "South Africa: Investors Handbook 2014/2015" at 39 https://www2.deloitte.com/content/dam/Deloitte/za/Documents/tax/ZA_DTI-InvestinginSA_2014-15.pdf (Date of use: 19 November 2017).

1131 Department of Trade and Industry (South Africa) (2013) "South Africa's Top Ten Investment Projects" http://www.thedti.gov.za/DownloadFileAction?id=833 (Date of use: 19 November 2017).

1132 Constitution of the Republic of South Africa, 1996, as amended to 2013.

1133 Bill B 4-2015, published in Government Gazette 38418 of 26 January 2015.

1134 Act 22 of 2015.

(b) Dispute resolution forum

Should a dispute arise between an investor and the government of South Africa, an investor may refer the dispute to mediation[1136] or a local court.[1137] ISDS is also possible, subject to the exhaustion of local remedies, and the consent of the government of South Africa.[1138]

South Africa is not a member of the ICSID Convention.

(c) Expropriation and compensation Standard

Section 25 of the Constitution regulates expropriation. It provides that a law of general application may only expropriate property for a public purpose or interest, and subject to the payment of just and equitable compensation.[1139] Just and equitable compensation must be quantified with due regard to the:[1140]

(i) Current use of the property;

(ii) History of the acquisition and use of the property;

(iii) Market value of the property;

(iv) Extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(v) Purpose of the expropriation.

1135 Section 10 Protection of Investment Act.
1136 Section 13(1) Protection of Investment Act.
1137 Section 13(4) Protection of Investment Act.
1138 Section 13(5) Protection of Investment Act.
1139 Section 25(2)-(3) Constitution of the Republic of South Africa.
1140 Section 25(3) Constitution of the Republic of South Africa.

The Constitution emphasises the importance of land reform, and in particular, the Constitution shall not impede the state from taking measures to achieve land, water, and related reform in order to redress the effects of apartheid.[1141] It must be noted that there are moves to amend Section 25 of the Constitution, so as to provide for expropriation without compensation.[1142]

(d) Enforcement of awards and orders

An order issued by a court or an arbitral award must be enforced via the courts. This raises the issue of the efficiency, partiality, and costs of using the local courts. The IIAG ranks South Africa under Rule of Law as follows: an overall Rule of Law score of 94.7 (all scores out of 100), 96.5 points for judicial independence, 100 for judicial process and 85.4 for property rights.[1143] South Africa ranks 7th out of 54 African states, and 5th in SADC in terms of the Rule of Law.[1144]

The WGI gives South Africa a score of 58.17 under the Rule of Law indicator.[1145] South Africa's 2014 APRM report notes that progress is being made with regard to the transformation and independence of the judiciary.[1146]

1141 Section 25(8) Constitution of the Republic of South Africa.

1142 Parliament of the Republic of South Africa "Press Release" 27 February 2018 https://www.parliament.gov.za/press-releases/national-assembly-gives-constitution-review-committee-mandate-review-section-25-constitution (Date of use: 4 March 2018)

1143 IIAG "South Africa Scores, Ranks & Trends" http://mo.ibrahim.foundation/iiag/downloads/ (Date of use: 14 December 2017).

1144 IIAG 2017 Report at 26 http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017).

1145 WGI http://info.worldbank.org/governance/wgi/#reports (Date of use: 17 April 2017).

1146 At 121 http://aprmtoolkit.saiia.org.za/component/docman/doc_view/491-south-africa-third-report-on-aprm-npoa-implementation-2014 (Date of use: 14 November 2017).

The U.S. Department of State states that dispute resolution in South Africa can be time-consuming.[1147] However, there are no concerns raised regarding the independence of the judiciary or the efficiency of the courts. South Africa conducted an APRM assessment in 2007, but the report is now over a decade old, and may not reflect the true position regarding the contents thereof.[1148]

South Africa is a member of the New York Convention.[1149]

4.2.13 UNITED REPUBLIC OF TANZANIA

During 2015 Tanzania had the third highest SADC population of 53 million, and a landmass of 885 800 sq. km.[1150] GDP was USD 46 Billion, with an annual growth rate of 6.9 percent. Per capita income was USD 865.[1151] Tanzania's FDI is stable at between USD 1 Billion and 2 Billion.[1152]

The main economic sectors in Tanzania are agriculture (farm implements, agro-processing, agricultural machinery, irrigation equipment, fishing equipment, agricultural commodity trading), information and communications technologies (broadcasting,

1147 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/#wrapper (Date of use: 14 November 2017).

1148 APRM "South Africa Country Review Report No. 2" September 2007 http://www.aprmtoolkit.saiia.org.za/country-reports-and-experiences (Date of use: 10 February 2018). See also APRM "Third Report on the implementation of South Africa's APRM Programme of Action", January 2014 http://aprmtoolkit.saiia.org.za/component/docman/doc_view/491-south-africa-third-report-on-aprm-npoa-implementation-2014 (Date of use: 20 April 2018).

1149 http://www.newyorkconvention.org/countries (Date of use: 14 November 2017).

1150 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/834/index.html (Date of use: 10 April 2017).

1151 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/834/index.html (Date of use: 10 April 2017).

1152 Table 3, Appendix hereto.

computer supplies etc.), environment and energy generation (petroleum, solar, wind, natural gas, geothermal power generation) health (hospitals, pharmaceuticals, health equipment etc.), construction (roads and other infrastructure, equipment hire), consumer goods (agricultural processing and light consumer goods), financial services, mining (gold, copper, cobalt, coal, tin, phosphates etc.), textiles (cotton and textiles), tourism (agency services, camping equipment, vehicles, hotel equipment, diving equipment, tourist boats, mountain climbing equipment as well as tour promotion services e.g., web designing) and transportation (land, marine and air transport).[1153]

(a) Applicable regime

The Tanzania Investment Act[1154] and the Constitution of the United Republic of Tanzania[1155] regulate the expropriation of foreign investments in Tanzania.

(b) Dispute resolution forum

The Tanzania Investment Act provides that disputes between an investor and the government of Tanzania shall first be resolved amicably.[1156] If the dispute is not amicably resolved, then it shall by agreement of the parties be resolved by arbitration.[1157] The arbitration may be any of the following, and both parties have to agree to the choice of forum.[1158]

1153 http://www.foreign.go.tz/index.php/en/diaspora/category/news-and-events (Date of use: 10 April 2017).

1154 Act 26 of 1997.

1155 Constitution of 1977 as amended up to 30 June 1995, referred to as the 1997 Constitution.

1156 Section 23(1) Tanzania Investment Act.

1157 Section 23(2) Tanzania Investment Act.

1158 Section 23(2) Tanzania Investment Act.

(i) National arbitration in terms of the arbitration laws of Tanzania;[1159]

(ii) ICSID arbitration;[1160] or

(iii) Arbitration in terms of an investment treaty between Tanzania and the home state of the investor.[1161]

It must be noted that Tanzania has passed a law that prohibits the state from being a party to ISDS and foreign proceedings.[1162]

Tanzania is a member of the ICSID Convention.[1163]

(c) Expropriation and compensation Standard

The state may expropriate private property, provided that the expropriation is in terms of due process that provides for:

(i) Prompt, fair and adequate compensation;[1164] and

(ii) A right to access to a court or arbitration forum, for the purpose of determining the rights of the investor as well as the amount of compensation.[1165]

1159 Section 23(2) (a) Tanzania Investment Act.

1160 Section 23(2) (b) Tanzania Investment Act.

1161 Section 23(2) (c) Tanzania Investment Act.

1162 Section 11 The Natural Wealth and Resources (Permanent Sovereignty) Act.

1163 https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (Date of use: 01 April 2017).

1164 Article 24(2) Constitution of the United Republic of Tanzania; Section 22(2)(a) Tanzania Investment Act.

1165 Section 22(2) (b) Tanzania Investment Act.

(d) Enforcement of awards and orders

An order issued by a court or an arbitral award must be enforced via the courts. The IIAG ranks Tanzania under Rule of Law as follows: an overall Rule of Law score of 56.3 (all scores out of 100), 62.6 points for judicial independence, 54.2 for judicial process and 55.2 for property rights.[1166] Tanzania ranks 14th out of 54 African states and 8th in SADC in terms of the Rule of Law.[1167]

The WGI gives Tanzania a score of 39.4 under the Rule of Law indicator.[1168] The Tanzania 2013 APRM Report noted that the judiciary had resource and capacity constraints, which limited access to justice,[1169] and that there was tension between the judiciary and the legislature, due to the judiciary's authority to declare legislation invalid.[1170]

The U.S. Department of State states that the court system suffers from backlogs going up to four years.[1171]

Tanzania is a member of the New York Convention.[1172]

1166 IIAG "Tanzania Scores, Ranks & Trends" http://mo.ibrahim.foundation/iiag/downloads/ (Date of use: 14 December 2017).

1167 IIAG Report 2017 at 26 http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017).

1168 http://info.worldbank.org/governance/wgi/index.aspx#reports (Date of use: 17 April 2017).

1169 APRM "Tanzania Country Review Report No. 17", January 2013 at 143 http://www.aprmtoolkit.saiia.org.za/country-reports-and-experiences (Date of use: 10 February 2018).

1170 APRM "Tanzania Country Review Report" http://www.aprmtoolkit.saiia.org.za/country-reports-and-experiences (Date of use: 10 February 2018).

1171 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?dlid=254169&year=2016#wrapper

1172 http://www.newyorkconvention.org/countries (Date of use: 01 April 2017).

4.2.14 REPUBLIC OF ZAMBIA

As at 2015, Zambia had a population of 16 million and a landmass of 743 390 sq. km.[1173] GDP was USD 21 Billion, with an annual growth rate of 3.6 percent.[1174] Per capita income was USD 1 352. Zambia's FDI was between USD 1 Billion and 3 Billion from 2011 to 2015.[1175] Zambia's main economic sectors are mining (copper, cobalt, gold emeralds, topaz, opal, aquamarine etc.), agriculture (maize, soya beans, cowpeas, mixed beans, cassava etc.), manufacturing (textiles, wood products, building materials, processed foods, chemicals, leather products, tobacco etc.), infrastructure (railway, road, aviation), energy generation (coal, hydro, bio fuels), Information Communications and technology, health (private health care facilities and equipment) and education (private tertiary education institutions).[1176]

(a) Applicable regime

The Constitution of the Republic of Zambia[1177] and the Zambia Development Agency Act[1178] regulate the expropriation of foreign investments in Zambia.

(b) Dispute resolution forum

Disputes arising from an investment made under or regulated by the Zambia Development Agency Act are resolved by arbitration under the Arbitration Act.[1179] In

1173 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/894/index.html (Date of use: 10 April 2017).

1174 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/894/index.html (Date of use: 10 April 2017).

1175 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/894/index.html (Date of use: 10 April 2017).

1176 Zambia Development Agency "Zambia Investors Guide Handbook" (undated) at 6-8 http://www.zda.org.zm/?q=content/investment-guide-zambia (Date of use: 10 August 2018).

1177 Constitution of 1991 as amended by Act 18 of 1996.

1178 Act 11 of 2006.

terms of section 23 of the Arbitration Act, an organisation responsible for the regulation of the practice of a profession may apply to the Minister for recognition as an arbitration institution. An arbitration award is final and binding upon the parties.[1180] However, a court may set aside the award upon the application of one of the parties.[1181] Foreign lawyers are not allowed to represent parties at arbitration.[1182] An arbitral award made in terms of the Arbitration Act is final and binding.[1183] Arbitration proceedings are deemed to be private and confidential, and no details thereof may be published except as provided therein.[1184]

Zambia is a member of the ICSID Convention.[1185]

(c) Expropriation and compensation standard

The Constitution of the Republic of Zambia allows for property to be expropriated.[1186] In line with the Constitution, the Zambia Development Act provides that property may be expropriated, provided that the expropriation:

(i) Shall be for public purposes;[1187]

(ii) Is in terms of an Act of Parliament;[1188]

1179 Section 21 Zambia Development Agency Act. The Act in question is the Arbitration Act 19 of 2000.

1180 Section 20 Arbitration Act.

1181 Section 17 Arbitration Act.

1182 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?dlid=254169&year=2016#wrapper

1183 Section 20 Arbitration Act.

1184 Section 27 Arbitration Act.

1185 https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (Date of use: 01 April 2017).

1186 Article 16(1) Constitution of the Republic of Zambia.

1187 Section 19(1) Zambia Development Agency Act; Article 16(1) Constitution of the Republic of Zambia.

(iii) The said Act of Parliament provides for prompt payment of compensation at market value;[1189] and

(iv) The payment shall be freely remittable in foreign currency.[1190]

(d) Enforcement of awards and orders

Arbitration awards are enforced in the High Court, and appeals thereon are made to the Supreme Court.[1191] The IIAG ranks Zambia under Rule of Law as follows: an overall Rule of Law score of 74.9 (all scores out of 100), 63.1 points for judicial independence, 83.3 for the judicial process and 60.5 for property rights.[1192] Zambia ranks 9th out of 54 African states and 7th in SADC in terms of Rule of Law.[1193]

The WGI gives Zambia a score of 47.2 under the Rule of Law indicator,[1194] while the WJP gives her a score of 48 under the Rule of Law indicator.[1195] Zambia's 2013 APRM review notes that the president appoints members of the judiciary and determines their

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1188 Section 19(2) Zambia Development Agency Act; Article 16(1) Constitution of the Republic of Zambia.

1189 Section 19(2) Zambia Development Agency Act; Article 16(1) Constitution of the Republic of Zambia.

1190 Section 19(2) Zambia Development Agency Act; Article 16(1) Constitution of the Republic of Zambia.

1191 Section 18-19 Arbitration Act.

1192 IIAG "Zambia Scores, Ranks and Trends" http://mo.ibrahim.foundation/iiag/downloads/ (Date of use: 14 December 2017).

1193 IIAG Report 2017 at 26 http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017).

1194 WGI http://info.worldbank.org/governance/wgi/index.aspx#reports (Date of use: 17 April 2017).

1195 WJP 2016 Rule of Law Index at 21 https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016 (Date of use: 14 December 2017).

terms of service.[1196] The report recommended that Zambia entrench the functional, financial and structural aspects of the legislature and the judiciary.[1197]

The U.S. Department of State states that access to justice in Zambia is limited by physical accessibility, financial accessibility and unreasonable delay in the dispensation of justice.[1198]

Zambia is a member of the New York Convention.[1199]

4.2.15 REPUBLIC OF ZIMBABWE

According to 2015 figures, Zimbabwe had a population of 15 million and a landmass of 386 850 sq. km.[1200] It had a GDP of USD 14 Billion, with a growth rate of 3.2 percent.[1201] Per capita income was USD 965.[1202] Zimbabwe's economic opportunities lie in agriculture (tobacco, sugar, cotton, and horticulture), mining (diamonds, gold, and platinum) and manufacturing (food and beverages, clothing and textiles, wood and timber, fertilizers and chemicals and pharmaceuticals).[1203] FDI inflows from other

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1196 APRM "Zambia Country Review Report No. 16", January 2013 at para 48.2 http://www.aprmtoolkit.saiia.org.za/country-reports-and-experiences (Date of use: 10 February 2018).

1197 APRM "Zambia Country Review Report" at para 52 http://www.aprmtoolkit.saiia.org.za/country-reports-and-experiences (Date of use: 10 February 2018).

1198 https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?dlid=254169&year=2016#wrapper (Date of use: 01 April 2017).

1199 http://www.newyorkconvention.org/countries (Date of use: 01 April 2017).

1200 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/716/index.html (Date of use: 10 April 2017).

1201 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/716/index.html (Date of use: 10 April 2017).

1202 http://unctadstat.unctad.org/CountryProfile/GeneralProfile/en-GB/716/index.html (Date of use: 10 April 2017).

1203 Zimbabwe Investment Authority *A Practical Guide to Doing Business In Zimbabwe*

sources have been between USD 40 Million and USD 500 million per annum. These have stabilised at approximately USD 400 Million per year since 2011.[1204]

(a) Applicable regime

The Constitution of the Republic of Zimbabwe regulates the expropriation of investments in Zimbabwe.[1205]

(b) Dispute resolution forum

With regard to the expropriation of agricultural land, the only aspect that may be challenged before a court is compensation for improvements made prior to the expropriation.[1206] An expropriation of agricultural land may also not be challenged on the grounds that it is discriminatory.[1207]

In all other cases, a person who has a right or interest in a property that has been expropriated may, subject to section 72 of the Constitution, approach a competent court for the return of the property, the legality of the expropriation, or the amount of compensation.[1208]

Zimbabwe is a member of the ICSID Convention.[1209]

(undated) at 11 http://www.comesaria.org/site/en/opportunities.php?country=30&sector=&keyword=Search&id_article=133&tender=&button=Search (Date of use: 08 May 2017).

1204 Table 3, Appendix hereto.

1205 Constitution of 2013 (31 January version).

1206 Section 4(26), 72(3) (b) Constitution of the Republic of Zimbabwe.

1207 Section 72(3)(c) Constitution of the Republic of Zimbabwe.

1208 Section 71(3) (d)-(e) Constitution of the Republic of Zimbabwe.

1209 https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (Date of use: 01 April 2017).

(c) Expropriation and compensation standard

The Constitution of the Republic of Zimbabwe provides that every person has the right to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others.[1210] It allows for expropriation where the following conditions are satisfied the expropriation is:

(i) In terms of a law of general application;[1211]

(ii) Necessary for the interests of defense, public safety, public order, public morality, public health or town and country planning;[1212] and

(iii) For a public purpose.[1213]

With regard to agricultural land, no compensation is payable except for improvements to the land.[1214] Furthermore, a court is prohibited from adjudicating on a dispute relating to compensation for expropriated land.[1215]

(d) Enforcement of awards and orders

Disputes relating to expropriation are brought local courts for adjudication. The IIAG ranks Zimbabwe under Rule of Law as follows: an overall Rule of Law score of 42.5 (all scores out of 100), 45.6 points for judicial independence, 37.5 for the judicial process and 23.5 for property rights.[1216] Zimbabwe ranks 38th out of 54 African states and 13th in SADC in terms of the Rule of Law.[1217]

1210 Section 71(2) Constitution of the Republic of Zimbabwe.
1211 Section 71(3) (a) Constitution of the Republic of Zimbabwe.
1212 Section 71(3) (b) Constitution of the Republic of Zimbabwe.
1213 Section 71(3) (b) Constitution of the Republic of Zimbabwe.
1214 Section 72(3) (a) Constitution of the Republic of Zimbabwe.
1215 Section 72(3) (b) Constitution of the Republic of Zimbabwe.
1216 IIAG "Zimbabwe Scores, Ranks and Trends"

The WJP gives Zimbabwe a score of 37 under the Rule of Law indicator.[1218]

The U.S. Department of State states that the judiciary lacks resources, cases are backlogged, there is lack of partiality in cases with political overtones, and politicians interfere in foreign cases that are not favorable to Zimbabwe.[1219]

Zimbabwe is a member of the New York Convention.[1220]

4.3 SUMMARY OF LEGISLATIVE REMEDIES IN THE EVENT OF EXPROPRIATION

Below is a summary of the remedies available to an investor or investment in the event of expropriation, based on the preceding discussion.

SADC STATE	APPLICABLE LAW	DISPUTE RESOLUTION FORUM	COMPENSATION STANDARD	ENFORCEMENT MECHANISM
Angola	Private Investment Law	Local courts	Fair, prompt and effective compensation	Local courts
Botswana	Constitution;	Local courts	Prompt and	Local courts;

1217 http://mo.ibrahim.foundation/iiag/downloads/ (Date of use: 14 December 2017). IIAG 2017 Report at 26 http://s.mo.ibrahim.foundation/u/2017/11/21165610/2017-IIAG-Report.pdf?_ga=2.213790740.1276503674.1513271096-1221032858.1491926350 (Date of use: 14 December 2017).

1218 WJP 2016 Rule of Law Index at 21 https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016 (Date of use: 14 December 2017).

1219 https://www.state.gov/e/eb/rls/othr/ics/2016/af/254261.htm (Date of use: 17 April 2017).

1220 http://www.newyorkconvention.org/countries (Date of use: 01 April 2017).

	Acquisition of Property Act		adequate compensation	New York Convention
DRC	Investment Code; Constitution	Local arbitration, failing, international arbitration (ICSID or ICC)	Fair and equitable. Based on market value	Local courts; New York Convention
Lesotho	Constitution	Local courts	Full and prompt at market value	Local courts; New York Convention
Madagascar	Investment Law	Local courts	Fair compensation	Local courts
Malawi	Investment and Export Promotion Act; Constitution	Local courts	Appropriate compensation	Local courts
Mauritius	Investment Promotion Act; Constitution	Local courts	Adequate compensation	Local courts; New York Convention

Mozambique	Law on Investment; Investment Law Regulations; Constitution	Local courts, or if parties agree, ICSID or ICC arbitration.	Fair compensation	Local courts; New York Convention
Namibia	Investment Promotion Act; Constitution	Local courts or local arbitration (if state agrees)	Just compensation	Local courts; New York Convention
Seychelles	Investment Act; Constitution	Local courts, or by law or as per investment agreement.	Prompt and full compensation	Local courts New York Convention
South Africa	Constitution; Protection of Investment Act	Mediation, local courts or state-state arbitration if state agrees	Just and equitable	Local Courts New York Convention
Eswatini	Investment Promotion Act;	Investor chooses local courts or local	Adequate and fair compensation	Local courts; New York Convention

	Constitution	arbitration or UNCITRAL or ICSID.		
Tanzania	Investment Act; Constitution	Both parties must agree on the choice of Local arbitration, or ICSID, or arbitration i.t.o treaty.	Prompt fair and adequate compensation	Local courts; New York Convention
Zambia	Zambia Development Agency Act; Constitution	Local arbitration.	Market value	Local courts; New York Convention
Zimbabwe	Investment Authority Act; Constitution	Local courts.	Fair and adequate compensation	Local courts

Table 1: Summary of provisions relating to expropriation in SADC.

Source: Author's compilation based on the preceding discussion

4.4 ANALYSIS

It is clear from the abovementioned analysis that the investment laws of Member States are in conflict with each other, as well as with the 2006 Annex 1 or the 2016 Annex 1. The next section will look at the implications of these conflicts for the security of foreign investments in SADC.

4.4.1 Dispute resolution forum

Angola, Botswana, Lesotho, Madagascar, Malawi, Mauritius, Namibia, Seychelles, South Africa, Zambia, and Zimbabwe provide for local courts as the forum for settlement of investor-state disputes. Mozambique and Tanzania can be added to this list because they provide conditional access to ISDS, failing which a dispute must be referred to local courts. Furthermore, Tanzania has passed legislation to prohibit the state from being subjected to ISDS. The laws of these Member States are coincidentally aligned to the 2016 Annex 1, which provides that investor-state disputes shall be referred to the local courts of host states.

The mandatory referral of investor-state disputes to local courts puts the rule of law in those Member States in the spotlight, since that is the only forum to which the disputes can be referred (in the absence of applicable BITs, TIPs, or investment contracts). It was shown above that there are concerns about the state of the rule of law regarding the courts of Angola, Botswana, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Seychelles, Tanzania, Zambia, and Zimbabwe.

The DRC, Mozambique, Eswatini, and Tanzania provide for ISDS, contrary to the provisions of the 2016 Annex 1. Mozambique and Tanzania require mutual consent for arbitration. Eswatini gives an investor a choice of forum and the investor's choice is

binding on the state. The DRC also provides for arbitration as of right. Therefore, state practice is divergent even among states that provide for ISDS. In this regard, only the DRC and Eswatini are in compliance with the 2006 Annex 1 on the issue of ISDS. But in so doing they contravene the 2016 Annex 1. Mozambique is non-compliant with the 2006 and 2016 Annex 1 by providing optional access to ISDS. The rest of the Member States are in line with the 2016 Annex 1 by not providing access to ISDS.

The DRC, Madagascar Malawi, Mauritius, Seychelles, Eswatini, Zambia and Zimbabwe as members of COMESA face conflicting obligations arising from the 2006 Annex 1 and 2016 Annex 1 on the one hand, and the COMESA Treaty on the other. For example, the COMESA Treaty provides for the referral of disputes to the CCJ, [1221] while the 2006 Annex 1 gives an investor a right to ISDS, and the 2016 Annex 1 refers disputes to local courts. This raises the question: which forum must an investor whose investment was expropriated by one of these Member States use: the CCJ, ISDS or local courts? The 2006 Annex 1, the 2016 Annex 1 and the COMESA Treaty provide conflicting remedies in the event of expropriation. The overall effect of these conflicts is to create instability, unpredictability, and to raise the legal costs for all parties since the conflicts may lead to prolonged legal action. This also shows the result of multiple REC memberships that causes conflicting treaty obligations.

In the event of a conflict between either version of Annex 1 and the law of a host state, the provisions of Annex 1 shall prevail, since Annex 1 is an annex to a TIP, being the FIP. This is because a treaty is an international obligation that must be honoured, irrespective of the provisions of domestic law.

[1221] Article 26 COMESA Treaty.

Even if a Member State provides access to ISDS, contrary to the 2016 Annex 1, it can still refuse to be drawn into an ISDS case, on the basis that doing so will violate a treaty obligation provided in the 2016 Annex 1 not to provide Member State laws to be in line with the 2016 Annex 1.

4.4.2 Expropriation and compensation standard

It was shown above that SADC Member States provide for different levels of compensation in the event of expropriation.[1222] Botswana, Lesotho, Seychelles provide for full compensation. The DRC, Madagascar, Mozambique, Eswatini, Tanzania, and Zimbabwe provide for fair compensation. Malawi provides for appropriate compensation. Zambia provides for compensation at market value, which is close to if not similar to fair compensation. Namibia provides for just compensation, and Mauritius provides for adequate compensation.

It is important to note that the compensation standards of some SADC Member States are not in line with the 2006 Annex 1, which provides for prompt, adequate and effective (full) compensation. Botswana, Lesotho, Seychelles expressly provide for full compensation, while it may be said that Mauritius, Eswatini, Tanzania, Zambia, and Zimbabwe also provide full compensation since they provide for "adequate compensation". The 2016 Annex 1 requires the Member States to pay fair and adequate compensation.[1223] Therefore these Member States are in compliance with the 2006 Annex 1, but they are not compliant with the 2016 Annex 1.

[1222] See Table 1 above.

[1223] Article 5 2016 Annex 1.

In the event of a conflict between any version of Annex 1 and the laws of a host state with regard to the quantum of compensation for expropriation, it is submitted that the quantum provided in Annex 1 shall prevail, since the standard of compensation provided by Annex 1 is a treaty obligation that Member States must follow, irrespective of the provisions of their investment laws.

SADC Member States that are members of COMESA, namely the DRC, Madagascar Malawi, Mauritius, Seychelles, Eswatini, Zambia and Zimbabwe have an additional issue to deal with. The COMESA Treaty obliges them to pay adequate compensation in the event of expropriation.[1224] This compensation standard complies with the 2006 Annex 1 to the extent that it provides for full compensation. It will, however, not comply with the 2016 Annex 1, which does not require the payment of full compensation. However, the COMESA Treaty and the 2016 Annex 1 do not provide the same standard of compensation. Therefore, these Member States face conflicting compensation standards.

4.4.3 Enforcement

In terms of Article 54 of the ICSID Convention and Article III of the New York Convention, the courts of a host state must enforce ICSID and non-ICSID awards respectively. Articles 5 of the New York Convention and Article 36 of the UNCITRAL Model Law respectively allow a court to refuse recognition of an award among others if the court finds that the recognition or enforcement of the award will be against the public policy of the Member State. This exposes non-ICSID awards to being challenged and set aside.

[1224] Article 159(3) COMESA Treaty.

A 2008 study done by Queen Mary University reports that in up to 90 percent of arbitrations, Member States voluntarily complied with an award, while 40 percent of the cases were settled after the issue of the award.[1225] Therefore, it is only in the minority of the cases that states frustrate or fail to comply with arbitral awards. This is supported by UNCTAD data. According to UNCTAD, as of 22 November 2017, of 78 awards presented national courts for recognition, 50 were upheld, 11 were set aside, 3 were partially set aside, 1 was discontinued, and 13 were pending.[1226]

Nonetheless, the possibility of host states and courts refusing to recognise an award is a real threat to an investor. Three recent examples illustrate this point. In *Government of the Republic of Zimbabwe v Louis Karel Fick*,[1227] the respondents had to approach South African Courts to enforce an order of the SADC Tribunal that was awarded against Zimbabwe.[1228] Another matter that concerning Zimbabwe is being is *Bernhard Von Pezold.* In this matter, Zimbabwe was ordered to return the expropriated farms to the claimants plus damages of USD56 million, failing which Zimbabwe had to pay USD194 Million.[1229] Zimbabwe is seeking to have the award annulled, and in the interim has agreed to pay the damages into an escrow account pending the decision on annulment.[1230] Of course, one can also view Zimbabwe's annulment application as a bona fide use of available redress to challenge the award.

1225 See http://www.arbitration.qmul.ac.uk/docs/123294.pdf (Date of use: 09 April 2017).

1226 http://investmentpolicyhub.unctad.org/ISDS/FilterByFollowUpProceedings (Date of use: 22 November 2017).

1227 CCT 101/12 [2013] ZACC 22.

1228 See also De Wet 2014 (17) Potchefstroom Electronic Law Journal 553-565.

1229 *Bernhard Von Pezold* at para 1020.

1230 *Bernhard Von Pezold* Decision on Stay of Enforcement of the Award of 24 April 2017 at para 97-99; Decision on the Applicant's Urgent Application for Provisional Measures Regarding the Temporary Stay of Execution and The Escrow Arrangement of 22 August 2017.

Further afield, the attempts to enforce the award in *Walter Bau* made global headlines for all the wrong reasons, because Thailand did everything it could to avoid complying with the tribunal award.[1231] Since the award was issued in July 2009, the case was fought in New York, Switzerland, and Germany with no closure, because the Thai government consistently refused to comply with the award.[1232] When *Walter Bau* attached a Boeing 747 jet belonging to the Thai crown prince, the government gave security for the payment of the award in order to release the jet. However, by 2015, the case was still being contested, and at the time of writing there were no public reports of the status of the matter.[1233]

It is imperative that the SADC Member States comply with court orders and tribunal awards made against them, because failure to do so compromises the state of the rule of law in their states. In turn, this may lead to a loss of trust in their judicial systems. This may, in turn, lead to forum and treaty shopping by investors who seek to bypass their judicial systems.

1231 See for example Sucharitkul V "From Walter Bau to Hopewell to Bangkok Don Muang Airport" Asia-Pacific Arbitration Reporter 2015 (1) APAR 309-315 http://hsfnotes.com/arbitration/wp-content/uploads/sites/4/2015/09/2015-1-APAR-Article-Vanina-Sucharitkul.pdf (Date of use: 08 April 2017).

1232 Walter Bau AG was German construction business. During 1998, Walter Bau and a Thai partner were awarded a concession to build a 20km toll road from Bangkok to the Don Muang Airport. The final agreement was signed during 1989 in the name of a consortium of which Walter was a shareholder/partner. The toll road was ultimately finished, but there were unresolved disputes that led to Walter Bau commencing arbitration. Key disputes were the refusal of the Thai government to increase toll fees as agreed in one of the memoranda between the parties, the unilateral closure of the Don Muang Airport for a year and the creation of alternative road which reduced traffic on Walter Bau's toll road. The arbitral tribunal found that the Thai government breached Walter Bau's right to fair and equitable treatment, and awarded compensation of EUR30 million.

1233 Sucharitkul "From Walter Bau to Hopewell to Bangkok Don Muang Airport" at 313 http://hsfnotes.com/arbitration/wp-content/uploads/sites/4/2015/09/2015-1-APAR-Article-Vanina-Sucharitkul.pdf (Date of use: 08 April 2017).

4.5 CONCLUSION

The regulation of foreign investments in SADC by means of Member State laws and Annex 1 has been chaotic, unsatisfactory and a failure, because as shown above, Member States have failed to harmonise their laws with both the 2006 and 2016 Annex 1. There is also no uniformity among the Member States in terms of the regulation of foreign investments, especially with regard to the resolution of foreign investment disputes, and the quantum of compensation payable in the event of expropriation.

Furthermore, Member States such as Angola, Botswana, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Seychelles, Tanzania, Zambia, and Zimbabwe appear to provide inadequate levels of rule of law in their judicial systems. This is a violation of Article 4(c) of the SADC Treaty, which requires the Member States to respect the rule of law.

The status quo is unsustainable. What options does SADC have regarding the way forward?

In an endeavour to address this question, the next chapter will analyse recent developments in Brazil, the EU and India with regard to the regulation of foreign investments, so as to determine the lessons that SADC may learn there from, and what options may lie ahead for SADC in this regard.

CHAPTER 5

SADC AT CROSSROADS: TOWARDS A NEW DISPENSATION FOR THE REGULATION OF FOREIGN INVESTMENTS

5.1 INTRODUCTION

It was shown in Chapter 1 that one of the key objectives of this study is to analyse the options that are open to SADC to address the challenges identified in the Problem Statement, in particular with regard to the regulation of foreign investments and the forum for the resolution of investor-state disputes.[1234] This Chapter implements this objective. The Chapter will analyse recent developments in Brazil, the EU, and India, with regard to the regulation of foreign investments and the forum for the resolution of investor-state disputes. Building on this analysis, the chapter will propose the lessons that SADC can learn from these developments. The chapter will conclude with an analysis of the options that are open to SADC with regard to the level at which foreign investments in SADC should be regulated, and the mechanism for the resolution of investor-state disputes. This will lay the basis for the recommendations that will be made in Chapter 6.

ISDS has various challenges, as discussed in Chapter 2 above.[1235] According to UNCTAD, states and regions have responded to the challenges presented by ISDS in different ways,[1236] such as by maintaining the status quo (e.g. Brazil), disengaging from

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1234 See Objective 1.3.5 in Chapter 1.

1235 See the relevant discussion in Chapter 2 above.

1236 See also Mbengue and Schacherer 2017 (18) Journal of World Investment and Trade 414 at 442; Miles K "Investor-State Dispute Settlement: Conflict, Convergence, and Future Directions" 2016 European Yearbook Of International Economic Law 274-305; Schill SW "In Defence of International Investment Law" 2016 European Yearbook Of International Economic Law 309-338; Titi C "Recent Developments in International

the ISDS system (e.g. SADC), introducing selective adjustments (e.g. India) or by implementing systematic reforms (e.g. the EU).[1237] The question that arises for SADC is whether, given that it removed ISDS from the 2016 Annex 1, there are other options open to it? This study answers this question in the affirmative, and this chapter justifies the existence of other options that are open to SADC.

The EU's proposed ICS is the first of its kind, and is worthy of consideration. Brazil's ACFI is relevant because it provides for diplomatic protection in the form of state-state arbitration for the resolution of investor-state disputes. Angola, Mozambique, and Malawi have signed ACFIs with Brazil.[1238] This raises the question of, if these Member States like ACFIs enough to conclude them, do they view the ACFI model as a solution for SADC or even Africa? The India Model BIT 2015 is relevant herein because it adheres to ISDS while imposing limitations on access to ISDS, among other measures. India therefore believes that ISDS can be patched or fixed.

This chapter will commence with a brief discussion of the ICS Proposal, Brazil's ACFI and Indian Model BIT. This will be followed by an analysis of the lessons that SADC can learn from the developments in these jurisdictions. The chapter will conclude with an analysis of the options that are open to SADC with regard to the future regulation of foreign investments, and the forum for the resolution of investor-state disputes. These

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Investment Law" 2016 European Yearbook Of International Economic Law 703-731; Tuerk E and Rosert D "The Road Towards Reform of the International Investment Agreement Regime: A Perspective from UNCTAD" 2016 European Yearbook Of International Economic Law 769-786.

1237 United Nations Conference on Trade and Development "International Investment Agreement Issues Notes" No. 3, June 2014 at 2-9 http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d6_en.pdf (Date of use: 18 January 2018).

1238 http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu (Date of use: 9 August 2018).

lessons and options will be relevant, as SADC takes part in the AfCFTA investment protocol negotiations.[1239]

5.2 AN ANALYSIS OF SELECTED INITIATIVES TO ADDRESS THE CHALLENGES ARISING FROM ISDS

5.2.1 The EU's proposed ICS

In terms of a recent opinion of the European Court of Justice, and Articles 3(1) and 207 of the Treaty on the Functioning of the European Union (TFEU), the EU Parliament and the EU Council have the exclusive mandate to negotiate and conclude trade and foreign direct investment agreements.[1240] Based on this mandate, the EU has recently concluded the EU-Canada Comprehensive Economic and Trade Agreement (CETA),[1241] the EU-Vietnam Free Trade Agreement,[1242] the EU-Singapore Free Trade Agreement,[1243] and was negotiating the TTIP,[1244] until the USA withdrew from the TTIP

1239 African Union (Assembly) "Decision" at para 12(iii), 13. https://www.tralac.org/documents/resources/african-union/1834-au-decision-on-the-draft-agreement-establishing-the-african-continental-free-trade-area-21-march-2018-1/file.html (Date of use, 28 March 2018).

1240 Available at http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_2&format=PDF (Date of use: 21 April 2017). See also the recent opinion of the European Court of Justice requested by the European Commission in the case of ECLI:EU:C:2017:376 (Opinion 2/2015) at para 33, 305 http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d63c5084083f7b49bd8e26e1cacbce1dfd.e34KaxiLc3qMb40Rch0SaxyLb3r0?text=&docid=190727&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=473213 (Date of use: 21 May 2017).

1241 A copy of the CETA is available at http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/ (Date of use: 20 April 2017).

1242 http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 (Date of use: 21 April 2017).

1243 Available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=961 (Date of use: 21 April 2017).

1244 For documents and updates see http://eu.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_index_en.htm#eu-position (Date of use: 21 April 2017).

negotiations.[1245] Key to this study is the EU's proposed Investment Court System (ICS), which proposal is part of the dispute resolution mechanism of the TTIP.

Two things are noteworthy regarding the ICS proposal. Firstly, on 27 March 2014, the EU commenced a public consultation process in order to gauge public sentiment on the TTIP, in particular, with regard to the inclusion of ISDS in the TTIP.[1246] The public rejected the proposals with an overwhelming 99 percent majority.[1247] In particular, respondents rejected the inclusion of ISDS in the TTIP.[1248] The EU then returned to the drawing board, and emerged with the present ICS proposal (which as it will be shown below, is ISDS in disguise). Secondly, the negotiating directive of 17 June 2013 issued by the Council of the EU regarding the TTIP stipulated among others that the TTIP must provide for ISDS with an appeal mechanism.[1249]

1245 The withdrawal of the U.S. from the TTIP has not necessarily dampened the resolve to forge ahead with the ICS, as it is contained in the EU-Canada CETA 2016 and EU-Vietnam FTA 2016.

1246 http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 (Date of use: 03 November 2017).

1247 See the report of the outcome of the consultations: European Union (Commission) "Report on Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)", (Brussels, 13.1.2015 SWD (2015) 3 final) http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc153044.pdf (Date of use: 03 November 2017).

1248 See European Commission "Report on Online public consultation" at para 3.1 http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf (Date of use: 03 November 2017).

1249 See European Union (Council) "Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America", Brussels, 9 October 2014, at 9 http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf (Date of use: 04 September 2017).

The TTIP text consists of 24 Chapters, divided into 4 Parts.[1250] Part 1 deals with Market Access, Part 2 deals with Regulatory Cooperation, Part 3 deals with Rules, and Part 4 deals with Institutional and General Arrangements. The ICS proposals that will be used in this discussion are contained in Subsection 3 (Resolution of Investment Disputes and Investment Court System), Chapter II of Part 3 and Part 4.[1251] The proposed functioning of the ICS in relation to the mechanism for the resolution of investor-state disputes will now be briefly analysed, followed by some comments.[1252]

The ICS is supposed to be an international court, which will apply international law.[1253] It will have a Tribunal of First Instance (the Tribunal),[1254] and an Appeal Tribunal (the Appeal Tribunal).[1255] The ICS proposal provides for investor-state disputes to be resolved via ADR, although this is not mandatory.[1256] If ADR measures are not successful in resolving a dispute within six months from the submission of a request for consultation, an investor may submit a claim to the ICS Tribunal in terms of the ICSID

1250 The full text of the TTIP proposal is available in parts at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230 (Date of use: 1 November 2017).

1251 http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#institutions (Date of use: 1 November 2017).

1252 See also Baetens F "The European Union's Proposed Investment Court System: Addressing Criticisms of ISDS While Raising New Challenges" 2016 (43) (4) Legal Issues of Economic Integration 367–384; Reinisch A "Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration" 2016 (19) Journal of International Economic Law 761–786; Schwieder RW" TTIP and the Investment Court System: A New (and Improved) Paradigm for Investor-State Adjudication" 2016 (55) Columbia Journal of Transnational Law 178-227 at 189-193.

1253 Article 13(2) Chapter II, Part 3 TTIP Proposal.

1254 Article 9 Sub-section 3, Chapter II, Part 3 TTIP Proposal.

1255 Article 10 Sub-section 3, Chapter II, Part 3 TTIP Proposal.

1256 Articles 2-4 Sub-section 3, Chapter II, Part 3 TTIP Proposal.

Convention, UNCITRAL or other arbitration rules agreed by the parties to the dispute.[1257] In order to avoid parallel proceedings, a claimant is required to first withdraw any proceedings relating to the claim that may be pending before any court or tribunal.[1258] A claimant is required to submit proof of the withdrawal of such proceedings, as well as a declaration stating that it will not submit the same claim in another forum in the future ("no-U-turn clause").[1259]

A claimant must commence consultations within three years since it first acquired knowledge of the measures of a host state complained of, or within two years after the cessation of proceedings for the exhaustion of local remedies, if these were commenced.[1260] Furthermore, if a claimant does not refer a dispute to the ICS Tribunal within 18 months from submission of the request for consultations, the claimant shall be deemed to have withdrawn its request for consultations.[1261] A claimant is exempted from compliance with this deadline if it cannot do so due to the measures of a host state complained of.[1262]

A claimant is not required to first exhaust local remedies in a host state.[1263] A claimant may not submit a claim relating to an investment that was obtained through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.[1264]

1257 Article 6(2) Sub-section 3, Chapter II, Part 3 TTIP Proposal.

1258 Article14 (1)-(2) Sub-section 3, Chapter II, Part 3 TTIP Proposal.

1259 Article 14(2) Sub-section 3, Chapter II, Part 3 TTIP Proposal.

1260 Article 4(5) Sub-section 3, Chapter II, Part 3 TTIP Proposal.

1261 Article 4(6) Sub-section 3, Chapter II TTIP Proposal.

1262 Article 4(7) Sub-section 3, Chapter II TTIP Proposal.

1263 See the discussion in para 5.3.3 below. This contrasts with the Indian Model BIT, which requires mandatory ADR and the exhaustion of local remedies, as discussed below.

1264 Article 6(6) Sub-section 3, Chapter II, Part 3 TTIP Proposal.

The ICSID and the PCA are designated as the Secretariat of the ICS.[1265] The ICSID Convention, UNCITRAL Arbitration Rules or other arbitration rules shall apply to ICS proceedings.[1266] More specifically, Article 25(1) of the ICSID Convention regarding jurisdiction *ratione personae,* as well as Article II of the New York Convention shall apply.[1267] One cannot help but notice at this early juncture that the ICS is displaying elements of an arbitration institution.

The UNCITRAL Transparency Rules shall also apply to the proceedings.[1268] These rules encourage transparency and access to information in arbitration proceedings. They mandate that information and documents relating to an investor-state arbitration shall be made available to the public, interested parties such as *amici curiae* may join the proceedings, and hearings shall be open to the public.[1269]

The judgment of an ICS Tribunal is called a provisional award.[1270] A Tribunal shall issue a provisional award within eighteen months from the submission of a claim, although it may on good reason take longer to render an award.[1271] A Tribunal may order monetary damages or restitution of property with an alternative for monetary compensation.[1272] However, a tribunal may not award monetary damages that are greater than the loss

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1265 Article 9(16), 10(15) Sub-section 3, Chapter II, Part 3 TTIP Proposal.

1266 Articles 2, 7, 29(1) Sub-section 3, Chapter II, Part 3 TTIP Proposal.

1267 Article 7(2) Sub-section 3, Chapter II, Part 3 TTIP Proposal.

1268 Article 18(1) Sub-section 3, Chapter II, Part 3 TTIP Proposal. The rules are available at http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf (Date of use: 21 April 2017).

1269 Articles 3-6 UNCITRAL Transparency Rules.

1270 A provisional award shall become final if an appeal against it is not lodged within 90 days of the issue of the award.

1271 Article 28(6) Sub-section 3, Chapter II, Part 3 TTIP Proposal.

1272 Article 28(2) Sub-section 3, Chapter II, Part 3 TTIP Proposal.

actually suffered by a claimant as a result of the breach of the relevant provisions of the TTIP agreement, reduced by any prior damages or compensation already provided by the Party concerned.[1273] Furthermore, a Tribunal may not award punitive damages.[1274]

The TTIP proposal provides for the establishment of non-judicial structures. These are a Joint Committee (JC),[1275] Contact Points (CPs),[1276] Transatlantic Regulators Forum (TRF),[1277] Specialised Working Committees (SWCs) and Working Groups (SWGs),[1278] Domestic Advisory Groups (DAGs)[1279] and a Civil Society Forum (CSF).[1280] The JC[1281] and CPs[1282] are noteworthy structures, as they are similar in function to their Brazilian equivalents, which are discussed in the next section. Each Member State shall establish a DAG, which shall comprise of independent representative organisations of civil society in a balanced representation of economic, social, and environmental stakeholders, including, among others, employers and workers organisations, nongovernmental organisations, business groups, consumer groups, and public health associations.[1283] The CSF shall be a joint structure, and shall be convened by the JC at least once per

1273 Article 28(2) Sub-section 3, Chapter II, Part 3 TTIP Proposal.

1274 Article 28(3) Sub-section 3, Chapter II, Part 3 TTIP Proposal.

1275 Article X.1 Part 4 TTIP Proposal (EU Proposal for Institutional, General and Final Provisions) of 14 July 2016 http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154802.pdf (Date of use: 04 September 2017).

1276 Article X.5 Part 4 TTIP Proposal.

1277 Article X.2 Part 4 TTIP Proposal.

1278 Article X.1 Part 3 TTIP Proposal.

1279 Article X.7 Part 4 TTIP Proposal.

1280 See EU Proposal for Institutional, General and Final Provisions of 14 July 2016 http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154802.pdf (Date of use: 04 September 2017).

1281 The relevant function of the TTIP Joint Committee here is the resolution of problems that may arise in areas covered by the Agreement. The Brazilian Joint Committees also perform a similar function.

1282 The TTIP Contact Points are aimed at facilitating communication between Member States, just like the Brazilian Focal Points.

1283 Article X.7 Part 4 TTIP Proposal (this Part is not divided into Chapters).

year, and shall include DAGs and independent representative organisations of employers, workers, environmental interests, business groups, consumer groups, and public health associations.[1284]

The proposed creation of DAGs and CSFs is an important component of the TTIP. It brings public participation to the implementation of the TTIP, thus enabling transparency as well as the consideration of broader societal interests.

A few comments will now be made on the ICS proposal, noting that it is impossible to conduct a full analysis thereof herein.[1285]

As a starting point, it appears that the EU might not have the legal competency to establish the ICS as proposed. According to the German Magistrates Association, the ICS will be outside the scope of the existing EU legal and judicial order, and therefore its establishment will be a violation of EU law.[1286] This is supported by an opinion of a full bench of the European Court of Justice (ECJ) in the *European and Community Patents Court* case. In this matter, the ECJ held that the establishment of the European and Community Patents Court as an international court would be a violation of the EU Treaty and FEU Treaty.[1287] The ECJ found in this regard that such a court would be outside the

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1284 Article X.8 Part 4 TTIP Proposal.

1285 For a critique of whether the ICS proposal addresses the challenges of ISDS, see Schwieder 2016 (55) Columbia Journal of Transnational Law at 194-202.

1286 German Magistrates Association "Opinion on the establishment of an investment tribunal in TTIP - the proposal from the European Commission on 16.09.2015 and 11.12.2015" at 2 https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf (Date of use: 76 September 2017).

1287 European Court of Justice "Opinion 1/09: Opinion delivered pursuant to Article 218(11) TFEU (Opinion delivered pursuant to Article 218(11) TFEU – Draft agreement – Creation of a unified patent litigation system – European and Community Patents Court –

institutional and judicial framework of the EU.[1288] The ICS therefore faces the same predicament of illegality.

Aside from its possible illegality, the ICS also has an identity crisis. Is it really a court, or a standing arbitration tribunal in disguise? While the ICS purports to be an international court, it is strictly speaking not a court at all. Despite being branded by the EU as an international court, the ICS is more of an arbitral tribunal institution than a court in the ordinary sense of the word. The biggest give-away in this regard is that the ICS uses arbitration infrastructure such as ICSID and PCA as its Secretariat, and it uses the ICSID Convention, UNCITRAL Rules and the New York Convention to function. Furthermore, judgments of the ICS are called awards, a language that is used by arbitral tribunals.[1289] The EU Commissioner for Trade also made it clear that the "judges" of the ICS are in reality arbitrators when she said that:

> Our idea here is for governments, long before any actual cases are launched, to nominate a limited list of trustworthy arbitrators who would decide on all TTIP investment cases. To get onto the list, the arbitrators would have to be sufficiently qualified. For example, they would have to be eligible to be judges in their home systems.[1290]

Compatibility of the draft agreement with the Treaties)" http://curia.europa.eu/juris/document/document.jsf?text=&docid=80233&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=812343 (Date of use: 18 January 2018).

1288 At para 71.

1289 See for example Articles 10, 28-30

1290 See European Commission Speech by Cecilia Malmstrom - Commissioner for Trade "Discussion on Investment in TTIP at the meeting of the International Trade Committee of the European Parliament" Brussels 15 March 2015 http://europa.eu/rapid/press-release_SPEECH-15-4624_en.htm (Date of use: 03 November 2017).

Finally, the negotiation directive issued by the EU Council stated that the TTIP must retain ISDS, with an appeal mechanism.[1291] Indeed, this directive was followed, as can be seen from the use of ISDS facilities, rules and arbitrators. It is, therefore, difficult to argue that the ICS is a departure from ISDS when the EU's mandate was that ISDS must be retained. Otherwise, the ICS proposal is outside of the EU's directive as stated herein, and would then face issues of illegality.

The labelling of the ICS as an international court is therefore misleading. Reinisch suggests that the ambiguity relating to the naming of the ICS as a court rather than an arbitral institution appears to be deliberate.[1292] He opines that the ICS is an arbitral tribunal, despite the fact that the arbitrators were appointed by states without the involvement of investors.[1293] The German Magistrates Association also concludes that the ICS is a permanent court of arbitration and not an international court.[1294] Little wonder that a commentator calls the ICS "a wolf in a sheep's skin".[1295]

Nonetheless, the ICS proposal has some positive aspects. These are discussed below.

1291 European Union (Council) "Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America" at para 23-24 http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf (Date of use: 04 September 2017).

1292 Reinisch 2016 (19) Journal of International Economic Law 761 at 765.

1293 Reinisch 2016 (19) Journal of International Economic Law 761 at 768.

1294 German Magistrates Association "Opinion on the establishment of an investment tribunal in TTIP - the proposal from the European Commission on 16.09.2015 and 11.12.2015" at 2 https://www.foeeurope.org/sites/default/files/euus_trade_deal/2016/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf (Date of use: 76 September 2017).

1295 Ebenhart P "ICS: The Wolf in Sheep's Clothing, The EU's Great Corporate Rebrand" Public Services International May 2016 http://www.world-psi.org/en/investment-court-system-ics-wolf-sheeps-clothing (Date of use: 17 April 2017).

It is commendable that the ICS seeks to regulate the maximum legal costs that an unsuccessful claimant who is a natural person or a small or medium-sized business (SMEs) can pay.[1296] This will enable SMEs to enforce their rights in the event that they are impaired, without fear of being exposed to unlimited legal costs.[1297]

The ICS proposal's effort to reduce the duration that it takes to conclude cases to eighteen months, and for appeals to be concluded within six months is a positive move. But potentially, this means cases will take close to two years to conclude. The fact that Article 28(6) makes provision for cases to take a longer duration to conclude (without setting a ceiling on the extensions that can be granted) means that cases can potentially take longer. There ought to be ramifications if cases are not concluded on time, as contemplated by the ICS proposal.[1298]

The application of the UNCITRAL Arbitration Rules on transparency is another commendable feature, as it promotes public access and participation in investor-state cases.[1299]

1296 Article 28(5), Chapter II, TTIP Proposal.

1297 However, SMEs still face significant legal costs if they use the ICS, due to the multiple layers of appeals and the possibility of the inclusion of *amici curiae* etc. (Article 4 of the United Nations Commission on International Trade Law "Rules on Transparency in Treaty-based Investor-State Arbitration" http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf (Date of use: 15 October 2017) allow an interested party to join the proceedings in order to make submissions on a matter to which the dispute relates).

1298 Baetens 2016 (43) (4) Legal Issues of Economic Integration 367 at 377.

1299 Articles 4 and 5 of the United Nations Commission on International Trade "UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration" United Nations, New York 2014 http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf (Date of use: 15 October 2017) allow interested parties to join a case. See also Baetens 2016 (43) (4) Legal Issues of Economic Integration 367 at 373-374; Schwieder 2016 (55) Columbia Journal of Transnational Law 178 at 196.

It is noteworthy that the EU, like Brazil (as discussed in the next section), proposes the use of JCs and CPs to facilitate investor-state dispute resolution. This is an interesting pattern that deserves to be watched.

There are, however, a number of downsides to the ICS proposal, as discussed next. The use of the ICSID and PCA as the ICS Secretariat will increase costs for all parties, as these institutions charge their own fees, which are excessive.[1300] For example, the ICSID charges USD 25000.00 for the opening of a case, an annual administration fee of USD 42000.00, and USD 10 000.00 for the appointment of arbitrators.[1301] These are very significant for SMEs and developing states, especially when converted to local African currency. National courts in SADC do not charge fees of this magnitude.[1302] For example, in South Africa, there are no fees for opening a court case.

The application of the ICSID Convention to ICS cases poses serious challenges. This is because the EU is not a party to the Convention, and therefore an ICSID tribunal would lack jurisdiction against the EU.[1303] Furthermore, the EU cannot join the ICSID, as ICSID membership is presently limited to states only.[1304] The ICS proposal does not indicate how this challenge will be addressed.

1300 ICSID fees are available at https://icsid.worldbank.org/en/Pages/icsiddocs/Schedule-of-Fees.aspx, while PCA fees are available at https://pca-cpa.org/fees-and-costs/ (Date of use: 07 September 2017).

1301 https://icsid.worldbank.org/en/Pages/icsiddocs/Schedule-of-Fees.aspx (Date of use: 10 November 2017).

1302 Baetens 2016 (43) (4) Legal Issues of Economic Integration 367 at 379.

1303 Baetens 2016 (43) (4) Legal Issues of Economic Integration 367 at 369; Reinisch 2016 (19) Journal of International Economic Law 761 at 768-769.

1304 Reinisch 2016 (19) Journal of International Economic Law 761 at 769.

Another challenge is that the ICS proposal for the creation of a standing set of judges is contrary to Article 37(2) of the ICSID Convention, which requires the parties to a dispute to appoint arbitrators in every case.[1305] As the ICS proposal stands, investors do not play a role in the selection of judges/arbitrators. However, while this is worth highlighting, it may not be fatal, as Article 38 of the ICSID Convention empowers the Chairman of the ICSID to appoint arbitrators if none were appointed after 90 days.[1306] This procedure can be used to appoint ICS judges.[1307] But still, this defect shows the result of the patchwork that is the ICS.

Another challenge is that the introduction of an appeal mechanism (the ICS Appellate Tribunal) is in conflict with the ICSID Convention, which does not have an appeal mechanism. The ICSID Convention provides for the annulment of awards only.[1308] However, it is arguable that an appeal mechanism is not contrary to the spirit of the ICSID Convention, as the grounds of appeal are based on the grounds of annulment provided by the Convention.[1309] Once again, this is a potential point of contention, which the ICS proposal does not address.

The description of the ICS as a court and not an arbitral tribunal may render the New York Convention inapplicable to awards of the ICS.[1310] This is because the New York Convention only applies to foreign arbitral awards, not foreign court orders.[1311] The possibility, therefore, exists that if the EU insists that the ICS is a court, a state party may

1305 Reinisch 2016 (19) Journal of International Economic Law 761 at 777.
1306 Reinisch 2016 (19) Journal of International Economic Law 761 at 777.
1307 Reinisch 2016 (19) Journal of International Economic Law 761 at 777.
1308 Reinisch 2016 (19) Journal of International Economic Law 761 at 779.
1309 Reinisch 2016 (19) Journal of International Economic Law 761 at 780.
1310 Reinisch 2016 (19) Journal of International Economic Law 761 at 783.
1311 Article 1 New York Convention. The name of the convention also makes clear that it applies to foreign arbitral awards.

challenge an ICS award that is sought to be enforced in terms of the New York Convention.[1312] Therefore the continued reference to the ICS as a court may backfire on the EU.

The choice of the ICSID and the PCA as the secretariats to the ICS is controversial. The ICSID is controversial, due to its connection with the besieged ISDS, while the PCA is not popular with states that favor the ICSID system.[1313] Overall, the use of these structures connects the ICS to ISDS. It attracts attention to the ICS and raises the question of whether the ICS is not a rebranded form of ISDS after all.

The ICS proposal does not indicate how the ICS will deal with the issue of judicial precedent, in order to provide consistency with regard to decisions of the tribunals. Nothing in the proposal states that decisions of an ICS court shall be binding on future tribunals, and on what basis this will happen. Therefore, the ICS proposal fails to demonstrate how it will overcome this challenge.

The financial and professional independence of judges is also in issue here. This relates to how the judges are appointed, how their contracts are renewed, and how they are remunerated. The present proposal gives states the right to appoint judges and terminate or renew their appointments, to the exclusion of investors. Furthermore, states determine the judges' remuneration. Since states are potential respondents in the ICS, the amount of power they wield with regard to the above issues is cause for concern. Any perception that states appoint judges who will be friendly to their cause is not good

1312 Baetens 2016 (43) (4) Legal Issues of Economic Integration 367 at 382; Reinisch 2016 (19) Journal of International Economic Law 761 at 783. The relevant part is Article 11(1) Sub-section 3, Chapter II, TTIP Proposal.

1313 Baetens 2016 (43) (4) Legal Issues of Economic Integration 367 at 369.

for the ICS. It will compromise the legitimacy of the ICS from day one. Ideally, judges should be appointed in a transparent manner and by an independent party or structure. Either way, the DAG, and CSF should be involved in the process, as they represent the public interest in the selection process.

The German Magistrates Association opines in this regard that the ICS proposal does not meet the standards for professional and financial independence of judges as set out in the Magna Carta of Judges of the CCJE of 17 November 2010 (CCJE (2010/3).[1314] In addition, the ICS proposal allows government employees or persons who are on a government payroll to be appointed as judges, which also potentially tampers with the independence of judges, as these judges may be seen to be on the side of a state.[1315] Furthermore, the ICS may struggle to find highly qualified judges who will have to leave private practice to be full time with the ICS for short durations and low remuneration, in order to avoid conflict of interest as counsel or expert witness for one of the parties in future.[1316]

1314 German Magistrates Association "Opinion on the establishment of an investment tribunal in TTIP - the proposal from the European Commission on 16.09.2015 and 11.12.2015" at 2 https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf (Date of use: 76 September 2017).

1315 Baetens 2016 (43) (4) Legal Issues of Economic Integration 367 at 370; Schwieder 2016 (55) Columbia Journal of Transnational Law 178 at 203-206.

1316 German Magistrates Association "Opinion on the establishment of an investment tribunal in TTIP" at 2 https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/english_version_deutsche_richterbund_opinion_ics_feb2016.pdf (Date of use: 76 September 2017); Baetens 2016 (43) No. 4 Legal Issues of Economic Integration 367 at 370; Schwieder 2016 (55) Columbia Journal of Transnational Law 178 at 203.

The ICS proposal is silent on equality issues such as gender. It is glaring that the ICS proposal does not propose how to include and empower women in the appointment as judges.[1317]

Kleinheisterkamp and Poulsen suggest that the TTIP should exclude provisions for ISDS entirely.[1318] They opine that removing ISDS provisions will enable EU policy makers to return to the drawing board, to find ways to address the procedural and substantive issues involved from the bottom up.[1319]

In spite of the challenges discussed above, the ICS remains an important model and milestone in the improvement of the current ISDS system. However, the improvements will not please everyone, especially states and regions that have resolved to move away from ISDS, such as SADC.

Structurally, the EU must first overcome the legal obstacles that face the establishment of the ICS, in view of the ECJ opinion stated above. It must also resolve the legal conflicts that arise from linking the ICS with the ICSID Convention and the New York Convention, among others. From a public perception perspective, the EU will have to show that the ICS is not a disguised version of ISDS, but something entirely new, especially since the public referendum rejected the initial proposal that contained ISDS. This will not be an easy task, as the ICS uses elements of ICS. These are major challenges that the EU may fail to resolve. Even if the EU and its trade partners

1317 Baetens 2016 (43) (4) Legal Issues of Economic Integration 367 at 373.

1318 Kleinheisterkamp J and Skovgaard Poulsen LN "Investment Protection in TTIP: Three Feasible Proposals 2016 (7) European Yearbook of International Economic Law 527-540 at 529.

1319 Kleinheisterkamp and Poulsen 2016 European Yearbook of International Economic Law 527 at 529.

implemented the ICS proposal, respondents can have a field day raising objections regarding the jurisdiction of the ICS, based on the legal challenges raised above.

5.2.2 The Brazilian Investment Cooperation and Facilitation Agreement

Brazil, like most Latin American states, was originally opposed to the idea of BITs and ISDS.[1320] Brazil almost changed its attitude under the presidency of Collor de Mello, who initiated a process to liberalise Brazil's economy and a drive to attract foreign investment.[1321] During this period, BITs were globally touted as relevant to attract foreign investments, a theory which to date has not proven to be true.[1322]

Between 1994 and 1999, Brazil signed 14 BITs. However, only the BITs with Germany, Chile, France, Portugal, the United Kingdom and Switzerland were presented to Congress for ratification.[1323] Attempts to have the BITs ratified met stiff resistance from Congress. This, coupled with lack of a strong resolve by the Executive to ensure that the BITs were ratified, led to the demise of the ratification attempts.[1324]

1320 Lemos L and Campello D "The non-ratification of Bilateral Investment Treaties in Brazil:" A Story of Conflict in a Land of Cooperation" at 5- https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243120 (Date of use: 7 May 2017). For a background to Brazil's BIT practice see Volterra RG and Mandelli GF "India and Brazil: Recent Steps towards Host State Control in the Investment Treaty Dispute Resolution Paradigm" 2017 (6) Indian Journal of Arbitration Law 90-112 at 105-106.

1321 Lemos and Campello "The non-ratification of Bilateral Investment Treaties in Brazil:" A Story of Conflict in a Land of Cooperation" at 7 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243120 (Date of use: 7 May 2017).

1322 Lemos and Campello "The non-ratification of Bilateral Investment Treaties in Brazil:" A Story of Conflict in a Land of Cooperation" at 8 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243120 (Date of use: 7 May 2017).

1323 http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu (Date of use: 22 April 2017).

1324 Morosini F and Badin MTS "The Brazilian Agreement on Cooperation and

During 2012, the Brazilian Chamber of Foreign Trade (CAMEX) mandated a Technical Group for Strategic Studies on Foreign Trade (GTEX) to work on a new investment agreement that will replace the controversial BITs.[1325] At this point, Brazilian foreign investments were USD 355 Billion, most of which were located in Latin America and Africa.[1326] These investments needed to be protected. CAMEX then approved a new species of investment agreement termed the 'Investment Cooperation and Facilitation Agreement' (ACFI). The ACFI is part of Brazil's tool to increase Brazilian exports and market access abroad, especially in developing states. Angola and Mozambique were the first targeted parties to conclude the ACFI.

The Mozambique ACFI was the first to be signed on 30 March 2015, while the Angola ACFI was signed the next day on 01 April 2015.[1327] Mexico signed the ACFI on 26 May 2015, Malawi signed on 25 June 2015, and Chile and Colombia signed on 24 November and 09 October 2015 respectively.[1328] However, only the ACFI with Angola was ratified

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Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?" supplied by the author and available at https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/ (Date of use: 7 May 2017). For a discussion of the dynamics of the failed ratification process see Voltera and Mandelli (2017) (6) Indian Journal of Arbitration Law 90 at 105.

1325 Morosini and Badin "The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?" at para 1 https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/ (Date of use: 7 May 2017); Jimenez AG "On the Settlement of Investment Disputes between China and Latin America" 2017 (5) China Legal Science 34-62 at 52.

1326 Morosini and Badin "The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?" at para 1 https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/ (Date of use: 7 May 2017).

1327 http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu (Date of use: 22 April 2017).

1328 http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu (Date of use: 22

at the time of writing.[1329] This ratification is historic, since Brazil never ratified a BIT in the past (however Brazil did ratify 13 TIPs out of 18 that were concluded). It means that the ratification of the other ACFIs could be imminent, which in turn will usher state-state arbitration in SADC. During April and Amy 2018, Brazil signed further ACFI's with Ethiopia and Suriname respectively.[1330]

The Brazil-Malawi ACFI that is the only ACFI that is available from UNCTAD in English,[1331] and it will therefore be used in this discussion. The dispute resolution provisions of the Brazil-Malawi ACFI (ACFI) will now be briefly considered, noting that it is impossible herein to conduct a full analysis thereof.

It must be said at the onset that the ACFI is less focused on investor protection than on the facilitation of mutual investments between Member States.[1332] This makes it markedly different to instruments such as BITs that have investor protection as their focus. A central feature of the ACFI is that an investor cannot commence ISDS against a host state in the event of a dispute.[1333] Instead, Brazil and the other state party to the

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April 2017).

1329 http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu (Date of use: 10 September 2018).

1330 http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu (Date of use: 10 September 2018).

1331 http://investmentpolicyhub.unctad.org/IIA/country/27/treaty/3663 (Date of use: 18 January 2018).

1332 Article 1 Brazil-Malawi ACFI; Morosini and Badin "The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?" at para 2 https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/ (Date of use: 7 May 2017).

1333 Morosini and Badin "The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?" at para 2.2 https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-

ACFI will attempt to resolve the dispute amicably, failing which they may at their discretion engage in state-state arbitration.

The ACFI provides two structures that are central to resolving investor-state disputes.[1334] The first is the Joint Committee (JC).[1335] The JC is made up of representatives of each State Party, who are designated by their respective governments.[1336] The JC shall meet at least once a year, or as often is necessary.[1337] The chairmanship of the JC shall rotate annually.[1338] Some of the functions of the JC are to monitor the implementation of the ACFI, discuss and share investment opportunities, and to resolve disputes between investors and host states.[1339] The JC may establish *ad hoc* groups, which may meet on their own, or with the JC, as necessary.

The second structure is the Focal Point (FP), or Ombudsmen.[1340] The FP is not a joint structure like the JC. Each Member State shall establish its own FP.[1341] CAMEX is

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facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/ (Date of use: 7 May 2017).

1334 See Jimenez 2017 (5) China Legal Science 34 at 52-53; Voltera and Mandelli 2017 (6) Indian Journal of Arbitration Law 90 at 107.

1335 Article 3 Brazil-Malawi ACFI; Morosini and Badin "The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?" at para 2.2 https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/ (Date of use: 7 May 2017).

1336 Article 3(1) Brazil-Malawi ACFI.

1337 Article 3(3) Brazil-Malawi ACFI.

1338 Article 3(3) Brazil-Malawi ACFI.

1339 Article 3(4) Brazil-Malawi ACFI.

1340 Article 4 Brazil-Malawi ACFI; Morosini and Badin "The Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?" at para 2.2 https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/ (Date of use: 7 May 2017).

1341 Article 4(1) Brazil-Malawi ACFI.

Brazil's FP, while the Malawi Investment and Trade Centre is Malawi's FC.[1342] FPs shall operate under the guidance of JCs.[1343]

Some of the responsibilities of an FP are to act as a conduit between the Member States and investors and between the Member States, as well as to communicate suggestions and complaints from the other state or its investors, and to resolve investor-state disputes.[1344] FPs of the respective state parties shall cooperate to resolve disputes through consultations, negotiations, dialogue and bilateral meetings.[1345]

The ACFI provides the following procedure for the amicable resolution of investor-state disputes. The process starts when a claimant (being an investor or investment) lodges a complaint with its home state's JC about unfavorable treatment it received at the hands of a host state.[1346] Upon receipt of the complaint, the JC of an investor's home state shall inform the host state of the dispute in writing, providing details of the claimant's complaint.[1347] The JC of the host state shall have 60-120 days to respond to the complaint.[1348] An investor, as well as representatives of the host state whose entity or department etc. is involved in the dispute, may take part in the bilateral meetings between the JCs.[1349]

1342 Article 4(2) Brazil-Malawi ACFI.
1343 Article 4(4) (a) Brazil-Malawi ACFI.
1344 Article 4(4) Brazil-Malawi ACFI.
1345 Article 13(1) (a) Brazil-Malawi ACFI.
1346 Article 13(3) (a) Brazil-Malawi ACFI.
1347 Article 13(3) (a) Brazil-Malawi ACFI.
1348 Article 13(3) (b) Brazil-Malawi ACFI.
1349 Article 13(4) (c) Brazil-Malawi ACFI.

If the dispute is not resolved by negotiations and consultation, the parties may commence state-to-state arbitration.[1350] However, the ACFI does not detail how state-to-state arbitration will operate, such as the forum, arbitration rules etc. This vagueness, coupled with the fact that state-to-state arbitration is not mandatory, means that the possibility of the state parties reaching a deadlock regarding establishment and operation of the arbitration is real. Furthermore, state-to-state arbitration will only commence once it is convenient for the states, as they commence it at their discretion.[1351]

Secondly, the ACFI is silent on whether or not a claimant must first exhaust local remedies prior to the commencement of state-to-state arbitration. This is a critical omission. In this regard, it must be noted that Article 14 of the ILC Articles on Diplomatic Protection are relevant when diplomatic protection (including state-state arbitration) is to be exercised. Article 14 of the ILC Articles on Diplomatic Protection provides that a state may not exercise diplomatic protection before the claimant in respect of whom protection is sought has exhausted local remedies in the host state.[1352]

However, Article 15(e) allows a host state to waive the requirement for the exhaustion of local remedies since failure to exhaust local remedies is a defence available to it.[1353] The

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1350 Article 13(6) Brazil-Malawi ACFI.

1351 Article 15(5) Brazil-Mozambique ACFI; Voltera and Mandelli (2017) (6) Indian Journal of Arbitration Law 90 at 108.

1352 Booysen *Principles of International Trade Law As A Monistic System* at 66-67; United Nations (International Law Commission) "ARSIWA" Article 22 and 44 http://legal.un.org/ilc/sessions/53/ (Date of use: 02 October 2017); *Panevezys-Saldutiskis* at 22; *ELSI* at 42 para 50; *Interhande*l case *(Switzerland v United States of America)*, (Preliminary Objections) Judgment of March 21st 1959, I.C.J Reports 1959 6 at 27; Article 14 of the Articles on Diplomatic Protection and the Commentary thereon; Ngobeni 2012 (37) South African Yearbook of International *Law* 169 at 171.

1353 See Commentary on Article 15(e) at note 12-1, United Nations (International Law

waiver can be given in a treaty between an investor's home state and a host state, or in a contract between a host state and an investor.[1354] The waiver can be express or implied.[1355] This entails that the failure to exhaust local remedies will be a defence available to a host state before an arbitral or another tribunal. Hence the silence of the ACFI on this issue is a critical omission.

A downside of state-to-state arbitration is that it is susceptible to the same challenges as diplomatic protection. The key challenge of diplomatic protection is that it is an exclusive remedy to be exercised by a state at its sole discretion.[1356] Therefore, an investor has no right to compel its home state to exercise it. This creates uncertainty for an investor, as it has no guaranteed recourse in the event of expropriation or other harmful measures taken by a host state.

The involvement of states in investor-state disputes risks politicising investment disputes. For example, it is unlikely that states that have close economic or political ties

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Commission) "Draft Articles on Diplomatic Protection" http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf (Date of use: 04 September 2017).

1354 See Commentary on Article 15(e) at note 13-14 United Nations (International Law Commission) "Draft Articles on Diplomatic Protection" http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf (Date of use: 04 September 2017).

1355 See Commentary on Article 15(e) at note 13 United Nations (International Law Commission) "Draft Articles on Diplomatic Protection" http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf (Date of use: 04 September 2017).

1356 See Commentary on Article 1, note 3-5 United Nations (International Law Commission) "Draft Articles on Diplomatic Protection" http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf (Date of use: 04 September 2017); *Kaunda & others v President of the Republic of South Africa & others* 2005 (4) SA 235 (CC), *Van Zyl & others v Government of the Republic of South Africa &* others 2008 (3) SA 294 (SCA). *The Government of the Republic of South Africa v Von Abo* (283/10) [2011] ZASCA 65 (4 April 2011) at para 20-23; Ngobeni 2012 (37) South African Yearbook of International Law 169 at 171.

will embark on strenuous state-state arbitration, and risk jeopardising their ties for the sake of a private investor. However, the situation may be different when a claimant is a state owned entity owned by one of the parties.

For developing states with limited resources, exercising state-state arbitration may present a resource and expertise challenge. The state may have far more pressing issues to deal with back home, rather than to spend resources it doesn't have fighting for an investor. This may be detrimental to investors from such states. International arbitration requires the expensive services of arbitration institutions, lawyers and experts, not to mention the disbursements of state officials involved in a case.

State-to-state arbitration is also subject to Article 27(1) of the ICSID Convention.[1357] This Article provides that state-to-state arbitration will not be available once a claimant accepts a state's consent to ICSID arbitration. Consent to arbitration can be given in advance in a BIT, TIP, statute or investment contract.

Furthermore, the fact that arbitration is between states does not remove some of the challenges that ISDS faces, as discussed in Chapter 2 above.

[1357] Which provides that

> No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute. (Emphasis added)

5.2.3 The India Model BIT 2015

From 1994, India embarked on a BIT-signing campaign that led to 84 BITS being signed by 2013.[1358] These BITS were mainly based on the India Model BIT of 2003.[1359] At the time of writing, 52 out of remaining 61 these BITs were in force, although India gave notices that 58 of these remaining BITs will not be renewed when they expire in the first half of 2017.[1360] Furthermore, 9 out of 13 TIPs were in force at the time of writing.[1361]

India was prompted to review her BITs policy for the same reason that other developing states and regions did: it was swamped by costly ISDS cases in a short space of time.[1362] As a result of these cases, India reviewed resolved that a new Model BIT was required, which will form the basis of new BITs. A new Model BIT was, therefore,

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1358 See http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu (Date of use: 10 September 2018). For a background to India's foreign direct investment see Voltera and Mandelli 2017 (6) Indian Journal of Arbitration Law 90 at 91-95; Ranjan P *India's international investment agreements and India's regulatory power as a host nation* (PhD Thesis Kings College London 2012) at 35-66 https://kclpure.kcl.ac.uk/portal/files/13524464/Studentthesis-Prabhash_Ranjan_2013.pdf (Date of use: 08 September 2017).

1359 See https://www.italaw.com/sites/default/files/archive/ita1026.pdf (Date of use: 26 April 2017).

1360 See Voltera and Mandelli 2017 (6) Indian Journal of Arbitration *Law* 90 at 94; https://www.iisd.org/itn/2016/08/10/india-takes-steps-to-reform-its-investment-policy-framework-after-approving-new model bit/; http://www.dipp.gov.in/English/questions/25072016/lu1290.pdf; http://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/; http://www.bothends.org/en/newsitem/469/India-terminates-bilateral-investment-treaties-BITs-; http://www.thehindubusinessline.com/economy/indias-bilateral-investment-pacts-under-cloud/article9625580.ece (Date of use: 24 May 2017).

1361 See http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu (Date of use: 10 September 2018).

1362 See Voltera and Mandelli 2017 (6) Indian Journal of Arbitration Law 90 at 194. *White Industries Australia* was the first ISDS that India lost. For a list of arbitration cases against India see http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=2 (Date of use: 10 September 2018). Unfortunately details of the arbitrations are confidential and are publicly available.

approved during December 2015.[1363] In a nutshell, the Model BIT is designed to among others: limit the scope of investments which would be protected by the Model BIT;[1364] set out measures that will be outside the scope of the Model BIT; and impose significant substantive and procedural limitations on an investor's access to arbitration, without taking away the right to arbitration. The Model BIT vastly succeeds in this regard, as shown below.

Some selected provisions of the Model BIT will now be briefly discussed.[1365]

In order to reduce the scope of future disputes, the Model BIT starts by placing restrictions on the areas covered by the BIT, who can access it, and under what terms. This is noteworthy, as it increases India's regulatory space. Some of these restrictions are as follows.

The Model BIT discourages forum shopping and the use of shell companies, by limiting the types of entities that can access the BIT.[1366] It achieves this by denying the protection of the BIT to entities that do not have substantial business activities in their

1363 http://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf (Date of use: 25 April 2017).

1364 See also Volterra and Mandelli 201) (6) Indian Journal of Arbitration Law 90 at 96, 99.

1365 See also Jandhyala S "Bringing the state back in: India's 2015 model BIT" Columbia FDI Perspectives on Topical Foreign Direct Investment Issues, No. 154 August 17, 2015 http://ccsi.columbia.edu/files/2013/10/No-154-Jandhyala-FINAL.pdf (Date of use: 08 September 2017); Rosmy J "Renegotiation of Indian Bilateral Investment Treaties: An Analysis from a Development Perspective" http://www.uncitral.org/pdf/english/congress/Papers_for_Programme/99-JOAN-Renegotiation_of_Indian_Bilateral_Investment_Treaties.pdf (Date of use: 08 September 2017); Paktar A "Bilateral Investment Treaties - Has India Taken It a "Bit Too Far?" International Journal of Law and Legal Jurisprudence Studies: ISSN: 2348-8212: Volume 2 Issue 7 http://ijlljs.in/wp-content/uploads/2015/12/26.pdf (Date of use: 08 September 2017).

1366 By "BIT" in this context is meant a BIT that is based on the Model BIT.

home states,[1367] entities that are owned or controlled directly or indirectly by persons of a non-party state,[1368] and entities that have been established or restructured with the primary purpose of gaining access to the dispute resolution mechanisms provided in the BIT.[1369]

The Model BIT also limits the scope of the application of the BIT, by providing that it shall not apply to government procurement, subsidies or grants, services supplied in the exercise of governmental authority, taxation matters and disputes arising from investment agreements.[1370] This is a major carve-out of areas and sectors that foreign investors would typically be invested in, especially government procurement and services supplied under government authority (which could cover the non-commercial activities of state owned entities).

The Model BIT also excludes investments obtained by means of corruption, as they will not have been made in accordance with the Model BIT.[1371]

The Model BIT limits the jurisdiction of an arbitral tribunal. It provides that an arbitration tribunal established in terms of the BIT shall not re-examine any legal issue that was finally determined by a court of a host state in a dispute between the host state and the party to the investment dispute.[1372] Neither may a tribunal review the merits of a decision

1367 Article. 1.9 India Model BIT; Volterra and Mandelli 2017 (6) Indian Journal of Arbitration Law 90 at 101-102.

1368 Article 20.1(i) India Model BIT.

1369 Article 20.1(ii) India Model BIT. The claim in *Philip Morris Asia was* dismissed on similar grounds.

1370 Article. 2.6 India Model BIT; See Volterra and Mandelli 2017 (6) Indian Journal of Arbitration Law 90 at 108.96.

1371 Article 1(6) (ii) read with Article 9 India Model BIT.

1372 Article 14.2 India Model BIT.

of the court of a host state, nor may it accept jurisdiction over a claim that is subject to arbitration between Member States.[1373]

The dispute resolution provisions of the Model BIT operate as follows.

Unlike the ACFI and the ICS Proposal, Article 14(3) of the Model BIT provides that the first step that an investor must take is the exhaustion of local remedies before the courts or administrative bodies of the host state.[1374] It sets a prescription period of one year within which the exhaustion of local remedies must commence.[1375] If a claimant has exhausted local remedies, but is not satisfied with the outcome thereof, or having exhausted local remedies, a claimant is of the opinion (and it can demonstrate that the continued exhaustion of local remedies will be futile), then it can proceed to the next stage, which is the commencement of preventative ADR.[1376]

The current Model BIT makes the exhaustion of local remedies and the commencement of ADR measures, mandatory. A claimant who omits any of these steps shall not be entitled to proceed to commence arbitration in terms of the BIT.[1377] As a further disincentive, a tribunal is required to order costs of arbitration against a claimant, if it commenced arbitration without compliance with the requirements for exhaustion of local remedies, waiting periods for ADR or provisions of Article 14(1).[1378]

When a claimant commences ADR, it must issue a Notice of Dispute, to which a statement shall be attached, stating that the requirements for the exhaustion of local

1373 Article 14.2 India Model BIT.
1374 Volterra and Mandelli 2017 (6) Indian Journal of Arbitration Law 90 at 100-101.
1375 Article 14.3(i) India Model BIT.
1376 Article 14.3(ii) India Model BIT.
1377 Article 14.3(v) India Model BIT.
1378 Article 14.12(ii) India Model BIT.

remedies as well as Articles 9 to 12 of the Model BIT have been met.[1379] After submitting the Notice of Dispute, the parties have a period of one year to consult and negotiate on the resolution of the dispute.[1380]

In addition to the exhaustion of local remedies and ADR, the Model BIT sets a prescription period within which a claimant must commence arbitration. This period is three years from the date a claimant became aware, or should have become aware of the host state measure complained of, or eighteen months since the conclusion or abandonment of local remedies, whichever is later.[1381] A claimant must submit a Notice of Arbitration at least ninety days before commencing arbitration. Only then can a claimant submit an Arbitration Claim, stipulating the parts of the Model BIT which it is alleged a host state has breached, and that the claimant has suffered actual and non-speculative damages as a result of direct and foreseeable result of the breach.[1382]

Similar to the ICS, a claimant must also submit a waiver of a right to initiate or continue other dispute resolution procedures before another administrative tribunal, court etc. ("no-U-turn clause"), with regards to the same claim, unless it can show that it is not possible to give such waiver due to the expropriation or interference with the host state's management or control of the investment.[1383]

1379 Article 14.3(iii) India Model BIT.
1380 Article 14.3(iv) India Model BIT.
1381 Article 14.3(v) India Model BIT.
1382 Article 14.4(ii) India Model BIT.
1383 Article 14.4(i) (f) India Model BIT.

In a patial similarity to the ICS, the arbitration shall be conducted in terms of the UNCITRAL Arbitration Rules unless the parties agree otherwise.[1384] The Model BIT places upon a claimant the burden of proof with regard to jurisdiction, the existence of an obligation under Chapter II of the Model BIT, a breach of an obligation(s), that the investment, or the investor with respect to the Investment, has suffered actual and non-speculative losses as a result of the breach, and that those losses were foreseeable and directly caused by the breach.[1385] After a hearing, a tribunal may award monetary damages only, which shall not include punitive or moral damages.[1386] When awarding damages, a tribunal shall take into consideration any breaches of the BIT or laws of the host state by an investor/investment.[1387] An award shall be enforced in terms of the laws of the respondent host state.[1388] This provision brings the courts of a host state back into play with regard to the final implementation of an award, as does the New York Convention.

A respondent state may launch a counterclaim against a claimant to seek declaratory relief, enforcement action or monetary compensation.[1389]

The parties shall share arbitration costs and expenses equally unless a tribunal rules otherwise.[1390] However, each party shall pay its own legal costs, unless a tribunal rules otherwise.[1391]

1384 Article 14.7(i) India Model BIT.
1385 Article 14.9(ii) India Model BIT.
1386 Article 14.10(iii) India Model BIT.
1387 Article 14.10(ii) India Model BIT.
1388 Article 14.10(v) India Model BIT.
1389 Article 14.11(i) India Model BIT.
1390 Article 14.12(i) India Model BIT.
1391 Article 14.12(i) India Model BIT.

The Model BIT replicates Article 27 of the ICSID Convention. It provides that an investor's home state may not commence diplomatic protection unless the host state has failed to comply with an award or the decision of its courts.[1392]

A few comments will now be made on the India Model BIT.

India has introduced what is probably the most radical and extensive measures in recent times. The scope of exclusions provided in Articles 2.6, 16 and 17, as well as the investor obligations specified in Articles 9 to 12 will definitely have the intended effect of limiting investor claims in the targeted areas. In return, India will more regulatory space as investors in the excluded sectors cannot commence ISDS against her. This may push investors to seek protections via existing BITs that do not have the stated limitations, since India still has 52 BITS in effect. This will encourage to treaty shopping prior to the termination of these BITs. Investors with significant bargaining power can also negotiate investment contracts with better protections than those provided by the Model BIT. The rest will have to make do with the local courts of host states.

The central issue with regard to mandatory ADR and the exhaustion of local remedies is whether strict compliance therewith is necessary or not, i.e. whether this is a procedural requirement which can be condoned, or whether it is a jurisdictional requirement which may lead to a tribunal finding that it has no jurisdiction on the matter. A guide to the answer to this can be found in *Tulip Real Estate*. The tribunal in *Tulip Real Estate* held that a state's consent to arbitration in a BIT is a qualification on a state's sovereignty.[1393]

1392 Article 14.13(i) India Model BIT.

1393 At para 135.

Therefore, a state is entitled to set the terms under which it is prepared to submit to arbitration, which must be strictly complied with if they were meant to be mandatory.[1394]

Therefore, the mandatory nature of the pre-arbitration requirements of the Mode BIT are such that a tribunal may find that they must be strictly complied with, as stipulated in Article 14(3)(v) of the Model BIT.

The provision to the effect that a tribunal must order an investor who commences arbitration prematurely to pay the state's costs will be an additional deterrent to investors who do not comply with the pre-arbitration requirements.[1395] Read with the decision in *Tulip Real estate*, the effect of this provision bolsters the view that pre-arbitration requirements, including ADR, must be complied with.

It remains to be seen how tribunals will deal with the provision that a tribunal shall not re-examine any legal issue that was finally determined by a court of a host state in a dispute between an investor and a host state.[1396] The unwritten intent of this provision is to preserve an order made in favour of a host state. Will tribunals allow their decision-making powers to be curtailed by this provision? Will investors accept the provision? It is unlikely that investors will leave this provision unchallenged, especially if the earlier ruling was in favour of a host state. Nonetheless, India has made her position on the issue clear, and a tribunal must consider the provision for what it is.

In conclusion, India has boldly narrowed the scope of the Model BIT by placing restrictions that give her more regulatory space. This will significantly limit future investor claims. However, the Model BIT will remain a piece of paper until India concludes BITs

1394 *Tulip Real Estate* at para 55-72,135.
1395 Article 14.12(ii) India Model BIT.
1396 Article 14.2 India Model BIT.

based thereon. Until then, the existing 52 BITs and 9 Tips provide investors with more protection that the Model BIT, Therefore, if the Model BIT is to be of any significance, all existing BITs and TIPs to which India is a party must be renegotiated or terminated, and be replaced with new ones based on it. However, such termination is easier said than done, since most BITs are designed to have survival clauses that keep them in effect for several years after their termination. For example, India's BIT with Mozambique (which is in force) has a survival period of fifteen years from date of termination.[1397]

If India replaces its existing BITs and (and relevant part of TIPs) with the Model BIT, the restrictions placed by the Model BIT on access to ISDS through stringent pre-arbitration requirements will only serve to slow the commencement of ISDS with regard to the covered sectors. Ultimately, an investor who has an eye on ISDS as the prize will get to it, because investors in sectors that are protected by the Model BIT have guaranteed access to ISDS after complying with the formalities of pre-arbitration ADR and the exhaustion of local remedies.[1398]

Furthermore, the India Model BIT does not address the key challenges of ISDS, which are discussed in Chapter 2 above.

Finally, SMEs will incur significant costs to sue India, given the mandatory exhaustion of local remedies and ADR before arbitration can commence.

1397 Article 15(2) Agreement between the Government of the Republic of Mozambique and the Government of the Republic of India for the Reciprocal Promotion and Protection of Investments http://investmentpolicyhub.unctad.org/IIA/country/96/treaty/1937 (Date of use 10 September 2018).

1398 Article 14.4 India Model BIT.

5.3 LESSONS AND OPTIONS FOR SADC

5.3.1 Lessons for SADC

SADC can learn many lessons from the TTIP and ICS proposal\s, the Brazil-Malawi ACFI, and the India Model BIT. These lessons may be useful when SADC engages in the negotiations for the T-FTA or AfCFTA investment protocols, and even a review of Annex 1.

The key lessons from the EU are that the TTIP proposal shows that it is possible to have a single regional or continental instrument of foreign investments, and that provides a single forum for the resolution of investor-state disputes. The boldness of the EU in presenting the ICS proposal, with its challenges as discussed above, shows that SADC and other African states should not be afraid of going into uncharted territory in this regard, if needs be.

The use of the JCs and CPs by the EU and Brazil shows that there is a resurrection of diplomatic protection for the resolution of investor-state disputes. It is a pattern that SADC should pay attention to.

Through the DAG and CSF, the TTIP proposal also provides a valuable lesson in the involvement of civil society in the implementation of foreign investment regulation laws. The fact that the EU commenced the search for a solution to ISDS with the public referendum is commendable.

The India Model BIT provides a lesson in the tightening of foreign investment regulation, with a view to maximise regulatory space for host states. The provisions of the model BIT such as those relating to the scope of the BIT, ADR, and investor obligations, are

relevant lessons for SADC. They are useful for increasing the regulatory space of SADC Member States.

The India Model BIT also offers valuable lessons in the management of treaty shopping and the denial of benefits to corrupt investors. By denying the protection of the Model BIT to shell companies and corrupt investors, India sends a clear message that only genuine and law-abiding investments will be protected.

The India Model BIT also shows that mandatory preventative ADR can be a useful tool. Although making ADR mandatory will increase legal costs, in the long term it will inculcate a culture that promotes the settlement of disputes rather than litigation. The early settlement of disputes is good for all parties in the long term, as it saves them time, money as well as their relationship.

The Brazil-Malawi ACFI provides an alternative to the traditional options of ISDS or local courts. SADC can learn to use state-state arbitration, and state-state consultations in the form of structures such as the JC and FP as a form of preventative ADR. This despite the fact that state-state arbitration is a discretionary remedy.

The South Korean Office of Foreign Investment Ombud (OFIO), on which the Brazilian FP is based, has had great success in resolving investor-state disputes, and is worthy of further study in terms of its operational mode.[1399] The office of an Ombud can be very effective, especially where there are bureaucratic inefficiencies, and its early intervention

[1399] See resolved cases at http://ombudsman.kotra.or.kr/eng/rsc/case07.do?sResolutionCaseTyCd=07 (Date of use: 20 May 2017).

can pre-empt costly arbitration or litigation.[1400] It appears from reports that the IFIO has been highly effective. It is reported that the OFIO received approximately 4700 cases between 1999 and 2011, and that it resolved approximately 90 percent of the cases.[1401] SADC and even the AU can do well to incorporate a similar structure in the future as part of preventative ADR.[1402]

5.3.2 Options for SADC

It is now opportune to analyse some of the options that are open to SADC, with regard to the level at which investments should be regulated, as well as the mechanism for the resolution of investor-state disputes.[1403]

On the first aspect, it was shown in Chapter 1 that there are at least three views that emerged from the review of selected scholarly literature. These are the regulation of foreign investments at REC level, regulation at AU level via a soft law instrument such as the PAIC, and regulation at AU level via an investment treaty. On the second aspect, the options that are open to SADC are ISDS, litigation before the courts of host states, the SADC tribunal, and or the ACH&PR/ACJ&HR. These options will be briefly analysed, with a view to making proposals thereon in Chapter 6.

With regard to the level at which foreign investments should be regulated, the first option proposed by Denters and Gazzini is the use of RECs to regulate foreign investments. However, such regulation will face the same challenges as regionalism, that are discussed in Chapter 1 above.

1400 Chen 2017 (55) Columbia Journal of Transnational Law 547-591 at 590.
1401 Chen 2017 (55) Columbia Journal of Transnational Law 547 at 588.
1402 Chen 2017 (55) Columbia Journal of Transnational Law 547 at 589.
1403 This is in line with Objective 1.3.5 in Chapter 1.

The second proposal by Mbengue and Schacherer is the use of soft law instruments such as the PAIC to foster the harmonisation of investment treaty practice among AU Member States.[1404] However, this option has limitations, as shown in the discussion of this proposal in Chapter 1.

The third option, proposed by Paez, is the use of a continental investment treaty to regulate foreign investments.[1405] However, Paez does not provide sufficient motivation for this proposal. Therefore, it is difficult to critique the proposal. Nonetheless, its continental theme resonates with the recommendation made in Chapter 6 with regard to the regulation of foreign investments.

The rejection of the REC and PAIC proposals leaves the regulation of foreign investments at continental level to be evaluated. This will be done in the next section.

5.3.3 Towards a continental framework for the regulation of foreign investments

This section will discuss a possible continental framework for the regulation of foreign investments, as well as for the resolution of investor-state disputes. The section lays the basis for proposals that will be made in Chapter 6.

(a) The regulation of foreign investments

The recent formation of the AfCFTA and the future formation of the AEC puts the AU firmly in control of the future regulation of foreign investments in Africa. The formation of the AfCFTA means that RECs that are not already (or on the path to be) customs unions

1404 See the relevant discussion Chapter 1 above.
1405 See the relevant discussion Chapter 1 above.

will gradually cease to be free trade zones, as they cannot coexist with the AfCFTA.[1406] Such RECs shall cease to have authority over trade policy, which will be gradually taken over by the AfCFTA.[1407] Therefore, it makes sense that the RECs gradually transfer their authority over the regulation of foreign investments to the AfCFTA. It is also noteworthy that the AU is mandated to enhance socio-economic integration in Africa.[1408] Furthermore, the views espoused herein in this regard have been vindicated by the fact that the AfCFTA will have an investment protocol, an event that occurred when this study had been concluded. What follows is the author's views in support of the regulation of foreign investments in Africa by means of an AfCFTA investment protocol.

The real value of an AfCFTA investment protocol is that it will (unlike a soft instrument such as the PAIC) be an international agreement that is binding on Member States. This will enable it to foster uniformity and harmonisation from the top-down. This will also bring an end to the current regulation of foreign investments by conflicting RECs and state laws alike.

(b) The resolution of investor-state disputes

Based on the discussion of developments in the Brazil, the EU and India above, SADC's options regarding the resolution of investor-state disputes will now be analysed. The options are ISDS, the courts of host states, sub-regional courts, and continental/regional

1406 African Union (Commission) "Assessing Regional Integration VIII: Bringing the Continental Free Trade Area About" at 123 https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017).

1407 African Union (Commission) "Assessing Regional Integration VIII: Bringing the Continental Free Trade Area About" at 123-124 https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017).

1408 Mbengue and Schacherer 2017 (18) Journal of World Investment and Trade 414 at 419.

courts.

(i) The ISDS option

ISDS has many challenges, as indicated in Chapter 2 above. Hence SADC has removed it from the 2016 Annex 1, Brazil doesn't favour it, the EU is trying unsuccessfully to get rid of it, and India is restricting access to it. Despite the challenges, as well as SADC's removal of ISDS from the 2016 Annex 1, the reality is that some SADC Member States still have BITs and laws that allow access to it.[1409] There seems to be no major rush on the part of these Member States to terminate or renegotiate existing BITs, or to amend their laws to be in line with the 2016 Annex 1. Furthermore, there seems to be a horizontal shift towards state-state arbitration by SADC states that conclude ACFIs with Brazil, such as Angola and Malawi. SADC Member States do not seem to have a principled, consistent approach with regard to what to do with ISDS, given its removal from the 2016 Annex 1. It was also shown in Chapter 4 that SADC Member States laws differ with regard to the provision of ISDS to their investors. It was also shown therein that the laws of some Member States conflict with their REC treaty obligations.

Given the policy differences among SADC Member States with regard to ISDS, it is ideal to allow those Member States that wish to provide ISDS to their investors to do so. This is in line with the provisions of the PAIC,[1410] as well as the proposal of Ngobeni and Fagbayibo to the effect that host states may delay consent to ISDS, which will at least keep the door open for parties that wish to utilise it.[1411] South Africa also employed this

1409 For a database of BITs in force at see http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu (Date of use: 11 April 2018).

1410 See Article 42(1) PAIC.

1411 Ngobeni and Fagbayibo 2015 (19) Law, Democracy and Development 175 at 189.

approach in the new Promotion of Investment Act, by providing that ISDS can take place if the state so agrees[1412] while Namibia did the same (albeit with regard to the provision for local arbitration).[1413] This practice is not new, as it was shown in Chapter 4 that the internal laws of some host states provide access to ISDS if the host state agrees thereto.

No matter what one's views towards ISDS are, the reality in this regard is that the sovereignty of states implies host states must be allowed to regulate foreign investments and the resolution of investor-state disputes as they see fit, including by providing or denying ISDS for their foreign investors. In a nutshell, ISDS with all its challenges is not about to be removed from regulatory instruments. It is here to stay, at least for the foreseeable future. Its continued used will simply have to be managed (e.g. by the creation of an appeal mechanism, shortening the duration for the rendering of awards, reducing institutional costs, allowing states and other parties to sue investors or to counterclaim etc). Recommendations are made in this regard in Chapter 6 to the effect that ISDS can co-exist with litigation, as described in the recommendations.

(ii) The Local courts' option

It is controversial whether an investor must be obliged to refer an investor-state dispute to the courts of a host state or not.[1414] As shown in Chapter 2 above, central to the current debate regarding this issue is whether investor-state disputes must be referred to ISDS, the courts of host states, or both.[1415] Another way to phrase the issue is whether it is unfair and/or unjust to require investors to refer investor-state disputes to the courts of a host state, whether as a last resort or not. There is no cut-and-dried solution to the

1412 Section 13(5) Promotion of Investment Act.
1413 Section 28(4) Namibia Investment Promotion Act.
1414 See the discussion of the ISDS and litigation in Chapter 2 above.
1415 See the discussion of litigation and ISDS in Chapter 2.

resolution of this issue. The view adopted herein is that whether it is fair or unfair to make it mandatory for a foreign investor to refer an investor-state dispute to the courts of a host state depends primarily on the state of the rule of law in that state. This is further explained below.

Like ISDS, local litigation also has its downside. This includes the possibility that a host state may not guarantee an efficient and independent judicial system, or that local courts may lack independence, or be subject to political control.[1416] Furthermore, local litigation may take long to conclude e.g. due to a high caseload, thus resulting in costly litigation.[1417] However, unlike with ISDS, these challenges are not universal, as only some states would have one or more of these challenges. Furthermore, unlike with ISDS, the challenges relating to litigation are capable of being addressed on state by state basis.

There is ample support for the use of the courts of host states to resolve investor-state disputes, as shown below.

1416 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4, November 2017 at 11 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

1417 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4, November 2017 at 11 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

According to UNCTAD, there are five benefits to the use of the courts of host states.[1418] Firstly, such use puts foreign investors on an equal footing with domestic investors, as well as with other foreign investors that are not protected by investment contracts, or are from States that do not have BITs or TIPs with a host state.[1419] Secondly, litigation helps to establish a level playing field among foreign investors., by providing a similar forum to which their disputes with host states shall be referred.[1420] Thirdly, unlike arbitral tribunals, local courts are well-suited to applying and interpreting domestic laws.[1421] Fourth, ISDS is less needed in countries with well-developed and efficient legal systems, where the risk of denial of justice by virtue of a poor rule of law is low.[1422] Fifth, the use of local courts fosters the development of legal and judicial institutions of a host state.[1423] Finally,

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1418 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4, November 2017 at 11 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

1419 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4, November 2017 at 11 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

1420 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4, November 2017 at 11 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

1421 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4, November 2017 at 11 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

1422 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4, November 2017 at 11 http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

1423 United Nations Conference on Trade and Development "International Investment Agreements Issues Note", Issue 4, November 2017 at 11

local courts may, depending on the state of their rule of law, be an attractive forum for the adjudication of investor-state disputes.[1424]

At the continental level, the AU vigorously supports the use and development of domestic courts. Firstly, the African Charter mandates that human rights disputes must first be referred to local courts before they can be referred to the Commission.[1425] Secondly and most importantly, *Agenda 2063* envisages that by 2023, 70 percent of the populations of AU Member States must perceive their judiciaries to be independent, that they deliver judgments on a fair and timely basis, and that the rule of law is entrenched.[1426] Therefore, irrespective of the AU's or its Member States' views towards ISDS, the policy decision is that local courts must be used, and the rule of law must be promoted and protected.

Some scholars also support the use of the courts of host states, as shown below.

According to Chen, investors like to invest in states that have effective law-making, administrative and judicial institutions.[1427] Thus where states provide for ISDS, they have an incentive to improve the efficiency of their courts if the exhaustion of local remedies is a pre-requisite.[1428]

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http://investmentpolicyhub.unctad.org/Upload/Documents/IMPROVING%20INVESTMENT%20DISPUTE%20SETTLEMENT-%20UNCTAD%20POLICY%20TOOLS.pdf (Date of use: 10 April 2018).

1424 Salacuse 2007 (31) Fordham International Law Journal 138 at 163.

1425 Article 50, 56 African Charter.

1426 African Union (Commission) "Agenda 2063 First Ten-Year Implementation Plan 2014-2023" at 69 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf (Date of use: 16 November 2017).

1427 Chen 2017 (55) Columbia Journal of Transnational Law 547 at 570-572.

1428 Chen 2017 (55) Columbia Journal of Transnational Law 547 at 572.

Portfield suggests that requiring investors first to exhaust local remedies before referring disputes to ISDS can be of benefit to both the courts of a host state, as well as subsequent arbitral tribunals.[1429] The first benefit is that the use of the courts of host states supports of the rule of law in host states,[1430] and that it assists in the development of the legal systems of host states.[1431] Secondly, the use of the courts of host states improves the decision making of arbitral tribunals, by narrowing down facts and determining points of law, such as whether a contract was breached, or whether property rights have vested or not.[1432] Thirdly, the courts of host states may assist in the clarification of the relationship between domestic law and international law.[1433]

Schreuer suggests that arbitral tribunals and the courts of host states are not necessarily mutually exclusive.[1434] He opines that the courts of host states may be required to stay or compel arbitration proceedings.[1435] They may also be competent to issue provisional measures during arbitral proceedings.[1436] In non-ICSID arbitration, the courts of host states are inevitably required to recognise and enforce foreign arbitral awards in terms of the New York Convention.[1437] The courts of host states may also clarify issues of domestic law, such as by determining whether property or contractual rights actually

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1429 Portfield MC "Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?" 2015 (41) The Yale Journal of International Law Online 1-12.

1430 Portfield 2015 (41) The Yale Journal of International Law Online 1 at 5-6.

1431 Portfield 2015 (41) The Yale Journal of International Law Online 1 at 5-6.

1432 Portfield 2015 (41) The Yale Journal of International Law Online 1 at 6.

1433 Portfield 2015 (41) The Yale Journal of International Law Online 1 at 7.

1434 Schreuer C "Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration" 2005 (1) The Law and Practice of International Courts and Tribunals 1-17 at 17 para 7.

1435 Schreuer 2005 (1) The Law and Practice of International Courts and Tribunals 1 at 2.

1436 Schreuer 2005 (1) The Law and Practice of International Courts and Tribunals 1 at 2.

1437 Schreuer 2005 (1) The Law and Practice of International Courts and Tribunals 1 at 2.

exist or not.[1438] Furthermore, a claim based on denial of justice cannot be brought until domestic courts have had the opportunity to deal with a matter.[1439]

Salacuse opines that local courts may, if they are reformed (i.e. if their rule of law is acceptable), be an attractive forum for the adjudication of investor-state disputes.[1440]

Onyema also acknowledges the role of domestic courts in arbitrations.[1441] She opines that domestic courts are relevant before the commencement of arbitrations, during the arbitration proceedings as well as at the conclusion of the arbitration.[1442] Nonetheless, Onyema suggests that the role of domestic courts should be limited so that they play a less (interfering) role in arbitrations.[1443]

Vial and Blavi also accept that domestic courts are indispensable in arbitrations. But like Onyema, they opine that local courts should safeguard arbitration procedures without much interference therewith.[1444]

Even the ICSID Convention provides that a host state may as a pre-condition to providing consent to arbitration, require an investor to first exhaust local remedies before commencing ICSID arbitration.[1445]

1438 Schreuer 2005 (1) The Law and Practice of International Courts and Tribunals 1 at 2-3.

1439 Schreuer 2005 (1) The Law and Practice of International Courts and Tribunals 1 at 3.

1440 Salacuse 2007 (31) Fordham International Law Journal 138 at 163.

1441 Onyema 2014 (17) 5 International Arbitration Law Review 99-111.

1442 Onyema 2014 (17) 5 International Arbitration Law Review 1 at 10.

1443 Onyema 2014 (17) 5 International Arbitration Law Review 1 at 10-12.

1444 Vial G and Blavi F "New Ideas for the Old Expectation of Becoming an Attractive Arbitral Seat" 2016 (25) Transnational Law and Contemporary Problems 279-308 at 283-284.

1445 Article 26 ICSID Convention. For a discussion of this provision see GK Foster, 'Striking a

The customary international law also makes it mandatory that investor-state disputes must be referred to the courts of host states before diplomatic protection can be invoked. This explanation requires one to revisit the use of local courts in history of the resolution of investor-state disputes, because it is recommended in Chapter 6 that investor-state disputes be referred to local courts, if the state of the rule of law is acceptable. The lengthy explanation that follows is warranted.

As recently as the 1970's, investors were not in the same position to sue host states as they are today. As Salacuse and Sullivan state:

> …existing international law offered foreign investors no effective enforcement mechanism to pursue their claims against host countries that had injured or seized their investments or refused to respect their contractual obligations. As a result, investors had no assurance that investment contracts and arrangements made with host country governments would not be subject to unilateral change by those governments at some later time… Injured foreign investors who were unable to negotiate a satisfactory settlement, secure an arbitration agreement with a host state, or find satisfaction in the local courts had few options other than to seek espousal of their claims by the source country government…[1446]

During this era and specifically before the coming into being of the ICSID Convention, diplomatic protection was the main mechanism for the resolution of investor-state disputes.[1447] Diplomatic protection required an investor to exhaust local remedies before

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Balance between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration' 2011 (49) Columbia Journal of Transnational Law 201-267 at 212-213; Schreuer *The ICSID Convention: A Commentary* at 348-413.

1446 Salacuse and Sullivan 2005 (46) Harvard International Law Journal 67 at 70.

1447 See for example GK Foster "Striking a Balance between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration" 2011 (49) Columbia Journal of Transnational Law 201-267 at 209. For a discussion of the evolution of the protection of foreign investments see Miles K *The Origins of International*

its home state could be entitled to intervene.[1448] This requirement has been codified as Article 14 of the ILC Articles on Diplomatic Protection.[1449] The ICJ confirmed this requirement in the *ELSI*[1450] and *Interhandel*[1451] cases. The ICJ also considered, but did not apply this requirement in *Diallo* as the court found it unnecessary to do so.[1452] The SADC Tribunal confirmed the rule in *Mike Campbell*.[1453]

The exhaustion of local remedies rule has its roots in the 9th century rule that reprisals for injury to foreigners should only be authorised in the event of denial of justice in the jurisdiction where an alien suffered injury.[1454] This rule developed over the centuries,

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Investment Law: Empire, Environment and the safeguarding of Capital (Cambridge University Press Cambridge 2013) at 19-121.

1448 See Ngobeni 2012 (37) South African Yearbook of International Law 169 at 23.

1449 See United Nations (International Law Commission) "Draft Articles on Diplomatic Protection" Commentary at 80 para 1 http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf (Date of use: 04 September 2017); Ngobeni 2012 (37) South African Yearbook of International Law 169 at 23.

1450 I.C.J Reports 1989 15 at 42 para 50. For a discussion of this case see Murphy SD "The ELSI Case: An Investment Dispute at the International Court of Justice" 1991 (16) Yale Journal of International Law 391-452; Kubiatowski AS "The Case of Elettronica Sicula S.p.A: Toward Greater Protection of Shareholders' Rights in Foreign Investments" 1991 (29) Columbia Journal of Transnational Law 215-244; Palenzuela AL "The International Court of Justice and the Standing of Corporate Shareholders under International Law: Elettronica Sicula v. Raytheon (U.S. v. Italy)" 1991 (1) University of Miami Year Book of International Law 292-308.

1451 I.C.J Reports 1959 6 at 27. For a discussion of this case see Branning R "Comments on the Interhandel Case" 1958 (52) American Society of International Law 125-181; Briggs HW "Interhandel: The Court's Judgment of March 21, 1959, on the Preliminary Objections of the United States" 1959 (53) American Journal of International Law 547-563; Meron T "The Incidence of the Rule of Exhaustion of Local Remedies" 1959 (35) British Year Book of International Law 83-101; Simmonds KR "The Interhandel Case" 1961 (10) International Law Quarterly 495-547.

1452 Merits, Judgement, I.C.J Reports 2010 639 at 659 para 48.

1453 *Mike Campbell* at 19-22.

1454 For a discussion of the history of this rule see Cancado Trindade AA "Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law" 1976 (12) Belgian Review of International Law 499-527 at 501-507. For a discussion of the relationship between the exhaustion of local remedies and denial of

such that by 1875, it was an established rule that local remedies had to be exhausted before diplomatic protection could be invoked.[1455]

The basis of the exhaustion of local remedies rule is to ensure that where a host state is alleged to have violated the right(s) of an alien, it must have the opportunity to address the dispute within the framework of its domestic legal system.[1456] This was also recognised in *Mike Campbell*.[1457]

The exhaustion of local remedies rule acknowledges that it may not be ideal under certain circumstances to require an investor to first exhaust local remedies before diplomatic protection can be invoked. Hence Article 15 of the ILC Articles on Diplomatic Protection provides five exceptional circumstances where under local remedies need not be exhausted. Two of these exceptions that are relevant herein provide that local remedies need not be exhausted where:[1458]

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justice see Cancado Trindade AA "Denial of Justice and its Relationship to Exhaustion of Local Remedies in International Law" 1978 (53) Philippine Law Journal 404-420.

1455 Cancado Trindade 1976 (12) Belgian Review of International Law 499 at 517.

1456 See United Nations (International Law Commission) "Draft Articles on Diplomatic Protection" Commentary on Article 14 at 71 http://legal.un.org/ilc/documentation/english/reports/a6110.pdf (Date of use: 04 September 2017); D'Ascoli S and Scherr KM "The Rule of prior exhaustion of Local Remedies in the Context of Human Rights Protection" Italian Yearbook of International Law 2006 (16) 117-138 at 126; GK Foster "Striking a Balance between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration" 2011 (49) Columbia Journal of Transnational Law 201-267 at 211.

1457 *Mike Campbell* at 20.

1458 Article 15(a)-(b) United Nations (International Law Commission) "Draft Articles on Diplomatic Protection" http://legal.un.org/ilc/documentation/english/reports/a6110.pdf (Date of use: 04 September 2017).

(a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress; and

(b) There is undue delay in the remedial process that is attributable to the State alleged to be responsible.

The essence of the first exception above is that local remedies need not be exhausted if doing so will be futile or ineffective, or if there are no reasonably available remedies.[1459] The latter scenario encompasses situations where among others the courts of a host state lack judicial independence or are consistently biased against foreigners, or if the host state does not have an adequate judicial system.[1460] This exception was recognised in *Mike Campbell*.[1461]

The second exception above entails that an investor need not exhaust local remedies if there is an undue or unreasonable delay in the conclusion of proceedings for the exhaustion of local remedies.[1462] This exception was also recognised in *Mike Campbell*.[1463]

1459 See United Nations (International Law Commission) "Draft Articles on Diplomatic Protection" Commentary on Article 15, para 3 at 77 http://legal.un.org/ilc/documentation/english/reports/a6110.pdf (Date of use: 04 September 2017).

1460 See United Nations (International Law Commission) "Draft Articles on Diplomatic Protection" Commentary on Article 15, para 3 at 79 http://legal.un.org/ilc/documentation/english/reports/a6110.pdf (Date of use: 04 September 2017).

1461 *Mike Campbell* at 21.

1462 United Nations (International Law Commission) "Draft Articles on Diplomatic Protection" Commentary on Article 15, para 5 at 79-80 http://legal.un.org/ilc/documentation/english/reports/a6110.pdf (Date of use: 04 September 2017).

1463 *Mike Campbell* at 21.

The exceptions in Article 15(a)-(b) resonate with some of the findings made by the rule of law surveys regarding SADC Member States referred to in Chapter 4 above, in that they share the common themes of judicial independence and the efficiency of the courts of the host state. Therefore, it is reasonable that an investor should not be compelled to refer an investor-state dispute to the courts of a host state, under circumstances where the investor would be excused from doing so had the case been one based on diplomatic protection.

The exhaustion of the local remedies rule has over the years been incorporated into BITs and TIPs, by way of a provision that requires an investor to first exhaust local remedies prior to accessing ISDS. For example, SADC had such a provision in the form of Article 28(1) of the 2006 Annex 1.

It is clear from the above that whether ISDS is made available or not, the courts of host states are indispensable in the settlement of investor-state disputes. The acceptance of the central support role played by domestic courts in ISDS begs the question why, if such courts can be trusted with the support function they lend to ISDS, they cannot be trusted to resolve investor-state disputes entirely.

If one works from the premise that neither ISDS nor litigation is inherently better than the other, then there is a case to made for the retention of both mechanisms. However, retaining both mechanisms raises the question of, under what circumstances can investor-state disputes be referred to each of these forums?

Ideally, what is required is a mechanism that will, independently of the choice of an investor or a host state, determine when a dispute can be referred to the courts of a host

state, and when it cannot be so referred. This mechanism must take into account the state of the rule of law in a host state.

Some rule of law surveys assess the rule of law in various jurisdictions, including African states.[1464] Within the AU, the APRM has as one its roles the evaluation and monitoring of the rule of law in Member States.[1465] The IIAG also conducts annual surveys that include the rule of law in Africa.[1466] Therefore, AU Members are used to having their state of rule of law assessed, and should therefore welcome a new rule of law scoreboard if they see its value.

It was also shown above that the AU has as one its *Agenda 2063* objectives, the improvement of the rule of law in all Member States by 2023.[1467] However, except for stating member States shall undertake APRM reviews, the AU does not propose an independent mechanism that will foster the development of the rule of law in Member States. In other words, the objective to improve the rule of law is there, but the means to achieve it are not convincingly spelt out. It is shown in Chapter 6 that the APRM cannot on its own foster the rule of law. And it is noteworthy that the AU does not have an alternative mechanism in this regard.

1464 See the relevant discussion in Chapter 4 above.

1465 See the discussion of the APRM in Chapter 4.

1466 See http://mo.ibrahim.foundation/iiag/downloads/ (Date of use: 11 April 2018). The IIAG was used in the discussion undertaken in Chapter 4 above.

1467 See African Union (Commission) "Agenda 2063 First Ten-Year Implementation Plan 2014-2023" at 69 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf (Date of use: 16 November 2017).

Of the different rule of law scoreboards and surveys that were utilised herein, the Gaffney Rule-of-Law-Proposal deserves mention.[1468] This proposal suggests the use of a treaty-based rule of law rating system, similar to sovereign rating systems.[1469] The system would indicate whether there is a significant risk that the courts of a host state would not uphold the rule of law.[1470]

The common denominator between the rationale for the use of local courts discussed above, and the Gaffney proposal, is that both are in agreement that investor-state disputes must be referred to the courts of host states unless there will be a denial of justice if such courts are utilised.

Schwieder is of the view that the Gaffney Rule-of-Law-Proposal will not add value in developed states, since their justice systems are often credible, transparent and independent.[1471] Therefore, investors in developed states can dispense with access to ISDS, since these states have a high rule of law rating, which will rule out the use of ISDS.[1472] This view is in line with that adopted in this study.

However, Schwieder opines that the Gaffney proposal may reduce investment transaction costs in developing states, by providing investors with reliable, free

1468 Available at http://ccsi.columbia.edu/files/2013/10/No-149-Gaffney-FINAL.pdf (Date of use: 18 September 2017); Schwieder 2016 (55) Columbia Journal of Transnational Law 178 at 213-218.

1469 Gaffney "Rule of Law Proposal" at 1 http://ccsi.columbia.edu/files/2013/10/No-149-Gaffney-FINAL.pdf (Date of use: 18 September 2017); Schwieder 2016 (55) Columbia Journal of Transnational Law 178 at 214.

1470 Gaffney "Rule of Law Proposal" at 1 http://ccsi.columbia.edu/files/2013/10/No-149-Gaffney-FINAL.pdf (Date of use: 18 September 2017); Schwieder 2016 (55) Columbia Journal of Transnational Law 178 at 214; Schwieder 2016 (55) Columbia Journal of Transnational Law 178 at 214.

1471 Schwieder 2016 (55) Columbia Journal of Transnational Law 178 at 215.

1472 Schwieder 2016 (55) Columbia Journal of Transnational Law 178 at 216.

information regarding the rule of law status in target host states.[1473] Otherwise, host states that do not improve their rule of law will continue to face ISDS claims.[1474]

The Gaffney Rule-of-Law-Proposal, as well as the rule of law surveys discussed in Chapter 4 above inspire the proposal that will be made in Chapter 6, regarding the mechanism that should regulate access to the courts of host states as proposed therein.[1475]

(iii) The Sub-regional courts' option

The status quo in Africa is that there are sub-regional (or REC) courts to which investor-state disputes may be referred. These are the SADC Tribunal, the CCJ[1476] and the EACJ.[1477] Despite the fact that investors do not have access to the SADC Tribunal anymore, investors in SADC who reside in Member States that have cross membership with either COMESA or the EAC have access to the CCJ or the EACJ respectively. Investors who are residents of SADC/COMESA Member States, namely the Comoros, DRC, Madagascar, Malawi, Mauritius, Eswatini, Seychelles, Zambia and Zimbabwe can refer investor-states disputes to the CCJ, while those who are residents of SADC/EAC, namely Tanzania, can access the EACJ. Therefore, it is necessary to evaluate if the CCJ or the EACJ are effective forums for the resolution of investor-state disputes or not. In order to do so, the jurisdiction of the CCJ and EACJ will be briefly considered, noting that it is impossible to fully analyse them herein.[1478]

1473 Schwieder 2016 (55) Columbia Journal of Transnational Law 178 at 215.

1474 Schwieder 2016 (55) Columbia Journal of Transnational Law 178 at 216-218.

1475 See Recommendation 6.2.3 in Chapter 6 below.

1476 The court is established in terms of Article 19 of the COMESA Treaty. Its functioning is provided for in Articles 20-26. See http://comesacourt.org/ (Date of use: 18 May 2017).

1477 These courts are discussed below in this section.

1478 For a discussion of the CCJ and EACJ see Gathii JT "The Under-Appreciated

The CCJ[1479] was established in 1994 in terms of Article 7(1) (c) and 19 of the COMESA Treaty.[1480] Since 1998, the CCJ was based at the COMESA Secretariat in Lusaka, Zambia, but in 2003, the COMESA Authority resolved to relocate the court to Khartoum, Sudan.[1481] This relocation took place in 2015 when the current bench was inaugurated.[1482]

The object of the CCJ is to ensure legal compliance in the interpretation and application of the COMESA Treaty.[1483] The functioning of the CCJ is regulated by the CCJ Rules of Procedure 2016.[1484] The CCJ has a First Division and an Appellate Division.[1485] The

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Jurisprudence of African Trade Judiciaries" 2010 (12) Oregon Review of International Law 245-281 at 1-22 http://lawecommons.luc.edu/facpubs (Date of use: 30 February 2018). Please note that the page numbers refer to those in the web version available in the link provided.

1479 See http://comesacourt.org/ (Date of use: 10 December 2017); http://comesacourt.org/comesa-court-of-justice-inaugurated/ (Date of use: 11 December 2017).

1480 See http://www.comesa.int/comesa-court-of-justice__trashed/ (Date of use: 11 December 2017).

1481 http://www.comesa.int/comesa-court-of-justice__trashed/ (Date of use: 11 December 2017).

1482 See http://comesacourt.org/focus-on-sudan-as-the-comesa-court-holds-series-of-events/ (Date of use: 11 December 2017).

1483 Article 19 COMESA Treaty.

1484 COMESA Court of Justice "Rules of Procedure 2016" http://www.comesa.int/other-publications/ (Date of use: 18 May 2017).

1485 Article 19(2) COMESA Treaty.

First Division comprises of seven judges,[1486] while the Appellate Court has five judges.[1487] Judges hold office for a renewable period of five years,[1488]

The CCJ has jurisdiction over matters that may be brought before it pursuant to the COMESA Treaty.[1489] Any person who is resident in a COMESA Member State may refer for determination by the CCJ the legality of any act, regulation, directive, or decision of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of the Treaty.[1490] However, such person must first exhaust local remedies before the courts of the host state.[1491] The decision of the CCJ regarding the interpretation of the COMESA Treaty shall take precedence over interpretations by the courts of Member States.[1492]

The COMESA Treaty provides for the arbitration of disputes to which COMESA or its institutions are a party, or to which Member States are parties.[1493] Natural and legal persons can therefore not access this arbitration mechanism. Despite a review of the

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1486 Article 20(1) COMESA Treaty; http://comesacourt.org/composition/ (Date of use: 11 December 2017). These are Principal Judge Lady Justice Qinisile Mabuza (Eswatini), Justice Ali Sulaiman Mohamed (Ethiopia), Justice Mary N. Kasango (Kenya), Justice Dr. Leonard Gacuko (Burundi), Justice Clotilde Mukamurera (Rwanda), Justice Chinembiri Energy Bhunu (Zimbabwe), see http://comesacourt.org/focus-on-sudan-as-the-comesa-court-holds-series-of-events/ (Date of use: 11 December 2017). For the tenure of judges see Articles 21 and 22 COMESA Treaty.

1487 Article 20(1) COMESA Treaty; http://comesacourt.org/composition/ (Date of use: 11 December 2017). These are Judge President Lady Justice Lombe Chibesakunda, (Zambia), Justice Abdalla Elamin El Bashir (Sudan), Justice Dr. Michael Charles Mtambo (Malawi), Justice David Chan Kan Cheog (Mauritius), Justice Dr. Wael Marodouh Hassan Rady (Egypt), see http://comesacourt.org/focus-on-sudan-as-the-comesa-court-holds-series-of-events/ (Date of use: 11 December 2017).

1488 Article 21(1) COMESA Treaty.

1489 Article 23 COMESA Treaty.

1490 Article 26 COMESA Treaty.

1491 Article 26 COMESA Treaty.

1492 Article 29 COMESA Treaty.

1493 Article 28 COMESA Treaty.

COMESA 2003 Arbitration rules during 2017, it appears that the scope of the review is not intended to grant natural and legal persons access to arbitration.[1494] Recently, the COMESA Treaty was amended to allow for the arbitration of investor-state disputes.

The CCJ is well placed as a forum for the resolution of investor-state disputes, primarily because natural and legal persons have the right to refer cases to it, and the COMESA Treaty provides certain rights to investors, including the right to FET[1495] and compensation upon expropriation of an investment.[1496] However, it requires sufficient resources in order to discharge its functions.

The EACJ is established in terms of Article 9 of the EAC Treaty.[1497] The EACJ has its temporary seat in Arusha, Tanzania.[1498] The EACJ is an *ad hoc* court, and will only be a full-time court when it has sufficient caseload to justify a full-time operation.[1499] The EACJ has a First Instance Division and an Appellate Division.[1500] The First Instance Division is comprised of a maximum of ten judges,[1501] while the Appellate Division has a maximum of five judges.[1502]Judges hold office for a maximum period of seven years.[1503]

1494 See COMESA "Call for Applications Consultant to Review COMESA Court of Justice Arbitration Rules" at 3-4 http://comesacourt.org/wp-content/uploads/2017/04/170403_Call-for-Apllications-Consultant-to-Review-CCJ-Arbitration-Rules-N.pdf (Date of use 30 January 2018). The outcome of the review is not public at this stage.

1495 Article 159(1) (a) COMESA Treaty.

1496 Article 159(3) (b) COMESA Treaty.

1497 For a discussion of the operation of the court see Articles 23-47 EAC Treaty.

1498 http://eacj.org/?page_id=19 (Date of use: 10 December 2017).

1499 http://eacj.org/?page_id=19 (Date of use: 10 December 2017).

1500 Article 23(2) EAC Treaty.

1501 Article 24(2) EAC Treaty. Current judges are Hon. Lady Justice Monica Mugenyi (Principal Judge), Hon. Justice Isaac Lenaola (Deputy Principal Judge), Hon. Justice Faustin Ntezilayayo, Hon Mr Justice Fakihi Abdalla Jundu, Hon. Mr Justice Audace Ngiye, see http://eacj.org/?page_id=1135 (Date of use: 11 December 2017).

1502 Article 24(2) EAC Treaty. Current judges are Hon. Justice Dr Emmanuel Ugirashebuja

Natural and legal persons that are resident in the EAC may refer for determination by the court the legality of a regulation, directive, decision or action of a Member State or an institution of the EAC on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the EAC Treaty.[1504] A litigant must bring such proceedings within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the litigant, as the case may be.[1505] Unlike in the case of the CCJ, there is no requirement that a litigant must first exhaust local remedies.[1506]

Parties may refer disputes to the EACJ for arbitration, including investor-state disputes.[1507] Arbitration takes place in terms of the EACJ Arbitration Rules 2012.[1508] It appears that this facility is not being utilised.

However, the EACJ faces various challenges, such as limited financial resources, lack of respect for court decisions by Member States, lack of security of tenure of judges, staff shortages, limited jurisdiction, lack of physical and functional visibility etc.[1509]

(President of the Court), Hon. Justice Liboire Mkurunziza (Vice-President of the Court), Hon. Mr Justice Edward Rutakangwa, Hon. Justice Aaron Ringera, Hon. Justice Geoffrey W.M Kiryabwire (Judge Appellate Division), see http://eacj.org/?page_id=1135 (Date of use: 11 December 2017).

1503 Article 25(1) EAC Treaty.

1504 Article 30(1) EAC Treaty.

1505 Article 30(2) EAC Treaty.

1506 Article 26 COMESA Treaty.

1507 Article 32(c) EAC Treaty.

1508 Available at http://eacj.org//wp-content/uploads/2014/05/Arbitration-Rules-of-EACJ.pdf (Date of use: 30 January 2018). See also http://blogaila.com/2016/03/18/the-east-african-court-of-justices-arbitral-jurisdiction-over-commercial-contract-disputes-by-dr-faustin-ntezilyayo/ (Date of use: 30 January 2018).

1509 See East African Court of Justice "Strategic Plan 2010-2015" at 14-18 http://eacj.org/wp-content/uploads/2017/07/EACJstrategicplan2010-15.pdf (Date of use: 10 December 2017).

Furthermore, Member States and policy makers, in particular, seem not to appreciate the role and place of the EACJ.[1510] The EACJ is therefore operationally compromised, although it is noted that the court's strategic plan aims to address the above challenges.[1511]

Irrespective of the suitability or otherwise of the CCJ and the EACJ, the reality is that these courts cannot fill the void left by the SADC Tribunal, since they are not accessible to all SADC residents. This leaves SADC investors without access to their own sub-regional court.

The issue under discussion is not limited to the efficiency of the CCJ, EACJ or SADC Tribunal. Rather, the high-level issue is whether sub-regional courts are an effective forum for the resolution of investor-state disputes in SADC and Africa as a whole. The view adopted herein that the answer is in the negative, as explained below.

In addition to the resource challenges indicated above, the use of sub-regional courts will increase the duration and cost of investor-state litigation, particularly in the context of the proposals made in this study where the use of local and continental courts is proposed. For example, in South Africa, there is a three-tier superior court system comprising of the High Court,[1512] Supreme Court of Appeal[1513] and finally the Constitutional Court.[1514] Thus a claimant will have to first exhaust this judicial system,

1510 East African Court of Justice "Strategic Plan 2010-2015" at 17 http://eacj.org/wp-content/uploads/2017/07EACJstrategicplan2o1o-15.pf (Date of use: 10 December 2017).

1511 East African Court of Justice "Strategic Plan 2010-2015" at 20-26 http://eacj.org/wp-content/uploads/2017/07EACJstrategicplan2o1o-15.pf (Date of use: 10 December 2017.

1512 See http://www.judiciary.org.za/high-courts.html (Date of use: 8 January 2018).

1513 See http://www.justice.gov.za/sca/ (Date of use: 8 January 2018).

1514 See http://www.constitutionalcourt.org.za/site/home.htm (Date of use: 8 January 2018).

followed by the SADC Tribunal or other sub-regional court, and finally the ACJ&HR. Navigating these tribunals will take years and cost of lot of money in legal fees and other indirect costs. The preferred view is that sub-regional courts could at least be turned into local divisions of a continental court such as the ACJ&HR. This will reduce travelling time and costs for litigants who can access the court in their areas.

Furthermore, the SADC Tribunal, CCJ and EAC are not harmonised. Each has different jurisdiction, rules of procedure, access to resources, and varying levels of judicial expertise. This encourages forum shopping, whereby litigants who are able to so can choose one court over another due to for example the fact that the chosen court is seen as being more efficient. This is not a sustainable status quo when one takes a continental view of the matter.

In addition, if sub-regional courts are to be maintained, a continent-wide network of thereof will have to be established, to ensure that litigants throughout Africa have access to a sub-regional court in their area. While this is possible in theory, it is doubtful that the necessary resources can be put in place to create and operate such a network. On a practical level, the fact that the CCJ and EACJ have light caseloads and are under-resourced, as shown in this section, shows that these courts are not geared to be as efficient as they should be. The reality is that RECs, the AU and its Member States do not have the resources to establish a continent-wide network of sub-regional courts.

In conclusion, for reasons stated above, the use of sub-regional courts for the resolution of investor-state disputes is not effective or ideal in the context of regional integration that is taking place in Africa. A different solution will have to be found.

The elimination of sub-regional courts in this discussion leaves the continental option of utilising ACJ&HR[1515] for consideration. This discussion will now be undertaken.

(iv) The Continental courts' option

The ACH&PR was formed in order to give effect to the protection of the rights provided in the African Charter.[1516] The Court commenced operations in November 2006 in Ethiopia, but it relocated to Arusha, Tanzania in August 2007.[1517] The Court delivered its first judgment in 2009, and by 16 January 2018, it had received in excess of 194 cases, of which 43 were finalised,[1518] while the rest were pending.[1519]

The jurisdiction of the ACH&PR covers all cases and disputes concerning the interpretation and application of the African Charter, the protocol establishing the ACH&PR, and any other Human Rights instrument ratified by respondent Member States.[1520] The ACH&PR may also render advisory opinions on any legal matter relating to the African Charter or relevant human rights instruments to Member States of the AU, the AU or any of its organs, and any African Organisation recognised by the AU.[1521] The

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1515 Article 2 of the Protocol on the Statute of the African Court of Justice and Human Rights of 2008 merges the ACH&PR and the Court of Justice of the African Union to form the ACJ&HR. Articles 4-7 of the protocol provide the transitional arrangements leading up to the coming into effect of the ACJ&HR. The protocol is available at https://www.au.int/web/en/treaties/protocol-statute-african-court-justice-and-human-rights (Date of use: 18 May 2017).

1516 Article 1 African Charter.

1517 http://en.african-court.org/ (Date of use: 10 July 2017).

1518 http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#finalised-cases of (Duse: 16 January 2018).

1519 http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#pending-cases (Date of use: 16 January 2018).

1520 Article 3 Protocol to African Charter on Human and Peoples' Rights on The Establishment of an African Court On Human and Peoples Rights; the Court's website is http://en.african-court.org/ (Date of use: 10 July 2017).

1521 Article 4 Protocol to African Charter on Human and Peoples' Rights on The

sources of law to be applied by the ACH&PR are the African Charter and relevant human rights instruments.[1522]

Non-Governmental Organisations that have observer status before the Commission, as well as natural and legal persons, may institute proceedings before the court if the respondent Member State has lodged a declaration consenting to such action in terms of Article 34(6) of the protocol.[1523] The court dismissed a number of cases, some investment-related, on this basis.[1524] Current practice, as demonstrated by the number of submitted declarations, shows that the Member States are reluctant to allow natural and legal persons to sue them at this court. As of May 2017, only eight Member States had lodged declarations whereby they consent to the jurisdiction of the Court in cases referred by natural persons and organisations.[1525] For the moment, this is a major weakness in terms of the value of this court to investors.

In the medium term, any weaknesses of the ACH&PR and its protocol will be short-lived, as the protocol establishing the ACH&PR is in the process of being replaced by the protocol establishing the ACJ&HR, which is discussed next.

1522 Establishment of an African Court On Human and Peoples Rights.
Article 7 Protocol to African Charter on Human and Peoples' Rights on The Establishment of an African Court On Human and Peoples Rights.

1523 Article 5(3) Protocol to African Charter on Human and Peoples' Rights on The Establishment of an African Court on Human and Peoples Rights.

1524 Finalised cases can be found at http://en.african-court.org/index.php/cases/2016-10-17-16-18-21#finalised-cases (Date of use: 20 June 2017). Some of the cases that were dismissed for lack of jurisdiction are *Baghdadi Ali Mahmoud v The Republic of Tunisia*, Application 007/2012; *Youssef Ababou v Kingdom of Morocco*, Application 007/2011; *Amir Adam Timan v The Republic of the Sudan*, Application 005/2012; *Delta International SA and others v The Republic of South Africa*, Application 002/2012; *National Convention of Teachers Trade Union v The Republic of Gabon*, Application 012/2011.

1525 These are: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania and Tunisia (http://en.african-court.org/index.php/12-homepage1/1-welcome-to-the-african-court) (Date of use: 10 July 2017).

The ACJ&HR is the result of a merger of the ACH&PR and the ACJ, which was implemented by Articles 1 and 2 of the Protocol on the Statute of the African Court of Justice and Human Rights of 2008.[1526] The ACJ&HR is expected to be operational during 2030.[1527] It shall come into effect upon ratification by 15 Member States.[1528] At the time of writing, only six Member States had ratified the protocol establishing the ACJ&HR.[1529] The term of the judges of the ACH&PR shall end when the judges for the ACJ&HR are elected and sworn in.[1530] Unconcluded cases under the ACH&PR shall be transferred to the ACJ&HR.[1531] The ACJ&HR shall be the main judicial organ of the AU.[1532]

The ACJ&HR is divided into three sections: a General Affairs Section a Human and Peoples Rights Section and International Criminal Law Chamber.[1533] The General Affairs Section hears all matters except those relating to human rights in terms of Article 33 of the Statute of the Court, while the Human and Peoples' Rights Section hears human

1526 For a critique of this merger see Naldi GJ and Magliveras KD "The African Court of Justice and Human Rights: A Judicial Curate's Egg" 2012 (9) International Organizations Law Review 383-449.

1527 African Union (Commission) "Agenda 2063 Framework Document" at 171, Target for 2063 No. (e) http://www.un.org/en/africa/osaa/pdf/au/agenda2063-framework.pdf (Date of use: 15 November 2017).

1528 Article 9 Protocol on the Statute of the African Court of Justice and Human Rights. As of March 2017, only 6 Member States had ratified the protocol, namely Benin, Burkina Faso, Djibouti, Lesotho, Liberia and Madagascar (https://www.au.int/web/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pd)(Date of use: 10 July 2017). Is this the latest ratification status?

1529 https://www.au.int/web/sites/default/files/treaties/7792-sl protocol_on_statute_of_the_african_court_of_justice_and_hr_0.pdf (Date of use: 18 May 2017).

1530 Article 4 Protocol on the Statute of the African Court of Justice and Human Rights.

1531 Article 5 Protocol on the Statute of the African Court of Justice and Human Rights.

1532 Article 9 Protocol on the Statute of the African Court of Justice and Human Rights.

1533 Article 16 Statute of the African Court of Justice and Human Rights. Please note that during 2014 in Malabo, the AU amended the protocol by adding the International Criminal Law Chamber.

rights matters in terms of Article 34 of the Statute of the Court.[1534] The jurisdiction of the ACJ&HR covers the interpretation and application of the Constitutive Act, the interpretation, application or validity of other AU Treaties and all subsidiary legal instruments adopted within the framework of the AU or the OAU and many areas.[1535] Individuals or relevant NGOs accredited to the AU or to its organs may refer cases to the court, subject to the provisions of Article 8 of the Protocol establishing the Court. [1536] The sources of law to be applied by the ACJ&HR are the AU Constitutive Act, International treaties, whether general or particular, ratified by the contesting States etc. [1537]

Despite the fact that among others, natural and legal persons do not have an automatic right to refer cases to the ACJ&HR (and the ACH&PR), the ACJ&HR is an ideal continental court for the resolution of investor-state disputes, for the following reasons. The argument in support of a single continental court is not new.[1538]

First and foremost, the ACJ&HR is the judicial organ of the AU and the AEC.[1539] The Third Guiding Principle of a AfCFTA Institutional Structure provides that the AfCFTA Institutional Structures must be accessible to the people, and must leave no one behind.[1540] On this basis, UNECA, AU and the AfDB envision that the general public should have access to the ACJ&HR to enforce AfCFTA obligations.[1541] They state that:

1534 Article 17 Statute of the African Court of Justice and Human Rights.

1535 Article 28 Statute of the African Court of Justice and Human Rights.

1536 Article 30 the Statute of the African Court of Justice and Human Rights.

1537 Article 31 the Statute of the African Court of Justice and Human Rights.

1538 See for example Kindiki K "The Proposed Integration of the African Court of Justice and the African Court on Human and Peoples' Rights: Legal Difficulties and Merits" 2007 (15) Journal of International and Comparative Law 138-146 at 144-145.

1539 Article 18(1) AEC Treaty.

1540 African Union (Commission) "Assessing Regional Integration in Africa VIII Bringing the Continental Free Trade Area About" at 119

> … The proposed structures must extend down to the country level and give individuals the right to enforce compliance of CFTA obligations in national courts. However, appeals could be addressed at regional courts and subsequently the African Court of Justice and Human Rights so that citizens see the bigger picture on regional and continental jurisprudence developed through the additional layers of integration. In addition to national institutions, this will also require dispute settlement arrangements that are accessible to individuals…[1542]

As can be seen from the passage cited above, the AfCFTA Architecture as proposed, contemplates that the public can enforce compliance with AfCFTA obligations via their national courts.[1543] It is said that this will "decentralise compliance".[1544] In order to give effect to this, AfCFTA obligations will be made part of domestic law.[1545]

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https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017).

1541 The reader is advised to refer to the AfCFTA Agreement with regard to the final position in this regard.

1542 African Union (Commission) "Assessing Regional Integration in Africa VIII Bringing the Continental Free Trade Area About" at 119 https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017).

1543 See also African Union (Commission) "Assessing Regional Integration in Africa VIII Bringing the Continental Free Trade Area About" at 126 https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017).

1544 African Union (Commission) "Assessing Regional Integration in Africa VIII Bringing the Continental Free Trade Area About" at 126 https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017).

1545 African Union (Commission) "Assessing Regional Integration in Africa VIII Bringing the Continental Free Trade Area About" at 126 https://www.uneca.org/sites/default/files/PublicationFiles/aria8_eng_fin.pdf (Date of use 15 December 2017).

The fact that the current jurisdiction of the ACJ&HR will need to be amended as proposed herein is not an obstacle, as the AU Assembly can amend the jurisdiction of the ACJ&HR at any time.[1546] Therefore, all that is required to position the ACJ&HR to adjudicate investor-state disputes is a decision of the AU Assembly.

Furthermore, the ACJ&HR is a neutral, supranational court established by all AU Member States. It was not imposed on them. This gives it credibility among the Member States, and also depoliticises disputes by removing them from the courts of host states.

Most importantly, the use of the ACJ&HR will promote the rule of law in Africa. This is due to the fact that judges in the ACJ&HR are appointed through a democratic and credible process,[1547] judicial independence in terms of international law is enshrined,[1548] judges enjoy diplomatic immunity throughout Africa during their term of office,[1549] and a judge can only be suspended or removed from office by a two-thirds decision of the rest of the judges.[1550] Member States are obliged to comply with and execute a judgment of the court.[1551] Furthermore, by using existing ACJ&HR facilities, the court will not be exclusively for the use of investors to sue host states, as is the case with ISDS institutions, which are created for the benefit of foreign investors only.

The statute of the ACJ&HR provides for the appointment of judges who are competent in international law, which encompasses the field of investor-state disputes. Thus, there will be no need to appoint judges with additional skills and competencies. Furthermore, the

1546 Article 18(4) AEC Treaty.
1547 See Articles 6 and 7 of Statute of the African Court of Justice and Human Rights.
1548 Article 12 Statute of the African Court of Justice and Human Rights.
1549 Article 15 Statute of the African Court of Justice and Human Rights.
1550 Article 9 Statute of the African Court of Justice and Human Rights.
1551 Article 46 Statute of the African Court of Justice and Human Rights.

fact that the judges will not be limited to adjudicating investment cases means that their expertise will be better utilised by all litigants.

Having a single judicial authority for the continent will also make it easy for resources to be channeled towards the court, instead of the status quo of having multiple regional courts and tribunals, each of which requires (and presently lacks) scarce resources.

As stated above, existing sub-regional courts are ideally placed to act as divisions of the ACJ&HR. This will enable litigants to have access to the ACJ&HR in their regions, which will save them travel time and costs. This will also bring the ACJ&HR closer to the people, and enable it to live up to its status as the court of the continent. Therefore, the use of the ACJ&HR will not entail that existing REC courts' resources will go to waste. Establishing divisions of the ACJ&HR will also reduce the caseload of the ACJ&HR, thereby leading to the speedy conclusion of cases, which in turn will save litigants time and money. This is also in line with the AfCFTA approach that RECs and their resources shall be gradually subsumed into the continental framework.

5.4 CONCLUSION

There is clearly not a one-size-fits-all solution to the challenges facing the regulation of foreign investments in SADC or anywhere in the world for that matter. This applies to the mechanism for the resolution of investor-state disputes as well. SADC, together with its partners in the AfCFTA, must be innovative and bold in finding a lasting solution to the future regulation of foreign investments. It must find a solution that is unique to its African circumstances, and not blindly import solutions that were invented by others. The EU, Brazil, and India have demonstrated that it is possible to do this. These issues are

inherently complex, and no one state or region can claim to have found a solution thereto. Furthermore, no solution can appease all stakeholders.

Given the continental integration thrust towards the formation of the AEC that is gaining momentum by the day, the AU is best-placed to drive the regulation of foreign investments in Africa. Therefore, a legally binding regulatory instrument, such as the investment protocol that will be negotiated to from part of the AfCFTA, is the ideal instrument to regulate foreign investments in SADC and the rest of Africa. Similarly, the ACJ&HR as the judicial organ of the AU is equally well placed to adjudicate investor-state disputes. The conclusion of the AfCFTA Agreement, and the negotiation of the AfCFTA investment protocol confirm the view adopted in this study, to the effect that foreign investments must be regulated at AU level.

Nonetheless, the local courts of host states must not be ignored, as it was shown above that they are indispensable for the resolution of investor-state disputes.

ISDS too must, despite its challenges not be written off, as there are definitely SADC, AU Member States and RECs that prefer to use it. This point is demonstrated by the deadlock reflected in the dispute resolution mechanism of the PAIC, as well as the continuing conclusion of BITs that provide for ISDS by some SADC Member States.

What is needed is not a choice of ISDS or local courts, because the circumstances of each host state are not the same. Rather, what is needed is a mechanism that determine when an investor-state dispute can be referred to a court, bearing in mind the state of the rule of law in a host state.

The next chapter will summarise the findings made in this study and will make recommendations following SADC's options analysed above.

CHAPTER 6

FINDINGS AND RECOMMENDATIONS

6.1 SUMMARY OF FINDINGS

This study aims to recap the answers to the research questions raised in Chapter 1. These questions were answered in the course of the discussions undertaken in Chapters 2 through 5. The following is a summary of the findings made in each chapter in this regard.

Chapter 2 introduced the theoretical foundation of the study. It was shown therein that a host state cannot rely on its internal law to avoid complying with its international obligations. Secondly, it was shown that a host state that breaches its international obligations, such as by undertaking an unlawful expropriation, is liable to pay reparation and not compensation. Thirdly, the argument was made that the definition of an investment as applied in ICSID decisions including *Salini* may be applicable to non-ICSID arbitration.

Furthermore, it was shown that some states are moving towards the inclusion of the *Salini* criteria in their investment treaty practice. Finally, it was shown that litigation and ISDS have their pros and cons, and that circumstances should determine when each of these can be an appropriate mechanism for the resolution of investor-state disputes.

Chapter 3 analysed the provisions of 2006 and 2016 Annex 1, and compared these to similar regulatory instruments from other jurisdictions. It was found that the 2016 Annex 1 has reduced the protection that investors had in terms of the 2006 Annex 1, by removing access to ISDS and leaving the courts of host states as the only forum to

which investor-state disputes can be referred. Technically, the 2016 Annex lags behind similar instruments in terms of the way it regulates foreign investments, such as by failing to address treaty shopping by investors.

It was also found that SADC's decision to refer investor-state disputes to the courts of host states may be controversial, but that there is nothing wrong in principle with such a decision.

Finally, it was found that the regulation of foreign investments by means of either version of Annex 1 is not satisfactory, due to the failure of Member States to harmonise their laws and practices therewith.

Chapter 4 analysed the remedies that an investor would have in terms of the laws of SADC Member States, in the event of an expropriation. It was found that the security of foreign investments at Member State level is unsatisfactory, in that Member State laws are not harmonised with either version of Annex 1. It was found that as a result of the conflict between Annex 1 and Member State investment laws, the relevant version of Annex 1 will prevail over the investment laws. It was also found that the rule of law in most SADC Member states is not satisfactory. This risks denial of justice for investors who may be compelled to use the courts of these states, and is a possible contravention of Article 4(c) of the SADC Treaty.

Chapter 5 analysed recent developments in Brazil, the EU, and India with regard to the regulation of the resolution of investor-state disputes. The chapter analysed the lessons that SADC can learn from these developments, and the options that SADC has, with regard to the future regulation of foreign investments and the mechanism for the

resolution of investor-state disputes. It was found that SADC could learn various lessons, which are indicated therein. It was also found that SADC has the option of regulating of foreign investments at REC level by means of Annex 1 (the status quo), or of regulating foreign investments at T-FTA level (which is not different to the status quo), or of doing so at AfCFTA/AU level. As far as the resolution of investor-state disputes is concerned, the options that are open to SADC were found to be litigation before the courts of host states, ISDS, the SADC Tribunal (revitalisation thereof), or the ACH&PR/ACJ&HR.

The regulation of foreign investments at AU level by means of an AfCFTA investment protocol, as well as the referral of investor-state disputes to local courts, the optional provision for ISDS and the use of the ACJ&HR were preferred. With regard to the referral of investor-state disputes to local courts, it was found that there is a need for a mechanism that will determine when such disputes can be referred to local courts, and when they cannot be so referred, with due consideration to the state of the rule of law in a host state.

6.2 RECOMMENDATIONS REGARDING THE REGULATION OF FOREIGN INVESTMENTS AND THE RESOLUTION OF INVESTOR-STATE DISPUTES IN SADC

This section will make four recommendations with a view to addressing the challenges identified in the Problem Statement. The areas that are central to the security of foreign investments in SADC are the level at which foreign investments are regulated, and the

mechanism for the resolution of investor-state disputes.[1552] Therefore, the recommendations are focused on these areas. These recommendations are addressed to the AU, SADC, the T-FTA and their respective Member States.

In addition to contribute to the discourse on the issues covered by this study, the unique contribution hereof to the body of knowledge is the use of the proposed African Justice Scoreboard (AJS) as a gateway for access to the local courts of host states. The core of the recommendations is that foreign investments in SADC must be regulated by an AfCFTA investment protocol,[1553] and that investor-state disputes must be referred to the courts of host states (as determined by the AJS), or to optional ISDS, the ACJ&HR or other forum.

It is recommended that:

6.2.1 Foreign investments in Africa be regulated by means of an AfCFTA investment protocol:

The motivation for this proposal is provided in Chapter 5 above.[1554] It was found therein that in view of the formation of the AfCFTA and the AEC, it is preferable to regulate foreign investments at continental (AU) level than at REC level. The core motivation herein is that the regulation of foreign investments at AU level will create a single regime for the regulation of foreign investments, and thus it will facilitate harmonisation

1552 These areas emanate from objectives 1.3.4 and 1.3.5 in Chapter 1 above at 11.

1553 This proposal was drafted prior to the conclusion of the AFCFTA. Therefore, the fact that the AfCFTA will have an investment protocol is an incidental support of this proposal.

1554 See Chapter 5 above at 253-254. This recommendation was made prior to the AU's decision on 21 March 2018, to commence negotiations for an AfCFTA investment protocol.

in this regard. This will bring an end to the fragmentation that is caused by the regulation of foreign investments by different RECs. The decision of the AU to include an investment protocol to the AfCFTA Agreement underscores that this recommended is well founded.

6.2.2 Investor-State disputes must be referred to the local courts of a host state, optional ISDS, the ACJ&HR or other forum:

The motivation for this proposal is provided in Chapter 5 above. This proposal works from the premise that investor-state disputes must first be referred to the local courts of host states, if the AJS rating of a state is acceptable. If a state's AJS rating does not permit the referral of a dispute to local courts, then the dispute can be referred to optional ISDS (i.e. if a host state agrees thereto), the ACJ&HR or other forums that may be provided for that purpose. What is paramount here is that the courts of a host state are the first option to be considered for the resolution of investor-state disputes.

Ideally and in line with the continental approach motivated in Chapter 5, disputes that cannot be referred to the local courts of host states due to their poor AJS rating should be referred to the ACJ&HR. Should disputes be referred to other forums such as ISDS, the ACJ&HR can still act as a tribunal of last resort. With regard to ISDS, the use of the ACJ&HR in this way will enable the court to act as an appeal court with regard to arbitral awards. This linkage will require the amendment of current ISDS rules, or the creation of new ISDS institutions and rules. In this regard, motivation can be drawn from the EU's proposed Investment Court System, which shows that it is possible to create a new version of ISDS.

6.2.3 An AJS be established under the auspices of the AU:

It is recommended that an AJS be established under the auspices of the AU. The AJS will be a gateway used to determine whether an investor shall be obliged to refer a dispute to the courts of a host state or not. The motivation for the AJS is provided below.

In order to establish the AJS, the criteria and indicators to be used in assessing the AJS score shall first be determined. In this regard, existing rule of law scoreboards such as those referred to in Chapter 4, as well as the European Justice Scoreboard, can be used as a reference point.

A threshold AJS score shall be set. This threshold shall be the minimum AJS score that a host state can obtain in order for its rule of law to be deemed satisfactory for the adjudication of investor-state disputes. An AJS score that is above the set threshold shall imply that a host state's is satisfactory. Therefore, in the event of a dispute, an investor shall be obliged to refer it to the courts of a host state. On the other hand, an AJS score that is lower than the set threshold shall imply that the rule of law in a host state is unsatisfactory. This shall entitle an investor to bypass the courts of such host state, and to refer the dispute to ISDS (if the host state consents), the ACJ&HR or other forum provided for that purpose.

In order to prevent parallel proceedings, the AJS should be used on a fork-in-the-road or no-U-turn basis, meaning that an investment and all its investors must be irreversibly bound by the choice of forum that an investor or investment is directed to utilise as

determined by the AJS score of a host state.[1555] Therefore once a dispute is referred to either the courts of a host state, ISDS or the ACJ&HR, the same dispute cannot thereafter be referred to any other forum. Furthermore, if an investor commences proceedings, then the investment company shall be precluded from commencing proceedings based on the same cause of action. NAFTA,[1556] The EU's TTIP Proposal,[1557]and the India Model BIT[1558] provide examples of how parallel proceedings can be avoided.[1559]

The critical role that the AJS will play as proposed entails that its outcomes must be credible and beyond question. Therefore, the AJS must have credibility before Member States and investors alike. The AJS must be incorporated into the AfCFTA investment protocol, so that it becomes a treaty-based mechanism, unlike existing scoreboards that have no legally binding effect.

It must be noted in this regard that the AJS and the APRM are not mutually exclusive.[1560] Each has a different scope, and serves a different purpose. The APRM monitors performance by AU Member States in the areas of democracy and political governance, economic governance and management, corporate governance and socio-economic

1555 For a discussion of parallel proceedings in ISDS see for example Cremades BM and Madalena I "Parallel Proceedings in International Arbitration" 2008 (24) Arbitration International 507-540.

1556 Article 1121 NAFTA.

1557 Article 14(2) Sub-section 3, Chapter II, Part 3 TTIP Proposal.

1558 Article 14.4(i)(B)(f) India Model BIT.

1559 Article 14(2) Sub-section 3, Chapter II, Part 3 TTIP Proposal; Article 14.4(i)(B)(f).

1560 For further information regarding the APRM, as well as APRM reports see the Statute of the APRM at https://aprm-au.org/st_car/statute-of-the-aprm/; https://aprm-au.org/, https://au.int/en/organs/aprm; http://www.aprmtoolkit.saiia.org.za/official-documents/item/598-protocol-establishing-the-aprm-base-document-official-protocol-establishing-the-aprm-au-nepad (Date of use: 8 April 2018).

development.[1561] It is a self-monitoring instrument,[1562] and its membership is voluntary.[1563] Hence the rule of law forms a fraction of the scope of the APRM, while the AJS will be entirely dedicated to the assessment of the rule of law.[1564] This places the AJS in a better position to conduct detailed rule of law surveys. The AJS will also serve a purpose that the APRM does not serve, namely to act as a legally binding, independent, treaty-based tool for the monitoring of the rule of law in African states.

In terms of the conduct of the AJS surveys, it is recommended that the AU use a credible, professional and independent party such as an audit or law firm. This is to ensure that the AJS is devoid of political interference. The chosen service provider must serve for a certain period only, so as to allow other service providers to render the service, and to once again cement the independence and integrity of the AJS. The firm should be appointed through a public and transparent procurement process.

There are a number of benefits to the use of the AJS. The AJS will, if properly implemented, play an important role in the development of the rule of law in Africa, as it is an incentive for host states to improve the rule of law in their territories. In the process, the AJS will assist AU Member States to achieve their *Agenda 2063* rule of law objectives.[1565]

1561 Article 4(1) the Statute of the APRM.

1562 Article 5(1) the Statute of the APRM; https://au.int/en/organs/aprm (Date of use: 8 April 2018).

1563 Article 6(2) the Statute of the APRM; https://au.int/en/organs/aprm (Date of use: 8 April 2018).

1564 The rule of law is assessed under the section of democracy and political governance.

1565 See African Union (Commission) "Agenda 2063 First Ten-Year Implementation Plan 2014-2023" at 69 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf (Date of use: 16 November 2017).

In addition to serving as a gateway to local courts, the AJS will serve as an independent monitoring and remedial tool for the AU and Member States. Member States that score below the AJS threshold will be able to identify areas where there are shortcomings, and improve on them. Similarly, Member States that score above the AJS threshold will notice areas where they are performing satisfactorily, and will be able to take steps to sustain such performance. In this regard, the AJS and the APRM will complement each other, as each will learn from the successes, failures and outcomes of the other. This is good for both of them, and ultimately for the AU Member States.

6.2.4 An AIO be established under the auspices of the AU:

The AIO should be modelled on the South Korean OFIO, with necessary variations where needed. It was shown above that the OFIO has a high success rate of resolving investor-state disputes. The legal status and independence of the AIO is critical if it is to be successful and trusted. Therefore, in order to be fully empowered, the AIO must be established in terms of the AfCFTA investment protocol.

The credibility, competency, independence, and efficiency of the AIO will be critical, given the nature of the AIO's intervention. An independent person with competence in among others business and international economic law should lead the AIO. Equally, competent support personnel should also staff the AIO.

Member States and the business community must support the AIO once established because the prevention of investor-state disputes is in their mutual interests. Its success will contribute to a stable foreign investment climate and will save all parties significant

time and money from litigation and arbitration that would otherwise follow if disputes are not resolved early.

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PSEG Global v Republic of Turkey (ICSID Case No. ARB/02/5) Award of 19 January 2007

OKO Pankki OYJ, VTB Bank (Deutschland) AG and Sampo Bank Plc v The Republic of Estonia ((CSID Case No. ARB/04/06) Award of 19 November 2007

*Philip Morris Asia Limited v The Commonwealth of Australia (*PCA Case No. 2012-12) Decision on Jurisdiction of 17 December 2015

Philip Morris Brand SARL, Philip Morris Products S.A, Abal Hermanos S.A v Oriental Republic of Uruguay (ICSID Case No. ARB10/7) Award of 8 July 2016

Phillips Petroleum Company Iran v Islamic Republic of Iran (1989) 21 Iran-US CTR 79

Quiborax S.A,; Non Metallic Minerals S.A and Alan Fosk Kaplun v Plurinational State of Bolivia (ICSID Case No. ARB/06/02) Decision on Jurisdiction of 27 September 2012

Romak S.A (Switzerland) v Republic of Uzbekistan (PCA Case No. AA280) Award of 26 November 2009

R*usoro Mining Limited v The Bolivarian Republic of Venezuela (*ICSID Case No. ARB(AF)/12/5) Award of 22 August 2016

SAIPEM S.p.A v The Peoples Republic of Bangladesh (ICSID Case No. ARB/05/07) Decision on Jurisdiction of 21 March 2007

S.D. Myers Inc. v Government of Canada (Ad hoc UNCITRAL Tribunal) Partial Award of 13 November 2000

Salini Construttori S.P.A and Italstrade S.P.A v Kingdom of Morocco (ICSID Case No. ARB 00/4) Decision on Jurisdiction of 16 July 2001

Saluka Investments B.V. v The Czech Republic (UNCITRAL) Decision on Jurisdiction over the Czech Republic's Counterclaim of 7 May 2004

Siemens AG v The Argentine Republic (ICSID Case No. ARB/02/8) Decision on Jurisdiction of 3 August 2004

Sempra Energy International v The Argentine Republic (ICSID Case No. ARB/02/16) Decision on Objections to Jurisdiction of 11 May 2005

Sempra Energy International v The Argentine Republic (ICSID Case No. ARB/02/16) Award of 28 September 2007

Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v

The Government of Mongolia (Ad hoc UNCITRAL Tribunal) Award of 28 April 2011

Société Generale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v The Dominican Republic (UNCITRAL Arbitration, LCIA Case No. UN 7927) Award on Preliminary Objections to Jurisdiction of 19 September 2008

SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan (ICSID Case No. ARB/01/13) Decision of the Tribunal on Objections to Jurisdiction of 6 August 2003

SGS Société Générale de Surveillance S.A. v The Republic of Paraguay (ICSID Case No. ARB/07/29) Award of 10 February 2012

SGS Société Générale de Surveillance S.A. v Republic of the Philippines (ICSID Case No. ARB/02/6) Order of the Tribunal on Further Proceedings of 17 December 2007

SGS Société Générale de Surveillance S.A. v Republic of the Philippines (ICSID Case No. ARB/02/6) Decision on Jurisdiction of 29 January 2004

Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (ICSID Case No. ARB/84/3) Award 20 May 1992

Spyridon Rousalis v Romania (ICSID Case No. ARB/06/1) Award of 7 December 2011

Standard Chartered Bank v United Republic of Tanzania (ICSID Case No. ARB/10/12) Award of 2 November 2012

Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic (ICSID Case No. ARB/03/19) Decision on Jurisdiction of 3 August 2006

Swissbourgh Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust and others v The Kingdom of Lesotho (PCA Case No. 2013-29)

Swisslion DOO Skopje v The Former Yugoslav Republic of Macedonia (CSID Case No. ARB/09/16) Award of 6 July 2012

Tecnicas Medioambienta Tecmed S.A v The United Mexican States (ICSID Case No. ARB(AF)/00/2) of 29 May 2003

Telenor Mobile Communications A.S. v The Republic of Hungary (ICSID Case No. ARB/04/15) Award of 13 September 2006

Thomas Gosling and others v Republic of Mauritius (ICSID Case No. ARB/16/32)

Tidewater Investment SRL and Tidewater Cabire, CA v Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/5) Award of 13 March 2015

Tokios Tokeles v Ukraine (ICSID Case No. ARB/02/18) Decision on Jurisdiction of 29 April 2004

Tulip Real Estate Investment and Development Netherlands B.V. v Republic of Turkey (ICSID Case No. ARB/11/28) Award of 10 March 2014

Valeri Belokon v The Kyrgyz Republic (Ad hoc UNCITRAL Tribunal) Award of 24 October 2014

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd. and Others v Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27) Award of 9 October 2014

*Veteran Petroleum Limited (Cyprus) v The Russian Federation (*PCA Case No. AA 228) Final Award of 18 July 2014

Vivendi v Argentine I: *First Arbitration Proceeding and First Annulment Proceeding Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Award of 21 November 2000 and Decision on Annulment of 3 July 2002

Vivendi v Argentine II: *Second Arbitration Proceeding Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Award of 20 August 2007 and Decision on Annulment of 10 August 2010

Walter Bau AG (In Liquidation) v The Kingdom of Thailand (Ad hoc UNCITRAL Tribunal) Award of 1 July 2009

Waste Management Inc. v United Mexican States (ICSID Case No. ARB(AF)/00/3) Award of 30 April 2004

Wena Hotels Limited v Arab Republic of Egypt (ICSID Case No. ARB/98/4) Award of 8 December 2000

White Industries Australia v The Republic of India (Ad hoc UNCITRAL Tribunal) Final Award of 30 November 2011

Yukos Universal Limited (Isle-of-Man) v The Russian Federation, (PCA Case No. AA 227) Final Award of 18 July 2014

7 INTERNATIONAL TREATIES AND MODEL BILATERAL TREATIES

A

African Charter

African Charter on Human and Peoples' Rights, (date of signature 01 June 1981, in force 21 October 1986) https://au.int/en/treaties/african-charter-human-and-peoples-rights (Date of use: 15 October 2017)

African Charter on Democracy, Elections and Governance

African Union (Assembly) (Eighth Ordinary Session, 20 January 2007, Addis Ababa, Ethiopia) *African Charter on Democracy, Elections and Governance* http://archive.ipu.org/idd-E/afr_charter.pdf (Date of use: 15 April 2018)

AfCFTA Agreement

Agreement Establishing the African Continental Free Trade Area (date of signature 21 March 2018, not in force) https://www.tralac.org/documents/resources/african-union/1964-agreement-establishing-the-afcfta-consolidated-text-signed-21-march-2018-1/file.html (Date of use §30 April 2018)

AEC Treaty

Treaty Establishing the African Economic Community (date of signature 3 June 1991, in force 12 May 1994 http://www.wipo.int/edocs/trtdocs/en/aec/trt_aec.pdf (Date of use: 28 February 2017)

ASEAN Comprehensive Investment Agreement

ASEAN Comprehensive Investment Agreement, (date of signature 26 02 2009, in force 24 February 2012)
http://investmentpolicyhub.unctad.org/Download/TreatyFile/3095 (Date of use: 15 October 2017)

AU Constitutive Act

Constitutive Act of the African Union, OAU Doc CAB/LEG/23.15, (date of signature 7 November 2000, in force 26 May 2001)
https://au.int/sites/default/files/treaties/7758-treaty-0021_-_constitutive_act_of_the_african_union_e.pdf (Date of use: 18 January 2018)

B

Brazil-Malawi ACFI

Investment Cooperation and Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Malawi, (date of signature 25 06 2017, not in force)
http://investmentpolicyhub.unctad.org/Download/TreatyFile/4715 (Date of use: 15 October 2017)

C

Canada-Tanzania BIT

Agreement Between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments (date of signature 17 May 2013, in force 09 December 2013)
http://investmentpolicyhub.unctad.org/Download/TreatyFile/636 (Date of use: 15 October 2017)

Charter of Economic Rights and Duties of States

Charter of Economic Rights and Duties of States, A/RES/39/163, (resolution adopted by the General Assembly, 17 December 1984)
http://www.refworld.org/docid/3b00eff474.html (Date of use: 15 October 2017)

COMESA Treaty

Treaty Establishing the Common Market for Southern Africa, (date of signature 05 November 1993, in force 08 December 1994) http://investmentpolicyhub.unctad.org/Download/TreatyFile/2422 (Date of use: 15 October 2017)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (date of signature 10 June 1958, in force 7 June 1959) https://treaties.un.org/doc/Treaties/1959/06/19590607%2009-35%20PM/Ch_XXII_01p.pdf (Date of use: 18 January 2018)

ICSID Convention

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (with Rules and Regulations) 1965, amended to 2006, (ratified 14 September 1966, in force 14 October 1966) https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-

E

EAC Treaty

Treaty Establishing the East African Community, (date of signature 30 November 1999, in force 07 July 2000) http://investmentpolicyhub.unctad.org/Download/TreatyFile/2487 (Date of use: 15 October 2017)

Energy Charter Treaty

Energy Charter Treaty 2080 UNTS 95; 34 ILM 360 (1995), (date of Signature 17 December 1994, in force 16 April 1998), http://www.ena.lt/pdfai/Treaty.pdf#search=%22energy%20charter%20treaty%22 (date of use: 21 November 2017)

European Convention for the Protection of Human Rights

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 14, (date of signature 4 November 1950, in force 3 September 1953) http://www.echr.coe.int/Documents/Convention_ENG.pdf (Date of use: 21 October 2017)

I

India Model BIT

Model Text for The India Bilateral Investment Treaty 2015 https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf (Date of use: 15 October 2017)

International Covenant on Civil and Political Rights

International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16), UN Doc A/6316 (1966), 999 UNTS 171, (date of signature 16 December 1966, in force 23 March 1976) https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf (Date of use: 31 October 2017)

International Covenant on Economic, Social and Cultural Rights

International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, (date of signature 19 December 1966, in force 3 January 1976) http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf (Date of use: 31 October 2017)

International Convention on the Elimination of All Forms of Racial Discrimination

International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, (date of signature 21 December 1965, in force 4 January 1969) http://www.refworld.org/docid/3ae6b3940.html (Date of use: 21 October 2017)

Investment Agreement For the COMESA Investment Area

Investment Agreement For the COMESA Investment Area, (date of signature 23 May 2007, not in force)
http://investmentpolicyhub.unctad.org/IIA/treaty/3225 (Date of use: 15 October 2017)

J

Japan-Mozambique BIT

Agreement Between the Government of Japan and The Republic of Mozambique On the Reciprocal Liberalization, Promotion and Protection of Investments, (date of signature 01 June 2013, in force 29 August 2014)
http://investmentpolicyhub.unctad.org/Download/TreatyFile/3114 (Date of use: 15 October 2017)

N

NAFTA

North American Free Trade Agreement, (date of signature 17 December 1992, in force 01 January 1994)
http://investmentpolicyhub.unctad.org/Download/TreatyFile/2412 (Date of use: 15 October 2017)

P

PAIC

Pan African Investment Code
https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf (Date of use: 15 October 2017)

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III), (adopted 10 June 1998, in force 25 January 2004)

https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and (Date of use: 18 January 2018)

Protocol on the Amendments to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

Protocol on the Amendments to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, (date of signature 27 06 2014, not in force) https://au.int/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e-compressed.pdf (Date of use: 15 October 2017)

Protocol of the Court of Justice of the African Union

Protocol of the Court of Justice of the African Union, (date of signature 01 July 2003, in force 11 February 2009) https://au.int/sites/default/files/treaties/7784-treaty-0026_-_protocol_of_the_court_of_justice_of_the_african_union_e.pdf (Date of use: 15 October 2017)

Protocol on the Statute of the African Court of Justice and Human Rights

Protocol on the Statute of the African Court of Justice and Human Rights, (date of signature 01 July 2003, in force 11 February 2009) https://au.int/sites/default/files/treaties/7792-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf (Date of use: 15 October 2015)

S

SADC Agreement Amending Annex 1 (2016 Annex 1)

Southern African Development Community Agreement Amending Annex 1 (Co-operation on Investment) of The Protocol on Finance and Investment, (date of signature 31 August 2016, in force 24 August 2017) http://investmentpolicyhub.unctad.org/Download/TreatyFile/5527 (Date of use: 15 October 2017)

SADC FIP (2006 Annex 1)

Southern African Development Community Protocol on Finance and Investments, (date of signature 18 August 2006, in force 16 April 2010) http://investmentpolicyhub.unctad.org/Download/TreatyFile/2730 (Date of use: 15 October 2017)

SADC Model BIT

Southern African Development Community Model Bilateral Treaty Template, (published July 2012) http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf (Date of use: 18 January 2018)

SADC Tribunal Protocol

Southern African Development Community Protocol on Tribunal and Rules of Procedure thereof, (date of signature 07 August 2000, in force 14 August 2011) http://www.sadc.int/documents- 256 publications/show/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf (Date of use: 15 October 2017)

SADC Treaty

Treaty of The Southern African Development Community, (Date of signature 17 August 1992, in force 30 September 1993) http://investmentpolicyhub.unctad.org/Download/TreatyFile/3112 (Date of use: 15 October 2017)

Statute of the APRM

Statute of the APRM https://aprm-au.org/st_car/statute-of-the-aprm/; https://aprm-au.org/, https://au.int/en/organs/aprm; http://www.aprmtoolkit.saiia.org.za/official-documents/item/598-protocol-establishing-the-aprm-base-document-official-protocol-establishing-the-aprm-au-nepad (Date of use: 8 April 2018).

T

T-FTA Agreement

Agreement Establishing a Tripartite Free Trade Area Among the COMESA, EAC and SADC, (date of signature 10 June 2015, not in force) https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html (Date of use: 15 October 2017)

U

Universal Declaration of Human Rights

Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (adopted 10 December 1948)
http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (Date of use: 21 October 2017)

United Nations Charter

Charter of the United Nations, (date of signature 26 June 1945, in force 24 October 1945) 1 UNTS XVI
https://treaties.un.org/doc/publications/ctc/uncharter.pdf (Date of use: 31 October 2017).

V

Vienna Convention on the Law of Treaties

Vienna Convention on the Law of Treaties, 1155 UNTS 331, 1969 (8) ILM 679 (date of signature 23 May 1969, in force 27 January 1980)
https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf (Date of use: 31 October 2017)

8 NATIONAL LEGISLATION

Angola

Arbitration Act, Law No. 16/03

The New Private Investment Law, No. 14/15

Botswana

Acquisition of Property Act Chapter 32:10 of 28 January 1955 as amended

Constitution of the Republic of Botswana Constitution, 1966 (amended 2002)

DRC

Constitution of the Democratic Republic of Congo, 2005

Investment Code, Law, No. 004 of 21 February 2002

Lesotho

Constitution of the Kingdom of Lesotho, 1993 (amended 2001)

Madagascar

Madagascar Investment Law, No. 036 of 2007

Malawi

Constitution of the Republic of Malawi, 1994

Investment and Export Promotion Act 11 of 2012

Mauritius

Constitution of the Republic of Mauritius, 1968 (amended 2009)

Investment Promotion Act of 2000 Act 37 of 2008 (amended 2013)

Mozambique

Constitution of the Republic of Mozambique, 2004

Law on Investment, No. 3/93

Namibia

Constitution of the Republic of Namibia, 1998

Namibia Investment Promotion Act 9 of 2016

Seychelles

Constitution of the Republic of Seychelles, 1993 (amended 1996)

Seychelles Investment Act 31 of 2010

Eswatini

Constitution of the Kingdom of Eswatini, 2005

Eswatini Investment Promotion Act 1 of 1998

South Africa

Constitution of the Republic of South Africa, 1996, as amended to 2013

Expropriation Bill (B 4-2015, published in Government Gazette 38418 of 26 January 2015)
Protection of Investment Act 22 of 2015

Tanzania

Constitution of the United Republic of Tanzania, 1977 (amended 1995, referred to as the 1997 Constitution)
Tanzania Investment Act 26 1997
The Natural Wealth and Resources Contracts (Review and Renegotiation of Unconscionable Terms) Act, 2017
The Natural Wealth and Resources (Permanent Sovereignty) Act, 2017
The Written Law (Miscellaneous Amendments) Act, 2017

Zambia

Constitution of the Republic of Zambia, 1991 (as amended 1996)
Zambia Development Agency Act 11 of 2006

Zimbabwe

The Constitution of the Republic of Zimbabwe, 2013

9 STATISTICAL TABLES

SADC State	Population (Million)	Land Area (Sq. Km)	GDP (USD millions)	GDP Growth (% p.a)	GDP (USD/ Capita)	CPI Growth	Rate to USD
Angola	25 831	1 246 700	136 359	2.96	5 450	10.28	120AOA
Botswana	2 262	566 730	14 400	-0,32	6365	3.06	10 BWP
DRC	77 267	2 267 050	38 915	7.17	504	1.20	925 CDF
Lesotho	2 135	30 360	1 861	1.91	872	3.18	12 LSL
Madagascar	24 235	581 800	9 711	3.20	401	7.10	2933 MGA
Malawi	17 215	94 280	6 111	3.0	355	21.25	496 MWK
Mauritius	1 273	2 030	11 555	3.52	9 075	1.29	35 MUR
Mozambique	27 978	786 380	14 716	6.10	526	3.55	39 MZN
Namibia	2 459	823 290	12 594	5.66	5 122	4.34	12 NAD
Seychelles	0.96	455	1 558	3.50	16 145	4.04	13 SCR
S Africa	54 490	1 213 090	314 980	1.28	5 780	4.51	12 ZAR
Eswatini	1 287	17 200	4 016	2.0	3 120	3.27	12 SZL
Tanzania	53 470	885 800	46 265	6.95	865	5.59	1191 TZS
Zambia	16 212	743 390	21 921	3.60	1 352	10.10	8 ZMK
Zimbabwe	15 603	386 850	14 719	3.2	965	112	1 ZWD

Table 2. Select economic statistics on SADC Member States at 2015.

Source: Author's compilation based on UNCATDSTAT country profile data.[1566]

[1566] http://unctadstat.unctad.org/EN/Index.html (accessed 20 February 2017).

SADC State	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Angola	1303	-37	-893	1678	2205	-3227	-3023	-6897	-7120	1921	8680
Botswana	421	486	494	520	208	218	1371	487	398	515	393
DRC	266	256	1808	1726	663	2939	1686	3312	2098	1843	1673
Lesotho	70	58	104	194	92	51	149	138	123	162	169
Madagascar	86	294	773	1169	1066	808	809	812	567	350	517
Malawi	139	35	124	195	49	97	128	129	119	130	142
Mauritius	41	105	339	382	247	429	433	589	293	418	208
Mozambique	107	112	398	591	898	1017	3558	5629	6175	4901	3710
Namibia	385	386	733	720	506	793	1119	1133	800	431	1077
Seychelles	85	145	181	182	171	210	207	261	170	229	194
S Africa	6646	311	6538	9209	7502	3635	4242	4558	8300	5770	1772
Eswatini	45	121	37	105	65	135	93	89	29	-32	-120
Tanzania	935	403	581	1383	952	1813	1229	1799	2087	2049	1531
Zambia	356	615	1238	938	425	633	1110	2433	1809	3194	1653
Zimbabwe	102	40	68	51	105	165	387	399	400	544	421

Table 3: FDI inflows into SADC Member States from 2005 to 2015, in USD Millions.
Source Author's compilation from UNCTAD STAT data.[1567]

[1567] http://unctadstat.unctad.org/wds/ReportFolders/reportFolders.aspx (accessed 27 February 2017).