A Study of Foreign Investment Law in Africa: Opportunity Awaits

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I. Introduction

In the light of this year's historic International Council for Commercial Arbitration ("ICCA") Congress held in Mauritius, those of us in the international arbitration community have good reason to assess the role of Africa in this field. Our inquiry takes place within the context of a "gut check" moment for foreign investment law, as cynics predict the demise of investment arbitration and States negotiate the next generation of major multilateral treaties. It also takes place amidst an explosion of economic opportunity for African States and nationals.

How has Africa fit within the framework of foreign investment law to date? What do the current concerns relating to the legal framework mean for Africans? What specific concerns have Africans raised and how should we address those? What does the future hold for African Governments and African private investors doing business with foreigners, including Chinese parties?

This article will address these questions, and more. In doing so, it takes the optimistic view that international investment arbitration will persist as a means of peaceful dispute resolution, and that African States and nationals should maintain a healthy relationship to the field in a way that will benefit them over the long run.

II. Africa's Role Within Foreign Investment Law

Africans are no strangers to investment arbitration. In fact, the very first Respondent State in an ICSID proceeding was an African state, Morocco.[1] To best understand the future of Africa within Foreign Investment Law ("FIL"), one begins by looking, first, to the nature of that legal framework generally, then how Africa became involved in it, and, finally, what challenges the users of FIL face today.

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[1] *Holiday Inns S.A. & Others v. Morocco*, ICSID Case No. ARB/72/1 (1972); *see also* Pierre Lalive, "The First 'World Bank' Arbitration (Holiday Inns v. Morocco)—Some Legal Problems", 51 Br. Y.B. Int'l L. (1982) p. 123.

1. The Nature of Foreign Investment Law

Pauwelyn identifies three salient features of FIL that distinguish it from other international legal regimes.[2]

First, FIL's decentralization distinguishes it from regimes based on a single multilateral treaty — for instance, the United Nations, the World Trade Organization and the European Union. Pauwelyn observes:

> FIL is uniquely bifurcated between, on the one hand, substantive rules of investment protection and promotion set out especially in customary international law and treaties (mainly BITs) and, on the other hand, dispute settlement provisions and institutions, such as ICSID and UNCITRAL. In terms of adjudication, there is no world investment court or appellate body. Foreign investment disputes are decided by a variety of *ad hoc* arbitration tribunals. These tribunals [do] not infrequently contradict each other. Their awards cannot be appealed and are only superficially reviewed by ICSID annulment committees (limited to ICSID awards) or domestic courts asked to enforce, for example, an UNCITRAL or SCC award (under eg the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")).[3]

FIL, therefore, unlike more integrated international legal regimes, lacks precise form.

Second, this idiosyncratic nature of FIL is due to the fact that it did not

> emerge from major constitutional moments where States purposefully designed at least the core of the regime, as in the 1919 International Labor Organization (ILO) Constitution part of the Peace Treaty of Versailles, the post World War II Universal Declaration of Human Rights and the 1966 Covenants, or the Nuremberg Trials and the 1998 Statute of Rome.[4]

Instead it grew out of a mélange of customary international law rules on diplomatic protection and treatment of aliens, bilateral investment treaties, and guidelines fashioned by leading international and inter-governmental organizations (PCA, IBA and the OECD to name a few).[5] FIL thus was born of evolution, not revolution.[6]

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[2] Joost PAUWELYN, "At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed", ICSID Review, Vol. 29, No. 2 (2014) p. 378.

[3] *Ibid.* The above quote refers to several acronyms besides FIL, which is already defined in this article. They are "BITs" (bilateral investment treaties), "ICSID" (the International Centre for the Settlement of Investment Disputes), "UNCITRAL" (the United Nations Commission on Trade and International Law), and "SCC" (the Stockholm Chamber of Commerce).

[4] *Ibid.*

[5] *Ibid.* pp. 378-79. "PCA" refers to the Permanent Court of Arbitration, "IBA" to the International Bar Association, and "OECD" to the Organization for Economic Co-operation and Development.

Third, Pauwelyn notes that FIL is highly confrontational yet nonetheless dynamically stable. Thus, on the one hand FIL is criticized by some as being "out of balance, or biased in favor of private investors to the detriment of national policy space or a system of inappropriate private, behind-closed-doors arbitration of what are essentially public interest disputes."[7] On the other hand, despite such attacks, BITs increasingly have been concluded, not just between developed countries and developing countries, but also between developing states.[8] And all the while FIL continually evolves to address perceived imperfections — for example, increasing transparency, including wider policy exceptions in treaties, and narrowing the definitions of "investor" and "investment" in treaties.[9]

FIL is not pumped from just a single well. Rather, the conclusion of new BITs, academic scholarship, arbitral awards and participation by non-governmental organizations all contribute to its development. This means that those desiring to contribute to its development face low barriers to entry.

African nations — and individual citizens — have been a part of that development to date and they can continue to do so as we move forward.

2. Africa's Historical Role Within Foreign Investment Law

The creation of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "ICSID Convention") was a watershed event for FIL, including for Africa. Unlike certain South American States which resisted the ICSID Convention, maintaining their adherence to the Calvo doctrine,[10] African States overwhelmingly accepted the ICSID Convention from the beginning.

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[6] *Ibid.* p. 379.

[7] *Ibid.* p. 380.

[8] *Ibid.*:

> "At the same time, and puzzling to many as irrational, FIL continues to reproduce and reconfirm its basic tenets, and BITs and investment chapters in FTAs continue to be concluded not only by capital exporting countries in their relations with weaker capital importing or host States (as in the period up to the 1990s), but also as between developing countries (South–South BITs) . . . ."

[9] *Ibid.*

[10] Charity L. GOODMAN, "Unchartered Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina", 28 U. Pa. J. Int'l Econ. Law (2007) p. 449 at 469.

The Executive Directors of the World Bank approved the text of the ICSID Convention on 18 March 1965, and the Convention entered into force on 14 September 1966 when the twentieth instrument of ratification was deposited by the Netherlands.[11] During this period of the mid-1960's many African States had recently gained independence and eagerly sought foreign investment. Thus fifteen of the twenty instruments of ratification, the deposit of which brought the ICSID Convention into force, came from African States — Benin, Burkina Faso, the Central African Republic, Chad, the Republic of the Congo, Côte d'Ivoire, Gabon, Ghana, Madagascar, Malawi, Mauritania, Nigeria, Sierra Leone, Tunisia, and Uganda (the other five came from Iceland, Jamaica, Malaysia, the Netherlands and the United States).[12]

Looking further back in time, the *travaux préparatoires* of the ICSID Convention record that African officials were involved in the early discussions concerning the Convention. Of particular note was a legal consultative meeting that took place in Addis Ababa, Ethiopia for five days in December of 1963. Summaries of those discussions can be found in Volume II-1 of the well-known *History of the ICSID Convention*. It is worth examining those summaries of the Addis Ababa meetings in some detail because they are quite revealing in relation to today's ongoing debates about the legitimacy of investor-State dispute settlement ("ISDS") and the mistaken notion that capital-exporting countries alone created investment arbitration for their own benefit.

African delegations attended the meetings in high numbers. In response to 32 invitations the World Bank had sent out to African States before the meeting, 29 countries accepted the invitation, sending a total of 50 delegates, most of whom were lawyers or economists.[13] Aaron Broches, General Counsel for the World Bank at the

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[11] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 Mar. 1965, ¶ 46 ("[T]he Convention will enter into force upon the deposit of the twentieth instrument of ratification, acceptance or approval.").

[12] *See* List of Contracting States and Other Signatories of the Convention (as of 17 Nov. 2015), at <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf> (last accessed 5 March 2016).

[13] *ICSID, History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention* (1968) Vol. II-1, pp. 295-96; *see also ibid.* ("The countries that weren't represented were Algeria and Mauritania, which had advised us that unfortunately they were unable to spare the personnel at that particular time, and Gabon, which sent a cable … saying that since they agreed with the text as it stood they thought there was no need to send delegates to the meeting.").

time, described it as a "very successful meeting"[14] in which distinguished African experts offered comments, suggestions, or criticisms concerning certain aspects of the draft Convention but that "[n]o objections were expressed . . . to the principles underlying the draft."[15] Most African representatives overwhelmingly welcomed the idea, including T.O. Elias, then representing the Nigerian Government who later would go on to become the President of the International Court of Justice.

To initiate the first session of the meetings, the World Bank's Executive Secretary of the Economic Commission for Africa, after commenting on the need for "private investment as a means of promoting economic development," recognized that "Africa was naturally interested in all such endeavors."[16] His comments were followed by Mr. Broches, who observed:

> It was very fitting that the first of four regional meetings to be held by the Bank should take place in Africa. African countries [have] an urgent need to encourage the international flow of capital and skills and [have] shown a willingness to create an atmosphere conducive to financial and economic cooperation.[17]

Mr. Broches went on to observe that the discussions had been initiated not only at the request of investors, but also because certain African governments had sought the assistance of the World Bank in helping investors and recipient governments resolve certain disputes.[18]

Many African States needed capital at that time and saw multilateral investment agreements as a means to promote that goal. During the Addis Ababa meetings, Guinea's representative, for example, observed that "economic development could not be

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[14] *Ibid.* p. 295 (Extracts from Statement of Aaron Broches at Executive Directors' Meeting held 7 Jan. 1964 regarding the African Regional Meeting).

[15] *Ibid.* p. 296.

[16] *Ibid.* p. 239.

[17] *Ibid.* pp. 239-40.

[18] *Ibid.* p. 240 ("The Bank had therefore been led to wonder whether, in view of its reputation for integrity and its position of impartiality, it could not help in removing that obstacle to private investment. It had on a number of occasions been approached by governments and foreign investors who had sought its assistance in settling investment disputes and had been encouraged to bend its efforts in that direction by such events as the enactment by Ghana of foreign investment legislation which contemplated the settlement of certain investment disputes 'through the agency of' the World Bank. Similarly, Morocco and a group of French investors had entrusted to the President of the Bank the appointment of the President of an arbitral tribunal to settle disputes that might arise under a series of long-term contracts.").

achieved without capital,"[19] and the Central African Republic's delegate stated that "the aim of the Convention was to attract foreign capital."[20] Some have suggested that African States had no alternative to accepting the ICSID Convention, given their dire economic circumstances, or that they agreed to the Convention out of wishful thinking that investment treaties represented economic opportunity devoid of any risk of arbitration.[21]

The historical records available from the Addis Ababa meetings held in December 1963, however, suggest the opposite. In addition to recognizing their need to attract investment, African officials acknowledged that offering a neutral and international dispute resolution mechanism was a key factor for the deal. The representative from Ethiopia stated:

> Ethiopia favored the establishment of an International Conciliation and Arbitration Center. Ethiopian courts were empowered to hear cases against Government Ministries and Departments, but however independent the courts, the investor would always regard them as the instrument of the State. On the other hand, States might be reluctant to take action against investors because of the unfavorable impression such action might make on others. The proposed Center would therefore be of value in improving relations between investors and Governments.[22]

During the same discussion, Aaron Broches placed particular emphasis on the Convention's aim to remove investment disputes from the "realm of politics and diplomacy" and instead resolve them in an "insulate[d]" fashion "on the legal plane" only.[23] He further confirmed that the role of the World Bank in any dispute must remain neutral as between the investor and Respondent State: "While the Bank believed that

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[19] *Ibid.* p. 244.

[20] *Ibid.* p. 287.

[21] *See, e.g.*, Won KIDANE, "The China-Africa Factor in the Contemporary ICSID Legitimacy Debate", 35 U. Penn. J. Int'l L. (2014) p. 559 at 585-86. ("The historical record clearly indicates that the only reason that the African states accepted ICSID is because they thought that they had to do so in order to attract private foreign investment to develop their ailing post-colonial economies.").

[22] *History of the ICSID Convention*, Vol. II-1, p. 243.

[23] *Ibid.* p. 242; *see also ibid.* pp. 273, 274 (Broches: "Once an investor had been given the right to direct access to a foreign State, he should not have the right to seek the protection of his own State, ***and his State should not have the right to intervene on his behalf. The purpose of the section was to remove disputes from the realm of diplomacy and bring them back to the realm of law***. . . . All the present Convention was concerned with was to ensure that the final and binding character of the award under the agreement between the host State and the investor would not be affected by a decision under the bilateral agreement between the States."). (Emphasis added.)

private investment had a valuable contribution to make to economic development, it was neither a blind partisan of the cause of the private investor, nor did it wish to impose its views on others."[24]

The African delegations then went on to consider, in detail, not only the envisioned administrative structure and functioning of the Centre, but also its legal jurisdiction and competence, arbitral appointments, the powers and functions of an arbitral tribunal, obligatory elements of an arbitral award, and the significance of ensuring enforcement of awards.[25]

The participants in the Addis Ababa meetings recognized that the range of potential cases that could be submitted to the Centre would not be narrow. According to Mr. Broches:

> [T]he view that interest in the Convention would be limited to cases of indemnification on expropriation, was too narrow. Disputes frequently resulted from expropriation and the Bank had had experience of such disputes. On the other hand there were many other types of disputes which arose in the complex relationships between investors and host States, and the Center would be a suitable forum for their settlement.[26]

Indeed, representatives of some African States wanted to expand, not limit, the jurisdiction of ICSID. For example, the representative of Sierra Leone argued that there was "no reason why the facilities to be established by the Bank should be limited to Contracting States and nationals of Contracting States; they should be available also to non-contracting States."[27]

The historical records show that the African experts were aware that the proposed treaty contemplated a novel concept of open-ended sovereign consent to disputes with private investors, so-called "arbitration without privity."[28] The delegate from Uganda noted that the effect of the Convention "would be to place nationals on a par with States," which "represented a departure from customary international law," adding that this "was

[24] *Ibid.* p. 242.

[25] *Ibid.* pp. 255-61, 265-66, 266-69, 271-73.

[26] *Ibid.* p. 259.

[27] *Ibid.* p. 255.

[28] *See generally* Jan PAULSSON, "Arbitration Without Privity", 10 ICSID Rev.–F.I.L.J. (1995) p. 232.

a step which should not be taken lightly."[29] Yet, on the whole, the dialogue suggests that the African delegations believed that the Convention struck the proper balance between host State and investor. In the words of the Ethiopian representative:

> The investor should accept the fact that to a certain extent he was a member of the country in which he was called upon to work and that he had to play the role of a good citizen. On the other hand, the host Government should recognize that foreign capital was essential and grant the investor the same support and protection it accorded its own citizens.[30]

The Nigerian delegate further stated that "the aim was to strike a balance between the interests of investors and those of developing countries."[31] In the opinion of his Government, he noted, the idea behind the draft Convention "represented an attempt not only to restore the confidence of the investor but also to codify certain principles of customary law and to engage in the progressive development of international law"; he "warmly recommended it."[32]

Delegates also understood that the success of the ICSID model depended heavily on a trusted mechanism for the enforcement of arbitral awards. The Nigerian delegate believed that the enforcement provision was "the most important section[] of the Convention" and he "wished to suggest that it be strengthened."[33] Along the same lines, the delegate of Dahomey (now Benin) "wished to be assured that once an award was binding it would be enforced," suggesting a "provision which would compel the losing State to comply with the award."[34]

In relation to the choice of arbitrators to decide disputes, the overwhelming concern voiced by African representatives was that the arbitrators demonstrate a high level of expertise. The delegate of Sierra Leone suggested that one must "pay due regard

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[29] *History of the ICSID Convention*, Vol. II-1, p. 256; *see also ibid.* pp. 274-75 (showing that Mr. Broches responded to a question from the Uganda delegation about "the effect of a unilateral acceptance of the jurisdiction of the Centre by a State which had not entered into an investment agreement with a particular investor" by confirming that "unilateral acceptance of the Center's jurisdiction constituted an offer which could be accepted by a foreign investor and so become binding on both parties").

[30] *Ibid.* p. 243.

[31] *Ibid.* p. 244.

[32] *Ibid.*

[33] *Ibid.* p. 272.

[34] *Ibid.* p. 273.

to the qualifications of candidates."[35] The Nigerian delegate stated that "the persons so appointed should not be of [an inferior] quality."[36] The delegate of Cameroon expressed concern about "what authority would remain to a judge who had shown himself to be lacking in judgment or integrity."[37] And the delegate of Sudan recognized the fundamental importance of party appointments, saying: "Parties to a dispute should be entirely free to choose their arbitrators; such a provision would preserve the friendly nature of the Convention."[38]

The records of the December 1963 meetings in Addis Ababa reveal that the African delegates saw the ratifications as needing to show that the Convention met the interests of both capital-importing and capital-exporting States:

> [Mr. Elias (Nigeria)] pointed out, insofar as the required number of ratifications was concerned, that if the number of ratifications was too low and either all the African and Asian members ratified, or all the capital-exporting countries, the Convention might appear an instrument to serve the interests of only one category of countries.[39]

Mr. Broches "agreed that the Convention would be a failure if those ratifying it did not include both capital-importing and capital-exporting countries" and he was further "convinced that the Bank should not and would not submit a Convention to States unless it had satisfied itself of substantial support in both groups of countries."[40]

On the whole, the Addis Ababa meetings reflect that African States "warmly recommended" the ICSID Convention.[41] The World Bank's Executive Secretary of the Economic Commission for Africa left with the impression that "in Africa, probably more than in any other part of the world, attention is being given to the question of investment promotion."[42]

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[35] *Ibid.* p. 254.

[36] *Ibid.* p. 265.

[37] *Ibid.* p. 276.

[38] *Ibid.* p. 295.

[39] *Ibid.* p. 283.

[40] *Ibid.*

[41] *Ibid.* p. 244 (quoting a Nigerian official).

[42] *Ibid.* p. 296.

3. The Current Climate of Foreign Investment Law

Since the entry into force of the ICSID Convention, the field of FIL has expanded and developed. It is well known that an explosion of bilateral investment treaties occurred during the 1990's and early 2000's, with a corresponding increase in arbitral awards interpreting the growing body of treaties.[43]

As with any relatively new field of law, growing pains are to be expected, and they have been experienced. The statistics show, however, that, on balance, the system is functioning well, as the results of investment arbitrations have not been overly skewed one way or another as between investors and States. As of 2015, tribunals had upheld investor claims under international investment agreements in part or in full with monetary compensation awarded in 27 percent of cases.[44] In 2 percent of cases, tribunals found a breach of the treaty occurred, but no monetary compensation was awarded to the investor.[45] Tribunals decided in favor of States 36 percent of the time and 26 percent of cases were settled before a decision was reached.[46] In the remaining 9 percent of cases, claims were discontinued for reasons other than settlement.[47] While the data show that investors prevail in close to 60 percent of those cases that are decided on the merits,[48] efforts to overstate investor success in investment cases ignore the jurisdictional hurdles faced by claimants at the outset, with tribunals declining jurisdiction in 17 percent of cases.[49] Even when investors win, damages awards are usually not high. One study found that more than 80 percent of awards granted less than 40 percent of the damages sought.[50] Another study revealed that the average amount awarded investors

[43] *See* Antonio R. PARRA, "ICSID and the Rise of Bilateral Investment Treaties: Will ICSID Be the Leading Arbitration Institution in the Early 21st Century?", 97 Am. Soc'y Int'l L. Proc. (2000) p. 41 at 43; Susan D. FRANCK, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions", 73 Fordham L. Rev. (2005) p. 1521 at 1528 n.22.

[44] UNCTAD, *World Investment Report 2015 – Reforming International Investment Governance*, 116 (2015).

[45] *Ibid.*

[46] *Ibid.*

[47] *Ibid.*

[48] *Ibid.*

[49] *Ibid.*; *see also* Howard MANN, "ISDS: Who Wins More, Investors or States?", Investment Treaty News (24 June 2015).

[50] Charles N. BROWER & Sadie BLANCHARD, "What's in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States", 52 Colum. J. Transnat'l L. (2014)

(approximately US$10 million) was a fraction of what they typically requested (approximately US$343 million).[51]

How have African States fared thus far? A 2012 report focused on ICSID claims indicates that African States have done quite well in disputes in which they were the Respondent:

> In the fifty-six concluded arbitrations, more claims have been settled than upheld. In twenty-one arbitrations (or 38%), the parties settled the claims. Of these, thirteen settlements occurred before any award or decision was issued by the ICSID Tribunal. In the remaining eight cases, the settlement only occurred after the Tribunal had issued a decision on jurisdiction or liability or an award.
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> More claims have been dismissed than upheld. In fifteen arbitrations (or 27%), the claims were dismissed. Of these, seven were dismissed on jurisdictional grounds and eight on the merits.
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> Only in thirteen arbitrations (or 23%) have the claims been upheld, involving eleven different states. These are: the Central African Republic, Congo Republic (twice), Egypt (twice), Gabon, Guinea, Liberia, Senegal, Seychelles, Tanzania, Togo, and Zimbabwe. In turn, this means that thirty-three African Contracting States (or 75%) have either never been involved in ICSID proceedings, saw the claims rejected or settled the claims on terms that were agreeable to them.
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> Finally, five arbitrations (or 7%) were discontinued and in three cases [the outcome was not publicly available].[52]

Based on all of this, it might surprise an outside observer to know that in recent years vehement critics of investment arbitration have decried its structure as inherently biased in favor of investors. They argue in favor of an aggressive "rebalancing" between investors and States that would place decisive control in the hands of States over the

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p. 689 at 711; Daphna KAPELIUK, "The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators", 96 Cornell L. Rev. (2010) p. 47 at 81.

[51] Susan FRANCK, "Development and Outcomes of Investment Treaty Arbitration", 50 Hrvd Int'l L. J. (2009) p. 435 at 447.

[52] *See* Karel DAELE, "Africa's Track Record in ICSID Proceedings", Kluwer Arbitration Blog (30 May 2012), at <http://kluwerarbitrationblog.com/2012/05/30/africas-track-record-in-icsid-proceedings/> (last accessed 26 February 2016) ("Contrary to the perception that investment arbitration is biased against developing countries in general and African states in particular, the latter have fared reasonably well in these proceedings."); *see also* W. KIDANE, "The China-Africa Factor", p. 599 ("[I]n the last half-century, African states defended investment claims in Europe and the United States, and prevailed on the merits in about half of the cases.").

arbitral process. The same critics ultimately push for measures to discontinue the system of peaceful dispute resolution that has worked well for decades.

Unfortunately, the skeptics' movement has caught traction with a number of States. A few States have denounced the ICSID Convention in recent years, and others have announced their intention to terminate, or at least review critically, bilateral investment promotion and protection treaties to which they are a party.[53]

Most pertinent within the African context, South Africa has stated that it will renegotiate or terminate its "first wave" investment treaties.[54] It originally joined the international regime of investment protection in the aftermath of its transition to democracy, which took place in the mid-1990's.[55] From the 1990's onwards, South Africa eventually signed 58 bilateral and multilateral investment treaties, 31 of which entered into force.[56] More recently, mainly as a result of the outcome of two arbitrations in which foreign investors sought compensation for alleged breaches of BIT provisions,[57] South Africa decided to review its investment treaty policy. In October 2008, the South African Government decided to suspend further negotiations or conclusions of investment treaties.[58] At that time, some of the first investment treaties signed by South Africa were approaching their expiration date.[59] The Government decided not to renew them.[60] Furthermore, it unilaterally terminated its BITs with Austria, Belgium-Luxembourg, Denmark, France, Germany, the Netherlands, Spain, Switzerland, and the

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[53] C. BROWER & S. BLANCHARD, "What's in a Meme?", pp. 691-95 (noting, for example, that Bolivia, Venezuela, and Ecuador have denounced the ICSID Convention or reduced the scope of their consent to settle disputes thereunder, that South Africa announced that it will renegotiate or terminate its "first wave" investment treaties, and that Ecuador is in the process of auditing its 25 BITs).

[54] Engela C SCHLEMMER, *Bilateral Investment Treaty Overview — South Africa*, IC-OV 24 ZA (2015) p. 190.

[55] It is true that South Africa signed a BIT with Paraguay in 1974. *Ibid.* p. 168; UNCTAD's Investment Policy Hub, at <www.investmentpolicy.hub.unctad.org> (last accessed 23 March 2016).

[56] UNCTAD's Investment Policy Hub, at <www.investmentpolicy.hub.unctad.org> (last accessed 22 March 2016).

[57] These are "a confidential arbitration in terms of the Switzerland/South Africa BIT 1995 (terminated 31 August 2014) and *Foresti and others v The Republic of South Africa*, Award, ICSID Case no ARB(AF)/07/01, 4 August 2010." E. SCHLEMMER, *Bilateral Investment Treaty Overview — South Africa*, pp. 188-89.

[58] *Ibid.*

[59] *Ibid.* p. 185.

[60] *Ibid*.

United Kingdom.[61] In addition to the unilateral termination of BITs, in November 2013 the South African Government submitted to public consultation the "Promotion and Protection of Investment Bill" draft as part of its new policy regarding foreign investments, raising parallels with the ongoing European debate concerning the Transatlantic Trade and Investment Partnership.[62]

While South Africa has moved to terminate its BITs with European countries, such actions should not necessarily be interpreted as a broader African revolt rejecting investor-State arbitration. Thus far, no termination policy has been adopted in respect of South Africa's BITs with other African States that are currently in force: the South Africa-Mozambique BIT,[63] the South Africa-Mauritius BIT,[64] the South Africa-Nigeria BIT,[65] and the SADC Investment Protocol.[66] There are also a number of South African BITs signed with other African countries which have not entered into force.[67] The South African Government has not, to date, adopted a negative position regarding these BITs either.

Since South Africa is a heavy capital-exporter to neighboring countries,[68] it is possible that the Government will conclude that its investors in the African region should

[61] UNCTAD's Investment Policy Hub: Austria (Date of Termination: 11 October 2014); Belgium-Luxembourg (Date of Termination: 7 September 2012); Denmark (Date of Termination: 31 August 2014); France (Date of Termination: 1 September 2014); Germany (Date of Termination: 22 October 2014); the Netherlands (Date of Termination: 1 November 2013); Spain (Date of Termination: 23 December 2013); Switzerland (Date of Termination: 1 November 2013); United Kingdom (Date of Termination: 1 September 2014), at <www.investmentpolicy.hub.unctad.org> (last accessed 23 March 2016).

[62] On 27 July 2015, a revised version of the draft Promotion and Protection of Investment Bill was tabled. *See* E. C. SCHLEMMER, *Bilateral Investment Treaty Overview — South Africa*, p. 189.

[63] Entered into force on 28 July 1998. UNCTAD's Investment Policy Hub, at <www.investmentpolicy.hub.unctad.org> (last accessed 2 March 2016).

[64] Entered into force on 7 October 1998. *Ibid*.

[65] Entered into force on 27 July 2005. *Ibid*.

[66] Entered into force on 16 April 2010. *Ibid.*

[67] According to UNCTAD's Investment Policy Hub (last accessed 1 March 2016), the following are the countries with which South Africa has signed BITs which have not entered into force: Zimbabwe, Ethiopia, Guinea, Madagascar, Congo, United Republic of Tanzania, Gabon, Angola, Democratic Republic of Congo, Equatorial Guinea, Libya, Tunisia, Rwanda, Algeria, Uganda, Egypt, Ghana and Senegal. *Ibid.*

[68] "GAR Know-How: Investment Treaty Arbitration 2015 - South Africa", at <http://globalarbitrationreview.com/download/reference/212/2/south-africa> (last accessed 29 February 2016), section 11:

> "The termination process will likely follow a regional pattern, starting with BITs with EU States. BITs with Belgium/Luxembourg, Spain, Germany, the Netherlands and Switzerland have recently been terminated and terminations of other EU BITs are expected. There is, however, uncertainty over the fate of South Africa's BITs with other

have the right to investor-State arbitration. These considerations may not be the same in respect of the European treaties it recently terminated, as to which it may have feared being on the receiving end of an investment treaty claim. In this regard, the South African Government's behavior does not differ from some of the historically strongest capital-exporting States which have made an "about-face" and are now abandoning the investment legal system they always supported until finding themselves as a Respondent-States in arbitrations. This shift exemplifies a larger *Zeitgeist*, with States across the macroeconomic spectrum now adopting a "bunker" mentality and denouncing the entire notion of international dispute resolution solely to ward off potential liability.[69]

Of particular note, the European Commission has taken a new approach to investment arbitrations that could undermine the current system. After "pausing" the ongoing negotiations with the United States concerning the Transatlantic Trade and Investment Partnership in January 2014,[70] in order to conduct a "public consultation," the EU Trade Commissioner concluded that "there [was] a huge scepticism against … ISDS,"[71] even though over 95 percent of the responses to the consultation were forms generated by organizations notoriously hostile to arbitration.[72] Then, in September 2015, the European Commission released a new draft investment chapter text for the

> African States as South Africa is a capital exporter to Africa. A political decision on its African BITs has not yet been made."

In addition to terminating BITs with Belgium, Germany, Luxembourg the Netherlands, Spain, and Switzerland, South Africa has also terminated BITs with other European States: Austria, Denmark, France, and the United Kingdom (see footnote 61 above).

[69] The current atmosphere of fear and hysteria recalls the New International Economic Order ("NIEO") movement which caught hold but then quickly dissipated over 40 years ago. *See generally*, Charles N. BROWER & Sarah MELIKIAN, "'We Have Met the Enemy and He Is Us!' Is the Industrialized North 'Going South' on Investor-State Arbitration?", Arbitration International (2015) Vol. 31(1)

[70] Press Release, European Commission, "Improving ISDS to Prevent Abuse" - Statement by EU Trade Commissioner Karel De Gucht on the Launch of a Public Consultation on Investment Protection in TTIP (27 Mar. 2014), at <http://europa.eu/rapid/press-release_STATEMENT-14-85_en.htm> (last accessed 22 March 2016).

[71] European Commission Press Release: Report Presented Today: Consultation on Investment Protections in EU-US Trade Talks (Strasbourg, 13 Jan. 2015), at <http://europa.eu/rapid/press-release_IP-15-3201_en.htm> (last visited 22 March 2016).

[72] Robin EMMOTT & Philip BLENKINSOP, "Online Protest Delays EU Plan to Resolve U.S. Trade Row", Reuters (26 Nov. 2014), at <http://www.reuters.com/article/us-eu-usa-trade-idUSKCN0JA0YA20141126?> (last accessed 22 March 2016) ("[O]ver 95 percent [of the 150,000 responses] were from supporters of a small group of organisations hostile to a deal with Washington and who submitted identical or very similar responses . . . . [This was a] hijacking of the online consultation . . . . Many responses to the EU survey appeared to be automated or generated by forms filled in on campaign websites, encouraging EU citizens to reject arbitration policy in [TTIP].").

Transatlantic Trade and Investment Partnership, including the following proposed reforms: (1) the creation of a permanent "Investment Court System," which would include a tribunal of first instance and an appeals tribunal, (2) the creation of a roster of 15 arbitrators ("judges") appointed by the States as parties to the investment agreement, from which three would be selected by the President of the Tribunal – not the litigants – to hear any given case before the tribunal of first instance, with a similar mechanism for appeals, and (3) increasingly strict requirements for those arbitrators selected to serve on the roster – including a requirement that candidates be eligible to hold judicial office in their home country.[73] Since that time, the EU has concluded treaties with Canada and Vietnam that provide for similar institutional investment courts.[74]

If the Commission's plan becomes a reality, it not only would deprive litigants of the right to select their arbitrators, but also would place enormous and unquestioned authority into the hands of one individual, the President of the Tribunal, to hand pick the three decision-makers for any given dispute.[75] Bear in mind that all of the 15 judges of an institution such as the one envisioned by European Commission would be chosen by States, a highly political process, with no input by investor claimants, neither as regards the appointment of the 15 judges, nor in relation to the selection of the three judges to hear the claimant's case.

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[73] European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (19 Sep. 2015); European Commission Draft Text TTIP – Investment (16 Sep. 2015), at <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> (last accessed 5 March 2016).

[74] European Commission: Press Release, CETA: EU and Canada Agree on New approach on Investment in Trade Agreement (29 Feb. 2016), at <http://europa.eu/rapid/press-release_IP-16-399_en.htm> (last accessed 29 February 2016); The EU and Vietnam Finalise Landmark Trade Deal (2 Dec. 2015), at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1409> (last accessed 29 February 2016); Michael P. DALY & Jawad AHMAD, "The EU-Vietnam FTA: What Does It All Mean? What Does It mean for the Future?", Kluwer Arbitration Blog (14 Dec. 2015), at <http://kluwerarbitrationblog.com/2015/12/14/the-eu-vietnam-fta-what-does-it-all-mean-what-does-it-mean-for-the-future/> (last accessed 25 February 2016).

[75] European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (19 Sep. 2015), at <http://europa.eu/rapid/press-release_IP-15-5651_en.htm> (last accessed 22 March 2016); European Commission Draft Text TTIP – Investment (16 September 2015), at <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> (last accessed 5 March 2016) ("Within 90 days of the submission of a claim pursuant to Article 6, the President of the Tribunal shall appoint the Judges composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Judges to serve.").

The Commission's proposal, and many of the other anti-investor-State arbitration ideas now under consideration, run directly contrary to the fundamental tenets of international investment law recognized by Pauwelyn, as set forth earlier. In seeking to "institutionalize" the field, they ignore the fact that its decentralized nature has always provided one of its essential features, namely that investment disputes are decided by a variety of *ad hoc* arbitration tribunals. They would rather demolish the current structure, which has endured through evolution, and construct an entirely new system from scratch. They would rather trash an arrangement dynamically stable that has successfully self-corrected over time.

The European proposal would also run directly against the foundational ideas expressed during the Addis Ababa discussions which ultimately led to the ICSID Convention. Recall that the African officials involved in those meetings were driven by the desire to remove investment disputes from the political realm rather than infuse more political considerations into them. They were convinced that the ICSID Convention would meet the interests of capital-importing and capital-exporting States alike, striking the proper balance between investors and States. And they recognized the fundamental importance of Parties to a dispute being entirely free to choose their arbitrators.

III. Concerns About Africa's Underrepresentation in Arbitration

Turning to concerns about investment arbitration relating directly to Africa, a recent speech in London by the Vice-President of the International Court of Justice, Judge Abdulqawi Ahmed Yusuf, who is also a member of the governing board of the International Council for Commercial Arbitration, is particularly pertinent. Judge Yusuf linked the current debate about the legitimacy of investor-State arbitration in Africa with the idea that there is a lack of proper representation of the African continent in investment law.[76]

He pointed to two main causes for the lack of representation: (1) the limited number of jurisdictions used for arbitrations – primarily cities like London, Paris, New

[76] Lacey YOUNG & Alison ROSS. "Africa Must Have More Representation on Tribunals, Says Somali Judge", Global Arbitration Review (15 Oct. 2015), at <http://globalarbitrationreview.com/journal/article/34232/africa-representation-tribunals-says-somali-judge/> (last accessed 22 March 2016).

York, and Washington, D.C.; and (2) the fact that law firms do not usually know African arbitrators and, accordingly, tend to advise clients to appoint European, North and South American arbitrators. In this regard, Judge Yusuf affirmed that “Africans, if they feel that they do not participate in the rulemaking and in the development of the practice of arbitration […] will not feel comfortable with the results or with the awards which come out of these arbitral tribunals.”[77] Both issues merit exploration in some depth.

1. Arbitral Seats

The data confirm that most international investment arbitrations involving an African State do not take place in Africa. In fact, one study of ICSID cases in which an African State is Respondent revealed that not a single case was heard in Africa.[78] So, why do African States routinely arbitrate cases with private investors exclusively in Europe or the Americas and what can be done to reverse this course?

For one thing, it takes time to build up a reputation as an arbitration-friendly jurisdiction. Some African jurisdictions face an uphill battle in this regard because unfortunately they already have established a reputation as an arbitration-unfriendly venue.

Esso Exploration and Production Nigeria Limited and Shell N Exploration and Production Company Limited v. Nigerian National Petroleum Corporation provides an example.[79] The *ad hoc* proceeding was governed by an arbitration clause mandating that the arbitration be seated in Nigeria and governed by the UNCITRAL Rules, as incorporated in the Nigerian Arbitration and Conciliation Act. The Claimants had brought the arbitration to resolve a dispute over crude oil allocation and tax matters under a 30-year production-sharing contract. Following two years of proceedings, a hearing that took place in Abuja, and the issuance of a 117-page majority

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[77] L. YOUNG & A. ROSS, “Africa Must Have More Representation on Tribunals”.

[78] W. KIDANE, “The China-Africa Factor”, p. 595.

[79] The dispute resulted in a 24 October 2011 Final Award that is now in the public domain as a result of enforcement proceedings in the United States. *See Esso Exploration and Production Nigeria Limited and Shell Nigeria Exploration and Production Company Limited v. Nigerian National Petroleum Corporation*, Award dated 24 Oct. 2011, at <http://globalarbitrationreview.com/cdn/files/gar/articles/Esso_and_Shell_v_NNPC_final_award_2011.pdf > (last accessed 22 March 2016); *see also* Sebastian PERRY, “Nigerian Oil Fight Heads to US”, Global Arbitration Review (13 Nov. 2014), at <http://globalarbitrationreview.com/news/article/33164/nigerian-oil-fight-heads-us/> (last accessed 28 December 2015).

award in favor of the Claimants for US$1.8 billion, the local Nigerian High Court set aside the award, holding that tax matters were not arbitrable under Nigerian law and that the arbitrators had exceeded their jurisdiction.[80] The Claimants have pursued appeals in Nigeria.[81] In addition, as is sometimes the case where a set aside decision hinges on a distinct aspect of local law at the arbitral situs, the Claimants also have pursued an enforcement action in the United States under the New York Convention irrespective of whether the award is ever reinstated in Nigeria.[82]

In another arbitration reported in the media, Portugal's state-owned *Sociedade Portuguesa de Empreendimentos* (SPE) ran into significant trouble while pursuing an UNCITRAL Rules case seated in Angola's capital, Luanda, against the country's national diamond mining company.[83] When the tribunal issued a partial award upholding most of the Claimant's claims, the Provincial Court of Luanda disqualified all three tribunal members for alleged bias and constituted a new tribunal to hear the case, installing a former Angolan judge as the new tribunal chair.[84] Further, the State-owned Respondent in the arbitration lodged a civil lawsuit against the original three members of the tribunal before the Provincial Court, seeking US$15 million in damages.[85]

It is imperative that African jurisdictions offer stable environments for arbitration and that their domestic judiciaries play a major role in creating the perception of legal stability. If local courts have a reputation for setting aside awards, or for sluggishness or suspicion towards arbitration, business parties will avoid selecting that location as an arbitral seat and practitioners will advise their clients against arbitrating there. The same can be said if the courts delay ruling on applications, for example, for interim measures, or if they fail to appoint unbiased arbitrators when called upon to do so.

Looking beyond the judiciary at the seat, local legislatures can help broaden the appeal to the arbitration community by enacting a legal framework that is known and

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[80] S. PERRY, "Nigerian Oil Fight Heads to US."

[81] *Ibid.*

[82] *Ibid.*

[83] Sebastian PERRY, "Arbitrators Sued in Angolan Diamond Dispute", Global Arbitration Review (27 Feb. 2014), at <http://globalarbitrationreview.com/news/article/32448/arbitrators-sued-angolan-diamond-dispute/> (last accessed 22 March 2016).

[84] *Ibid.*

[85] *Ibid.*

trusted internationally. As discussed further below, it can only help Africa as a potential seat for arbitration if more African States adopt the UNCITRAL Model Law and look to harmonize their laws regionally concerning arbitration. While some States might wish to include local particularities within their arbitration laws, they should avoid overly restrictive measures such as those imposing strict time limits on the issuance of an award or nationality restrictions on arbitrators.

Local arbitral centers can also bridge the gap between the domestic courts and arbitral tribunals, paving the way for a jurisdiction to attract arbitration. Fortunately, Africa has seen a solid growth in arbitral institutions over the last few decades. African arbitral institutions now include the Cairo Regional Centre for International Commercial Arbitration (Egypt); the Arab Centre for Commercial Arbitration (Morocco); the Kigali International Arbitration Centre (Rwanda); the Arbitration Foundation of South Africa (South Africa); and the Conciliation and Arbitration Centre of Tunis (Tunisia).[86] The more that arbitral institutions solidify their reputations throughout the continent as established outposts for international disputes, the more likely it is that lawyers and businesspeople will feel comfortable referencing that institution in an arbitration agreement on the front end of a transaction.

It also helps enormously if sophisticated business infrastructure can be found in a jurisdiction looking to host more arbitrations. International arbitrators and counsel are creatures of convenience and practicality. This means that they will look for qualities in an arbitral seat such as direct flights from major hubs, reliable hotels and conference centers, trustworthy vendors who can handle litigation support requests on short notice, proximity to restaurants that cater to foreigners, and so forth. To the extent that more and more African cities are investing in their tourist industries and establishing a reputation for hosting visitors from across the world, that should also, in turn, increase business visitors, including those involved in cross-border disputes.

[86] *See* Becky L. JACOBS, "A Perplexing Paradox: 'De-Statification' of 'Investor-State' Dispute Settlement?", 30 Emory Int'l L. Rev. (2015) p. 17 at 32 (listing African arbitral institutions); Charles N. BROWER & Jeremy SHARPE, "International Arbitration and the Islamic World: The Third Phase", 94 Am. J. Int'l L. (2003) p. 643 at 653-54 (same).

2. African Arbitrators

Moving on to Judge Yusuf's second concern — the lack of African arbitrators — it is worth recalling that African jurists, lawyers, and experts have played an instrumental role in the creation and development of FIL. Aside from the large number of African delegations that participated in the Addis Ababa discussions in December 1963, two Africans, both Egyptian, played a key role during the early history of ICSID. Ahmed El Khosheri presided over the first-ever ICSID case brought under an investment treaty, *AAPL v Sri Lanka*,[87] and he sat on the first *ad hoc* committee to annul an ICSID award, *Klöckner v Cameroon*.[88] He also was involved in many oft-cited ICSID cases in one role or another, including *Desert Lines v. Yemen* (Tribunal member),[89] *SGS v Philippines* (Tribunal President),[90] *SPP v. Egypt* (counsel),[91] and *Vivendi v Argentina II* (President of second *ad hoc* annulment committee).[92] Likewise, Ibrahim Shihata served as Senior Vice President and General Counsel of the World Bank and Secretary-General of ICSID during a period of enormous expansion of the ICSID system between 1983 and 1998.

Other Africans that come to mind as having played prominent roles in investment arbitration are Dr. Samuel K. B. Asante (Ghana), who served on the tribunals in *AAPL v. Sri Lanka*[93] and *Alimenta S.A. v. Republic of The Gambia*;[94] Salim Moollan (Mauritius) who sits on the tribunal in *Agility v. Pakistan*[95] and serves as counsel in *Philip Morris Asia Limited (Hong Kong) v. Australia*;[96] and Georges Abi Saab (Egypt), who has garnered attention as a firebrand over the course of many years and has sat as arbitrator in

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[87] *Asian Agricultural Products v. Sri Lanka*, ICSID Case No. ARB/87/3, Award dated 27 June 1990.

[88] *Klöckner v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Annulment Decision dated 21 Oct. 1983.

[89] *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award dated 6 Feb. 2008.

[90] *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Jurisdictional Award dated 29 Jan. 2004.

[91] *Southern Pac Properties (Middle East) Limited v. Egypt*, ICSID Case No. ARB/84/3, Award dated 20 May 1992.

[92] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Annulment Decision dated 20 Aug. 2007.

[93] *Asian Agricultural Products v. Sri Lanka*, ICSID Case No. ARB/87/3, Award dated 27 June 1990.

[94] *Alimenta S.A. v. Republic of The Gambia*, ICSID Case No. ARB/99/5 (case settled).

[95] *Agility for Public Warehousing Company K.S.C v. The Islamic Republic of Pakistan*, ICSID Case No. ARB 11/8 (case pending).

[96] *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12 (case pending).

a long list of cases.[97] There are other qualified international law judges and scholars from Africa too – for example, Judge Yusuf, whose comments triggered this discussion.

In response to Judge Yusuf's second point, though, it is indeed undeniable that Africans are not heavily represented on investment arbitral tribunals.[98] Nor can one dismiss the fundamental importance of ensuring some level of understanding and commonality between the judge and the judged in our field. But the more interesting question is how should the arbitral community respond in the face of this observation? The long-sighted answer to that question is that the field will evolve to address the deficiency, and the community should play its own part by readily encouraging such development.

The short-sighted answer to the question, however — the one promoted by many of today's skeptics of investment arbitration — would be to engage in radical reforms immediately that would dismantle the system of party appointments and in "institutionalizing" the system might consider mandating diversity also. But moving away from party-appointed arbitrators would be a grave mistake. One of the foundational elements in international dispute resolution is the significant and timeless right of parties to choose their arbitrators. This is reflected in nearly all of today's major international arbitration rules and many of the world's domestic arbitration laws, including the 1985 and 2006 versions of the UNCITRAL Model Law.[99]

Parties' rights to appoint their decision-makers is not only the very essence of arbitration, but it also is key to the perceived legitimacy of the whole process. The last point cannot be overstated. It might be tempting for some, especially those who have never actually lived through an investment arbitration, to view the arbitral appointment process as a broader platform to rectify perceived social inequities — a noble idea in the abstract. But that view fails to account for the preferences of the litigants to the dispute.

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[97] *See* ITALaw, Arbitrators: Georges Abi Saab, at <http://www.italaw.com/arbitrators/georges-abi-saab> (last accessed 27 February 2016).

[98] *See* Chiara GIORGETTI, "Who Decides Who Decides in International Investment Arbitration?", 35 U. Penn. J. Int'l L. (2013) p. 431 at 459-60; *see also* B. JACOBS, "A Perplexing Paradox", pp. 32-33; W. KIDANE, "The China-Africa Factor", pp. 562–63, 572-73; Won KIDANE & Weidong ZHU, "China-Africa Investment Treaties: Old Rules, New Challenges", 47 Fordham Int'l L. J. (2014) p. 1035 at 1082.

[99] *See generally* Charles N. BROWER & Charles B. ROSENBERG, "The Death of the Two-Headed Nightingale: Why the Paulsson–van den Berg Presumption that Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded" World Arbitration & Mediation Review Vol. 6(3) (2012) p. 619 at 628.

They own the process. The truth is that the ability to choose their own arbitrators is a key reason why parties, both investors and States, agree to arbitrate to begin with.[100] Their trust in the arbitral system is what keeps it going.

Those who took part in the early discussions preceding the ICSID Convention, including distinguished African officials as noted above, recognized as much. They acknowledged that international investment arbitration is the culmination of an extremely delicate balancing act between the rights of States and those of investors. As Professor Michael Reisman has noted, "[p]robably no arbitral institution ... better captures the curious convergence of dissimilar interests of governments, foreign investors and international institutions than the Washington Agreement of 1965, which produced the International Centre for the Settlement of Investment Disputes."[101] To deprive both parties to a dispute of the right to appoint their arbitrators would be to upset the careful balancing mechanism already in place. Needless to say, the new proposed EU "investment court" approach described above disregards all of this.

Those criticizing the current system also often overlook the fact that States themselves bear some of the responsibility for such imperfections as occur in the present system. An example is the approach too many States take to Article 13 of the ICSID Convention, which allows each Contracting State to appoint up to four persons each to ICSID's official Panel of Conciliators and its Panel of Arbitrators. As of 2013, only 108 of the 158 ICSID Contracting States had availed themselves of that entitlement.[102] Moreover, many States appoint State officials who are guaranteed never to be accepted as neutral arbitrators. Even after an arbitration has commenced, States sometimes create unnecessary difficulties. For example, in certain cases it takes months to constitute a tribunal because the State Respondent simply refuses to participate.[103] States should

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[100] *See* C. GIORGETTI, "Who Decides Who Decides", p. 465; *see also ibid.* p. 461 ("Despite criticisms by both experts and practitioners, party-appointment is a sound choice for international investment arbitration and should be maintained for a number of reasons. Parties support it, and there are good policy reasons to maintain it.").

[101] W. Michael REISMAN, "International Arbitration and Sovereignty", 18 Arb. Int'l (2002) p. 231 at 236.

[102] B. JACOBS, "A Perplexing Paradox", p. 33; C. GIORGETTI, "Who Decides Who Decides", p. 483.

[103] *See, e.g.*, *Manufacturers Hanover Trust Co. v. Egypt*, ICSID Case No. ARB/89/1, Decision on the Jurisdiction and the Constitution of the Arbitral Tribunal and on Recommendation of Provisional Measures dated 6 June 1991, ¶¶ 1-50 (explaining the long chronology leading to the constitution of the tribunal).

avail themselves of their full rights of appointment before simply denouncing the system as under-inclusive and abandoning it.

Nor does it serve a constructive purpose simply to accuse the current body of well-known arbitrators of trying to maintain a monopoly for their own self-interest, as some critics have done recently.[104] Johnny Veeder, QC recently and correctly pointed out that arbitrators themselves are not the people best-placed to defend the field of investment arbitration.[105] He quoted Mandy Rice Davies, who famously stated during the Profumo Inquiry, "[T]hey would say that, wouldn't they?"[106] But the arbitral awards speak for themselves and disabuse those who might be tempted to buy into conspiracy theories. The statistics cited above reveal a healthy body of law that favors neither investors nor States. At least since the award was issued in *Vacuum Salt Products Ltd. v. Ghana*,[107] the first ICSID claim to be dismissed for lack of jurisdiction *ratione personae*, there has been no justified basis to believe that arbitrators allow their own financial interests to bleed into the reasoning or conclusions set forth in the awards they issue.

Nor should arbitral institutions, such as ICSID, be held responsible for perpetuating an under-inclusion of African and other arbitrators. ICSID properly declines to appoint as arbitrator anyone whose lack of experience would likely generate a challenge from either of the parties to a dispute. ICSID remains bound to respect Article 14 of the ICSID Convention, which mandates that "[p]ersons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance."[108] By adhering to Article 14, ICSID also honors the demands of the African delegates who gathered in Addis Ababa in 1963 to help craft the ICSID Convention and who repeatedly insisted that arbitrators must demonstrate a high level of expertise. One should take note that since 2009 ICSID has taken numerous

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104 *See, e.g.*, Pia EBERHARDT & Cecilia OLIVET, "Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom" (2012), at <http://www.tni.org/sites/www.tni.org/files/download/profitingfrominjustice.pdf> (last accessed 6 March 2016).

105 Alison ROSS, "Arbitration Will Survive – But Avoid Hubris, Warns Veeder", Global Arbitration Review (20 Jan. 2016), at <http://globalarbitrationreview.com/news/article/34495/arbitration-will-survive-avoid-hubris-warns-veeder/> (last accessed 22 March 2016).

106 *Ibid.*

107 *Vacuum Salt Products Ltd. v. Ghana*, ICSID Case No. ARB/92/1, Award dated 16 Feb. 1994, ¶¶ 28, 41.

108 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature, Mar. 18, 1965, 575 U.N.T.S. 159, 17 U.S.T. 1270, art. 14.

steps to increase both regional and gender diversity in appointments, including by encouraging all Member States to appoint panel members reflecting such interests.[109]

In any event, arbitral appointments are made by the parties in most cases, not by an institution or appointing authority.[110] Parties to a new dispute facing high potential liability and costs understandably tend to counter those risks by adopting a conservative approach to arbitral appointments. Those who have advised clients through the initial stages of an arbitration know that clients look first and foremost to appoint an individual who will command the respect of the other members of the tribunal and considerations of race, gender, or nationality are secondary at best. Simply put, parties are inherently unwilling to gamble on new faces as their own well-being is at stake.

Returning to Judge Yusuf's concern, we should aim to enlarge the pool of qualified arbitrators to include more representatives from African States. But when and how? An appetite exists in our community to effect change now, and that movement understandably has appeal. But adjustments should come organically via evolution rather than revolution. It would be difficult to incorporate diversity requirements into legal instruments like the ICSID Convention because of the enormous practical challenges posed by such a procedure. Some arbitral institutions are taking smaller steps. By way of example, the American Arbitration Association now asks potential arbitrators to provide demographic information that the institution can use in seeking to achieve a robust and inclusive roster of arbitrators.[111] It would be a mistake to go further and impose strict demographic requirements as a prerequisite to appointment.[112] The key is to counter-balance the desire for diversity with the fundamental right of a party to choose its arbitrator.

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[109] "Is ICSID a 'Monarchy'?", Global Arbitration Review (4 Jan. 2016), at <http://globalarbitrationreview.com/news/article/34415/is-icsid-monarchy/> (last accessed 22 March 2016) (citing ICSID's response to criticisms).

[110] *Ibid.* (noting that over 75 percent of all appointments are made by the parties to a dispute).

[111] *See* American Arbitration Association: Diversity Project 2016, at <http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7B5e32800a-e26c-4725-9ab0-fd1e72a1a9d1%7D_2016_Diversity.pdf> (last accessed 22 March 2016) ("In order to assist the AAA's continuing efforts to reflect diversity on its panels, committees, educational seminars and other work of the Association, we are asking our panelists to voluntarily provide us with demographic information.").

[112] *See, e.g.*, C. BROWER & J. SHARPE, "International Arbitration and the Islamic World", p. 651 (criticizing domestic laws requiring that arbitrators be Muslim and men).

The passage of time inevitably will help to resolve Judge Yusuf's concern. The next generation of international lawyers is more diverse than the last and thus the ever-expanding pool of arbitrators inevitably will reflect that diversity. Outreach programs, internships, externships, writing competitions, and job opportunities now attract top talent from all parts of the globe. ICCA, in particular, deserves credit for playing a role in that regard.[113] Even the top United States and British law firms that dominate the investment legal field now actively recruit from more corners of the world and play a part in training the rising stars who will receive appointments in the coming decades. It would appear that the "new breed" of international lawyer has a more cosmopolitan outlook than generations past and will continue to open the doors of opportunity to young, gifted lawyers from different backgrounds. It is noteworthy that the arbitration community rankings are also starting to adjust, readily embracing top women arbitrators like Gabrielle Kaufmann-Kohler, who was recently described by *Global Arbitration Review* as the world's "most influential arbitrator."[114] It is only a matter of time before more African arbitrators join the ranks.

IV. Africa's Future

Having looked to Africa's role in international arbitration to date we turn now to the future. Given the ever-developing field of FIL, Africa will have opportunities that are new and different from those presented to other regions in the past. African States and investors in Africa still face challenges but they have ample room to forge their own paths to success.

[113] *See, e.g.*, Young ICCA Co-Chair Election: Young ICCA Opens Nomination Process for Two New Co-Chairs, at <http://www.arbitration-icca.org/YoungICCA/AboutYoungICCA/cochair_election.html> (last accessed 17 March 2016) ("Young ICCA co-chairs are elected in a unique two-stage process which ensures a balance of merit-based succession, geographic and institutional diversity and democratic legitimacy.").

[114] *See* Rishab GUPTA & Katrina LIMOND, "Who Is the Most Influential Arbitrator in the World?", Global Arbitration Review (14 Jan. 2016), at <http://globalarbitrationreview.com/news/article/34478/who-influential-arbitrator-world/> (last accessed 22 March 2016).

1. Economic Opportunity

In May 2000, the *Economist* ran a cover story, entitled "Hopeless Africa."[115] The headline captured the sentiment of a time, as most news relating to Africa dredged up the continent's troubled past, scarred by colonialism, slavery, war, disease, dictatorship, and corruption. Yet just three years ago in 2013, the same publication ran a story with an entirely different tone, entitled "Africa Rising: A Hopeful Continent."[116] What has changed? Various African countries have fared better than their Northern counterparts during the recent economic recession.[117] While African States and their citizens still experience hardship in many areas, it seems that the continent as a whole has endured the rocky transition into this new century and settled into a positive trajectory in many respects.

It is well known that Africa has always offered strong prospects for direct investments in the mining sector.[118] None of those opportunities will likely disappear anytime soon. Zambia remains a major producer of copper and cobalt;[119] Tanzania has gold and diamonds, and in recent years substantial uranium deposits also have been discovered;[120] Zimbabwe is richly endowed with gold and chrome, and it boasts the second-largest platinum reserves in the world;[121] Botswana enjoys diamond reserves;[122] and Morocco holds phosphates.[123]

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[115] "Hopeless Africa", The Economist (11 May 2000), at <http://www.economist.com/node/333429> (last accessed 22 March 2016).

[116] "Africa Rising: A Hopeful Continent", The Economist (2 Mar. 2013), at <http://www.economist.com/news/special-report/21572377-african-lives-have-already-greatly-improved-over-past-decade-says-oliver-august> (last accessed 22 March 2016).

[117] Badar Alam IQBALA and Bhawana RAWATB, "Role of India's and China's FDI, Trade and ODA in the Development of African Region", The Journal of World Investment & Trade, Vol. 14, No. 3 (2013) p. 559 ("While ministers in Europe try to hold together crumbling economies, a success story has been quietly emerging to the south.").

[118] *See* Bruno ZELLER, "Mining Projects in Ohada: The Legal and Judicial Climate", in *Arbitration and Dispute Resolution in the Resources Sector: An Australian Perspective* (2015) p. 231.

[119] Peter LEON, "Creeping Expropriation of Mining Investments: An African Perspective", 27 J. Energy & Nat. Resources L. (2009) p. 597 at 634.

[120] *Ibid.* p. 636.

[121] *Ibid.* p. 639.

[122] *Ibid.* p. 599 n.3.

[123] *Ibid.*

Recent news stories suggest, however, that future prosperity will transcend the commodities industries and challenge traditional ways of thinking. As a matter of macroeconomics, Africa is enjoying an unprecedented surge. FDI on the continent continues to rise, with Africa's share of global FDI flows having increased to 4.4 percent in 2014 from 3.7 percent in 2013.[124] Six of the ten fastest-growing economies in the world today are in Africa, and it is the world's fastest-growing continent economically with an average rise in GDP of 5.5 percent over the past decade.[125] The emergence of more shopping malls across the continent reflects broad positive economic trends, including a growing middle class and a consumer class with spending power.[126] Africa also boasts the youngest population on earth, as three-quarters of its people are under the age of 35.[127] In fact, the average age of an African is just 19.[128] Combined with improving healthcare and societal stability, that means that Africa offers an unparalleled youthful energy that other regions cannot. On a continent of 1 billion people, 800 million Africans (80 percent) are under the age of 35, which is where China was when its boom years began in the 1990's.[129]

The last two decades have also shown a marked trend toward democracy on the continent. In 1990 only three African countries were democratic. Today, on the other hand, 25 (out of 54) African States are democratic.[130] The clear trend is toward stability

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[124] "World Investment Report 2015 – Reforming International Investment Governance" UNCTAD, UNCTAD/WIR/2015 (henceforth WIR 2015: Reforming International Investment Governance) p. 34, at <http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf> (last accessed 29 February 2016). It is important to highlight that according to UNCTAD FDI flows in Africa are not uniform across the region: North, West and Southern Africa saw decline in FDI flows while East and Central Africa saw a slight increase in FDI flows.

[125] Ashish J. THAKKAR, *The Lion Awakes: Adventures in Africa's Economic Miracle* (2015) pp. x-xi.

[126] Norimitsu ONISHI, "Nigeria Goes to the Mall", N.Y. Times (5 Jan. 2016), at <http://www.nytimes.com/2016/01/05/world/africa/nigeria-goes-to-the-mall.html?_r=0> (last accessed 22 March 2016).

[127] A. J. THAKKAR, *The Lion Awakes*, p. xi.

[128] Peter WONACOTT, "World News: Africa Gets a New Checkup — For Older Leaders, Keeping Medical Conditions a State Secret Turns Tougher", Wall Street Journal (4 Mar. 2014), at <http://www.wsj.com/articles/SB10001424052702304703804579382860720320696> (last accessed 22 March 2016).

[129] A. J. THAKKAR, *The Lion Awakes*, p. 93.

[130] *Ibid.* p. xi.

and trust. Moreover, Africa's increasingly young and urban population shows an appetite for driving out the old guard of leaders.[131]

Levels of technology also have increased quickly across the continent, allowing some African States to "leapfrog" innovations missed in the past and now to join, or even lead, the modern era. The opening of a fiber-optic cable in 2009, which provided broadband Internet service to millions of people in Southern and Eastern Africa, is part of an ambitious plan to expand Web access and help spur the continent's economy and technology industry.[132] Access to mobile phones has skyrocketed, too, with mobile data and voice services facilitating business transactions. Around 80 percent of sub-Saharan Africa's 800 million people should have access to a mobile telephone by the end of the decade.[133] Expanding tech industries in cities such as Nairobi, Accra, Lagos, and Kigali have given rise to the new nickname, "Silicon Savannahs."[134]

While significant challenges remain for individual countries, the recent history of several African countries shows signs of hope and prosperity. The population of Nigeria, for example, recently surpassed South Africa to become the largest in Africa. The United Nations predicts that it will become one of the world's five most populous countries by 2050, and that trajectory is already drawing increased investment and emboldening businesses.[135] A third of Nigeria's 167 million people already have entered the middle class.[136]

Rwanda also has been the subject of positive media attention. After the horrific genocide that occurred in 1994, Rwanda survived on emergency food aid until 2000, but

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[131] Drew HINSHAW, "World News: Armed Forces Seize Power in Burkina Faso — President's Push for Law Allowing Him to Run for a Fifth Term Sparks Violent Protests in West African Nation's Capital", Wall Street Journal (31 Oct. 2014); P. WONACOTT, "World News: Africa Gets a New Checkup".

[132] Cat CONTIGUGLIA, "With Cable, Laying a Basis for Growth in Africa", N.Y. Times (10 Aug. 2009), at <http://www.nytimes.com/2009/08/10/business/global/10cable.html> (last accessed 22 March 2016).

[133] Ed CROPLEY, "Mobile Phone Access in Africa Set to Double in Next Five Years", Reuters (3 June 2015), at <http://www.reuters.com/article/us-africa-phones-idUSKBN0OJ1U020150603> (last accessed 13 March 2016).

[134] A. J. THAKKAR, *The Lion Awakes*, p. xi.

[135] Drew HINSHAW & Patrick MCGROARTY, "World News: Nigeria Economy Takes Lead in Continent - Nation's First Full Reading Since 1990 Bumps South Africa From Top Spot, Reflecting Foreign Companies' Commitment", Wall Street Journal (7 Apr. 2014).

[136] Drew HINSHAW, "In Nigeria, Rising Dreams of Web Commerce", Wall Street Journal (4 June 2012), at <http://www.wsj.com/articles/SB10001424052702303879604577412043390891430> (last accessed 22 March 2016).

since then it has seen remarkable economic progress, especially considering its characteristics as a small, landlocked country with no significant mineral resources.[137] In recent years, the State has become known for its "butter-smooth roads," investors are pouring money into the economy, and modern office buildings line the streets of Kigali.[138] Rwanda's economy has grown nearly 8 percent a year since 2004, and it has made great strides in transforming itself into an "African Singapore," a commercial hub for the region.[139]

Although Ivory Coast saw its economy suffer during a decade of political conflict, it has returned to relative political stability since 2013, and the country's economy has been gradually recovering.[140] It accounts for more than 31.6 percent of the GDP within the West African Economic and Monetary Union.[141] The World Bank has ranked it as one of the 10 most improved countries in terms of business regulation.[142]

Perhaps most importantly, Africa is undergoing a paradigm shift in self-perception. The new generation of Africans does not necessarily want to remain dependent on commodity prices for economic stability. Nor do they want to subsist on foreign aid. As Ashish J. Thakkar, a young Ugandan entrepreneur named by *Forbes* as one of the ten most powerful men in Africa, wrote in his 2015 book, *The Lion Awakes: Adventures in Africa's Economic Miracle*: "We do not need aid, and we don't deserve, or want, pity. We want partnerships. . . . Instead of giving us gifts, trade with us, buy from us and invest in us."[143] Thakkar's Africa yearns to be treated on an equal footing with the rest of the world. This message not only points to the future, but also harkens back to a bright aspect of the continent's past, when the ancient African city of Timbuktu used to

[137] Matthew CLARK, "A Texting Entrepreneur Embodies Spirit of a New Rwanda", Christian Science Monitor (9 Apr. 2009), at <http://www.csmonitor.com/World/Africa/2009/0410/p06s01-woaf.html> (last accessed 22 March 2016).

[138] *Ibid.*

[139] Patrick MCGROARTY & Alexandra BERZON, "Hoteliers Fill a Gap in Africa — Marriott to Open in Rwanda, Joining Race Against Rivals", Wall Street Journal (19 Sept. 2012), at <http://www.wsj.com/articles/SB10000872396390443720204578004243238970954> (last accessed 22 March 2016).

[140] "When Asia and Africa Meet", Global Arbitration Review (23 Sept. 2014), at <http://globalarbitrationreview.com/journal/article/32992/when-asia-africa-meet/> (last accessed 22 March 2016).

[141] *Ibid.*

[142] *Ibid.*

[143] A. J. THAKKAR, *The Lion Awakes*, pp. xii, 183, 185.

be one of the world's richest and most important crossroads, a nexus of trade and culture dating as far back as the 1400's.[144]

2. The Changing Landscape in Foreign Investment Law

The economic surge now taking place across the African continent occurs at the same time as significant changes are being made to the landscape of FIL. FIL has shifted in recent decades from its traditional roots as a North-South phenomenon to something more complex and nuanced. Three particular trends mark the shift: (1) an increase in South-to-South investment treaties and FDI; (2) a change in the presumption that investment disputes are brought only by investors from developed States against developing States; and (3) a reshuffling of State proponents of FIL. These trends make up part of an ongoing "sea change" which opens the way for African States to exert more influence to FIL.

On the first point, as of June 2008, developing countries "were parties to 77 percent of all BITs, 61 percent of all [double taxation treaties], and 81 percent of all other [international investment agreements]."[145] The latest UNCTAD report reveals that South-to-South foreign direct investment continues to grow.[146] As Roberto Echandi explains, the number of multinational enterprises ("MNE") from developing countries conducting business in other developing countries "has skyrocketed" and, coupled with increasing South-to-South investment flows, "investment relations can no longer be

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[144] *See* Mad FISHER, "These 600-Year Old World Heritage Sites Might Be Rubble by August", The Atlantic (3 July 2012), at <http://www.theatlantic.com/international/archive/2012/07/these-600-year-old-world-heritage-sites-might-be-rubble-by-august/259360/> (last accessed 22 March 2016).

[145] James ZHAN, Jorg WEBER, and Joachim KARL, "International Investment Rulemaking at the Beginning of the Twenty-First Century: Stocktaking and Options for the Way Forward" in *The Evolving International Investment Regime: Expectations, Realities, Options* (José E. ALVAREZ, Karl P. SAUVANT, Kamil Gérard AHMED, and Gabriela P. VIZCAÍNO. Oxford: OUP, 2011) p. 196.

[146] WIR 2015: Reforming International Investment Governance), p. 8:

> "South–South FDI flows, including intraregional flows, have intensified in recent years. FDI from developing economies has grown significantly over the last decade and now constitutes over a third of global flows. The largest outward investing economies include Brazil, China, Hong Kong (China), India, the Republic of Korea, Malaysia, Mexico, Singapore, South Africa and Taiwan Province of China. FDI outward stock from developing economies to other developing economies, excluding Caribbean offshore financial centres, grew by two-thirds from $1.7 trillion in 2009 to $2.9 trillion in 2013. East Asia and South-East Asia were the largest recipient developing regions by FDI stock in 2013 (figure I.9). The share of the poorest developing regions in South-South FDI is still low, but it is growing."

visualized as a North-South phenomenon."[147] As of December 2014 "a number of developing countries in the [East Asia and Pacific] region, which traditionally had been predominately recipients of foreign investment, recently have been shifting towards becoming capital-exporting countries, driving a concurrent rise in the number of BITs and other [international investment agreements] concluded with recipient countries of such capital exports, mostly within the [East Asia and Pacific] region, in Africa as well as in Central and South America and the Caribbean."[148] Simply put, developing countries are taking increasing ownership and control over the laws and economics of FIL.

The second trend is most visible through the emergence of claims against traditionally capital-exporting States. European and North American States never expected to be subjected to investment claims but experience has demonstrated otherwise. For example, however, Vattenfall, a Swedish State-owned producer and operator of nuclear power plants, commenced an investor-State claim under the Energy Charter Treaty against Germany, a case that has made major headlines in the media and contributed to the backlash in Europe against investor-State arbitration.[149] More recently, TransCanada Corporation and TransCanada Pipelines Limited have threatened a US$15 billion claim against the United States under Chapter 11 of the North American Free Trade Agreement ("NAFTA") relating to the Keystone XL Pipeline.[150]

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[147] Roberto ECHANDI. "What Do Developing Countries Expect from the International Investment Regime?" in *The Evolving International Investment Regime: Expectations, Realities, Options* (J.E. ALVAREZ, K.P. SAUVANT, K.G. AHMED, and G. P. VIZCAÍNO. Oxford: OUP, 2011) p. 4.

[148] Claudia T. SALOMON & Sandra FRIEDRICH, "Investment Arbitration in East Asia and the Pacific – A Statistical Analysis of Bilateral Investment Treaties, Other International Investment Agreements and Investment Arbitrations in the Region", The Journal of World Investment & Trade, Vol. 16, No. 5-6 (2015) p. 841.

[149] "Vattenfall Launches Second Claim Against Germany", Global Arbitration Review (25 June 2012), at <http://globalarbitrationreview.com/news/article/30634/vattenfall-launches-second-claim-against-germany/> (last accessed 22 March 2016); Claire PROVOST & Matt KENNARD, "The Obscure Legal System that Lets Corporations Sue Countries", The Guardian (10 June 2015), at <http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid> (last accessed 13 March 2016); Manuel PÉREZ-ROCHA, "When Corporations Sue Governments", N.Y. Times (3 Dec. 2014), at < http://www.nytimes.com/2014/12/04/opinion/when-corporations-sue-governments.html?_r=0> (last accessed 13 March 2016).

[150] Luke Eric PETERSON. "TransCanada's Threatened $15 Billion Claim Against the United States Could Stoke Debate Over Scope to Take 'Politically-Motivated' Measures", Investment Arbitration Reporter (8 Jan. 2016), at <http://www.iareporter.com/articles/transcanadas-threatened-15-billion-claim-against-the-united-states-could-stoke-debate-over-scope-to-take-politically-motivated-measures/> (last accessed 22 March 2016).

More generally, we are encountering an increasing number of non-traditional types of disputes and the appearance of unaccustomed types of claimants and respondent-States in investment arbitrations, as non-Western investors start to utilize the investment arbitration system. Thus, Al Jazeera Media Network, a Qatari national, recently commenced ICSID proceedings against the Arab Republic of Egypt[151] under the Qatari-Egypt BIT, accusing the Egyptian Government of shutting down the media organization's Egyptian news operations, detaining and criminally charging its employees.[152] Unlike conventional investment disputes, this case potentially infuses human rights considerations into the FIL regime.

Other cases are cropping up, too. In *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*,[153] Chinese insurance companies brought claims against the Government of Belgium in respect of a series of measures taken by Belgium to rescue Fortis Bank, in which the Claimants held shares.[154] Also noteworthy is an UNCITRAL Rules case commenced by a group of Iranian investors — the Dayyani family — against the Republic of Korea under the Iran-Korea BIT,[155] alleging that Korea, through its State-owned and State-controlled entities, breached its obligations under a share purchase agreement, the BIT and customary international law by wrongfully terminating the agreement and failing to reimburse the deposit under the contract.[156]

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[151] *Al Jazeera Media Network v. Arab Republic of Egypt* (ICSID Case No. ARB/16/1).

[152] Luke Eric PETERSON, "Analysis: As Al Jazeera Media Network Notifies Egypt of Possible Arbitration Claim, What Legal Arguments Loom in Such a Case?" Investment Arbitration Reporter (28 Apr. 2014), at <http://www.iareporter.com/articles/analysis-as-al-jazeera-media-network-notifies-egypt-of-possible-arbitration-claim-what-legal-arguments-loom-in-such-a-case/> (last accessed 29 February 2016).

[153] *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29, Award dated 30 April 2015 (dismissing Claimants' claims for lack of jurisdiction).

[154] Jarod HEPBURN, "Reasons Emerge for Dismissal of Claim Brought by Chinese Insurer Ping An against Belgium over Fortis Bank Bail-Out" Investment Arbitration Reporter (28 May 2015), at <http://www.iareporter.com/articles/reasons-emerge-for-dismisal-of-claim-brought-by-chinese-insurer-ping-an-against-belgium-over-fortis-bank-bail-out/> (last accessed 29 February 2016).

[155] Clovis TREVINO, "Korea Round-Up: Lone Star Case Reaches Hearings, as at Least Two Other Investment Treaty Claims Loom" Investment Arbitration Reporter (18 May 2015), at <http://www.iareporter.com/Korea+round-up%3A+Lone+Star+case+reaches+hearings%2C+as+at+least+two+other+investment+treaty+claims+loom articles/23170/> (last accessed 29 February 2016).

[156] *Ibid.*

The third trend follows from the second. Just as traditionally capital-importing countries are increasingly attracted by the benefits of FIL, some conventionally capital-exporting countries have retreated from their allegiance to FIL. In particular, some developed countries once they found themselves on the wrong end of an investment claim,[157] have become skeptical, even critical, of the very regime that they historically have sought to promote and safeguard. As noted above, the new European Commission approach to investment treaties is indicative of this trend. Germany, especially, has redefined itself as a hotbed of such criticism even though it signed the very first BIT ever with Pakistan in 1959 and since then had entered into more BITs than any other nation.[158] The United States also has taken steps to define the substantive protections it offers to investors. In collaboration with its NAFTA partners, Canada and Mexico, the United States issued an "interpretation" of the terms "fair and equitable treatment" and "full protection and security" in Article 1105 of NAFTA, declaring that they mean no more than the customary international law standard for treatment of aliens.[159] It has carried forward this same position in Article 5(2) of its "2012 U.S. Model Bilateral Investment

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[157] C. BROWER & S. MELIKIAN, "We Have Met the Enemy", p. 19; Andrea K. BJORKLUND. "Improving the International Investment Law and Policy System" in *Report of the Rapporteur Second Columbia International Investment Conference: What's Next in International Investment Law and Policy? The Evolving International Investment Regime: Expectations, Realities, Options* (J.E. ALVAREZ, K.P. SAUVANT, K.G. AHMED, and G. P. VIZCAÍNO. Oxford: OUP, 2011) p. 219:

> "ii. Rejection of the System by the North? The interests of investors and of the states that have traditionally been the homes of investors are no longer perfectly aligned. It is ironic that the changing attitudes to foreign direct investment (FDI) are very much evident in the United States and other developed countries. Legitimacy problems are intensified when proponents (e.g. the United States) suddenly look more cautiously at the regime. This change in approach prompts the question of whether it is possible that the investment law regime has become too liberal even for the key liberalizers. Investments by sovereign wealth funds (SWFs) are regarded with suspicion in the developed world, so now in international negotiations Germany and the United States, for example, are taking positions that contradict their former ones. …"

[158] Kyriaki KARADELIS, "Germany Shuns Arbitration in EU-US Treaty", Global Arbitration Review (19 Mar. 2014), at <http://globalarbitrationreview.com/news/article/32512/germany-shuns-arbitration-eu-us-treaty/> (last accessed 22 March 2016).

[159] "Notes of Interpretation of Certain Chapter 11 Provisions", NAFTA (31 July 2001), at <http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp> (last accessed 22 March 2016) ("The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens".).

Treaty"[160] as well as in the most recent draft Trans-Pacific Partnership investment text released to the public in November 2015.[161]

That some of the traditional proponents of investment law have reduced their support of FIL bodes ill for its continuing vitality, but at the same time it opens prospects to other States, including African ones, to pick up the reins and assume a more leading role in promoting the future of FIL. Indeed, other regions and States that have been traditionally hostile to investment arbitration have accepted its benefits over time. By way of example, the Islamic world witnessed a change in its attitude towards arbitration through four phases. In the first, from the end of World War II until the 1970s, international arbitration concerned disputes arising out of long-term oil concessions. "To Islamic eyes, the entire experience no doubt was redolent, if not an extension, of the old 'Capitulations' system of extraterritorial courts administered by European powers."[162] The second phase occurred in the 1970's and reached into the early 1980's, when few States had modern arbitration statutes, pan-Arabanism was on the rise, accompanied by a resurgence of nationalism and the use of oil as an economic power.[163] By the third phase, in the early 2000's, "Islamic countries, whose mineral wealth [had] made a number of them capital exporters, increasingly [had] joined and even promoted the worldwide system of international arbitration."[164] Their growing acceptance of international arbitration was exemplified by their adoption of the New York Convention and the UNCITRAL Model Law.[165]

China, referred to in more detail below, also has gone through a transformation of its FIL policy. While initially reluctant to submit disputes fully to investor-State

[160] United States Model BIT (2012), at <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (last accessed 22 March 2016).

[161] *See* Douglas THOMSON, "TPP Made Public at Last", Global Arbitration Review (5 Nov. 2015), at <http://globalarbitrationreview.com/news/article/34308/tpp-made-public-last/> (last accessed 25 February 2016); Trans-Pacific Partnership Investment Chapter, at <https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf> (last accessed 24 March 2016).

[162] C. BROWER & J. SHARPE, "International Arbitration and the Islamic World", p. 644.

[163] *Ibid.* pp. 645-46.

[164] *Ibid.* pp. 646-47.

[165] *Ibid.* pp. 647-51. Most recently, Abu Dhabi adopted the UNCITRAL Model Law: Douglas THOMSON, "Abu Dhabi Freezone in Bid to be Seat" (12 Feb. 2016), at <http://globalarbitrationreview.com/news/article/34562/abu-dhabi-freezone-bid-seat/> (last accessed 2 March 2016).

arbitration, it has become a major promoter of the system. China's policy towards BITs underwent, essentially, four periods. First, in the 1980's China adopted BITs with Western European capital-exporting countries, in which the investor-State arbitration was restricted to disputes over the amount of compensation due for expropriation.[166] Second, by the 1990's, while China's treaties followed the same restrictive formulation as in the first period, it was signing almost 10 treaties per year – all with developing economies in Asia, Africa and Latin America.[167] Third, by 1998 China began adopting liberal international investment agreement models that granted advance consent to broader arbitration, and also included "comprehensive national treatment clauses" in BITs with historically capital-exporting countries, while concluding "less stringent" treatment clauses[168] with developing countries. Finally since 2008 China has negotiated 13 BITs with varied formulations. Some treaties have granted a high level of protection to foreign investors, while not providing policy exceptions. While most of the new treaties contain a set of "balanced provisions," not all do so, and for the ones that do, the formulation differs.[169]

All in all, the three trends described here reconfirm that FIL is not stagnant, and that even the identities of its beneficiaries and of its most vigorous proponents shift with the passage of time. Those who attack FIL as an inherently biased system tend to ignore its nature as a fluid body of law and buy into outdated theories that it will always benefit a select few, while working to the detriment of all others. The facts show otherwise, however. Developing countries in Africa and elsewhere that are hungry to reap the rewards of FIL have a chance to fill the gap left by traditional proponents and might just become the bellwether of the field for the future.

3. China and Beyond

One cannot discuss opportunity and Africa nowadays without addressing the continent's vital relationship with China. The critical financial connection between the

[166] Alex BERGER, "Hesitant Embrace: China's Recent Approach to International Investment Rule-Making", The Journal of World Investment & Trade, Vol. 16, No. 5-6 (2014) pp. 847-48.
[167] *Ibid.* p. 848.
[168] *Ibid.* p. 849.
[169] *Ibid.* p. 850.

two regions is undeniable. As of 2005, Africa's largest infrastructure financier is no longer the World Bank; it is China.[170] And as of 2009, China became Africa's single largest trading partner, surpassing the United States.[171]

The numbers are nothing short of staggering. China's foreign direct investment in Africa skyrocketed from under US$100 million in 2003 to more than US$12 billion in 2011.[172] An Op-Ed in the *New York Times* described the straight-forward forces at play:

> Despite all the scaremongering, China's motives for investing in Africa are actually quite pure. To satisfy China's population and prevent a crisis of legitimacy for their rule, leaders in Beijing need to keep economic growth rates high and continue to bring hundreds of millions of people out of poverty. And to do so, China needs arable land, oil and minerals [all of which Africa has].[173]

In fact, more than 2,000 Chinese companies have invested across Africa, primarily in the energy, mining, construction and manufacturing industries.[174] At the same time African exports to Asia also have been on the rise.[175]

One might argue that among the most important sources of law within the context of Sino-African relations are the BITs between them.[176] Starting in 1989, when China concluded its first African BIT with Ghana, and until mid-2010, China signed 31 BITs

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[170] W. KIDANE, "The China-Africa Factor", p. 563.

[171] Dambisa MOYO, Op-Ed., "Beijing, a Boon for Africa", N.Y. Times (27 June 2012), at <http://www.nytimes.com/2012/06/28/opinion/beijing-a-boon-for-africa.html> (last accessed 22 March 2016).

[172] *Ibid.*

[173] *Ibid.*

[174] B.A. IQBALA and B. RAWATB, "Role of India's and China's FDI, Trade and ODA in the Development of African Region", p. 565.

[175] Anil Kumar KANUNGO, "India's Overseas Investment in Africa: An Initiative for South-South Cooperation", The Journal of World Investment & Trade, Vol. 11, No. 5 (2010) p. 822:

> "Since 2000 there has been a massive increase in trade and investment flows between Africa and Asia. Today, Asia receives about 27 percent of Africa's exports, in contrast to only about 14 percent in 2000. This volume of trade is now almost on par with Africa's exports to the United States and the European Union (EU) - Africa's traditional trading partners. In fact, the EU's share of the African exports has halved over the period 2000-05. Asia's exports to Africa also are growing very rapidly - about 18 percent per year - which is higher than to any other region. At the same time, although the volume of FDI between Africa and Asia is more modest than that of trade, and SSA accounts for only 1.8 percent of global FDI inflows, African-Asian FDI is growing at a tremendous rate (Broadman, 2007)."

[176] W. KIDANE & W. ZHU, "China-Africa Investment Treaties", pp. 1047-48.

with African countries.[177] UNCTAD's BIT database currently lists 18 China-Africa BITs that are in force.[178] And China shows no signs of slowing down. The country is very active in negotiating BITs and ranks second after Germany on the list of the most active contracting parties to BITs worldwide.[179]

A study of China-Africa BITs reveals that they provide for State-to-State as well as investor-State dispute resolution procedures, and the scope of the investor-State dispute settlement provisions have evolved over time, trending in the direction of more investment protections and fewer restrictions on the scope of arbitration.[180] The flip side of this development from the African perspective, of course, is that Chinese investors will start to use arbitration. Already in February 2007 ICSID received its first case filed by a Chinese investor against Peru for alleged breach of obligations under the 1994 China-Peru BIT.[181]

The relationship between the Chinese and Africans within the FIL context is certainly novel. The two parties view the field from different vantage points. Recall that China only opened up to investment in 1978 and was found attractive as a destination for foreign money long before it adopted a liberal BIT policy.[182] China's recently concluded BITs with African countries contain provisions which China, as then largely a capital-importing nation, soundly rejected two decades ago.[183] Critical to understanding its interactions with Africa is the realization that China is constantly balancing its role as a recipient of Western investment with that of its role as a sender of increasing investment to Africa. From the African perspective, China has much to learn, as it is more of a

[177] Dr. Uche Ewelukwa OFODILE, "Africa-China Bilateral Investment Treaties: A Critique", 35 Mich. J. Int'l L. (2013) p. 131 at 133.

[178] China: Bilateral Investment Treaties, at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu> (last accessed 1 March 2016) (listing China's BITs that have entered into force with Algeria, Cameroon, Egypt, Equatorial Guinea, Ethiopia, Gabon, Ghana, Madagascar, Mali, Mauritius, Morocco, Mozambique, Nigeria, South Africa, Sudan, Tanzania, Tunisia, and Zimbabwe).

[179] U. OFODILE, "Africa-China Bilateral Investment Treaties", p. 137.

[180] *Ibid.* p. 174.

[181] *See Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction (June 19, 2009); *see also Ping An Life Ins. Co. of China, Ltd. & Ping An Ins. (Grp.) Co. of China, Ltd. v. Kingdom of Belg.*, ICSID Case No. ARB/12/29.

[182] U. OFODILE, "Africa-China Bilateral Investment Treaties", p. 203.

[183] *Ibid.* p. 206.

"newcomer" to FIL than Africa, not having lived through as many investment disputes as African States and African parties.

Looking beyond China, there are a number of other countries eager to increase their investments in Africa. As of 2013, the top five foreign investors in Africa, aside from China, were France, the United States, Malaysia, and India.[184] In particular, India, with its domestic demand for energy and raw materials, has significantly invested in the continent.[185] Among other Asian countries seeking hosts for outbound investment, competition to invest in Africa has intensified, especially between Japan and China.[186] Brazil also is gaining a foothold in the continent. From 2003 to 2010, trade between Brazil and Africa expanded, with Brazil's former President Lula da Silva making 12 official visits to the continent, doubling the number of Brazilian embassies in Africa, and boosting trade from US$3 billion in 2000 to US$26 billion in 2008.[187]

In sum, the powerful economic potential of Africa will continue to attract new business partners from other parts of the world like a magnet. African States will only increase the flows of FDI by continuing to conclude investment treaties with their trade partners, and in doing so they will also protect their own investors abroad who are likely to increase in numbers over the future decades.

4. The Path Forward

For those African States ready to seize the opportunity and take the next steps toward attracting foreign investment and protecting their own investors abroad, what is the best path forward?

To begin with, African States should approach BITs individually. African countries historically have entered into BITs that do not tend to deviate from standard models developed over time.[188] Even most South-to-South BITs are frequently concluded without much discussion or debate, perhaps based on the notion that South-to-South economic trade and investments are benign, mutually beneficial, and always create

[184] *See* "When Asia and Africa Meet".

[185] A.K. KANUNGO, "India's Overseas Investment in Africa: An Initiative for South-South Cooperation", pp. 806, 810-11.

[186] *See* "When Asia and Africa Meet".

[187] U. OFODILE, "Africa-China Bilateral Investment Treaties", p. 152.

[188] *Ibid.* p. 197.

win-win outcomes.[189] Thus, African States typically have looked to standard templates put forward by the United States or European countries when signing a BIT with a counterparty.

As referred to above, however, recent developments in the field of FIL suggest that there may no longer be a standard model for BITs because the United States and Europe have adopted different approaches to the next generation of treaties, most likely resulting in a fragmented regime of investment law. Whereas the European Commission has proposed an institutionalized investment court in its negotiations with the United States, Canada, and Vietnam, the United States has largely followed the approach set forth in its 2012 Model BIT in its negotiations for the Trans-Pacific Partnership.

Rather than blindly following the United States or Europe, African States should blaze their own path. As noted above, FIL is not pumped from a single well, and Africa's approach need not be tethered to that of its Northern neighbors, especially as regards South-to-South BITs. African States should, however, include strong investment protections in the BITs that they negotiate, as those protections will instill confidence in foreign investors and help shield Africans who invest abroad.

African States also should adopt BIT provisions specifically tailored to the particular realities and needs of the country. It should go without saying that Africa is not monolithic, but instead it is a highly diverse, complex continent made up of 54 countries and thousands of different languages and religions.[190] A one-size-fits-all approach will not work for the continent when it comes to BITs. For example, States where FDI remains concentrated in the extractive industries, especially mining, should remain wary that their economies may be more vulnerable to falling commodity prices.

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[189] *Ibid.* p. 135.

[190] Some might say that Africa is even larger than would appear to the eye based on traditional maps. A 2010 article in the *Economist* entitled "The True True Size of Africa" brought this matter home in a visceral manner. Citing a map developed by German software designer, Kai Krause, the article pointed out that the traditional representations of Africa are distorted as a result of the "Mercator map" which was created in 1596 to help sailors navigate and which gives the right shapes of countries but at the cost of distorting sizes. According to more accurate, modern cartography, the United States, Western Europe, India, China, Japan and Mexico would all fit within the actual size of Africa. *See* "Cartography: The True True Size of Africa", The Economist (10 Nov. 2010), at <http://www.economist.com/blogs/dailychart/2010/11/cartography> (last accessed 22 March 2016); *see also* A. J. THAKKAR, *The Lion Awakes*, p. 32.

Claims involving creeping expropriation will be more likely to arise during commodity boom and bust periods. BITs should account for such scenarios to the extent possible.

Likewise, countries emerging from recent conflicts or seeking to improve their infrastructure and quality of life very quickly might consider entering into BITs offering more generous investment protection and fewer restrictions on arbitration in order to broadcast their commitment to protecting FDI. States with rule of law problems might look to negotiate BITs that expressly forbid acts of corruption. States tempted to enter into long-term deals with foreign companies that show a tendency to compromise on environmental standards should consider addressing those risks at the outset of a project. They might make it clear during the negotiations with the investor that environmentally destructive practices that would violate the African State's domestic laws would also mean that the investment had not been accepted in accordance with domestic law under the BIT, rendering it outside the jurisdiction of any investment tribunal or inadmissible. The relationship between investment law and environmental law is developing quickly,[191] and African States could have a hand in shaping that intersection.

African States looking to integrate themselves quickly within the arena of international investment law can do so without even having to start the long process of negotiating new BITs. Almost half of the BITs signed by African States have not yet entered into force due to lack of completing the ratification process.[192] In particular, whereas African States tend to ratify the BITs they sign with non-African countries, a stunning 80 percent of intra-African BITs are not in force for lack of ratification.[193] African States would signal a strong commitment to the foreign investment legal regime by committing to what they have already agreed in principle and ratifying the outstanding BITs.

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[191] *See, e.g.*, "Does the Smoke Haze Over South East Asia Violate International Law? A Legal Update from Dechert's International Arbitration Practice", at <http://sites.edechert.com/10/5575/uploads/onpoint---does-the-haze-of-smoke-over-se-asia-violate-international-law.pdf?sid=d67124c6-4e83-430e-a0b7-659274f86b0a> (last accessed 8 March 2016).

[192] Karel DAELE, "The Unfinished Work of Foreign Investment Protection in Africa", Kluwer Arbitration Blog (22 Feb. 2013), at <http://kluwerarbitrationblog.com/2013/02/22/the-unfinished-work-of-foreign-investment-protection-in-africa/> (last accessed 13 March 2016) ("To date, African states have entered into 767 BITs. This is the good news. The bad news, however, is that 338 of them, a staggering 44%, have not entered into force for lack of completing the ratification process.").

[193] *Ibid.* ("Of the 662 BITs signed between an African and a non-African state, 64% are in force today and 36% are not. Of the 145 BITs signed between two African states, only 20% are in force and 80% are not.").

African States additionally should consider common positions among similarly situated States. Just as greater economic cooperation among African states might help increase the continent's economic fortunes,[194] so, too, might greater legal cooperation attract more foreign investment. To the extent that States with cohesive legal systems and mutual interests can band together, they can increase their bargaining power and attract foreign investment through a broader, multilateral promise of stability. Examples of such efforts are provided by the Organization for the Harmonization of African Business Law ("OHADA")[195] and the South African Development Community ("SADC"),[196] although the later represents a cautionary tale as well insofar as it relates to international arbitration.

Article 16 of the SADC Treaty envisions an SADC Tribunal; however, the SADC Tribunal, officially inaugurated in 2005, was *de facto* suspended five years later in 2010 following several judgments against the Zimbabwean Government.[197] In a decision of 28 November 2008, the Tribunal found Zimbabwe in breach of its treaty obligations and ordered it to pay certain evicted farm owners fair compensation.[198] During the same period, an ICSID tribunal decided *Funnekotter v. Zimbabwe*, awarding damages to a group of Dutch farmers whose land had been repossessed by the Zimbabwe Government.[199] Unfortunately, Zimbabwe ignored the unfavorable awards, refused to pay them, and the SADC tribunal has become defunct since then.[200]

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[194] Murithi MUTIGA, "Africa's Path to Prosperity", N.Y. Times (25 Apr. 2014), at <http://www.nytimes.com/2014/04/25/opinion/mutiga-africas-path-to-prosperity.html> (last accessed 22 March 2016).

[195] The acronym "OHADA" derives from the French title of the organization, *Oranisation pour l'Harmonisation en Afrique du Driot des Affaires*. OHADA was formally created in 1993 with the signature of the Port-Louis Treaty in 1993. Common political will amongst Francophone African States generated the idea to strengthen their collective legal systems, harmonize their business laws, and establish simple, modern, common rules adaptable in all Member States. Within the OHADA system, parties may choose institutional arbitration, conducted under the auspices of the Common Court of Justice and Arbitration, or *ad hoc* proceedings under the Uniform Arbitration Act.

[196] The SADC is composed of 15 Member States in Southern Africa and based on a 1992 treaty, which aims to promote the interdependence and integration of national economies for the harmonious, balanced and equitable development of the region.

[197] Southern African Development Community: Towards a Common Future, at <http://www.sadc.int/member-states> (last accessed 25 February 2016).

[198] *Mike Campbell v. Zimbabwe* (Case No SADCT 2/07).

[199] *Funnekotter v. Zimbabwe*, ICSID Case No. ARB/05/6, Award dated 22 Apr. 2009, ¶ 132.

[200] B. JACOBS, "A Perplexing Paradox", p. 30; *see also* K. DAELE, "The Unfinished Work of Foreign Investment Protection in Africa".

In 2012 the SADC also issued a Model BIT aimed at "promot[ing] harmonization of the Member States' investment policies and laws."[201] The Model BIT does offer an arbitration provision in Article 29, but unfortunately it includes a "special note" preceding the provision, clarifying that "[t]he Drafting Committee was of the view that the preferred option is not to include investor-State dispute settlement [because] [s]everal States are opting out or looking at opting out of investor-State mechanisms."[202] To restore confidence in their commitment to international dispute resolution, the SADC member States should reinstate the SADC tribunal and adopt a pro-arbitration stance in the SADC Model BIT.

Economic, political and financial reforms are also required for the African continent to contribute meaningfully to the FIL regime. In this regard, a first step may be legislative reform. As of the date of this article, Egypt, Kenya, Madagascar, Nigeria, Rwanda, Tunisia, Uganda, Zambia and Mauritius have adopted or based their national arbitration legislation on the UNCITRAL Model Law (1985).[203] Broad adoption of the Model Law, potentially, can lead to harmonization of the curial laws across the continent. This is far from aspirational. To draw a comparison to another growing region, Professor Julian D.M. Lew, QC has stated that the highest concentrations of countries that have adopted the Model Law were located in the Asian region.[204] He predicted that Asia's

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[201] SADC Model Bilateral Investment Treaty Template with Commentary (July 2012), Preamble, at <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> (last accessed 22 March 2016).

[202] *Ibid.*, Article 29, Special Note.

[203] UNCITRAL Model Law on International Commercial Arbitration (1985) – Status, at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html> (last accessed 2 March 2016).

[204] Professor Julian D.M. LEW, QC, "Increasing Influence of Asia in International Arbitration", Asian Dispute Review (Jan. 2014) Print. P. 4-9. Based on the UNCITRAL "Status of conventions and model laws" Report dated 30 April 2013 (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V13/832/00/PDF/V1383200.pdf?OpenElement), the following countries have adopted the Model Law or based their legislation on the Model Law:

> Bangladesh (2001), Brunei (2009), Cambodia (2006), India (1996), Japan (2003), Philippines (2004), Republic of Korea (1999), Singapore (1994), Sri Lanka (1995), Thailand (2002), Malaysia (2006), Viet Nam (2005), Hong Kong (2010) and Macao (1998).

Myanmar has recently published a bill which largely tracks the Model Law. *See* Jainil Bhandari, Chester Toh, Kelvin Poon, Paul Tan, and Jawad Ahmad. "MYANMAR: A Fresh Start", Global Arbitration Review Law Business Research (11 June 2014), at <http://globalarbitrationreview.com/news/article/32714/myanmar-fresh-start/> (last accessed 22 March 2016).

arbitral centers would be "in the vanguard" of developing international arbitration law through "reliance on the Model Law and the development of its principles when necessary through the courts of the Model Law countries."[205] This, he proposed, would lead to "*conformity*" in the legal application of the Model Law.[206] African States can draw inspiration from these developments. As FDI inflows and outflows increase, it would not be surprising to see African States participating in the development of FIL and international arbitration practices.

V. Conclusion

The future shines bright across Africa. The continent offers some of the greatest economic opportunities on the planet and the coming decades inevitably will increase transnational business for Africans. Dynamically stable yet evolving, foreign investment law provides a well-suited tool upon which African States should rely to continue to attract investment and protect their own investors abroad. African States have always played a role in shaping foreign investment law, starting with the gestation of the ICSID Convention. Given the current climate of fear and uncertainty among the traditional proponents of FIL, Africa is poised not only to reap the benefits of the field but also perhaps to assume a leadership role in defining the next generation of treaties. Careful planning and the passage of time should address some of the most pressing concerns regarding international arbitration in Africa. As the future unfolds, opportunity awaits.

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[205] J. LEW, "Increasing Influence of Asia in International Arbitration", p. 6.
[206] *Ibid*.