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Evaluating the Legitimacy of the Investor-State Dispute Settlement Mechanism for the AfCFTA

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Abstract

Phase two of the negotiations on the African Continental Free Trade Area (AfCFTA) has begun. This phase includes negotiating the protocol on investment. The International Investment Regime (IIR) allows foreign investors to institute proceedings against states through Investor State Dispute Settlement (ISDS), which is criticised as undergoing a 'legitimacy crisis'. This paper assesses the legitimacy of ISDS to evaluate whether it is a suitable mode of adjudicating international investment disputes in the AfCFTA. Accordingly, it sets out the criteria to be used in assessing legitimacy and further uses these criteria to appraise the legitimacy of ISDS, ultimately demonstrating that the present ISDS framework lacks sufficient legitimacy to be adopted as the mode of adjudicating international investment disputes in the AfCFTA. This is because of the perception that ISDS is unfair and biased due to its imperial and neo-colonial background and the excessive corporate power it grants to foreign investors. ISDS is also lacking in transparency and democratic values and conflicts with the AfCFTA's objective of sustainable and inclusive socio-economic development. The paper advocates against the inclusion of ISDS in the AfCFTA protocol on investment and asserts that the challenge is in finding a mode of adjudication that is more equitable and inclusive than ISDS.

Keywords: *African Continental Free Trade Area, Investor State Dispute Settlement, Legitimacy, Investment, ISDS, AfCFTA*

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I. Introduction

The African Continental Free Trade Area (AfCFTA) is an agreement that has established the largest free trade area in the world.[1] The aim of AfCFTA is to deepen economic integration in Africa by introducing a single market for goods and services and promoting investment and movement of persons in Africa.[2] The AfCFTA's objective is to aid African countries in accelerating growth by reducing barriers to trade and attracting foreign direct investment.[3] It is a multi-phase process that is currently in its second phase which involves developing protocols on investment, competition policy, and intellectual property rights.[4] This paper's focus is on the development of the protocol on investment.

The AfCFTA's protocol on investment is expected to include investment protection standards and provide a forum for settling disputes arising out of a breach of the investment protection standards.[5] It is this author's opinion that African states have to be cautious as they proceed to negotiate this protocol on investment. They need to ensure that the institutional design of the protocol on investment adopts a mode of adjudicating international investment disputes that is equitable and takes into consideration the needs of not just states and foreign investors but of all stakeholders of the African International Investment Regime (IIR). These stakeholders include civil society and local communities that are often directly affected by the actions of foreign investors.

Of particular interest in the negotiation of the protocol on investment is Investor-State Dispute Settlement (ISDS). This is because ISDS is widely criticised as undergoing a 'legitimacy crisis',[6] yet the "Zero Draft" of the Protocol on Investment to the Agreement Establishing the African Continental Free Trade

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1 World Bank, *The African continental free trade area*, 27 July 2020, - < https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area> on 10 January 2022.

2 Akinkugbe O D, 'A Critical Appraisal of the African Continental Free Trade Area Agreement' in Kugler K & Sucker F, eds, *International Economic Law from a (South) African Perspective* South Africa: JUTA Law, 2021 at 283.

3 World Bank, *The African continental free trade area*, 27 July 2020, - < https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area> on 10 January 2022.

4 Virusha Subban, 'Africa: AfCFTA update – the streamlining of intra-African trade gathers momentum' 28 February 2022 - < https://www.globalcompliancenews.com/2022/02/28/africa-afcfta-update-the-streamlining-of-intra-african-trade-gathers-momentum140222/ > on 1 April 2022.

5 Hogan Lovells, 'Report on the African Continental Free Trade Agreement 2019 Implications for the continent' - <https://www.hoganlovells.com/en/knowledge/topic-centers/~/media/2e3f5059b0c44b3c84d8e5bc375abbf8.ashx > at page 9.

6 Howard D M, 'Creating consistency through a world investment court', 41(1) *Fordham International Law Journal,* 2017, 17.

Area dated November 2021 and uploaded to 'ISDS Platform' in April 2022 provides for ISDS as a mode of adjudicating international investment disputes in Annex 1 of the draft protocol.[7] It is, therefore, necessary to consider whether ISDS is a suitable mode of adjudicating international investment disputes in AfCFTA before the protocol on investment is finalised.

ISDS is the process by which disputes between a foreign investor and a host state arising out of an investment are settled.[8] These disputes may arise out of an investment contract between the foreign investor and the host state or the terms of an International Investment Agreement (IIA) between the host state and the home state of the foreign investor.[9] This paper focuses on the mode of determining disputes arising out of IIAs.

ISDS is unique when compared to other modes of international adjudication.[10] Most regimes have a permanent adjudicative body established under a multilateral treaty like the International Court of Justice (ICJ),[11] the International Criminal Court (ICC)[12] or the International Tribunal for the Law of the Sea (ITLOS)[13] to settle disputes arising from those regimes. The International Investment Regime (IIR) is however not based on a single multilateral treaty but on the thousands of IIAs which collectively comprise the regime.[14] ISDS relies on consent to arbitrate provided by states in these agreements.[15]

Once a dispute emerges from one of the IIAs, the dispute is determined based on *ad hoc* arbitration that is administered by different institutions, such as the International Centre for Settlement of Investment Disputes (ICSID), depending on the terms of the IIA.[16] ICSID's purpose includes providing facilities for the arbitration of investment disputes between Contracting States

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7 ISDS Platform, *AfCFTA protocol on investment draft (Nov 2021)*, 14 April 2022, - <http://www.isds.bilaterals.org/?afcfta-protocol-on-investment> on 22 July 2022.

8 Dolzer R and Schreuer C, *Principles of international nvestment law,* 2nd ed Oxford University Press, Oxford, 2014, 233.

9 Dolzer R and Schreuer C, *Principles of international investment law,* 244-245.

10 Simmons J B, 'Valuation in investor-state arbitration: Toward a more exact science' 30(1) *Berkeley Journal of International Law*, 2012, 196.

11 *Statute of the International Court of Justice*, 18 April 1946.

12 *Rome statute of the International Criminal Court (last amended 2010)*, 17 July 1998.

13 *United Nations convention on the law of the sea*, 10 December 1982.

14 Salacuse J, 'The emerging global regime for investment,' 51 (2) *Harvard International Law Journal,* 2010, 427.

15 Paulsson J, 'Arbitration without privity,' 10(2) *ICSID Review - Foreign Investment Law Journal,* 1995, 232.

16 Gaukrodger D, 'Appointing authorities and the selection of arbitrators in investor-state dispute settlement: An overview' organisation for economic co-operation and development, *OECD consultation paper,* 2018, 9 - < https://www.oecd.org/investment/investment-policy/ISDs-Appointing-Authorities-Arbitration-March-2018.pdf > on 25 August 2021.

and nationals of other Contracting States.[17] Each investor-state dispute is settled by a separate arbitral tribunal. The proceedings under the ICSID Convention are self-contained and the awards are final and binding, save for very narrow exceptions provided by the ICSID Convention.[18]

The dissatisfaction with ISDS can be discerned through the reaction of academics, the general public and states. Some academics highlight ISDS' lack of accountability, openness, coherence, and integrity.[19] States such as Bolivia, Ecuador, and Venezuela have reacted by withdrawing from the ICSID Convention.[20] Australia and South Africa, on the other hand, have been reconsidering their participation in investment arbitration.[21] In justifying its decision Australia stated that the ISDS would give foreign businesses greater legal rights than domestic businesses and would constrain the Government's public policymaking ability.[22] An online public consultation process conducted by the European Union on ISDS in the now stalled Trans-Atlantic Trade and Investment Partnership received an overwhelming 145,686 responses, a majority of which were opposed to the inclusion of ISDS and considered it a threat to democracy.[23]

Accordingly, this paper relies on the work of Nienke Grossman on the legitimacy of international adjudicative bodies,[24] specifically the criteria she identified to assess legitimacy of international courts and tribunals, to assess the ISDS framework. This paper demonstrates that the present ISDS framework lacks sufficient legitimacy to be adopted as the mode of adjudicating international investment disputes in AfCFTA. This is owing to the perception that it is unfair and biased due to its neo-colonial background, the assertions that it grants excessive corporate power to foreign investors, and the perceived dependence of ISDS

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17 Article 1 (2) of the *Convention on the settlement of investment disputes between states and nationals of other states*, 14 October 1966.

18 Dolzer R and Schreuer C, *Principles of international investment law,*239

19 Van Harten G, *Investment treaty arbitration and public law,* Oxford University Press, Oxford, 2007, 152-184.

20 United Nations Conference on Trade and Development (UNCTAD) *World Investment Report 2012: Towards a new generation of investment policies,* 2012, 87.

21 UNCTAD*, International investment policy making in transition: Challenges and opportunities of treaty renewal,21* June 2013, 3 - <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d9_en.pdf > on 25 August 2021.

22 UNCTAD, *World Investment Report 2012: Towards a new generation of investment policies,* 2012, 87 - <http://unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf > on 25 August 2021.

23 European Commission, *Report: online public consultation on investment protection and investor-to-state dispute settlement (isds) in the transatlantic trade and investment partnership agreement (TTIP),* 13 January 2015, 2-3 and 8-10 - <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf> on 25 August 2021.

24 Grossman N, 'Legitimacy and international adjudicative bodies' 41(1) *The George Washington International Law Review,* 2009, 107.

tribunals on corporate or state interests. ISDS is also lacking in transparency and democratic values, and it fails to convince that it is committed to the underlying IIR. For these reasons, this paper advocates against the inclusion of ISDS in the AfCFTA in order to establish a more equitable investment protection regime in Africa.

This paper began by introducing the AfCFTA and ISDS in Part I. It continues as follows: Part II discusses legitimacy in international adjudication and sets out the criteria to be used when assessing the legitimacy of ISDS. Part III then assesses the legitimacy of ISDS against the established criteria. Part IV very briefly discusses an option that could be considered as an alternative to the ISDS, and Part V concludes the paper.

II. Legitimacy, International Adjudication and the International Investment Regime

The legitimacy of international law and international institutions has become a key point of discussion as international institutions gain greater authority.[25] Most research on the legitimacy of international law focused on the broad issue of international rules and international institutions without distinguishing the legislative and judicial functions.[26] This paper focuses on the legitimacy of international adjudicative bodies. Under this part of the paper, the author advances a method through which the legitimacy of ISDS should be understood and appraised and outlines the criteria that should be used in order to assess ISDS' legitimacy.

i. Understanding legitimacy in international law

Thomas Franck defined legitimacy in international law as 'a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or the institution has come into being and operates in accordance with generally accepted principles of right process'.[27] This definition, therefore, focuses on how an institution is perceived by those addressed by the institution. This form of

[25] Bodansky D, 'The Legitimacy of International Governance: A coming challenge for international environmental law' 93 (3) *American Journal of International Law,* 1999, 597.

[26] Diependaele L, De Ville Ferdi and Sterckx S, 'Assessing the normative legitimacy of investment arbitration: The EU's investment court system' 24(1) *New Political Economy*, 2017, 45.

[27] Franck T, *The power of legitimacy among nations,* Oxford University Press, Oxford, 1990, 24.

legitimacy is generally referred to as subjective legitimacy.[28] Legitimacy has also been defined as 'justified authority or the right to rule and generate obligations…'[29] This definition of legitimacy does not focus on the perception of an international institution or law but rather seeks to identify adequate and objective moral criteria to justify the public's acceptance or rejection of an institution's legitimacy.[30] This form of legitimacy is generally referred to as objective legitimacy.[31]

This paper focuses on the subjective legitimacy of international investment adjudication as the intention of this paper is to discuss how ISDS is perceived as opposed to discussing whether the authority of ISDS is justified. This is because, in the author's opinion, most of the critiques against ISDS are based on how it is perceived as opposed to whether ISDS complies with certain objective moral criteria. Nevertheless, it is important to note that the subjective and objective legitimacy of an institution complement each other. The popular acceptance of an institution's authority - its subjective legitimacy- has been noted to be a necessary element of its normative justification.[32] As was noted by Samantha Besson, '…it is difficult to have sustainable objective legitimacy without some subjective legitimacy along the way and vice versa'.[33]

Subjective legitimacy may be approached in different ways. Thomas Franck's definition outlined above focuses on the qualities of rules of international law that pull those addressed towards compliance.[34] Focusing on the compliance pull of rules, however, does not offer much assistance when what is being evaluated is an adjudicative body as the focus is on the rule as opposed to the adjudicative body. This paper will primarily adopt Nienke Grossman's approach to subjective legitimacy which considers whether the 'relevant public' regards a system of adjudication as justified, that is, whether the system's claims to authority deserves respect or obedience for reasons not restricted to self-interest.[35] As a result, this

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28 Besson S, 'Legal philosophical issues of international adjudication: Getting over the amour impossible between international law and adjudication' in Romano C P R, Alter K J, and Shany Y (eds) *The Oxford Handbook of International Adjudication,* Oxford University Press, Oxford, 2013, 430.

29 Besson S, 'Legal philosophical issues of international adjudication:', 430.

30 Diependaele *et al* 'Assessing the normative legitimacy of investment arbitration: The EU's investment court system', 38.

31 Besson S, 'Legal Philosophical issues of International Adjudication: Getting over the amour impossible between international law and adjudication', 430.

32 Bodansky D, 'The legitimacy of international governance: A coming challenge for international environmental law', 601.

33 Besson S, 'Legal Philosophical issues of international adjudication: Getting over the amour impossible between international law and adjudication', 431.

34 Grossman N, 'Legitimacy and international adjudicative bodies', 119-120.

35 Grossman N, 'Legitimacy and international adjudicative bodies', 117.

paper analyses and expounds on the criteria Nienke Grossman identified to assess legitimacy by also looking at how legitimacy changes over time depending on multiple factors and by highlighting that legitimacy should be understood as a matter of degree and not as an exact science.

The relevant public in matters of international investment adjudication is the IIR community, which for the purposes of this paper is comprised of all actors involved in and affected by foreign investment projects. This includes not only states and foreign investors who are the parties that can institute proceedings before institutions such as ICSID,[36] but also local communities who are affected by foreign investment projects.[37] The community plays a central role when assessing subjective legitimacy. As noted by Franck, the most basic indicator of a rule's legitimacy is whether it is validated by the community.[38] Without any level of deference or validation from the community, an adjudicative body loses the justified authority it needs to fulfil its functions.

Admittedly, focusing on how an adjudicative body is perceived by the community can pose some challenges. For example, it is not usually possible to have a system of adjudication that is perceived as legitimate by the entire community. Looking at the IIR, ISDS can be perceived in two radically different ways depending on one's perspective: as a system for helping defenceless private actors fighting state arbitrariness or alternatively, as a system of relatively weak states fighting immense corporate power.[39] This divide in the perception of ISDS is already evident among the eminent scholars and academics in the field.[40] However, this divide should not stop an enquiry into the subjective legitimacy of ISDS.

Discussions on the legitimacy of a system or an institution are also difficult as there is no singular framework that is identified as the 'most legitimate' system for other frameworks to aspire to. If this was the case, the IIR community would not be fiercely debating the legitimacy of international investment adjudication.

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36 Article 25 (1) of the *Convention on the settlement of investment disputes between states and nationals of other states*, 14 October 1966

37 Perrone N, 'The "invisible" local communities: Foreign investor obligations, inclusiveness, and the international investment regime.' 113 *American Journal of International Law Unbound,* 16.

38 Franck T, *The power of legitimacy among nations,* 198.

39 Puig S and Strezhnev A, 'The David effect and ISDS' 28 (3) *European Journal of International Law,* 2017, 732.

40 See the different positions adopted in 'Public statement on the international investment regime', 31 August 2010 - < http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/.> on 25 August 2021 who are against the present ISDS system as compared to 'An open letter about investor-state dispute settlement' April 2015 - < https://www.mcgill.ca/fortier-chair/isds-open-letter > on 25 August 2021 who are in support of the present system.

As was noted by Franck, 'legitimacy is not a matter of assembling readily available ingredients and mixing them in the right proportions'.[41] The legitimacy of an institution is a matter of degree.[42] All international institutions are capable of generating a sense of obligation and therefore contain some form of legitimacy, but some are more legitimate than others.[43] The issue, therefore, is ascertaining which institutions are structured in a manner that increases their legitimacy.

Another characteristic of the legitimacy of an institution is that it changes over time.[44] This means that rules or institutions that were perceived and accepted as legitimate when constituted could lose that legitimacy over time depending on how the rules are applied or the operations of the institution. José Alvarez correctly argued that 'rules may undermine legitimacy when their application produces results that appear so extraordinarily unjust, cavalier, unfair, even absurd or when they do not satisfy the test of common sense or fairness'.[45]

The above notwithstanding, this paper demonstrates that there are certain criteria that can help to discern, despite the varying ideologies, whether an adjudicative system is likely to be perceived as justified by the IIR community.

ii. Criteria to be used when assessing subjective legitimacy of an international adjudicative body

Grossman established three criteria that influence the perceptions of a justified authority of an international tribunal: first, whether it is fair and unbiased; second, whether it is transparent and infused with democratic norms; and third, whether it is interpreting and applying norms consistent with what international actors believe the law should be.[46] These three criteria are deduced from legal and political science literature on legitimacy and state practice.[47] The insights on state practice are drawn from a survey of the European Court of Justice, Inter-American Court of Human Rights, ICSID, the ICJ, the ITLOS and the World Trade Organisation Dispute Settlement Body.[48]

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41 Franck T, *The power of legitimacy among nations,* 25.

42 Franck T, *The power of legitimacy among nations,* 26.

43 Franck T, *The Power of Legitimacy among Nations,* 207.

44 Claude Jr I L, 'Collective legitimization as a political function of the united nations' 20 (3) *International Organization,* 1966, 369-370.

45 Alvarez J E, 'The quest for legitimacy: An examination of the power of legitimacy among nations by Thomas Franck' 24(1) *New York University Journal of International Law and Politics,* 1991, 199.

46 Grossman N, 'Legitimacy and international adjudicative bodies', 115.

47 Grossman N, 'Legitimacy and international adjudicative bodies', 122-123.

48 Grossman N, 'Legitimacy and international adjudicative bodies', 122-123.

a. Whether a tribunal is perceived as fair and unbiased

The first criterion requires a tribunal to be perceived as fair and unbiased.[49] This means that the international tribunal should contain the following: fair process; competent and independent adjudicators; impartial and independent benches and panels; and unbiased secretaries and registries.[50]

Fair process means that all parties to litigation have an equal opportunity to present their views on both procedure and merits of their case.[51] On impartiality and the independence of adjudicators, several factors are relevant in assessing whether adjudicators are unbiased including: the tenure and length of term of the adjudicators; the selection process of the adjudicators; and the qualifications of the adjudicators.[52] In connection with the selection process, it has been noted that constitutive treaties of some tribunals and their rules of procedure have been designed to balance adjudicative panels by having rules regarding the nationality of the adjudicators, ensuring representation of the principal legal systems of the world and promoting diversity in adjudicative panels by having adjudicators from both developed and developing nations.[53] With respect to competency, it has been noted that a knowledgeable and well-known adjudicator will be aware of and engage with the prevailing legal understanding thereby making it more difficult to make a decision based purely on bias.[54]

The above explanation of what constitutes a fair process focuses on the fairness of the rules of procedure of an adjudicative body. This paper goes further than analysing the rules of procedure and examines whether ISDS is perceived as fair in light of its origins. This is because the legitimacy of an institution can also be gauged through the lens of the origin of an institution's powers.[55]

The legitimacy of the origin of international institutions was not a controversial issue as it was ordinarily assessed based on whether a state consented to the formation of the institution.[56] The question, however, is whether state consent when signing the constituting treaty of an international adjudication body grants that body perennial legitimacy. This has to be answered in the negative

49 Grossman N, 'Legitimacy and international adjudicative bodies',123.

50 Grossman N, 'Legitimacy and international adjudicative bodies',123-124.

51 Grossman N, 'Legitimacy and international adjudicative bodies',124.

52 Grossman N, 'Legitimacy and international adjudicative bodies', 130.

53 Grossman N, 'Legitimacy and international adjudicative bodies', 138-139.

54 Grossman N, 'Legitimacy and international adjudicative bodies', 134.

55 d'Aspremont J and Brabandere E, 'The complementary faces of legitimacy in international law: the legitimacy of origin and legitimacy of exercise',190.

56 d'Aspremont J and Brabandere E, 'The complementary faces of legitimacy in international law: the legitimacy of origin and legitimacy of exercise', 215.

because state consent has been noted to be an insufficient anchor of legitimacy for various reasons including international institutions once established engage in law-making that is not controlled by states; some states have no choice but to accept certain international rules; and the fact that people's views change over time eroding the initial consent to an institution.[57]

The inadequacy of state consent as the sole anchor of the 'legitimacy of origin' of international institutions means that another mode of enquiry should be considered. D'Asprermont and Brabandere noted that in contemporary international law the question of *how* power is bestowed upon international institutions, especially for those activities that have far-reaching influence on the daily lives of citizens, has become essential.[58] It is, therefore, necessary to examine the historical background that led to the institution of ISDS when analysing whether it is fair and unbiased.

b. Whether an international tribunal is transparent and infused with democratic norms

The second criterion is whether an international tribunal is transparent and infused with democratic norms.[59] Transparency involves the extent to which interested parties, both inside and outside the judicial process, are able to observe and evaluate the international tribunal's processes as well as its decision making and functioning.[60] A lack of opportunities to participate undermines legitimacy as the public do not trust 'secret' proceedings.[61] Transparency is linked to legitimacy because it is a democratic norm that permits some form of accountability.[62] It allows domestic and other constituents to hold their governments accountable for their actions before international tribunals and the results of these actions.[63]

The transparency of an international tribunal can be enhanced by holding open hearings, producing a transcript of the proceedings for public access in relevant languages and making its preliminary rulings and final decisions available

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57 Diependaele *et al* 'Assessing the normative legitimacy of investment arbitration: The EU's investment court system', 45-46.

58 d'Aspremont J and Brabandere E, 'The complementary faces of legitimacy in international law: The legitimacy of origin and legitimacy of exercise', 215-216.

59 Grossman N, 'Legitimacy and international adjudicative bodies', 153.

60 Grossman N, 'Legitimacy and international adjudicative bodies', 153.

61 Keohane R O and Nye Jr J S, 'The club model of multilateral cooperation and problems of democratic legitimacy' in Porter R B et al (eds) *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millenium,* Brookings Institution Press, Washington DC, 2001, 277.

62 Grossman N, 'Legitimacy and international adjudicative bodies', 153.

63 Grossman N, 'Legitimacy and international adjudicative bodies', 158.

for public scrutiny, including the reasoning and the dissenting, concurring and separate opinions.[64]

c. Whether there is sufficient commitment to the underlying normative regime

The third criterion is whether there is sufficient commitment to the underlying normative regime.[65] There are *two factors* that can be used to determine the commitment to the underlying normative regime: first, whether the normative regime develops in accordance with the international actors' interests and values; and second, whether the decisions of the tribunal are considered legally sound and consistent with commonly accepted principles of legal decision-making.[66]

Looking at the IIR, the regime can develop through the negotiation and signing of IIAs which provide the standards of protection in international investment law. These standards are changed and/or developed over time by international actors depending on the changing interests and values of the IIR.[67] The normative regime can also develop as a result of the use of teleological methods of interpretation by international tribunals to broaden the scope of international rules.[68]

Analysing the development of the normative IIR as part of assessing the legitimacy of ISDS admittedly raises a number of challenges. First, it presumes that the norms that constitute a normative regime are clear and ascertainable. Van Harten noted that investment treaties do not establish coherent, non-contradictory rules that are capable of being known and followed on a reliable basis.[69] The broad wording of IIAs creates the possibility of multiple ideologies to co-exist within the same regime.[70] This has led some authors to conclude that 'as long as the investment treaty system remains based on thousands of

64 Grossman N, 'Legitimacy and international adjudicative bodies', 154.

65 Grossman N, 'Legitimacy and international adjudicative bodies', 143.

66 Grossman N, 'Legitimacy and international adjudicative bodies', 144.

67 Alvarez J, 'Why are we "re-calibrating" our investment treaties?' 4 (2) *World Arbitration and Mediation Review,* 2010, 143.

68 Helfer L R and Alter K J, 'Legitimacy and lawmaking: A tale of three international courts' 14 *Theoretical Inquiries in Law,* 2013, 481.

69 Van Harten G, 'Investment treaty arbitration, procedural fairness, and the rule of law', 628.

70 See the different positions adopted in 'Public statement on the international investment regime', 31 August 2010 - < http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/. > on 25 August 2021 who are against the present ISDS system as compared to 'An open letter about investor-state dispute settlement' April 2015 - < https://www.mcgill.ca/fortier-chair/isds-open-letter > on 25 August 2021 who are in support of the present which shows different ideologies existing in the current international investment regime.

BITs and FTAs interpreted by hundreds of *ad hoc* tribunals, we will continue to see conflicting analogies and diverse paradigms for understanding the system's nature'.[71]

Assessing the legitimacy of ISDS based on the commitment of *ad hoc* tribunals to the IIR is further made arduous due to the vague protection standards contained in IIAs. As a result of the vague protection standards, arbitral tribunals are unable to agree on where to draw the line between the protection of foreign investor property rights and the legitimate right of a state to pass regulations for the public good.[72] In order to resolve this difficulty a proposal has been made for the increase in the specificity of the language setting out the protection standards of IIAs and their effects on a state's national systems.[73] Quite apart from the specificity of IIAs it has been noted that most states provide little or no input into the treaty interpretation process[74] and an alternative proposal to deal with the vague protections standards in IIAs is to provide states with a greater 'voice' in the way treaties are interpreted.[75]

As ISDS tribunals are not directly responsible for the wording of IIAs and due to the difficulty in ascertaining the principles and norms that presently constitute the IIR, this paper focuses more on the second factor, which is, whether the decisions of the tribunal are considered legally sound and consistent with commonly accepted principles of legal decision-making as the third criterion.

This paper therefore utilises these three criteria as a tool for assessing the subjective legitimacy of the current ISDS framework.

III. Assessing Subjective Legitimacy in Investor-State Dispute Settlement

i. Whether investor-state dispute settlement is fair and unbiased

The fairness, or lack thereof, of ISDS can be assessed by examining its origin, its institutional structure and the manner in which arbitrators exercise

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71 Roberts A, 'Clash of paradigms: Actors and analogies shaping the investment treaty system,' 107(1) *American Journal of International Law*, 2013, 75.

72 Chung O, 'The lopsided international investment law regime and its effect on the future of investor-state arbitration', 960.

73 UNCTAD*, International investment agreements: Flexibility for development,* June 2000, 123.

74 Gordon, K. and Pohl J, 'Investment treaties over time - treaty practice and interpretation in a changing world', 02 *OECD Working Papers on International Investment*, 2015, 40 < https://www.oecd.org/investment/investment-policy/WP-2015-02.pdf> on 10 January 2022.

75 Gordon, K. and Pohl J, 'Investment treaties over time - treaty practice and interpretation in a changing world', 02 *OECD Working Papers on International Investment*, 2015, 40.

their authority. This examination leads to the conclusion that ISDS is perceived as unfair and biased and therefore lacking in legitimacy due to the unfair manner of its establishment. This is because ISDS was designed to enable powerful developed countries to police developing countries which in turn led to the establishment of a mode of adjudication that grants foreign investors excessive corporate power.

a. The Unfair Origins of ISDS

Kate Miles discusses the historical origins of International Investment Law and notes that it resulted from an international legal system created by European states to protect the interests of their capital exporting nationals leaving the IIR inculcated with imperialism.[76] Non-European legal regimes and internation trading and investment systems were ultimately replaced with a universal system of international law based on European conceptions of property.[77] The European and United States international law was conceptualised as a universal law superior to the legal systems of non-Western countries which were deemed to be unreliable and political.[78] Miles' discussion of the origins of international investment law also highlights the existence of unequal treaties that conferred one-sided rights and were the product of actual or threatened use of force by the dominant Western commercial powers of the day and spotlights how the neutrality of the language used disguised the imposed nature of the agreement.[79]

In the 17th century, European countries adopted a novel technique of pursuing state interests through a select group of trading companies which were granted sovereign rights and privileges.[80] The activities of these corporations shifted from commercial enterprise to imperial acquisition.[81] The relationships the European corporations formed with the new territories influenced the development of International Investment Law which enmeshed the interests

[76] Miles K, 'International investment law: Origins, imperialism and conceptualizing the environment,' 21 *Colorado Journal of International Environmental Law and Policy,* 2010, 1-2.

[77] Miles K, 'International investment law: Origins, imperialism and conceptualizing the environment,' 21 *Colorado Journal of International Environmental Law and Policy,* 2010, 4.

[78] Weghman V and Hall D, 'The unsuitable political economy of investor-state dispute settlement mechanisms,' 87(3) *International Review of Administrative Sciences*, 2021, 485 < https://journals.sagepub.com/doi/pdf/10.1177/00208523211007898 > on 10 January 2022.

[79] Miles K, 'International investment law: Origins, imperialism and conceptualizing the environment,' 21 *Colorado Journal of International Environmental Law and Policy,* 2010, 6.

[80] Miles K, 'International investment law: Origins, imperialism and conceptualizing the environment,' 21 *Colorado Journal of International Environmental Law and Policy,* 2010, 12.

[81] Miles K, 'International investment law: Origins, imperialism and conceptualizing the environment,' 21 *Colorado Journal of International Environmental Law and Policy,* 2010, 13.

of the European States and private commerce.[82] This historical examination demonstrates that during the development of the International Investment Law, developed capital exporting states collaborated with their nationals engaging in trade and foreign investment in the development of international property rules. This in turn led to the laws developed representing the interests of capital exporting states and their nationals.[83]

The historical alignment of state interests with those of foreign investors, in particular trading companies, influenced the development of international trading rules including the system to be used to resolve investor-state disputes.[84] The emphasis on the protections of an investor's interests can be seen in the present ISDS system that is decentralised and makes use of *ad hoc* arbitration, a system of adjudication that is better suited to resolving commercial disputes.[85] This commercial approach that was adopted due to the historical emphasis on investor protection is troublesome as the question to be determined in commercial arbitration differs from the one to be determined in investment treaty arbitration.[86]

Later in the development of the IIR, most Bilateral Investment Treaties (BITs) were originally signed between a developed and a developing country.[87] In the vast majority of cases, BITs opted to make use of ISDS to settle investment disputes.[88] At this time, developing countries had very little understanding of the implications of the BITs they were signing as there had been very few disputes then.[89] Developed countries on the other hand viewed ISDS as a means of providing a remedy against direct expropriations by administrations in developing countries. As was succinctly summarised by the United States Senator Elizabeth Warren, 'they were concerned that a corporation might build a plant one day only to watch a dictator confiscate it the next. To encourage foreign investment

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82 Miles K, 'International investment law: Origins, imperialism and conceptualizing the environment,' 21 *Colorado Journal of International Environmental Law and Policy,* 2010, 13-14.

83 Miles K, 'International investment law: Origins, imperialism and conceptualizing the environment,', 18-19.

84 Miles K, 'International investment law: Origins, imperialism and conceptualizing the environment,' 21 *Colorado Journal of International Environmental Law and Policy,* 2010, 18-19.

85 Miles K, 'International investment law: Origins, imperialism and conceptualizing the environment,' 21 *Colorado Journal of International Environmental Law and Policy,* 2010, 19.

86 Howard D M, 'Creating consistency through a world investment court', 4.

87 Franck S D, 'The legitimacy crisis in investment treaty arbitration: Privatizing public international law through inconsistent decisions', 1527-1528.

88 Dolzer R and Schreuer C, *Principles of international investment law,* 233.

89 Kelsey J, 'The Crisis of legitimacy in international investment agreements and investor state dispute settlement' in Ekins R and Gee G (eds) *Judicial Power and the Left,* Policy Exchange, London, 2017, 99.

in countries with weak legal systems, the United States and other nations began to include ISDS in trade agreements'.[90]

Though BITs impose obligations on both signatories, developing countries were not expecting an outflow of capital to developed states.[91] Foreign capital was moving from developed states to developing states. This one-sided movement of foreign capital means that in reality, the BITs were only extending protection to investors from developed countries[92] which in turn means that it is the nationals of developed countries that would benefit from ISDS.

The historical emphasis on protection of foreign investors' interests led to foreign investors being granted the right to directly sue the host state in the event of an infringement of a BIT.[93] This right to institute suits was granted in addition to the right to diplomatic protection that foreign investors enjoy from their host state in traditional international law.[94]

Robert Howse correctly exhibited the unfairness of only granting foreign investors a right to institute proceedings while denying other stakeholders of the IIR, such as environmentalists and labour union representatives, the same right.[95] Howse's critique is crucial as it highlights the exclusion of stakeholders who have an interest in the hearing and determination of ISDS disputes where these disputes concern politically sensitive matters such as environmental regulation and labour rights. Those who oppose this argue that the environmentalists and labour union representatives should rely on the protection and representation of the home state. This is a one-sided view of the matter. If foreign investors can benefit from diplomatic protection and get the right to institute proceedings, representatives of minorities or disempowered groups should also enjoy the right to directly access ISDS.[96]

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90 Warren E, 'The Trans-Pacific Partnership clause everyone should oppose' The Washington Post, 25 February 2015 - <https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?noredirect=on&utm_term=.c4bb7867111b> on 25 August 2021.

91 Perrone N, 'The governance of foreign investment at a crossroad: Is an overlapping consensus the way forward?' 15(1) *Global Jurist*, 2014, 3.

92 Perrone N, 'The governance of foreign investment at a crossroad: Is an overlapping consensus the way forward?', 3.

93 Dolzer R and Schreuer C, *Principles of international investment law,* 232.

94 Dolzer R and Schreuer C, *Principles of international investment law,* 229.

95 Howse R, 'international investment law and arbitration: A conceptual framework,' Institute for International Law and Justice, Working Paper 2017/1, 2017, 40-53 - < https://www.iilj.org/wp-content/uploads/2017/04/Howse_IILJ_2017_1-MegaReg.pdf > on 25 August 2021.

96 Howse R, 'International investment law and arbitration: A conceptual framework,' 40-53.

The position taken by African states with respect to ISDS can be considered by examining the historical record that led to the adoption of the ICSID Convention. Won Kidane has reviewed this historical record and notes that objections were raised by African states on the question of standing of a private investor to proceed against a sovereign state in an arbitral forum.[97] This demonstrates that African states were not in support of allowing foreign nationals to institute proceedings against them in an international arbitral tribunal and this opposition shows the current ISDS system that allows foreign investors to sue was not perceived as legitimate during the discussions that led to the adoption of the ICSID Convention.

Further, in the discussions leading to the acceptance of the ICSID Convention, Cameroon and Tunisia objected to challenges to state expropriations in the public interest.[98] Despite the objection of some African states, allowing foreign investors to institute proceedings against states led to foreign investors challenging state regulation, including non-discriminatory regulation for a public purpose (such as public health measures), if the foreign investor was of the view that the regulation diminished its investment.[99] This led to ISDS claims causing a 'regulatory chill' as state officials had to consider the cost of investor challenges in deciding whether or not to adopt health, environmental, and other public policies.[100] This one-sided power that is only granted to foreign investors in the IIR has left many stakeholders disgruntled and labelling the regime and ISDS unfair.

It is difficult to perceive ISDS as fair in light of its neo-colonial origins elaborated above. ISDS originated and was developed to be used by developed countries against developing countries. If included in AfCFTA, the degree of legitimacy that ISDS is likely to generate in the African community is therefore minimal.

b. Independence and integrity of arbitrators

There is no evidence of actual systematic bias by arbitrators towards investors in ISDS.[101] However, the pivotal issue when discussing the independence and

97 Kidane W, 'The China-Africa factor in the contemporary ICSID legitimacy debate,' 35(3) *University of Pennsylvania Journal of International Law,* 2014, 587.

98 Kidane W, 'The China-Africa factor in the contemporary ICSID legitimacy debate,' 35(3) *University of Pennsylvania Journal of International Law,* 2014, 587.

99 Kelsey J, 'The crisis of legitimacy in international investment agreements and investor state dispute settlement', 101.

100 Chung O, 'The lopsided international investment law regime and its effect on the future of investor-state arbitration', 963.

101 Howse R, 'International investment law and arbitration: A conceptual framework,' 4.

impartiality of arbitrators is how they are *perceived*. As the oft quoted statement goes: 'Justice should not only be done, but should manifestly and undoubtedly be seen to be done'.[102]

The challenge with the perception of arbitrators in ISDS is that they are viewed as being beholden and/or dependent on either corporate or state interests.[103] The fact that parties are able to appoint arbitrators in ISDS has been noted to give parties an incentive to appoint an arbitrator they believe will be sympathetic to their views, create an incentive for an arbitrator to side with an appointing party and may even create a cognitive bias that leads to inaccurate decisions.[104] The dependence on parties' interest can be demonstrated in two key ways. First, the fact that arbitrators sit as adjudicators while simultaneously serving as counsel in other proceedings can, consciously or unconsciously, tempt the arbitrator to determine a dispute in a way that could benefit the position he has taken as counsel in other proceedings.[105] Secondly, it has been noted that the parties to an international investment dispute have an interest in appointing arbitrators that they hope will support their respective positions.[106] This has led to the present system being described as 'a secretive tribunal of highly paid corporate lawyers'.[107] Nonetheless, this is not a shortcoming that applies solely to the ISDS.

The advocates for ISDS argue that there are sufficient systems in place to ensure that prejudiced or biased arbitrators are removed.[108] While this is correct with respect to cases of *ipso facto* bias, for example where a relative of an arbitrator is a shareholder in the claimant company, these systems cannot help in improving the subjective legitimacy of ISDS which has been eroded due to the perceived lack of independence of arbitrators. It has been noted by Naomi

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102 *R v Sussex Justices*; *Ex parte McCarthy* [1924] 1 KB 256 at page 259.

103 Van Harten G, *Investment treaty arbitration and public law,*172.

104 Giorgetti C, Ratner S, Dunoff J, Hamamoto S, Nottage L, Schill S and Waibel M, 'Independence and Impartiality in Investment Dispute Settlement: Assessing Challenges and Reform Options' Academic Forum on ISDS Concept Paper, 14 <https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/6-independence.pdf > accessed on 27 February 2022.

105 Diependaele *et al* 'Assessing the normative legitimacy of investment arbitration: The EU's investment court system', 41.

106 Brower C and Schill S, 'Is arbitration a threat or a boon to the legitimacy of international investment law' 9(2) *Chicago Journal of International Law*, 2009, 491.

107 The Economist, 'The arbitration game' 11 October 2014 - < https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game> on 25 August 2021.

108 European Federation for Investment Law and Arbitration (EFILA), 'A response to the criticism against ISDS' 17 May 2015, 2015, 20 - < https://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf > on 25 August 2021.

Tarawali that there is a perception that ISDS is biased against African states in terms of case outcome.[109] The ICSID decision in *SCB (Hong Kong) v. Tanzania*[110] was also perceived as biased towards African countries and led to civil society and trade union organisations across Africa writing an open letter to 'stop the unfair investor-state dispute settlement against Africa'.[111]

A second argument that has been made in defence of the present framework is that an arbitrator's reputation for independence and impartiality is too fragile to risk through biased decision making and therefore this works as a control mechanism.[112] This argument is a double-edged sword. Theoretically, arbitrators can also build a reputation of being critical of large businesses in order to appeal to host states or build a reputation of being critical of state intervention in private interests in order to appeal to foreign investors and secure future appointments.[113] The perception of being beholden to state or foreign investor interests persists, which illustrates that ISDS is not viewed as being fair and unbiased and therefore legitimate.

The origins of ISDS discussed above show an emphasis on protection of foreign investors to the exclusion of local communities and other stakeholders of the IIR. This, combined with the perceived lack of independence of arbitrators in ISDS, goes against one of the key objectives of AfCFTA, which is to deepen economic integration in accordance with the Pan African Vision, Agenda 2063.[114] Agenda 2063 is a shared framework for inclusive growth and sustainable development for Africa.[115] In the author's opinion, the unfair origin of ISDS focused largely on foreign investor rights does not demonstrate inclusivity or sustainability and this is one of the reasons ISDS is unlikely to generate sufficient legitimacy if it is adopted as the mode of adjudicating international investment disputes under AfCFTA.

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[109] Tarawali N, 'Towards or Away from Investment Treaty Arbitration in Africa' 9 *Emerging Markets Restructuring Journal* 2019 <https://www.clearygottlieb.com/-/media/files/emrj-materials/issue-9-2018/towards-or-away-from-investment-treaty-arbitration-in-africa-pdf.pdf > on 1 June 2022

[110] Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania ICSID Case No. ARB/15/41

[111] Bilaterals.org, 'Stop the unfair investor-state dispute settlement against Africa' <https://www.bilaterals.org/?stop-the-unfair-investor-state> on 22 July 2022.

[112] Brower C and Schill S, 'Is arbitration a threat or a boon to the legitimacy of international investment law', 492.

[113] Brower C and Schill S, 'Is arbitration a threat or a boon to the legitimacy of international investment law', 492. See also Van Harten G, *Investment treaty arbitration and public law,* 171.

[114] Article 3(a), *Agreement Establishing the African Continental Free Trade Area*, 21 March 2018

[115] African Union Commission Background Note 01 on Agenda 2063, 2015 - < https://au.int/sites/default/files/documents/33126-doc-01_background_note.pdf > accessed 12 August 2021.

ii. Whether investor-state dispute settlement is transparent and infused with democratic norms

The second criterion for assessing legitimacy requires an international tribunal to be designed in such a manner that parties outside the judicial process can observe and assess its processes and outcomes.

The use of *ad hoc* arbitration to settle international investment disputes has been criticised for focusing too heavily on confidentiality and privacy of proceedings when the matters being considered involve regulatory concerns that have an effect on the community at large.[116] The focus on privacy and confidentiality in ISDS was based on a commercial approach to dispute settlement.[117] This has led to ISDS being described as 'a private, global super court that empowers corporations to bend countries to their will'.[118]

Public access is about parties to a dispute and adjudicators knowing that their views and arguments can be read and analysed by anyone so they can consider the wider implications of their actions.[119] The critique of the transparency and openness of ISDS is not limited to the public getting access to the papers filed and awards of arbitral tribunals; it is also about public participation in ISDS proceedings.[120] The notion here is that the legitimacy of adjudicative decisions which affect regulatory concerns may require views other than those of the claimant and the respondent.[121]

The lack of public access to arbitral proceedings was highlighted in the *BiWater v Tanzania* case, an ICSID arbitration.[122] BiWater is a private company incorporated under the laws of England and Wales. In this case, there was a possibility of a further intervention by the amici, comprised of five international and Tanzanian Non-Governmental Organisations but it was decided in Procedural Order 6 that it would not be necessary.[123] Furthermore, Procedural

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116 Van Harten G, *Investment Treaty Arbitration and Public Law,* 159.

117 Asteriti A and Tams C J, 'Transparency and representation of the public interest in investment treaty arbitration' in Schill S (ed) *International investment law and comparative public law*, Oxford University Press, Oxford, 2010, 789.

118 Hamby C, 'The Court that rules the world' Buzzfeed News, 28 August 2016 - <https://www.buzzfeed.com/chrishamby/super-court?utm_term=.nwL9xd3Rr#.nfzomgR0b> on 25 August 2021

119 Van Harten G, *Investment Treaty Arbitration and Public Law,* 161.

120 Diependaele *et al* 'Assessing the normative legitimacy of investment arbitration: The EU's investment court system', 41.

121 Van Harten G, *Investment Treaty Arbitration and Public Law,* 159.

122 Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22

123 Aldson F, 'Biwater v Tanzania: Do corporations have human rights and sustainable development obligations stemming from private sector involvement in natural resource provision?' 2 *Environmental*

Order 6 was not made available to the public making it impossible to assess the reasons for the decision which led to a lack of transparency in the process.[124] This lack of transparency has been noted as one of the concerns African countries have raised in connection with ISDS.[125]

This critique on the transparency and openness of ISDS has not gone unnoticed. ISDS has evolved over time to include improved access to investment arbitration practice and the inclusion of non-disputing parties as amicus curiae.[126] The 2006 revision of the ICSID rules has been lauded for recognising, in principle, the possibility of non-party submissions upon consultation of the disputing parties.[127] Further, the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration have also been cited as an example of the move towards transparency and openness in *ad hoc* investment arbitration.[128]

The reforms to increase the transparency and openness of ISDS should be commended. The reforms notwithstanding, there are areas which could benefit from increased transparency. An example is oral submissions and hearings which are only open to parties.[129] The conversation around inclusion in the IIR is critical as recent research has shown that local communities, who are often indigenous peoples, in many cases have an interest in the resources targeted by the foreign investor but are completely excluded or made 'invisible' by the IIR.[130]

Further, an empirical study of ISDS awards resolved between September 2011 and September 2014 found that a surprising number of awards remain confidential and there continues to be no legal requirement that ISDS awards

Liability 64 - < https://www.academia.edu/306487/Biwater_v_Tanzania_Do_corporations_have_human_rights_and_sustainable_development_obligations_stemming_from_private_sector_involvement_in_natural_resource_provision > on 10 January 2022.

124 Aldson F, 'Biwater v Tanzania: Do corporations have human rights and sustainable development obligations stemming from private sector involvement in natural resource provision?' 2 *Environmental Liability* 64 - < https://www.academia.edu/306487/Biwater_v_Tanzania_Do_corporations_have_human_rights_and_sustainable_development_obligations_stemming_from_private_sector_involvement_in_natural_resource_provision > on 10 January 2022.

125 Muigua K, 'Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges' <http://kmco.co.ke/wp-content/uploads/2020/06/Investment-Related-Dispute-Settlement-under-the-African-Continental-Free-Trade-Agreement-Promises-and-Challenges-Kariuki-Muigua-June-2020.pdf> accessed on 27 February 2022 at page 10.

126 EFILA, 'A response to the criticism against ISDS', 14.

127 Article 37(2), *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)* 25 September 1967.

128 EFILA, 'A response to the criticism against ISDS', 16.

129 Asteriti A and Tams C J, 'Transparency and representation of the public interest in investment treaty arbitration', 794.

130 Perrone N, 'The "invisible" local communities: Foreign investor obligations, inclusiveness, and the international investment regime.' 113 *American Journal of International Law Unbound,* 16.

be made public.[131] This is important as it allows parties who may be affected by an ISDS tribunal to observe and evaluate the tribunal's processes as well as the decision making. In non-ICSID cases, there is no requirement that the occurrence of a dispute is known.[132] Notwithstanding the progress made in ensuring more transparency and openness in ISDS therefore, it remains a very secretive mode of dispute resolution.

One of the objectives of AfCFTA is to promote and attain sustainable and *inclusive* socio-economic development for the state parties.[133] According to the World Bank, a sustainable path for development and poverty reduction is defined as one that manages, among other things, to ensure social inclusion.[134] Social inclusion is defined as, 'the process of improving the ability, opportunity, and dignity of people, disadvantaged on the basis of their identity, to take part in society'.[135]

In the author's opinion, the AfCFTA cannot achieve its goal of sustainable and inclusive socio-economic development if the mode of adjudicating international investment disputes is one that is perceived to focus on privacy and confidentiality. The lack of a sufficient degree of transparency and democratic norms in ISDS erodes its legitimacy and makes it incompatible with the AfCFTA's objectives.

iii. Whether investor-state dispute settlement is committed to the underlying international investment regime

As elaborated above, this criterion is examined by considering the standard of the decisions made by an international tribunal and whether these are consistent with accepted principles of legal decision-making. This requires the identification of coherence and consistency in judicial decision-making. The desire for consistency is motivated by the need to avoid an international tribunal being perceived as arbitrary and ineffective which may lead to a boycott of the

131 Behn D, 'Legitimacy, evolution and growth in investment treaty arbitration: Empirically evaluating the state of the art', 46(2) *Georgetown Journal of International* Law, 2015, 379.

132 Behn D, 'Legitimacy, evolution and growth in investment treaty arbitration', 379.

133 Article 3(e), *Agreement Establishing the African Continental Free Trade Area.*

134 World Bank, *The World Bank Group goals: End extreme poverty and promote shared prosperity,* 19 April 2013, 31 -<https://openknowledge.worldbank.org/bitstream/handle/10986/20138/899250WP0Box380PUBLIC00WB0goals2013.pdf?sequence=1&isAllowed=y > on 25 August 2021.

135 World Bank, *Inclusion matters: The foundation for shared prosperity,* 18 October 2013, 4 - <https://openknowledge.worldbank.org/bitstream/handle/10986/16195/9781464800108.pdf?sequence=1&isAllowed=y > on 25 August 2021.

tribunal.[136] Consistency in this context requires that a rule be applied uniformly in every similar or applicable situation.[137] Coherence on the other hand relates to the principle that a system should make sense as a whole and form a well organised structure.[138]

ISDS has been criticised for a lack of consistency. William Burke White, in his analysis of the cases filed as a result of the Argentine financial crisis, summarised the problem as follows:

> 'The fact that four Tribunals, when confronted with the same facts, evidence, and argumentation would reach very different interpretations of the law and diametrically opposite holdings is, itself, sufficient to call into question the legitimacy and viability of the ICSID arbitral system'.[139]

The four tribunals referred to in the quote above are the tribunals that decided *CMS v Argentina*[140], *Enron v Argentina*[141], *LG&E v Argentina*[142] and *Sempra v Argentina*[143]. The tribunals in the *CMS v Argentina, Enron v Argentina* and *Sempra v Argentina* cases concluded that Argentina was not entitled to rely on the necessity and non-precluded measures defences while the tribunal in the *LG&E v Argentina* case concluded that Argentina is entitled to invoke the non-precluded measures defence and that the necessity defence is potentially applicable.[144] Argentina applied to annul the award in the *CMS v Argentina* case and the Annulment Committee attacked the tribunal's finding that Argentina was not entitled to rely on the non-precluded measures defence but acknowledged that it had limited power to review the award.[145]

In the author's opinion, the lack of consistency in instances such as the cases filed against Argentina lead to International Investment Law's incapability to form a well organised structure and become a coherent system.

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136 Grossman N, 'Legitimacy and international adjudicative bodies', 150.

137 Franck T, *Fairness in international law and institutions,* Oxford University Press, Oxford, 1995, 38.

138 Howard D M, 'Creating consistency through a world investment court', 33 - 34.

139 Burke-White W, 'The Argentine financial crisis: State liability under BITs and the legitimacy of the ICSID system,' 3 *Asian Journal of WTO & International Health Law and Policy,* 2008, 199.

140 CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8.

141 Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3.

142 LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1.

143 Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16.

144 Burke-White W, 'The Argentine financial crisis: State liability under BITs and the legitimacy of the ICSID system,' 3 *Asian Journal of WTO & international Health Law and Policy,* 2008, 187.

145 Burke-White W, 'The Argentine financial crisis: State liability under BITs and the legitimacy of the ICSID system,' 3 *Asian Journal of WTO & international Health Law and Policy,* 2008, 204.

There are those who feel that due to the fragmented nature of the IIR, coherence should not be a key concern of the legitimacy debate.[146] The argument is that in the absence of a multilateral treaty, some divergences in treaty interpretation are a natural consequence of the system.[147] This approach fails to explain the divergence in reasoning in cases where the treaty being interpreted was the same as in the Argentinian cases.

The plea for consistency does not mean that each and every dispute must be determined in exactly the same way. As has been explained above, IIAs do not have the effect of creating well-defined property rights.[148] This, coupled with the fact that the IIR belongs to an extremely plural and culturally diverse tradition of property rights means the work of arbitrators in determining the substantive rights of foreign investors is not easy.[149] This creates inconsistency of substantive rights in investment arbitration.[150] Arbitrators therefore determine disputes on substantive rights based on their value systems.[151] An arbitrator who takes a legal realist view is therefore likely to reach a different conclusion from an arbitrator who takes a law and economics approach. Such inconsistency cannot be avoided. What can be avoided is the inconsistency that arises out of similar facts involving similar provisions being interpreted by different tribunals that reach different conclusions.

In order to protect against inconsistency, Grossman notes that states usually ensure that adjudicative bodies have an appellate system.[152] The challenge with ISDS is that there is no right to appeal an erroneous decision of an arbitral tribunal on the merits.[153] An appellate mechanism would assist in cases such as *CMS v Argentina* where despite the Annulment Committee taking the position that the arbitral tribunal made certain errors of law it had no jurisdiction to overturn the award.[154]

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146 Caron D, 'Investor state arbitration: Strategic and tactical perspectives on legitimacy', 32(2) *Suffolk Transnational Law Review,* 2009, 517-518.

147 EFILA, 'A response to the criticism against ISDS', 13.

148 Perrone N, 'The international investment regime and foreign investor rights: Another view of a popular story' 11 (1) *Manchester Journal of International Law,* 2014, 417.

149 Perrone N, 'The international investment regime and foreign investor rights: Another view of a popular story', 418.

150 Perrone N, 'The international investment regime and foreign investor rights: Another view of a popular story', 418.

151 Perrone N, 'The international investment regime and foreign investor rights: Another view of a popular story', 418.

152 Grossman N, 'Legitimacy and international adjudicative bodies', 150.

153 Dolzer R and Schreuer C, *Principles of international investment law,*239.

154 *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. Arb 01/08, Decision of the ad hoc Committee on the Application for Annulment, 25 September 2007 at para. 131 to 136.

The lack of consistency in arbitral awards and of an appellate review mechanism when dealing with crucial and high stakes cases have led some to conclude that the present ISDS system 'shocks sense of rule of law or fairness'.[155] As noted by Talkmore Chidede, inconsistent decisions is one of the concerns African countries have raised with respect to ISDS.[156] This shows that the inconsistency of ISDS decisions has further eroded the legitimacy of ISDS in Africa. The author is of the view that the concerns raised by African countries with respect to inconsistent decisions arising out of ISDS is another reason why AfCFTA should not include ISDS as a mode of adjudication of international investment disputes.

IV. The Way Forward

The main focus of this paper is to demonstrate ISDS' lack of subjective legitimacy and argue against its inclusion in the AfCFTA's protocol on investment. In this section, this paper highlights an alternative option available for adjudicating international investment disputes under AfCFTA, which is likely to be perceived to be more legitimate than ISDS.

The Draft Pan-African Investment Code developed by the African Union Commission - Economics Affairs Department suggests African states are moving towards a framework of resolving international investment disputes that requires the exhaustion of domestic remedies as a pre-requisite to ISDS.[157] Some African states have gone a step further and enacted legislation that requires an exhaustion of domestic remedies and, even then, if the dispute is to progress to arbitration, the parties will be the host state and the home state of the investor as opposed to the foreign investor and the host state.[158] In light of this, this author is of the opinion that a dispute resolution mechanism in the AfCFTA's protocol on investment that requires an exhaustion of domestic remedies is likely to increase the subjective legitimacy of the adjudication of international investment disputes under the AfCFTA.

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155 Chung O, 'The lopsided international investment law regime and its effect on the future of investor-state arbitration', 968.

156 Chidede T, 'Investor-state dispute settlement in Africa and the AfCFTA Investment Protocol' - < https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html > accessed on 27 February 2022 .

157 Article 42 (1) (c) of the Draft Pan-African Investment Code, December 2016 < https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf > accessed on 1 June 2022

158 Section 13(5) of the Republic of South Africa's Protection of Investment Act, Act 22 of 2015 < https://www.gov.za/sites/default/files/gcis_document/201512/39514act22of2015protectionofinvestmentact.pdf > accessed on 1 June 2022.

Where an investor is not satisfied by the outcome of domestic remedies, the author suggests that the dispute be referred to the Dispute Settlement Body already established under the AfCFTA where the dispute will be between the home state of the investor and the host state. Such a dispute resolution mechanism would, in the author's view, move away from a neo-colonial system that led to too much power being granted to foreign investors, and increase transparency in the adjudication of international investment disputes, as this will be done in domestic courts or at the AfCFTA's Dispute Settlement Body where there is likely to be increased public access. The coherence of decisions is also likely to increase as these will be passed by one body.

V. Conclusion

In this paper, the author has demonstrated that the origins of ISDS are neo-colonial, which led to the adoption of a structure of dispute resolution that is more suited to private commercial dispute resolution as opposed to investor-state disputes. Further, ISDS lacks sufficient transparency as it focuses too heavily on confidentiality and the privacy of parties which prevents public access to the dispute resolution process. The lack of public access leads to a system that prevents court watchers from evaluating the tribunal's processes and decision-making.

The paper has also demonstrated that the decisions of ISDS tribunals lack a sufficient degree of consistency which in turn makes the entire IIR system incoherent. The inconsistency of ISDS tribunals erodes the confidence of international actors to submit to the tribunals and further erodes the legitimacy of ISDS.

The above assessment of the subjective legitimacy of ISDS shows that it fails to generate a sufficient degree of legitimacy due to the reasons elaborated above. ISDS' failure to generate a sufficient degree of legitimacy should not be entirely blamed on ISDS; the stakeholders of IIR should invest more effort in ascertaining the protection standards in IIAs in order to increase the legitimacy of ISDS. This notwithstanding, ISDS' legitimacy crisis makes it unsuitable to be the mode of adjudicating international investment disputes in AfCFTA.

The challenge that African States will face when negotiating the protocol on investment is to design a mode of adjudication that is more equitable and inclusive than ISDS. This author has suggested requiring the exhaustion of domestic remedies before referring a dispute to the AfCFTA's Dispute Settlement Body, but this is an idea that will have to be explored further in another paper.