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Administrative and Judicial Treatment: An Analysis of the AfCFTA Protocol on Investment

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Abstract

Investment Agreements are increasingly used as economic integration tools for attracting foreign direct investment to scale up production, develop value chains, increase trade, and achieve development. The AfCFTA Protocol on Investment creates a framework for investment cooperation and facilitation and investment disputes prevention. It aims to attract strategic investments needed by State Parties to pursue sustainable development while simultaneously yielding returns on investments. In the old generation agreements, they granted investors direct access to international dispute settlement. Adjudicating investor-state disputes led to concerns about infringement on state sovereignty and rights to regulate. Backlash against the international investment regime led to change in approach to IIAs by some parties to address such concerns. This is evident in the AfCFTA Protocol on Investment. Key changes in this endeavour are the investment protection provisions. Of particular interest to this paper is the exclusion of Fair and Equitable Treatment Standard of investment protection, whose reputation and appeal as an investor-friendly principle lies in its indeterminacy, coverage of wide range of governmental actions, flexibility, and potential for wide interpretation in claims other than lawful expropriation. it was replaced by the provision on administrative and judicial treatment. Interestingly, Article 17(1) benchmarks this breach to the minimum standard of treatment under customary international law. This demonstrates efforts to preserve regulatory space and accommodate environmental and developmental exigencies. Given the well-established nexus between investment and development, and the role that strategically attracting foreign direct investment can play in attaining developmental goals, this paper analysis the implication of Article 17 on the continents' ability to attract foreign direct investment. The paper observes that weak legal and regulatory environments could impact in-

vestment and lead to arbitration where Article 17 will be subjected to rigorous interrogation with consequences. Using doctrinal research, this paper analysis the implication of Article 17 to distil its possible implication on the continent's ability to attract foreign direct investment to fund sustainable development while highlighting potential pitfalls and recommending ways forward.

Keywords

AfCFTA, Arbitration, FDI, FET, Governance, Interpretation, Investment, Investment Arbitration, Rule of Law, Sustainable Development, Trade

1. Introduction

The global investment landscape is experiencing a tough phase characterised by uncertainty and volatility. The World Investment Report (WIR) 2025 indicates that global investment flows fell by 11% in 2024. Developed economies bore the brunt, while developing economies made overall gain of 0.2%. Africa gained 75%, a chunk of which is attributed to the Egypt Project, with 63% without which the continent saw a 12% rise (UNCTAD, 2025). However, the Secretary-General of UNCTAD cautions on potential dire consequences for development, impacting job creation, infrastructure development, and attaining sustainable development.

Data from the report indicates that there was a deficit in sustainable development sectors that are critical for Africa. Infrastructure −35%, renewable energy −31%, water and sanitation −30%, and agricultural system −19% respectively (UNCTAD, 2025). There was a 25% gain in health and education, and the digital economy grew by 14%. For developing countries, 10 countries got 80% share of the digital sector green field projects (UNCTAD, 2025). No African country was among these 10 countries that held the lion share of these greenfield digital projects (UNCTAD, 2025). The fall in foreign investment is attributed to an observed pattern foisted by geopolitical tensions, rising trade barriers, increasing screening measures for foreign investment, especially in developed countries, and a shift in priorities towards short-term risk avoidance and national interest. This makes the global investment landscape more volatile, selective, uncertain and highly competitive.

2. Evolution of the Investment Regime as a Conduit for Foreign Direct Investment

Although investment law is a relatively new field of international law, it has developed and evolved rapidly from quiet existence to high activity (Aaken, 2008). It is described as a "construct of norms, standards, principles, institutions and procedures" that serve the purposes of the international community (Ryan, 2009). The field originally developed from the customary international law protection of foreign nationals abroad. In the nineteenth century, European states and the United States argued that aliens were entitled to a minimum standard of protec-

tion under international law (Alschner, 2017).

The field developed and expanded rapidly during the BIT era due to increased globalisation and rise in cross-border investments enabled by the movement of capital through foreign direct investment (FDI) as a conduit (Ryan, 2008). This stimulated the need for a legal regime that can mitigate risks, provide certainty, and safeguard continued global economic growth (Ryan, 2008). It resulted in an investment regime governed by myriad IIAs (Alschner, 2017), ranging from Bilateral Investment Treaties (BITs), Multilateral Investment Treaties (MITs), and Regional Investment Treaties (RITs), etc.

This rapid growth is in tandem with an increase in foreign investment (Katselas, 2012), due to the significant role that investments play in the economy (Chaisse, 2015). A correlation is made between IIAs and increase in foreign investment as IIAs could be perceived as tools for promoting investment flows among parties (Dolzer, 2005) and "*a mechanism for overcoming commitment problems between the investor and the host State in order to generate mutual benefits*" (Aaken, 2008). As tools for promoting investment flow, IIAs' evolution is traceable to the Abs-Shawcross draft investment treaty of 1958 and the first ever investment treaty between Germany and Pakistan in 1959 (Mann, 2013; Kidane, 2018)[1]. The pace picked up as developing countries gained independence. The earlier phase of the investment regime developed amid the Cold War and decolonisation (Mann, 2013; Ryan, 2009).

A notable evolutionary phase was marked by investors leveraging the IIAs to take legal action against host states for injury or loss of their investments from the late 1990s (Aaken, 2008). Investors leveraged investment protection provisions in IIAs to make claims since they are designed to limit the exposure of foreign investors to domestic administrative regulation in response to their concerns over the predictability and stability of host states' domestic legal frameworks (Dolzer, 2005). Resort to arbitration occurred simultaneously with the rise in the number of BITs signed (Aaken, 2008). This increased the cost of BITs for host states (Aaken, 2008), leading to criticism and calls for reform of the regime. The backlash resulted in changes to IIAs and the reforms being witnessed from 2012 to date (UNCTAD, 1a). It has been observed that the changes witness by the investment regime is attributable to the impact of investor-state arbitration, and not so much about the substantive provisions of IIAs (Behn, Berge, & Langford, 2018). Since the surge in resort to investment arbitration, some IIAs were terminated (Ranjan, 2014), some were renegotiated, new ones were entered into and some state parties such as Ecuador and Bolivia denounced their memberships of the ICSID system (Aaken, 2008).

3. The Backlash and Reform of the International Investment Regime

The investment regime faced two-fold backlash. Criticisms resulting from the pro-

[1]The history of investment law is trace to decades before the investment regime. See Mann (2013), Kidane (2018).

gressive interpretation of IIAs on one hand (Hueckel, 2011-2012), push back against the limiting impact of arbitral awards on the regulatory space of host states, and judicial decisions, on the other. A substantial number of old-generation IIAs provide for investment dispute settlement (Mann, 2013). The Dispute Settlement Mechanism (DSM) allows investors to institute arbitral proceedings against a host state without recourse to its domestic legal system (Ripinsky & Williams, 2008; Hueckel, 2011-2012). From the late 90s, a significant number of cases were submitted to arbitration against host states challenging their actions which impacted investments. Notable among them were those submitted for breach of the North American Free Trade Area Agreement (NAFTA) (Mann, 2013). Many of the awards issued by arbitral tribunals were against Argentina in claims emanating from its financial crisis and the measures it took to protect its economy from crashing (Ranjan, 2014). The surge in investment arbitration during this phase is illustrated below:

Table 2: Number of known treaty-based arbitrations[12]

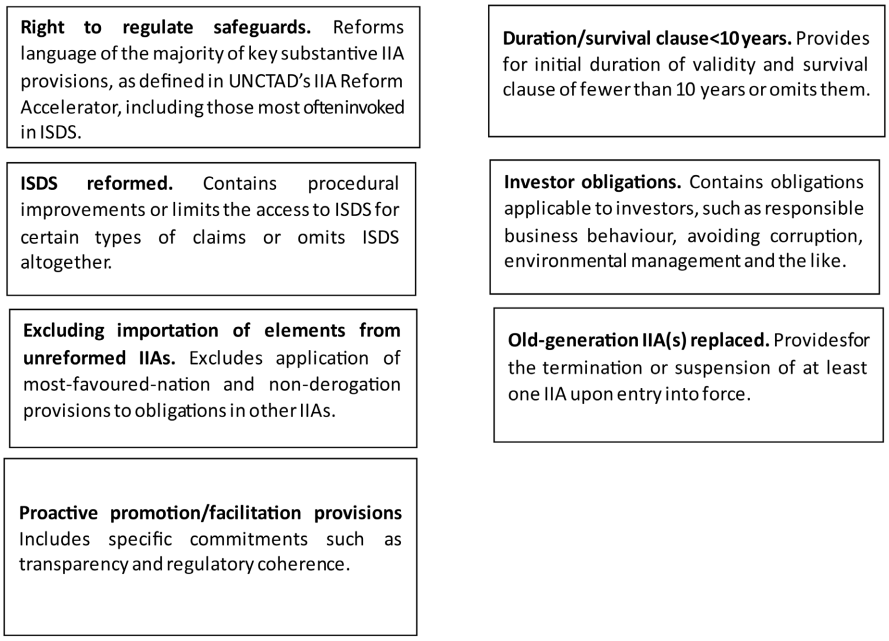
1987	1
1995	~20
2000	~50
2005	~230
2008	~330
2011	~450

Source: Mann (2013).

Many of the arbitral claims were against host state regulatory measures covering environmental, urban, monetary policy, re-organisation of public telephone services, taxation, industrial policies, privatisation-related decisions, and health and safety measures (UNCTAD 1b, 2023). From the changes that occurred due to the backlash, UNCTAD observed two key trends in the new IIAs treaty-making. They include investment protection standards comparable to those in BITs, and limited investment provisions in IIAs.

4. IIA Reforms and the AfCFTA Protocol on Investment

According to UNCTAD, certain provisions are prevalent in new generation IIAs, particularly those made between 2020-2023 (UNCTAD 1c, 2024). They cover new governance investment issues addressing facilitation and cooperation to safeguard the regulatory space of parties, liberalisation, and protection of investment. (UNCTAD 1c, 2024). A common feature is hortatory reference to the protection, policy goals, or sustainable development in the treaty preamble, and investor obligations (UNCTAD 1c, 2024). Some of the selected reforms identified by UNCTAD include the following:



Source: UNCTAD.

Out of the IIAs executed from 2020 to 2023, 75% reformed right to regulate by including safeguards to the rights, 58% either reformed or omitted ISDS, 46% excluded importation of elements from unreformed IIAs, 38% included proactive promotion/facilitation provisions, 29% included duration or survival clause of less than 10 years, 13% included investor obligations, and 13% replaced old-generation IIAs. The AfCFTA Protocol on Investment, like some new generation IIAs, incorporated some of these trends. It contains provisions promoting and facilitating investment and cooperation, and provides for investment protection, investor obligations and sustainable development investments.

The objectives of the Protocol include to encourage intra-African investment flows and opportunities, promote and facilitate same, while fostering sustainable development (AfCFTA)[2]; establishing a balanced, predictable and transparent continental legal and institutional framework for investment that considers interests of State Parties, investors and local communities (AfCFTA)[3]; provide a sound legal framework for the prevention, management and settlement of investment disputes (AfCFTA)[4]; encourage acquisition and transfer of appropriate and relevant technology in Africa (AfCFTA)[5]; and promote, enhance and consolidate coordinated positions and cooperation on matters related to investment promotion, facilitation and protection within the continent (AfCFTA)[6].

Article 5(1) of the Protocol covers Denial of Benefits where an investor or investment from another state party will be denied the benefits of the Protocol

[2]Article 2(a), AfCFTA Protocol on Investment.
[3]Article 2(b), AfCFTA Protocol on Investment.
[4]Article 2(c), AfCFTA Protocol on Investment.
[5]Article 2(d), AfCFTA Protocol on Investment.
[6]Article 2(e), AfCFTA Protocol on Investment.

where: it has no substantial business activity in the Home State; the investment is established or restructured just to access the dispute settlement mechanism provided under the Protocol; the investor or investment is engaged in activities prejudicial to the essential and national interests of the Host State; it is owned or controlled, directly or indirectly, by natural or juridical persons of a third party with no diplomatic relationship with the denying state or toward which it prohibits transactions; it is owned or controlled, directly or indirectly, by natural or legal persons of the denying Host State; it is owned or controlled, directly or indirectly, by natural or juridical persons of a non-State Party that has no substantial business in the territory of a State Party; or one that has committed a breach of a specific binding obligation under Part V of the Protocol covering investor obligations (AfCFTA)[7]. Such denial is subject to review in accordance with Part VII of the Protocol (AfCFTA)[8].

Part I covers general provisions such as definitions (AfCFTA)[9], objectives (AfCFTA)[10], scope of application (AfCFTA)[11], admission of investment[12], and denial of benefits (AfCFTA)[13]. Part II deals with investment promotion and facilitation and covers investment promotion (AfCFTA)[14], investment facilitation (AfCFTA)[15], incentives for sustainable investments (AfCFTA)[16], national focal points (AfCFTA)[17], publication of information (AfCFTA)[18], and non-disclosure of confidential information (AfCFTA)[19]. Part II deals with Investment Protection Standards and covers national treatment (AfCFTA)[20], exceptions to National Treatment (AfCFTA)[21], Most-Favoured Nation Treatment (AfCFTA)[22], exceptions to Most-Favoured Nation Treatment (AfCFTA)[23] interpretation of Non-Discrimination (AfCFTA)[24], Administrative and Judicial Treatment (AfCFTA)[25], Physical Protection and Security (AfCFTA)[26], Expropriation (AfCFTA)[27], exceptions to Expropriation (AfCFTA)[28], Compensation for Expropriation (AfCFTA)[29],

[7]Article 5 (1)(a)-(g), AfCFTA Protocol on Investment.
[8]Article 5(2), AfCFTA Protocol on Investment.
[9]Article 1, AfCFTA Protocol on Investment.
[10]Article 2, AfCFTA Protocol on Investment.
[11]Article 3, AfCFTA Protocol on Investment.
[12]Article 4, AfCFTA Protocol on Investment.
[13]Article 5, AfCFTA Protocol on Investment.
[14]Article 6, AfCFTA Protocol on Investment.
[15]Article 7, AfCFTA Protocol on Investment.
[16]Article 8, AfCFTA Protocol on Investment.
[17]Article 9, AfCFTA Protocol on Investment.
[18]Article 10, AfCFTA Protocol on Investment.
[19]Article 11, AfCFTA Protocol on Investment.
[20]Article 12, AfCFTA Protocol on Investment.
[21]Article 13, AfCFTA Protocol on Investment.
[22]Article 14, AfCFTA Protocol on Investment.
[23]Article 15, AfCFTA Protocol on Investment.
[24]Article 16, AfCFTA Protocol on Investment.
[25]Article 17, AfCFTA Protocol on Investment.
[26]Article 18, AfCFTA Protocol on Investment.
[27]Article 19, AfCFTA Protocol on Investment.
[28]Article 20, AfCFTA Protocol on Investment.
[29]Article 21, AfCFTA Protocol on Investment.

Transfer of Funds (AfCFTA)[30], exceptions to Transfer of Funds (AfCFTA)[31]. Part IV deals with sustainable development issues and covers Right to Regulate (AfCFTA)[32], Minimum Standards on Environment, Labour and Consumer Protection (AfCFTA)[33], Investment and Climate Change (AfCFTA)[34], Investment and Public Health and Pandemics (AfCFTA)[35], Pursuit of Development Goals (AfCFTA)[36], Human Resources Development (AfCFTA)[37], and Transfer of Technology (AfCFTA)[38].

Part V deals with investor obligations and covers Relation to State Party obligations (AfCFTA)[39], Compliance with National and International Law (AfCFTA)[40], Business Ethics, Human Rights and Labour Standards (AfCFTA)[41], Environmental Protection (AfCFTA)[42], Indigenous Peoples and Local Communities (AfCFTA)[43], Socio-Political Obligations (AfCFTA)[44], Anti-Corruption (AfCFTA)[45], Corporate Social Responsibility (AfCFTA)[46], Corporate Governance (AfCFTA)[47], Taxation and Transfer Pricing (AfCFTA)[48]. Part VI deals with institutional arrangements and covers Committee on Investment (AfCFTA)[49], Establishment of the Pan-African Trade and Investment Agency (AfCFTA)[50], Technical Assistance (AfCFTA)[51], Capacity Building and Cooperation. (AfCFTA)[52] Part VII deals with management and settlement of disputes and covers State-State Dispute Settlement (AfCFTA)[53], Dispute Prevention and Grievance Management (AfCFTA)[54], Dispute Resolution (AfCFTA)[55], and Investor Liability (AfCFTA)[56].

Part VIII deals with the final provisions and covers Entry into Force, Relationship, International Investment Agreements, Relationship with other Protocols,

[30]Article 22, AfCFTA Protocol on Investment.
[31]Article 23, AfCFTA Protocol on Investment.
[32]Article 24, AfCFTA Protocol on Investment.
[33]Article 25, AfCFTA Protocol on Investment.
[34]Article 26, AfCFTA Protocol on Investment.
[35]Article 27, AfCFTA Protocol on Investment.
[36]Article 28, AfCFTA Protocol on Investment.
[37]Article 29, AfCFTA Protocol on Investment.
[38]Article 30, AfCFTA Protocol on Investment.
[39]Article 31, AfCFTA Protocol on Investment.
[40]Article 32, AfCFTA Protocol on Investment.
[41]Article 33, AfCFTA Protocol on Investment.
[42]Article 34, AfCFTA Protocol on Investment.
[43]Article 35, AfCFTA Protocol on Investment.
[44]Article 36, AfCFTA Protocol on Investment.
[45]Article 37, AfCFTA Protocol on Investment.
[46]Article 38, AfCFTA Protocol on Investment.
[47]Article 39, AfCFTA Protocol on Investment.
[48]Article 40, AfCFTA Protocol on Investment.
[49]Article 41, AfCFTA Protocol on Investment.
[50]Article 42, AfCFTA Protocol on Investment.
[51]Article 43, AfCFTA Protocol on Investment.
[52]Article 44, AfCFTA Protocol on Investment.
[53]Article 45, AfCFTA Protocol on Investment.
[54]Article 46, AfCFTA Protocol on Investment.
[55]Article 47, AfCFTA Protocol on Investment.
[56]Article 48, AfCFTA Protocol on Investment.

Notification, Application, Amendments, and Authentic Texts (AfCFTA)[57].

From the IIA making trends identified by UNCTAD, the Protocol took steps to preserve the regulatory space of host states. It allows host states to regulate on sustainable development-related issues, tying this right to general international law and barring investors from making claims for compensation on such issues (AfCFTA)[58].

Article 5 (b) denies benefits of the Protocol to investments primarily established to access the dispute settlement mechanism. The Protocol reformed dispute settlement. Part VII which deals with management and settlement of disputes covers two categories of dispute settlement: state-to-state dispute settlement which incorporates the Dispute Settlement provisions and procedures for consultation and settlement of such disputes, and the espousing of claims of nationals by home states through diplomatic protection in accordance with customary international law (AfCFTA)[59]. Article 45, which provides for prevention and grievance management, is an interesting addition. It requires state parties to designate a competent authority to receive, follow-up, de-escalate, and aid with resolving potential differences, grievances, complaints, and difficult experiences by investors and their investments. The second category covers investor-state disputes. The Protocol took a different approach by requiring amicable resolution of disputes through consultations, negotiations, conciliation, mediation, or other dispute resolution mechanisms of host states in the first instance. It further states that where such disputes cannot be resolved, they may seek to resolve them through the mechanism that will be provided in the annex to the protocol when negotiated (AfCFTA)[60].

Article 47 provides that an investor could be subjected to civil actions for liability in accordance with the domestic laws and regulations of the home state for acts, decisions, and omissions made in a host state where such actions result in damage, injuries, or loss of life. It also expects State Parties to develop rules that will enable civil liability of investors in the territory of home states, bearing conflicts of laws and recognition and enforcement of foreign judgments in mind. It also does not preclude bringing civil claims in the domestic courts of host states.

On excluding importation of elements from unreformed IIAs, the Protocol excluded an outright provision offering fair and equitable treatment standard to investments, replacing it with administrative and judicial treatment (AfCFTA)[61]. It proactively promotes and facilitate investments, imposes obligations on investors to abide by including those related to laws, regulations, administrative guidelines and relevant international law (AfCFTA)[62]. This includes complying with investment-related human rights, including indigenous rights, labour rights, environ-

[57]Article 49, AfCFTA Protocol on Investment.
[58]Article 24, AfCFTA Protocol on Investment.
[59]Article 44, AfCFTA Protocol on Investment.
[60]Article 46, AfCFTA Protocol on Investment.
[61]Article 17, AfCFTA Protocol on Investment.
[62]Article 31, AfCFTA Protocol on Investment.

mental, anti-corruption, anti-money laundering, anti-terrorism financing, and anti-bribery measures, while also requiring state parties to ensure compliance (AfCFTA)[63].

Article 33 requires investors to comply with high standards of business ethics and comply with human rights and labour standards, ensure they are not complicit in human rights abuses, eliminate discrimination in employment and occupation, refrain from discriminatory or disciplinary action against employees, and act in accordance with fair business, marketing and advertising practices. Investors are also under environmental protection obligation including to respect right to clean, healthy and sustainable environment, comply with principles of prevention and precaution, carry out environmental impact assessment, apply the precautionary principle to environmental impact assessment, and take steps to mitigate harm, restore impact site and ensure clean, healthy and sustainable environment, and investors should not exploit or use natural resources to the detriment of the host state and local community.

Investors also have obligations towards indigenous people and local communities under the Protocol. They are expected to respect their rights and dignity, legitimate tenure rights to land, water, fisheries and forest, and submit environmental and social impact assessments to the competent authorities and make them available and accessible to local communities, indigenous people, and other stakeholders (AfCFTA)[64], it also imposes socio-political obligations on investors requiring them to refrain from interfering in the international and intergovernmental affairs of state parties such as influence appointments, undermine political stability and security, and public opinion (AfCFTA)[65].

Article 38 enjoins investors to achieve the highest possible level of contribution to sustainable development of the host state, stimulate economic, social and environmental progress; strengthen local capacity; encourage the development of human capacity through employment opportunities, and access to professional training; promote gender equality and inclusivity; refrain from seeking non-legislation backed exemptions; develop and apply self-regulatory practices and management systems; promote knowledge of workers about corporate policies; encourage business association; and foster benefit sharing arising from an investment with local communities. in this regard, state parties undertake to encourage investors operating within their territories to incorporate internationally recognised standards into their internal policies.

Article 39 expects investors to meet national, regional, and internationally accepted standards of governance, ensure equitable treatment of all shareholders, encourage active cooperation with their stakeholders, make timely, accurate disclosure, and comply with national policies on human resource development. To achieve this, (3) encourages state parties to improve regulatory and institutional

[63]Article 31-38, AfCFTA Protocol on Investment.
[64]Article 35, AfCFTA Protocol on Investment.
[65]Article 36, AfCFTA Protocol on Investment.

frameworks for corporate governance. (4) expects state parties to set up measures enhancing transparency in financial reporting, disclosure, accounting and audit practices.

On taxation and transfer pricing obligations, Article 40 expects investors to use arms-length transactions when dealing with affiliated companies, comply with domestic tax laws and international laws and principles governing base erosion and profit shifting, and comply with taxation information request laws. In (2), state parties undertake to detect and prevent transfer pricing manipulation in accordance with international legal instruments. When it comes to trade facilitation trend, the protocol devoted a whole chapter to investment promotion and facilitation.

5. An Analysis of the Administrative and Judicial Treatment of Investment Protection under the AfCFTA Protocol on Investment

Notably absent in the Protocol like in most new generation International Investment Agreements (IIAs) is the controversial fair and equitable treatment (FET) provision. However, State Parties committed to providing Administrative and Judicial Treatment in Article 17 as follows:

1) *Each State Party shall ensure that, in administrative and judicial matters, investors and investments of another State Party are not subject to treatment which constitutes a fundamental denial of justice in criminal, civil and administrative adjudicative proceedings, an evident denial of due process, a manifest arbitrariness, a discrimination based on gender, race or religious beliefs, or an abusive treatment in administrative and judicial proceedings.*

2) *For greater certainty, Paragraph* 1 *shall not be interpreted as equivalent to fair and equitable treatment. For further certainty, Paragraph* 1 *includes the minimum standard of treatment under customary international law and does not allow for an interpretation and application of such a standard that would go beyond the elements contained in Paragraph* 1.

(2) benchmarks the interpretation of (1) on the minimum standard of treatment under customary international law.

In investment arbitration, particularly during determination of liability and quantification of damages, tribunals resort to customary international law where the IIA does not provide rules to determine compensation, when an investor invokes an arbitration clause in an IIA, or where the relevant provisions of the IIA are vague or incomplete (Ripinsky & Williams, 2008). Customary international law is an evolving phenomenon (Newcombe & Paradell, 2009; Ripinsky & Williams, 2008), one where state practices are recognised by the international community and develops into normative binding rules on states (Ripinsky & Williams, 2008). Such rules are usually demonstrated through consistent application and settled practice (Ripinsky & Williams, 2008).

Although reference to customary international is frequent in international in-

vestment arbitration, the controversy surrounding the existence or otherwise of customary international law and its content is far from settled for theoretical and evidentiary reasons (Kläger, 2011). Theoretically, it is criticised for being impossible to establish the "*true generality of state practice and opinion juris.*" (Kläger, 2011; Ripinsky & Williams, 2008) Hence, arbitral tribunals adopted pragmatic approach to establish custom (Ripinsky & Williams, 2008). When identifying rules of customary international law, they emphasis on objectively determined evidence of state practice.

The evidentiary criticism revolves around proof of customary law (Ripinsky & Williams, 2008). It deals with questions surrounding the content of minimum standard (Kläger, 2011), the determination of its legally binding status (Ripinsky & Williams, 2008), and its applicability (Ryan, 2009). This criticism stems from difficulty in establishing customary international law. For instance, Kläger observed that it is debatable if guarantee of minimum standard of protection extends beyond the rules governing compensation for expropriation. To resolve the proof dilemma, tribunals consult International Law Commission resources, court or tribunal decisions, treaties, decisions of international organisations, etc. While establishing minimum standard for lawful expropriation is settled, the interpretational challenges confronted in determining minimum standard in investment law persists as the regime evolves.

Arbitral tribunals have extended the scope and content of minimum standards without substantial validation through state practice that promotes narrow interpretation, and *opinio juris* (Fahner, 2023), and referring to arbitral jurisprudence instead. This earned them a reputation for creating customs through interpretation. The development was attributed to two factors—the treaty-based nature of activating the standard led to treaty interpretation method of determining customs instead of the classic method; the earlier approach to interpretation applied subjective elements leading to arbitral tribunals applying their own opinion of justice (Fahner, 2023), hence the reputation of creating customs. This approach by arbitral tribunals increases interpretational risks of investment arbitrations.

Four key features detailed in the provisions of Article 17 (1) & (2) include: it specifies the administrative and judicial issues that will constitute a fundamental breach of the provision. These include denial of justice in criminal, civil, and administrative adjudicative proceedings, evident denial of due process, a manifest arbitrariness, discrimination based on gender, race or religious beliefs, or abusive treatment in administrative and judicial proceedings. Secondly, it categorically prohibits the equation of these treatments with FET. Thirdly, it specifically requires that the meaning given to treatments should include the minimum standard of treatment under customary international law and restricts the interpretation of these minimum standards as specified in (1). This section analyses each specified treatment against the backdrop of international minimum standards of treatment under customary international law to identify their implications for the efficient implementation of the protocol.

Analysing minimum standard of treatment under customary international law usually commences with a review of the Neer case of 1929 where the United States brought a claim against Mexico before the US-Mexico General Claims Commission for failure to properly investigate and prosecute Neer's murderers. While finding Mexican Officials to have been duly diligent in their investigation, the Commission held that the propriety of governmental action should be put to the test of international standards and for it to constitute an international delinquency, such actions should "amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action "*so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency*" (Newcombe & Paradell, 2009).

It has been observed that while the statement by the Commission in Neer case has become a reference point for minimum standard of treatment under international law for respondent in investment disputes as evidence of minimum treatment, it should be relied on with caution for the following reasons: minimum standards involve interconnected and overlapping standards applicable to the treatment of foreigners or their properties. Secondly, the case itself involves the response of Mexico to the criminal actions of private actors towards Neer, and not the action of the state. Hence, when it comes to claims arising from breach of IIAs, the value of the case lies in of the principles of treatment of aliens.

Denial of Justice: Denial justice is traceable to medieval times (Paulsson, 2005), to the concept of collective responsibility doctrine that emerged among ancient teutonic tribes to redress injuries to aliens when clans were not eligible for peace and protection (Sabahi, 2011). This evolved and transformed from collective responsibility for collective liability, to individual responsibility from individual liability which aligns with Roman law (Sabahi, 2011). The collective responsibility doctrine was impacted by the work of Grotius (Sabahi, 2011). Self-help, alongside collective responsibility paved the way for reprisals initially against judges who failed to entertain complaints of citizens or members of another clan (Sabahi, 2011). This formed the foundation of the international law doctrine of denial of justice (Sabahi, 2011). The doctrine is usually invoked as justification for reprisal upon authorisation through a letter of reprisal (Sabahi, 2011). Subsequently, reprisals became detached from denial of justice and replaced by international delinquency as justification for reprisals (Sabahi, 2011). This was later superseded by international law of diplomacy where the claims of injured aliens are espoused by their home state (Francioni, 2009; Oppenheim, 1905), through consular relations which resulted in the minimum standard of treatment of aliens (Francioni, 2009).

Denial of justice accords aliens route access justice, and access to justice described as an integral part of customary international law, guarantees access to remedy in a host state (Francioni, 2009). By allowing investors to bring claims against states through investor-state arbitration, the IIA regime enabled investment law to modify the traditional state-to-state customary law process of provid-

ing aliens with access to justice. It internationalised access to justice to private actors outside the human rights field (Francioni, 2009). It is described as resulting in a convergence between the rights of aliens and the human rights field with three key manifestations. It impacts how the legality of a host state's interference with an investor or investment, investors' ability to get justice through judicial process, or how arbitration could be evaluated (Francioni, 2009). It also impacts emerging claims by the public against adverse effects foreign investments in a host state (Francioni, 2009). Several claims have been brought before arbitral tribunals involving government's actions that adversely affected investments. These actions were taken in response to unrest or protest over health, environmental or cultural adverse impact of the investments. Thirdly, it impacts how reconciliation between sovereign immunity and access to justice happens (Francioni, 2009). Cases in this regard were mostly brought against regulatory actions of host states, with many states perceiving such claims as restricting their sovereign rights to regulate.

Arbitrariness: Although arbitrariness appears frequently in IIAs, its meaning and scope is far from settled (Stone, 2012; Schreuer, 2023). Arbitral jurisprudence indicates that the threshold for establishing arbitrariness is high (Stone, 2012). Resort to customary international law does not yield more clarity on the meaning (Schreuer, 2023). Nevertheless, as a nebulous notion albeit being sometimes situated in the principles of abuse of rights and due process (Schreuer, 2023), under customary international law, national actions that were found to have caused injury to an alien were considered to have been in breach of the minimum standard of treatment and in violation of customary international law (Schreuer, 2023). As a treaty-based standard, Schreuer identified four categories of measures that describe arbitrariness from arbitral jurisprudence. They include a measure that inflicts damage on the investor without serving any apparent legitimate purpose; a measure that is not based on legal standards but on discretion, prejudice, or personal preference; a measure taken for reasons that are different from those put forward by the decisionmaker; and a measure taken in wilful disregard of due process and proper procedure (Schreuer, 2023). Key takeaways here are that discretionary, high-handed and wilful disregard for processes and procedures could result in arbitrariness claims and care must be taken to balance actions with protection.

6. Potential Challenges Arising from the Investment Protection Provisions

Although Article 17 of the Protocol attempts to preserve state parties' regulatory space and limit investors' access to international dispute settlement, implementation could be a challenge for some reasons. This is important because IIAs alone do not attract FDI; they do so alongside other factors, including market size based on GDP or economic stability, comparative advantage in terms of resources, skills or openness, cost, quality of the legal system, respect for the rule of law, political risk, or aggregate institutional quality (Fiezzoni, 2012).

2019 research on factors that influence investors' investment decision identified supportive political environments, stable macroeconomic conditions, and conducive legal and regulatory environments as their top three critically important decision factors (Driemeier & Pritchett, 2015). Other factors identified include political stability, macroeconomic stability, legal and regulatory environment, talent/skills, low taxes, physical infrastructure, market size, ability to export, intellectual property protections, investor protections, low labour and input costs, supply chain coordination, local input sourcing, and resource endowments (Driemeier & Pritchett, 2015).

A review of Africa's legal and regulatory environment demonstrates the challenging environment within which the guarantees made by Article 17 will be implemented. Africa's rule of law and justice average decreased by −0.7 points between 2014 and 2023 based on 6 indicators namely: public perception at 37% a decrease of −0.5 points, executive compliance with the rule of law at 53.7% a decrease of −3.1 points, equality before the law at 43.1% a decrease of −2.4 points, impartiality of the judicial system at 47.0% a decrease of −0.6 points, property rights at 55.7% a decrease of −0.4 points, judicial processes at 46.0% a decrease of −0.2 points (Ibrahim, 2024).

35 out 54 countries scored below 50 points, and the total Average point for Africa is 45.9 points (Ibrahim, 2024). Judicial processes decreased by −0.2 points; the average point for judicial processes was 46.0 and 30 countries scored below 45 points. In this subcategory, due process decreased by −3.5 and stood at 43.2, timeliness of trials decreased by −2.3 and stood at 44.3, and enforcement of justice decreased by −0.8 and stood at 52.3. However, access to and affordability of justice increased by +0.6 and stood at 49.0 (Ibrahim, 2024). Judicial independence average stood at 40.7 point, and 30 countries fell below average (Ibrahim, 2024). Access to justice average stood at 55.6 and 24 countries scored below average (Ibrahim, 2024). The average points for transparency of judicial reasoning were 60.6 and 25 countries scored 50 and below (Ibrahim, 2024). On absence of judicial purges reflecting arbitrary removal of judges, the average was 71.4 and 21 countries scored below average (Ibrahim, 2024). Judicial average 53.3 and 26 countries scored below average (Ibrahim, 2024).

Compared to other regions with significant number of developing countries, Sub-Saharan Africa's ranking on rule of law dropped from 31.41 in 2014 to 28.52 in 2023, South Asian rose from 36.78 in 2014 to 40.57, Europe and Central Asia dropped from 66.1905 to 66.5609, and East Asia and Pacific rose from 55.51 to 60.06 in 2023. On regulatory quality, South Asia rose from 26.92 to 27.36 and East Asia and Pacific rose from 48.79 to 55.04 in 2023, Europe and Central Asia dropped from 69.50 to 55.04, while Sub-Saharan Africa dropped from 29.85 to 27.44. On governance effectiveness, South Asian rose from 35.28 to 38.03 and East Asia and Pacific rose from 53.16 to 59.63 in 2023, Europe and Central Asia dropped from 67.39 to 66.58 (World Bank 1b, n.d.), while Sub-Saharan Africa dropped from 25.75 to 26.32 (World Bank 1b, n.d.). On control of corruption,

South Asian dropped from 37.56 to 36.67 and East Asia and Pacific rose from 56.77 to 59.77 in 2023, Europe and Central Asia dropped from 63.80 to 64.73 while Sub-Saharan Africa dropped from 30.47 to 31.71 (World Bank 1b, n.d.).

30 countries scored below average on judicial processes, 30 countries scored below average on judicial independence, 25 countries scored below average on transparency, 24 countries scored below average on access to justice, 21 countries scored below average on absence of judicial purges reflecting arbitrary removal of judges, 22 countries scored below average on due process, 20 countries scored below average on timeliness of trials, 21 countries scored below 52.3 average on enforcement of justice (Ibrahim, 2024). Furthermore, 64.8% of the African population living in 33 countries experiencing deterioration of the rule of law since 2014, and 63.7% living 38 countries with deteriorating accountability and transparency (Behn, Berge, & Langford, 2018), for 60% of Africa's population that experienced decline in accountability, transparency and rule of law, the decline was attributed to decline in absence of undue influence as of 2023.

The above indicates the yardstick within which the principles identified in Article 17 of the Protocol will be benchmarked. Thus far, African countries appear to score below average. If a significant number of State Parties operate below average in administrative and judicial indicators, the chances of violating Article 17 by some state parties is high. In defence of the investment arbitration, it was observed that investment arbitration is not biased towards developing countries and in favour of developed countries but rather, biased in favour of developed countries' governance aspect that strengthens property rights protection through strong institutions, and the extent to which a state maintains impartial bureaucracies. The strength of their governance framework and institutions was observed to have possibly increased the chances of wealthy respondent states to successfully defend against claims than other respondent states (Behn, Berge, & Langford, 2018).

This aligns with the findings on three critical factors for investment decisions: requiring strong legal and institutional framework for protecting investments, and transparent regulatory framework that allows for predictability of compliance rules through effective governance. Therefore, governance and rule of law are crucial to State Parties ability to attract FDI through the Protocol on investment. Although investment protection provisions and investment arbitration are promoted for protecting investors against a host states' inefficient judicial and administrative systems that could ultimately incentivise host states to improve their systems, it has also been argued that resort to domestic systems and exhaustion of local remedies is expected to strengthen and enable domestic legal systems eventually as aggrieved parties resort to the system to seek remedies (IISD, 2017). While this defence of domestic legal systems could be true, the uncertainty surrounding timelines and lack of clarity on how this will materialise due for instance to its dependence on political will, present transaction costs that could increase investment risks. This means resort to domestic legal systems in weak economies could

increase investment costs and be counterproductive for those with weak systems that seek to enforce exhaustion of local remedies such as some African countries. Given the level of governance and rule of law in Africa, this paper observes as follows:

1) Treaties generally seek to ensure stable and predictable investment environments through investment governance, investment protection and access to international arbitration for breach of treaty obligation (Chaisse, 2015). The Protocol seeks to limit investors access to international arbitration and subjects them to domestic administrative and judicial processes. Lack of confidence is some of these processes led to access to resort to international arbitration in the first place. Furthermore, investment protection provisions in IIAs are designed to limit the exposure of foreign investors to domestic administrative regulation in response to their concerns over the predictability and stability of the legal framework that will govern their investments. The nuanced indication of governance, legal and regulatory weakness in several Member States, means the environment in such states is uncertain. This increases the risks of the violations identified in Article 17. In such situations, subjecting investors to domestic administrative and judicial processes risks exposing investors to the unfavourable and unpredictable investment environments and send a signal that protection guaranteed by the treaty is not feasible. This could impact investment decision and State Parties ability to attract FDI.

2) Given the differing levels of effective governance and rule of law structures State Parties, countries with stronger governance and rule of law stand a better chance of attracting impactful FDI that weaker parties. Where this happens, the potential for FDI to be concentrated in few countries is high given the decline in governance and rule of law in Africa contrary to the expectations of the Protocol on Investment.

3) State Parties with weaker structures could attract FDI that may not add insignificant value to their development drive, other than to bring in foreign exchange. This is because weaker structures create room for exploiting the system through bureaucracy. Driemeier and Pritchett, observed that where strict rules meet weak institutions, outcomes appear not to result from neural application of policy to fact, but negotiated on a case-by-case basis. This bends the rules and application appear like "*individuated deals*" (Driemeier & Pritchett, 2015). It creates implementation flexibility and introduces preferential treatment to the detriment of processes.

4) On the nexus between corruption, firm profitability, regulatory compliance and regulations, Driemeier and Pritchett also observed that in implementation flexible environments, the very large and firm-specific deviations in reported compliance times and Doing Business estimated compliance times conform with environments with considerable policy implementation flexibility that creates huge potential rents. In such environments, officials could potentially use delays to extract payments. Although the authors could not establish direct links between flexibility and corruption, the potential for rent created by flexible environments increases

the chances of corruption. From the African index data, undue influence also appears to exist in some State Parties. This could indicate flexibility in implementation, which could impact investor expectations, performance, and confidence.

5) It is also observed that firm performance, which reflects investor expectations, is impacted by shift in policy implementation. Performance was affected more by measures of the variability of the policy implementation than the policies themselves. What this means is that where there is a gap between legal/regulatory rules and their implementation, it impacts investor expectations and its ability to make a sustainable contribution to economic growth. The data from African countries indicate that although rules are in place in many of the countries, there appears to be implementation flexibility that could be linked to governance and rule of law performance.

6) The assessment of Africa's governance and rule of law environment indicates potential implementation obstacles for the Protocol. This could ultimately result in actions that breach investors' legitimate expectations and dissatisfaction. It increases the risk of investor-state disputes where Article 17 could be tested. For countries with high implementation flexibility, establishing denial of due process, arbitrariness, discrimination, etc., may be possible. Article 17 expressly guarantees protection against denial of due process, manifest arbitrariness, discrimination and abusive treatment in administrative adjudicative proceedings and judicial proceedings. This places the rule of law and some governance factors at the core of the protection offered.

The World Investment Report 2025 indicated that Africa's FDI grew by 75% which was attributed principally to a $35 billion development megaproject in Egypt (UNCTAD, 2025). The project is to build a new city in the Ras El Hekma peninsula. Project aside, the investment landscape profile indicates an economy in crisis with foreign currency shortage, high inflation, dwindling revenue from the Suez Canal (Werr & Strohecker, 2024), bureaucratic red tapes, complex legal and regulatory frameworks, exchange rate fluctuation, corruption and bribery (FindAPropertyEgypt). Furthermore, the governance and rule of law index reports scores Egypt 14.9 well below Africa's 45 points average on absence of discrimination in justice making it third to the last, it scored 10.3 on due process and fairness. It scored 13.9 below a 44.3 average on timeliness of trial. On equality before the law it scored 22.9, the average 43.1It also scored 24.1 on enforcement of justice against 52.3 average, 33.3 points, 5.7 below 46.3 on absence of discrimination in civil justice, 24.2 below 44.3 on absence of discrimination in civil justice, 50.0, above the above average of 48.0 on property rights regulation, it scored, scored 50.1 above the 40.7 average on judicial independence, on executive compliance with judicial decisions, it scored 41.3 ahead of 23 countries based on 50.1 average, 22.4 out of 41.9 average on judicial checks on executive, 38.3 out of 42.6 on absence corruption in the judiciary average is, 18.3 out of 45.2 average on absence of bribery in administrative processes, 36.2 on absence of Bribery or Corrupt Exchanges in the Public Sector, and 48.7 above 42.3 average on functioning criminal justice system. This provides a picture and

profile of the governance and rule of law environment within which Article 17 will apply in Egypt.

For instance, its economy is said to be facing legal, regulatory, bribery in administrative process and corruption challenges, exchange rate fluctuation. Some of them could impact regulatory processes such as delays and increased cost of compliance. Investors typical fund projects through project financing using syndicated loans. Delayed approvals mean increased cost of borrowing and financing. Where such delays result in judicial proceedings, Egypt's scores on judicial check, corruption in the judiciary, discrimination in justice, average trial timeline, enforcement of justice and due process and fairness are indicators of the weakness of its judicial and adjudicative administrative processes. Where an investor submits its disputes to such an adjudicatory system and experiences these challenges, especially delays that may impact investment, it could potentially result in the kind of violations envisaged by Article 17 of the Protocol, such as denial of due process or arbitrariness. This is especially so given its low score in the enforcement of civil justice, which is where a significant number of claims may arise, and where Egypt stood at 21.1 below the 54.4 average.

The observations above indicate the potential impact of weak governance and rule of law in Africa on its ability to attract FDI while insulating itself from investment arbitration. Where investors resort to arbitration, the vague and limited application of some of the principles under customary international law could expose state parties to challenges to their regulatory rights. Below are some recommendations on steps that could attract FDI and reduce some risks of exposure to interpretation by arbitral tribunals.

7. Recommendations

This paper recommends the following to enhance the Protocol's ability to preserve regulatory space while strategically attracting FDI.

1) When negotiating annexes to the Protocol, State Parties should consider the implications of these weak institutions on the risk of resort to investment arbitration and potential unfavourable interpretation of some of the principles in Article 17. One way could be to set up a body that will give clear and definitive content to the vague principles. That way, arbitral tribunals will be restricted in determining the content of the principles. Article 46(2) and (3) provide that any unresolved dispute between an investor and the host state would be resolved through a dispute resolution mechanism that will be negotiated in an annex upon adoption of the Protocol by State Parties. During negotiation, State Parties could consider establishing an AfCFTA Commission similar to the NAFTA Free Trade Commission (now USMCA Free Trade Commission) to oversee the implementation and management of dispute resolution, among other mandates. Through the commission, State Parties can monitor and regularly determine the meaning and scope of indeterminate principles that will guide arbitral tribunals as part of dispute resolution management. It could serve as an alternative vesting interpretation powers

in the Committee on Investment, as provided for in Article 41, subject to the approval of Heads of States and Governments

2) Subjecting investors to weak domestic processes will both stifle the attainment of Sustainable Development Goals (SDGs) as envisaged by the Protocol and send a wrong signal to investors that they will be operating in unfavourable environments. This will concentrate FDIs in some State Parties and exacerbate underdevelopment in others. State Parties should consider utilising the specially created body or the alternative option recommended in (1) above to preserve their regulatory space, rather than subject investors to domestic legal and administrative processes that could cost time and money while yielding no results.

8. Conclusion

This paper analysed the AfCFTA Protocol on Investment and its implications for attracting FDI to support sustainable development. The paper focused specifically on investment Protection offered by Article 17. It was found that although the protection offered was benchmarked on customary international law to protect regulatory powers, some interpretational risks still exist. Proof of custom will be difficult given the maze of IIAs that form the investment regime. Furthermore, while establishing some of the principles may be easier for physical treatment of the investor, the same cannot be said for the treatment of an investor's economic interest. This is because, in investment law, customary law has been established for compensation and not for other elements of investment protection. State Parties will do well to have a second look at the equating approach they have adopted to interpreting Article 17.

Statutes and Regulations

Protocol to the agreement establishing the African continental free trade area on investment, https://au-afcfta.org/wp-content/uploads/2024/11/EN-AfCFTA-Protocol-on-Investment-clean-1.pdf.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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