ARBITRATION IN AFRICA: ‘CHINDIA’ PERSPECTIVE

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1. INTRODUCTION

Growth of business in this globalised era has converted the world into a global village, where States draws upon the strengths of one another for their economic, social and political development. Given such a trend, trade and commerce has increased exponentially relying on bilateral and multi-lateral arrangements amongst different States across the globe.

Today trade practices have moved beyond the traditional export import business. Investment in each other’s State in diverse fields pulls a major string in the overall development of regions. Developing States look for foreign investors preferably from developed States or from semi-developed States of neighbouring regions. These investors could be an outright private commercial entity or semi-state owned entity which would invest in the host-State in variety of pursuits. Such areas of investment may include the manufacturing industry, telecommunication sector, infrastructure sector, information-technology industry, etc. And then come disputes and the need for expedient resolution of such conflicts. This is precisely the starting point of this paper’s discussion.

This paper focuses on investment related arbitration between African and Asian States only, pursuant to the broad mandate of the conference. Also, the paper specifically focus on India and China as Asian States, and select countries from four regions (southern, western-central, eastern and northern) of Africa. We will be exploring this in the light of the economic activity between Africa and Asia which is booming like never before. Business between the two continents is not new: India's trade with Africa's eastern and southern regions dates back to at least the days of the Silk Road, and China has been involved on the continent since it started investing there, mostly in infrastructure, during the postcolonial era. But today, partly as a result of accelerating commerce between and among developing countries throughout the world, the scale and pace of trade and investment flows between Africa and India and China are exceptional.¹ According to the World Investment Report 2013, Africa was the only region

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that saw Foreign Direct Investment (FDI) flow rise in 2012. These FDI flows were partially driven by investment in the extractive sector. A significant part of FDI flows to Africa are now coming from Asia, which is a new and remarkable trend. Indeed, trade and investment between Africa and Asia in general and China and India in particular have soared during the last decade.\(^2\)

To be precise, trade and investment relations between India and Africa were established in the 16th Century. The first outward foreign direct investment (O-FDI) in Africa was undertaken by India’s Birla Group in 1960s when they established textile mill in Ethiopia. India’s investment in Africa is primarily driven by its need to ensure the reliable supply of natural and energy resources, which the region has in abundance. It is also driven in the search for newer markets. India O-FDI outflows increased from US $243 million in 2000 to US $ 11 billion in 2007 (UNCTAD FDI STATISTICS). Indian Investments in Africa stood at US$ 9.2 billion in 2008-09. According to IMF estimates, total Indian investments in Africa at the end of 2011 were US$ 14.1 billion – a share of 22.5% of total Indian outward FDI stock, making the country the seventh largest investor in the continent. Another estimate puts cumulative Indian investments into Africa at over US $ 35 billion.\(^3\) According to the latest joint report by the Confederation of Indian Industry (CII) and the World Trade organization (WTO), India’s current investments in Africa amount to more than $50 billion. On the other hand, direct Chinese investment in Africa was estimated at 30 billion U.S. dollars in 2013, covering 50 countries.\(^4\) The consistent rise of China’s O-FDI in Africa in recent years is notable. Some market analysts are indicating that if similar trends would continue then the Chinese (OFDI) stock (the total accumulated value of assets) to the continent may quadruple to $100 billion. These projections and analytical tones are often reported in open public sources and periodicals.

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1Harry G. Broadman, China and India Go to Africa New Deals in the Developing World, FOREIGN AFFAIRS, (March/April, 2008), http://www.foreignaffairs.com/articles/63224/harry-g-broadman/china-and-india-go-to-africa (last accessed on September 15, 2014).


4Roland Amoussou-Guenou, supra note 2.
Owing to such phenomenal rise in investment related transactions and contracts, there are bound to be discords amongst investor and State parties. Confronted by the reality of these developments, African countries, like other developing countries, now appreciate that these transactions are inescapable for the implementation of their economic and social programmes. African governments and private parties involved in negotiating international business transactions such as loan agreements, petroleum and mining agreements, industrial joint ventures, management agreements, international procurement contracts, international supply contracts, bilateral or international trade agreements and bilateral investment agreements have come to the realization that foreign parties to these transactions, i.e. foreign governments, transnational corporations, international banks, foreign investors, international suppliers and contractors, all insist on an appropriate dispute settlement mechanism, which is invariably international arbitration.5

The hypothesis in this paper is that the African States do not conform to the modern arbitration laws and practice with minimal judicial interference and positive attitude of the State parties in enforceability of arbitral award against themselves. The primary study reveals that African States present a mix of arbitration laws and practices. Apex courts of African States also reflects an ambivalent attitude towards allowing an arbitration regime to flourish, and their approach in supporting enforcement of foreign arbitral award is further murky. Given the length and breadth of Asian and African States and investment transactions amongst them, this paper will only focus on selected African States vis-a-vis India and China as growing economic powers of Asian region and also competing investors in African States.

II. BIT DISCOURSE: AFRICA-INDIA & AFRICA-CHINA

Every prudent investor seeks investments which will yield a fair return at a minimum risk. The other party in the commercial equation, the entrepreneur in the market for capital, attempts to encourage the investor by assuring him that the risks inherent in a particular business transaction will be acceptable. Because of the possibility of conflict between them, both the investor and the entrepreneur want specific assurances that potential disputes will be resolved promptly, efficiently, and inexpensively. That is, ideally, international disputes

5AMAZU A. ASOUZU, INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES (PRACTICE, PARTICIPATION AND INSTITUTIONAL DEVELOPMENT), CAMBRIDGE UNIVERSITY PRESS 13 (1st ed. 2004).
should be resolved promptly so that the flow of trade is not unduly disrupted. However, traditional litigation in a national court can be a costly, time-consuming, cumbersome and inefficient process, which obstructs, rather than facilitates, the resolution of business disputes. The formal adversarial structure and the possibility of national bias can destroy the business relationships which are conducive to the smooth flow of international trade. Access to the national courts may be restricted because of the overcrowded court dockets in many countries. The intricacies of the national procedures may be unknown to one or more of the parties. Moreover, foreign judgments may be difficult to enforce. For these reasons and others, businessmen seek alternatives to traditional litigation. Therefore, arbitration is a potentially more efficient, attractive and preferred dispute resolution process for many investors and entrepreneurs. This is true in case of African States as well.

However, it is necessary to appreciate the linkage between BITs and investment arbitration, including investor-state arbitration. It is important to note that the legal framework of modern international investment law has been established primarily through treaties. They take the form of Bilateral Investment Treaties or multilateral treaties. These treaties aim to protect and promote foreign investments as well as to develop the economy of the state in which the investment is made (the host state). The framework strives to increase inflows of foreign direct investment into countries (particularly developing nations) by

(a) Requiring that the host state treat investors in accordance with international standards, and
(b) Granting foreign investors the right to institute an international arbitration against the host state if these standards are not met.

The proliferation of BITs started with the first BIT made between Germany and Pakistan way back in 1959. Since then, BITs gained recognition as being an effective tool to ensure sustained investment trade and practice amongst contracting States. It is important to note

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8Hereinafter referred as BITs.
10BARRY LEON & JOHN TERRY, *WHY ARBITRATING AGAINST A STATE IS DIFFERENT: TWELVE KEY REASONS* HANDBOOK ON INTERNATIONAL ARBITRATION & ADR, AMERICAN ARBITRATION ASSOCIATION 105 (2nd ed. 2010).
that BITs were originally signed between developed states and developing states, with the intention that this would promote the flow of investment from the former to the latter. More recently, a greater number of BITs have been signed between developing countries.\textsuperscript{11} From an Asian standpoint, the recent growth of BITs has led Dolzer and Schreuer to observe:\textsuperscript{12}

\textit{The most significant trends in the evolution of BIT practice in the past decade concerns the negotiation of BITs by Asian states. China has concluded 117 treaties between 1982 and 2006. India concluded its first BIT in 1994, had already entered into 26 BITs by 1999, and in 2006 was a party to 56 such treaties.}

It is noteworthy that the very purpose of BITs is to protect foreign direct investment. There is uniformity in the structure of many modern BITs. Virtually all BITs will include dispute settlement clauses, frequently by reference to International Center for Settlement of Investment Disputes (ICSID) arbitration. That is, BITs usually provide for resolution of investment disputes by international arbitration.\textsuperscript{13} In the BITs concluded in last few decades, it is most common to find independent dispute resolution provisions for disputes between the Contracting States as to the meaning or effect or the treaty and a separate provision for disputes between investor and State.\textsuperscript{14} Also, most BITs provide for ICSID arbitration in the event of dispute although it is not uncommon to find an option for ad hoc arbitration under the UNCITRAL Arbitration Rules.

Alike the world over, African States have also began to sign Bilateral Investment Treaties with both developed nations and Asian developing economies like India and China, amongst others. These BITs does include dispute resolution clauses and also facilitate smooth investment regime. India and China have positively reciprocated their commercial and investment interest in African countries by their diverse initiatives periodically. That is, India has undertaken a series of important initiatives to create an enabling trade and business environment, to facilitate and enhance bilateral trade and investments with the African countries. For instance, some of the BITs signed between India and African states include

\textsuperscript{11} \textsc{Simon Greenberg}, \textit{supra} note 9, at 480.
\textsuperscript{12} \textsc{R. Dolzer & C. Schreuer}, \textit{Principles of International Investment Law}, Oxford University Press, 480 (2\textsuperscript{nd} ed. 2008).
\textsuperscript{13} \textsc{Andrew Tweeddale & Keren Tweeddale}, \textit{Arbitration of Commercial Disputes: International and English Law and Practice}, Oxford University Press 470 (1\textsuperscript{st} ed. 2010).
\textsuperscript{14} \textsc{David Joseph Q.C.}, \textit{Jurisdiction and Arbitration Agreements and Their Enforcement}, Sweet & Maxwell 594 (2\textsuperscript{nd} ed. 2010).
BITs with Egypt, Ghana, Mauritius, Morocco and Mozambique. Consequently, India is the largest investor in Ethiopia, and one of the top five foreign investors in Egypt, Ghana, Kenya, Mauritius, Mozambique, Nigeria, South Africa, Sudan and Tanzania. So far in 2012, the number of destinations of Indian overseas investment in Africa has increased, with Uganda, Zambia, Zimbabwe, Liberia, Mali and Rwanda. Some of the internationally reputed Indian companies have invested substantially in African States over the years. Such as Bharti Airtel, Reliance, Tata and Ambani groups have been aggressively buying large African assets. In 2007, Tata Africa had invested US$100 million in Africa, which has increased phenomenally since then. Indian businesses are also active in automobiles, telecommunications and education sectors of Africa. For example, major Indian automobile having huge stake in African counties would include, Tata, Mahindra and Ashok Leyland. Interestingly, Indian companies’ most favored destinations in the continent have been Nigeria and South Africa.

Similarly, China has also progressed and in fact far ahead of India in expanding its investment quotient in African States. In fact Harry Broadman, a chief economist observed in of one of his writings in PwC in 2013 that “China’s investments in Africa have become diversified in recent years. While oil and mining remain an important focus, Chinese foreign direct investment (FDI) has flooded into everything from shoe manufacturing to food processing”. China has signed more number of BITs with African States in proliferation of its trade and investment. Some of the BITs between China and African states include BITs with countries like Botswana, Cameroon, Cote D’Ivorie, Djibouti, Ethiopia, Egypt, Ghana, Madagascar, Morocco, Tunisia, and Uganda. A few of the notable and biggest Chinese investors in Africa comprise of Sinopec, China National Petroleum Group, China State Construction Engineering Corporation and China Metallurgical Group Corporation, which formed partnerships with state oil companies in Nigeria, Angola, Sudan, Egypt, Chad and Niger. China has also actively invested in mining, drilling, infrastructure, transportation and telecommunications sectors over the last two decades.

Let us now examine the case of arbitration legal infrastructure that African countries offer to investors from Asian states in particular and other global trade partners in general.

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15 See, Chris Devonshire-Ellis, India’s Bilateral Investment Treaties, GATEWAY HOUSE, (July 2, 2013), http://www.gatewayhouse.in/indias-bilateral-investment-treaties/ (last accessed on September 17, 2014).
III. AFRICA

AFRICA

ARBITRATION

MODEL: INVESTOR FRIENDLY OR REPELLENT

Alan Redfern and Martin Hunter noted in their successful book:

“An established and well-organized arbitral institution can do much to ensure the smooth progress of an international arbitration even if the parties themselves- or their legal advisers- have little or no practical experience in the field.”

This observation clearly indicates that the institutional mechanism of arbitration can play a very pivotal role in effective dispute resolution. Pursuant to this, it may be noted that both the states in Africa and Asia have periodically taken special efforts to ensure amicable, speedy, cost-effective investment dispute resolution arising between state and non-state parties from both the continents. Such efforts do reflect the emergence of arbitration institutions at the regional level to cater for both African and Asian state parties. Two such historic institutions were created in late 1970’s, one in Kuala Lumpur in 1978 and other in Cairo in 1979. These institutions emerged from the Asian-African Legal Consultative Committee which thought to develop a scheme for settlement of disputes arising out of economic and commercial transactions with a view to promote stability and confidence in such transactions with the countries in the Asian-African region. The scheme envisaged promotion of the institution of arbitration, encouragement in the growth of national arbitral institutions and establishment of regional centres for arbitration under the auspices of the Committee. Arbitration under the Rules of the Regional Centres is conducted under a modified version of the UNCITRAL Arbitration Rules. An objective of the AALCC scheme has been to promote the wider use and application of the UNCITRAL Arbitration Rules. Each Regional Centre has a specific mandate in that direction. The Kuala Lumpur Regional Centre for Arbitration (KLRCA) and Cairo Regional Centre for International Commercial Arbitration (CRCICA) were the first dispute resolution institutions to use the UNCITRAL Arbitration Rules (between 1978 and 1980). The Centres were primarily established ‘with the objective of providing a system for settlement of international commercial disputes by arbitration’. Their aim was to provide commercial parties with efficient, expeditious, fair and relatively inexpensive dispute resolution mechanisms under their Rules. It was also to generally minimise the need to have


19 AMAZU A. ASOBU, supra note 5, at 82-83.
recourse to institutions outside the Asian–African region, which would involve difficulties and inconvenience.\textsuperscript{20}

The adoption by these Regional Centres of a modified version of the UNCITRAL Arbitration and Conciliation Rules as their institutional rules was not only a practical, but a positive, step indicating that, in principle, Asian–African states are not opposed to modern arbitration. The utility of those Rules as administered by the Regional Centres and other institutions would largely depend on their success in effectively resolving particular disputes satisfactorily. An implication of the promotional programmes of the Regional Centres might be that, in the short term, arbitration and the ADR methods, their values and the activities of the Centres would be more widely known. A large number of potential arbitrators would also emerge in Africa and Asia. This might, in the long run, lead to an appreciation of local dispute resolution resources by governments and private parties, causing a shift in the patterns of appointment of arbitrators and the choice of parties’ representatives. It is undisputed that today, the Centres and their activities have stimulated interest and created greater awareness and opportunities in dispute resolution matters in Africa and Asia. In addition to the impact of the dispute resolution projects of UNCITRAL, the establishment and activities of the Regional Centres facilitated their wider diffusion and instigated the establishment of national arbitral institutions by private organisations in Africa and beyond.\textsuperscript{21}

Moving forward, it is now essential to understand the growth of arbitration laws and practice in Africa. Discussing arbitration trends in Africa is complicated by the fact that there are distinctions between different regions in Africa, and within them, and information about local court decisions can be difficult to obtain.\textsuperscript{22} African countries have varied (though similar in certain respects) historical development. In the legal field, there are various legal systems and traditions operating within the continent. There are various customary laws, laws based on certain faiths for example Islamic or Sharia and African traditional religions, received laws for example, the common law (English speaking countries with historical and colonial ties to England), the civil law (French speaking countries with historical and colonial ties to France and Belgium), the Dutch and Roman laws for example in South Africa. In most African countries there is a combination of some of these laws and legal regimes existing and

\textsuperscript{20} Id.

\textsuperscript{21} AMAZU A. ASOZU, supra note 5, at 104.

\textsuperscript{22} Steven Finizio & Thomas Führich, infra note 24.
cohabiting side by side. In addition to these differences, arbitration legislation and practice varies greatly: many of African countries have adopted modern arbitration laws based on the UNCITRAL Model Law, but a significant number do not have modern arbitration laws. While most have ratified the United Nations Convention on the Enforcement of Foreign Arbitral Awards (the New York Convention), a significant number have not. Similar perspective is notable in the case of investment treaty based arbitration in Africa. That is, while most African countries have signed and ratified the ICSID Convention, six have not (Angola, Djibouti, Equatorial Guinea, Eritrea, Libya and South Africa) and four have signed but not ratified it (Ethiopia, Guinea-Bissau, Namibia and São Tomé and Príncipe).

Besides, there is an existence of another international arbitration mechanism in regional grouping amongst African countries, known as OHADA and in selected Asian countries. OHADA is an international organization created by a Treaty signed in Port-Louis (Mauritius) in October 17, 1993 originally by fourteen African States. The idea behind the creation of OHADA sprang from a political will to strengthen the African legal system by enacting a secure and legal framework for the conduct of business in Africa, which is considered as necessary for the development of the Continent. The importance of an appropriate and user-friendly legal framework, as well as an effective dispute resolution mechanism, to attract foreign investment and foster economic development and growth was the main concern of the founders of OHADA. The OHADA has progressively become the common business law in Anglophone and Francophone African countries, taking the best from the civil law and the common law system. The OHADA provides its member states with: a single, modern, flexible and reliable business law, adapted to each country’s economy, arbitration as an

\[23\] See, WERNER MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA, CAMBRIDGE UNIVERSITY PRESS 380-492 (2\textsuperscript{nd} ed. 2006).


\[25\] Organization of Harmonization in Africa of Business Law (hereinafter referred as OHADA)

\[26\] China, India, Malaysia, Singapore, Thailand and Vietnam.

\[27\] It is to be noted that the OHADA Treaty was revised in Quebec (Canada) on 17 October 2008, http://www.ohada.com/traite-revise.html (last accessed on September 20, 2014).


\[29\] At present OHADA has 17 member countries: Benin, Chad, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Democratic Republic of Congo, Ivory Coast, Gabon, Guinea, Bissau Guinea, Equatorial Guinea, Mali, Niger, Senegal, and Togo.

appropriate and trustworthy way to settle dispute, an opportunity for training judges and judicial staff and ensuring their specialisation. In pursuance of the objectives of predictability, transparency and security for business transactions, OHADA operates through four institutions: first, the Council of Ministers; second, the CCJA (Common Court of Justice and Arbitration); third, the Permanent Secretariat; and fourth, the ERSUMA (Regional Training Centre for Legal Officers). Of these the first two institutions are most significant for the operation of arbitration under OHADA regime. That is the first one is the highest decision-making institution and the legislative body of the organization and is represented by the ordinary regulation on arbitration, as organized by the Uniform Act of March 11, 1999. The second one concerns the institutional arbitration administered by the Common Court of Justice and Arbitration (CCJA) under the Rules of Arbitration of March 11, 1999. The Common Court or Justice and Arbitration (CCJA) is a supra-national body, which is both a Court of Justice and an Arbitration institution covering all the 17 OHADA States. Unlike other institutions such as the ICC where a standard arbitration clause is provided in the ICC arbitration Rules, the CCJA has not proposed any model arbitration clause to its potential users. Article 21 of OHADA Treaty determines the scope of CCJA’s administration of arbitration in a given dispute. The other major advantage for the potential users of the CCJA arbitration is that, according to Article 20 of OHADA Treaty once the award is issued and granted “exequatur”, it can be enforced directly in all the OHADA member states, without additional procedures in individual OHADA countries where enforcement will be requested. This regional recognition and enforcement feature of a arbitral award is unique. It does not exist in any other region in the world.

32 TUMNDE, M. S, ET. AL, supra note 30, at 59-60.
34 Id.
35 Id.
36 Article 21 of the OHADA Treaty provides: “in application of an arbitration agreement or a submission, any party to a contract, whether one of the parties has its habitual domicile or resides in one of the member states, whether the contract is executed or has to be executed totally or partially on the territory of one or several states, may submit a contractual dispute to the arbitration procedure provided for by the present Section…”.
37 Article 20 states of the OHADA Treaty provides: the judgments of the Common Court of Justice and Arbitration are final and conclusive. In no case may a decision contrary to a judgment of the Common Court of Justice and Arbitration be lawfully executed in a territory of a Contracting State.
38 Roland Amoussou-Guenou, supra note 33.
The adoption of the treaty establishing the Organization for the Harmonization of Business Law in Africa, has worked to realise the unification of business law in the member states and removed fear of uncertainties from business investors\(^\text{39}\). To sum up, the OHADA framework provides for an arbitration mechanism, which can be used for the settlement of disputes between the private sector and public entities in the context of Asian trade and investment in Africa\(^\text{40}\).

As already specified in the beginning of this paper, only select African states are being studied from an arbitration (including investor-state) standpoint. Each of these countries reflects general arbitration law and practice trends in their region. The reflections below provide a succinct understanding of this issue.

**Arbitration in Southern Africa, Western-Central Africa, Eastern and Northern Africa**

*Many of the countries in Southern Africa do not have modern arbitration laws:* only four have adopted arbitration laws based on the UNCITRAL Model Law (Madagascar, Mauritius, Zambia and Zimbabwe), with two more (Angola and Mozambique) recently enacted legislation however, not strictly adopting the Model Law. The six common law countries in the region (Botswana, Lesotho, Malawi, Namibia, South Africa and Swaziland) have arbitration legislation based primarily on the 1950 English Arbitration Act\(^\text{41}\). In the specific context of South Africa it is notable that the Arbitration Act 42 of 1965 [of South Africa] was designed with domestic arbitration in mind and has no provisions at all expressly dealing with international arbitrations. By present-day standards, the Act is characterised by excessive opportunities for parties to involve the court as a tactic for delaying the arbitration process, inadequate powers for the arbitral tribunal to conduct the arbitration in a cost-effective and expeditious manner and insufficient respect for party autonomy (i.e. the principle that the arbitral tribunal’s jurisdiction is derived from the parties’ agreement to resolve their dispute outside the courts by arbitration). In short, the 1965 Act is widely perceived by those involved in international arbitration as being totally inadequate for this

\(^{39}\text{M. C. Ogwezzy \\& S. A. Bello, supra note 31, at 13.}\)

\(^{40}\text{Roland Amoussou-Guenou, supra note 33.}\)

\(^{41}\text{Steven Finizio \\& Thomas Führich, supra note 24.}\)
This act is also not based on the UNCITRAL model law. In 1998, a South African Law Commission report on international commercial arbitration proposed various reforms including a draft arbitration bill based on the UNCITRAL model law; this has not been implemented. South Africa acceded to the New York Convention without reservation in 1976. Fortunately, it is positive news for the investors doing business in this country that South African courts are supportive of arbitration practice.

It is worth noting that the courts in several jurisdictions within in Southern Africa show a more arbitration-friendly approach than their national legislatures, with several recent decisions interpreting their powers of intervention narrowly. For example, the Supreme Court of Appeal in the famous case of Telecordia Technologies Inc v Telkom SA Ltd, has affirmed the international principle that judicial intervention when reviewing international commercial arbitration awards is to be minimised. The Supreme Court of Appeal has affirmed the principle of party autonomy in arbitration proceedings, holding that the courts will defer to domestic awards except where there are clear procedural irregularities. The approach that courts shall refrain from intervening in the findings of the arbitral tribunal was further developed by the 2009 ruling by the Constitutional Court of South Africa in Lufuno Mphaphuli & Associates (Pty) Ltd v. Andrews and Another [2009] ZACC 6, in which the Constitutional Court found that ‘courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently.’ The Constitutional Court found further that the constitutional right to a fair and impartial hearing was not directly applicable to private (as opposed to statutory) arbitration (and thus did not give the courts a basis to intervene in arbitral proceedings). It reiterated the view that the court’s power to set aside an arbitral award should be interpreted narrowly.

It is also notable that South Africa is not only weak in not conforming with the modern arbitration laws but has also not ratified ICSID Convention, and this could be annoying for major investors eyeing this country for potential investment. Hence, scepticism looms large as to how long the South African courts would remain pro-arbitration in their approach. Generalisation in the positive direction is based on the few decisions of the South African Supreme Court. However, in practicality, investors aiming at the South African market would

42 AMAZU A. ASOBU, supra note 5, at 123, 123-124.
44 See, Telecordia Technologies Inc v Telkom SA Ltd, 2007 (3) SA 266 (SCA).
45 Supra note 43.
not impressed by antiquated South African arbitration law with stray incidents of courts supporting the arbitration process in principle. Nonetheless, Mauritius (being a southern African State) appears to be fast establishing itself as a leading arbitration centre in Africa. The recent launch of LCIA-MIAC, a joint venture of the London Court of International Arbitration and the Mauritius International Arbitration Centre, and the latest announcement that the International Council for Commercial Arbitration (ICCA) will hold its 2016 Congress in Mauritius is a boost to the morale of African States.

Interestingly, the western and central African side reflects an encouraging picture in the realm of arbitration especially involving international parties. That is, many of the countries in this region are member states of OHADA. The OHADA countries have adopted a Uniform Arbitration Act, which is largely based on the UNCITRAL Model Law. Beyond the member states of OHADA, Nigeria is the only country in the region that has a modern arbitration law based on the UNCITRAL Model Law. Nigeria’s economic strength and its energy resources mean that Nigerian parties are frequently involved in international arbitration, and the Nigerian courts are gaining a reputation for being less adversarial and more cooperative in enforcing arbitral awards. A clear example of such a positive attitude of the judiciary is evident in the case of Ras Pal Gazi Construction Company v. Federal Capital Development Authority. In this case involving the state and despite the award being declared against the state, the Supreme Court of Nigeria while dismissing the appeal noted that “An award made pursuant to arbitration proceedings constitutes a final judgment on all matters referred to the arbitrator. It has a binding effect and upon application in writing to the court (shall) be enforced by the court… Once an award has been made and not challenged in court, it should be entered as a judgment and given effect accordingly… The only jurisdiction conferred on the court is to give leave to enforce the award as a judgment unless there is real ground for doubting the validity of the award.

In the eastern African region, the arbitration regime is not very discouraging if not encouraging either. Kenya, Rwanda and Uganda are the only countries in the region to have

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46Members include Benin, Bur kina Faso, Cameroon, Cent al African Republic, Chad, Comoros, Congo, the Democratic Republic of Congo, Ivory Coast, Equator ial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Niger, Senegal, and Togo.
47Steven Finizio & Thomas Führich, supra note 24.
adopted arbitration laws based on the UNICITRAL Model Law. This region can now also boast having established a forum for alternative dispute resolution specially using the method of arbitration through the Kigali International Arbitration Centre (KIAC). This centre was established in Rwanda in May 2012 to provide institutional support to domestic and international arbitration.

Lastly, in the northern part of Africa, most of the countries have an arbitration law conforming to the UNICITRAL Model Law and also all the countries except Libya are signatories to New York Convention. One issue of worry remains the judicial attitude towards enforcing the foreign arbitral award. This region also provides for one of the preeminent arbitration institutions especially founded for settlement of Asia-Africa Investment disputes. This institution is known as Cairo Regional Centre for International Commercial Arbitration (CRCICA) based in Cairo. CRCICA’s current rules came into force in 2011 and are based on the 2010 UNICITRAL Arbitration Rules.

To conclude, we see that all African States are yet to embrace the modern arbitration legal prescriptions and practices. We have seen a contrast of the UNICITRAL model and the ICSID model amongst African States in pursuit of dealing with investor-state arbitration. In the case of ICSID, the situation is not very unpleasant owing to inherent security features it possesses like enforcement of arbitral award. However, investors would be largely worried in cases where the African States would virtually compel the investor to initiate arbitration if necessary only under the UNICITRAL model and enforcement of the award thereafter as per the mandate of the New York Convention or any other convention that permits enforcement. Such a practice could be really repellent to a foreign investor, due to the substantial judicial intervention in arbitration as seen in case of South Africa which still operates its antiquated arbitration law. Judicial activism of being investor friendly by keeping itself away from arbitration and ensuring quick enforcement of a foreign arbitral award may not be a permanent feature. That is, minimization of judicial intervention and also independence of the judiciary in cases of even enforcing awards against the state is highly called for in the States of Africa. It may be concluded that such a supporting legal environment for a foreign investor v. State arbitration cannot be guaranteed without the strong will of the State. This can further only be achieved if such a policy decision to ensure quick and amicable resolution of investor-states dispute is transcended into action by way of legislative action embracing
modern arbitration laws and cutting down on judicial powers of unwarranted interference during and post arbitration proceedings.

**Above all, regional arbitration institutions in Africa need to be optimally utilised** in order to popularize arbitration in Africa. Such institutions could also help in shaping up the arbitration law jurisprudence in the continent to a large extent providing *cost-effective dispute resolution* mechanisms to both the foreign investor and the State party, *unlike the western or European expansive arbitration in London, Paris, New York or Washington.*

**IV. BOTTLENECKS IN INVESTOR-STATE ARBITRATION**

Phenomenal growth of trade and commerce in the globalised economy has led to the developed states exploring newer trade markets in developing countries including window of investment alongside traditionally exporting their products. Similarly, owing to the factors like a weak State economy and given the rich natural resources that some of the developing countries possess, such developing States are paving way for the foreign investors to start business in their countries. In order to streamline this investment based commerce, as already seen in the discussion above, BITs and multi-lateral investment treaties have played a pivotal role. Besides, numerous factors have contributed to the growing number of BITs, among them the “gradual economic interdependence among developed and emergent economies and the general trend towards globalisation”\(^{50}\). However, *one of the most annoying and ensuing challenges of such investment based commerce is to secure speedy and cost effective dispute resolution*, especially in case of investor-state dispute. *Africa is no exception grappling with such unpleasant commercial challenges.* Also we have discussed above that arbitration is acknowledged as the most preferred medium of investment dispute resolution involving both private foreign investor and the host State party. Pursuant to the scope of this paper and the conference, I would now quickly move on to **to assess the challenges** that are **inherently present in the investor-state arbitration** and more specifically in the context of *Africa being such host State vis-a-vis foreign investors from Asian countries (India and China as sample States).* Moreover, it is just not the numeric increase in state-party arbitrations that is significant, but also that these arbitrations often involve large sums of

\(^{50}\) **BARRY LEON & JOHN TERRY, supra** note 10, at 106.
money, complex issues, high-profile subject matter and a plethora of national and international interests-economic, political and even cultural.\footnote{Id.}

Let us see the \textit{cardinal factors responsible for turning investor-state arbitration into a hostile activity} generally and particularly in Africa.

(i) \textit{Locus for arbitration (Cost effective aspect):} The preferred venue for resolving investor-state dispute is often a bigger concern even prior to the commencement of the arbitration proceedings. Cost of arbitration based on the seat of arbitration is certainly one of the important considerations.

Africa can potentially offer cost effective venues for arbitration. Owing to budget travel, stay, and allied resources that Africa offers, it increases the quotient of affordability for any commercial entity/foreign investor. This is in stark contrast to the arbitration proceedings in Western or European countries, where the travel cost for parties, witnesses, lawyers and arbitrators including their stay and other logistic support is exponentially higher.

(ii) \textit{Modernity of State’s arbitration law & Institutions:} Seat of arbitration remains unqualified without a reference of the applicability of lex arbitri, curial law and the substantive law governing the dispute of arbitration, besides cost effective element identified aforesaid.

Lex arbitri in most of the African states is in a developing phase hence, not enticing enough for an investor, if the seat of arbitration would be Africa. Besides, African governments are often assertive in insisting on a local seat of arbitration and the application of local laws in relation to projects where they are the client. Modernity of arbitration laws in Africa has been specifically dealt with in the preceding discussion. That is, over all a legal framework conducive for arbitration as well as publications (books, journals, other resource materials, etc.) on commercial law, arbitration and dispute resolution are major requirements\footnote{See, Amazu A. Asouzu, Some Fundamental Concerns and Issues about International Arbitration in Africa, AFRICAN DEVELOPMENT BANK, https://www.mcgill.ca/files/isid/LDR.2.pdf (last accessed on September 30, 2014).} for contemporary African countries to raise their standards of handling investor-state arbitration.
(iii) **Political and Civil Unrest:** Political and civil unrest and instability, which are unfortunate facts of life in certain states within sub-Saharan Africa, can naturally present fundamental obstacles to the conduct of arbitral proceedings and/or the enforcement of awards. Particularly over the last decade, the majority of sub-Saharan African states (examples include Tanzania, Ghana and Botswana) have, however, shown a considerable degree of political stability. Concerns over civil unrest should not, therefore, necessarily deter arbitration and/or enforcement in sub-Saharan Africa. On the contrary, this issue is better considered on a case-by-case basis, giving careful consideration to the state in question (or even, in some instances, the region within that state). This is particularly significant because State’s change in political leadership may affect the economic policy of the state vis-a-vis investment and investors. So would change in the bureaucrats administering the system. Ultimately, investor may incur great difficulty in harmonising the claim with the new leadership.

(iv) **Enforcement of arbitral award (Judicial Independence and Court’s workload):** The issue of judicial independence is most significant factor determining efficacy and successful completion of dispute resolution by arbitration. Courts’ independence is uncertain, barring some reflections from South African and Nigerian Apex Courts in particular cases. In African states with more advanced regimes for the enforcement of arbitral awards, enforcement periods range from six months to over a year, and courts in the region frequently struggle with large case backlogs. In the worst cases, enforcement proceedings can drag on for many years before final resolution. Independence of the judiciary to enforce arbitral awards timely and without bias or influence from the State is most indispensible. The absence of it could ultimately defeat the entire arbitration pursuit by the investor and may adversely the future economic ventures in the region.

**Why Africa couldn’t catch up with developments in Arbitration Worldwide?**

**Jorge Castaneda rightly observed:** The underdeveloped nations do not accept compulsory submission to rules in the formulation of which their needs and interests were not taken into
account, but rather, on the contrary, were created by the practice and in response to the needs of their probable adversaries.\footnote{J. Castaneda, ‘The Underdeveloped Nations and the Development of International Law’, 15 INTERNATIONAL ORGANIZATION 38, 41(1961).}

In response, \textit{Lalive aptly argued}: Rejecting the institution for having developed, more or first of all, in Western Europe would be about as intelligent as rejecting the use of the railway or the airplanes because they were not developed or used to begin with in the Antarctic or the Sahara.\footnote{AMAZU A. ASOUZU, supra note 5, at 411, 411-412.}

It cannot be disputed that, since the first aeroplanes and trains were invented, they have been subject to subsequent developments necessitated by their importance and use. The same should be so for the arbitral process both in formal and in normative terms. Most importantly, the ‘new states’ never challenge the whole body of international law which existed before their statehood as ‘to do so would mean rejecting many rules which operate to their advantage’.\footnote{\textit{Id.}}

In this context, it is very interesting to note why African States appear to be suspicious of arbitration especially of agreeing on western form of arbitration including reference of a dispute to institutions like ICC. African countries don’t seem to be excited to embrace modern arbitration law. Perhaps they rightfully feel threatened by the overwhelming power of certain multinational corporations whose financial resources far surpass their own and whose tentacles extend into many different countries. Whether such fears are well grounded or not, they obviously still produce feelings of insecurity and dependence and a deep suspicion of a hidden agenda essentially for the benefit of big business. Without sufficient information on how the arbitral process benefits them immediately, African lawyers and their governments are understandably unwilling to get too involved in a process which they perceive as largely benefiting the trading entities of the West. Therefore, among the \textit{major obstacles until recently hindering the development of sophisticated arbitration institutions, forms and practices in Africa}, on levels that are presently experienced in the rest of the world \textit{are}: lack of adequate information about the arbitral process, lack of doctrinal discussion and/or study by African scholars of the major multilateral formulations of the past 50 years and of the ongoing studies and negotiations that are taking place, particularly those undertaken within...
the auspices of UNCITRAL and other formulating agencies; and fears and suspicions about
the process which has been perceived by most African States as being largely in the interest
of the Western trading entities.56

V. INVESTORS’ EXPECTATIONS & THE ROAD AHEAD

Given the nature of trade and commerce, it is realistic that most companies want to grow and
make more profit. They generally first do so in their home country. When this has occurred,
they look for new markets abroad. Other companies want to lower their production costs.
This can be done by producing abroad, in countries where the cost of labour is cheaper or
where the production regulations are less demanding. Yet other companies depend on natural
resources that are not available in their home country. All of these companies will look for
opportunities to make investments abroad – so-called foreign direct investments. In
developing countries, these companies find an interested partner. This is where the interests
of foreign investors and African States meet and where investment deals are made to the
benefit of both parties.57

However, making a foreign investment is different in nature from engaging in a commercial
transaction. Whereas a commercial transaction typically consists of a one-time exchange of
goods or services and money, the decision to invest in a foreign country initiates a long-term
relationship between the investor and the host country. Often, the investor is required to make
substantial funds available at the outset of the project, with the expectation of recouping this
amount plus an acceptable rate of return only ten or twenty years later. This long-term
relationship, in combination with the size of the investment and the profits to be made by
both the investor and the host country, make foreign investments particularly prone to
disputes. Such disputes may arise during the period of investment out of a change in the
economic conditions of the project (e.g., the arrival of competitors or a change in the prices
of the raw materials), or in the position of the government (e.g., subsequent to change of
government following elections).58

56 Samson L. Sempasa, Obstacles to International Commercial Arbitration in African Countries, 41.2 THE
57 LISA BOSMAN, supra note 49, at 402.
58 LISA BOSMAN, supra note 49, at 403
With the backdrop of the aforesaid discussion, it wouldn’t be unrealistic to say that indeed every company and every investor is out in the market for profit and sustainable growth. In the context of this paper, it would be prudent to conclude that **every such investor would ideally want to assess the African State** and their market beyond its parent state with **check list like**:

(a) **Identification of BIT** between investor’s parent State and the Host State;

(b) Fair and clearly worded **arbitration clause in such BIT**;

(c) **Conducive executive machinery**- Host State offers for procuring various clearances necessary to set up business;

(d) **Supporting legal infrastructure** for speedy and cost effective dispute resolution. This involves:
   
   (i) **Arbitration Regime of the Host State**- most importantly whether the arbitration law of the host state is in conformity with the international acceptable practices and standards, possibly in tune with UNCITRAL Model Law.

   (ii) **Host State’s status of ratification** vis-a-vis ICSID & New York Convention or any other convention permitting enforcement of arbitral award.

   (iii) **African States not being party to ICSID, New York Convention or OHADA** and not even having modern arbitral law- this could be a real challenging situation for an investor to handle, if investment in such a State could not be avoided for commercial reasons.

   (iv) **Independence of judiciary/courts**- with respect to court’s approach in expeditiously enforcing arbitral awards irrespective of it being against the host State, with minimal judicial scrutiny if so warranted on justifiable grounds by the mandate of the arbitration law.

(e) **Political stability** which is an important factor determining investment policies for the foreign players/investors.

(f) **Locus of arbitration**- this would relate to assessing whether arbitration could be preferred in the host state or elsewhere, what would be the cost incurred depending on such identification of venue and other logistic support required.
The aforesaid checklist would be highly relevant for Indian and Chinese investors in particular. This is because of the exciting revelation that despite India and China being heavy investors in African countries, not a single investment dispute based arbitration has been initiated by claimants from either of these Asian countries. This is especially stimulating in the light of the fact that so far ninety-seven ICSID proceedings that have been initiated against African states. Out of these, sixty-one proceedings (63%) were initiated by claimants from Europe. Nineteen proceedings (20%) were initiated by claimants from the Americas. Claimants from the Middle-East filed eight arbitrations (8%). Four proceedings were brought by claimants from Asia and Australia (4%). In only one proceeding was the claimant African (1%). In case of four proceedings (4%), nationality of claimant is not known so far. This would perhaps indicate that Indian and Chinese investors seldom utilise BITs between their countries and African States to protect their interest.

Therefore, a shrewd investor would make advanced study of the prospective African State and access the potential ensuing risks and challenges that would pop up in the event of dispute and arbitration proceedings including the enforcement of the award. Having appreciated such factors affecting business in a foreign land, I believe there may not be any other alien element to deter the investors from capitalising on the benefits of contracting and investing in African countries.

VI. CONCLUSION

Pursuant to the above discussion it is noteworthy that Africa appears to be actively participating in foreign investment dispute resolution through international arbitration. However, African States need to urgently redeem themselves from the clutches of complex legal system and diverse legal practices spread across the continent. Africa can catch up with the venues like Paris, London, New York, Singapore, Beijing, and many more, in emerging as the preferred host of arbitral tribunals. Some of the most necessary initiatives Africa should undertake in the immediate future in the light of aforesaid considerations are:

(a) Modernising arbitration laws

(b) Generation of scholarly resources on arbitration law and practice.

59Lisa Bosman, supra note 49, at 412.
(c) Investing in training of lawyers and judges- in order to make them competent to handle investor-state complex arbitrations and administer as arbitrators if necessary.

(d) Develop infrastructure like modern conference, telecommunication, etc, facilities for accommodating arbitral tribunals.

(e) Strengthen regional arbitration institutions

India and China being trading partners in Africa, are far ahead of the African States so far as modern day arbitration laws, practice and judicial support is concerned. Both of these Asian nations could perhaps export legal resources to Africa in this area. This would further strengthen regional relations between the common investors in Africa. Asia-Africa may also mutually enrich their roots in arbitration jurisprudence in the future.