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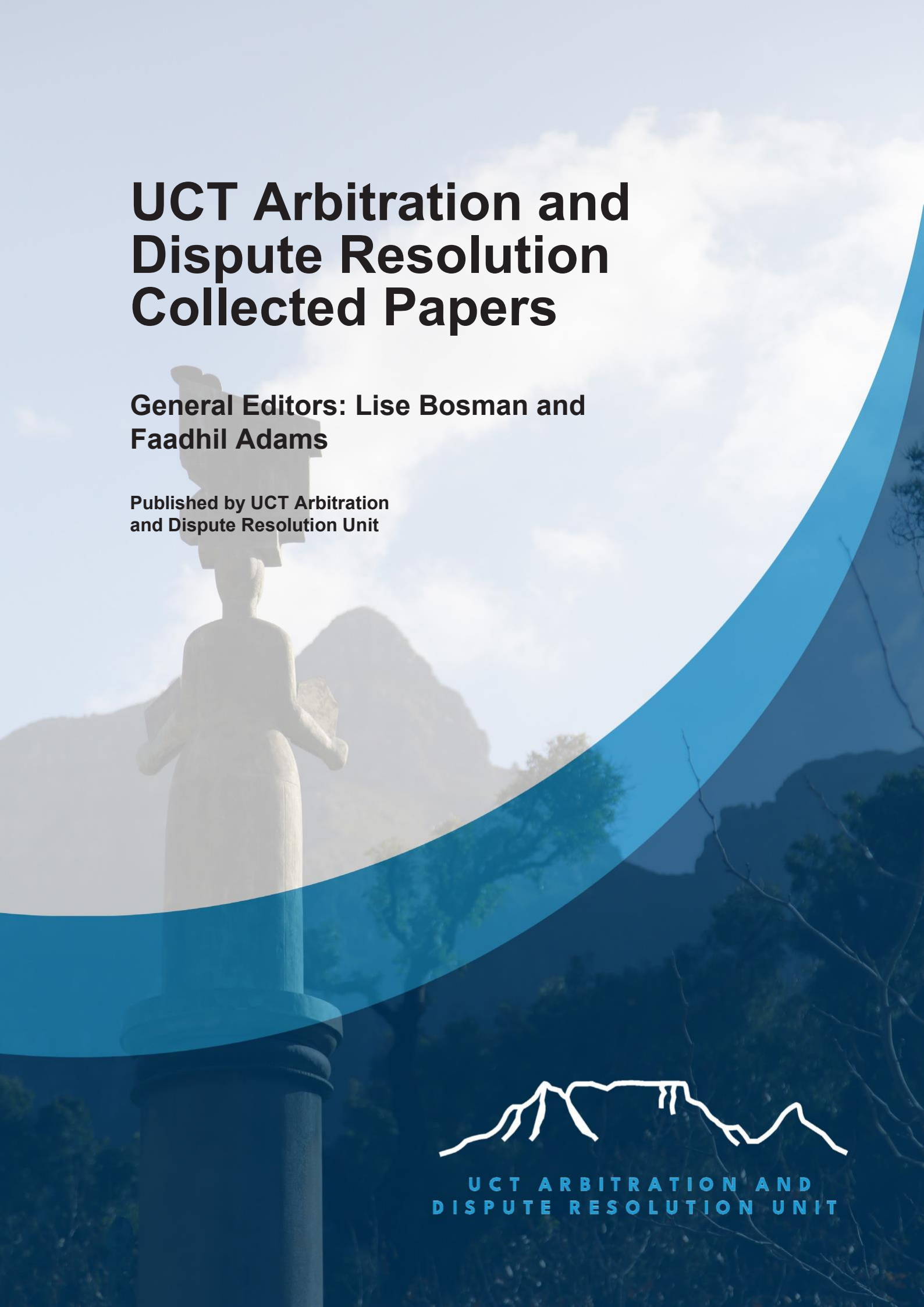


UCT ARBITRATION AND DISPUTE RESOLUTION UNIT

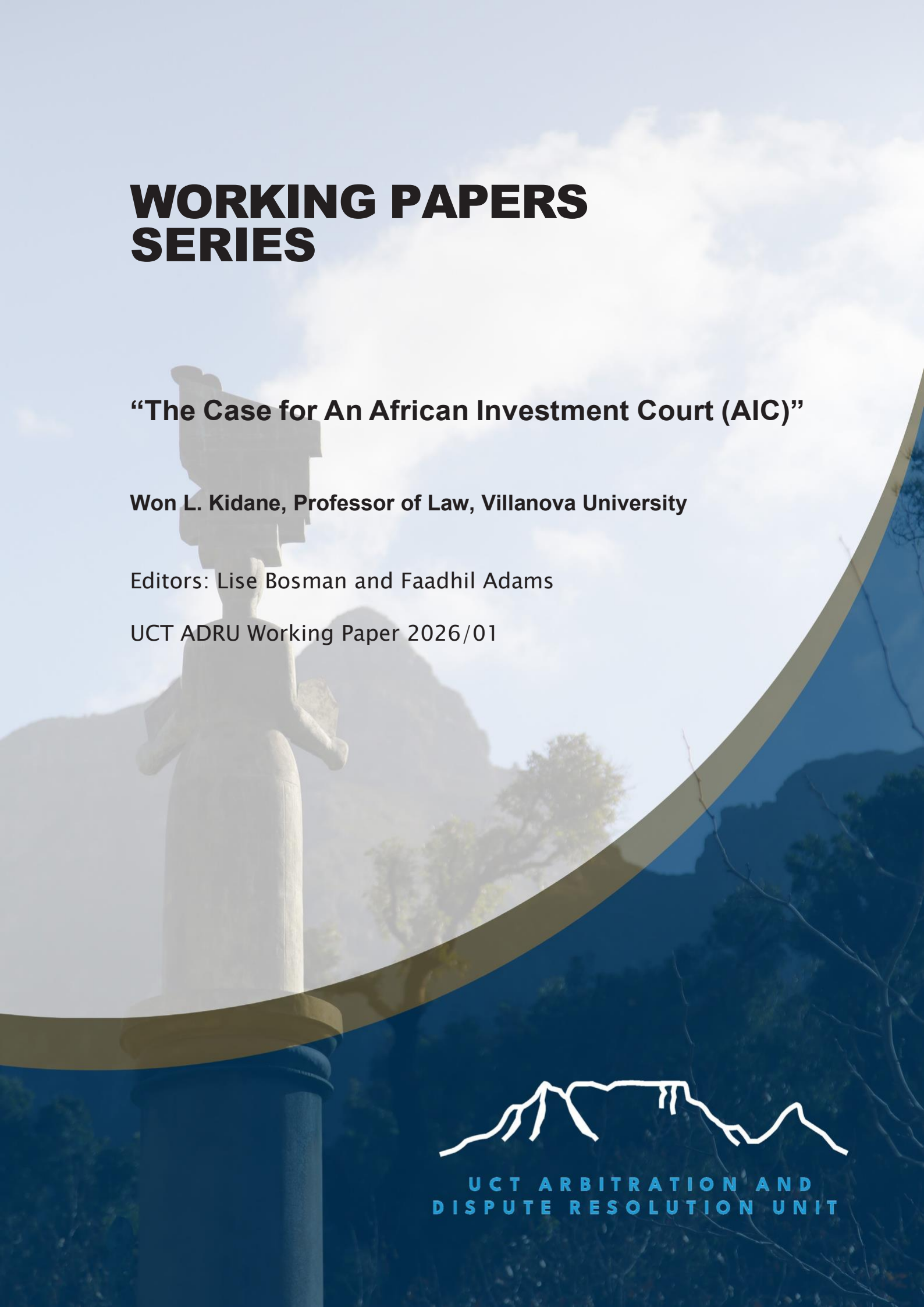
WORKING PAPERS SERIES

“The Case for An African Investment Court (AIC)”

Won L. Kidane, Professor of Law, Villanova University

Editors: Lise Bosman and Faadhil Adams

UCT ADRU Working Paper 2026/01



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"“The Case for An African Investment Court (AIC)”

Prof. Won Kidane

FEBRUARY 2026

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Introduction

A September 2025 Financial Times article titled "*Arbitration Doesn't Work but There is a Better way of Attracting Foreign Direct Investment*"[1] counsels that: "countries that are deserving destinations for FDI need to break free from the clutches of a rapacious arbitration-litigation complex."[2] It further speculates that "bilateral investment treaties aren't dead yet, but they need to go. The sooner the better."[3] And that is because "BITs once held great promise as a means of attracting foreign direct investment by providing a framework for protecting investors from capricious (or corrupt) decisions by host governments, and fairly, efficiently adjudicating disputes. They have failed decisively."[4]

The conclusion that BITs have failed and that the "arbitration-litigation complex" is "rapacious," anecdotal as it were, may have overstated the empirical reckoning,[5] but the global sovereign demand for reform is laud, clear and urgent.[6]

The overall debate on investor–state dispute settlement (ISDS) reform has reached a transformative juncture.[7] The United Nations Commission on International Trade Law (UNCITRAL) established Working Group III (WG III) in 2017 for the purpose of reforming ISDS.[8] The idea of a standing Multilateral Investment Court (MIC) has emerged as the core of efforts to address long-standing criticisms of ad hoc arbitration centered around concerns over inconsistency, incoherence, and accuracy of the jurisprudence, transparency and representational deficits, costs, duration, and overall legitimacy of the system.[9]

For developing regions, and Africa in particular, this moment is not only a challenge but also an opportunity to move from being norm-takers to norm-makers, designing compatible institutions that build on existing efforts and marry careful innovation to ensure legal predictability and developmental priorities.[10]

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[1] *See* Jay Newman et al., *Arbitration Doesn't Work but There is a Better way of Attracting Foreign Direct Investment*, FINANCIAL TIMES (Sep. 18, 2025) (Jay Newman is an author and former senior portfolio manager at Elliott Management, where he led its Argentina campaign. Nick Kumleben is energy director at Greenmantle. Richard Carty was Managing Director of Morgan Stanley Principal Strategies and CEO of Bonanza Creek Energy). https://www.ft.com/content/ef828174-78e8-4d5f-83d4-1db43ec2cbe6?accessToken=zwAGP2i7I9-YkdPvgoF0eOhNX9OD1B20PsLL5g.MEQCICTb8Mos0Tsm09C9cdjklTukCSUkYkYa9fGLPv4R1shOAiAiw1KllA0cWj3i0BfOEV5oQhwLBMqgaqQU0a2nC5ntRA&

[2] See *id.* at ¶ 3. (introducing difficulties of bilateral investment treaties and suggesting countries escape "arbitration-litigation complex").

[3] See *id.* at ¶ 1. (stating bilateral investment treaties should no longer be utilized).

[4] See *id.* at ¶ 2. (explaining past perceptions of BITs as valuable mechanisms for encouraging FDI and protecting against corrupt and inefficient behavior by host governments).

[5] For a discussion on the perceived failures of BITs, see *infra* notes 20-48 and the accompanying text.

[6] *See* International Investment Agreements Issues Note, Trends in the Investment Treaty Regime and a Reform Toolbox for the Energy Transition, UNCTAD, (Aug., 2023) (https://unctad.org/system/files/official-document/diaepcbinf2023d4_en.pdf) (demonstrating increased termination of BITs and continued discussion of ISDS mechanisms).

[7] *See* Newman, *supra* note 1, at ¶ 2. (emphasizing contrast between past perceptions of BITs).

[8] *See Working Group III: Investor State Dispute Settlement Reform*, UNCITRAL (Sept., 2025) https://uncitral.un.org/en/working_groups/3/investor-state (providing database for procedural rules reform and cross-cutting issues).

[9] *See Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session (Vienna, 27 November- December 2017)*, UNCITRAL, (Dec. 19, 2017) https://docs.un.org/en/A/CN.9/930/Rev.1 / (Feb. 26, 2018) https://docs.un.org/en/A/CN.9/930/Add.1/Rev.1 (describing Working Group III goals to (i) identify concerns regarding ISDS, (ii) consider whether reform is desirable, and (iii) develop relevant solutions to address reform goals).

[10] *See* Gustavo de Carvalho, *From Norm-Takers to Norm-Makers*, COUNCIL ON FOREIGN RELATIONS, (July, 2020) https://www.cfr.org/report/norm-takers-norm-makers (describing ways in which Africa is a norm-maker, including its "creative and

This article traces the global effort to diagnose the deficiencies and reform the Bilateral Investment Treaty (BIT) based ISDS and proposes the establishment of the African Investment Court (AIC) under the African Continental Free Trade Agreement (AfCFTA) Investment Protocol (The Protocol).[11]

The Protocol was passed by the Assembly of Heads of State and Government of the African Union in November 2023 without a dispute resolution provision.[12] That is because the dispute settlement proved impossibly contentious.[13] This author was once a part of the drafting consultative process and critiqued the substantive provisions in his recent book, *Africa's International Investment Law Regimes*.[14]

This article urges the establishment of the AIC not only because the Protocol would be meaningless without a dispute settlement mechanism but also that it would offer Africa the opportunity to seize this constitutional moment and shape a more just and accountable system of the settlement of international investment disputes for itself and serve as an example for the rest of the world.[15]

With that in mind, Part II surveys the literature to answer the key questions of whether BITs have failed and if ISDS is to blame.[16] Part III summarizes the global effort at reforming ISDS including the debate surrounding the establishment of what is called the Multilateral Investment Court (MIC).[17] Part IV offers a detailed account of the design of the African Investment Court (AIC) including its political and economic viability.[18] Part V provides a brief summary of the conclusions.[19]

Have BITs Failed and Is Arbitration to Blame?

Have BITs failed?

The literature remains divided on whether bilateral investment treaties (BITs) meaningfully attract foreign direct investment (FDI) to developing countries.[20] Early cross-sectional studies reported modest correlations between treaty

proactive responses to strengthen multilateralism, like establishing the AU"). Africa can move beyond normative roles and become more active in shaping the future of the international system, *id.*

[11] For a discussion on the deficiencies in BITs, see *supra* notes 1-4 and the accompanying text.

[12] *See generally*, Won L. Kidane, *African International Investment Law Regimes*, OXFORD UNIV. PRESS (Nov. 17, 2023) (providing historical background of Africa Union and evolution of ISDS).

[13] See *id.* (explaining Protocol anticipated dispute settlement provisions incorporated as an annex negotiated within a twelve month period); see also *AfCTA Protocol on Investment*, UNCTAD (Feb. 2023) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/8533/download

text (stating in event of dispute between investor of State Party and Host State relating to alleged breach of this Protocol, investor and Host State "shall initially seek to resolve amicably the dispute through consultations, negotiations, conciliation, mediation or other amicable dispute resolution mechanisms available in the Host State.") This Protocol also states "notwithstanding the outcome of the dispute prevention and grievances management process under Article 45, in the event that an investor of a State Party and the Host State are unable to amicably resolve the dispute in accordance with paragraph 1 of this Article, they may seek to resolve such dispute in accordance with the dispute resolution mechanisms to be provided in the Annex referred to in paragraph 3 of this Article. Rules and Procedures governing Dispute Prevention, Management and Resolution of disputes covered by this Protocol, shall be set out in an annex to this Protocol. The Annex shall be negotiated after the adoption of this Protocol by the Assembly of Heads of State and Government of the Africa Union, and finalized within twelve months at the latest from the date of adoption of this Protocol. The annex, upon adoption by the Assembly of Heads of State and Government of the Africa Union, shall form an integral part of this Protocol." *Id.* More than 36 months since then, no agreement has been reached. This author's conversation with the drafters suggests that the matter has proven to be more politically more contentious than anticipated. *Id.*

[14] *See* Kidane, *supra* note 12. (explaining African states averaged 3% of FDI inflow, but were required to answer 25% of all investor–state claims adjudicated under auspices of ICSID).

[15] For a discussion on the potential benefits of establishing the AIC, see *infra* notes 148-153 and the accompanying text.

[16] For a discussion on the relationship between ISDS and BITs, see *infra* notes 20-89 and the accompanying text.

[17] For a discussion on the global effort to reform ISDS and the MIC, see *infra* notes 90-147 and the accompanying text.

[18] For a discussion on the design of the AIC, see *infra* notes 148-253 and the accompanying text.

[19] For a summary of the article's discussions, see *infra* notes 254-267 and the accompanying text.

[20] *See* Jason Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, UNIV. OF WIS. L. SCH. (April 23, 2010).
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594887

ratification and FDI inflows, but those findings weakened once researchers began correcting for endogeneity, selection bias, and institutional quality.[21] More recent empirical and doctrinal scholarships emphasize that the relationship is conditional; BITs can enhance investor confidence and attract capital only under certain governance and risk conditions.[22] This section summarizes the studies.[23]

Empirically, Eichler [24] finds that the existence of a BIT increases bilateral investment flows by roughly 30–40 percent, with the strongest effects in developing countries characterized by high political risk.[25] BITs thus function less as engines of investment creation and more as risk-mitigation instruments, reassuring investors where domestic institutions are weak.[26] In contrast, the incremental value of BITs appears negligible in politically stable states, confirming earlier research by Tobin & Rose-Ackerman [27] and Busse et al.[28] that institutional credibility conditions the treaty effect.

Still, even this conditional optimism is contested.[29] Jason Yackee,[30] in a widely cited empirical analysis, found no statistically significant relationship between the existence of BITs and increased FDI inflows once controlling for country-specific effects.[31] Yackee argued that BITs often fail to provide the credible commitment investors require, since arbitration enforcement and state reputation depend more on domestic legal reliability than on international promises.[32] This skepticism tempers claims that treaties alone can create investment where institutional trust is absent.[33]

(explaining statistical exercises are inconsistent with some studies demonstrating positive impacts on foreign investment and others showing negligible or negative impact).

[21] *See* Sadhon Saha et al. *Effects of Institutional Quality on Foreign Direct Investment Inflow in Lower-Middle Income Countries*, 8 HELIYON (Sept. 30, 2022) https://www.cell.com/heliyon/fulltext/S2405-8440(22)02116-8? (examining the institutional and regulatory quality on foreign investment inflows).

[22] *See* Steffen Eichler, *Bilateral Investment Treaties and Portfolio Investment*, 91 J. INT'L FIN. & ECON. (2024) https://www.sciencedirect.com/science/article/pii/S1042443123001865 (finding expropriation risk and BIT's investor protection are complementary).

[23] For a discussion on the recent empirical and doctrinal scholarship, see *infra* notes 39-48 and the accompanying text.

[24] *See* Eichler (presenting annual dataset on bilateral portfolio investment positions from 2002 to 2017).

[25] *See id.* (explaining "account for the host country's level of political risk…[and finding] that bilateral portfolio equity investments will be 74% and 81% higher if the BITs investment protection is strong.").

[26] *See id.* (explaining for countries with high political risk, marginal effect of BITs is positive and effective).

[27] Jennifer Tobin & Susan Rose-Ackerman, *When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties*, 6 REV. INT'L ORG. 1 (Aug. 7, 2010) (showing BIT is important institution for dealing with domestic political risk and has effect on FDI).

[28] *See* Matthias Busse et al., *FDI Promotion Through Bilateral Investment Treaties: More Than a Bit?*, 146 Rev. World Econ. (Feb. 2, 2010) https://www.ssoar.info/ssoar/bitstream/handle/document/21410/ssoar-2010-1-busse_et_al-fdi_promotion_through_bilateral_investment.pdf?sequence=1&isAllowed=y (explaining impacts of BITs depend on characteristics of host country, including institutional development and capital account openness).

[29] *See* Yackee, *supra* note 20 (suggesting BITs are unlikely to significantly promote foreign investment). Yackee considers political risk rankings as dependent variable in substitution for other frequently used variables to study FDI inflows. *Id.*

[30] *See id.* at 3. (finding BITs may have some influence on investment decisions, but aren't significantly correlated with foreign investment).

[31] *See id.* at 23. (finding general counsel offices in large U.S.-based corporations have little knowledge of BITs as risk-reducing devices, and therefore, it's unlikely corporate decision-makers factor treaties into investment decisions).

[32] *See id.* at 10. (explaining potential positive correlation between BITs and FDI for countries with strong domestic property-rights regimes). Yackee discusses a 2003 study by Hallward-Driemeier that involved analysis of 20 years of bilateral FDI inflows from OECD countries. Hallward-Driemeier found BITs are either insignificantly correlated with FDI or are negatively associated with a country's FDI inflow. *Id.*

[33] *See* Anja Ipp, *Past the Tipping Point? The Diminishing Value of Investment Treaties and Arbitration in the Green Transition Era*, KLUWER ARBITRATION BLOG (May 4, 2024) https://legalblogs.wolterskluwer.com/arbitration-blog/past-the-tipping-point-the-diminishing-value-of-investment-treaties-and-arbitration-in-the-green-transition-era (explaining there is limited evidence to support claim that investment treaties support countries' efforts to attract investment). In a meta-analysis of 74 studies, OECD found "robust evidence that the effect of international investment agreements is so small as to be considered zero." *Id.*

Yu et al[34] show that BITs can nonetheless produce positive institutional externalities.[35] Studying seventy-three developing economies between 2005 and 2019,[36] they report some correlation between the number of BITs in force and improvements in contract-execution indicators, particularly reduced enforcement times.[37] They argue that BITs may create governance spillovers, encouraging reform in domestic judicial systems as states internalize the procedural commitments embedded in investment treaties.[38]

From a normative standpoint, Javagal (2024)[39] frames BITs as instruments that must balance investment promotion with national sovereignty.[40] Javagal underscores that modern treaty design should incorporate regulatory carve-outs, general exceptions, and transparency safeguards to preserve the host state's regulatory autonomy and sustainable-development goals.[41]

Similarly, Cree Jones and Weijia Rao (2023) argue in "*(Un)stable BITs*"[42] that the legitimacy of BITs increasingly depends on stability and adaptability: states are renegotiating or terminating older agreements to regain policy flexibility

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[34] *See* Xiao Yu et al., *The Effects of BITs on Contract Execution in Developing Countries: Some Implications for the Covid-19 Crisis*, 10 FRONTIERS PUB. HEALTH (March 30, 2022) https://www.frontiersin.org/journals/public-health/articles/10.3389/fpubh.2022.839030/full (finding prominent effects of BITs on improvement of contract execution in host countries with common law system).

[35] *See id.* (explaining efforts to expand scope of research of BITs from FDI and business activity to institutional quality of host country and deepen existing research pertaining to contract execution in relation to daily business activities of enterprises).

[36] *See id.* (The BITs that these 73 developing countries concluded constitute 88% of the world's BITs. See id ("By 2016, 73 developing countries had signed 2,598 BITs in total, accounting for about 88% of the total 2,957 BITs globally, of which 1,923 had entered into force.")

[37] *See id.* ("Taking the data of 73 developing countries from the world bank's business environment project and the United Nations Conference on Trade and Development from 2005 to 2019 as research samples, this paper discusses the improvement effect of BITs on contract execution in developing countries. The empirical study found that the BITs in general or the BITs that have entered into force can play a positive role in promoting the contract execution of developing countries."

[38] *See id.* ("International dispute settlement mechanism and domestic judicial mechanism are involved in the construction of a predictable and innovative business environment, which means maintaining international investment order requires a balanced consideration of resources at home and abroad. Investment arbitration and specific contract execution are related to the balance between the protection of investors' interests and the regulation rights of host countries, as well as the value judgment of the investment laws and control policies of host countries. The ruling focuses on promoting investment relations and maintaining investment order through the balance of interests. Regional economy is established on organizational rules and entities, and the force of law is an important premise to ensure that practice does not exceed reasonable expectations. In the context of international dispute settlement where a temporary organization tasked with arbitrating a dispute between two parties applies rules or principles of international law to evaluate the law or public policy of host governments, host countries often take measures such as expanding legal sources, enhancing legal effectiveness and adaptability to reduce the risk of losing a lawsuit and the transaction cost of the system, so as to get rid of the situation that the legitimate regulation power is controlled by the arbitral tribunal. The development of international investment dispute settlement methods promotes the improvement of host countries' overall business environment and institutional system. Host countries indirectly strengthen the effectiveness of domestic laws while adjusting their own foreign investment laws and public policies. Compared with international law, domestic law has more enforceable effectiveness and more precise adjustment subjects. When investment disputes are transferred from international to domestic, the effective time and conditions of law are more disposable. Although the governance structure continues to change and market demands are becoming more diversified, the rule of law is still the main line in building a business environment. The decision that state parties explicitly regard the investment arbitration award as the scope of domestic law means that the investment treaty arbitration also belongs to the scope of domestic law, rather than the scope of public international law, which reflects that domestic law and international law have a certain crossover and the scope of the boundary presents a narrowing trend. With the increasingly introverted international obligations, host countries are subject to regulation by adopting a specific legal framework within their own legal system, granting specific rights, and avoiding specific acts.")

[39] *See* Samanvitha Javagal, *Bilateral Investment Treaties: Fostering International Investment While Preserving National Sovereignty*, SSRN (June 17, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4859596 (explaining BITs eliminate need for diplomatic involvement to resolve conflict, and assure impartiality which allows conflicts to be resolved without political interference).

[40] *See id.* (discussing how developing countries can leverage FDI to promote sustainable economic growth by recognizing the value of BITs).

[41] *See id.* (discussing regulatory carve-outs and sustainable-development safeguards).

[42] *See* Cree Jones & Weijia Rao, *(Un)stable BITs*, 47 YALE J. OF INT'L. L. (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4187920 (finding more balanced negotiations may increase stability of investor protections and as countries become more sophisticated, there may be growth in investment treaty network).

while retaining sufficient investor assurances.[43] Their analysis reinforces the view that the BIT regime is not static but evolving toward more balanced arrangements integrating sovereignty concerns with market signaling.[44]

Complementing this doctrinal evolution, Gu (2025)[45] argues in the ICSID Review that the effectiveness of BITs now depends on how domestic investment laws interact with treaty obligations.[46] Gu notes that many developing states are amending investment codes to localize fair-and-equitable-treatment standards and clarify arbitration procedures, creating a form of "domesticated international investment law" that merges international credibility with domestic control.[47] This hybridization reflects a broader trend toward legal pluralism in investment governance, where BIT commitments are sustained by internal legal reform rather than external enforcement alone.[48]

Institutional perspectives are reinforced by UNCTAD's 2024 World Investment Report,[49] which emphasizes that investment performance in developing economies increasingly depends on facilitation, regulatory modernization, and digital efficiency, not merely on the number of treaties in force.[50] UNCTAD reports that global FDI declined by seven percent in 2023, with developing-country inflows falling to US $867 billion, despite widespread adoption of liberalizing policy measures.[51] Only about 16 percent of global FDI stock is now covered by "new-generation" international investment agreements (IIAs) incorporating sustainable-development and facilitation provisions.[52] These findings suggest that institutional quality and investment-facilitation reforms, rather than treaty proliferation, are the principal drivers of modern FDI attraction.[53]

Finally, recent empirical work has emphasized treaty heterogeneity and that is, the idea that not all BITs are created

[43] *See id.* (explaining 165 of 2,667 BITs entered into force on or before December of 2020 have been unilaterally terminated and 121 have been renegotiated).
[44] *See id.* (explaining less developed and capital-importing countries that value longevity and stability have contributed to seismic shifts in investment treaty network which may result in greater equity).
[45] *See* Tianjie Gu, Beyond BITs: *The Evolving Relationship Between Domestic Investment Law and ISDS in the Era of Domestication*, ICSID REV. (July 4, 2025), https://academic.oup.com/icsidreview/advance-article-abstract/doi/10.1093/icsidreview/siaf015/8189209 (explaining how coordination between domestic and international investment law is essential for the success of ISDS reform).
[46] *See id.* (explaining domestic investment laws provide adaptable framework to fulfill obligations imposed by international regimes).
[47] *See id.* (citing Investment Code of Burundi (2021), article 37 which states "where recourse is had to international arbitration, it shall comply with the arbitration rules of the International Centre for Settlement of Investment Disputes in force at the time of the making of the investments to which the dispute relates").
[48] *See* Julien Chaisse & Georgios Dimitropoulos*, Domestic Investment Laws and International Economic Law in the Liberal International Order,* CAMBRIDGE UNIV. PRESS (Jan. 13, 2023) https://www.cambridge.org/core/journals/world-trade-review/article/domestic-investment-laws-and-international-economic-law-in-the-liberal-international-order/BDF63F6BFCA83A91584538103CA26EC3 (explaining States are utilizing domestic means to regulate foreign trade and investment; this includes using domestic law to govern entry and development of foreign investments).
[49] *See* United Nations Conference on Trade & Dev., *World Investment Report 2024: Investing in Sustainable Energy for All*, UNCTAD (2024) [hereinafter UNCTAD WIR 2024].
[50] *See id.* at 3. (explaining stricter financing conditions, investor uncertainty, volatility in financial markets, and greater regulatory scrutiny were principle causes of decline in FDI in developing countries in 2022).
[51] *See id.* at 45-47. (methodology for analyzing national investment policy trends included analysis of measures either reported directly to UNCTAD by Member States through annual surveys or by UNCTAD researchers through publicly available sources, such as government websites).
[52] *See id.* at 65. (explaining new-generation IIAs included provisions on investment facilitation and cooperation and tended to safeguard States' right to regulate).
[53] *See id.* at 146. (explaining Togo's efforts to use digital transformation to enhance FDI attraction). In 2022, Togo launched its first investment portal to offer detailed guidance on administrative procedures to start and operate a business. *Id.*

equal.[54] A forthcoming 2025 study in the Journal of International Trade & Economic Development[55] shows that design variation, particularly the inclusion of explicit regulatory exceptions, MFN scope, and dispute-resolution provisions, substantially affects treaty performance.[56] The finding that "treaty quality" matters more than sheer quantity echoes Bonnitcha et al. (2024)[57] and Bodea et al. (2024).[58] Taken together, the evolving literature indicates that BITs can help attract and retain investment only when integrated into credible domestic governance and reform strategies.[59] The preponderance of the evidence seeks collateral justification for BITs indicating the measurable luck of intrinsic success.[60]

Is Arbitration to Blame?

In 2017, the UN Commission on International Trade Law, entrusted Working Group III (WG III) with a broad mandate to address systemic issues in ISDS.[61] That mandate required WG III to identify concerns in ISDS, assess whether reform was desirable, and consider potential solutions.[62] The Commission endowed WG III with discretion to design solutions consistent with States' sovereignty, while remaining cognizant of related work of other institutions.[63]

From its initial sessions, WG III adopted a consensus-based and transparent process, engaging States, observers,

[54] See Zhaokuan Zhu et al., *The Impact of Heterogeneity in Bilateral Investment Treaties on Foreign Direct Investment*, J. OF APPLIED ECONOMICS, (Apr., 2025) https://www.researchgate.net/publication/390510915 (Abstract: "Prior research remains highly debated regarding whether bilateral investment treaties (BITs) effectively attract foreign direct investment (FDI). In this context, this study introduces a new dataset, the international investment agreement (IIA) mapping project, and panel data on FDI flows among 203 countries worldwide from 2009 to 2021. The findings indicate that higher BITs quality indicators, including breadth, depth, and non-economic standards (NES), significantly enhance FDI stock, with this effect remaining robust across various model specifications. Furthermore, as the domestic institutional quality of host countries improves, this positive effect is further amplified. These insights deepen the understanding of BITs effectiveness and offer policy implications for policymakers aiming to attract FDI through more comprehensive BITs.")

[55] *See id.* (explaining BITs limit sovereignty of signatory states, discouraging discriminatory actions, and promoting FDI inflows).

[56] *See id.* at 7. (stating BITs breadth index is measured by mapping elements of (1) scope and definitions, (2) treaty duration, (3) and amendment and termination components of the IIA mapping project).

[57] *See generally*, Jonathan Bonnitcha & Zoe Phillips Williams, *The Impact of Investment Treaties on Domestic Governance in Developing Countries*, 46 L. & Pol'y (2024). (Abstract: "We clarify a variety of mechanisms that plausibly link investment treaties to impacts on domestic governance. Considering incentive, acculturative and political economy mechanisms, we find little evidence that the treaties lead to changes in domestic law, institutional structure or policy-making. The treaties also have surprisingly limited relevance in investor-state bargaining outside formal adjudicatory processes. Overall, our findings point to a profound decoupling between investment treaties and domestic governance; they also clarify the conditions under which such decoupling can persist, notwithstanding material incentives for states to ensure tighter alignment. Rather than interpreting decoupling as a failure of domestic implementation, our case study suggests that the problem is with the treaties themselves, in that they place obligations on developing countries t Bilateral Investment Treaties, particularly ones that include formal umbrella clauses, appear to undermine host countries' capacity to generate tax revenues from their resource rents. The more resource rents are available in an economy, the more BIT obligations correlate with lower tax intake. The effect is statistically significant and qualitatively substantial.")

[58] *See* Cristina Bodea et al., *Global Treaties and Domestic Politics: Do Bilateral Investment Treaties Constrain Taxation in Developing Countries?*, 68 Int'l Stud. Q. 1, 25 (Sept., 2024) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3288100 ("Bilateral Investment Treaties, particularly ones that include formal umbrella clauses, appear to undermine host countries' capacity to generate tax revenues from their resource rents. The more resource rents are available in an economy, the more BIT obligations correlate with lower tax intake. The effect is statistically significant and qualitatively substantial.")

[59] *See id.* (explaining BITs must attract sufficient FDI to compensate for economic constraints imposed on policymakers).

[60] *See id. at 25* (concluding BITs deter taxation in developing countries).

[61] *See UNCITRAL Working Group III and Reform of Investor-State Dispute Settlement*, IISD, (July, 2017) https://www.iisd.org/projects/uncitral-working-group-iii-and-reform-investor-state-dispute-settlement (introducing UNCITRAL mandated Working Group III which was established to address concerns related to ISDS).

[62] *See* United Nations Secretariate, *Possible Reform of Investor-State Dispute Settlement (ISDS),* UNCITRAL, *(Dec., 2017)* https://docs.un.org/en/A/CN.9/WG.III/WP.142 (explaining concerns expressed regarding ISDS regime for consideration by Working Group).

[63] *See id.* at 10. (permitting Working Group to consider policy objectives of reform, specific issues that need to be addressed, and whether proposed reforms would be applicable to wide range of investment treaties under various arbitration rules).

treaty parties, academics, and NGOs.[64] The Secretariat's early Note on possible reform of ISDS (A/CN.9/WG.III/WP.142) and subsequent submissions laid the groundwork.[65]

In its Draft Report of WG III, the Secretariat summarized that the Working Group recognized core systemic concerns in ISDS, including: (a) absence of a framework for coherence, (b) questions of arbitrator impartiality and repeat appointments, (c) cost and duration of proceedings, (d) third-party funding, (e) lack of appellate review or institutional oversight, and (f) the need for better dispute prevention and mediation.[66] Thus, from the outset WG III's agenda was procedural reform, not revisiting substantive treaty rights.[67]

WG III began convening informal online sessions as early as December 2021 focused on the draft Code of Conduct, financing structures, and multilateral tribunal models.[68] These meetings enabled early stakeholder input before formal sessions.[69]

By mid-2022, WG III formally scheduled work on procedural and cross-cutting issues (WP.244, WP.245).[70] In September 2022 (43rd session), WG III discussed the establishment of an Advisory Centre, a standing tribunal mechanism, and adjudicator selection and appointment reforms (WP.212, WP.213).[71]

At its 2023 sessions, WG III finalized draft Codes of Conduct for arbitrators and for judges (in a possible standing mechanism) (A/CN.9/WG.III/WP.223) and revised them at the 44th session (A/CN.9/1130).[72] The Codes were adopted by the UNCITRAL Commission during its 56th session in July 2023.[73] These set out binding standards for independence,

[64] *See Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Forth Session*, UNCITRAL, (Dec. 19, 2017) https://docs.un.org/en/A/CN.9/930/Rev.1 UNCITRAL, (Dec. 19, 2017) / (Feb. 26, 2018) https://docs.un.org/en/A/CN.9/930/Add.1/Rev.1 (explaining Working Group would (i) identify and consider concerns regarding ISDS, (ii) consider whether reform was desirable in light of identified concerns, and (iii) develop relevant solutions to be recommended to the Commission).

[65] *See Possible Reform of Investor State Dispute Settlement (ISDS*), UNCITRAL, (Sept. 18, 2017) https://docs.un.org/en/A/CN.9/WG.III/WP.142 (establishing Working Group III was requested to ensure that deliberations would be Government-led with high-level input from all Governments, consensus-based, and fully transparent).

[66] *See id.* (explaining Working Group's priorities in addressing possible ISDS reform and consequences of such changes).

[67] *See* Jean-Michel Marcoux et al., *Discourses of ISDS Reform: a Comparison of UNCITRAL Working Group III and ICSID Processes*, 27 J. INT'L ECON. L. 314, 318 (May 17, 2024) https://academic.oup.com/jiel/article/27/2/314/7678841 (noting early WG III focus on procedural aspects).

[68] *See UNCITRAL Working Group (ISDS Reform)- Informal Online Meetings*, UNCITRAL, (Jan. 12, 2021) (explaining discussions in December of 2017 included considerations for compliance for Code of Conduct (Article II), financing aspects of multilateral investment tribunals, shareholders claims for reflective losses, and multilateral instruments on ISDS reform).

[69] For further discussion on works of Working Group III, *see Working Group III: Investor-State Dispute Settlement Reform*, UNCITRAL, https://uncitral.un.org/en/working_groups/3/investor-state (providing comprehensive list of ISDS reform documents).

[70] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Provisions on Procedural and Cross-Cutting Issues*, UNCITRAL, (July 8, 2024) https://docs.un.org/en/A/CN.9/WG.III/WP.244 (explaining Working Group may wish to consider final form of Draft Provisions, "including: (i) whether they should be presented as a comprehensive set of provisions or individual provisions; (ii) whether they should apply only to arbitration or other forms of adjudicatory dispute resolution proceedings (for example, a standing mechanism); (iii) whether they should apply to disp utes and proceedings arising from investment agreements, domestic legislation as well as investment contracts; and (iv) how they would be implemented by States.").

[71] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Advisory Centre*, UNCITRAL, (Dec. 3, 2021) https://docs.un.org/en/A/CN.9/WG.III/WP.212 (covering scope and governing structure of advisory centre, as well as services and beneficiaries of possible legal structures, location, cost, and financing).

[72] *See Possible Reform on Investor-State Dispute Settlement (ISDS) Draft Codes of Conduct and Commentary*, UNCITRAL (Nov. 23, 2022) https://docs.un.org/en/A/CN.9/WG.III/WP.223 (containing revised version of draft code of conduct for arbitrators in international investment dispute resolution ("Code for Arbitrators") and draft code of conduct for judges in international investment dispute resolution ("Code for Judges"); together, these are considered "the Codes.").

[73] *See Code of Conduct for Arbitrators* (Dec. 7, 2023), UNCITRAL, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2318944_coc_arbitrators_e-book_eng.pdf (introducing Code of Conduct with respective commentary of UNCITRAL).

impartiality, disclosure, multiple roles (double-hatting), and duties of diligence.[74]

Also by 2023, WG III completed draft provisions on investment mediation (WP.226) for possible inclusion in treaties, legislation, or contracts.[75] WG III thus introduced a dispute-prevention track alongside adjudication.[76]

In 2024, WG III turned its attention to creating an Advisory Centre for International Investment Dispute Resolution.[77] In April 2024, the Working Group approved a draft statute for the Center, forwarding it to the Commission for adoption in principle.[78] Subsequently, WG III completed its work on that draft statute, marking a significant step forward.[79]

By early 2025, WG III's project schedule encompassed sessions addressing procedural and cross-cutting issues (A/CN.9/1195, A/CN.9/1194) including damage valuation, cost allocation, and enforcement mechanisms.[80]

The U.S. submitted comments on the Draft Multilateral Instrument on ISDS Reform (WP.246) in February 2025, signaling that States are seriously engaging with options for a binding multilateral instrument.[81]

Throughout, WG III has maintained its focus on reform design rather than unilateral state action. Its working documents and online resource catalogue (UNCITRAL "ISDS Online Resources") consolidate treaty texts, submissions, and academic inputs.[82]

As of now, WG III has not declared "success"—rather, its recorded output reflects partial but significant progress in addressing procedural and legitimacy deficits:

1. Adoption of Codes of Conduct is one of WG III's first formal deliverables, suggesting wide acceptance that adjudicator ethics must be regulated in a unified manner.[83]
2. Structural reform (appellate/MIC) remains on the table. WG III's notes (e.g., WP.224) propose appellate mechanisms and multilateral court options.[84]

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[74] *See id*. at 15. (explaining "independence" refers to absence of external control and relations with disputing party that might influence Arbitrator's decision; "impartiality" refers to absence of bias or predisposition of Arbitrator towards disputing party or issues raised in proceeding).

[75] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Provisions on Mediation*, UNCITRAL, Jan. 16, 2023) https://docs.un.org/en/A/CN.9/WG.III/WP.226 (providing revised version of draft provisions broadening offer to mediate and reiterating voluntary and consensual nature of mediation).

[76] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Statute of an Advisory Centre on International Investment Dispute Resolution*, UNCITRAL, (Feb. 7, 2024) https://docs.un.org/en/A/CN.9/WG.III/WP.238 (providing revised draft statute of advisory centre on international dispute resolution with information requested by Working Group).

[77] *See id.* (explaining in January of 2024, Working Group completed its second reading of Articles one through eight of draft statute of advisory centre as contained in A/CN.9/WG.III/WP.236 and requested Secretariate further revise draft statute based on decisions and deliberations of Working Group).

[78] *See id.* (explaining at forty-seventh session, Working Group approved articles one to eight after making minor editorial changes).

[79] *See id.* at 14. (concluding draft statute and anticipating issues that require further deliberations and preparations by the Secretariate).

[80] *See Possible Reform of Investor-state Dispute Settlement (ISDS) Draft Provisions on Procedural and Cross-Cutting Issues*, UNCITRL, (June 30, 2025) https://docs.un.org/en/A/CN.9/WG.III/WP.253 (presenting revised draft provisions that do not address who can submit claim and types of dispute resolution proceedings available).

[81] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Multilateral Instrument on ISDS Reform*, UNCITRAL, (July 8, 2024) https://docs.un.org/en/A/CN.9/WG.III/WP.246 (providing first draft of multilateral instrument structured as framework convention with protocols).

[82] *See Investor-State Dispute Settlement Reform: On-line Resources,* UNCITRAL, (last visited Oct. 2025) https://uncitral.un.org/en/comm/wg/working_group_III/resources/ISDS_online_resources (providing database of all commission documents, working group documents, related texts, statements, and additional resources).

[83] For further discussion on UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, see *supra* note 72.

[84] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Appellate Mechanism*, UNCITRAL, (Nov. 17, 2022) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp_224-e.pdf (containing draft provisions relating to functioning of appellate mechanisms regardless of its form and addressing issues to be considered in implementation of reform element, including possible ways to establish appellate mechanism and to constitute appellate tribunal).

3. Cost, duration, and case management are among persistent concerns; WG III continues to explore early dismissal, summary procedures, and security for costs (WP.219, WP.192).[85]
4. Third-party funding regulation is addressed but not yet resolved; WG III's WP.172 and others propose disclosure obligations and coordination with cost rules.[86]
5. Institutional legitimacy tension: WG III's process is consensus-based and slow; critics (e.g., CCSI) argue that it tends to prioritize incremental fixes over bolder structural change.[87]
6. WG III has largely avoided re-opening substantive treaty rights debates; this limitation constrains how far reforms can address "failure" rooted in substantive imbalance.[88]

WG III's record provides a firm institutional foundation for diagnosing ISDS failures: it confirms that the system is viewed by many States and stakeholders as procedurally unstable, ethically under-regulated, financially burdensome, and lacking consistent appellate oversight.[89]

At the anecdotal level, in more than two decades of experience in the field, the author of this article has not met any African scholar, arbitrator, practitioner, judge, diplomat or political leader of any status who does not express grave concern about BIT-based ISDS.[90]

The reform trajectory is underway gradually, but it also illustrates how systemic diagnosis outpaces systemic transformation.[91]

The Global Effort to Reform of Investor-State Dispute Settlement

This section summarizes the most contemporary efforts that have been made to reform ISDS globally including the contributions of African states.[92]

Why a Standing Mechanism and What it Looks Like

UNCITRAL's reform track begins with a diagnosis: ad hoc tribunals, appointed case-by-case by the parties, generate fragmented jurisprudence and weak incentives for coherence, while offering only thin guardrails on impartiality (e.g., repeat appointments, double-hatting).[93] The Secretariat's design papers envision a permanent standing mechanism, a court structure, precisely to institutionalize consistency and shore up legitimacy.[94]

At its core, the model replaces party appointment with a roster- or merit-based system for selecting adjudicators; it contemplates fixed terms, disclosure and conflict rules, and limits on multiple roles.[95] Substantively, it marries a first-

[85] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Provisions on Procedural Reform,* UNCITRAL, July 11, 2022) https://docs.un.org/en/A/CN.9/WG.III/WP.219; *see also Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Provisions on procedural and Cross-Cutting Issues*, UNCITRAL, (July 8, 2024). https://docs.un.org/en/A/CN.9/WG.III/WP.244

[86] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Third-Party Funding – Possible Solutions,* UNCITRAL, (Aug. 2, 2019) *https://docs.un.org/en/A/CN.9/WG.III/WP.172*

[87] *See Prioritization and Draft Provisions on Procedural and Cross-Cutting Issues*, UNCITRAL, (May 21, 2024) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ccsi_iied_iisd_sc_submission_-_may_21.pdf

[88] *See* Jean-Michel Marcoux et al., *Discourses of ISDS Reform: a Comparison of UNCITRAL Working Group III and ICSID Processes*, 27 J. INT'L ECON. L. (May 17, 2024) https://academic.oup.com/jiel/article/27/2/314/7678841 (noting UNCITRAL WG III not necessarily concerned with procedural matters based on mere frequency of terms included in corpus of submissions).

[89] *See id.* (explaining states support reform initiatives to address issues of ethics and conflicts of interest specific to investment arbitration).

[90] For further discussion on the author's experience in the field, see *supra* note 12.

[91] See id. (expanding on author's research).

[92] For further discussion on contemporary efforts to reform ISDS, see infra note__.

[93] *See Possible Reform on Investor-State Dispute Settlement (ISDS) Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters*, UNCITRAL, (Dec. 8, 2021) https://docs.un.org/en/A/CN.9/WG.III/WP.213

[94] *See Possible Reform on Investor-State Dispute Settlement (ISDS) Draft Statute of a Standing Mechanism for the Resolution of International Investment Disputes*, UNCITRAL, (Feb. 8, 2024) https://docs.un.org/en/A/CN.9/WG.III/WP.239

[95] *See id.* 7. (explaining in Article 12 members of tribunals shall hold office for term of (period of time to be specified) years and….shall not be eligible for reappointment).

instance division with an appellate tier that can correct errors of law (and, in narrow cases, manifest errors of fact), thereby creating a predictable body of precedents over time.[96]

Jurisdiction would be consent-based and modular: states opt in through a multilateral instrument or protocol, with flexibility for phased participation.[97] Administratively, a permanent registry would manage filings, scheduling, and publication, while stable remuneration would reduce fee-driven incentives.[98] For enforcement, the design looks to existing anchors (ICSID, New York Convention) or, where feasible, a self-contained regime to minimize domestic-court interference.[99]

As indicated briefly above, a key strand of WG III's reform initiative is the development of a standing multilateral adjudicatory institution, often referred to as a Multilateral Investment Court (MIC), conceived as a structural response to the systemic deficiencies of ad hoc investor–State arbitration.[100]

From the earliest sessions, WG III's mandate included exploring whether reform was necessary and what form it might take; over time, the standing court proposal emerged as a central mechanism to address legitimacy, consistency, and accountability deficits.[101] The rationale is straightforward: permanent adjudicators and institutional memory can reduce fragmentation, prevent repetitive appointments, and better guard against unpredictable decisions, challenges at the heart of the WG's diagnosis of ISDS's legitimacy crisis.[102]

The Secretariat's working papers lay out the contours of the MIC vision offers a detailed blueprint for selection, appointment, tenure, and ethical safeguards, proposing the use of State-nominated rosters or merit-based panels rather than party-based appointments.[103] To curb conflicts of interest and enhance impartiality, WP.213 also contemplates recusal rules, term limits, and restrictions on "double-hatting."[104] Meanwhile, WP.185 introduces the concept of a two-tiered adjudication structure, combining first-instance and appellate chambers, with the appellate body reviewing legal and manifest factual errors and ensuring coherent legal development across cases.[105] The Secretariat treats the appellate tier as an essential corrective mechanism that limits the risk of divergent rulings without imposing full rehearing.[106]

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[96] *See id.* at 12. (providing scope, conditions, and grounds of appellate procedure).
[97] *See id.* at 3. (explaining draft statute would need to adjust depending on model to be developed by Working Group).
[98] *See id.* at 4. (explaining under Article 4, amount of renumeration of members of Dispute Tribunal and Appeals Tribunal determined during conference of contracting parties).
[99] *See Deutsche Telekom AG v. Republic of India*, No. 12 Sch 7/21, 12th Civil Chamber, (Jan. 26, 2023) (discussing domestic laws of countries where enforcement of foreign awards is more favorable). https://jusmundi.com/en/document/decision/en-deutsche-telekom-ag-v-the-republic-of-india-judgment-of-the-higher-regional-court-of-berlin-thursday-26th-january-2023#decision_44801
[100] *See Possible Reform on Investor-State Dispute Settlement (ISDS) Draft Multilateral Instrument on ISDS Reform, UNCITRAL,(July 8, 2024) https://docs.un.org/en/A/CN.9/WG.III/WP.246 (providing first draft of multilateral instrument as framework for convention with protocols).*
[101] *See Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session*, UNCITRAL, (Dec. 19, 2017) https://docs.un.org/en/A/CN.9/930/Rev.1 (explaining role of Working Group III to identify concerns regarding ISDS and develop solutions to be recommended to Commission).
[102] See Konstantin Ksenofontov et al., *Rebalancing the Scales: Diversity and Reform of Investor-State Dispute Settlement*, KLUWER ARBITRATION BLOG, (June 26, 2025) https://legalblogs.wolterskluwer.com/arbitration-blog/rebalancing-the-scales-diversity-and-reform-of-investor-state-dispute-settlement/ (reporting Working Group III fifty-first session and establishment of standing mechanism to resolve international investment disputes. The authors discuss the ICSID Convention requirement that arbitrators must be "persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgments.").
[103] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Standing Multilateral Mechanism: Selection and Appointment of ISDS Tribunal Members and Related Matters*, UNCITRAL, (Dec. 8, 2021) https://docs.un.org/en/A/CN.9/WG.III/WP.213 (covering selection and appointment of ISDS tribunal members and interrelated topics on establishment and functioning of standing multilateral mechanism).
[104] *See id.* at 17. (discussing conditions of service, including recusal, term limits, and double-hatting constraints).
[105] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Appellate and Multilateral Court Mechanisms*, UNCITRAL, (Nov. 29, 2019) https://docs.un.org/en/A/CN.9/WG.III/WP.185
[106] *See id.* at 15. (explaining standing mechanism may include (i) mechanisms for ensuring early dismissal of unfounded claims, (ii) possibility of encouraging parties to solve disputes through mediation, (iii) mechanism to cater for possible counter0claims by respondents, and (iv) mechanism for consolidation of cases and remedies that can be used to limit concurrent proceedings).

The court's jurisdiction and participation scheme is designed to be consent-based and modular; States would opt in through ratification of the MIIR or relevant Protocols.[107] Participation might be phased, and optional structures may allow common membership of only appellate or certain subject-matter access.[108] The Secretariat envisions that MIC design be linked to but not automatically subsume existing treaties unless parties explicitly adopt the mechanism. WP.208 expands on institutional elements such as a registry/secretariat structure, judge compensation, and funding architecture.[109] It further considers how to appoint full-time support staff, manage administrative logistics, and facilitate registry functions to support consistent operations.[110] Finally, the MIC design addresses award finality and enforcement, proposing that its judgments be binding on participating States, with limited factual review in the appellate body and enforcement linked to existing instruments like ICSID or the New York Convention or, where feasible, a self-contained enforcement regime to minimize domestic court interference.[111]

Numerous design questions remain open. WG III continues to debate hybrid models (e.g. standing appellate over ad hoc first instances), appropriate opt-in thresholds, transitional grandfathering of older treaties, carve-outs for sectors like taxation or public health, and the precise parameters for ethical oversight, recusal, sanctions, and budget independence.[112] WG III's current trajectory situates the court not as a panacea but as a core structural anchor for systemic reform offering a more predictable, institutionally grounded adjudicatory framework to complement procedural enhancements like codes of conduct and roster reforms.[113]

How States and Regional Blocs Are Reacting

As UNCITRAL WG III's proposals for a standing adjudicative body crystallize, States and regional entities have begun submitting comments that reflect varying preferences, concerns, and design refinements.[114] The European Union, the United States, Canada, and a number of African states have intervened, some modestly, others ambitiously, to help shape what the institutional design ultimately becomes.[115]

[107] *See id.* at 8. (describing appellate mechanism as an *option* available under rules of institutions handling ISDS cases).
[108] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Multilateral Instrument on ISDS Reform*, UNCITRAL, (July 8, 2024) https://docs.un.org/en/A/CN.9/WG.III/WP.246
[109] *See Investor-State Dispute Settlement (ISDS) Reform Draft Code of Conduct: Means of Implementation and Enforcement*, UNCITRAL, (Sept. 2, 2021) https://docs.un.org/en/A/CN.9/WG.III/WP.208 (explaining declaration is only applicable once the declaration has been signed, meaning candidates would not be bound by declaration alone) ; see also *Draft Multilateral Instrument on ISDS Reform*, *supra* note 107. (explaining existing treaties will not automatically be assumed unless parties opt in).
[110] *See id.* at 4. (describing model declaration by arbitrators regarding their independence, impartiality, and availability).
[111] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Appellate and Multilateral Court Mechanisms*, UNCITRAL, (Nov. 29, 2019) https://docs.un.org/en/A/CN.9/WG.III/WP.185 (proposing binding awards and reliance on ICSID/New York enforcement frameworks). Reliance on the New York Convention for enfrocment may raise the issue of whether an international court judgment counts as an arbitral award for purposes of the Convention or require some kind of reverse (double) exequatur but in a negotiated fresh treaty, express provisions could be added to avoid any such doubts.
[112] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Appellate Mechanism,* UNCITRAL, (Nov. 17, 2022) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp_224-e.pdf (exploring hybrid design, transitional rules, carve-outs, governance, and finance issues).
[113] *See Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Fifty-Second Session*, UNCITRAL, (Oct. 14, 2025) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/acn9-1238-e_advance_copy.pdf
[114] *See Possible Reform of Investor-State Dispute Settlement Submission from the European Union and its Member States on Certain Aspects Concerning the Jurisdiction of the Standing Mechanism*, UNCITRAL, (June 11, 2025) https://docs.un.org/en/A/CN.9/WG.III/WP.257
[115] *See* Sijoula Atanda-Lawal, *Reforming Investor-State Dispute Settlement: Legal Trends and Challenges*, 13 INT'L. J. OF ECON., COM. AND MGMT., (Sept., 2025) https://ijecm.co.uk/wp-content/uploads/2025/09/1397.pdf (analyzing EU, North America, and Nigeria's approach to proposed ISDS reform).

Global Reaction

State reactions at the global level converge on the need for systemic reform while diverging on scope and pace.[116] The European Union and its Member States are the leading champions of judicialization, endorsing a standing body and an appellate layer, with safeguards for regulatory autonomy and options for partial accession.[117]

One of the most active contributors, the European Union and its Member States, have submitted detailed interventions on both the Draft Multilateral Instrument (WP.246) and, more precisely, the Standing Mechanism design.[118] Among these is Submission WP.257, focused on certain aspects of the jurisdiction of the standing mechanism, for example, whether to permit partial accession (e.g., joining only the appellate tier) and safeguards for domestic policy space.[119] The EU has also taken supply-side positions on appointment methods, ethical constraints, and carve-out clauses to preserve regulatory authority.[120]

Beyond submissions to WG III, the EU's institutional roadmaps (via trade policy pages and Commission documents) align with the MIC proposals, signaling a long-term strategic preference for a judicialized investment governance architecture.[121] The EU appears comfortable embedding the standing court within a multilateral investment reform instrument but demands strong safeguards such as balancing judicial independence, regulatory exceptions, and phased accession in design-level feedback.[122] Canada has already incorporated a standing court in some of its most recent investment treaties. [123]
Additional submissions come from States such as Singapore, Brazil, and India, reflecting diverse development profiles and legal traditions.[124] Some raise concerns about eligibility criteria for appointment, the balance of judicial tenure vs accountability, and whether developing States might be at disadvantage if the court structure mandates high administrative overhead.[125] Others propose opt-out or reservation mechanisms for sensitive sectors.[126] Non-State observers (e.g., ICSID, CCSI, NGOs) also organized joint commentaries, particularly around transparency, third-party funding, and non-adversarial dispute prevention, which have informed State submissions.[127] The United States has recently commented without committing one way or another.[128] The pattern is clear: few reject the court idea outright; most seek to shape it so it is flexible, administrable, and politically saleable.[129]

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[116] *See id.* (describing reform initiatives led by international bodies and practical obstacles to meaningful reform).
[117] See *Submission from the European Union and its Member States on Certain Aspects Concerning the Jurisdiction of the Standing Mechanism*, *supra* note 113.
[118] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Multilateral Instrument on ISDS Reform*, UNCITRAL, (July 8, 2024) https://docs.un.org/en/A/CN.9/WG.III/WP.246
[119] See *Submission from the European Union and its Member States on Certain Aspects Concerning the Jurisdiction of the Standing Mechanism, supra* note 113.
[120] *See id.* at 4. (describing EU position in standing mechanism proposals).
[121] See *Multilateral Investment Court Project – Relevant Documents*, European Commission, https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project/relevant-documents_en (last visited Oct. 29, 2025).
[122] *See Comments from the European Union and its Member States*, European Commission, (Mar., 2024) https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/fbe8005f-b353-4417-9e98-86b171bbfef7/details?download=true
[123] *See* Charles Brower, *Against Imperial Arbitrators: The Brilliance of Canada's New Model Investment Treaty*, 17 FIU L. REV. 1, 4, (2023) https://ecollections.law.fiu.edu/cgi/viewcontent.cgi?article=1541&context=lawreview# (explaining Canada's embrace of EU's rollout of permanent international investment court in Comprehensive Economic and Trade Agreement (CETA)).
[124] *See Compilation of Comments Received on the Draft Provisions on Procedural and Cross-Cutting Issues*, UNCITRAL, (Jan. 7, 2025) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/compilation_of_comments_on_wp.244_7_jan_2025.pdf (including Singapore and Brazil's interventions).
[125] *See id.* (providing a variety of States' comments).
[126] *See id.* (providing various suggestions on appointment criteria, sector carve-outs, and opt-in flexibility).
[127] *See id.* at 17. (including CCSI, IIED, IISD, and South Centre's comments on cross-cutting issues, including dispute prevention, transparency, and third-party funding protocols).
[128] *See UNCITRAL Working Group III – USG Comments on /CN.9/WG.III/WP.246: Draft Multilateral Instrument on ISDS Reform*, UNCITRAL, (Feb. 16, 2025) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/us_comments_to_wp_246_miir_-_2025.02.16_final.pdf
[129] See *Compilation of Comments, supra* note 127.

The African Reaction

African submissions are distinctive for how consistently they yoke legitimacy and efficiency; A useful starting point is South Africa's early, detailed submission in 2019 (WP.176).[130] South Africa endorsed WG III's diagnosis of systemic problems i.e., consistency and correctness of awards, arbitrator independence, cost and duration, and third-party funding, but argued that purely procedural fixes risk entrenching an imbalanced system unless paired with reform of substantive investment standards.[131]

In a striking passage, South Africa warned that "an investment court would thus exacerbate and entrench this unbalanced and harmful system,"[132] urging WG III to consider alternatives beyond "ISDS & a court system," including dispute prevention, state-to-state avenues, and mechanisms to ensure policy space and human-rights coherence.[133] This is not surprising given South Africa's replacement of most of its BITs with a domestic legislation in recent years.[134]

Other African states have made more targeted, technical contributions that nevertheless bear on the court's architecture.[135] Morocco's submission (WP.161) flagged tools that would interact with, or serve as building blocks for, a standing mechanism: expedited processing of unfounded claims, security for costs guidance, and, notably, scrutiny / appellate review models.[136]

In addition, Algeria's submission (WP.248) made valuable contributions, emphasizing the importance of greater clarity, consistency, and fairness in the interpretation of investment dispute mechanisms.[137] Specifically, Algeria proposed broadening the scope of joint interpretation to not only include the text of the agreement but also to consider the annexes and contextual instruments that aid in enhancing the quality of interpretation.[138] Moreover, Algeria recommended formalizing the methods and timelines of written submissions from parties to ensure transparency and neutrality.[139] Collectively, these recommendations underscore Algeria's commitment to procedural equity and overall integrity of the dispute settlement process.[140]

While multiple African States have contributed to the evolution of Working Group III's draft provisions, Tanzania has notably departed from traditional ISDS practices through its Permanent Sovereignty Act (PSA).[141] Under PSA, disputes pertaining to the extraction and exploitation of natural resources cannot be subject to foreign courts; instead, they must be adjudicated in domestic tribunals in accordance with Tanzanian law.[142] Tanzania's departure from international

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[130] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of South Africa*, UNCITRAL, (July 17, 2019) https://docs.un.org/en/A/CN.9/WG.III/WP.176

[131] *See id.* (describing limitations in current mechanisms to address inconsistency and incorrectness of arbitral decisions).

[132] *See id.* at 16. (explaining South Africa agrees with need for alternative to traditional ISDS in form of more modern and structured process that is better adapted to investment disputes that involve sustainable development and public policy issues).

[133] *See id.* (supporting "better balance, more coherence, and ….a generally more legitimate international investment regime…").

[134] *See* Mmiselo Freedom Qumba, *South Africa's Move Away from International Investor-State Dispute: a Breakthrough or Bad Omen for Investment in the Developing World?*, 2019 DE JURE L. J., (Last visited Oct. 29, 2025) https://www.saflii.org/za/journals/DEJURE/2019/18.pdf (reporting South African government's termination of BITs it had signed with European countries and promulgation of PIA).

[135] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Submission from the Government of Morocco*, UNCITRAL, (Mar. 4, 2019) https://docs.un.org/en/A/CN.9/WG.III/WP.161

[136] See id. (providing suggestions to appellate process).

[137] *See Written Comments of Algeria on Draft Provisions 21 and 22 Concerning Procedural and Cross-Cutting Issues*, UNCITRAL, (last visited Oct. 29, 2025) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/algeria_-_21_et_22.pdf

[138] *See id.* (recommending broadened scope of interpretation to include preamble, annexes, and additional context that supports faithful understanding of parties' intentions while maintaining consistency).

[139] *See id.* (providing recommendations for Draft Provision 22, including establishing procedure for written submissions that is clearly defined and time-bound).

[140] *See id.* (establishing Algeria's commitment to transparency and fairness in dispute resolution).

[141] *See* Magalie Masamba, *Government Regulatory Space in the Shadow of BITs: The Case of Tanzania's Natural Resource Regulatory Reform*, IISD, (Dec. 21, 2017) https://www.iisd.org/itn/2017/12/21/governmentregulatory-space-in-the-shadow-of-bits-the-case-of-tanzanias-natural-resource-regulatory-reform-magalie-masamba/.

[142] *See id.* (explaining ensuring permanent sovereignty involves Review and Renegotiation of Unconscionable Terms Act which requires Tanzanian parliament review and renegotiate all agreements that contain unconscionable terms).

arbitration under ISDS reflects a broader regional perspective among African countries seeking to align foreign investment frameworks with domestic priorities and to ensure investment benefits for domestic citizens.[143]

At the regional level, the Africa Group has filed coordinated comments on the draft provisions for procedural and cross-cutting issues.[144] Although these comments are not a wholesale endorsement or rejection of a standing court, they articulate priorities that condition African support for any institutional design: harmonization and coherence across treaties, calibrated cost and duration controls, robust transparency, effective regulation of third-party funding, and phased, capacity-sensitive implementation.[145] The Africa Group expressly anchors its views in earlier Secretariat notes (notably WP.231 and WP.232) and the WG's sessional debates, reinforcing that African states are seeking reforms that are administrable for developing-country agencies and fiscally sustainable. [146]

Engagement has also come through African-hosted intersessional processes.[147] The third inter-sessional regional meeting (Conakry, Republic of Guinea) captured regional priorities that map neatly onto the standing-mechanism debate: lowering cost and delay, capacity-building, and ensuring that any central institution respects domestic regulatory space and developmental objectives. [148]

Read together, these interventions sketch a distinctly African vantage point on a multilateral court.[149] There is deep receptivity to solving the pathologies that the court is meant to address (fragmentation, incentives around party appointments, lack of review), but also clear conditions: any standing mechanism must not re-create asymmetries that exposed states to expansive claims, must be coupled with serious tools for cost control and dispute prevention, and must leave room for African treaty policy, now increasingly embodied in the AfCFTA Protocol on Investment to privilege development policy space and more state-centric arrangements.[150]

South Africa's caution about a standalone "investment court," Morocco's technocratic proposals (expedited procedures and review), and the Africa Group's harmonization and implementation priorities are less contradictory than complementary; they describe a reform effort in which institutionalization is acceptable only if it is calibrated to developmental realities and integrated with broader African treaty reforms already underway at continental level.[151]

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[143] *See id.* (describing benefit to local populations through promotion of sustainable investment is goal of many countries, including Tanzania).

[144] *See Comments of the Africa Group on the Draft Provisions on Procedural and Cross-Cutting Issues*, UNCITRAL, (last visited Oct. 29, 2025) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/africa_group_statement_on_procedural_crosscutting_issues.pdf

[145] *See id.* (dividing procedural and cross-cutting issues addressed into (1) those aimed to achieve harmonization with existing procedural rules, (2) those that would build on existing procedural rules and provisions in recent investment treaties, and (3) those that were not found in procedural rules addressing cross-cutting issues and would require negotiations in Working Group III).

[146] *See Possible Reform of Investor-State Dispute Settlement (ISDS) Draft Provisions on Procedural and Cross-Cutting Issues*, UNCITRAL, (July 26, 2023) https://docs.un.org/en/A/CN.9/WG.III/WP.231

[147] *See Summary of the Intersessional Regional Meeting on Investor-State Dispute Settlement (ISDS) Reform Submitted by the Government of the Republic of Guinea*, UNCITRAL, (Oct. 4, 2019) https://docs.un.org/en/A/CN.9/WG.III/WP.183 (noting Guinea meeting as part of reform knowledge base feeding back into WG III's design work).

[148] *See id.* at 2. (stating meeting was attended by government officials from 33 other States, representatives of intergovernmental organizations, and representatives of non-governmental organizations, all of whom demonstrated commitment to reforms and initiatives relating to ISDS).

[149] *See* Robert Mutembei Koome, *Africa's Perspective of International Courts: Lessons for Multilateral Investment Court*, Afronomicslaw, (Jan. 31, 2024) https://www.afronomicslaw.org/category/analysis/africas-perception-international-courts-lessons-multilateral-investment-court (describing African countries' recommendations for equitable inclusion to combat challenges faced by Sub-Saharan African countries in establishment of MIC).

[150] *See* Muhammad Siddique Ali Pirzada, *The AfCFTA Investment Protocol: A New Age for Regional Investment and Dispute Resolution*, HARV. INT'L. L. J., (Apr. 11, 2025) https://journals.law.harvard.edu/ilj/2025/04/the-afcfta-investment-protocol-a-new-age-for-regional-investment-and-dispute-resolution/#

[151] *See* Hamed El-Kady et al., *The Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area: What's in it and What's Next for the Continent?,* IISD, (July 1, 2023) https://www.iisd.org/itn/2023/07/01/the-protocol-on-investment-to-the-agreement-establishing-the-african-continental-free-trade-area-whats-in-it-and-whats-next-for-the-continent (describing investment-related human rights and human development goals as ultimate ambition of Africa).

Designing an African Investment Court Under the AfCFTA Investment Protocol

The African Continental Free Trade Area (AfCFTA) Investment Protocol offers a rare constitutional moment for Africa's international economic law architecture.[152] It consolidates decades of fragmented bilateral investment treaty (BIT) practice into a single continental framework and opens an institutional pathway for Africa to recalibrate investor–State dispute settlement (ISDS) according to its developmental priorities and operationalize that moment by embedding adjudication in the AfCFTA's objectives of sustainable development, regional integration, and the right to regulate.[153]

In the wake of the UNCITRAL Working Group III process, the Protocol thus provides an opportunity to translate Africa's critiques of the global ISDS system into a distinct African Investment Court (AIC) that reflects regional values, economic realities, and governance needs.[154]

A regional court can do things the global model cannot easily guarantee. It can hard-wire dispute-prevention steps, introduce state-to-state filters for systemic issues, and accommodate counterclaims by states for investor misconduct or environmental harm.[155] It can explicitly treat sustainable development and regulatory space as interpretive canons so that jurisprudence grows in dialogue with Africa's policy priorities rather than in tension with them.[156]

Rationale for a Continental Institution

African States' interventions at UNCITRAL reveal deep concerns about the asymmetries of existing ISDS structures, particularly the cultural exogeneity, unpredictability, and limited accessibility for Africa.[157] The AfCFTA Investment Protocol already embodies policy objectives of sustainable development, regional integration, and the right to regulate that set the stage for a normative basis for a regional adjudicatory mechanism.[158] A continental court would institutionalize coherence across Africa's multiple investment regimes that are sought to be replaced by the AfCFTA Protocol and offer unform interpretation of the Protocol itself going forward.[159]

More importantly, an Africa specific continental system can incorporate Africa-specific safeguards that the global UNCITRAL proposals could not fully guarantee.[160] For example, an AIC could be designed with mandatory exhaustion of local remedies or regional mediation mechanisms, promoting dispute prevention before escalation. It could also integrate state-to-state filters, frivolous-claim procedures, and public-interest interventions to ensure alignment with the African Union's Agenda 2063.[161]

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[152] *See AfCFTA Protocol on Investment (2023) Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment*, EDIT, (last visited Oct. 29, 2025) https://edit.wti.org/document/show/8993cb69-cbc5-4f07-a372-5ef5c74e7b78

[153] *See The African Continental Free Trade Area*, World Bank Group, (July 27, 2020) https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area (discussing sustainable development goals and opportunities for reforms necessary to engage economic growth in African countries).

[154] *See id.* (explaining AfCFTA regional focus provides opportunities to help African countries diversify their exports, accelerate growth, and attract FDI).

[155] *See* Lise Johnson et al., *Investor-State Dispute Prevention: A Critical Reflection*, 75 DIS. RES. J., 107, 109 (2021) https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1201&context=sustainable_investment_staffpubs

[156] *See* Jebby Romanus Gonza, *The Role of African Regional Courts in Shaping Sustainable Development: Balancing Competing Pillars and Contributing to Global Jurisprudence*, 34 COMP. & INT'L ENVTL. L., (June 13, 2025) https://onlinelibrary.wiley.com/doi/full/10.1111/reel.70000 (describing African courts' efforts to incorporate sustainable development in their decisions).

[157] For further discussion on African States' interventions at UNCITRAL, see *supra* notes 133-149 and accompanying text.

[158] *See* Gonza, *supra* note 159. (explaining AfCFTA highlights that achieving sustainable development is important objective and commitment of member states).

[159] *See* Pirzada, *supra* note 153. (demonstrating support for state-centric framework that reshapes continent's approach to investment regulation).

[160] *See id.* (describing array of investor duties in AfCFTA, including: adherence to legal frameworks of host states, rigorous ethical standards in business conduct, labor practices, human rights, corporate governance, and safeguarding of environmental integrity, prohibition of corrupt activities, and active promotion of sustainable development).

[161] *See Agenda 2063: The Africa We Want*, African Union, (2015) https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf

Legal and Institutional Feasibility

Legally, the AIC fits perfectly within existing African instruments. The AU Constitutive Act empowers the Union to create specialized judicial organs;[162] the AfCFTA Agreement authorizes the adoption of protocols and annexes to implement its objectives;[163] and general treaty practice (Vienna Convention) permits parties to establish subsidiary organs.[164]

The AIC could be constituted via the already dedicated AfCFTA protocol. Institutionally, the court would integrate with Africa's judicial ecosystem rather than displace any. Financing can follow the AU scale of assessment, augmented by filing fees and support from the African Development Bank, UNECA and other supporters.[165]

Institutional Design Features

Structure and Jurisdiction

The proposed African Investment Court could draw selectively from the UNCITRAL model while adapting it to African institutional practice. In terms of structure, it could be a two-tier system: First Instance and Appellate Division. [166] In terms of composition, a standing roster of adjudicators appointed by the Assembly of the African Union or a specialized AfCFTA Investment Committee, with guaranteed regional, gender, and linguistic representation.

In terms of jurisdiction, the First Instance Court would have competence over disputes arising under the AfCFTA Investment Protocol and any investment agreements concluded by AfCFTA Members that expressly refer to the Court. Jurisdiction could also extend to counterclaims by respondent States for investor misconduct or environmental or other harm as the Protocol anticipates.

In terms of the applicable substantive law, in addition to the comprehensive investment law rules of the AfCFTA Investment Protocol, relevant national laws, and general principles of African and international law may be added for purpose of interpretation. The Court would explicitly recognize sustainable-development objectives and the right to regulate as further interpretive canons. The details may be provided in its rules of procedure and evidence to be adopted later.

Awards could be recognized and enforced under the New York Convention or a provision similar to the ICSID enforcement mechanism may be added in the AIC establishment Annex to the AfCFTA.

Unlike ad hoc arbitration, limited to adjudicating cases and controversies, the Court may be given the jurisdiction to issue advisory opinions at the request of Member States or regional economic communities, fostering interpretive coherence.

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[162] *See Constitutive Act of the African Union*, African Union Arts. 3, 5 & 22, (2000) https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf (enumerating objectives and organs of the Union, and economic, social, and cultural council).

[163] *See Agreement Establishing the African Continental Free Trade Area*, African Union, (last visited Oct. 30, 2025) https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (providing "any additional instruments, within the scope of this Agreement, deemed necessary, shall be concluded in furtherance of the objectives of AfCFTA and shall, upon adoption, form an integral part of this Agreement.").

[164] *See Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*, United Nations, (1975) https://legal.un.org/ilc/texts/instruments/english/conventions/5_1_1975.pdf

[165] *See Sub-Regional Development Banks Urged to Scale up Financing to Accelerate Africa's Development*, ECA, (Mar. 15, 2025) https://www.uneca.org/stories/sub-regional-development-banks-urged-to-scale-up-financing-to-accelerate-africa%E2%80%99s (demonstrating commitment to enhancing capacity to mobilize resources, attract private sector investment, and strengthen contributions to regional integration and economic transformation).

[166] *See* Hannes Lenk, *An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada*, 1 EUROPEAN FORUM, (Aug. 14, 2016) https://www.europeanpapers.eu/europeanforum/investment-court-system-new-generation-eu-trade-and-investment-agreements (describing investment court system with Vietnam and CTA that established two-level judicial structure, including (1) Tribunal of First Instance, and (2) Appeals Tribunal).

A Regional Circuit Model

Accessibility, legitimacy, and coherence are easier to reconcile if the AIC adopts a regional circuit structure. Five or six trial-level circuits would exercise first-instance jurisdiction over disputes arising in their territories, while a single appellate division seated at the African Union Headquarters in Addis Ababa or at the AfCFTA Secretariat in Accra, would ensure uniform interpretation.

A sensible allocation would reflect both economic, geographic and linguistic-legal affinity, drawing upon existing regional economic communities (ECOWAS, EAC, SADC, COMESA, ECCAS). Such a system would foster legitimacy, efficiency, and representational diversity while maintaining coherence through a centralized appellate authority.

One of the persistent challenges for any continental court is balancing accessibility, linguistic and legal diversity, and the need for uniform jurisprudence. A multi-tiered, regional circuit structure offers a pragmatic solution, anchoring the court in Africa's sub-regional realities while preserving a single appellate authority for coherence.[167]

The AIC could operate through five or six regional trial divisions ("circuits"), each possessing first-instance jurisdiction over disputes arising in, or substantially connected to, the States within its region. The Appellate Division, located at the African Union Headquarters in Addis Ababa, would sit as the final interpreter of investment law under the AfCFTA Investment Protocol. This structure mirrors the United States federal judiciary, where geographically distributed circuit courts handle appeals within their territories while maintaining doctrinal harmony through a single supreme appellate court.

Circuit allocation should reflect both economic geography and linguistic–legal affinity. A working model could establish:

1. North African Circuit – covering States of the Maghreb and Nile Basin (e.g., Egypt, Morocco, Tunisia, Algeria, Sudan), with proceedings accessible in Arabic and French;
2. West African Circuit – drawing on ECOWAS infrastructure and bilingual proceedings (English/French) for Anglophone and Francophone West Africa;
3. Central African Circuit – focused on ECCAS members, based perhaps in Yaoundé or Brazzaville, with French as the working language;
4. East African Circuit – linked to the East African Community and headquartered in Nairobi or Arusha, using English and Swahili;
5. Southern African Circuit – covering SADC States, seated in Johannesburg or Gaborone, with English and Portuguese as working languages; and
6. OHADA Circuit accounting for overlaps.

This arrangement would provide geographic proximity, enabling lower litigation costs, regional familiarity with domestic law, and stronger integration with existing economic communities (ECOWAS, EAC, SADC, COMESA, CEN-SAD, OHADA). It may be modified as needed.

Composition and Jurisdiction

Each circuit would have three to five permanent judges, appointed by the African Union Assembly upon nomination by regional groupings, and supported by local registries housed within existing regional economic-community secretariats. Trial-level circuits would hear investor–State claims, counterclaims, and preliminary matters under the AfCFTA Investment Protocol and relevant domestic laws. Circuit decisions would be binding and enforceable subject to appeal to the central Appellate Division ensuring consistency of interpretation.

Central Appellate Division

The Appellate Division, sitting at the AU headquarters, would consist of a panel of perhaps seven judges representing Africa's sub-regions, appointed for a non-renewable term of six years. It would review questions of law and fundamental procedural fairness, issue binding precedents, and maintains an AIC Reporter System for uniform jurisprudence, akin

[167] *See Regional Politics: Sub-Saharan Africa*, Council on Foreign Relations, (last visited Oct. 30, 2025) https://education.cfr.org/learn/reading/regional-politics-sub-saharan-africa# (describing political and social realities).

to the *Federal Reporter* in the U.S. model. The AU seat would also house the permanent Registry and Secretariat, serving as a hub for research, recordkeeping, and judicial training.

Advantages of the Circuit Approach

This regionalized structure provides multiple functional benefits including accessibility (litigants and governments can appear before a geographically proximate tribunal,) legitimacy **(**proceedings conducted in local languages and legal traditions enhance public confidence,) efficiency (distributed caseload management avoids bottlenecks and reduces procedural delays,) capacity-building (regional circuits cultivate localized expertise and strengthen Africa's legal profession,) and ensures unity in diversity (the AU appellate layer preserves doctrinal coherence while respecting Africa's plural legal cultures.)

Ultimately, this circuit-based architecture aligns with the AfCFTA's guiding principle of "variable geometry" allowing progressive integration at different regional speeds while converging toward a unified continental system.[168] It would transform the AIC from a remote supranational body into a networked institution embedded in Africa's political economy, combining accessibility with the authority of a centralized appellate court.

Legal and Institutional Feasibility of an African Investment Court under the AfCFTA and African Union Framework

Why Might the AIC Succeed where Other African Courts have Stumbled?

AIC could succeed because it occupies a different political space. Courts that decide human-rights or governance disputes can trigger direct political backlashes.[169] By contrast, investment adjudication is technocratic and commercial and operates where states already accept international oversight.

This relative insulation from domestic politics is why the New York Convention has enjoyed such durable success: it facilitates commerce without adjudicating internal governance conflicts.[170] Framing the AIC as a trade-and-investment facilitation mechanism gives it a coalition of support among states seeking growth, predictability, and integration.

Moreover, the creation of a continental investment court under the AfCFTA Investment Protocol is both legally feasible and institutionally consistent with Africa's existing treaty architecture. The African Union (AU) already possesses the competence and procedural tools to establish specialized judicial bodies under its Constitutive Act, while the AfCFTA Agreement itself provides the substantive jurisdictional and procedural scaffolding needed for such an institution.[171]

Together, these two pillars, the Constitutive Act of the AU and the AfCFTA Agreement and its additional Protocol on Investment, form a robust legal foundation for the establishment of an African Investment Court (AIC) that operates as an organ of the AU, but under the AfCFTA's functional framework.

What Are the Treaty Basis?

Article 5 of the Constitutive Act of the African Union expressly empowers the Union to create institutions and specialized agencies as necessary to achieve its objectives.[172] Among the AU's enumerated organs are "specialized technical committees," "financial institutions," and "judicial organs,"[173] a category broad enough to encompass a dedicated investment court.

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[168] *See* Sewagegnehu Dagne, *Variable Geometry of African Integration and AfCFTA*, Afronomicslaw, (June, 2019) https://www.afronomicslaw.org/2019/06/28/variable-geometry-of-african-integration-and-afcfta

[169] *See* Michael Klarman, *Courts, Social Change, and Political Backlash*, Georgetown Univ. L. School, (2011) https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?params=/context/hartlecture/article/1001/&path_info=klarman.pdf (discussion relationship between courts and political reaction in U.S.).

[170] *See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1985),* New York Convention, (last visited Oct. 30, 2025) https://www.newyorkconvention.org/english

[171] *See* AfCFTA, *supra* note 155. (providing procedural and jurisdictional structure).

[172] *See* Constitutive Act, *supra* note 165 at 8. (stating organs of Union and organs Assembly may decide to establish).

[173] *See id.* (stating organs of Union).

Article 3 of the Act further lists as Union objectives the promotion of economic integration, the protection of human and peoples' rights, and the harmonization of policies across member States all of which align with the rationale for a continental investment adjudicatory body.[174]

Moreover, the Protocol on the Statute of the African Court of Justice and Human Rights (the so-called "Merged Court Protocol") establishes precedent for creating specialized judicial chambers within the AU system.[175] That Protocol consolidates the African Court of Justice and the African Court on Human and Peoples' Rights into a single court with multiple divisions, including a Human Rights Section and a General Affairs Section.[176] By analogy, the AfCFTA framework could support a standalone, integrated into this judicial continuum.

What is the Legal Mandate under the AfCFTA Agreement?

The AfCFTA Agreement itself provides a clear legal foundation.[177] Article 4(e) of the AfCFTA Agreement lists among its general objectives the "establishment of a mechanism for the settlement of disputes concerning the rights and obligations of Member States."[178]Article 20 of the same Agreement empowers the Council of Ministers to "adopt protocols and annexes" as integral parts of the AfCFTA framework.[179] This provision has already been exercised to adopt the Protocol on Investment, which, like its counterparts on Trade in Goods and Services, is designed to be self-contained and operationally distinct.[180]

The Investment Protocol's dispute-settlement provisions may thus serve as the enabling clause for the AIC. Under the Vienna Convention on the Law of Treaties, the Parties to a treaty may agree to establish "subsidiary organs" to interpret or apply its provisions, as long as such organs operate consistently with the treaty's object and purpose.[181]

The AfCFTA Secretariat and Council of Ministers therefore possess clear competence to propose and negotiate an implementing protocol establishing the Court, much as the WTO's Dispute Settlement Body was created within the Marrakesh Agreement framework.[182]

How Does it Integrate with Existing African Courts?

The AIC would not need to replace or compete with existing regional or continental judicial bodies. Instead, it can be integrated within the AU's judicial hierarchy as a specialized economic tribunal, complementing the African Court on Human and Peoples' Rights and coexisting with sub-regional courts (e.g., the ECOWAS Court of Justice, COMESA Court of Justice, and SADC Tribunal (when no longer in suspension).[183]

The AIC could be designated a specialized judicial organ under Article 5(2) of the Constitutive Act, reporting through the Assembly of the Union but or just simply be added as an Annex to the Protocol and adopted as such and functionally coordinated by the AfCFTA Secretariat.[184]

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[174] *See id.* at 5. (listing objectives of Union).
[175] *See Protocol on the Statute of the African Court of Justice and Human Rights*, African Union, (last visited Oct. 30, 2025) https://au.int/sites/default/files/treaties/36396-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf
[176] *See id.* at 5. (describing merger into single Court).
[177] *See* AfCFTA, *supra* note 154.
[178] *See id.* at 5. (stating "for purposes of fulfilling and realising the objectives set out in Article 3, State Parties shall: cooperate on customs matters and the implementation of trade facilitation measures").
[179] *See id.* at 13. (establishing dispute settlement mechanism to apply to settlement of disputes arising between State Parties that shall be administered in accordance with Protocol on Rules and Procedures on Settlement of Disputes (which shall establish, inter alia, a Dispute Settlement Body).
[180] *See Trade in Goods*, Africa Forum, (last visited Oct. 30, 2025) https://www.africatradefoundation.org/trade-in-goods
[181] *See* Vienna Convention, *supra* note 167. (describing establishment of subsidiary organs).
[182] *See Marrakesh Agreement Establishing the World Trade Organization*, INT'L TRADE ADMINISTRATION, (last visited Oct. 30, 2025) https://www.trade.gov/trade-guide-marrakesh-agreement-establishing-wto
[183] See Nkatha Murungi & Jacqui Gallinetti, *The Role of Sub-Regional Courts in the African Human Rights System*, Conectas Human Rights, (2010) https://uwcscholar.uwc.ac.za:8443/server/api/core/bitstreams/9df52a8e-f332-4a3d-8889-62c25fcc9504/content
[184] *See Constitutive Act of the African Union*, African Union, 1, 8 (last visited Oct. 30, 2025) https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf

Jurisdictional coordination could be ensured through memoranda of understanding among the various regional courts, defining referral procedures, conflict-of-jurisdiction rules, and recognition of judgments. In this way, the AIC would function as a continental apex body on investment matters.

Is it Politically, Economically and Functionally Viable?

From a political perspective, the establishment of the AIC would resonate with Africa's long-standing aspiration to "speak with one voice" in global economic governance.[185] The Pan-African Investment Code (PAIC), developed by the AU in 2016, already calls for a unified African approach to investment regulation. [186] The AfCFTA Investment Protocol now provides the legal vehicle for that ambition.

The States Parties would appreciate its ability to maintain coherence across the multiple judicial tiers operating under a system of precedential hierarchy, which may be codified in its Statute. A Registry of Investment Jurisprudence, maintained by the AfCFTA Secretariat, could bring transparency by publishing digests and summaries, ensuring doctrinal consistency and public accessibility. In time, this system would cultivate an autonomous African corpus of investment jurisprudence rooted in the values of sustainable development and integration.[187]

Perhaps the most compelling reason an African Investment Court could succeed where other regional judicial bodies have struggled lies in its political economy. As mentioned above, investment adjudication, unlike human-rights or constitutional review, rarely implicates the internal political balance of power within States.[188] It operates instead in the domain of commerce and international commitments, fields in which African governments have historically shown a greater willingness to delegate authority to supranational institutions.[189]

Experience across the continent underscores this distinction. The SADC Tribunal and, to a lesser extent, the ECOWAS Court of Justice, encountered political backlash primarily because their human-rights and rule-of-law decisions touched the core of domestic political sovereignty.[190] By contrast, an investment court would adjudicate primarily investment and regulatory disputes arising from cross-border economic activity, where governments already accept international oversight through treaties and contracts, which routinely waive sovereign immunity.[191]

This relative neutrality grants the AIC a political "safe zone," just as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) has achieved near-universal acceptance, including across Africa, because it facilitates commerce without intruding into national politics.[192] The AIC would likely enjoy the same de-politicized legitimacy. Investors and States alike perceive predictable investment adjudication as mutually beneficial, while political elites rarely view it as a threat to regime security or constitutional control.[193]

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[185] *See* David Luke, *African Can Achieve More if it Will Speak with One Voice*, IPS, (Feb. 12, 2022) https://www.ips-journal.eu/interviews/africa-can-achieve-more-if-it-will-speak-with-one-voice-6360/

[186] *See Draft Pan-African Investment Code*, African Union, (Dec., 2016) https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf

[187] *See* Donald Sparks, *The Sustainable Development Goals and Agenda 2063: Implications for Economic Integration in Africa*, 8 MACROTHINK INSTITUTE, (Dec. 4, 2016) https://www.researchgate.net/profile/Donald-Sparks-3/publication/311567668_The_Sustainable_Development_Goals_and_Agenda_2063_Implications_for_Economic_Integration_in_Africa/links/605e322d458515e83472e4b5/The-Sustainable-Development-Goals-and-Agenda-2063-I

[188] *See* Thomas Schultz, *Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study*, 25 EUR. J. INT'L L., (Jan. 20, 2025) https://academic.oup.com/ejil/article/25/4/1147/385535

[189] *See id.* (explaining government wields its power through law and in accordance with law).

[190] *See* Mia Swart, *A House of Justice for Africa: Resurrecting the SADC Tribunal*, Brookings, (Apr. 2, 2018) https://www.brookings.edu/articles/a-house-of-justice-for-africa-resurrecting-the-sadc-tribunal/#

[191] *See* Henry Berry, *Waiver of Foreign Sovereign Immunity: The Scope of 28 U.S.C. § 1605(a)(1) (Notes),* 1 NYLS J. OF INT'L & COMP. L., (1980) https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1011&context=journal_of_international_and_comparative_law

[192] *See Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)(the "New York Convention")*, UNCITRAL, (last visited Oct. 30, 2025) https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2

[193] *See* Luis Paradell Trius, *Sovereignty, Statehood and State Responsibility, The Legitimacy of Investment Treaties*, Cambridge Univ. Press, (Feb. 5, 2015) https://www.cambridge.org/core/books/sovereignty-statehood-and-state-responsibility/legitimacy-of-

Moreover, the AfCFTA's economic-integration logic provides a unifying narrative: the AIC would be framed not as a rights-enforcement tribunal but as a trade-and-investment facilitation mechanism, designed to enhance Africa's attractiveness as an investment destination and promote intra-African commerce.[194] This alignment with shared economic interests, rather than contested political values, makes the AIC's institutionalization politically and economically viable and, in the long run, sustainable.

Governance and Financing

The AIC's sustainability depends on predictable financing and accountability.[195] Funding could be apportioned among AfCFTA Members according to the AU's scale of assessment, supplemented by filing fees and technical-assistance contributions from development partners.[196]

Judges would receive fixed renumeration based on the number of days that they sit to adjudicate similar to the ICSID Model of compensation,[197] with limited retention fee annually. The AfCFTA Secretariat could serve as the registry and administrative hub. Oversight could be vested in a Council of Ministers (Investment) with authority to adopt procedural rules and appoint disciplinary panels.

Comparative Advantages

Compared with the UNCITRAL Multilateral Investment Court, an African court offers several advantages: the first is normative coherence because it would directly reflect the rules and values codified in the AfCFTA Protocol, particularly developmental policy space and regional integration.[198]

Second, this court can reduce litigation expenses by eliminating reliance on distant arbitral institutions and by providing regional legal capacity. Third, African governments and publics are more likely to view a homegrown court as legitimate and accountable. Fourth, the Court can incorporate broader accountability features such as transparency, amicus participation, and counterclaims, that respond to criticisms of classic ISDS.

Transitional Provisions

A phased approach could begin by establishing the Appellate Division first and empowering it to review awards grand fathered under African BITs that will be replaced by the AfCFTA Protocol (with the consent of the parties of course) followed by full institutionalization into a standing court.

This stepwise model mirrors the UNCITRAL framework's modular design while preserving African ownership. The AfCFTA Secretariat could also coordinate with UNCITRAL and ICSID to ensure procedural compatibility, allowing mutual recognition of awards while maintaining jurisdictional autonomy.[199] This could be accomplished through memoranda of understanding or other cross-institutional agreements or treaties.

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investment-treaties/7D1BF9444C28FBB32C259C461CBBDEE0 (describing States' frustrations with inconsistencies in investment adjudication).

[194] *See* Hippolyte Fofack, *A Competitive Africa*, IMF, (Dec., 2021) https://www.imf.org/en/Publications/fandd/issues/2018/12/afcfta-economic-integration-in-africa-fofack

[195] *See* Johnson, *supra* note 158. (describing need to address concerns regarding government accountability and transparency).

[196] *See Decision on the Scale of Assessment for the Regular Budget and the Peace Fund*, African Union, (Feb. 11, 2019) https://africanlii.org/pt/akn/aa-au/statement/decision/au-assembly/2019/734/eng@2019-02-11 (describing adoption of new scale of assessment based on principles of solidarity, equitable payments, and capacity to pay in way that ensures no country bears disproportionate share of budget).

[197] *See ICSID Convention, Regulations, and Rules*, International Centre for Settlement of Investment Disputes, (2006) https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf

[198] *See Agreement Establishing the African Continental Free Trade Area*, African Union, (last visited Oct. 29, 2025) https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf

[199] *See* Samuel Kahura, *ICCA Kigali 2025: Saving ISDS through Modernization - The AfCFTA Protocol on Investment as a Blueprint for Drafting of Investment Treaties*, Kluwer Arbitration Blog, (May 27, 2025) https://legalblogs.wolterskluwer.com/arbitration-blog/icca-kigali-2025-saving-isds-through-modernization-the-afcfta-protocol-on-investment-as-a-blueprint-for-drafting-of-investment-treaties/ (describing AfCFTA Protocol on Investment as example of modern treaty that can help overcome problems associated with ISDS).

Conclusion: From Reform to Reconstruction

The debate on investor–State dispute settlement reform, as reflected in the work of UNCITRAL Working Group III, has reached a critical moment.[200] After years of procedural tinkering, the global community faces a choice between incremental repair and systemic redesign.[201] Africa, long a rule-taker in the investment regime, now has an unprecedented opportunity to become a rule-maker to translate its collective experiences and critiques into an institutional innovation that embodies regional priorities.[202]

UNCITRAL's reform process demonstrates both the necessity and the limits of global procedural fixes.[203] The African Investment Court offers a complementary pathway: a regional institution that is permanent, accessible, representative, and development oriented.[204] With regional circuits and a continental appellate court, it reconciles Africa's legal and linguistic diversity with the need for coherent doctrinal consolidation.[205]

Significantly, the AIC's political economy gives it a greater prospect of success than earlier African judicial experiments.[206] Unlike human-rights or governance courts, an investment court functions in the technocratic realm of commerce and development, insulated from the volatile currents of domestic politics.[207] It is likely to be viewed not as a constraint on sovereignty but as a facilitator of growth, much as the New York Convention, which achieved near-universal adoption precisely because it depoliticized commercial adjudication.[208]

Beyond its regional significance, the AIC can contribute constructively to the global reform conversation. Its jurisprudence could inform the multilateral process, demonstrating how adjudicatory institutions may promote not only legal predictability but also sustainable and inclusive development. In this sense, Africa's experiment would complete the circle: from participation in UNCITRAL's search for a multilateral court to the creation of its own model rooted in regional realities yet globally relevant.[209]

Finally, the African Investment Court should not be understood merely as a defensive mechanism against external regimes, but as an affirmative project of institutional imagination, a means to reconcile investment protection with public governance, and economic integration. As the AfCFTA continues to reshape the continent's economic map, the AIC stands as both a symbol and an instrument of Africa's determination to define its own path in the evolving landscape of international investment law.[210]

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[200] *See* Ladan Mehranvar & Tarald Gulseth Berge, *Time and Compromise in UNCITRAL's Working Group III*, COLUM. CTR. ON SUSTAINABLE INV., (Oct. 27, 2025) https://ccsi.columbia.edu/news/time-and-compromise-uncitrals-working-group-iii

[201] *See id.* (describing negotiation of compromise and ultimate outcomes that reflect balance of leverage and control over reform narrative).

[202] *See* Abubakar Bukola Saraki, *Ending Dependency: Rethinking Africa's Path to Prosperity*, This Day, (Oct. 29, 2025) https://www.thisdaylive.com/2025/10/29/ending-dependency-rethinking-africas-path-to-prosperity/

[203] *See* Kabir Duggal et al., *Procedural Versus Substantive Reforms: Is the Work of UNCITRAL WGIII Worth the Wait?*, Kluwer Arbitration Blog, (June 27, 2021) https://legalblogs.wolterskluwer.com/arbitration-blog/procedural-versus-substantive-reforms-is-the-work-of-uncitral-wgiii-worth-the-wait/

[204] Support is building up. *See e.g.,* Obiajunwa Ama, *Investor-State Arbitration and African States: A Proposal for a Pan-African Investment Court*, Canterbury Christ Church Univ. (2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4286502 (describing benefits of African investment court and innovative treaty-making mechanisms utilized by several African states).

[205] *See id.* at 98. (explaining foundation of African investment court will "incorporate local realities and instill legitimacy in investment dispute resolution through a publicly agreed codified and unified investment treaty.").

[206] *See id.* at 242. (describing role of OHADA treaty which harmonized business laws of member states and serves as optimistic pointer to feasibility of legal harmonization in Africa).

[207] *See* Fernando Dias Simoes, *UNCITRAL Working Group III: Would an Investment Court De-Politicize ISDS?*, Kluwer Arbitration Blog, (Mar. 25, 2020) https://legalblogs.wolterskluwer.com/arbitration-blog/uncitral-working-group-iii-would-an-investment-court-de-politicize-isds/# (discussing tools to mitigate political influence).

[208] *See* Gary Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. INT'L L., 115, 115 (2018) https://repository.law.umich.edu/cgi/viewcontent.cgi?params=/context/mjil/article/1941/&path_info=uc.pdf ("the New York Convention—is the world's most significant legislative instrument relating to international commercial arbitration.")

[209] *See* Ama, *supra* note __. (describing need to recognize and address local realities).

[210] *See* El-Kady, *supra* note __. (describing ultimate ambition to make Africa destination for sustainable investments).