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International investment law before African courts

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I. Introduction

In an article published in 1989, Augustus Agyemang, a practicing barrister in Ghana, affirmed that "*for a number of reasons African courts are unsuitable for settling investment disputes and, therefore, the role of African courts in this area should, as far as possible, be minimised*".[1] His main arguments were the absence of strong traditions of judicial independence in African States and the fact that foreign investment in Africa mainly involves the exploitation of natural resources, which would jeopardise the objectivity of national courts because of the very high national interests that are at stake.[2] Mr Agyemang's point of view obviously reflects the prevailing narrative on the advantage of international investment arbitration to bypass the

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1 Agyemang AA, 'African Courts, the Settlement of Investment Disputes and the Enforcement of Awards' (1989) 33 Journal of African Law 31, 33.

2 ibid. See also, Bryde B-O, *The Politics and Sociology of African Legal Development* (Metzner 1976) 67.

domestic courts of developing countries, including African countries.[3] And indeed, in the last thirty years, the great majority of disputes between a foreign investor and an African State have been settled by international arbitration, either on the basis of investment contracts or bilateral investment treaties (BITs). And one should not forget that at the beginning of the ICSID dispute resolution system, African States were key drivers for its creation and development.[4]

Therefore, analysing international investment law in African courts comes with the caveat that judicial decisions on foreign investment matters are rare. At the outset of the present chapter, it is also important to mention, the practical difficulties of conducting research on this topic. As Africa consists of over 50 different jurisdictions, the selection of cases dealing with investment disputes is to some extent a subjective undertaking. The selection is also not the result of a systematic research of all African courts and tribunals because gaining access to court decisions is for most African jurisdictions extremely difficult if not impossible since there are in general no accessible online databases. Against this backdrop, the methodology of this chapter has less been guided by finding *major* decisions but by trying to identify *major* categories of situations, events and institutions in which or through which questions of international investment law have been dealt with in the African context. The chapter is thus selective in nature and aims at showing tendencies instead of exhaustivity. A noteworthy tendency that becomes apparent through the chapter's analysis is that the prevailing narrative of bypassing African courts and tribunals seems declining in importance as an increasing number of national investment law instruments foresee African judicial and arbitral institutions for the settlement of investment disputes.

II. African National Courts

Part II dealing with African national courts, first looks at *major* interactions, such as the situation in which international investment tribunals review prior African national proceedings (II.1.) and second, where African national courts made attempts to interfere in international arbitral proceedings (II.2). This part also considers *major* historical events leading to national

[3] Schreuer C, 'Interaction of International Tribunals and Domestic Courts in Investment Law', in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers (2010),* (Brill | Nijhoff 2011) 71.

[4] Le Cannu P-J, '*Foundation and Innovation: The Participation of African States in the ICSID Dispute Resolution System*' (2018) 33 ICSID Review Foreign Investment Law Journal 456, 457.

court decisions, such as the judicial order to allow the seizure of the Argentinean warship *Ara Libertad* by Ghanaian authorities (II.3.), judgements of the Zimbabwean constitutional court enforcing the country's highly controversial land reform (II.4.) and lastly, judgments of the South African constitutional court interpreting the constitutional guarantee against expropriation in light of the country's apartheid history (II.5).

1. Prior proceedings in African courts and subsequent review thereof by international investment tribunals

A typical form of interaction between international arbitral tribunals and domestic courts in investment law occurs when the national court proceedings become subject to review in investment arbitration.[5] In the arbitral proceedings opposing the investors *Jan de Nul and Dredging International* to Egypt, a judgment of an Egyptian lower court in the district was under scrutiny.[6]

The dispute arose out of a misunderstanding about the terms and conditions of a contract on dredging activities in the Suez Canal. The investor alleged that the Suez Canal Authority (SCA) misrepresented the size of the tasks. The investor namely contended to have encountered conditions during the performance of the dredging works that were not mentioned at the tender stage, namely a lesser volume to be dredged, an imbalance between the deepening and widening operations, and a higher proportion of rock.[7] Therefore, the claimants requested compensation of additional costs, which was denied by SCA and thus led to two contract claims before Egyptian national courts. The first was an action to declare the dredging contract null and void due to error and fraud. With the second action, the investors sought relief for a series of deductions made by the SCA from the amounts paid under the dredging contract.[8]

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5 Schreuer C, above note 3, 'Interaction of International Tribunals and Domestic Courts in Investment Law'. There are in fact a number of such cases against Egypt, see *Middle East Cement Shipping v Egypt,* ICSID Case No ARB/99/6, *Siag v Egypt,* ICSID Case No ARB/05/15; *H&H Enterprises v Egypt,* ICSID Case No ARB 09/15. For more details on these cases, see Wehland H, 'Domestic Courts and Investment Treaty Tribunals: The Effect of Local Recourse Against Administrative Measures on the Breach of Investment Protection Standards' [2019] Journal of International Arbitration 207.

6 *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt,* ICSID Case No ARB/04/13, Award, 6 Nov 2008, paras 191, 255-261.

7 ibid, para 76.

8 ibid, para 81.

The Administrative Court of Ismaïlia rendered the decisions for the two contractual disputes.[9] In substance on the first contractual case, the Court declined to annul the contract for fraudulent misrepresentation or error and dismissed the claim for extra compensation, because the investors "had failed to make the necessary investigations and had undertaken to perform at the price agreed regardless of the dredging conditions".[10] Concerning the second contractual case, the Court awarded the investors USD 1,087,997.64 and LE 216,045, which constituted around one-third of the deductions claimed.[11] Disagreeing with the outcome of the case, *Jan de Nul* appealed the judgement on both cases before the High Administrative Court of Egypt. SCA as well appealed, yet only against the second contractual claim for undue deductions. In addition, the investors submitted a BIT claim to ICSID.[12] Throughout, the arbitral proceeding the national appeal proceedings remained pending.[13]

Before the investment tribunal, the investor claimed, relying on the fair and equitable treatment standard, that a denial of justice had occurred through the "unfair" decision taken by the Administrative Court of Ismaïlia.[14] The claimants' concern with the Egyptian judgment was its outcome, which did not recognize the fraudulent misrepresentation in the contract as SCA retained technical information as regards the size of the project. The arbitral tribunal did not follow the arguments of the claimants. First, the tribunal underlined that the investor did not "complain of the failure of the Egyptian legal system as such, but merely of the conduct of the Ismaïlia Court […]. This is not sufficient to justify a claim for denial of justice, let it be through the fair and equitable claim."[15] Moreover, the appellate proceedings were ongoing and did not appear to be "in any manner dysfunctional".[16] As a result, the tribunal explicitly denied that "an unjust judgement of a lower court may *per se* constitute unfair and inequitable treatment and, therefore, denial of justice."[17] Finally, all claims based on the BIT were dismissed by the ICSID tribunal. According to available information, the investor has dropped both actions for appeal before the Egyptian national courts.[18] The appeal initiated by SCA has been rendered on 24

[9] ibid, para 103.
[10] ibid, para 104.
[11] ibid, para 106.
[12] ibid, para. 107.
[13] ibid, para. 260.
[14] ibid, para 259.
[15] ibid, para 260; see also paras 258-259.
[16] ibid, para 260.
[17] ibid, para 259.
[18] Probably as a consequence of the unsuccessful ICSID claim.

January 2017. The High Administrative Court of Egypt nullified the 2013 decision of the Administrative Court of Ismaïlia, which thus resulted in the nullification of any compensation for the investor for the alleged undue deductions made by SCA.[19]

The dispute between *Jan de Nul* and Egypt shows that investment tribunals are not easily satisfied with a denial of justice claim made by an investor. To the contrary, the case underlines that investors are to make a reasonable attempt in domestic courts to obtain redress before a claim for the violation of the international protection standard can be filed against the host country. The *Jan de Nul* tribunal thus reserved the role of the Egyptian national courts to decide upon the contract claim that was submitted to them.

2. African national courts interfering in investment arbitration

It is not uncommon in international investment arbitration that a respondent seeks to challenge the jurisdiction of a tribunal through action in domestic courts. In the African context, especially for the early ICSID cases, international arbitral tribunals had to assert on several occasions their jurisdiction in the face of attempts by the respondent State to seize national courts.[20] Occasionally, this has led national courts to order temporary injunctions to suspend the proceedings before arbitral tribunals.[21]

A recent dispute opposing a US investor against Ghana is an illustrative example for this type of interaction between national courts and international investment law. Right after the start of the arbitral proceeding of *Balkan Energy v. Ghana*,[22] the respondent filed an interlocutory injunction against the arbitration, which was granted by the High Court of Justice in Accra.[23]

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19 Egyptian High Administrative Court, Appeal No 11120/49 and 12400/49, Judgement of 24 January 2017.

20 *Holiday Inns v Morocco*, see Lalive P, 'The First 'World Bank' Arbitration (*Holiday Inns v. Morocco*) – Some Legal Problems', 51 BYIL 123, 160 (1980) 123; See also, *Benvenuti & Bonfant v Congo*, Award, 15 August 1980, 1 ICSID Reports 335, paras 1.12-1.14; *LETCO v Liberia*, Award, 31 March 1986, 2 ICSID Reports 356, 378; *MINE v Guinea*, Award, 6 January 1988, 4 ICSID Reports 69.

21 See *Salini Costruttori v Federal Democratic Republic of Ethiopia,* Award regarding the Suspension of the Proceedings, 7 December 2001, ICC Arbitration No 10623/AER/ACS, paras 77-78. In this case, the tribunal issued provisional measures enjoining parties from pursuing related claims in domestic courts. See for a more recent case, *Salini Costruttori v Federal Democratic Republic of Ethiopia,* Award regarding the Suspension of the Proceedings, 7 December 2001, ICC Arbitration No 10623/AER/ACS, para 60

22 *Balkan Energy Ltd v the Republic of Ghana,* PCA Case No 2010-7, Award on the Merits, 1 April 2014.

23 ibid, para 327. See also, Order for Interlocutory Injunction*,* 25 June 2010, Ghana High Court of Justice (Commercial Division).

The injunction restrained the investor from, *inter alia,* taking any further steps in the arbitration proceedings. A few weeks later, the Ghana High Court confirmed the injunction.[24]

The central argument of the respondent, in its suit before the High Court, was that the power purchase agreement (PPA) between the investor and Ghana, including its arbitration clause, was invalid because the national parliament did not approve the deal. Such approval, however, would have been necessary according to the country's constitution.[25] In a next action, the respondent made an expedited reference to the Supreme Court of Ghana concerning the constitutional validity of the PPA.[26] In its judgement, the Supreme Court had to determine whether the PPA fell under Article 181 of the country's constitution, which requires approval by the national parliament to authorise the Government to enter into an "international business or economic transaction to which the Government is a party".[27]

The Supreme Court first acknowledged that the provision was very vague as it does not formulate clear criteria that allow distinguishing between international transactions that require parliamentary approval and those that do not. To give meaning and sense to the provision, the Court found that "there is a need to imply that only *major* international business or economic transaction are to be subject to its provision".[28] The Supreme Court then analysed the nature of the PPA and concluded that not only it was of international character but also that given its scope, it had to be qualified as a major economic transaction. For the PPA in question, the parliamentary approval would have been necessary. As a consequence, the PPA was invalid according to the Supreme Court.[29]

Interestingly, the arbitral tribunal gave a different interpretation to Article 181 of the Constitution of Ghana. Like the Supreme Court, the arbitral tribunal also first underlined that the constitutional basis was very vague and therefore, whether the PPA fell under it or not, were

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24 Ruling*,* 6 Sep 2010, Ghana High Court of Justice (Commercial Division).
25 *Balkan Energy Ltd v the Republic of Ghana,* para 327.
26 ibid, para 328 making reference to Supreme Court of Justice, Ghana*, Rulings,* 2 Nov 2011 and 16 May 2012.
27 Paragraphs 1 and 5 of Article 181 read in conjunction. See, Art 181(1): "Parliament may, be a resolution supported by the votes of a majority of all the members of Parliament, authorise the Government to enter into an agreement for the granting of a loan out of any public fund or public account."; and 181(5): "This article shall, with the necessary modifications by Parliament, apply to an international business or economic transaction to which the Government is a party as it applies to a loan."
28 *Balkan Energy Ltd v the Republic of Ghana,* para 338. Emphasis in original.
29 ibid, para 342.

both "correct" legal interpretations.[30] On the other hand, and this was the tribunal's main reason for not following the Supreme Court, Ghana invoked the invalidity of the PPA based on the absence of parliamentary approval only once the dispute had already occurred. In other words, the tribunal upheld the claimant's argument by which the constitutionality of a contractual arrangement should not be subject to an "after-the event scrutiny".[31] Based on its own interpretation, the arbitral tribunal upheld its jurisdiction under the PPA.[32] The *Balkan Energy v. Ghana* case confirms the position of arbitral tribunals not to submit to an attempt by national courts (even of the highest courts) to curtail or negate their jurisdiction. The case also shows that national courts and investment arbitrators dealing with a same national legal object can find extremely different solutions, sometimes opposite in their direction.

3. Enforcement of international awards by African courts: The Saga of *Ara Libertad*

Another classic way of interaction between international investment law and national courts is at the enforcement stage of an award, where the prevailing party seeks to obtain payment of the compensation before a national court. One major hurdle that can prevent the execution of an award is State immunity. A very well-known case in this respect occurred in Ghana and related to the detention of the Argentinean warship *Ara Libertad* at the port of Tema close to Accra. The case raised a lot of international attention given that Argentina requested the International Tribunal for the Law of the Sea (ITLOS) to order provisional measures.[33] In this Section, the history of this unique case shall be traced back with a focus on the national court decisions.

The events that have led to the detention of the *Ara Libertad* originated from a dispute relating to a fiscal agency agreement (hereafter: FAA) that Argentina entered into in 1994 with Bankers Trust Company, a New York bank. Under the FAA, Argentina issued a series of bonds. NML Capital Ltd (hereafter: NML) purchased two of them. As Argentina defaulted on the bonds, NML sued Argentina in a New York court and obtained judgment.[34] Subsequently, Argentina

[30] ibid, para 377.
[31] ibid, para 390.
[32] ibid, paras 374-397.
[33] *"ARA Libertad" (Argentina v Ghana),* ITLOS Provisional Measures, Order of 15 Dec 2012, ITLOS Reports 2012, p 332.
[34] *NML Capital, Ltd v Argentina*, No 08 Civ 6978 (TPG) (SDNY) 23 February 2012. NML also sought enforcement in France. In 2013, the French Supreme Court rendered three fundamental decisions setting aside enforcement measures carried out by NML Capital Ltd against the Republic of Argentina, see Arrêt n° 394 du

failed to settle the judgment debt, which led NML to start enforcement proceedings in the United Kingdom. Contrary to the argument of Argentina to object the jurisdiction of the British courts on grounds of state immunity, the UK Supreme Court found that Argentina did not enjoy state immunity in relation to the suit because it had waived its immunity under the FAA.[35] A consent order was made against it in favour of NML. Yet again, Argentina failed to pay the judgment debt. When the Argentinean warship *Ara Libertad* was on its way to Ghana, NML issued a writ in the High Court of Ghana in order to enforce the judgment debt. The High Court ordered the arrest and detention of the warship at Tema.[36] The High Court based its decision on the explicit waiver of state immunity contained in the bonds and referred back to the decisions taken by the British courts finding that state immunity did not apply in commercial or private transactions entered into between a state and a private commercial entity.[37]

After several unsuccessful negotiations between Argentinian diplomats and Ghanaian authorities, Argentina brought an action against Ghana before the ITLOS arguing that Ghana had breached international law, namely violating State immunity for warships.[38] Pending the decision of the tribunal, Argentina requested the prescription of provisional measures from the ITLOS ordering Ghana to release the ship immediately. On 15 December 2012, ITLOS granted provisional measures and the *ARA Libertad* was released shortly after.[39]

To allow Ghana to comply with the ITLOS order, the Attorney-General of Ghana sought the annulment of the decision of the High Court before the Supreme Court.[40] According to the

28 mars 2013 (10-25.938) - Cour de cassation, ECLI:FR:CCASS:2013:C100394; Arrêt n° 396 du 28 mars 2013 (11-13.323), Cour de cassation, ECLI:FR:CCASS:2013:C100396; Arrêt n° 395 du 28 mars 2013 (11-10.450), Cour de cassation, ECLI:FR:CCASS:2013:C100395

35 *NML Capital Limited (Appellant) v Republic of Argentina (Respondent)* [2011] UKSC31, On appeal from [2010] EWCA Civ 41.

36 *Order for Interlocutory Injunction and Interim Preservation of the "ARA Libertad",* High Court of Justice (Commercial Division), Accra, 2 October 2012.

37 ibid.

38 Argentina initiated arbitration under Annex VII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). For more details, see Kraska J, 'The "ARA Libertad" (Argentina v. Ghana)' (2013) 107 The American Journal of International Law 404.

39 *"ARA Libertad" (Argentina v. Ghana),* ITLOS Provisional Measures, Order of 15 Dec 2012, ITLOS Reports 2012, p 332, para 108: "(…) THE TRIBUNAL, (1) Unanimously, Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under article 290, paragraph 5, of the Convention: Ghana shall forthwith and unconditionally release the frigate ARA Libertad, shall ensure that the frigate ARA Libertad, its Commander and crew are able to leave the port of Tema and the maritime areas under the jurisdiction of Ghana, and shall ensure that the frigate ARA Libertad is resupplied to that end."

40 See Supreme Court of Ghana, Civil Motion No J5/10/2013, judgment, 20 June 2013. More concretely, the motion brought by the Attorney-General of Ghana was for *certiorari* and prohibition against the High Court.

Attorney-General, the High Court has erred in international law as it found that the immunity of warships could be waived. In its judgement, the Supreme Court agreed with the Attorney-General and held that the High Court made a fundamentally and patently wrong decision by holding that Argentina's contractual waiver of immunity, in so far as it related to the seizure of a military asset, should be given effect to.[41] The Supreme Court, moreover, found that the courts of Ghana should not have promoted conditions leading to a possible military conflict when they have had the judicial discretion to follow an alternative path. This public policy consideration should have informed the court that waiver of sovereign State immunity over military assets should not be recognised under Ghanaian common law.[42]

4. African courts enforcing national law conflicting with international investment law: The Land Reform in Zimbabwe

Since Zimbabwe's independence in 1980, the Zimbabwean government, under the ruling of Robert Mugabe, embarked on a program of land and agrarian reform to establish more equitable access to land for black farmers.[43] Thus, in 1990, Section 16 of the Zimbabwean Constitution, which guarantee the right to property, was amended to facilitate the expropriation of land owned in majority by white farmers.[44] The constitutional amendment was complemented in 1992 by a legislative act, the "Land Acquisition Act", which allowed the acquisition of land for the purpose of resettlement of black communities.[45] Any expropriation was to result in fair or equitable compensation within a reasonable time under the Land Acquisition Act. At first, the government of Zimbabwe took the precaution of ensuring that an amendment was introduced

In the common law system, *"certiorari"* is a court process to seek judicial review of a decision of a lower court or administrative agency.

41 Supreme Court of Ghana, Civil Motion, Para. 56: The "learned trial High Court judge, in deciding this case of first impression in this jurisdiction, made a fundamental error which is patent on the face of the record, by failing to respond to the significance of the military nature of the asset sought to be attached. The order to attach a military vessel was on its face palpably and fundamentally wrong in law and principle."; The paragraph numbering has been added by OUP, see Dagbanja D, 'ARA Libertad Case, Ghana and NML Capital Limited (joining) v Attorney-General and Argentina (joining), Ruling, Civil Motion No J5/10/2013, ILDC 2547 (GH 2013), (2014) 108(1) AJIL 73, 20th June 2013, Ghana; Supreme Court', Oxford Reports on International Law [ORIL], available at <https://opil.ouplaw.com/view/10.1093/law-ildc/2547gh13.case.1/law-ildc-2547gh13> (last accessed 8 December 2019).

42 ibid, para 61.

43 Mbengue MM, 'La portée globale d'une lutte locale (Mike Campbell c. Zimbabwe)', in H. Muir Watt et al. (eds.), *Tournant Global en Droit international privé* (Pedone forthcoming 2020).

44 For more details see, Nadli GJ, 'Land Reform in Zimbabwe: Some Legal Aspects' Journal of Modern African Studies, 1993, 587-589.

45 In 1996, the Supreme Court of Zimbabwe ruled for the first time that the acquisition of land for social equity and distributive justice purposes by compliance with the Land Acquisition Act was constitutional, see *Davies and others v Minister of Lands, Agriculture and Water Development*.

to the Constitution (Section 16A) in order not to violate of its international obligations, in particular, those guarantees granted to foreign investors under international investment agreements that it has concluded with third countries.[46] Due to the slowness in the effective implementation of the reform, the Zimbabwean government decided in 2000 to carry out another reform, called the Fast Track Land Reform Programme.[47] The new reform was to amend the Constitution (new Articles 16A and 16B) to allow for the expropriation of land *without compensation* from the Zimbabwean government.[48]

Especially, Article 16B(1) of the Constitutions allows for the expropriation without compensation of all those agricultural lands that have been required and listed for resettlement purposes within the Land Acquisition Act. In the investment arbitration case of *Von Pezold v. Zimbabwe*, the tribunal found that the measures taken by Zimbabwe were contrary to the applicable BITs.[49] The ICSID award did not lead to any change of legislation. To the contrary, national courts of Zimbabwe further enforced the country's land reform. This is highlighted by the case *Nyahondo Farm Ltd v. Brigadier General Tapfumaneyi,* in which the Zimbabwean Supreme Court found that Article 16B namely prevailed over the general Article 16, which foresees compensation in case of expropriation.[50] Subsequent, national court decisions have systematically relied on the *Nyhondo* case.[51] The successor of Robert Mugabe, Emmerson Mnangagwa, indicated that the land reform was irreversible. He promised that former white farmers would be compensated yet not for the land itself but rather for the improvements they had made on their former farms.[52]

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46 See, *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award 28 July 2005, para 101.

47 Mbengue MM, above note 44.

48 See 2005 Constitution of Zimbabwe, Arts 16A and 16B; the text is available at <http://www.servat.unibe.ch/icl/zi00000_.html> (last accessed 9 December 2019). See especially, *Von Pezold v Zimbabwe*, para 184: "The effect of the Constitutional Amendment was to expropriate the farms of nearly every white farmer in Zimbabwe (of the 4,500 white farmers farming in 2000, today there are less than 200 whose farms have not been expropriated)".

49 ibid, paras 488-521.

50 *Nyahondo Farm (Private) Limited v Brigadier General A.W. Tapfumaneyi & Ors*, Case No SC 176/08, High Court of Zimbabwe, Harare, 7 July 2008, aff'd on appeal to the Supreme Court of Zimbabwe, Harare, 6 November 2008, CLEX-91 and CLEX-92. Judgment No. CCZ 5/17Constitutional Appeal No SC 176/08.

51 See eg, the High Court's judgment in *Route Toute v. Minister of National Security Responsible for Land, Land Reform and Resettlement*: "I am bound by the contrary position recently adopted by the Supreme Court in [Nyahondo] to the effect that agricultural land covered by investment protection agreements under section 16(9b) is susceptible to acquisition in terms of section 16B" (CLEX-93, 19)". Quoted in von *Pezold v Zimbabwe*, para. 529, footnote 7.

52 Mkodzongi G and Lawrence P, 'The Fast-Track Land Reform and Agrarian Change in Zimbabwe' (2019) 46 Review of African Political Economy 1.

5. African courts applying national investment law: The case of South Africa

The South African Investment Promotion and Protection Bill was adopted in 2015 and came into force in 2018.[53] One of the characteristic features of this legislation is that disputes between foreign investors and South Africa will be dealt with in South African national courts.[54] In terms of its substantive standards, the instrument is largely pegged to the South African Constitution and based on the extension to foreign investors of the protection granted to nationals. To date, foreign investor claims based on the Bill have not yet occurred but a closer look at the case law of the South African Constitutional Court bears interesting insights for foreign investors in South Africa. Especially for the guarantees against expropriation, the Promotion and Protection Bill explicitly refers to the country's constitution stating that "Investors have the right to property in terms of Section 25 of the Constitution."[55] An interesting decision on how the South African Constitutional Court interprets this Section is the *Agri South Africa v. Minister for Minerals and Energy* case and shall, therefore, be further discussed.[56]

At the beginning of the early 2000s, South Arica enacted the so-called Mineral and Petroleum Resources Development Act (hereafter: Mineral Act), which was to reform the mineral rights regime. Under the Act, the State becomes the custodian of the country's mineral resources acting for the benefit of all South Africans. It may grant, refuse and administer mineral rights.[57] *Agri South Africa*, a union of South African landowners brought an application against the Minister for Minerals and Energy given that the implementation of the Mineral Act impaired with their mineral ownership. *Agri South Africa* held coal rights in respect to some of its farms

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[53] Promotion and Protection of Investment Bill of South Africa (adopted 2015, entered into force on 13 July 2018), available at <https://investmentpolicy.unctad.org/investment-laws/laws/157/investment-act> accessed 18 November 2019.

[54] Promotion and Protection of Investment Bill of South Africa, Section 13 "4) Subject to applicable legislation, an investor, upon becoming aware of a dispute as referred to in subsection (1), is not precluded from approaching any competent court, independent tribunal or statutory body within the Republic for the resolution of a dispute relating to an investment. 5) The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. The consideration of a request for international arbitration will be subject to the administrative processes set out in section 6. Such arbitration will be conducted between the Republic and the home state of the applicable investor."

[55] Promotion and Protection of Investment Bill of South Africa, Section 10. Legal protection of investment.

[56] *Agri South Africa and Minister for Minerals and Energy*, Constitutional Court of South Africa, Case CCT 51/12 [2013] ZACC 9, Judgment of 18 April 2013 (hereafter *Agri South Africa*). Similar cases are *Shoprite Checkers (PTY) Limited and others v. Affairs and Tourism Eastern Cape and others*, Constitutional Court of the Republic of South Africa, Judgment, 30 June 2015 [46]; *Thiagraj Soobramoney v. Minister of Health (Kwayulu-Natal),* Constitutional Court of the Republic of South Africa, Judgment, 27 Nov 1997, [36].

[57] Winks B, 'Expropriation – a minefield?', De Rebus, Volume 2013, Issue 532, Jul 2013, 44-46.

and land. These coal rights have not yet been used in the sense that no prospecting or mining has been conducted. As a result of the Mineral Act, the application of *Agri South Africa* to obtain new rights for the exploitation of the coal was denied.[58] For the claimant, this amounted to an expropriation of their mineral rights yet no compensation has been paid by the State. The first instance tribunal, the North Gauteng High Court, found that the claimant's mineral rights had been expropriated and therefore compensation was due. The Minister for Minerals and Energy subsequently appealed to the Supreme Court, which, in return, denied the existence of any expropriation. As a consequence, *Agri South Africa* made a recourse before the Constitutional Court, namely invoking Section 25 of the 1996 South African Constitution.

Section 25 of the Constitution states, on the one hand, that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property"[59]. On the other hand, Section 25 foresees that property can be expropriated only when based on a law of general application and only if that law has been enacted for the public purpose and that compensation has been paid.[60]

In deciding the case, the Court had to tackle two key questions. First, the question of whether or not mineral rights can be considered as property. Second, the question of whether the implementation of the Mineral Act constituted a deprivation, which amounted to expropriation as alleged by *Agri South Africa*.[61] As regard the first question, the Court found that mineral rights are indeed property and unfold in two aspects. The ownership of the minerals and the right to exploit them.[62]

As regards the second question, the Court distinguished the notions of deprivation and expropriation. Depriving property relates, according to the Constitutional Court to the sacrifices that holders of private property may have to make or the extinguishing of such property rights without the right to receive compensation. Expropriation, however, entails state acquisition of the property in the public interest and must always be accompanied by compensation.[63] In its analysis, the Court accepted that the Mineral Act had an effect of deprivation for the claimant

[58] *Agri South Africa*, paras 14-15.
[59] South African Constitution, Section 25(1).
[60] ibid, Section 25(2).
[61] *Agri South Africa*, para 46.
[62] ibid, paras 37 et ff.
[63] ibid, para 48.

but the State measure was in conformity with Section 25 of the Constitution given that the Mineral Act was of general application and, moreover, the deprivation was not arbitrary based on the object of the law as well as the transitional arrangements. According to the Court, there could be no expropriation where deprivation does not result in property being acquired by the State. As mentioned before, under the Mineral Act, the State becomes the custodian of the mineral rights i.e. property but does not *acquire* the property. For the Court, this finding was corroborated by the fact that under the Mineral Act, the State will not be a co-contender with citizens for the rights to exploit national minerals. The State acts as a "facilitator" so that broader and more equitable access to mineral and petroleum resources can be realised. As a result, the deprivation of property in question did not amount to expropriation.[64]

Hence, the Constitutional Court did not easily accept the presence of expropriation, which would require the State to pay for compensation. In its interpretation of Section 25(2) of the Constitution, the Court reminded the disputing parties of the underlying issues and specificities of property in South Africa. The Court stressed the role that Section 25 plays in "facilitating the fulfilment of [the] country's nation-building and reconciliation responsibilities, by recognising the need to open up economic opportunities to all South Africans."[65] The Court went on by highlighting the history of the country, which would warrant against a "near-absolute" status of individual property rights.[66] Indeed, the way in which the Constitutional Court weighed the private interest against the public interest is telling. It reveals the overriding aim expressed in the South African Constitution to bring about a fundamental transformation of a society that suffered political and economic injustice in the past. Therefore, and in the words of the Court, Section 25 must be interpreted "with due regard to the gross inequality in relation to wealth and land distribution".[67]

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64 ibid, para 69: "[…] An assertion by Agri SA that the state has in terms of the correct interpretation of section 25 expropriated the mineral rights, is an overly liberal one. It disregards the public interest and constitutional imperative to transform and facilitate equitable access to our mineral and natural resources, to which courts are enjoined to have regard when construing section 25"

65 ibid, para 60.

66 ibid, para 62: "[…] It must always be remembered that our history does not permit a near-absolute status to be given to individual property rights to the detriment of the equally important duty of the state to ensure that all South Africans partake of the benefits flowing from our mineral and petroleum resources."

67 ibid, para 60.

III. African Supranational Courts

Part III of the present chapter deals with African regional courts and institutions given that they play an increasing role in the judicial landscape of Africa. In this respect, *major* institutions will be analysed, such as the OHADA Common Court of Justice and Arbitration (III.1.), the East African Court of Justice (III.2.) and the ECOWAS Community Court of Justice (III.3).[68]

1. OHADA Common Court of Justice and Arbitration (CCJA)

The CCJA has been established by the OHADA[69] Treaty. The Court's main responsibility is to ensure and to monitor the application and uniform interpretation of OHADA law in all Member States.[70] The CCJA also serves as the region's arbitration centre administrating and supervising the arbitral proceedings.[71] In addition, the CCJA has the competence to annul arbitral decisions.[72]

In a recent judgement of 19 November 2015, the CCJA annulled an OHADA award in the case of *Getma v. Guinea*.[73] The original award, rendered in April 2014, held that Guinea's termination of a port and railway concession contract breached the contract, which led to a finding of €38 million plus interest in compensation. Shortly after, Guinea submitted an annulment action before the CCJA. The private fee agreement between the parties became the central issue in the annulment judgment.[74] More concretely, Guinea alleged that the tribunal

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[68] The present chapter deliberately excludes the Tribunal of the South African Development Community (SADC), which is dealt with in chapter 30 written by Henok Asmelash.

[69] OHADA is the Organisation for Harmonisation of Business Law in Africa (OHADA – the French acronym for *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*) is with its current 17 Member States the largest harmonization project in Africa. It is interesting to note that OHADA is not listed as one of the RECs but OHADA represents a unique case of the "use of law to promote regional development in Africa, Rudahindwa JB, *Regional Development Through International Law – Establishing an African Economic Community*, (Routledge 2018) 175.

[70] OHADA Treaty, Art 1: "The main objective of having conformity with OHADA law is to ensure that local and foreign investors enjoy protection and reliable judicial framework and thereby to generally improve the business environment in order to attract more investment". See also Rudahindwa, above note 69, 175.

[71] OHADA Treaty, Art 21.

[72] OHADA Arbitration Rules, Art 29.

[73] *Getma International v. Republic of Guinea*, Case 139/2015, CCJA Annulment, 19 November 2015. The underlying arbitration: *Getma International v. Republic of Guinea* [I], CCJA Case 1:14-cv-01616-RBW, Award, 22 September 2014 (originally written in French); For the parallel BIT claim, see *Getma International and others v Republic of Guinea* [II], ICSID Case No ARB/11/29, Award, 16 August 2016.

[74] It goes beyond the present contribution to comment on the pros and benefits of the CCJA's reasoning. For a critical comment see Jones T, 'Attempt to enforce Guinea award in the US continues after "repugnant set aside"' Global Arbitration Review 2/2016. For a more positive account, see Soopramanien R and

had failed to fulfil its mandate by ignoring provisions that prohibited private fee agreements between the parties and the arbitrators. According to Guinea, the three arbitrators in the OHADA arbitration were bound by a fee schedule approved in advance by the CCJA itself, which sets the arbitrators' fees at a total of around 40 million CFA francs (approximately €60,000). Guinea revealed that the president of the tribunal had requested on two occasions that the amount should be increased, yet the CCJA denied both requests. Nevertheless, the president of the tribunal, Ibrahim Fadlallah, actively engaged in negotiating a sperate fee agreement with Getma and Guinea. Under the private fee agreement, the total arbitrators' fee amounted to €450,000.[75]

For its part, Getma contested this view of the tribunal's conduct, arguing that OHADA law permitted parties to derogate from general rules on fees by mutual agreement. In any case, Getma contended, a tribunal's violation of fee rules could not lead to the annulment of the whole award. The CCJA did not follow the arguments of Getma finding good reasons for the CCJA provisions setting fees in advance. Such reasons include encouraging parties in OHADA states to submit claims to arbitration and to ensure that arbitral fees were foreseeable and proportional to the amount in dispute.[76] Furthermore, the court held that the provisions of OHADA law cited by Getma did not apply to the original arbitration, which was instead governed by the more specific CCJA rules. Given that the tribunal's requests to approve a higher fee were rejected twice, and that the tribunal had nonetheless made its own arrangements with the parties, the CCJA held that the tribunal had exceeded its mandate. Consequently, the award has been annulled.

For Getma the annulment of the CCJA has had clear consequences. The company failed to enforce the award in US courts.[77] Furthermore, it is interesting to note that in a parallel ICSID proceeding based on the US-Guinea BIT, Getma argued that the annulment of the OHADA award constituted a denial of justice.[78] The ICSID tribunal found, however, that no denial of

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Soopramanien S, 'Spotlight on Africa: Problem of Legitimacy and Inclusivity in International Arbitration' 2016 TDM (4).

75 *Getma International v Republic of Guinea*, Case 139/2015, CCJA Annulment.

76 ibid, pt 5: "Attendu que ces disposition ont pour objet de garantir aux parties qui ont décidé de soumettre leur litige à l'arbitrage de la Cour, le paiement d'honoraires prévisibles, proportionnels à la valeur réelle du litige et déterminées selon un barème connu à l'avance".

77 On 3 November 2015, the US District Court for the District of Columbia ruled that Getma's enforcement action should be stayed After, the judgement of the CCJA, the enforcement was denied by order of 9 June 2016.

78 *Getma International and others v Republic of Guinea* [II].

justice could occur in circumstances where Getma could simply present its claims again to a new OHADA tribunal.[79] The claimants' nominated arbitrator, Bernardo Cremades, issued a five-page dissenting opinion on this precise question considering that this was not a viable option since the claimants had meanwhile lost confidence in the OHADA forum.[80]

2. The East African Court of Justice (EACJ)

The EACJ is the main judicial organ of the Est African Community (EAC). Since its establishment, the Court has been very active to support the objective of EAC and thereby to foster the process of integration. According to Article 30(1) of the EAC Treaty, "any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty." This provision allows corporations to directly bring a claim against an EAC member state when the latter adopted a measure that infringes any of the EAC treaty provisions including the guarantees for economic operators.[81] An illustrative case is *British American Tobacco Ltd v. The Attorney General of Uganda.*[82] Under scrutiny, in this case, was the 2014 Excise Duty Act of Uganda that aimed at introducing an excise duty on cigarettes applicable in a non-discriminatory manner to all such goods in the EAC region. Yet in 2017, the Act was amended to make a distinction between locally (i.e. EAC) manufactured cigarettes and those that are imported from outside the EAC. *British American Tobacco*, a company with headquarters in the UK, challenged the legality of the 2017 amendment, arguing that it violates certain provisions of the EAC treaty as well as the Customs Union and the Common Market Protocols.[83] In its judgement, the Court made an interesting statement on those provisions of the EAC treaty framework that are dealing with investment as the Court examined whether the impugned amendment of the Ugandan legislation "violate[d] and/ or infringe[d]" Article 80(1)(f).[84] According to the Court, "Article 80(1)(f) imposes the obligation to *harmonize and rationalise investment incentives including those relating to*

[79] ibid, para 348 et ff.
[80] ibid, Dissenting Opinion of Bernardo Cremades, para 11.
[81] See eg *Simon Peter Ochiebg & Another v Attorney General of Uganda*, EACJ, Decisions, Ref No 11 of 2013.
[82] *British American Tobacco Ltd v The Attorney General of Uganda*, EACJ, Decision, Ref No 7 of 2017, 26 March 2019.
[83] See also Rudahindwa, above note 69, 157.
[84] *British American Tobacco Ltd v The Attorney General of Uganda*, para 47.

taxation of industries particularly those that use local materials and labour with a view to promoting the Community as a single investment area. The gist of these legal provisions is to impress it upon Partner States to establish an export oriented economic dispensation in the EAC region and pursue such investment policies as would entrench the EAC single investment area".[85]

In the overall outcome of the case, the Court found that Uganda acted in a manner that is likely to jeopardise the objectives of the EAC treaty as it would "roll back" the gains of the Customs Union and the Common Market established thus far in the EAC region. Concerning the question of whether or not Uganda had violated Article 80(1)(f) of the EAC treaty, the Court ultimately found that the applicant had failed to prove its case.[86] Despite this latter circumstance, the *British American Tobacco* case is interesting in highlighting that the EACJ is keen to promote the single investment area of EAC and that in fact a foreign company incorporated in an EAC country can bring a claim against such country before the EACJ.

3. ECOWAS Court of Justice

The possibility for foreign investors within ECOWAS[87] to use the ECOWAS Community Court of Justice (CCJ) has been considered and promoted.[88] Yet as the law currently stands, there are a number of obstacles and legal uncertainties. With the last amended of 2005, the CCJ enjoys an extended jurisdiction, notably, it can hear human rights cases and expands the admissibility rules to disputes between individuals and the member states of their residence.[89] As of today, the CCJ has become "four courts in one": an administrative tribunal for ECOWAS, a human rights court, a court of arbitration, and an Inter-State dispute resolution tribunal. *A priori*, relevant for investment disputes seems to be the constellation when the CCJ acts in its capacity of an arbitral tribunal. However, the jurisdiction must be established through consent in an

[85] ibid, para 73. Emphasis in original.
[86] ibid, para 79.
[87] Economic Community of West African States / Communauté économique des États de l'Afrique de l'Ouest.
[88] See Happold M and Radović R, 'The ECOWAS Court of Justice as an Investment Tribunal' [2018] The Journal of World Investment & Trade 95.
[89] Revised Treaty of ECOWAS, 1995 Revised ECOWAS Treaty, 1991 Protocol creating the CCJ, A/P1/7/91; 2005 Supplementary Protocol, A/SP1/01/05. These instruments are available at http://prod.courtecowas.org/basic-texts/ (last accessed 3 December 2019).

investment treaty or contract.[90] And in fact, the 2008 ECOWAS Supplementary Act on Investments does only foresee the possibility to have recourse to the CCJ in exceptional circumstances.[91] The other route that investors could take in order to bring a claim before the CCJ, is to file a claim based on an alleged violation of the investor's human rights. In this respect, the case law of the Court is, however, not conclusive. In a case *CNDD v. Côte d'Ivoire,*[92] the Court found that legal persons can file human right complaints. Yet the Court later rejected this in *Ocean King Nigeria Ltd v. Senegal.*[93] In the latter case, however, the Court held that the right to a fair trial was not related to as a human right and found that it must examine the right to a fair trial to corporations under the ECOWAS Treaty.[94] This short overview of the case law of the ECOWAS Court reveals already certain ambiguities. In sum, except for the *CNDD v. Côte d'Ivoire,* corporations cannot submit violations of human rights to the CCJ; as far as the right of a corporation to a fair trial is concerned, investors can bring a claim against the State before the Court. At the same time, it is important to mention that the importance of the CCJ might grow in the future. The new ECOWAS Investment Code that was finalized in 2018 foresees the arbitration division of the CCJ as one of the fora for the settlement of investment disputes.[95]

IV. Concluding remarks

Based on the discussed cases, African courts are an important example that show how national judges are seen by investment arbitration and how they look at the arbitral systems, and how

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[90] See *Ocean King Nigeria Ltd v Senegal,* ECW/CCJIJUD/07/11, 8 July 2011, para 47: "[…] corporate bodies such as the plaintiff herein can access the Court only where there is a prior agreement between the parties to a particular transaction that disputes arising out of that transaction shall bet settled by the Court […]".

[91] See ECOWAS Supplementary Act on Investments, Art 33(6): "Any dispute between a host Member State and an Investor, as envisaged under this Article that is not amicably settled through mutual discussions may be submitted to arbitration as follows: (a) a national court; (b) any national machinery for the settlement of investment disputes; (c) the relevant national courts of the Member States". Art 33(7) thereof then states: "Where in respect of any dispute envisaged under this Article, there is disagreement as to the method of dispute settlement to be adopted; the dispute shall be referred to the ECOWAS Court of Justice."

[92] *The National Co-ordinating Group of Departmental Representatives of the Cocoa-Coffee Sector (CNDD) v. Côte d'Ivoire,* ECW/CCJ/APP/02/09, 17 Dec 2009, paras 20-30.

[93] *Ocean King Nigeria Ltd v Senegal,* ECW/CCJIJUD/07/11, 8 July 2011, para 50. See for more details, Happold and Radovic, above note 87, 111-113.

[94] One needs to note that from the Court's reasoning, it is not clear why the Court considers to be under such obligation, why and on what basis; presumably it is a matter for the CCJ of inherent jurisdiction.

[95] The new 2018 ECOWAS (the new Act is on file with the authors), Art 54(2): "Where recourse is made to arbitration, the arbitration may be conducted at any established public or private alternative dispute resolution centres or the arbitration division of the ECOWAS Court of Justice. Member States and investors are encouraged to utilise regional and national alternatives dispute settlement institutions."

these two visions can diverge. The important aspect to take away from a discussion on international investment law in African courts is that there seems to exist a trend in Africa towards using African national and regional courts for settling investment disputes. Evidence of the trend is a certain push for regionalisation of international investment law and the emergence of an African vision of international investment law.[96]

South Africa is a frontrunner in this respect. Yet Tanzania also enacted new legislation in 2017, called the Sovereign Act, which stipulates that permanent sovereignty over natural resources requires that any disputes relating to resource extraction be adjudicated in judicial bodies or other organs established in Tanzania.[97] Other African States, such as the Ivory Coast now promote African arbitral centres instead of ICSID or other international institutions. Its 2018 Investment Code states that disputing parties can agree to submit their dispute to the CCJA. The clause is not obligatory but mentioning the CCJA as the sole arbitral centre is a clear indication for promoting this institution. A very similar approach has been taken by in the 2018 ECOWAS Investment Code, which, in turn, suggests the ECOWAS Court as the forum for the settlement of investment disputes falling under the new code. All these examples show a new trend. To some extent, they seem to suggest a certain loss of confidence in international arbitrators to understand Africa specific circumstances, which *inter alia* encompass issues of the redistribution of national resources and the mitigation of historical inequalities. The trend of returning to African courts, tribunals and arbitration centres is highly interesting and these developments should be further monitored.

[96] Mbengue MM and Schacherer S, 'Evolution of International Investment Agreements in Africa: Features and Challenges of Investment Law "Africanization"', in Chaisse J, Choukroune L and Jusoh S (eds), *Handbook of International Investment Law and Policy*, Springer International Publishing, online version see, https://link.springer.com/referenceworkentry/10.1007/978-981-13-5744-2_77-1 (last accessed 12 February 2020)

[97] See, Tanzania, The Natural Wealth and Resources Act 2017 ("Sovereignty Act"), Section 11(2).