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Co-operative Bank House
8th Floor, Haile Selassie Avenue
P.O. Box 548-00200, Nairobi, Kenya
Tel: +254 20 222 4029
Mob: +254 771 293 055
Email: training@ncia.or.ke
www.ncia.or.ke

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# Investment Arbitration Reforms - Knotty Questions and Options

Paul Ngotho[1]

## Abstract

The author traces the current challenges to the Investor-State Dispute Settlement (ISDS) regimes to factors which were well known at inception of ISDS but were left unaddressed. His article is premised on the belief that the current ISDS is not fit for purpose while the proposed reforms are both inadequate and too slow. He argues that ISDS requires wholesale reforms since disputes are inevitable.

He comments on the host states' two common reactions to the ISDS. On the termination of BITs, he argues that investor protection through treaties is still necessary. He is skeptical about the creation of "special national courts". Foreign investors abhor national courts, which they fear are subject to varying levels of direct or indirect manipulation by states. It might be just a matter of perception but in subjective areas like justice are involved, perceptions are important in their own right regardless of whether the reality might be different. The special courts would, in any event, lead to a zero game once nearly every state has its own.

The article also explores the limitation of regional courts and the possibility of reforming arbitral institutions to fill the gap. He concludes that a thoroughly reformed ICSID is the most viable option but cautions that the reforms, to be effective and accepted by the users, must go far beyond the mere tweaking of procedural rules.

1 Paul Ngotho HSC is an Economist, Chartered Surveyor and Chartered Arbitrator. He holds a Master of Laws (LL.M) degree in International Dispute Resolution from the University of London. He presented a shorter earlier version of this paper in the African Institute of International Law (AIIL) and Asian-Africa Legal Consultative Organisation (AALCO) seminar in Arusha, Tanzania on 19th -21st November 2018. This article is part of his series on ISDS reform and appears as chapter 6 in his book Treatise in International Arbitration (2020). He is also the author of Contemporary Issues in Arbitration (2016), Lectures in Arbitration (2020) and Essays in International Arbitration (2020). His email contact is ngothoprop@yahoo.com

## 1. Background

That the current Investor-State Dispute Settlement (ISDS) regimes are fundamentally flawed is old news, leaving for consideration only when and how reforms would be addressed. They emerged from the aftermath of the Second World War, when much of Africa and Asia had no voice while China, Japan, Singapore, South Korea, India and Brazil had not emerged as major players in the international arena. The mineral resources in much of LCDs had not been discovered. Investors came from a handful of states, which enjoyed powerful positions as colonial powers while many new, inexperienced host states were competing for the precious investment. Strong nationalism and rhetoric from host states did not yield much on the negotiating table, where investor states adopted a take-it-or-leave-it stance. One can see why the dispute clauses in some of the bilateral and multilateral investment treaties (BITs and MITs) were skewed in favour of the investors and why meaningful ISDS reforms must include BITs and MITs themselves.

States have been known to make knee-jerk reactions like terminating BITs, banning foreign arbitrators or lifting immunity against arbitrators in order to expose them to criminal sanctions. Even regional patch-up operations are not a viable long-term solution. If anything, they are a demonstration of the frustrations which states and other actors face in the current ISDS regimes. "Investor-State dispute settlement is unfortunately not dead", lamented the Office of the United Nations High Commissioner for Human Rights in a news release on 19 April 2016.

The reasons why users are dissatisfied with the current ISDS systems are well documented. However, the political-economic dynamics which have made ISDS reforms necessary and urgent have not been fully appreciated.

Firstly, the most significant is that the traditional dichotomy of the More Developed Countries (MDCs) producing the investors while the LDCs were the host states has changed, making the call for a fair system universal. There are increasing investments between MDCs and between LDCs. That leads to the same state contributing investment and acting as a host state at the same time but in different transactions.

Secondly, LDCs still need foreign investment to exploit their resources. Their desperation is apparent from the fact that some of them are still signing BITs which contain onerous terms. Their young and demanding populations coupled with ambitious development goals and the high cost of exploiting natural resources have put economic and political strains on LDCs. The universal recognition of peoples rights over their natural resources does not seem to have strengthened LDC positions.

Thirdly, the collapse of USSR in 1980s robbed the world of a much needed counter-balance in the world arena, leaving LDCs at the mercy of the cartel of European and North American states and their attendant multi-lateral agencies. The investor nations used their strong financial position and historical ties with the host states to force political and economic reforms in LCDs, which had little option that to comply.

Fast forward to the 2000s with cash-rich China, and to some extent Japan, shopping for resources and investment opportunities. Suddenly, LCDs got options without political strings with respect to China. The dynamics on the supply side of the investment market equation changed to LDCs benefit. Of course, that led to valid concerns about over-dependence on China for investment and credit. There is also speculation on how China, a relatively new player, might enforce its rights in the event of default. While the US and some of the European states are also now heavily economically dependent on China, LDCs are much more vulnerable.

The above shifts have led to the convergence of MDCs and LDCs interests, putting both groups on the same side in agitating for ISDS reforms in order to achieve a system which is fair to all. It's amazing how simply putting the boot on the other foot leads to changes upstairs.

Polanco R[2]. advances the view that in order to address some of the criticisms leveled against ISDS, a large majority of states have taken a '*normative*' strategy, negotiating or amending investment treaties with provisions that potentially give more control and greater involvement to the contracting parties, and notably the home state. This is particularly

2 The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection? Cambridge University Press, 2018. See comments at https://www.wti.org/research/publications/1196/the-return-of-the-home-state-to-investor-state-disputes-bringing-back-diplomatic-protection/ accessed 2nd April 2019.

true of agreements concluded in the past fifteen years.

Amending a few of the 3,000-odd BITs and initiatives like introducing new national or regional BIT templates cannot fully address the underlying ISDS problem, which is multi-faceted and global in nature. When two states each with its own BIT templates negotiate a new BIT, one must yield. The ISDS challenge is much broader and not amenable to localised patchwork at BIT, regional or continental levels in a globalised world. This article gives the background to ISDS, lists the concerns and considers the various options as well as reform timelines. It restricts itself to adjudicative ISDS and not negotiation, mediation, conciliation, fact-finding, UN General Secretary's Good Office etc all of which are still very important because they promote or facilitate amicable settlement. Amicable settlement should always be given a change even though success cannot be guaranteed. Suffice to say that conciliation and mediation take up of BIT disputes has been slow especially after the existence of a dispute becomes public.

## 2. The Criticisms

Criticisms of the existing ISDS regimes have classified into six themes[3] as follows:

- Excessive costs and recoverability of cost awards
- Excessive duration of proceedings
- Lack of consistency and coherence in legal interpretation
- Incorrectness of decisions
- Lack of diversity among ISDS adjudicators
- Lack of independence, impartiality & neutrality

Tafadzwa Pasipanodya[4] adopts that list, which does not claim to be universal or exhaustive.

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3 https://www.jus.uio.no/pluricourts/english/news-and-events/news/2019/reforming-international-investment-arbitration-wor.html accessed on 25th January 2019.

4 "Issues with the current ISDS System: From Diagnosis to the Desirability and Feasibility of Reform", a paper presented in the AIIL-AALCO Arusha Seminar, 2018

The six and additional issues are discussed in a different order below.

Firstly, arbitrators in investment arbitrations are mainly party-appointed. Parties' rights to determine how their dispute is resolved and to appoint the tribunal is one of the characteristic features of arbitration as opposed to courts. Yet, it creates the potential of arbitrators favouring their benefactors in appreciation of the appointment and to ensure future appointments in this apparently lucrative field. Such concerns can be eliminated completely by the parties entrusting an independent entity with the appointment of the entire tribunal. This mode of arbitrator appointment is very unpopular among parties.

Secondly, double-hatting, where the same familiar faces inter-change roles between arbitrator and counsel in different arbitrations, has been critiqued as inherently unhealthy and "*incestuous*". Such is inconceivable in national courts, where it could in fact be tolerated due to diversity of cases and issues they handle. However, investment arbitration is uniquely vulnerable to this practice because the issues and standards under consideration are the same in nearly all the cases. A person who has interpreted what an investment is as an arbitrator in one case cannot, if he has an inkling of professional integrity in him, argue differently as counsel in a different case with similar or identical circumstances. A detailed discussion of double-hatting is found in the ESIL Reflection The Ethics and Empirics of Double Hatting[5], part of which states:

"*In his closing speech at the 2015 European Society of International Law Conference, Philippe Sands took aim at some of the association's members. The international legal profession, he maintained, bore some responsibility for the legitimacy crisis in international law. The crux of his concern was the ethics of appointments. To a reasonable observer, it might appear that international lawyers were prioritizing their material and political interests over independence and impartiality.*

*Sands named four specific practices. First, select lawyers and law firms were 'capturing' international investment arbitration and charging excessive fees. Second, International Court of Justice (ICJ) judges were acting as arbitrators – seemingly the 'only' international court to*

5 https://esil-sedi.eu/post_name-118/ accessed on 15th March 2019.

*allow this practice. Third, some judges and arbitrators were too close to states, participating in the appointment processes of state counsel or leaking confidential information to governments. Fourth, he labeled as 'deplorable' another practice of double hatting in which individuals act simultaneously as arbitrators and legal counsel in international investment arbitration" (Emphases added.)*

That lawyers are at least part of the problem is also reflected in EU Commissioner Cecilia Malmstrom's statement on 5 May 2015 that, "*(M)y assessment of the traditional ISDS system has been clear - it is not fit for purpose in the 21st Century. I want the rule of law, not the rule of lawyers.*"[6] (Emphasis added.)

Sands is saying that the ISDS system is under siege from a cartel of international law firms, which employ arbitrators-cum-litigators to control the judicial outcomes and to protect both their fees and market. Since those firms stand to be adversely affected by any meaningful reforms, they can be reasonably expected to resist. Furthermore, any effective reforms must either involve their cooperation or strategies to lessen their stranglehold of ISDS.

Interestingly, the law firms are, in the context of corporate social responsibility, major sponsors of most arbitration conferences, the main forum for discourse on all matters arbitral. They directly or otherwise control the agenda, content and tone through theme choice and reserved moderator/speaker slots. As for the arbitration journals, one just has to read the lists of editors of international arbitration journals.

Thirdly, investors are increasingly challenging the legislative and regulatory roles of sovereign states by filing cases which are based on the actions taken by states in good faith to enhance or control public health, environment and security. Thus Phillip Morris, even though it lost, tried to use ISDS to force Uruguay to change its laws on cigarette packaging and marketing claiming that they amounted to expropriation as they affected it adversely.

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6 "Investments in TTIP and beyond -- toward an International Investment Court"

Fourthly, the finality of arbitral awards even when they have factual or legal errors is considered too rigid and unjust. The correction of errors as allowed by nearly, if not absolutely, all arbitration rules and national arbitration laws is limited to arithmetic and typographical errors and rarely allow delving into the merits. Appeals or setting aside on merits are an exception to the rule.

Fifthly, confidentiality, which is understandable and perfectly acceptable where only private parties are concerned, is ill-suited where public interest and public funds are at stake. The great strides which have been made to introduce transparency in ISDS recently have addressed all the concerns. Ideally, a single individual citizen of a host state who is adversely affected by the actions of a foreign investor should be able to make an independent claim against the investor in the same forum regardless of his or her government's position.

The sixth criticism is the perceived absence of consistency and coherence in the decisions of arbitral tribunals. This problem, which is significant on its own, ultimately leads to shifting and unpredictable jurisprudence, which are bad for planning and business. These interrelated problems erode confidence in arbitration as an ISDS forum.

Funke Adekoya SAN[7] has given the example of five arbitrations arising from the Argentina-US BIT. Argentina had removed stabilization measures during economic crisis. Three tribunals determined that the action did not satisfy either the necessary defence under customary international law or the emergency clause under the BIT while two tribunals concluded that the action met the emergency defence under the BIT.

Two further comments are worth making at this juncture. First, those arbitrations were administered. That demonstrates that the delimitation of charges of inconsistencies to *ad hoc* arbitrations is unjustified. Indeed, the above six criticisms against ISDS regime have always been raised against *ad hoc* in favour of institutional arbitrations. The complaint about lack of consistency and coherence is in fact common in both types

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7 The Practical Considerations of Having a World Investment Court. Paper presented in the AIIL-AALCO ISDS Conference, Arusha 19-21st November 2018

of arbitration. It has been leveled even against ICSID, which runs tightly-administered arbitrations, refers to precedents and has an in-house annulment procedure. Second, and more significant, similar criticisms have been leveled against ICJ, which is an "*international court*" by any definition and has tenured judges and bursts the myth that the establishment of an international investment court is capable of curing the inconsistency problem.

Seventhly, high arbitral awards against LDCs compete or threaten development and recurrent budgets. The quantum awarded in the arbitration between *Process and Industrial Development Ltd* and Nigeria has drawn much attention and is currently the subject of litigation in both the US and UK. Interest alone at 7 % p.a. or USD 1.2m daily was about USD 2.3 billion during the first five years, raising the total sum due to about USD 9 billion in 2018. Such figures raise emotions and political pressure in LDCs and tend to overshadow rational discourse on the risks which investors take.

This is a controversial issue. On one hand, it could be that the relatively high quantum in awards is justified. A party's ability to pay is not one of the usual issues for determination in any dispute. That the gross revenues or even profits of some multinational corporations exceed the combined GDP of several LDCs is also not a major consideration in the determination of liability or quantum. On the other hand, some of the methods used in quantifying damages, especially when projects abort before any significant money is actually invested, are suspect and require thorough and sober interrogation within and without the ISDS fora.

Eighthly, states are exposed to frivolous claims which must be defended at a colossal expense in a system under which they are not assured to recover their costs even if they win. MDCs might also find the cost high in absolute terms but they are probably mollified by the fact that much of the money, being legal fees for international law firms, remains in their economies.

International arbitrators are, unmistakably, created in large European and American law firms senior partners image in age, gender, colour, nationality, profession and the law schools attended. This should not

be surprising, given that arbitrators are, in reality, appointed not by parties but by their counsel, who are more comfortable with their own type. Thus the law firms have contributed immensely not only to the lack of diversity and the exorbitant costs but also to the other problems facing ISDS. Much ink, air miles, conference time, research and lobbying have gone into the diversity and inclusion debate in the last ten years. Diversity, while most desirable, cannot cure the more fundamental underlying problems in ISDS. Users will not stop complaining about inconsistence of awards if the panels became more or truly diverse.

It is necessary to distinguish complaints against ISDS from those against foreign investors. States have a duty to carry out due diligence to establish if potential investors and traders have been paying taxes or been blacklisted in their home states or elsewhere. This might involve lifting the veil to see the names behind the investment companies and to establish who their local errand boys are. In the *World Duty Free*[8] case, a little initiative would have established that the company was under receivership when it signed the initial contract. Due diligence on *Cortec*[9] would have raised unmistakable red flags.

## 3. Calvo Doctrine and Hull Formula

For completeness, discussion on ISDS in historical, current or future contexts must pay homage to *Calvo and Hull*. Apparently, some of the issues haunting ISDS today were considered century ago and left unresolved. If that is so, then one cannot help wondering if there is any chance that they will be resolved now or in future.

The clamour to modify investment regimes and ISDS are merely the reincarnation of the *Calvo Doctrine*[10], named after Carlos Calvo (1824-1906), an Argentinian diplomat and legal scholar. The doctrine evolved in mid-1800s, when Argentina was heavily indebted and under the threat of military intervention from the investor states. The timing of the current debate is hardly surprising, given that some LDCs are heavily indebted and others admittedly over-indebted.

8 https://www.italaw.com/documents/WDFv.KenyaAward.pdf

9 https://www.italaw.com/sites/default/files/case-documents/italaw10051.pdf

10 The doctrine was advanced by Carlos Calvo, in his International Law of Europe and America in Theory and Practice (1868) source https://www.britannica.com/topic/Calvo-Doctrine

The Calvo Doctrine was essentially restated by the Drago Doctrine, which was propagated by the Argentine foreign minister Luis Drago in 1902. At the time Venezuela was indebted to Great Britain, Germany, and Italy, which threatened armed intervention to collect. Drago advised the United States government that "public debt cannot occasion armed intervention nor even the actual occupation of the territory of (latin) American nations."

The Calvo Doctrine advocates the regulation of the jurisdiction of governments over aliens and the scope of their protection by their home states, as well as the use of force in collecting indemnities - nations were not entitled to use armed force to collect debts owed them by other nations. It maintains that aliens should not enjoy more rights or more amenable standards than the nationals of the states where they invest and that uniform standards should apply for all nations, regardless of the size or economic strength.

It also maintains that that foreigners who held property in Latin American states and who had claims against the governments of such states should apply to the courts within such nations for redress instead of seeking diplomatic intervention. The *Calvo Doctrine* was incorporated into BITs, which require investors to exhaust local legal remedies prior to seeking ISDS.

The *Hull Formula*, or *Rule*, is named after the US Secretary of State Cordell Hull (1871–1955). It recognises minimum standards in international law which were applicable and which superseded national standards. It advocates prompt, adequate and effective compensation for investors after expropriation. Not much needs to be said about the *Hull Formula* except that much of it has prevailed in the long run and found their way into national laws, BITs and customary international law. For example, the international minimum standard is integral in customary international law. It basically says that there is a minimum standard of treatment which applies to foreign investors regardless of the fact that a lower standard might apply to nationals when it comes to payment for expropriations.

## 4. The Reform Options

The ISDS reform options which render themselves for serious consideration are four: national investment courts, a new multilateral court, new or reformed international arbitral institution and a reformed ICSID.

## 5. National Investment Courts

Every state would like its investment disputes determined in its own national courts. Such courts have, and will always, play a major role in investor-dispute resolution especially in the support of *ad hoc* arbitrations and the enforcement of non-ICSID awards. A recent intervention by Kenyan High Court[11] stopped the enforcement of an award from an *ad hoc* arbitration in an investor dispute which had previously been dismissed by an ICSID tribunal. The investor has appealed. The role national courts play in commercial, and to a lesser extent in investment, arbitrations, is still significant. What is under discussion here is whether such courts should decide the merits of investment disputes.

Special national courts are promoted by governments, which are typically respondents in many national arbitration and in nearly all investment disputes. Listen to the sales pitch in New York from the The Netherlands Commercial Court (NCC):

*"The NCC is a newly established commercial court focused on resolving complex international commercial disputes. Located in the centre of European business, Amsterdam, the NCC is conducting its proceedings in English, allowing foreign-speaking attorneys to participate in the case without a translator. Joining the team of already existing international commercial courts in Singapore, Dubai, Qatar and London, the NCC incorporates a number of invaluable advantages. In addition, the NCC aims to make each proceeding more efficient and less extensive, and therefore, shorter and less expensive than in other international commercial courts. Launched only in January, 2019, the NCC is already becoming an attractive alternative to cross- border litigation and arbitration."*[12]

11 http://kenyalaw.org/caselaw/cases/view/159886/ accessed on 12th March 2019

12 https://s.typeapp.com/ws/h1307W1VAmF accessed 28th February 2019

The China International Commercial Court is, quite understandably, a function of the Belt and Road Initiative (BRI):

*"...the formal inauguration on 29 June 2018 of a new Chinese court specifically focused on resolving BRI disputes (the Court) is another step... as a forum for resolving BRI disputes. BRI projects are generally financed wholly or largely by Chinese funders, and constructed by Chinese contractors using largely Chinese workforces, so these entities might try to negotiate for dispute resolution in China. However, whether non-Chinese parties will be willing to submit to the jurisdiction of the Court remains to be seen...doubts will linger over its independence and impartiality (whether fairly or unfairly). The obvious lack of neutrality, just in terms of location, will always be a big factor making other dispute resolution jurisdictions attractive. And then there is the problem of enforcement, in which arbitration reigns supreme...It is also possible that, in wholly Chinese-funded projects, submission to the jurisdiction of the Court may be a condition of funding. "*[13]

According to Tanzania's Constitutional and Legal Affairs minister Augustine Mahiga, the country plans to enact a law that will facilitate the settling of disputes with investors in the country in order to increase transparency and cut unnecessary costs[14]. The move is consistent with Tanzania's approach to investment arbitrations generally as reflected in the country's recent public statements and legislation[15].

Tanzania, Uganda and the joint venture oil companies[16], after months of negotiations, agreed that any dispute arising from contracts on the 24-inch wide 1,445km export pipeline from Ugandan oilfields to the Tanzanian port of Tanga would be arbitrated *"in London"*[17], which probably means LCIA. This scenario is the perfect demonstration of

13 https://www.ciarb.org/resources/features/china-international-commercial-court/ accessed on 15th February 2019

14 https://www.iarbafrica.com/en/news-list/17-news/956-new-law-on-settling-investment-disputes-in-the-offing?utm_source=ActiveCampaign&utm_medium=email&utm_content=I-Arb+Weekly&utm_campaign=I-Arb+Weekly+25%2F4%2F2019

15 Reference is made to Public Private Partnership Amendment (Amendment) Act. No.9 of 2018 and Natural Resources and Natural Wealth Management Act of Tanzania.

16 Total E&P, Tullow Oil Uganda and China National Offshore Oil Company

17 https://www.iarbafrica.com/en/news-list/17-news/952-london-to-arbitrate-ea-oil-pipeline-project-rows?utm_source=ActiveCampaign&utm_medium=email&utm_content=I-Arb+Weekly&utm_campaign=I-Arb+Weekly+25%2F4%2F2019

the hard choices which e parties make and the fact that states do not have the final say. Tanzania had initially offered to host the arbitration, but the other partners preferred a neutral country. Both Uganda and Tanzania are members of the East African Community and so one would have expected them to opt for the East African Court of Justice.

At this rate, investors will soon be faced with a full beauty parade of copied and pasted versions of special national investment courts. Will the investors bite? Will the stone which Hull so vehemently rejected with finality become the ultimate quoin stone of ISDS? Sam Luttrell[18] thinks not: "*From the international business person's perspective*, *the most significant risk is that judges in other states may be biased against foreign parties*". Humphrey O'Sullivan puts it more graphically '*there is little use in going to law with the devil of the court while the court is held in hell*". That was in 1831. Little has changed the last 188 years. Foreign investors' morbid fear of national courts in hosts states is not baseless. It is not like foreign investors do not know the door to the local court! They have been there every day for traffic offences, pick-pockets, employment cases, physical planning matters[19] etc.

"*Special*" national courts to handle investment disputes are quite easy to set up and relatively inexpensive to run as funding would also be more or less assured. They would also have full-time judges of national repute. But that is all in favour. The criticisms against national courts are weighty, hence the qualification that the ones are "*special*" or specially for investment disputes. Since regular national courts have long been rejected by investors for that purpose, the carrot lies in new courts' newness and specialty, which would, hopefully, guarantee fairness to the foreign investors.

However, the current spate of states quickly retreating into cocoons called special national courts is a zero-sum game once every state has such a court. It would be unfair to suggest that all national judges or that all national courts are biased against foreigners in general or foreign investors in particular. However, their independence is, in the eyes of foreign investors, a hit-and-miss affair or at least suspect,. The

18 Bias in International Commercial Arbitration, Kluwer Law International

19 https://www.capitalfm.co.ke/news/2019/04/court-orders-kiambu-to-process-tatu-city-building-approvals/

investors might not to take the risk of a forum in which the selection, renumeration, retirement and removal of each adjudicator are all dependent on the opponent. Even lesser matters like the exposure of a judge to transfer from the special court to a less glamorous one could be a powerful motivator.

In addition, patriotism is an important consideration in international arbitration. The current ISDS systems generally require that no member of the tribunal shares nationality with either party. Even ICJ allows a party to appoint an ad hoc judge to balance the situation whenever one party shares nationality with one of the permanent judges. Host states could deal with the nationality bias issue quite easily by reserving the presidency and/or most of the seats in the special courts to non-citizens. They would then administratively ensure that no member of the bench in a particular case shares nationality with the investor in each case. However, they are most unlikely to deal with that aspect since they would lose control of what is essentially a national court. Investors would also love a court they could control! Since they are not able to do that legitimately, the best they could negotiate for is for disputes to be heard in courts in the home states, a prospect which host states would not normally accept.

The other major drawback to special national courts is the venue. Being national courts, they are likely to routinely hear cases in the host state in spite of powers to sit elsewhere. Host states could easily frustrate foreign investors and their witnesses through arrests for genuine or trumped up charges timed to frustrate the investor's case in court. Non-judicial harassment includes being trailed, phone tapping, stage-managed muggings, food poisoning and pickpockets– governments are known to play hard ball as any private party in arbitration and are never short of tricks. Counsel might require licences from the host state's attorney general while the investor's foreign expert witnesses might require work permits as opposed to visitor's visas all of which are controlled by governments. Even the executions are not beyond contemplation. A private investor's counsel survived narrowly after ingesting a radio-active poison, which is accessible strictly to states, in a European capital.

Every jurisdiction has some decidedly pro-executive judges, who get rewarded by particularly prestigious appointments and honours. Few

judiciaries can withstand sustained pressure from their governments, and foreign investors are not about to take the risk. Obviously, national courts have limited geographical jurisdiction as they would normally entertain cases in which there is a connection to the subject state. The other drawback is that judgements of national courts are not as widely enforceable in other states as foreign arbitral awards are under the New York Convention. The problem of sovereign immunity would dodge the special courts throughout. A special national court might achieve a reasonable level of consistency and coherence. However, for certain the jurisprudence across the several national courts on the same issues is likely to be much more chaotic than what ISDS is currently accused of.

## 6. Multilateral and International Investment Arbitration Courts

The perfect international investment court would be made up of tenured judges, who would work to high ethical standards and be truly impartial and independent. It would also be free from political manipulation by states and would have trial and probably appeal chambers. The decisions would be binding and enforceable worldwide.

Parties are, quite unexpectedly, disinterested in arbitration under regional courts, which have tenured judges and which would save parties the money which would otherwise go to private arbitrators. The judges are nominees of the member states while the services are free of charge to users. However, regional courts are prone to regional political dynamics and to crippling under-funding. Investors have given many of them a wide berth. The East African Court of Justice and COMESA court are, apparently quite unpopular ISDS destinations. Each had in November 2018 handled only three investment disputes even though they do not charge any fees to the parties.

The ICJ and the International Criminal Court (ICC[20]) are probably the best examples of truly international courts. They have tenured judges who have impressive credentials. Yet ICJ is facing the same criticisms as the ISDS - inconsistency, time, costs, domination by MDCs especially the permanent members of the UN Security Council.

20 Not to be mistaken for the International Chamber of Commerce, which has a reputable arbitral institution.

S. Gozie Ogbodo has, for example, criticized the ICJ as follows:

*"nomination of ad hoc judges by parties under Article 31 of the ICJ Statute corrupts the integrity of the Court by allowing a party before it to nominate an ad hoc judge if none of the ICJ judges is a nationality of the party. In other words, every party before the ICJ is entitled to either a judge of the same nationality on the Court or an ad hoc judge. On the face of it, this practice may be geared towards ensuring fairness and democracy in the operation of the Court. However, a critical examination of this practice - as well as the outcome - portrays an abuse of the judicial process at the highest level. The records indicate that ad hoc judges typically vote for their country of nationality, irrespective of the majority decision of the Court. Guaranteeing a contentious party the right to a representative judge does not augur well for the Court's image of impartiality. The impression created by this practice is that a party can only be guaranteed a fair and impartial justice before the Court if, and only if, the party is represented by one of the judges – either one of the elected judges or an ad hoc judge. Moreover, the mere fact that a party before the court must have a representative judge does not only negate the impartial appearance of the Court, but speaks volumes about its ability to dispense States-blind justice to the parties before it. This practice contravenes the claim that a member of the Court is not a delegate of the government of her/his own country. Since an ad hoc judge is an appointee of a state party before the Court, the likelihood of future appointment will definitely sway the judge to be sympathetic to the state party which typically is his home state."*[21]

The discovery that a large number of ICJ judges were carrying out private arbitrations in complete violation of the absolute prohibition under Article 16.1[22] of the ICJ Statute bursts the myth that tenured judges would necessarily work to a higher ethical standards than private arbitrators. As noted by Sands elsewhere in this article, the ICJ judges are in fact quite close to states and not because of nationality but because states are actual or potential clients in private arbitrations.

21 An Overview of the Challenges Facing the International Court of Justice in the 21st Century at https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1159&context=annlsurvey accessed on 6th March 2019

22 "No member of the Court may not exercise any political or administrative function, or engage in any other occupation of a professional nature" (Emphasis added.)

ICC has been accused of unduly targeting African states. That allegation requires objective analysis against the worldwide geographical occurrence of the violations which ICC is mandated to handle. Such an analysis is beyond the scope of this paper.

At one stage, the African Union requested that the U.N. Security Council defer the cases against Uhuru Kenyatta and his deputy, William Ruto, at ICC for one year to allow them to deal with the aftermath of an attack by Al Qaeda-linked Somali militants. The 15-member Security Council was split - seven members, including Russia and China, voted in favour while eight including France, the United States and Britain abstained. Resolutions need nine votes and no vetoes to pass. Britain, France, the United States, China and Russia hold veto powers.[23]

ICC itself admitted "*political interference*" as the reason for terminating the Kenyan post-election violence cases. It did not say where the interference came from. The US embassy and various European missions in Nairobi over the years issued statements which make them prime suspects. That the US had any interest was rather queer because it was not then or at any stage bound by the Rome Statute. Therefore, it played Unoka, who Chinua Achebe refers to in *Things Fall Apart* as, "*the outsider who wept louder than the bereaved*".

Moreno Ocampo[24], the ICC Prosecutor who carried out the investigations and partly prosecuted the Kenyan cases, came highly recommended having gained his fame in high-profile cases in Argentina. This former Transparency International board member had earned coveted honours like being on the "Brave Thinkers" and "100 Top Global Thinkers" lists but his 9-year tenure at the ICC was, in this writer's view, an unmitigated disaster. The Court criticised his shameless attempt to rely on material which he refused to disclose to the accused in the Thomas Lubanga case. He then deliberately or otherwise botched the Kenyan cases with shoddy investigations.

23 https://www.reuters.com/article/us-kenya-icc-un/africa-fails-to-get-kenya-icc-trials-deferred-at-united-nations-idUSBRE9AE0S420131115 accessed 30th January 2019.

24 https://en.wikipedia.org/wiki/Luis_Moreno_Ocampo

In addition, ICC has faced some rather pedestrian challenges. Sample this:

*"Unqualified judges, in some cases with no expertise on international law and in one case no legal qualifications, have been appointed to key positions because of highly politicized voting systems and a lack of transparency...To elect a person to the ICC who doesn't even have a law degree for example, is a most unfortunate precedent to have set."*[25] *(Emphasis added.)*

How did the premier international civil and criminal courts both end up being managed like the judiciary of a banana republic? Few national courts in the world today are that depraved even in police states and military dictatorships. How did the ICJ and ICC get here? The answer is contained above and underlined for ease of reference.

There is little motivation to create a new "*world investment*" court today. States, particularly LDCs, are unlikely to sign a new treaty for the creation of such a court given the criticisms of the current ICSID.

The proposed European Union and US Transatlantic Trade and Investment Partnership (TTIP) proposal is worth commenting on. According to Stephen M. Schwebel, a international arbitrator and former ICJ President,

*"The EU now proposes to replace investor-State arbitration by an Investment Court System, a Tribunal of the First Instance composed of 15 judges appointed jointly by the EU and the US, of which five would be EU nationals, five US nationals and five nationals of third countries. Three judges would be randomly assigned to each case; the disputing parties would not choose the particular judges....the Commission's objective is to replace all investment dispute settlement mechanisms with a permanent International Investment Court and an Appeals Tribunal."*[26]

25 https://www.google.com/amp/s/amp.theguardian.com/law/2010/sep/08/law-international-court-justice-legal

26 http://isdsblog.com/2016/05/30/former-icj-president-criticizes-ec-investment-court-proposal/ accessed 12th March 2019.

The appointment of the judges of the court of first instance is similar to that of the Iran-US Claims Tribunal, which has 9 members of whom the 3 are Iranian, 3 US nationals and 3 from other states.

Under TTIP, the investors would have no role to play either in the initial recruitment of the judges or the subsequent appointment of the panel to hear a specific case. Even the states would not have that option, but they do not need it since they will have played the greater role in the appointment of the entire court. Furthermore, the fact that a panel of 3 would be chosen at random means that there is a possibility of two or all three members of any panel coming either from EU or from US appointees thus undermining confidence in the system. According to Schwebel in the paper quoted above:

"*the fundamental objection to the EU Commission's proposal to replace investor/state arbitration with an investment court is that it would replace the current system, which on any objective analysis works reasonably well, with a system that would face substantial problems of coherence, rationalization, negotiation, ratification, establishment, functioning and financing*"

The possibility of states populating the court with pro-state arbitrators to the detriment of the investors coupled with the fact that the more powerful states carry more weight in the appointment of the judges mean that the appointment of judges might be an exercise of horse trading.

Judge Schwebel[27], is critical of the EU's TTIP, and suggests that the current ISDS is fairer because "*(T)he costs of investor/state arbitration are borne by the parties, but under the EU's approach they would apparently be borne by States alone.*" That might or might not be correct or unique to TTIP as the establishment and maintenance costs of ICSID as well as the regional or special national courts are funded by states. The same would apply to an international investment arbitration court, just as happens now with ICJ and ICC. The representation and witness costs as well as disbursements would be borne by parties themselves and

27 The Proposals of The European Commission For Investment Protection And An Investment Court System 17th May 2016 http://isdsblog.com/wpcontent/uploads/sites/2/2016/05/THEPROPOSALSOFTHEEUROPEANCOMMISSION.pdf

awarded to the prevailing party in the end even though this practice is not universal. In fact, award of costs to the prevailing party might be more assured under some special national courts depending on the legal tradition and the applicable municipal law of the subject state. Therefore. minimal weight should be given to Schwebel's views above.

The Permanent Court of Arbitration (PCA) is not a court but an arbitral institution, which primarily applies the UNCITRAL arbitration rules. Since inception of PCA, it had as at November 2018 been asked to appoint arbitrators in 725 cases, of which 170 were ISDS matters. That year it administered 170 disputes and had 3-inter-state, 95 investor-state and 50 contract-based arbitrations pending.

The Organisation for the Harmonisation of Business Law in Africa (OHADA) model, which involves, first and foremost, uniform arbitration laws and then creation of a regional court replacing all national courts, requires a lot of political goodwill. That model has a lot of potential for Africa especially in the Africa Continental Free Trade Area era. However, the fact that all the member countries are capital receiving states will be a major challenge, which might or might not be sufficiently countered by the inclusion of non-Africans in the panel of arbitrators.

## 7. Reformed ICSID

The ICSID Convention, which entered into force in 1966, was meant to establish institutional and legal framework for foreign investment dispute settlement by providing an independent, depoliticized forum for arbitration, conciliation and fact-finding. While signing the ICSID Convention in April 2019, Djibouti's Minister of Economy & Finance in Charge of Industry, Commerce &Tourism, Ilyas Moussa Dawaleh said, "*(J)oining ICSID is part of a series of actions that the government of Djibouti has undertaken to transform the business and investment environment in Djibouti, create employment opportunities for youth and women, and to boost economic growth in the country.*"[28] The signing brings to 163 the number of states which have signed the convention, which has been ratified by 154 states.

28 https://www.iarbafrica.com/en/news-list/17-news/950-djibouti-signs-icsid-convention-to-encourage-investment?utm_source=ActiveCampaign&utm_medium=email&utm_content=I-Arb+Weekly&utm_campaign=I-Arb+Weekly

Given the criticisms which have been leveled against ISDS generally and ICSID in particular, the fact that a state signed the Convention in 2019 is an indication that states still have a substantial residual level of confidence in ICSID and/or that they are desperate to attract foreign investment.

During ICSID's relatively long history, from 1966 to 2006, no state which was bound by the ICSID Convention denounced the treaty. For forty years there were no exits, only entries. Hither to only 3 states which have been bound by the ICSID have denounced the Convention, i.e. Bolivia from 3rd November 2007, Ecuador from 7th January 2010 and Venezuela from 25th July 2012 – the last exit was 7 years ago. That compares favourably with 13, the number of states which have become bound by the Convention since 2007 – Canada, Mexico, Sao and Principe, Kosovo, Iraq, Haiti, Cabo Verde, Montenegro, Nauru, Qatar, San Marino, South Sudan and Serbia. The entries are more than 4 times the exits. The ratio is more impressive when one considers states like Djibouti, which have since 2007 indicated their intentions, even though they are not yet bound by the ICSID Convention[29]. In comparison, the New York Convention, which is older that the ICSID Convention by eight years and has more significant impact on states, had as at 20th April 2019, 159 contracting states, which were bound by that treaty[30].

Judge Schwebel opines that ICSID, having successfully administered a very large number of cases, is not facing criticism from investors or states but by "*uninformed or misinformed* critics have made so much *uninformed and misinformed noise*". That comment calls for verification of the credentials of some of the ISDS critics.

Gus van Harten is a law professor at Osgoode Hall Law School in Toronto, Canada, and specialises in investment arbitration. He has "*studied the field closely since foreign investor lawsuits against countries began to explode in the late 1990s... (and) received a PhD in the subject from the London School of Economics and Political Science in the mid-2000s.*" [31]

29 https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf accessed on 7th April 2019.

30 http://www.newyorkconvention.org/countries

31 https://gusvanharten.wordpress.com

What about Philippe Sands?[32] After completing his postgraduate studies at Cambridge, he spent a year as a visiting scholar at Harvard Law School. He was appointed Queen's Counsel in 2003. He is a British and French lawyer at Matric Chamber and Professor of Laws and Director of the Centre on International Courts and Tribunals at the University of London. A specialist in international law, he appears as counsel and advocate before many international courts and tribunals, including the ICJ, International Tribunal for the Law of the Sea, European Court of Justice, European Court of Human Rights and the International Criminal Court. He also serves on the panel of arbitrators at the ICSID and the Court of Arbitration for Sport. He is the author of sixteen books on international law. His book East West Street: On the Origins of Genocide and Crimes against Humanity (2016) has been awarded numerous prizes.

Schwebel has also described the ISDS criticisms as being "*more colorful than they are cogent*" and addressed three of the criticisms against ICSID in a simple and factual manner. Firstly, on the claim that tribunals are biased toward investors, he draws from Susan Franck's research, which concluded that, of 144 publicly available awards as of January 2012, states won 87 cases (about 60%) when arbitrators resolved a dispute arising under a treaty, while investors won 57 (40%) and that, even when investors were awarded damages, they won significantly less than the average amount claim of USD 343m, and that about a quarter of investment claims were dismissed at the jurisdictional stage. His conclusion is that those findings hardly suggest bias against states.

That research suggests, at face value, that the arbitration tribunals are unbiased. Yet it could be that, for example, states could win 75, 80 or 90% of the time given more independent tribunals. Conversely, a state success rate of only 20 or 30% would not necessarily mean that the tribunals were either biased against investors. Such statistics do not prove anything either way and are unhelpful in the assessment of tribunals' independence and impartiality. The relatively high dismissal rate on jurisdiction and low success rate on merits in spite of the best legal and expert advice which investors can procure speaks more about the quality of some of the cases which are mounted against states than about the independence and impartiality of the arbitral tribunals.

32 https://en.wikipedia.org/wiki/Philippe_Sands accessed on 27th March 2019.

On the alleged asymmetry which gives investors freedom to bring claims against states, while states cannot bring claims against investors, Judge Schwebel's response is that states can, and have, brought counterclaims against investors under ICSID and UNCITRAL. Fair enough.

Regarding the often-conflicting arbitral awards, he readily admits the charge and says that such cannot be unexpected in the decentralized, horizontal nature of the ISDS system. He adds that conflicting interpretations of similar provisions in BITs often arise because tribunals are responding to differences in the facts of each case and that even in the relatively centralized, hierarchical judicial systems of a state, conflicts among courts are common, aptly demonstrated by the inconsistencies that exist between state and federal jurisprudence in the US.

Being labelled as noise makers is something the critics can live with but it cannot extinguish debate on the small matter of ICJ judges' willful violation of an express statutory provision even if institutional failures in ICJ and the UN stop the matter from being addressed.

According to Edmund Northcott and Acacia Hosking[33], the changes in the works at ICSID are limited to electronic filing, disclosures of third party funding, requirement of parties consent for publication of awards, security for costs, bifurcation, requirement for parties to challenge the arbitrator within 20 days of the basis of challenge arising instead of "*promptly*", new time lines for selection of arbitrators and for publication of awards etc. While those changes are desirable, their impact would be minimal on the main areas of criticism - costs and duration of proceedings and zero effect on the remaining for criticisms, i.e. inconsistent and "incorrect *decisions*", incoherence in interpretation, lack of diversity and lack of independence, impartiality and neutrality.

Amendment of the Convention itself would be quite cumbersome, if not impossible. Article 65 stipulates that any contracting state may propose amendment of this Convention by sending a proposed amendment to the Secretary-General not less than 90 days prior to the meeting of the Administrative Council at which such amendment is to be considered. The

33 10Things you need to know about the new draft ICSID Rules https://www.kwm.com/en/be/knowledge/insights/10-things-you-need-to-know-about-the-new-draft-icsid-rules-20181119 accessed on 2nd April 2019

proposal would then be transmitted by him or her to all the members of the Administrative Council. According to Article 66, if the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depository of this Convention of a notification to contracting states that "all Contracting States have ratified, accepted or approved the amendment". Any amendment must be ratified by all the Contracting states to be effective. Getting all the contracting states to ratify an amendment would probably take decades. Therefore, reforming ICSID through mandatory or optional arbitration rules is a more practical solution. Will ICSID rise to the occasion or it will adopt Justice Schebel's dismissive attitude of critics as noisy, uninformed and misinformed?

## 8. International Arbitral Institutions

The challenges and practical difficulties with each of the above options opens a unique opportunity for innovative and reputable arbitral institutions in international commercial arbitration to diversify to investment arbitration through rules which address the various criticisms. While a proven track record would be advantageous, the opportunity is open to new institutions also. There may even be room for like-minded institutions to put aside the ever-present sibling rivalry and cooperate in jointly developing the rules but administering the arbitrations independently.

There are several categories of arbitral institutions: national or government sponsored, professional associations like CIArb. and independent international bodies which are neither of the first two, special interest groups in unrelated professional bodies and completely privately owned institutions which are owned by a handful of arbitrators. Each category has its strength and weaknesses, which define its suitability for this role.

An interesting controversy[34] arose in India about the government's alleged attempted control of the proposed New Delhi International Centre. A petition filed in court claims that the enabling ordinance[35], in its present form, is unconstitutional as it compromises the independence of judiciary because of the control which would be exercised by the central government in the appointment of the arbitrators. While s.14 gives the Arbitration Centre authority to maintain a panel of arbitrators, section 28 authorises that centre to establish the chamber of arbitrators and to scrutinise the application for empanelment of the arbitrators.

The petitioner's case is that the since the composition of Centre under section 5 is majorly formed of the central government, then the independence and autonomy of the centre would be compromised. CIETAC has emerged out of the blues to become a world leader in domestic and international commercial arbitration. BRI projects give it an excellent entry point into ISDS. Whether China can break into the ISDS market depends on numerous factors which have discussed in a general manner above.

## 9. The Spectrum

The following table is an attempt to analyze the options in an empirical manner. It is work in progress and reflects the author's interim thoughts as at 20th April 2019. Even the weights (0-5 and 0-10) and scores are provisional. It could even be that he has left out some of the issues which should be scored.

34 https://barandbench.com/delhi-hc-new-delhi-international-arbitration-centre/

35 New Delhi International Arbitration Centre Ordinance, 2019

## Matrix of ISDS Options

| | Special Nat. Courts | Int'l Investment Court | Reformed Arbitral Institutions | Reformed ICSID |
|---|---|---|---|---|
| Absence of bias (0-10) | 4 | 7 | 7 | 9 |
| Advantage* of parties' choice of tribunal (0-10) | 0 | 0 | 10 | 10 |
| Costs of proceedings (0-10) | 10 | 5 | 0 | 5 |
| Absence of inconsistency, incoherence and incorrect decisions (0-10) | 10 | 8 | 6 | 8 |
| Taking too long (0-5) | 4 | 5 | 3 | 3 |
| Lack of diversity (0-5) | 0 | 3 | 5 | 5 |
| Confidentiality (0-5) | 0 | 2 | 5 | 0 |
| Total | 28 | 30 | 36 | 40 |
| Ranking | 4 | 3 | 2 | 1 |

*The right of parties to take part in the appointment of the tribunal is here taken as an advantage, but that it can also considered a disadvantage is acknowledged.

The relatively low score of an international investment court are unexpected. A reformed ICSID emerges the most viable option but, should it not rise to the occasion then the next contender is reformed arbitral institutions. It is worth repeating that a thorough comparison based on empirical study or even a completely different comparison matrix are required but that those are far beyond the scope of this paper.

## 10. Time Lines

The ideal time for ISDS reforms was 20 years ago. The next ideal time was yesterday. Obviously, how soon they will take place depends much of the option or options which are chosen. Some options are inherently slow due to the numbers of players involved, while others are a copy and paste affairs which can be up and running in months.

The Chartered Institute of Arbitrators (CIArb) held a panel discussion[36] in London on 13th February 2019 under the telling theme, "Evolution, Not Revolution: CIArb's Work on Investor State Dispute Settlement

36 https://www.ciarb.org/news/evolution-not-revolution-ciarb-sets-out-its-approach-to-the-question-of-isds-reform/

(ISDS) Reform at UNCITRAL Working Group III". It recognised the need for reforms to improve the consistency, clarity and predictability - lack of consistency of the decisions as one of the concerns creating unpredictability of the results and how standardization would lead to a uniform interpretation of the key concepts in international arbitration and many states loss of confidence in the current dispute resolution system. Conflicts of interest, ethics, code of conduct and possible sanctions were also discussed as could be expected in a forum called by a professional body which trains and accredits arbitration practitioners. The participants cautioned that reforms should be carried out an incremental way. They advocated evolution, which, at least in the strictly scientific sense, has no agenda, time frame or pre-determined outcome. Evolution has evidently failed to recognize, let alone address, these complaints for decades.

Evolution has its place and has in fact been going on silently all the while. One just has to consider the changes in arbitration jurisprudence, BIT content, confidentiality in investment disputes, the so- called Americanisation of arbitration and the gender diversity to appreciate the role which evolution has played. The pace must be determined by the issues at stake. Paucity in ethics among arbitrators and lack of confidence in the entire ISDS system cannot be left to left to evolutionary forces any longer. You can't cross a river in installments.

Obviously, whoever is either making a net gain or not hurting particularly badly from the status quo cannot begin to appreciate the urgency. For example, South Africa has terminated BITs in which it is host state and retained the ones in which it is the investor. This gives a hint of who between investors and states is benefiting more from the flawed ISDS system.

Continued resistance to reforms could lead to the next stage. Many states refusal to take part in ISDS or to honour awards which would put ISDS, states, investors in a most awkward position. That would pressurize the various players to cooperate in accelerating the ISDS reforms. African states threats, whether justified or not, to quit the Rome Statute en mass shows that the clamour for ISDS regimes could turn nasty if not addressed in a timely, fair and systematic manner.

## 11. Epilogue

The common thread in the criticisms facing ISDS points to an integrity crisis. Users are losing confidence in the entire system from the institutions, arbitrators, lawyers and international arbitration as a dispute resolution forum. To put things in perspective, would a national judiciary, faced with such flaws, survive? If not, then ISDS must not be allowed to survive in its current state. And time is of the essence: - a legal, political, economic or even mechanical system which is inherently flawed is costly to maintain in the short run and must be replaced sooner than later.

The above approach might give the wrong impression that the choice is between one or two options and all the others. In reality, all of the options will probably be attempted simultaneously, competing for space and disputes until one or two fora takes clear dominance probably twenty years down the line.

Some of the criticisms against ISDS revolve around ethics, integrity, conflict of interest, disclosures etc...CIArb. and the International Bar Association, have developed various guidelines and codes for application in domestic and international arbitrations already while the former is a specialist in the professional training of arbitrators. Their unrivaled experience and expertise in those fields should be mainstreamed into investment arbitration.

Finally, the pro- and anti- arbitration pendulum moves all the time but the metal ball never stops or spins out of control. In spite of all the criticism, even in domestic situations, many parties, even when they have other options, still prefer arbitration to litigation. Internationally, there are limited practical options outside amicable settlement. The choice is between arbitration and arbitration.

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Nairobi Centre for International Arbitration
Co-operative Bank House, 8th Floor.
Haile Selassie Avenue,
P.O Box 548-00200 Nairobi, Kenya.

Tel: +254 771 293055
Email: info@ncia.or.ke
www.ncia.or.ke