RETHINKING INVESTMENT DISPUTE RESOLUTION MECHANISM WITHIN SADC:

SWISSBOURGH DIAMOND MINES (PTY) LTD AND OTHERS

VS THE KINGDOM OF LESOTHO –

AS A CASE STUDY

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DECLARATION CERTIFICATE

I declare that this Mini-Dissertation which is hereby submitted for the award of Legum Magister (LL.M) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

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LIST OF ACRONYMS

ACFI	Agreements on Cooperation and Facilitation of Investments
BEE	Black Economic Empowerment
BITs	Bilateral Investment Treaties
CIFA	Cooperation and Investment Facilitation Agreements
CPSID	Convention for the Pacific Settlement of International Disputes
FDI	Foreign Direct Investment
FIP	Finance and Investment Protocol
FTAs	Free Trade Agreements
GATT	General Agreement on Tariffs and Trade
ICSID	International Convention on Settlement of Investment Disputes
ILC	International Law Commission
ISDS	Investor-State Dispute
JC	Joint Committee
LHDA	Lesotho Highlands Development Authority
MRA	Mining Rights Act
NAFTA	North America Free Trade Area
PCA	Permanent Court of Arbitration
REC	Regional Economic Community
SADC	Southern African Development Community

SSDS	State-State Dispute Settlement
TPP	Trans-Pacific Partnership
TTIP	Trans-Atlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties

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CHAPTER ONE

General Introduction

1.1 Introduction

International investment dispute resolution has been a subject of much debate in the recent years. This is a result of the proliferation of both bilateral investment treaties (BITs) and free trade agreements (FTAs) which contain investment chapters. The rise in number of these agreements has resulted in a rise in the number of disputes between investors and host states. Developing countries including Sub-Saharan African states rely on foreign direct investment to stimulate their economic development. In order to achieve this, countries entered into BITs and FTAs for the promotion and protection of such investments. However, the same protection that has been afforded the investors has come back to haunt many states. Countries like the Republic of South Africa have had to rethink their stance as regards all their BITs and even influenced a shift in the regional economic community's investment chapter. Traditionally investment dispute resolution has been influenced by BITs which have incorporated investor state dispute resolution, by which they allow investors to approach international arbitral tribunals for relief for any interference with their investments. The said system has received in recent times a lot of criticism and there is a paradigm shift from the investor state dispute resolution to state to state dispute resolution. Despite the apparent shift and or confusion in the dispute resolution the vital importance of an effective dispute resolution mechanism to any Regional Economic Community (REC) cannot be underestimated as it is one of the vital components for sustainability of regional integration.[1]

The Southern African Development Community (SADC) is a REC established per the SADC Treaty signed in August 1992 in Windhoek.[2] SADC places high premium on the achievement of development and economic growth.[3] In its quest to pursue the said objectives of economic integration and the rule of law, the SADC established the SADC Tribunal in 1992 which only

[1] Saurombe A, Analysis and Exposition of Dispute Settlement Forum Shopping for SADC Member States in the light of the Suspension of the SADC Tribunal, (2011) 23, SA Merc Law Journal, 392 – 406, at page 364.
[2] Treaty of the Southern African Development Community ('the 1992 Treaty') (opened for signature 17 August 1992) available at <http://www.sadc-tribunal.org/docs/Treaty.pdf>.
[3] Article 4.

assumed its operations in 2005. Article 16(1) of the Treaty states that the 'Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon disputes ... referred to it'. Apart from the tribunal and for the promotion and protection of investments SADC adopted the Protocol on Finance and Investment (FIP).[4] The protocol contains an investment chapter in annex 1 of the protocol. It provides for both the protection of investments and a dispute resolution platform. The dispute resolution mechanism is characterised by investor state dispute resolution. It provides an investor with the option to approach either the SADC tribunal, the ICSID or ICSID additional facility and it provides also for the dispute to be brought before an ad hoc tribunal under the UNCITRAL rules of arbitration.

The SADC Tribunal was however suspended in 2010 by the Heads of State, trimming down the number of fora available for dispute resolution. At the time of its suspension, there were cases pending before the tribunal which to date are still pending with no direction as to how they should be dealt with. One such case is the case of *Swissbourgh Diamond Mines v. The Kingdom of Lesotho*,[5] the case has now been referred for international arbitration in Singapore pursuant to article 28(2) of the FIB. Subsequent to the suspension of the tribunal which action has been attributed to political motive, the Heads of State of the SADC have already signed a Protocol on the New SADC Tribunal. Though the latter has not come into force, it brings about more changes in the investment dispute settlement mechanism in that it curtails the jurisdiction of the Tribunal and reduces it to State to State dispute settlement. This has a direct effect on the pending case which could possibly not be heard to finality.[6]

As a direct consequence of the suspension of the Tribunal and non-communication of a strategy for the pending cases going forward, the promoters of the Swissbourgh mines have lodged the claim afresh in arbitration under the UNCITRAL Arbitration Rules. The facts in brief are as follows: on or around October 1986 the Kingdom of Lesotho and the Republic of South Africa concluded a treaty concerning the Lesotho Highlands Project. The intention was to build dams in

[4] Entered into force on the 16th day of April 2010.
[5] *Swissbourgh Diamond Mines and Others v. The Kingdom of Lesotho*, Case No SADC (T) 04/2009 (11 June 2010).
[6] The case in point is the Swissbourgh Diamond case referred to in footnote 5 above.

Lesotho the first phase of which was the building of Katse Dam which would supply water to the South African province of Gauteng. For purposes of the construction and facilitation of the project a statutory body was formed which is the Lesotho Highlands Development Authority (LHDA). In the course of its duties relating to the construction of the Katse Dam in 1991, the LHDA was served with an interdict interdicting it from pursuing construction activities at or near the Rampai area which was a catchment area for the dam.

The interdict was sought and granted by the High court of Lesotho pursuant to an application by the Swissbourgh Diamond Mines. Swissbourgh Mines had acquired from the Government of Lesotho certain mining rights and were issued with a mining lease for the Rampai area which apparently fell within the Katse Dam catchment area. The rule nisi was subsequently discharged by agreement but the final determination of the application was kept in abeyance pending negotiations and a possible settlement. On or around March 1995 the LHDA lodged a counter-application for a declaration that the Rampai leases awarded to the Swissbourgh Diamond Mines be declared void *ab initio* as certain process and formalities had not been followed in their application process. The Court found in favour of the LHDA. Swissbourgh Diamond Mines appealed the judgment and its appeal was dismissed in October 2000. The basis of the judgement of both the High Court and the Court of appeal was that the processes that were not followed were very vital and went to the very root of land allocation in Lesotho which is also enshrined within the Constitution of Lesotho.

The promoters of the company and shareholders being South African citizens; approached the South African government for diplomatic protection. The Government turned down their request for diplomatic protection. They then approached the High Court of South Africa to challenge the decision of government not to afford them diplomatic protection.[7] The case was dismissed and they appealed the Supreme Court of Appeal and the appeal was dismissed.[8] In 2010 the case was brought before the SADC Tribunal with the mine and the promoters alleging based on the judgement there was an expropriation of their investment in Lesotho. There has not been any finality as aforementioned to the matter. The matter has been heard by an arbitral tribunal

[7] *Swissbourgh Diamond Mines (Pty) Ltd v Government of the RSA* 1999 (2) SA 279.
[8] *Van Zyl and others V. Government of Republic of South Africa* (2007) SCA 109 (RSA).

(Permanent Court of Arbitration)[9] which in turn has ordered that a tribunal be set to hear the matter as it has been filed in the SADC Tribunal.[10]

During the period of the suspension of the tribunal and before the judgement on jurisdiction in the above mentioned matter the SADC amended the FIP to totally exclude investor state dispute resolution in favour of the seemingly recently preferred state to state dispute resolution. [11] The amendment has a direct impact on the case at hand as it means that the investor does not enjoy direct access to the SADC Tribunal under its current formation except by support from its home state.

1.2 Statement of the Problem

Investment dispute resolution is an integral part of the SADC's effort to protect investments. Investment dispute resolution within the SADC is based on the articles 27 and 28 of the FIP. Article 28 provides for a leeway for forum shopping as it provides for the submission of a claim to the SADC Tribunal, investor state dispute settlement under the United Nations Commission on International Trade Law (UNCITRAL) rules[12] or structured arbitration in terms of the International Centre for Settlement of Investment Disputes (ICSID) and the ICSID Additional Facility rules[13]. The annex 1 could be interpreted as pro-investors. This is more so as it provides the investors with an option to approach international arbitral tribunals in order to resolve investment disputes between themselves and their host states. This means of investment dispute resolution is preferable to investors at it involves lesser hassles of state to state involvement.

[9] Singapore Permanent Court of Arbitration.
[10] *Swissbourgh Diamond Mines (Pty) Limited et al v. Kingdom of Lesotho* PCA case no. 2013-29, Partial Final Award delivered on the 18th April 2016, page 133.
[11] During its sitting of the 12-14 February in Botswana the Committee on the Annex one passed a resolution to amend the FIP and removed the dispute resolution mechanism. The document is only awaiting a ministerial conference for it to be adopted.
[12] The UNCITRAL Arbitration Rules are ad hoc arbitration rules adopted in 1976 in order to help investors and state parties and state to state with their dispute resolution, it has no permanent seat but parties can agree on the seat and other essentialia such as the appointment of arbitrators and the language and choice of law for the arbitration.
[13] ICSID Convention, establishes the centre for settlement of disputes, it was adopted under the auspices of the World Bank to address the issue of investor state dispute resolution as between a member host country and an investor, giving the investor audience at an international level. Unlike the UNCITRAL rules it is institutionalised and only admits Investor state dispute (ISDS) and not state to state dispute resolution.

The suspension of the SADC Tribunal has dented options available to investors in terms of fora to which investment disputes can be instituted. The ratification of the amended FIP would then aggravate the situation as it will scrape-out all other fora leaving state to state dispute resolution as the only option for investors. The new SADC further does disservice to the dispute resolution mechanism within SADC as it affords *locus standi in judicio* only to the states.

The Swissbourgh case puts a test to a previously untested dispute resolution mechanism and provides a practical example of an ineffective dispute resolution mechanism and it raises legal questions which put into question the ability or veracity of the SADC to provide for an effective dispute resolution mechanism.

In 2012 the SADC promulgated the SADC BIT Template, though not compulsory for use by member states it has a direct bearing on the dispute resolution mechanism. It is more detailed than annex 1 and brings up issues of policy space and the respect for host state laws.[14]

Looking at the sum of the documentation laying the basis for the SADC dispute resolution mechanism, and testing the same per the case forming the case study, the probative question is whether the dispute resolution mechanism within SADC is effective and efficient and whether the it actually protects the interests of both the investor and the host state.

1.3 Research Questions

The research will therefore answer the question whether or not the FIP offers a sound, effective and efficient dispute resolution mechanism that could be relied on by investors, host states and home states. The following sub questions will help reach a relevant conclusion:-

[14] Woolfrey S, A New Approach to Investment Governance in Southern Africa, Monitoring Regional Integration in Southern Africa Yearbook 2013-2014, Trade Law Centre and Konrad-Adenauer-Stiftung.

- What is the status of the dispute resolution mechanism within the SADC and how did it evolve? What are the repercussions if any of the pre-suspension of the SADC Tribunal, suspension of the SADC Tribunal, and the amendment of the FIP?

- Using the Swissbourgh case as a case study what has been the impact of the SADC dispute resolution on the disputes raised as per Annex 1 of the FIP? What are the repercussions of the PCA's ruling on the dispute settlement in SADC?

- What are the consequences of the new protocol on the SADC Tribunal on the dispute resolution mechanism? A comparative analysis will be done of the dispute resolution mechanism within the SADC with those provided for under the SADC Model BIT, the US Model Bit and the Brazilian Agreements on Cooperation and Facilitation of Investments. What impact if any would the protection of investments Act of South Africa have on the SADC dispute resolution Mechanism?

1.4 Thesis Statement

Foreign direct investment is key to economic development. It is needed most in SADC hence the efforts to promote the region as preferred investment destination.[15] The largest downside risks of investors for this region are amongst others political risks.[16] As indemnity against such risks investors are likely to invest in countries where there is investor protection and a dispute settlement system through which they could have access to international investor state dispute settlement as compared to other forms of dispute settlement. On the other hand most host states are pushing for acknowledgement of their policy and regulatory space in their quest to promote and protect investments. There is therefore a need for a balance of rights of both host states and investors within the investment dispute resolution in order to have a sound and effective dispute resolution mechanism.

[15] Preamble, Protocol on Finance and Investment.
[16] Vasani S et al, Protecting Foreign Investments in Sub-Saharan Africa: The Southern African Development. Community and its Protocol on Finance and Investment, available at http://www.jonesday.com/Protecting-Foreign-Investments-in-Sub-Saharan-Africa-01-06-2014/?RSS=true, accessed on the 12th November 2015.

1.5 Justification of the study

The need for foreign direct investment cannot be under estimated. SADC as a community is inclined to attract the same, like most developing states, they have as a result therefore adopted annex 1, which contains the dispute resolution mechanism for the region. There is a visible paradigm shift in the investment resolution sphere. Traditional Investor state dispute settlement as influenced by BITs has been criticised as pro-investors and denying the host states enough policy space. The dispute resolution mechanism within the SADC is itself influenced by Traditional BITs and the dispute settlement mechanism therein is more or less along the same lines that of a BIT. There is an apparent shift from investor state dispute settlement to state-to-state dispute settlement mechanism. FIP Annex 1 as amended seems to have taken into account the shift but has at the same time promulgated a model BIT that encompasses the same without making them part of the protocol. Otherwise than this annex 1 of the FIP has not been subjected to a practical exercise nor has it been litigated over to completion to evince its efficiency and effectiveness and as such the study will subject the dispute resolution mechanism to the test.

There is an undeniable shift in paradigm in the investor state dispute resolution towards a balance in the dispute resolution mechanism and as a result therefore there is need to rethink the investment dispute resolution mechanism of SADC in the light of the challenges peculiar to the region using one of the cases borne of the system.

1.6 Research Methodology

The research will be mostly desktop research it will consider both primary and secondary research material. It will adopt a descriptive, analytical and make a critical analysis to the provisions of the SADC Protocols, the case at hand and the relevant legislation. It will also undertake a comparative analysis of the relevant provisions of the investment chapter of the FIP with the US and the India Model BIT templates for lessons if any to learn from the same. The reason to choose the US and the India model BIT is that they are the most recent and looking at the SADC model BIT, it would seem that certain aspects of both model BITs were considered and have in some form or another influenced the model SADC BIT.

1.7 Limitations of the Study

The study will consider investment dispute settlement within the SADC, the tribunals within the SADC system, the provisions of the SADC Protocols that have a bearing on investment dispute settlement and a comparative study will be made between the SADC dispute settlement with the US and the Brazilian model templates to identify whether there are any lessons to learn from the same and then recommendations will be made on how to best re-construct the dispute settlement within the SADC.

1.8 Chapter Breakdown

Chapter one will focus on the introduction, statement of the problem, research questions, the research rationale, hypothesis and the scope and limitation of the research.

Chapter Two will look into the evolution of dispute resolution in investments. The evolution of the investment dispute resolution within the SADC, with emphasis on the status of investment dispute resolution before the promulgation of the FIP and the SADC Tribunal, the emergence of the tribunal, its suspension and its re-surfacing in a different formation, and what will obtain post the amended FIP.

Chapter three will traverse the Swissbourgh case, the history of the case from the High Court of Lesotho, the Appeal Court, the High Court of South Africa and the Supreme Court of Appeal, the SADC Tribunal, the international arbitration under the PCA, the consequential pending arbitration before a newly composed SADC Tribunal. The questions of law raised therein will be critically examined such as the retrospective application of the FIP, indirect expropriation, respect for host state domestic laws, and the concept of exhaustion of local remedies. How the current dispensation will affect the case and its completion and the consequences brought about by the award by the PCA.

Chapter four will be a comparative analysis, it will look into the relevant provisions of the Model SADC BIT template 2012 in line with the proposed new dispensation of dispute resolution. An analysis will be conducted between the two and dispute resolution as provided for under the US

BIT 2012 and the Brazilian Agreements on Cooperation and Facilitation of Investments (ACFI) Model template. The USA has been in the earlier years an exporter of Capital, but in the recent years it has become an importer and promoter of FDI with the shift came about the emergence of a new model template the 2012 template. Brazil on the other hand has moved away from model BIT and has introduced what it has been termed ACFI which have brought about a lot of changes both to the protection of investments and policy space of the host nation. The South African Protection of Investments Act 2014, and its possible influence to the SADC dispute Resolution mechanism and its possible effects on the dispute resolution mechanism within the region will be looked into and how it could help influence the investment dispute resolution mechanism within the Community.

Chapter five will look into the conclusions and the recommendations for a better dispute resolution mechanism within the region and the end of the paper.

CHAPTER TWO
EVOLUTION OF INVESTMENT DISPUTE SETTLEMENT

2.1 Introduction

It is imperative therefore in traversing the investment dispute resolution within the SADC to examine the evolution of this phenomenon as it has evolved with time and has become one of the most controversial fields of study in International Investment Law. This chapter will therefore look into the background of investment dispute resolution from the gunboat diplomacy, to the evolution of the Calvo doctrine, the emergence of ICSID, the adoption of the Protocol on the SADC Tribunal and the adoption of the FIP to the suspension of the SADC Tribunal, the Protocol on the new SADC Tribunal and the amendment of the FIP. The controversy within the dispute settlement mechanisms in International Investment law will be analysed with particular attention to investor state dispute resolution mechanism and how it has affected investment dispute resolution within SADC.

2.2 Gunboat Diplomacy

In the beginning there were guns.[17] In the Middle Ages, and even after the emergence of the modern nation state in the seventeenth century, an alien and his property were subject to abusive and discriminatory treatment, either at the hands, or with the implicit permission of the local governing body.[18] The remedy for such a dispute was the reprisal from the home state of the alien.[19] These reprisals were often characterised by threats by more powerful states against their investment counterparts and this state of affairs was referred to as the gunboat diplomacy. This is a Darwinian model where law and order were substituted for prevalence of force by imperial states to extract concessions from weaker states.[20]

[17] Cook J. T, The Evolution of Investment State Dispute Resolution in Nafta and Cafta: Wild West to World Order, Pepperdine Law Review, vol 34:1085, 2007, at page 1088.
[18] Johnson Jr. T and another, From Gunboats to BITs, The Evolution of Modern International Investment Law, page 649.
[19] Ibid at page 649.
[20] Ibid at page 1088.

The reprisal by the alien's home state were based on the notion of state responsibility for injuries to the aliens the core of which is believed to have been first stated by Emmerich Vattel in 1758: "whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen".[21] During the nineteenth century when investment started to boom, it was often between the western states and their colonies, and as such the law that governed the investment was the law of the colonial master, but in the advent where FDI started to spread to other countries otherwise than the colonies, there emerged a minimum standard to which the western powers believed their citizens should be subjected to.[22] The western powers believed that their nationals should not be subjected by theirs host states to a standard of treatment below a certain international minimum, even if that standard entailed treatment of the alien better than that guaranteed by the host state for their own nationals. They held further that if the standard was not met, they had, based on the principle of diplomatic protection as we know it today, the right to treat the act or omission by the host state as an international wrong against the home state, for which the home state was entitled but not bound to seek reparation in its own name on behalf of the alien.[23]

The use of force or threat thereof on behalf of aliens was not itself a means to an end, it somewhat necessitated the adjudication of the claims under the standards which the powers reckoned would be acceptable.[24] And as a result thereof and with the progression of the nineteenth century there emerged *ad hoc* tribunals that arbitrated over disputes. The highlights of the process and a milestone of the said arbitration process was the adoption of the Convention for the Pacific Settlement of International Disputes (CPSID) and later to the establishment of the Permanent Court of Arbitration at The Hague.[25] The signatories of the treaty recognised arbitration as the most effective and most equitable means of settling disputes that diplomacy had failed to

[21] De Vattel E and another, The Law of Nations: Or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns (Philadelphia: T. & J.W. Johnson, 1884) at page 161 cited by Johnson Jr. and another Ibid at page 649.
[22] Ibid page 651.
[23] Ibid page 651.
[24] Ibid at page 653.
[25] The convention was adopted at the 1899 Peace Conference at The Hague. The PCA was established as per chapters II and III of the said treaty.

settle.[26]Arbitration at the time was still espoused as diplomatic protection as individuals at the time had no right of audience before the tribunals and only states could appear on their behalf.

With the change in times, the waning of grips by colonial powers,[27] and the outlawing of the use of force by the United Nations Charter and the increasing possibility of condemning states which resorted to aggression to maintain their positions in world trade and investment;[28] gunboat diplomacy lost favour most especially with the Latin American states and a new doctrine emerged in the form of 'Calvo doctrine'.[29]

2.3 The Calvo Doctrine

The doctrine postulated that foreign investor or aliens, as the case may be, enjoyed or had only the rights and privileges enjoyed by nationals of the host state and they could only therefore seek enforcement of such rights only before national courts.[30] Where disputes emerged between a foreign investor and a host state, it provided that the investor had to assert his rights before the local courts and that the foreign investor had no recourse to diplomatic protection by his home state, nor does the investor have recourse to international dispute settlement fora.[31] The doctrine negated diplomatic protection and the military interventions; it postulated that aliens were entitled to no greater treatment than that afforded to nationals under the laws of the host state.[32]

Mexico as a South American state in the succeeding decades to the emergence of this doctrine nationalised a majority of US owned businesses in Mexican Agrarian and oil business. This resulted in exchanges between the then US Secretary of State Cordell Hull and his counter-part

[26] Op cit Johnson Jr. at page 654.
[27] Op Cit at page 1089.
[28] Sornarajah M, The International Law on Foreign Investment, 3rd Ed, Cambridge University Press, 2010, Cambridge, page 123.
[29] Carlos Calvo is an Argentine Jurists who in 1868 published his study the "Derecho Internacional Terico y Practico de Europa y America (1868) and the "le droit international: theory et practique" 1896, he is the father to the legendary Calvo Doctrine.
[30] Op Cit (Sornarajah), page 123.
[31] Dolzer R and another, Principles of International Investment law, 2008, Oxford University Press, New York, page 12.
[32] Op cit (Johnson Jr) page 656.

when a letter was written to the latter which letter today forms the basis of what is commonly referred to as the 'Hull doctrine'. The letter spelled out that international law allowed the expropriation of foreign property but where such is the case, it required that there should be "prompt, adequate and effective compensation".[33] This standard of protection still subsists to date in most bilateral investment treaties forming the basis for compensation in case of expropriation. Though not profoundly, however, the Hull doctrine in a way crystallised the diplomatic protection of home state of their citizens in foreign territories which protection the Calvo doctrine was seemingly negating. This is more so because in this earlier times and based on the common law principle that:

"it is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right – its right to ensure, in the person of its subjects, respect for the rules of international law,"[34]

2.4 Diplomatic Protection

Traditionally, diplomatic missions are put in place in order amongst others to pursue and protect the interests of a state's nationals abroad. This is based on the fiction exalted in the *Mavrommatis Palestine Concessions* case, which is that diplomatic protection is based on a notion that an injury to a national constituted an injury to the state itself.[35] This fictitious duty was then extended to include business interests of foreign investors as they were taken as the property of the aliens and thus were rightfully due to be so protected. Traditionally, under international law investors did not have a direct access to international remedies to pursue claims against foreign states for violation of their rights; they depended solely on their home states to pursue the claims on their behalf.[36]

[33] Ibid page 13.
[34] *Mavrommatis Palestine Concessions case* PCIJ, ser. A, No2, page 12.
[35] Duggard J,First Report on Diplomatic Protection, International Law Commission, 52nd session obtained from https://www.researchgate.net/publication/237569196_First_report_on_diplomatic_protection, on the 14/04/16, page 1.
[36] Op cit, page 211.

Diplomatic protection is however not a right that a citizen can rely on, but lies within the discretion of the home state that may decide whether to provide it.[37]

For a foreign investor to qualify for diplomatic protection, a number of factors were considered and they include the following:-

a) The willingness of the state to take up the matter on his behalf, which willingness could be revoked at any given time by the state depending on the pressures or other influences that it has.[38]
b) The foreign investor must have an effective link of nationality to the state which espouses his claim.[39] This link was supposed to have existed continuously from the time the injury occurred until such time that the claim was presented on behalf of the individual.[40]
c) The exhaustion of local remedies by the foreign investor before his home state could possibly take up the case on his behalf.

The law on dispute settlement developed further amongst others due to the inherent shortcomings of this doctrine and as a result of an ever ending need to find a working solution to investment dispute resolution.

2.5 The Emergence of Investor-State Dispute Resolution

The shortcomings in diplomatic protection led to the emergence of arbitration practice as between the individual investor and the host state. Professor Borchard in an essay in 1927 had the following to say about diplomatic protection and the emergence of investor-state arbitration:-

"Protection by the nation of a citizen abroad reflects one of the most primitive institutions of man – the theory that an injury to a member is an injury to his entire clan […]

[37] Schlemmer E.C, Protection of investors and investments, 21 S. Afr. Mercantile L.J. 734 2009, page 742.
[38] *Barcelona Traction, Light and Power Co. ltd (Belgium v Spain)* judgment, 5 February 1970, the court mentioned that "a state must be viewed as the only judge to decide whether its protection will be granted, to what extend it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case."
[39] Op cit, Dugard, page 2.
[40] Opt cit Dolzer R, page 211.

A cursory examination of the existing practice still demonstrates the inefficiency, if not, indeed, the unfairness of the system. When the citizen abroad is injured he is expected first to exhaust his local remedies […] Assuming that the local remedy is ineffective, the citizen may invoke the diplomatic protection of his own government. That government may act as it deems fit in the matter, either extend good offices, make diplomatic claim, or institute coercive measure of protection in the event that diplomacy fails. Coercive measures invite the danger of war, involving all the people of the claimant's state […]

It has been suggested heretofore that the nations should voluntarily agree automatically to submit all pecuniary claims to arbitration if diplomacy failed, and that arbitration should be deemed an inherent part of due process in such matters […]

It is submitted that international law may well go a step further. Whether or not the nations agree to submit such legal issues to arbitration, the individual himself should have the opportunity of trying the issue in the international forum before his state becomes politically involved in the case […] It could require treaties by which state would agree to permit themselves to be sued, but there would be a strong incentive on the part of both defendant and plaintiff states to institute this intermediary forum, […] By enabling the injured citizen to sue the defendant state in the international forum […] all three parties to the issue and the cause of peace would be benefited, for they would rely upon legal processes for the assurance of international due process of law to the alien. This is all any of the parties has the right to ask […] The institution of the practice would remove from the political to the legal field an important department of international relations"[41]

The need for investor-state dispute settlement was reflected as early as in these ages but it was not until the 1960 when the investor-state dispute resolution began to crystallise by the emergence of the Convention for the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention).[42] Investor-state dispute resolution has been made part of most

[41] Borchard M. E, Limitations on Coercive Protection, American Journal of International Law, 303 (1927), page 303 – 306.

[42] This was however not the birth of private arbitration, international commercial arbitration had at the time began in Europe and the US. And this has seen the birth of institutions such as the PCA.

traditional investment treaties. It has been dubbed as a unique creature of international law. It is largely an effort to both judicialize and depoliticize the process of resolving international investment disputes, namely; problems that private investors experience when state measures arguably damage the foreign investment.[43] The system has provided individual investors with a neutral dispute resolution mechanism which has the potential to lower commercial risk, facilitate confidence in the international investment system, and avoid the political sensitivities encumbering state-to-state adjudication.[44] It also has the benefit of dissuading the arguable bias by national courts, political interferences and other undue influences presumably faced by local courts regarding claims brought before national courts by investors.[45]

2.5.1 International Centre for Settlement of Investment Disputes (ICSID)

In 1965 emerged a new dispute resolution mechanism which gave investors recourse to an international mechanism of investment dispute resolution; the promulgation by the World Bank of the ICSID Convention.[46] The convention created the International Centre for Settlement of Investments Disputes (ICSID).[47] The purpose of the Convention is to promote economic developed by encouraging private international investment[48] by providing a reliable mechanism for impartially resolving disputes between an investor and the country of investment.[49]

Currently the ICSID Convention has been signed by around 160 countries. [50] However in recent times state parties have been withdrawing from the Convention, prompting calls for need to review the ICSID investor-state arbitration. The convention has given a platform for investors to approach

[43] FRANCK S.D, the ICSID Effect? Considering Potential Variations in Arbitration Awards, 51 Va. J. Int'l L. 825 2010-2011, at page 833.
[44] Ibid 834.
[45] Ibid 834.
[46] 575 UNTS159; ILM 524 (1965) The convention was adopted on the 18th March 1965 in Washington and it entered into force on the 14th October 1966.
[47] This is the reason why the convention is often referred to as the ICSID Convention. It is also referred to as the Washington convention as a result of its adoption thereat.
[48] Schreuer C, The ICSID Convention: A commentary, 2001, Cambridge University Press, UK, page 4, and this is as per the Preamble of the Convention.
[49] Op Cit, page 745.
[50] https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf, of all SADC Member states 11 out of fifteen member states are members to the treaty.

this arbitration tribunal directly without the intervention or assistance of their home states.[51] It has further curtailed the need for diplomatic protection; it however leaves room for home states to intervene or take up cases where the host state against whom an award has been entered fails to comply.[52]

There are requirements that need to be met before an investor may approach ICSID, to wit: " the host state and home state of the investor must both be parties to the Convention; " the dispute must be a legal dispute arising directly out of an investment;[53] " the investor and the host state must both consent to ICSID jurisdiction in writing;[54] and " the investor must be a 'national of another contracting state'".[55]

Awards awarded under the convention are final and binding, and they cannot be appealed but can only be annulled under very restrictive conditions. The awards cannot be overturned by a judgment of a local or other court.

In 1978 an ICSID additional facility was established.[56] It is more relevant for such cases where the jurisdiction would fall outside the jurisdiction of the ICSID Convention and parties herein would have to submit themselves to such jurisdiction.[57] It permits arbitrations on issues that do not arise directly out of an investment, and it can also perform fact finding.[58] The rules of procedure are similar to those of the ICSID safe for a few rules of acceptance of claims.

2.5.2 United Nations Commission on International Trade Law (UNCITRAL)

[51]Article 27(1) ICSID which provides for the following "no contracting state shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another contracting state shall have consented to submit or shall have submitted to arbitration under this convention, unless such other contracting shall have failed to abide by the award rendered in such a dispute.
[52] Article 27(1) ICSID Convention.
[53] Article 25 ICSID convention.
[54] Article 25(1).
[55] Article 25.
[56] Schefer N.K, International Investment Law, Text, Cases and materials, 2013, Edgar Eelgar Publishing Inc. page 375.
[57] Op Cit.
[58] Article 2, Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules).

Though the ICSID arbitration is the most common, it is not the only forum. Some investment treaties provide for some other means such as the UNCITRAL Rules of Arbitration.[59] The UNCITRAL Arbitration Rules were revised in 2010 to reflect the evolution in arbitral practice in the period since the adoption of the 1976 Rules. They were revised again in 2013 to incorporate the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.[60]

The UNCITRAL Rules of Arbitration are utilized mostly for *ad hoc* proceedings, but they also apply to administered arbitrations.[61] They cover a comprehensive set of procedural rules upon which parties can agree for the conduct of their arbitral proceedings.[62] They can be and are used for both Investor-state and state-to-state arbitrations and have been provided in numerous investment treaties as an alternative means of arbitration mostly alongside the ICSID Convention. The same obtains for the SADC Model BIT, the FIP before amendment and the US Model BIT 2012.

The version of the UNCITRAL Arbitration Rules in effect today comprises the 2010 revised rules and the 'rules of transparency' which provide for transparency in arbitral proceedings. It is presumed that the same shall apply under arbitration agreements concluded after August 15, 2010, except where the parties have agreed to apply a particular version of the UNCITRAL Arbitration Rules or where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.[63]

2.6 Is there a legitimacy crisis in Investor-State Dispute Settlement (ISDS)?

ISDS is currently embroiled in a legitimacy crisis. There are arguments against its inclusion in amongst others the Trans-Pacific Partnership Agreement (TPP) an FTA which could, if ratified by

[59] They were adopted by the General Assembly in 1976 under the auspices of the United Nations Commission on International Law, the rules were revised in 2010 and in 2013.
[60] Permanent Court of Arbitration Website, available at https://pca-cpa.org/en/services/appointing-authority/uncitral-rules/, accessed on the 19th May 2016.
[61] See UNCITRAL website and particularly at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html, accessed on the 19/05/2016.
[62] Ibid.
[63] See Permanent Court of Arbitration Website, available at https://pca-cpa.org/en/services/appointing-authority/uncitral-rules/, accessed on the 19th May 2016.

its members, cover as much as 36% of the world economy.[64] The so called legitimacy crisis has seen countries withdraw from the ICSID, the likes of Bolivia, Ecuador and Venezuela, and has seen countries such as Australia and India exclude them from their model BITs and FTAs.[65] There has been a shift in recent times even for the SADC region as shall be seen herein under from a full-fledged ISDS mechanism to a state-to-state mechanism. Countries like the Republic of South Africa who are not parties to the ICSID Convention have made an overhaul of their investment Treaties and have promulgated laws within their jurisdictions that deal with investor protection, and in so doing have completely cut ISDS and introduced state-to-state arbitration. Developing countries such as Brazil completely forego the inclusion of the ISDS system in their agreements.

The criticisms against ISDS include the following:-

(i) That ISDS system itself is pro-investors and provides VIP treatment for foreign investors.[66] ISDS further offends one of the basic structures on an investment treaty which is national treatment.[67] In terms of the principle such treatment afforded to nationals shall be afforded to foreign investors without any discrimination, however for ISDS purposes only the foreign investors are recognised players and not the local investors. It grants them further rights in that only they can bring about claims for takings against the host state whilst the host state itself is precluded from instituting any action against them for breach of obligations.[68] The investors are subjected to a standard of treatment sometimes above such which the host state itself cannot afford. The standard is adjudged as a minimum standard at international law, and the same standard cannot be subjected to any local and does not come with any corresponding duty from the investor. It thus also violates one of the fundamentals of the rule of law which is equality before the law.

[64] Matveev A, Investor-State Dispute Settlement: The Evolving Balance between Investor Protection and State Sovereignty, 40, U.W.Austl.L.Rev.348, 2015.
[65] Saya H, A Critical Analysis of the Commonly Recommended Reforms of Investor-State Dispute Settlement (ISDS), 4 Legal Issues J, 39 2016.
[66] See Corporate Observatory Europe, 'Still Not Loving ISDS;10 reasons to Oppose Investors' Super-Rights in EU Trade Deals', reason 3, https://corporateeurope.org/international-trade/2014/04/still-not-loving-isds-10-reasons-oppose-investors-super-rights-eu-trade. Accessed 20th January 2016.
[67] Ibid page 43.
[68] Op cit, (Corporate Observatory Europe) reason 3.

(ii) Another legitimacy criticism raised against ISDS is that it is fundamentally flawed.[69] It lacks the necessary judicial independence. The arbitral tribunals are usually manned by three arbitrators who are paid on an hourly basis and are not remunerated like judges. They often rotate and serve in one case as an arbitrator and counsel in the next,[70] this, it is believed creates a leeway for them to make investor-friendly awards such that investors could return for more claims in which case they continue to make more income in the future.[71] The decisions of such arbitral tribunals are not subjected to any legal scrutiny such as review or appeal as they are legally binding on the parties. Such decisions can only be annulled by the tribunal itself and this is despite the fact that those decisions could be legally wrong and the cost astronomically and financially damaging to the country involved.[72]

The constitution of the arbitral tribunal has also been attributed to the legitimacy crisis in that each party is determined to win, and this becomes the motive for such arbitral tribunal. Impartiality and justice are none of the disputant(s) concerns as they tend to be interested in one thing only; winning. They exercise their right of unilateral appointment, like everything else, with that overriding objective in view. The result therefore is about ways and means to shape a favourable tribunal, or at least to avoid a tribunal favourable to the other side – which is logically assumed to also be speculating with the same zeal and towards the same goal.[73] This is unlike an appointment of a judge who for all intents and purposes has to be impartial and met out justice.

(iii) Apparent inconsistencies in awards from the arbitral tribunals. ISDS is lesser concerned about the consistency of decisions and or the principle of *stare decisis* and thus the system has been accused of giving rise to an erratic pattern of decisions with reasoning often impressionistic.[74] This is against the fact that the credibility of the system depends on consistency. This is more so when it is perceived that a legal system that is jittery

[69] Op cit, (corporate Observatory Europe) reason 4.
[70] Op cit (Matveev) page 351.
[71] Op Cit (Corporate Observatory Europe) reason 4.
[72] Ibid reason 4.
[73] Van-Aaken A, Delegating Interpretative Authority in Investment Treaties: the case of Joint-Administrative Commissions in Jean E Kalicki and Anna Joubin-Bret (eds) Reshaping the Investor-state Dispute Settlement System – journeys for the 21st Century(Brill 2015) 21 at page 33.
[74] Op Cit (Matveev) at page 354.

and inconsistent runs the risk of its users losing confidence in it and in the long term defeat its own purpose.[75]

(iv) It is believed that the ISDS instead of being a defender for investors' rights, the system has been used as a tool by investors to fight the host states and thus weaken their regulatory power.[76] There has been a proliferation of ISDS claims against state parties in the last few decades that state parties' right to regulate has been shrunk and this has been referred to as a regulatory chill. One of the most recent cases has been the *Philip Morris Asia Limited v. the Commonwealth of Australia*,[77] the facts of which in brief are, Australia in its quest to regulate the health sector enacted the Tobacco Plain Packaging Act 2011 and the Tobacco Plain Packaging Regulations 2011, the net effect of which were to outlaw any adverts on cigarette packaging and to have the cigarette packaging in plain packets against the normally flashy packaging preferred by tobacco companies. The claimant, a tobacco company claimed that the Act and regulations as enacted abrogated the provisions of the treaty between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments. The claimant contended that the legislation barred the use of intellectual property on tobacco products and packaging, thus transforming Philip Morris Australia from a manufacturer of branded products to a manufacturer of commoditised products with the consequential effect of substantially diminishing the value of their investments in Australia.[78]

Though Australia has won the case on jurisdiction and admissibility, it only goes to show how far ISDS can invade into a countries regulatory space and cause the chill. And if Philip Morris had won the case it could have caused panic within the ISDS system and give a lot of credence to the criticism.

[75] Ibid page 354.
[76] Op cit (saha) at page 44.
[77] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA case No. 2012-12.
[78] Ibid para 6,7 and 8.

For Southern Africa there has been the infamous Foresti case[79] in South Africa, which case was brought about by the investors in the post-apartheid era who believed certain laws on the regulation of the mining industry had an expropriation effect on their mining rights. The Act complained of was part of the South African Black Economic Empowerment (BEE) policy aimed at balancing the scales between the formerly disadvantaged communities the white rich regime. The BEE policies have been litigated over in the courts of South Africa and stood the test and were proclaimed as positive discrimination. On the same note, though settled out of court, this goes a long way into showing how far ISDS can go in shrinking the regulatory space.

(v) Transparency or the lack thereof of the arbitral process is one of the causes of the crisis.[80] The transparency issue was one of the advantages of the ISDS, because parties could approach a tribunal without the fear that their commercial secrets could be exposed. However the same has been criticised and consequently led to the emergence of or developments in both the ICSID Rules and the UNCITRAL rules to include rules on transparency. However, this notwithstanding, the transparency is still an exception and not the general rule. Parties may agree to such publication.[81] The ICSID would in circumstances where parties are not agreeable to the publishing of the award and or proceedings just publish an excerpt of the legal reasoning of the award.[82]

(vi) Another criticism levelled at ISDS which is quite novel but exciting for our purposes is that it offers a backdoor privilege for investors to undermine and attack court decisions. [83] An Example in this instance has been made by reference to the *Chevron Corporation and another v. Ecuador*[84] case, where the claimant made a claim against the host state (Ecuador) in an international arbitration to avoid a judgement of around 9.5 billion US Dollars for a clean-up of an oil spillage in the Amazonian rainforests as ordered by the Ecuadorian Courts. The investor alleged that the judgement was in

[79] *Foresti and others v Republic of South Africa* (ICSID Case no. ARB (AF)/07/1)
[80] Sappideen R and Another, Investor-State Arbitration: the Roadmap from the Multilateral Agreement on Investment to the Trans-Pacific Partnership Agreement, 40 Fred.L.Rev.207 2012 at page 219.
[81] Op Cit (Corporate Observatory Europe) reason 3.
[82] ICSID Arbitration Rules, Rule 48 as cited in, Browner C. N and Another, What's in a Meme? The Truth about Investor-State Arbitration: Why it Need not, and Must not, Be Repossessed by States, 52 Colum. J. Transtnat'l L. 689, 2013-2014, at page 717.
[83] Op Cit (Corporate Observatory Europe) reason 7.
[84] *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL PCA Case No 2009-23.

violation of its rights to fair and equitable treatment as enshrined in the US-Ecuador investment treaty and it sought compensation.

The criticisms are not without corresponding arguments which seek to support ISDS, and these include the fact that ISDS is the best method of all available to dispute resolution as compared to the traditional diplomatic protection and the state-to-state dispute resolution. There is a lot of commotion within the international investment dispute settlement mechanism which has given rise to a shift in paradigm again from ISDS and alternatives to it as shall be looked into herein.

2.7 The SADC and Investment Dispute Resolution

The SADC FTA was notified under article XXIV of the GATT 1994 in 2004.[85] As aforementioned, it has amongst its objectives economic growth of the region and the settlement of disputes of whatever form within the region. The treaty at article 4 provides that, the member states should work towards the peaceful settlement of disputes, and to this end the SADC adopted the Protocol for the SADC Tribunal.

2.7.1 The SADC Tribunal

The tribunal was the judicial organ for the community with jurisdiction over contentious and non-contentious proceedings.[86] The treaty clothed the tribunal with the mandate to ensure adherence to and the proper interpretation of the provisions of the SADC treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.[87] It provided further that the Tribunal shall also give advisory opinions on any matter submitted to it by the Summit and the Council and that the decisions of the Tribunal shall be final and binding,[88] though it did not fully elaborate upon whom such decisions are binding. The jurisdiction conferred on the tribunal included disputes between state parties of the Community not only on the interpretation of the SADC protocols but

[85] Saurombe A, The Southern African Development Community Trade Legal Instruments Compliance with Certain Criteria of GATT Article XXIV, PEL/PELJ 2011(14)4 288.
[86] Khulekani, TOWARDS A SUPRANATIONAL ORDER FOR SOUTHERN AFRICA: A Discussion of the Key Institutions of the Southern African Development Community (SADC).
[87] Article 16 of the SADC Treaty.
[88] Article 15.

also on any other agreements that member states could conclude amongst themselves or within the community and which confer jurisdiction.[89] It was also clothed with the jurisdiction over disputes between natural or legal persons and states,[90] SADC, or any of its institutions,[91] non-state entities and SADC, SADC and its staff.[92]

The Tribunal protocol provided that the Tribunal shall be composed of not less than 10 judges from nationals of member states who possess the qualifications for appointment to the highest judicial offices in their respective states and are jurists of recognised competence.[93] The composition of the Tribunal was five designated judges who, in terms of the protocol, sat regularly and five other provisional judges who constituted a pool within which the president would in the absence of a substantive judge invite one to sit whenever there is a temporary vacancy or where a substantive judge is unable to carry out his duties. The president was elected from the five designated judges. [94]

The SADC Tribunal could be safely termed the apex court within the community. This is more so when the protocol provides that to ensure an effective and uniform application of SADC law within the region, national courts of member states may turn to the Tribunal to give preliminary rulings on any issue before the national court or national tribunal relating to SADC.[95] Its judgments and rulings in terms of the Protocol were final and binding.[96] The applicable law for the Tribunal was the Treaty, the Protocols and all subsidiary instruments adopted by the Summit, by the Council or other institutions or organs of the SADC pursuant to the SADC Treaty or any of its protocols.[97] The Tribunal Protocol further provided that the Tribunal shall develop its own jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of States.[98]

[89] Article 14.
[90] Article 15.
[91] Article 17.
[92] Article 18.
[93] Article 20.
[94] Article 22.
[95] Op cit page 73.
[96] Article 24.
[97] Article 21.
[98] Ibid article 21.

2.7.2 Promulgation of the FIP

In 2004 SADC promulgated the Finance and Investment Protocol. The protocol addresses a wide range of issues related to finance and investment. [99]The protocol states that state parties shall co-ordinate their investment regimes and cooperate to create a favourable investment climate within the region as set out in Annex 1.[100] Annex 1 sets out the necessary protections for investments within the Community. Though drafted in 2004 it only became binding on member states in 2006 after signature by the majority member states.

The FIP provides for definitions of investor and investment and provides for the protections normally provided for under a traditional BIT. Substantive protections are found under articles 5 and 6 of the Annex; they deal with both the illegality of nationalisation or expropriation of investments otherwise than for a public purpose, under the precepts of the law and in a non-discriminatory manner and encompasses the 'Hull doctrine' of payment of prompt, adequate and effective compensation to the investor. Article 6 provides for the fair and equitable treatment of investments within the community and the most favoured nation principle.

2.8 Dispute resolution within FIP

The protocol provides for a clear dispute resolution mechanism. It provides for the rights of investors to have access to courts, judicial and administrative tribunals and other competent authorities within the host state in order to address any grievances that could erupt as a result of an investment. It also provides for failure to adopt such measures by a state party as an abrogation of the FIP.[101]

Of greater importance to this paper is article 28. The article introduces investor-state arbitration within the community. It gives an individual investor the right to refer any dispute relating to an

[99] Claypoole C, The SADC Protocol on Finance and Investment: An Underused Investment Protection Tool in Southern Africa, International Arbitration Newsletter, Latham & Watkins, October 2013.
[100] Article 3 of the FIP.
[101] Article 27.

admitted investment to arbitration. The starting point being amicable settlement. Where the dispute is not resolved the Annexed mandate the dispute be subjected to local remedies. And where the same bears no fruit the Annex provides for a mandatory a cooling-off period of at least six months before the matter could be referred for arbitration.[102]

The annex provides for different fora for dispute resolution. It provides that state parties may agree to submit their dispute to the SADC Tribunal, the ICSID, and the ICSID additional facility this is because the choice of fora is based on the consent of a member state to such jurisdiction. The protocol also provides that where there is no agreement between the state party and an investor the said dispute shall be submitted for arbitration under the UNCITRAL rules of arbitration.[103]

Investor-state dispute resolution is an important tool for the investor in dispute settlement. This would go a long way into providing the necessary confidence of the investor who may otherwise be afraid of the lack of judicial independence within the host state. There has not been enough cases litigated by the SADC Tribunal resulting from the FIP as a result of the suspension of the said tribunal in 2010.

2.9 Suspension of the SADC Tribunal

The suspension of the Tribunal has been condemned as elevating the norms of solidarity and regime protection by the SADC Heads of State above democratic and legal principles espoused in the SADC Treaty.[104] The suspension has a huge impact on both human rights and investments at large and has been cited as a loss of a vital ally to the citizens of the community and its investors alike. [105] The SADC being proclaimed as a rule based community that observes the rule of law, the suspension of the SADC Tribunal begs the question whether the SADC has begun a retreat

[102] Article 28 annex 1 of the FIP.
[103] Article 28(3).
[104] Nathan L, Solidarity Triumphs Over Democracy – The Dissolution of the SADC Tribunal, December 2011, https://www.researchgate.net/profile/Laurie_Nathan/publication/265110127_Solidarity_Triumphs_Over_Democracy_-The_Dissolution_of_the_SADC_Tribunal/links/555b28f008aeaaff3bfbec68.pdf accessed 04/05/2016.
[105] Cowell F, The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction, HRLR 13 (2013), 153 – 165.

from the principle of the rule of law.[106]The suspension came pursuant to a judgement by the tribunal against Zimbabwe in *Mike Campell v. The Republic of Zimbabwe*. The decision did not go well with the authorities in Zimbabwe. As a result they lobbied for the clamp down of and the review of the mandate of the Tribunal. The suspension was pursuant to a review of the mandate of the Tribunal WTI Advisors Ltd, Geneva, an affiliate of the World Trade Institute (WTI).[107] There is pursuant to the suspension a Protocol on the new SADC Tribunal though the same has not become operational to date. This suspension of the tribunal left cases a limbo within the Tribunal with no end in sight. The suspension of the Tribunal and the involvement of the Kingdom of Lesotho has been used as a basis by the Swissbourgh Diamond Mines to approach the Permanent Court of Arbitration in Singapore for relief against the Kingdom of Lesotho alleging that they have been denied access to justice and to their right to a fair and equitable treatment.[108]

2.10 The New SADC Tribunal

At the 34th summit of Heads of State and Government the heads of state signed the Protocol on the Tribunal within the SADC.[109] The new protocol repeals the 2000 protocol on the Tribunal in the SADC.[110] The protocol introduces a new tribunal with reduced jurisdiction and fewer powers.[111] The adoption of the new tribunal has brought about concerns about its legitimacy, the review process provided for in the Protocol for the SADC Tribunal particularly article 37 has not been followed. The heads of states took it upon themselves in a show of power to adopt a top-down

[106] Chigara B, What should a Reconstituted Southern African Development Community (SADC) Tribunal be Mindful of to Succeed?, 81 Nordic Journal of International law, (2012) 341 -377, at page 346.
[107] The SADC Tribunal, Set-up, Review and Outcome: Justice Denied accessed from: http://www.mikecampbellfoundation.com/page/sadc-tribunal-background-scope-wti-review on the 21st January 2016.
[108] Op Cit PCA 2013-29.
[109] COMMUNIQUÉ OF THE 34TH SUMMIT OF SADC HEADS OF STATE AND GOVERNMENT VICTORIA FALLS, ZIMBABWE AUGUST 17-18, 2014 available at http://foreign.govmu.org/English/Communiqu%C3%A9s/Documents/SADC%20English.pdf, accessed on the 17th May 2018.
[110] Article 48 new protocol on the Tribunal in the SADC.
[111] Erasmus G, A New Tribunal for SADC, but with Limited Jurisdiction and Fewer Powers, 2012, TRALAC Trade Law Centre, Tralac Policy Brief, page 1, available at http://www.tralac.org/files/2013/08/tralac-Policy-Brief-Progress-report-on-SADC-Tribunal-20130828.pdf, accessed on the 17th February 2016.

review process where they decided what should happen, there was little or no public participation in the matter.[112]

The composition of the Tribunal still maintains the status quo of the previous protocol. It provides for "not more than ten judges … from member states who possess the qualifications required for appointment to the highest judicial offices in their respective member States or who are jurists of recognised competence or expertise in international law".[113] Like the predecessor there shall be five permanent judges and other pool judges from whom a judge may be picked to sit when a permanent judge is incapacitated to carry out his duties.[114]

The protocol has brought about changes to the jurisdiction of the tribunal; the jurisdictional powers have been watered down as compared to its predecessor,[115] and the tribunal in terms thereof shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between the parties.[116] In interpreting the jurisdiction of the tribunal the said article even when read with article 49 which provides for amicable settlement of disputes as a starting point. And provides further that any failure to settle disputes pertaining to the application, interpretation and implementation of this Protocol shall be referred to the SADC Tribunal. The protocol only alludes to the interpretation and application of the Protocol exclusively and no other legal instruments, this is restrictive as opposed to its predecessor who had the power over the application and interpretation of other applicable legal instruments.

The importance of jurisdiction cannot be over emphasised, it is the power of a court to decide a case.[117] It encompasses the overall power of who can appear before the court and what powers and orders the court can issue in relation thereto.[118] The protocol by restricting appearance to state parties has side-lined individual investors and employees of the community and other international organisations as they do not have a right of audience within the Tribunal. This is a potential scare

[112] Erasmus G, The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for the SADC Community Law' 2015, Tralac Working paper no. US15WP01/15, TRALAC.
[113] Article 3 of the New Protocol to the Tribunal.
[114] Article 3(2).
[115] Op cit, (Erasmus) page 7.
[116] Article 33 the new Protocol.
[117] Garner, Black's Law Dictionary, West, 8th Ed, 2004.
[118] Op Cit (Erasmus) page 6.

to some investors who would best prefer audience before an impartial tribunal otherwise than they being represented by their home state.

2.11 Amendment of the FIP[119]

SADC member states have pursuant to the suspension of the SADC Tribunal and the promulgation of the Investment Protection Bill[120] amended the investment dispute resolution provisions of annex 1 of the FIP. The fora to which disputes can be submitted have been curtailed leaving only state-to-state dispute resolution.[121] The Protocol provides only that state parties shall ensure that investors have the right of access to courts, judicial and other administrative tribunals. Reference is made only to such organs with the host state and such review of decision as pertaining to expropriation and nationalisation of investments and the determination of compensation thereof.[122] There is no reference to dispute resolution in the Protocol. In terms of the notes to the Amendment, the whole of Article 28 has been removed and they only point to the fact that state-to-state dispute resolution has already been alluded to in article 24 of the SADC Treaty and as such there is no need to include the same.[123] The insinuation here is that by curtailing investor-state dispute resolution in article 28 and leaving investors to guess, will automatically lead them to the SADC Treaty.

2.12 Conclusions

This chapter has analysed the evolution of investment dispute resolution from the use of force and or threat of force, to the provision of diplomatic protection by member states taking up claims on behalf of their citizens. There are inefficiencies related thereto as it is the discretion of the host state to either take up or refuse to take up the matter. This notwithstanding due to diplomatic ties

[119] What Is available is a draft amended FIP and the amendment notes, the amendment is pending the conference by the head of states which should have been held in March 2016, but never materialized.
[120] The bill has since been signed into law by the President of South Africa.
[121] The development within the Annex 1 of the FIP were influenced by the Republic of South Africa. With their adoption of the above cited bill, pursuant to the Forestri case, South Africa thought it prudent at the time to curtail investor dispute resolution in their law to give more effect to policy space of the South African Government, this however has not been retained by the Act as it allows for an investor to approach an international tribunal per consent with the host state. See article… however the same has not been the case with the FIP.
[122] Article 25 (amended FIP) there isn't much that has been changed to the former article 27 of the FIP as it then was.
[123] Ibid Notes to the amendment (article 28).

the member state may at times be reluctant to take up such cases to foster relations. As a result investor-state dispute settlement was adopted and it provided individual investors a platform to assert their rights at an international fora. There are a various arbitration centres but focus has been on ICSID and the ICSID additional facility and the UNCITRAL Arbitration rules which are commonly used and form part of the SADC dispute resolution mechanism our subject matter in this research.

CHAPTER THREE
ANALYSIS OF THE SWISSBOURGH MINES CASE

3.1 Introduction

The previous chapter examined the evolution of the dispute resolution mechanism within the SADC and how the same obtains today. *Swissbourgh Diamond Mines v. The Kingdom of Lesotho* is a case currently pending both before the SADC Tribunal, the same was brought before the Singapore Arbitration Centre but has since been dismissed with the tribunal ordering that an African Tribunal be set up to deal with the claim as entered in the SADC Tribunal.[124] This Chapter will interrogate the said case from its inception in the High Court of Lesotho,[125] its subsequent appeal in the Court of Appeal in Lesotho,[126] the appeal for diplomatic protection by the shareholders in the High Court of South Africa,[127] and the subsequent appeal in the Supreme Court of Appeal.[128] The case proceeded to the SADC Tribunal and to the International Arbitration at the Singapore Arbitration Centre and has been referred back to Arbitration.

Brevitatis Causa, a brief outline of the facts has been made in the preceding chapter. It is then prudent to deal with the issues that brought about the case. The cause of action and all subsequent litigation is an alleged expropriation of mining rights by the Government of Lesotho against Swissbourgh and its sister companies. Having approached the High Court of Lesotho for an interdict for the halting of works for the construction of the Katse dam, a counter application was entered by the fourth respondent the Lesotho Highland Development Authority (LHDA), which sought to declare the mining lease registered under no. 21044 in the deeds registry, in Maseru on the 26th October 1988, entered into between the Basotho Nation and Swissbourgh in respect of the

[124] *Swissbourgh Diamond Mines (pty) Ltd and Others v Government of Lesotho* PCA 2013-29 at page 135.
[125] *Swissbourgh Diamond Mines (Pty) Ltd Another v Commissioner of Mines and Geology No. And Others* (CIV/APN/394/91).

[126] *Swissbourgh Diamond Mines (pty) Ltd and Another vs LHDA and others* (C OF A 09/1999) reported in Lesotho Appeal Cases 2000 – 2004.
[127] *Van Zyl and Others v Government of Republic of South Africa and Others* (20320/02) [2005] ZAGPHC 70 (20 July 2005).
[128] *Van Zyl and others V. Government of Republic of South Africa* (2007) SCA 109 (RSA).

Rampai Area as null and void and of no force and effect, and the cancelling of the entry in the register of the Registrar of Deeds, Maseru, relating to the aforesaid mining lease.[129]

The LHDA contended that the acquisition of the said mining lease had not followed the provisions of section 6 and 7 of the Mining Rights Act (MRA), [130] which act was couched in Mandatory terms stating the procedure to be followed. The Act provided a discretion to the King and chiefs acting on his behalf, could in accordance with the terms of a recommendation of the Mining Board and in the manner prescribed in the MRA, but not otherwise, to grant new titles or to refuse any grant recommended thus giving him unfettered discretion to so deal.[131]

The act provides that any person may apply to the King for the grant of a mineral title. The said application shall be in writing and shall be first made to the Minister who shall refer the same to the Mining Board in order for a recommendation to be made by the Board,[132] which Board shall consider every application forwarded to it. It may decline to make a recommendation in which case it shall inform the applicant. In the event it makes a recommendation it shall make the same in writing to the principal chief or ward chief within whose jurisdiction the land for which the mining lease will have been applied for, accompanied in the case of a mining lease or prospecting lease by a written statement of the recommendation for the grant of the relevant lease (mining or prospecting).[133]

On receipt of the application and the recommendation from the Mining Board, the principal chief or ward chief shall consult with all the chiefs within the area of jurisdiction of whom any part of the land in question falls. If upon consultations it seems a majority of the chiefs approve of the grant, he shall accordingly grant the application. But if the majority disapproves he has discretion to either grant the application in terms of the recommendation by the Mining Board despite the majority descent, or he can decline the allocation or refer the application back to the Mining Board for its recommendation on any alterations proposed. [134] A decision whether to grant or refuse grant

[129] Op cit para 14
[130] Act Number 43 of 1963.
[131] Section 6(1).
[132] Section 6(2).
[133] Section 6(2).
[134] Section 6(4) I, ii and iii.

of title shall have to be referred back to the Mining Board which authority shall have the mandate to either cause the relevant title be issued in respect of the application or communicate any refusal to grant title to the applicant.[135]

The contention by the LHDA was that the applicants had failed to secure the mandatory consultations and approvals of the chiefs. The evidence pertaining to this fact was not contested by the respondent Swissbourgh who however rejected the argument basing themselves on the Lesotho Order 1970 and the suspension of the Constitution brought about by the 1970 *coup d'etat*.[136] They argued that the Order 1970 and the suspension of the constitution suspended all functions of the King and by extension those of the Chiefs as the highest authority became the Prime Minister. They argued further that the mandatory wording of section 6 and 7 of the MRA were reduced to being merely directive.

It however sufficed that within the same year, the government of the then Prime Minister Dr Leabua Johnathan promulgated the Office of the King Order,[137] which order provided for the appoint of the Queen as the Regent in the absence of the King. Besides this order several other others were enacted which include the Lesotho Order 1973 which purportedly reinstated the powers of the King. It was argued on behalf of the LHDA therefore that the then administration did not have the intention of thrashing the office of the King hence Office of the King Order 51. It was contended furthermore that with the emergence of the subsequent *coup d'états,* where the executive powers of the king were so recognised, until the grant of the mining lease to Swissbourgh, the King and chief did have the prerogative powers and as such it was mandatory that they should have been so consulted. This was based on a fact that when the leases were granted there was in place a new constitutional dispensation in the form of Lesotho Order 1986. The Order placed executive powers on the King acting on the advice of the Military Council.

[135] Section 6(4) (2).
[136] The order came after the suspension of the Constitution of Lesotho 1966, and became the new constitutional order, it gave executive powers to the Tona Kholo, there were other subsequent orders which were also as a result of *coup d'etat,* the government of Dr. Leabua Johnathan was overthrown by the military government of Major General Lekhanya who was in tern overthrown by the General Phisoane Ramaema's military government. Each of the *coup d'etat* came with a new constitutional dispensation on where the executive powers lay. All save the 1970 order granted executive powers on the King on the advice of either the council of ministers or that of the Military council.
[137] Order 51 of 1970.

Swissbourgh also raised a point of conspiracy against it by both the government of Lesotho and the Government of South Africa as it said due to the Highlands Water Project, the Republic of South Africa like the Kingdom of Lesotho had every intention of seeing through the project and as such there was collusion between the two states. This contention and arguments by Swissbourgh were dismissed by the High Court of Lesotho and it ordered punitive damages in favour of the LHDA, declared the lease as null and void and of no force and effect and ordered its expunging from the registry.[138]

The respondent Swissbourgh appealed the decision to the Court of Appeal of Lesotho based on the same argument; the Court of appeal upheld the judgement of the court a quo and rejected the appellants' case. Swissbourgh also argued that based on the company law in Turquand Rule, the LHDA was bound by the rule as it was not known to Swissbourgh that the necessary consultation were not followed by the government then they were bound by the decision taken and that they cannot challenge the procedure.[139] The Court of Appeal rejected this argument based on the fact that like the Swissbourgh, LHDA was a third party whose interests and rights had been violated by the non-observance of the process mandated by the law and as such they were not bound by the rule.

It is apposite to mention that when the matter was before the High Court of Lesotho Government revoked the mining leases in respect of other mining leases held by Swissbourgh and these were in respect of Matsoku, Motete, Patiseng and Orange. Swissbourgh mines approached both the High Court and the Court of Appeal of Lesotho and the revocation was declared unlawful and as such a nullity.[140] This notwithstanding, Swissbourgh Mines decided to cancel the mining leases in respect of these other mining areas citing the government's acts as repudiation of contract. It however retained the mining lease for Rampai.

[138] Op Cit, LAC 2000-2004.
[139] Ibid.
[140] Op Cit LAC 2000- 2004.

3.2 CALL FOR DIPLOMATIC PROTECTION

A few weeks after the handing down of judgment by the Court of Appeal, Mr. Van Zyl, his wife, the Trusts which they represented and all the subsidiary companies and the Swissbourgh appealed to the government of the Republic of South Africa for Diplomatic Protection[141]. They claimed that their mining rights had been expropriated, not only in respect of the Rampai mining lease which was declared a nullity but also in respect of the other four mining leases they had themselves cancelled. The said request was denied by the Government of South Africa, pursuant to advice given by a series of legal experts to the President of the Republic. A note verbale was however sent to the Lesotho High Commission about the matter at hand requesting that the Government of Lesotho look into the matter and try and resolve it.[142]

Their request for diplomatic protection having been so rejected, Mr Van Zyl and others approached the High Court of South Africa for the review of the decision by the government of South Africa to deny them diplomatic protection. The applicants were Mr. Van Zyl as a person with 5% shares in Swissbourgh Diamond Mines, Van Zyl and his wife as Trustees for Burmilla Trust (to which trust the claim for Swissbourgh against the government of Lesotho was later ceded) and which held 90% shares in Swissbourgh, the Van Zyls as trustees of another trust, the Josias van Zyl Family Trust which trust had a 5% shares in Swissbourgh, the balance of the applicants were four companies registered in Lesotho in which the Swissbourgh held 99% shares, with the family trust holding the 1% remaining shares. The Van Zyls and the trusts were South African Citizens whilst the companies remained citizens of Lesotho by incorporation.

Before dealing with the review application it is pertinent to mention that, before the application was lodged the applicants lodged a claim against the Government of the Republic of South Africa and a statutory body for their alleged unlawful interference with its Mining rights in Lesotho which

[141] This was done as per a letter to the Department of Foreign Affairs of South Africa dated the 25th October 2000. It relied on the unlawful revocation of mineral leases during 1992 and the destruction and confiscation of assets by the Government of Lesotho, and it also. it also complained about corruption at the highest level within the government of Lesotho and that Swissbourgh had suffered a miscarriage of justice at the hands of the Lesotho Courts and that they had no faith in the Independence and impartiality of the Courts of Lesotho and they rejected the judgements against them as the judges were biased and specially selected for their case.

[142] Op cit, (20320/02) [2005] ZAGPHC 70 (20 July 2005) para 14.

caused them damages amounting to R945m, and R507, 8m and the amounts were claimed from the respondents respectively. The case was however withdrawn and the withdrawal used in the subsequent review application it being alleged that government had given the applicants a legitimate expectation that if they withdrew the claim government would pursue their claim for diplomatic protection.[143] This was however not to be.

As a result of the refusal to grant diplomatic protection the applicants approached the High Court of South Africa for the review of the decision. The basis of their claim being that he as an investor, the trusts and the companies had a constitutional right to be afforded 'effective diplomatic protection' by the government. The basis being that his mining rights in Lesotho had been expropriated without they being afforded compensation as a result Lesotho had abrogated an international law standard. [144] Like they had intimated in the courts of Lesotho they alluded to some form of collusion between the Government of South Africa and the Government of Lesotho, and that there was corruption at the highest level and were denied access to justice by the Courts of Lesotho.

The review application was dismissed by the High Court of South Africa and the Supreme Court of Appeal. The following reasons were given:

- The applicants failed the nationality test, that in order for one to qualify for diplomatic protection he should have had continued nationality with the state that affords him such protection. It was held that all the companies were Lesotho registered companies, and that this notwithstanding they later ceded their rights to Burmilla trust and as such had lost the claim. For the trust on the other hand it had only been ceded rights and that in itself did not in any manner make the trust a victim but only a beneficiary of any rights accruing to the claim.
- It was held further that the claim against Lesotho was a claim that needed to be addressed by the local authorities, this was based on the finding that the mining leases were not international documents nor did the parties intent to internationalise them as they only made reference to national laws. It held therefore, that no international claim arose out of

[143] Ibid para 14.
[144] Op Cit para 34.

the same and as a result there has been no breach of an international standard upon which the state could afford diplomatic protection.

- The court held further that diplomatic protection is a right a state can afford to its citizens, however that was the call of the government to assess the form of diplomatic protection to be so afforded as it involved diplomatic policy which was the sphere of government and as such was not reviewable by the courts of law.
- It was held further that a state may not bring a claim for diplomatic protection before the injured person has exhausted all local legal remedies unless, with the exception where such legal remedies cannot provide a reasonable effective redress or there are undue delays attributable to the state concerned.[145] That in this case the applicants had pursued their claims in the local courts but only to the extent of lodging the claims in the High Court of Lesotho but they are to date still pending and have not been pursued.

The Supreme Court of Appeal cited with approval the Constitutional Court decision in *Kaunda v. The President of the Republic of South Africa*[146] and the following are important; traditional international law acknowledges that states have the right to protect their nationals beyond their borders but they are under no obligation to do so;[147] diplomatic protection is not recognised by customary international law as a human right and thus cannot be enforced as such and it remains the prerogative of the state to exercise at its discretion.[148] In the same manner the request by the applicants as they contended that they claim a right to be afforded diplomatic protection otherwise than a right to have their request considered had to be dismissed. It was held further that a court cannot tell the government to make diplomatic interventions for the protection of its nationals, [149] the decision as to whether and if so, what protection should be given is an aspect of foreign policy that is essentially the function of the executive.[150]

[145] Harms ADP as he then was citing with approval Dugard, Seventh Report on Diplomatic Protection Articles 14 and 16.
[146] *Kaunda and Others v. President of RSA* 2004(10) BCLR 1009.
[147] Ibid Para 23.
[148] Ibid Para 29.
[149] Ibid Para 73.
[150] Ibid para 79.

3.3 ARBITRATION UNDER THE SADC TRIBUNAL

In 2009 after the promulgation of the FIP and the loss, both before the host state local courts and the home state courts, Mr. Van Zyl and others approached the SADC Tribunal on a claim of expropriation. The claimants sought damages arising from the government of Lesotho's purported violation of article 4(c)[151] and 6 of the SADC Treaty by its measures in respect of the claimant's mining leases. In august 2010 the FIP entered into force. The matter was opposed and was ready for hearing when again in 2010 the SADC summit unanimously adopted a resolution that the term of office of judges which were due to end in October could not be renewed and that no new cases could be entertained by the tribunal. As a result of the non-renewal of the term of office the Tribunal could not operate as the quota was below the prescribed number.

Mr. Van Zyl and company approached again the Tribunal in 2011 per an application requesting the SADC Tribunal to continue operations in relation to its case. The same application could not proceed due to the unavailability of Judges and the ultimate dissolution of the Tribunal by the SADC summit in 2012 and a decision was made to negotiate a new tribunal which would limit the jurisdiction of the new tribunal. The case of the claimants could therefore not proceed.

3.4 ARBITRATION UNDER THE PCA

With no end in sight Mr. Van Zyl approached the PCA under the UNCITRAL Rules of Arbitration. He founded his claim on the FIP; in the first instance he claimed that the panel should find that as a result of the respondent's conduct in relation to the shutting down of the SADC Tribunal to vote with the rest of the SADC member states for the Dissolution of the SADC Tribunal and or as a result of its failure to act whilst the claimant's case was pending in the Tribunal, the respondent had abrogated the following[152]:-

[151] Article 4© provides that SADC and its member states shall act in accordance with the following principles, c) human rights, democracy and the rule of law and Article 6(1) provides that member states undertake to adopt adequate measures to promote the achievement of the objectives of the SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its objectives and the implementation of the treaty.
[152] Op cit, PCA 2013-29 at page 25.

a) Article 6(1) of Annex 1 of the FIP and in particular that it constituted unfair and inequitable treatment and/or a denial of justice
b) Article 27 of Annex 1 of the FIP in that it denied claimants access to justice
c) Article 4(c) and or of article 6 (1) of the SADC Treaty
d) A breach of customary international law

And on the second phase that if the panel found the above in the positive then it should award to the claimants such relief and compensation as it could have been granted by the SADC Tribunal.[153] They further claimed moral damages in an amount to be determined by the proceedings.[154]

There were jurisdictional issues raised by the respondent in relation to the matter which were dismissed. The respondents submitted that the Tribunal had no jurisdiction based on the FIP as the claim for the appellants was based solely on the alleged expropriation that has seen the respondents go through both the Lesotho and South African courts and to the SADC Tribunal and that to that end the jurisdiction of the tribunal was wanting.[155]

The tribunal held that it had jurisdiction to hear the matter and found all the four in the affirmative and for the claimants and dismissed the respondent's contention. The tribunal held that the respondent had a duty to see to it that the claimants had access to courts or such tribunals or authority to have their claim dealt with. By its failure to prevent the disbanding of the SADC Tribunal in relation to pending cases it was held that it had abrogated its obligations under international law and in particular article 6(1) of the Annex 1, article 27 and both articles 4 (c) and 6 (1) of the SADC Treaty. The tribunal cited with approval the South African Constitutional Court case of *Zimbabwe v. Fick*[156] where the court held that the SADC Treaty placed an international law obligation on member states to ensure that citizens had access to the tribunal and that its decisions were enforced.

[153] Ibid page 9.
[154] Ibid page 9.
[155] Ibid page 10.
[156] *Zimbabwe v. Fick judgment* (27 June 2013) para 69.

On the question whether or not Lesotho was responsible for the actions of the SADC in the disbanding of the Tribunal the court cited a few so called influential decisions in *Himpurna Califonia Energy Ltd v. Republic of Indonesia*[157] " to prevent an arbitral tribunal from fulfilling its mandate in accordance with procedures formally agreed by the Republic of Indonesia is a denial of justice" and *Almonacid-Arellano et all v. Chile*[158] where the tribunal held that "no state may resort to contrivances in order to violate *jus cogens* norms; its prohibitions are not dependent on the state's acquiescence.

The actions of the respondent were attributed to the fact that the resolution to disband the tribunal was supposed to be taken without any formal objection by a member state. Lesotho despite its having consented to arbitration and having a case pending before the tribunal was adjudged to have an obligation to make provision for the continuance of the matter by either having raised an objection or having provided for a different forum for the continuance thereof.[159]

The tribunal having found in the affirmative and in favour of the claimants, however it refused to award such damages as the SADC Tribunal could have otherwise have awarded had it heard the matter. The tribunal held that they did not have the jurisdiction to so decide and as such have ordered for the convening of a new tribunal to hear the matter, the tribunal should be a tribunal that could possibly be equated to the SADC Tribunal as it will be a three-person arbitral tribunal to be seated in Mauritius or one of the SADC states unless an alternative seat is provided.[160] The arbitrators must meet the qualifications of persons who could qualify as SADC Tribunal Judges in terms of the now defunct protocol to the SADC Tribunal, article 3(1) thereof.[161] The award goes further to bestow jurisdiction on such a tribunal and provides that the tribunal shall have the same jurisdiction as that which was enjoyed by the SADC Tribunal when the matter was lodged in 2009.[162] The rules of application within the tribunal have been ordered as the UNCITRAL Rules safe that to the extent possible, the tribunal will take into account the SADC Tribunal Protocol and

[157] *Himpuna v. Indonesia* CA-47/CA-Hb-14 page 136.
[158] *Almonacid-Arellano et all v. chile*, Inter-American Court of Human Rights, Separate Opinion of Judge Antonio A Cancado-Trinadade para 19.
[159] Op Cit page 112.
[160] Op cit (PCA 2013-29) Para 9.34 (a).
[161] Op cit (PCA 2013-29) Para 9.34(b).
[162] Op cit (2013-26) para 9.34 (d).

Rules.[163] The arbitration shall be administered by the PCA unless the parties could agree otherwise.[164] It goes on to set time frames for the setting up of the panellists and where there is no consensus the PCA will be the appointing authority.[165]

The award by the tribunal is somewhat disconcerting in that it brings about to the fore a structure unknown to the jurisprudence of the SADC, it above all, superimposes itself on the said tribunal to administer its proceedings. How can we talk of the rule of law and impartiality when we breed creatures that have not been provided for in any law? What is more disturbing is that the same tribunal has proclaimed that it does not have any jurisdiction to hear the matter of compensation does it then somewhat create a window of opportunity by creating another creature through which it could possibly hear the matter?

3.5 Dissenting award

There is however a dissenting award by Mr. Justice Nienaber and which award the author hereto subscribes to.[166] The gist of the dissent is that the tribunal had no jurisdiction to entertain the claim. He attributes the jurisdictional issue to the true claim of the claimants. He holds a different view that the shutting down of the SADC Tribunal is an inchoate claim without which the primary claim for pecuniary loss for the expropriation of mining rights would otherwise have not seen the light of day. The learned panellist observed that the reliance on denial of access to justice was just a cloak and a cover for the real dispute as lodged in the SADC Tribunal and that there can be no damages for disbanding of the SADC Tribunal hence the claimants themselves wanted to twist the tribunal to award them the damages as prayed for in the SADC Tribunal.[167] He observed further that at best an order deserving of the claimants in terms of the disbanding of the SADC Tribunal could only be a declaratory order on such disbanding, which order would be a pyrrhic victory for the claimants.[168] The fact that the claimants claimed that the tribunal substitute itself for the SADC Tribunal and decide such damages as the tribunal would have otherwise granted was just to

[163] Op cit (2013-26) para 9.34 (e).
[164] Op cit (2013-26) para 9.34 (f).
[165] Op cit (2013-26) para 9.34 (i).
[166] The dissenting award was passed on the 18th April 2016.
[167] Ibid page 5.
[168] Ibid page 10.

circumvent the temporal jurisdictional barrier which in terms of article 28(4) of the FIP which confronts the claimants who had pleaded loss for mining rights.[169]

The learned panellist observed that the alleged expropriation occurred not only before the establishment and coming into effect of the FIP but long before the establishment of the SADC Tribunal itself, and he held that, like the award itself held, the claim as lodged in the SADC Tribunal could not be heard before them as the PCA lacked the necessary jurisdiction to hear the same. He intimated further that if they had such incapacity to hear the matter it was unheard of to establish a tribunal that would otherwise be supposed to hear the matter.

The learned panellist made a distinction between a primary and secondary right of the claimants as given in the award. He made a distinction between the primary right of the performance by the respondent in terms of or under the mining leases and a secondary right to remedies for the wrongful interference of the mining rights. He postulates that what was promised was the exploitation of mining rights, and a breach of the same brought about an entitlement to compensation for such wrongful interference. And this was the purview of the courts of Lesotho and the SADC Tribunal as recognised by such laws.

There is also a secondary right which is the right to legal relief in terms of the wrongful interference with the mining rights and the same is attributable to the primary right. And that if the primary right is for any reason invalid so should the secondary right. If the tribunal cannot hear the primary right for jurisdictional purposes it has no right hearing the subsequent secondary claim.

He made an observation further that though conceded on behalf of the respondents that the disbanding of the tribunal was wrong without furnishing an alternative avenue for resolution of the dispute, however the resolution to disband the SADC Tribunal by the member states was not concerned if at all with any aspect of the claimants' admitted investment, this included its validity, meaning and scope. It was only adopted at the behest of Zimbabwe to appease and accommodate that country in the aftermath of the problems created by the Campbell case award. And that if the dispute did not concern any aspect of any particular obligation by the respondent in regard to any

[169] Ibid page 4.

specific investment but was only a dispute concerning the legality of a general policy obligation by the SADC member states which only happened to catch the investment in the crossfire, then it failed the test of jurisdiction in terms of a dispute concerning an admitted investment in terms of Annex 1 of the FIP.[170]

Understandably, it would mean if the policy decision were actionable against the respondent, this would mean that in the same vain it would be attributable to other member states including the home state the Republic of South Africa. The Republic of South Africa was also complacent in the vote for the disbanding of the Tribunal in line with its policy decisions, and by so doing it hurt one of its nationals.

3.6 Pending Arbitration

There are interesting issues that are raised by the current pending case before the contemplated arbitration tribunal. This form of arbitration is not sanctioned by any law and it brings about a lot of problems that come with ISDS, in that it is often believed that arbitrators can go haywire in the interpretation of treaty provisions in ways that constraint the host state's regulatory space[171] and are biased towards the interests of investors.[172] For instance it is inconceivable how an arbitral tribunal can found jurisdiction and make a finding that in pursuance of its political policies Lesotho's concurrence with other member states to the suspension of the SADC Tribunal could found a fresh dispute between an investor and a host state. Even if that were the case, does it justify an emergence of another creature to which neither the SADC Treaty and protocols nor the Lesotho's domestic laws subscribe? These notwithstanding, there are however issues that still need be addressed in order to see through the matter and put it to finality more than two decades later.

[170] Ibid page 13.
[171] Broude T, et al, Who Cares about Regulatory Space in BITs? A Comparative International Approach, Research Paper No.02-16, May 2016, International Law Forum, The Hebrew University of Jerusalem, page 2.
[172] Ibid page 2.

3.6.1 Retrospective Application of Treaties (FIP)

The Finance and Investment Protocol (the new and the old Protocols) are treaties like any other and contain provisions on their application and none suggest retrospective application. The FIP specifically provides that the treaty shall only apply to disputes that have arisen within the period of the coming into existence the protocol.[173] The law on application of treaties is well-established. The same has been set-out in the Vienna Convention on the law of Treaties (VCLT)[174] and the International Law Commission 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles on State Responsibility).[175]

The VCLT provide that unless a different intention can be discerned from the treaty or is otherwise established, the provisions of the treaty are not binding on a party in relation to acts which took place or any situation which ceased to exist before the date of entry into force of the treaty in respect to that particular party.[176] On the other hand the ILC Articles on State Responsibility provide that "an act of a state does not constitute a breach of an international obligation unless the state is bound by the obligation in question at the time the act occurred" The two conventions go to show that for Lesotho to have obligations under the SADC Treaty or the FIP as the case may be, the obligation for which it is accused of abrogating should have at the time of commission have been an act binding on the member state.

The above cited provision have had backing in terms of international awards in amongst others the following awards:- *Tecmed v. Mexico*, where the tribunal held that the basic principle in international law is that unless there is a different interpretation of the treaty or unless established in its provisions, such provisions are not binding in connection with an act or event which took place or a situation that ceased to exist before the date of its entry into force. The burden of proving

[173] Article 28 FIP (before amendment) the amended version contains no dispute resolution mechanism and as such no specific mention of its application.
[174] No. 18232 concluded at Vienna on the 23rd may 1969.
[175] The text was adopted by the International Law Commission at its 53rd session, in 2001, and submitted to the General assembly as a part of the Commission's report covering the work of the session (A/56/10) available in Yearbook of the International Law Commission, vol. II, Part Two.
[176] Article 28 VCLT.

the existence of any such exception to the principle of non-retroactive application established therein naturally lies with the party making the claim. [177]

In 2008 another arbitral tribunal in *Chevron v. Ecuador* held along the same lines that the language of article 28 of the VCLT is clear that there is no retrospectivity in the application of treaties unless a different intention can be discerned from the treaty or can otherwise be established. It provides further that the principle of non-retrospective application of treaties applies for provisions in treaties that deal specifically with dispute resolution.[178]

The PCA in its finding held that it has no jurisdiction to deal with the claim by the claimants as the matter fell out of the jurisdiction ambit of the FIP[179] but nonetheless went ahead and ruled in favour of a tribunal to deal with the matter as filed. Does the PCA by so doing found jurisdiction for the Tribunal in terms thereof? The author would in the circumstance, as the dissenting award has reiterated, expected to have had the matter dismissed based on the fact that the primary claim by the claimants was not covered by the FIP; the treaty upon which they had based their claim.

3.6.2 Expropriation

The FIP has a provision regulating expropriation. It provides that Investments shall not be nationalised or expropriated in the territory of any State Party except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation.[180] What remains however is what constitutes expropriation in respect of the case at hand?

In the current case, the mining rights acquired by the claimants were declared a nullity by the domestic courts of Lesotho. In response however the claimants cancelled their mining leases as

[177] *Tecnicas Medioambientales Tecmed, S.A v. United Mexican States*, ICSID Case no. ARB (AF)/00/2 Award (29 May 2003), para 63.
[178] *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v. Republic of Ecuador*, PCA Case No. AA277, interim award (1st December 2008) para 172.
[179] Op cit (PCA 2013-26).
[180] Article 5 FIP.

they claimed they took the cancellation of leases as a repudiation of contract in respect of the four mining leases to the exclusion of the Rampai mining lease. They however have only lodged cases in the courts of Lesotho and have not pursued the same. In relation to the Rampai lease, the issue was adjudicated from the High Court of Lesotho through to the Court of Appeal, the merits were also dealt with by the South African Courts and the PCA. How then can a judgment of a competent court be interpreted as an expropriation by the host state? In terms of the laws of Lesotho and as has been found by South African Courts which are renowned for their independence, the claimants had no rights to property in respect of mining rights at Ha Rampai, this is more so when the same rights were declared a nullity by a competent court.[181] And in terms of the laws of Lesotho the claimants did not qualify for compensation because they did not possess any rights which could otherwise entitle them to such.[182]

The ICSID arbitral tribunal in the *Loewen v/s the United States*,[183] the facts of which in brief were, the claimants in this case included a Canadian company, the Loewen Group, had one of its subsidiaries invest in Mississippi on a chain of funeral homes. The subsidiary then entered into a transaction with a local American funeral home owner a Mr. O' Keefe. A dispute arose between the two parties and O'Keefe brought an action against Loewen Group and its subsidiary in a local court in Mississippi alleging the defendants had engaged in anti-competitive and predatory business practises in breach of contract.[184] The case was heard before a jury. The trial featured possible prejudicial comments by the plaintiff and his counsel about Loewen's foreign nationality and accusations that the subsidiary's owners had engaged in racial bias against members of the ethnic community to which the jurors belonged.[185]

The matter was decided in favour of the plaintiff and he was awarded **$500** million in damages, including **$75** million for emotional distress and $400 million in punitive damages. This was

[181] Op Cit (RSA (2007) SCA 109.
[182] Ibid.
[61] *Loewen Group, Inc. v. United States*, ICSID Case No. ARB [AF]/98/3.
[184] Trade Pacts' Investor –state systems Private Corporate Tribunals used to Attack Countries' Courts, Loewen Nafta Case: Foreign Corporations unhappy with domestic jury awards in Private Contract Disputes can Demand Bail out from Taxpayers, an article read from https://www.citizen.org/documents/Loewen-Case-Brief-FINAL.pdf accessed on the 13th April 2016.
[185] Forster G.K, Striking a Balance between Investor Protection and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration, 49 Colum. J Transnat'I L, 201 2010- 2011 at page 216.

despite the plaintiff's actual losses being far lesser. The defendants sought to appeal the judgment, but could not, as they had to post a bond of 125% of the judgment amount in order to obtain a stay of execution to enable any appeal. They applied to the trial court to have the court to lower the bond requirement but the same was refused. The claimants then approached the Mississippi Supreme Court but the decision not to lower the bond was upheld. As a result of the claimants' inability to raise the bond and the possible and imminent risk of execution of the judgement and also a possible bankruptcy they agreed to settle with O'Keefe for **$175** million.

Subsequently, Loewen brought a **NAFTA** claim against the United States, alleging that the conduct of the Mississippi state courts violated several substantive provisions of that treaty, including the national treatment obligation (which requires **NAFTA** Parties to refrain from discrimination against investors from other Parties), the obligation to provide "fair and equitable treatment" and the obligation to refrain from expropriation without adequate compensation.[186]

The tribunal concluded that "the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment."[187] But however, Loewen's case was dismissed based on other considerations such as the non-exhaustion of local remedies. The tribunal however in its award held that for any proceedings to be challenged before any arbitral tribunal such proceedings should be such that they resulted in a miscarriage of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment.[188]

In the case at hand there has been no evidence of any unwarranted delays or obstruction or even access to courts. Otherwise the claimants were given ample time to air their grievances and there was no deficiency within the system. What the claimants made was an allegation of collusion

[186] Ibid page 216.
[187] Ibid Page 217.
[188] Op cit page 218.

between the Governments of Lesotho and South Africa against them, which allegation was tested and was found to be without merit and even resulted in costs being awarded against the claimants.

3.6.3 Exhaustion of Local remedies

The exhaustion of local remedies is a rule that is well established in international law. It formed part of diplomatic protection where a home state espoused the claim of its citizen, it was imperative that local remedies be first exhausted.[189] The FIP provides for exhaustion of local remedies for a party to bring its case before the tribunal or for arbitration and it also provides for a six months cooling-off period before such a claim can be brought for international arbitration.[190] To this end, the Swissbourgh claims against the government of Lesotho have only been lodged with the High Court of Lesotho and are to date still pending due to non-prosecution, this is as far as the four mining leases are concerned. As for the Rampai mining lease the same is a judgment of a competent court of law, applying internal statutes which in terms thereof had processes to be followed which processes were mandatory and were the constitutional basis of land allocation in Lesotho and a tenent of Lesotho's customary law.

The law as pertains to exhaustion of local remedies and as has been decided by arbitral tribunals states that:- local remedies need not be exhausted where there are no reasonable available local remedies to provide such effective redress, or the local remedies provide no possibility for such redress.[191] It has been provided further that only those local remedies which are available and effective have to be exhausted before invoking the responsibility of the state.[192] This means literally that before Swissbourgh could bring any claim before the SADC Tribunal it should have exhausted local remedies. As it is the case, they have failed to exhaust the same as the cases are alimbo in the courts of Lesotho, the question would then be whether or not the remedies within the domestic setting are available and effective. For all intends and purposes the claimants have been afforded the necessary channels to access the courts and to this end they have lodged their claims

[189] Op cit page 209.
[190] Article 28(1) FIP.
[191] ILC Draft Articles on Diplomatic Protection [International Law Commission 2006].
[192] Commentary to the ILC Articles on State Responsibility.

but have failed to prosecute them. The Supreme Court of South Africa has found also in the positive that the claimants have been afforded ample time to exhaust local remedies and that the same courts system was effective enough as in one instance it decided the matters of the revocation of the four mining leases in favour of the claimants, and beyond this it afforded the claimants some fifty eight days of oral evidence in relation to the Rampai mining leases.[193]

The arbitral tribunal in *ST-AD v. Republic of Bulgaria* provided that applicants are only required to exhaust local remedies that are available and effective, and that in determining whether any particular remedy meets the criteria of availability and effectiveness, regard must be had to the particular circumstances of the individual case.[194] There is nothing that suggests to the author herein in the circumstances that there is reason enough for the respondents not to have exhausted the local remedies available to them. The alleged revocation of the leases and the subsequent cases that were filed need to have been prosecuted to finality. This is in line with the judgment in the Supreme Court of Appeal of South Africa.

3.7 CONCLUSIONS

This chapter examined an age long dispute over mining rights in Lesotho, the matter has been litigated from domestic courts in Lesotho to South African Courts in pursuance of diplomatic protection. It proceeded from there to the international sphere of the SADC Tribunal and was however caught in the winds of change as the Tribunal was disbanded with the same pending. It took a turn and the claimants found a cause of action on the disbanding of the tribunal in order to pursue their claim and try to bring the matter back into the fray, however the jurisdictional issues such as non-retrospective application of treaties are catching up with it. It had been demonstrated how arbitrators can go haywire in their interpretation of treaty provisions in favour of investors and even bring to the fore fora that is not covered under any law but which it is expected will make a final and binding award to be executed against the parties.

[193] Op cit (170/06) [2007] ZASCA 109 at para 89 to 90.
[194] ST-AD V. Bulgaria, Award on Jurisdiction (18th July 2013).

CHAPTER FOUR
COMPARATIVE STUDIES

The previous chapter looked into the history of the Swissbourgh case from its inception in the courts of Lesotho, to their claim for diplomatic protection in South Africa, the lodging of the case before the SADC Tribunal and the subsequent lodging of the matter before the PCA. It also examined the award of the Tribunal that the matter started de novo before a reconstituted replica SADC Tribunal. An examination of the legal issues raised by the case in terms of the jurisdiction of the tribunal to hear the matter and expropriation as a concept under the FIP was considered. Much related to the dispute resolution mechanism in SADC is the SADC model BIT, the same will be looked at in this chapter in relation to Annex 1 of the FIP and a comparison shall be made therewith the US BIT template and the Brazil BIT template. An attempt will also be made to analyse the new South African Protection of Investment Act the possible impact on the dispute settlement within the SADC.

4.1 The SADC Model BIT and ANNEX 1

In 2012 almost two years after the entry into force of the FIP, the SADC promulgated the SADC Model Bit. The Model Bit is an instrument by the community to try and foster harmonisation by member states of their BITs and investment policies and laws.[195] It is a guide by the community to help member states develop their own BITs; as such it is not compulsory and or binding on member states.[196]The Model BIT has a dispute resolution mechanism at chapter 5. It must be borne in mind that the Model Bit was promulgated after the entry into force of the FIP and before its amendment, and within an era when the Republic of South Africa reviewed its treaty practice and there were signs of discontent by many nations to the ISDS and countries such as Australia were withdrawing from the ICSID. As a result therefore, the Model BIT provides for only state to state arbitration for any conflicts relating to investments.[197] It could be said that the Model BIT has laid a basis for the amendment of the FIP to exclude ISDS and to leave only state-to-state dispute resolution in line with the New SADC Tribunal. The Model BIT however still provides a leeway

[195] SADC Model Bilateral Investment Treaty with Commentary, July 2012, Gaborone Botswana, page 3.
[196] Ibid page 3.
[197] Article 28(3)(a) SADC Model BIT.

for other member states who may wish to be bound by investor-state arbitration to resort to the same.[198]

The Model BIT somewhat reintroduces the concept of diplomatic protection; it gives state parties the liberty to represent their nationals for damage occasioned to their investment based on the age long principle. It lays down a two-fold protection first for damages occasioned to an investor as a result of a breach of the treaty[199] and secondly for purely state-to-state disputes for the application and interpretation of the treaty.[200] The Model BIT makes a provision for an amicable settlement of disputes and for mediation as an alternative means to resolve disputes. It calls for the use of diplomatic means such as good offices.[201] This is unlike the FIP which has no provision for alternative dispute resolution.

There are points of similarity however. In terms of the FIP there should be a cooling off period of six months before arbitration[202] and the exhaustion of local remedies.[203] The model BIT goes further and provides for exhaustion not only of local remedies but also of local administrative remedies.[204] This is with the hind-sight that litigation may not be the only form of dispute settlement available to the investor concerned. The Model BIT provides further that a state may not bring a matter for arbitration unless there is no available remedy within the local setting that is capable of providing effective relief for the dispute concerning the underlying measure, or that the legal remedies provide no reasonable possibility of such relief in a reasonable period of time.[205] There has not been any indication as to what a reasonable period means in the model BIT and this could pose a lot of problems as it brings in a lot of subjectivity, a reasonable period may take different interpretations depending on the countries justice system.

[198] Special note to Article 29, which provides in a nutshell that the intention is to exclude ISDS, due to the fact that other states are opting out of the same, such states include the RSA, it goes further to provide that however where a state is of the view that it wants to include the same they are at liberty to do the same as the Model BIT offers a comprehensive guidance of the ISDS.

[199] Article 28.3 (a).
[200] Article 28.3 (b).
[201] Article 28.2.
[202] Article 27.
[203] Article 27.
[204] Article 29(4) (b) (1) (i).
[205] Article 28.4(b).

There is a provision also for a fork-in-the-road; this is a provision that should an investor choose a forum to resolve the dispute between the parties he may not do forum shopping for an alternative forum in order to resolve the same dispute.[206]

Due to some of the major concerns that have been raised as against ISDS, such as the secrecy in how the proceedings are conducted, the model BIT brings up some transparency In providing for such hearings to be open to the public with such caveats as pertaining to confidential information in the proceedings.[207]

The Model Bit introduces the concept of *amicus curae* any third party who is not a disputing party but who has an interest in the proceedings is allowed to intervene. This is helpful in that parties who have an interest but are not necessarily directly engaged in the dispute can have their say and help resolve the dispute.

The model Bit is a bit more comprehensive that the FIP which in its current form contains no dispute resolution chapter but leaves all dispute resolution to the SADC Tribunal and to state-to-state dispute resolution.

4.2 The US Model BIT

The experience of Canada and the US as respondents in the North America Free Trade Area (NAFTA) investment arbitrations have prompted them to create new model BITs.[208] They have within their Bits incorporated important innovations relating to ISDS.[209] The US model BIT has not like many other IIAs taken a shift form the traditions BIT provisions it is however more comprehensive and clear.

[206] Article 29(4)(c).
[207] Article 28(12) and 29(17)(b).
[208] The US promulgated the 2004 Model Bit and later amended the same with the 2014 BIT which shall for the basis of our comparison in this chapter.
[209] World Investment Report 2015, Reforming International Investment Governance, Chapter IV, page 124.

The BIT provides for the amicable settlement of disputes between the parties. It encourages the use of consultations and negotiations which could include the use of non-binding third party procedures.[210] Where such procedures cannot solve the dispute it provides for investor-state dispute resolution, under the ICSID convention where parties are party to the Convention,[211] under the ICSID Additional Facility where either party (respondent or non-disputing Member) are parties to the Convention,[212] or under the UNCITRAL or any other arbitration tribunal or arbitration rules, whichever the parties would want to submit their claim under.[213] In contrast to the SADC model Bit and the FIP the US model BIT does not place emphasis on the exhaustion of local remedies. It gives an investor full access to arbitration where consultations have proved a failure.

The US BIT template provides for a detailed arbitration process giving amongst others the following; how a party can provide consent to arbitration;[214] the conditions and limitations on consent of each party;[215] the selection of arbitrators;[216] the conduct of the arbitration proceedings;[217] the governing law;[218] timelines for filing of pleadings;[219] interpretation of annexes[220] and expert reports.[221] In traditional BITs and in the SADC BIT template all the above listed are left to either to the discretion of the arbitral panel or the choice of rules as between the parties and as such have not been detailed out in the BIT.

The BIT however has some novelty in the introduction of transparency of the arbitral proceedings. This is in answer to the critics the secrecy to arbitral proceedings and which has seen the adoption by the UNCITRAL of the new UNCITRAL Arbitration Rules on Transparency. The US model BIT is modelled around the NAFTA provisions and provides that pleadings, memorials and other

[210] Article 23(a) US Model BIT.
[211] Article 24(3)(a).
[212] Article 24(3)(b).
[213] Article 24(3)© and (d).
[214] Article 25 US Model Bit.
[215] Article 26.
[216] Article 27.
[217] Article 28.
[218] Article 30.
[219] Article 24.
[220] Article 31.
[221] Article 32.

documents filed of records be made available to the public,[222] it goes further to provide for the conduct of the proceedings to be heard in public.[223]

Though the US has been subject to a litany of cases under the ISDS it has however retained in its model BIT, ISDS. This is despite the current contentions of the system's inclusion in the negotiation of the two mega regional IIAs; the Trans-Atlantic Trade and Investment Partnership and the Trans-Pacific Partnership.[224] As mentioned above it provides for ISDS under the ICSID, the ICSID additional facility, under the UNCITRAL arbitral rules or any other arbitration the parties may agree to. It on the other hand, provides for state-to- state dispute resolution. This is in terms where a party has received an award in its favour and the respondent state has refused to honour the award. In this instance the non-disputing state can assume the responsibility and take the matter up and an arbitral tribunal set up as between the state parties.[225] The model BIT is believed was the major influence to the UNCITRAL Rules on transparency 2014.[226] The model BIT also has a standard state to state arbitration clause, this is to the extent of the application and interpretation of the BIT.[227]

4.3 The Brazil's Cooperation and Investment Facilitation Agreements (CIFAs)

A new innovation has been brought about in the international investment sphere by the new Brazilian agreements on investments; the Cooperation and Investment Facilitation Agreements (CIFAs). The agreements promote the amicable ways to prevent and settle investment disputes and propose state-to-state dispute settlement as a backup for those disputes that have not been so settled.[228] It diverges significantly from the traditional dispute settlement mechanisms found in

[222] Article 29(1).
[223] Article 29(2) but however it is with the proviso that any such information that is confidential shall be kept so by the arbitral tribunal and that the parties shall agree on the modalities of public hearings and such necessary logistical arrangements.
[224] The inclusion of ISDS has been of a major concern to most states within this IIAs, with most countries opting or refusing the inclusion of the ISDS within the agreements.
[225] Article 34(8).
[226] See https://www.csis.org/analysis/us-model-bit-sets-global-standard-isds-transparency.
[227] Article 37.
[228] Bernasconi-Osterwalder N and Another, Comparative Commentary to Brazil's Cooperation and Investment Facilitation Agreements (CFIAs) with Mozambique, Angola, Mexico and Malawi, 2015, International Institute for Sustainable Development, at page 1 available at https://www.iisd.org/sites/default/files/publications/commentary-brazil-cifas-acfis-mozambique-angola-mexico-malawi.pdf.

traditional BITs, in that it totally excludes investor-state dispute resolution. Unlike ordinary BITs which are mostly geared towards investment protection it has its main focus on the cooperation and the facilitation of investments.[229] For instance, the Brazil-Malawi agreement provides that the agreement has as its main objective to promote cooperation between the parties with the aim to encourage and facilitate mutual investment. To achieve such objective the two parties, through institutional governance, should establish an agenda on investment cooperation and facilitation and by the development of mechanisms for risk mitigation and prevention of disputes, among other instruments mutually agreed on between the parties.[230]

Unlike the US, Brazil has not been a party to any investor-state arbitration; this is because even though it signed about fourteen (14) BITs between 1994 and 1999 none of them ultimately came into force as congress ratified none of them.[231] It has signed its CIFA's amongst others with African countries who also happen to be members of the SADC.[232] This is despite the existence of the SADC model BIT, and this raises the question whether these countries best prefer the CIFA to the model BIT designed for them.

The CIFA establishes two types of institutions to govern the agreement and it is these two that try and prevent and or resolve investment disputes. There are the Ombudsmen otherwise referred to as the Focal Points and the Joint Committee (JC).[233] The latter operates only at a state-to-state level while the former provides support to investors.[234] The first level of dispute prevention involves the ombudsperson, which manages consultations and negotiations between investors and states. Among other functions, the ombudsperson offers support for investors from the other party in its territory to: a) "interact with the relevant government authorities to assess and recommend referrals for suggestions and complaints received from the Government and investors of the other party;" and b) "mitigate conflicts and facilitate their resolution in coordination with relevant government

[229] Ibid page 1.
[230] Article 1, Brazil-Malawi CFIA, this is also reflected in other agreements such the Angola and Mozambique CFIAs
[231] Adal M, Foreign Direct Investment in Brazil: Post-Crisis Economic Development in Emerging Markets, 2016, Academic Press, New York, page 86.
[232] The first CIFA was signed with Mozambique in 2013, and then with Angola in April 2015 and with Malawi in June 2015. There are also other African countries that Brazil is in negotiation with for the signature of CIFAs such as Algeria, Morocco and Tunisia and the Republic of South Africa another SADC State.
[233] Morosini F and another, the Brazilian Agreement on Cooperation and Facilitation of Investments (ACFI): A New Formula for International Investment Agreements?, 2015, IISD, Investment Treaty News.
[234] Ibid.

authorities and private sector bodies."[235] If the ombudsperson fails to resolve the dispute, dispute prevention operates at its second level, the JC.[236]

The JC shall resolve any issue or dispute concerning Parties' investment in an amicable manner. A Party may submit a concern of an investor to the JC.[237] Much like the first level of dispute prevention, the JC will work with the Parties to find mutually satisfactory solutions to the problem. At this stage, representatives of the interested investor and of the governmental or non-governmental entities involved in the measure or situation under consultation shall participate in the bilateral meetings held by the JC.[238] Far from being a third-party arbitrator, the JC functions as a mediator, issuing a summarized report.[239] If the JC is unable to work out a mutually satisfactory solution, any party to the agreements may submit to the other party – state-to-state – a written request to the establishment of an arbitral tribunal.[240]Exhaustion of negotiations and consultations at the JC level is mandatory to initiate arbitral proceedings between States.[241]

The Brazilian agreements in contrast to the FIP (before the amendment), the SADC model BIT and the US model BIT, it bring about dispute prevention rather than resolution, and where such cannot be so prevented it offers an innovative channel of dispute resolution. The Focal Points and the Joint Committee have become the administrative functionaries for dispute prevention and resolution. The same are intergovernmental and as such could be said to be addressing some of the issues raised by investors about the biases within host state court systems.

The Agreements however on the other hand, like the US model BIT and the amended FIP espouse the age old diplomatic protection in the settlement of investment disputes in the state-to-state dispute settlement mechanism.

[235] Article 4 Brazil-Malawi (CFIA).
[236] Morosini F and another, The New Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs): Navigating between resistance and conformity with the global investment regime, available at http://www.law.nyu.edu/sites/default/files/upload_documents/Morosini%20-%20Global%20Fellows%20Forum.pdf, accessed on the 27/05/2016.
[237] Article 13.3 (Brazil-Malawi) ICFA.
[238] Article 13.3.c (Brazil-Malawi).
[239] Article 24.3.g (Brazil-Chile).
[240] Article 13.6 (Brazil-Malawi).
[241] Article 25 (Brazil-Chile).

4.4 The Protection of Investments Act (South Africa)

The Republic of South Africa is the largest economy within the SADC. In 2010 South Africa decided to cancel all its BITs and make an overhaul of the legal framework for investment protection.[242] This was post the *Piero Foresti and others v Republic of South Africa*.[243] The country has now signed into law the Protection of Investments Act.[244] The Act domesticates investment dispute settlement. In terms of the Act the Republic shall provide an investor such administrative, legislative and judicial processes to all investors within the republic in respect of their investments that is not arbitrary, and in line with the constitution and applicable South African laws.[245] Where administrative processes have been so extended the investor has the right to written reasons and a right to administrative review of such decisions.[246]

The Act provides for the resolution of disputes through a lawful and fair public hearing by the domestic courts and or where necessary by an independent and impartial tribunal in terms of the constitution.[247] The Act provides for alternative dispute resolution in that it gives the investor who has a dispute an avenue for mediation within period of six months of such dispute arising, this however does not preclude an investor from approaching the courts of law for recourse.[248] Where the dispute is not settled either by administrative action or by the local courts, the dispute may be submitted to arbitration. Such arbitration is dependent on the Republic providing its consent to the arbitration and the same shall be as between the Republic of South Africa and the investors' home state.[249] The act totally precludes investor-state dispute resolution.

The Act is almost on all fours in line with the FIP as amended and the SADC model BIT, the right to such fair administrative and judicial processes resonates with article 25 of the amended FIP and

[242] Op cit, (woolfrey) page 64.
[243] *Piero Foresti and others v Republic of South Africa (*ICSID case No. ARB (AF)/07/1) the Tribunal Award (4 August 2012. The case involved two Italian families and a Luxembourg based holding company who had invested in mining and processing of granite in South Africa, they alleged that the Minerals and Petroleum Resources Development Act (MPRDA) and Act in South Africa which formed part of their Black Economic Empowerment programme violate provisions of the South Africa Luxembourg Treaty and that the same was an act of expropriation.
[244] Act no 22 of 2015.
[245] Section 6(1) Protection of Investment Act.
[246] Section 6(2).
[247] Ibid section 6(4).
[248] Section 13(4).
[249] Section 13 (5).

the exclusion of investor-state dispute settlement is also in line with the FIP and in line with the protocol on the new SADC tribunal as only state parties may participate in any arbitration if there could be need for the same. The similarities could be attributed to the fact that the Act was promulgated post the proposed amendment to the FIP and post the drafting of the SADC model BIT.

4.5 Conclusion

The chapter has brought about a comparative analysis of the dispute settlement within the SADC and other regions, the US model BIT and the new Brazilian agreements. There are some inconsistencies within the SADC as to what is available for dispute resolution. The SADC model BIT though only illustrative to members provides for both ISDS AND SSDS. The inconsistency could be problematic since there is no tribunal within the community that could possibly hear an individual investor in as much as the SADC Tribunal has been revamped to exclude individual investors in favour of states. The Brazilian agreements have brought about some innovation in dispute prevention rather than dispute resolution however where such are not so resolved again state-to- state arbitration comes into play. State-to-state arbitration is also provided for in the US model BIT, but for specific purposes of enforcement of awards pursuant to fruitful awards in favour of the investor, or where the home state is not complying or for the application or interpretation of the treaty.

CHAPTER FIVE
CONCLUSIONS AND RECOMMENDATIONS

5.1 Summary of findings

The necessity for an effective and efficient dispute resolution mechanism cannot be over-emphasised. It is needed both by investors and host states alike. Investors are keen to have assurances against the takings by government and would much prefer access to international dispute resolution tribunals and in this case arbitral tribunals. On the other hand host states have been spooked by the inclusion of investor-state dispute resolution in either BITs or FTAs as they fight for policy space and the right to regulate investments within their borders. The ensuing has resulted in an age long shift from gunboat diplomacy to the ISDS and recently to more diverse means of dispute prevention and alternative means of dispute resolution in the quest to find effectiveness and efficiency.

A cursory look at the last chapter shows the world attempting to find the illusory balance between the rights of the investor and the host state. Countries such as the US have burnt the brunt in terms of arbitration under the ISDS but have maintained the system. This could be attributed to the fact that though they are now FDI and or capital recipients as opposed to them formerly only being capital exporters, they have to cater not only for inward investments in their treaties but also for their investors in other jurisdiction so that they can have the best of the ISDS.

5.2 Conclusions

The emergence of ISDS provided an alternative that gave hope to investors, it eased the uncertainties and inadequacies investors faced when their claims were espoused by their home states under diplomatic protection. However, the proliferation of ISDS arbitral cases caused a ‘panic’ within the International Investment Law sphere and resulted in a legitimacy crisis over the system with numerous criticisms being levelled at it. Some state parties opted out of one or all BITs that provide for ISDS. Some States such as the Republic of South Africa reviewed their BITs and took a stance within their local setting to exclude the ISDS.

To this end suggestions were made on how the system can best be improved. Some of the suggestions were taken into account and have to date been incorporated by both the ICSID arbitration rules and the UNCITRAL Arbitration Rules. There has been the inclusion of transparency in the rules but some if not all other suggestions for reform have been rejected. To this date there are still suggestions for reform of the system, some member states are taking a stance in forcing for the exclusion of ISDS in their BITs and its inclusion in FTAs to which they are state parties.[250]

An overview of the comparative analysis suggests that though some countries have bought the legitimacy crisis endemic and are seen promulgating local laws that preclude ISDS, and to the same end have influenced the exclusion of the same within FTAs within which they are members.[251] At the same time some jurisdictions like the US believe in the ISDS system and rather detail their BITs in order to be reflective of what they want. This is along the lines of a pro-ISDS argument that it is not the ISDS that has a problem per se but it is the treaty provisions signed by individual member states. The provisions are more often ambiguous and they give the arbitrators the leeway and more power to interpretation thus leading to erroneous decisions. It has been suggested that states should be accountable to draft treaties with clarifying key ideas and provisions, cautiously defining the scope of the treaties and alongside clear ISDS clauses.[252]

Countries like Brazil are emerging economies, they have not been subjected to any ISDS as a result of their not having ratified any treaties. They have come up with a novel idea of dispute prevention and dispute resolution. They have totally excluded ISDS and opted for the age long state-to-state arbitration for the resolution of those disputes that could not be eschewed and whose resolution has failed. The conflicting stances taken by individual states would show the extent of the crisis.

SADC has been caught in the middle. It formerly included ISDS in its investment chapter. It however, later somersaulted and suspended its tribunal and also amended its investment chapter

[250] Australia is such a country and is opposed to the inclusion of the ISDS in the TTP.
[251] This is the case of South Africa which has enacted the Protection of Investments act and has been instrumental in the Amendment of the FIP and towards the total exclusion of the ISDS both locally and within the SADC.
[252] UNCTAD.

to exclude ISDS. This could be attributed to the brunt burned by certain SADC member states who have been respondents in ISDS cases. The change has been rather mystifying and has left a lot of confusion in its wake including leaving investors who already had cases pending in the tribunal stranded and without clear recourse for their claims. The SADC Tribunal's re-constitution has denied individual investors access to international arbitration otherwise than through their home states, thus bringing back the challenges inherent in diplomatic protection. The community seeks an investor to seek redress within the local setting of a member state.

The shift in paradigm in the SADC dispute settlement mechanism has affected the Swissbourgh case and to a large extent denied the region an opportunity to create its own jurisprudence. The SADC Tribunal was disbanded whilst the matter was still pending, its re-constitution though it has not come into effect does not help in any manner in as much as the jurisdiction of the tribunal has been curtailed. Apart from the curtailed tribunal the Annex 1 of the FIP has been amended to exclude ISDS, this is to the peril of the investor. As a result of the disbanding of the Tribunal the investor was forced to go forum shopping for a tribunal that could possibly resolve his issues and he sought refuge in the PCA under the UNCITRAL Rules of Arbitration.

The tribunal has ordered for constitution of another arbitral tribunal, of SADC originality with arbitrators appointed in a similar fashion judges that of the SADC Tribunal were appointed to hear the matter. What is surprising about the award is that the PCA arbitral tribunal concedes that they have no jurisdiction to entertain the matter as the cause of action came into being way before the SADC Tribunal was promulgated. They however nonetheless continue in their tracks to order a tribunal to deal with a matter that already has jurisdictional procedural question of which they have already a somewhat ruling on.

This notwithstanding, the matter itself as filed in the SADC Tribunal is wanting in a lot of respects, some of the issues being the claimants have not exhausted local remedies in relation to the claims so made. They have approached a tribunal which did not exist when the cause of action arose and under a treaty that does not provide for retrospective application. This is against the rule of application of treaties and especially the Vienna Convention on the Law of Treaties. The case is

also in line with the criticism looked into herein to the extent that it allows individual investors to challenge decisions of the host state and have host states pay a price for having impartial courts.

5.3 Recommendations

Recommendations have been made for reform of the ISDS the same amongst others include: -

5.3.1 The encouragement of alternative methods of dispute resolution as alternatives to arbitration and or litigation in the form of mediation and conciliation.[253] The SADC model BIT like the US model BIT provide for the amicable settlement of investment disputes, however there are not streamlined ways set out as to manner in which the same should be done. The Brazilian Model provides for the Focal Points and the Joint Committee for consultation in the spirit of preventing and settling disputes but however it there are again no streamlined processes to be followed to make the process effective. A practical example cannot be taken herefrom in as much as the processes have not been tested as the agreements are fairly new.

5.3.2 In keeping with the alternative dispute resolution mechanism, there has also been recommendations for reform of the current ISDS system keeping only the basic structure.[254] The suggested reforms include going more to the root of the investment treaty signed. This is more so because the dispute resolution mechanism cannot work in isolation of the general body of the treaty. It has been suggested that the treaty be delimiting on the illegibility of an investor to bring a claim, the reduction of the subject matter for ISDS claims.[255] The same can be achieved by making concise and restricted interpretation of investment and investor and at times making the rule for the exhaustion of local remedies mandatory.[256]

5.3.3 Otherwise than the reform work it has been suggested that the current arbitral system be improved. The improvement can be in terms of improving the transparency of the arbitral process by giving the public access to arbitral documents more along the lines of the NAFTA and the US model BIT. Giving legitimacy to the arbitral process by ensuring that arbitrators are people with

[253] Reforming the International Investment Regime: An Action Menu, Chapter IV, UNCTAD report 2013.
[254] Ibid page 145.
[255] Op Cit (saha) at page 48.
[256] Ibid.

the requisite skill and are fully independent, impartial and free from conflicts of interest and lastly affordable. [257] The suggestion would augur will with the arbitrators being remunerated like judges to kill the need to work longer hours thus inflating the cost of arbitration.

5.3.4 In line with the preservation of the ISDS there has been calls for introduction of an appeals' mechanism. This is a possible means of improving consistency among awards and enhancing predictability, hence reducing some of the legitimacy concerns.[258] The same would give room for parties to challenge some of the legal mistakes made in awards and or provide an avenue for review of the arbitral proceedings which are currently non-existent.

5.3.4 There have also been suggestions that propose the replacement of the ISDS with other forms of adjudication:-

5.3.4.1 The total exclusion of ISDS and the introduction of state- to-state dispute settlement. This route it is believed would reduce the number of frivolous suits that are brought by investors as states themselves would be reluctant to bring about legal argument they themselves would not want other states to bring up against them.[259] It has also been provided that the state-to-state dispute resolution would have to be modelled or should take lessons from the World Trade Organisation dispute resolution mechanism and this would also be in line with the argument and principle that only state parties can bring about claims in the international law sphere.

5.3.4.2 Otherwise than the state-to-state dispute resolution there have been calls for the establishment of an international investment court.[260] The establishment of such a court would replace the *ad hoc* arbitral proceedings but it would be an independent court consisting of judges who have a security of tenure and are precluded from the 'double hat dilemma'[261] of coupling as both arbitrator and counsel at the same time. It is perceived that the court would contribute a lot to the consistency and predictability of the interpretation of the international investment agreements

[257] Op cit (UNCTAD) page 146.
[258] Op Cit (Saha) page 49.
[259] Op Cit (UNCTAD) at page 153.
[260] Ibid at page 153.
[261] Op Cit (Matveev) at page 383.

and deal with the perceived biases of the arbitrators and entrench the notion of independence and impartiality.[262]

The above cited proposals for reform of the international investment dispute settlement system are not without problems for implementation. If there has been a problem over the years for the establishment of a multilateral investment treaty, it could be as much difficult to establish an international investment court to which member states can subscribe. Some of the suggestion have been made and some heeded by arbitral institutions such as the ICSID and the UNCITRAL as we have seen the inclusion of transparency rules in their rules of procedure. However, for those that cannot be easily implemented we would recommend the inclusion of the same in the BITs or FTAs regionally and sub-regionally to try and influence the inclusion of the same in the international sphere.

The current dispute resolution system within the SADC would be termed as host state friendly and detrimental to the individual investor. As it stands, it has favoured Zimbabwe as a member state otherwise than have Zimbabwe have respect for the rule of law. The first manner in which to restore confidence within the system for both the investor and the host countries is not to totally exclude ISDS.

In line with suggestions made for reform by the UNCTAD, we would recommend that the ISDS be retained but only structurally, that is allowing an individual investor to bring about a claim against the host state. The same should not be one sided but it should also allow a member state to bring about proceedings against an investor for abrogation of treaty provisions. Annex 1 of the FIP needs to be revisited in order to, and in line with the recommendations, align the type of cases that can be brought about for adjudication regionally. The respect for member states' domestic laws and court structures need to be emphasised. The definitions of 'investor' and 'admitted investment' need to be circumscribed and narrowed down and the types of claims that can be entered for arbitration need to be circumscribed in order to delimit and eschew frivolous claims.

[262] Op Cit (UNCTAD) at page 153.

In line with the retaining of ISDS and along the spirit of the FIP, which is the promotion of the regions as an investment destination of choice, and in the spirit of amicable settlement of disputes, the community could make use of its investment promotion agencies as provided for in the FIP to try and have bilateral focal points not to deal only with promotion of investments but also to assist in the amicable settlement of investment dispute.

We recommend also that there should be a mandatory exhaustion of local remedies rule by investors and states alike before any international adjudication can be pursued. The Community and the member states need to invest in capacity building within the individual member states to handle certain cases and to harmonise both their laws and processes for consistency purposes. The number of days within which a case be heard within the member states should be improved so that there can be reliance on the local courts.

The current SADC Tribunal as constituted has insufficiencies. It is not an investment court with speciality in the field. It is a tribunal for the community for the interpretation and application of the SADC Treaty. We would therefore recommend that there be an investment court within the Community that deals only with investments and that the judges called upon to sit in the court should not only be judges of prominence in their jurisdictions but international investment law experts.

There should lastly, be introduced within the community an appellate mechanism for investments. This would help address some legal challenges such as reviews and appeals from the court a quo. They would go a long way into addressing the legitimacy crisis. The establishment of the courts would deal with the issue of public access and other transparency issues as raised and judges with a security of tenure need be appointed.