International Journal of Trend in Scientific Research and Development (IJTSRD)
Volume 7 Issue 5, September-October 2023 Available Online: www.ijtsrd.com e-ISSN: 2456 – 6470

Contour of Investment Dispute Settlement Mechanism: A Crucial Analysis of its Purview and Impact on the Sustainability of the Extractive Industries in Cameroon

Bande Gulbert Mbah Tarh

Ph.D. in Law, Senior Lecturer, FSJP, University of Maroua, Maroua, Cameroon

ABSTRACT

This paper x-rays the primordial role of the investor-state dispute settlement (ISDS) mechanisms in fostering international cooperation for economic development, especially in the extractive industries (EI). As it provides a forum for investors to bring claims against States and vice versa. The ICSID Convention maintains a careful balance between the interests of the investors and those of the host States - as the Convention permits the institution of proceedings by both the host States and the investors. However, the evolution of the international investment system has transformed this broadly conceived forum into a relatively unilateral forum. Since under the current system, the best a Respondent State can hope for is that the investor covers their legal costs. With the investors having much to gain, while the States have everything to lose. As such, any successful State counterclaims and claims can serve as a deterrent to any frivolous claim from the investors, thus, providing the Respondent States with a motive to bypass jurisdictional objections and move straight to the merits. In this vein, the right granted to the private parties, to effectively sue a sovereign State for breaches of "acquired rights" granted in contracts, international investment agreements (IIAs), and customary international law, has been called, by both the opponents and proponents, as the pulling-down of the State to the same level as a private party. Despite ICSID permission and encouragement of State counterclaims, most State counterclaims in ISDS always fail because of the narrow interpretations of the counterclaim jurisdictional requirements, as well as the lack of substantive protections for States in contracts and IIAs. On this account, the paper also considers the effectiveness of ISDS and enforcement in Cameroon, and the ISDS proceedings under the OHADA system. Which in pursuant to the global recognition of arbitration as a predominant ISDS mechanism and the concomitant growth in the normative and institutional frameworks regulating the conduct of investment arbitration, created the Common Court for Justice and Arbitration (CCJA) and adopted the Uniform Act on Arbitration - as the lex loci arbitri for all arbitration proceedings conducted within the OHADA zone. Although investors are still sceptical about such ISDS mechanisms because they are afraid of its legal and judicial uncertainty and insecurity – thus, prompting them to anchor at the ICSID. That being the case, the paper examines these issues by first cascading the spectrum and implications of the investment dispute settlement mechanisms – by focusing on the rights and obligations of the parties of an ISDS process, and then tackling the purview and impact of investment dispute settlement and enforcement framework in Cameroon, by examining the alternative mechanisms that can enhance sustainability in its EI.

How to cite this paper: Bande Gulbert Mbah Tarh "Contour of Investment Dispute Settlement Mechanism: A Crucial Analysis of Its Purview and Impact on the Sustainability of the Extractive Industries in Cameroon" Published in International Journal of Trend in Scientific Research and Development (ijtsrd), ISSN: 2456-6470, Volume-7 | Issue-5, October 2023, pp.64-90, URL: www.ijtsrd.com/papers/ijtsrd59868.pdf

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KEYWORDS: *Investment, Dispute Settlement, Sustainability, Extractive Industries, Cameroon*

INTRODUCTION

Explicitly, the rapid flow of foreign direct investments (FDI) in Cameroon like other African countries, has simultaneously witnessed the global recognition of arbitration as a principal mechanism for ISDS. This has prompted significant growth in the normative and institutional frameworks regulating the conduct of investment arbitration throughout the continent. As such, States have entered into international investment treaties, which establish the terms and conditions of FDI within each State, and provide rights directly to the

investors of each State that is a party to the treaty. With such treaties also containing provisions bearing on dispute settlement and restrictions on local content requirements.[1] On this account, it is noted that such restrictions and other pertinent issues at times often result in disputes between the investors and host-State. A situation that is very precarious since the investors often undertake the risk to invest in a project overseas, whereby the stability of such investment is usually at the mercy of the investor's home sovereign to protect - through intervention or diplomatic channels. Despite this, it is observed that during the post-colonial transition era, the diplomatic channels did not readily provide timely recourse - since in any event, such diplomatic channels are inevitably political and tend to be uncertain, slow, and inefficient. Owing to these debilities, the investors advocated for something akin to the commercial arbitration system, which was seen as a success following the putting in place of the International Centre for the Settlement of Investment Disputes (ICSID)[2]; the Multilateral Investment Guarantee Agency (MIGA)[3] to safeguard non-commercial risks; and the New York Convention[4], to ensure the enforceability of commercial arbitration awards, etc. As they provide the forum through which a problem could be resolved through an investor-state dispute settlement (ISDS) mechanism, whereby a State undertakes to allow private actors to engage with it directly without having to go through the diplomatic channels or even having to exhaust local remedies.

With this general trend, is thus, giving investors the choice of arbitral mechanisms through institutions like ICSID and the affiliated Additional Facility (for States that are not signatories to ICSID), the International Chamber of Commerce (ICC), or the various regional arbitration centres. From this, it is noted that the methods and procedures for resolving disputes between the parties to bilateral investment treaties (BITs) involve the application of the treaties - which are typically spelt out in a rather elaborate set of provisions. For this reason, the submission of any dispute to ICSID depends on whether both States are signatories to the Washington (ICSID) Convention, and possessed a BIT submitting to the jurisdiction of ICSID. Nevertheless, for States that have not signed the ICSID convention - the dispute may be submitted to the Additional Facility for Administration of Conciliation, Arbitration, and Fact-finding Proceedings, which is also under the auspices of the World Bank, as well as the ICSID. In this regard, under the BITs, the jurisdiction of the ICSID, as well as of the competence of the tribunals, must be established either under the ICSID Convention or the ICSID Additional Facility Rules, and the bilateral or multilateral treaty concerned. Despite this, some "old generation" BITs only allowed for a State-to-State dispute settlement mechanism. However, in recent BITs, the investor-to-state mechanism is currently the rule – though some BITs still make the availability of the investor-state dispute settlement conditional upon the prior exhaustion of local remedies.

Similarly, it is worth noting that the ICC offers an international court of arbitration with arbitration places in 42 different countries in 2001. As such, it also offers different mechanisms to reach an amicable settlement - with one of such being the ICC-Alternative Dispute Resolution Rules. Equally, the ICC arbitral awards enjoy much greater international recognition than the judgments of the national courts. As several States have signed the 1958 New York Convention, which is primordial for the functioning of the ICC and other dispute settlement centres - since the Convention facilitates the enforcement of awards in all contracting States. In addition, several other multilateral and bilateral arbitration conventions may also help enforcement. In this vein, it is observed that in 2001, 566 requests for arbitration were filed with the ICC court of which over 8% involved at least a State or a parastatal entity.[5] In this line of thought, it is worth noting that the ICSID has emerged as the most significant forum for the submission of BIT disputes. Although during the first 30 years of its existence since 1965, ICSID only had to deal with an average of one or two cases a year. But with the proliferation of BITs, the dispute settlement system of the ICSID has been much more frequently used. Thus, between 1998 and the beginning of 2002, the ICSID has been registering on average one case a month.[6] As such, of the 14 cases in 2001, 11 were brought based on the dispute settlement provisions of BITs. Likewise, by the end of March 2003, the ICSID announced 72 concluded cases and 46 pending cases.[7]

[1] According to the United Nations Commission on International Trade Law (UNCITRAL)'s country-specific list of bilateral investment treaties

[2] See the Washington (ICSID) Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (as amended on 10 April 2006), and ICSID Rules and Regulations of 18 March 1965. http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp.

[3] See the Seoul Convention of 1985 setting up the Multilateral Investment Guarantee Agency (MIGA) - aimed at safeguarding non-commercial risks.

[4] See the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

[5] See different pages on the ICC website on arbitration (http://www.iccwbo.org/court/english/arbitration)

[6] See ICSID website: online decisions and awards

[7] *Ibid.*

In this connection, it is clear that ICSID provides jurisdiction for the settlement of investment disputes. With the aim to foster international cooperation for economic development[8] - as it is currently a forum for investors to bring claims against States, and *vice versa*. This shows how the provisions of the ICSID Convention aim to maintain a careful balance between the interests of the investors and those of the host States. As the Convention permits the institution of proceedings by the host States, as well as by the investors.[9] Despite this, it is observed that the evolution of the system for international investment has transformed this broadly conceived forum into a relatively unilateral forum. Since under the current system, the best a Respondent State can hope for is that the investor covers their legal costs. With the investors having much to gain, while the States have everything to lose. As such, any successful State counterclaims and claims can serve to deter the frivolous claims from the investors and provide the Respondent States with a motive to bypass jurisdictional objections and move straight to the merits. For this reason, the right granted to the private parties, to effectively sue a sovereign State for breaches of "acquired rights" granted in contracts, international investment agreements (IIAs), and principles of customary international law, has been called, by both the opponents and proponents, as the "pulling-down of the State" to the same level as a private party.[10] On this account, the paper aims to consider these issues in two parts, with the first part cascading the spectrum and implications of the investment dispute settlement mechanisms – with a focus on the extractive industries (EI), while the second part tackles the purview and impact of investment dispute settlement and enforcement in Cameroon and the way forward to enhance sustainability in its EI.

I. CASCADING THE SPECTRUM AND IMPLICATIONS OF THE INVESTMENT DISPUTE SETTLEMENT MECHANISM

In this contemporary era, the EI is one of Africa's flagship industries and a growth engine for several countries like Cameroon. This is because not only have some of the extractive endeavours developed a significant infrastructure - but also a consistent regulatory framework to allow domestic and foreign investors to access their extractive resources. Thus, since oil, gas and mining are complex businesses, requiring significant investments, potentially generating high returns and involving manifold political issues, disputes often inevitably arise. As such, the international investment agreements (IIAs)[11] typically provide foreign investors with the right to resolve their disputes with the host States through "Investor-State Arbitration". On this account in this regime, the investors often seek redress in international arbitral tribunals under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) or other *ad hoc* panels utilising procedural rules like the UNCITRAL rules. As such, these IIAs that capital-importing nations conclude to offer assurance to incentivise - often wary the investors to undertake foreign direct investment (FDI) transactions and operations - have become part of the "common sense" approach most nations follow to improve their investment climate. Based on this, proponents of such regimes argue that IIAs and the wider dispute settlement regime associated with them are necessary to protect foreign investors who often make significant investments that become profitable only in subsequent years. As the investor usually has significant sunk costs at the initial stages of the investment - especially as seen in the case of the EI. That being the case, it is worth noting that once these have been made and the projects commence operating, the balance of power often tilts in favour of the host State.[12] Consequently, to alleviate the situation, *Professor Thomas Wälde* stresses the importance of protecting the investors, by emphasizing the need to "provide the investors with rights that can enable them to convert the agreements with the host States from mere political understandings to more legally affected constraints."[13]

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[8] See Article 46 of the Washington (ICSID) Convention.

[9] Report of the Executive Directors of the International Bank for Reconstruction and Development on the ICSID Convention. http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp.

[10] López, J. (2007). "Algunas consideraciones Acerca de Los Denominados Contratos Ley", 11 *Derecho Y Cambio Social, §III*. ("Nothing impedes the State from submitting to the sphere of private law and laying itself down on a level of parity with the particular contractor when public convenience so requires; in such situations, the State may not make use of the exorbitant clauses [making the contract subject to International Public Law] since these are incompatible with the private law". http://www.derechoycambiosocial.com/revista011/contratos%20 ley.htm.

[11] The term 'IIAs' refers to bilateral investment treaties (BITs), double taxation treaties (DDTs), and free trade agreements with investment chapters (FTAs). In the past 20 years, there has been a substantial increase in IIAs. There are now 5,929 IIAs, including 2,750 BITs, up from 1,000 in 1995. UNCTAD, World Investment Report 2010, p. 82.

[12] Vernon, R. (1971). *Obsolescing bargain mechanism in Sovereignty at Bay: The Multinational Spread of U.S Enterprises,* (New York Basic Books, p. 326).

[13] Waelde, T. (2008). "Renegotiating acquired rights in the oil and gas industries: Industry and political cycles meet the rule of law", *Journal of World Energy Law Bus*, 1 (1), pp. 55-97.

But contrariwise, critics of the current system argue that IIAs are overly concerned with protecting the rights of the investors at the detriment or expense of the need for legislative flexibility of the host States, to meet the needs of its citizens and protect the legitimate public policy objectives.[14] As such, the tension between the international investment regime and the public interest is made more pronounced in cases of disputes, when the investors are permitted under IIAs to bring claims against the host State to protect the rights of their investment. In this vein, it is noted that the increase in the number of IIAs has been accompanied by an increase in the number of known investment arbitration cases, from a handful in 1995 to over 350 in 2009.[15] That being the case, it is observed recently that the disputes in the extractive industry account for 32 of the 128 pending cases at the ICSID;[16] with the Latin American governments making up 66% of the respondents.[17] As such, it is worth noting that the large number of cases arising from the EI is not surprising. As *Wälde* affirms the paradigm case that leads to the EI disputes in the following words, "Once the capital has been put down and the project is finally starting to generate revenues, the successive government administrations often find themselves compelled by public pressure to erode the projects' return, by imposing changes in law, regulation or policy that aim to access (and often redistribute) the now-available revenue streams".[18] This is especially true in primary commodity booms - when greater-than-projected price swings lead to surplus wealth accruing to primary commodity-producing firms. As such, the investor contracts and IIAs effectively stabilise the original obligations of the host State government, protecting the investor from 'opportunistic' later changes. As a consequence, to an investor, a stabilised agreement that prevents the renegotiation of the contract when prices swing upwards may look like a solution to the obsolescing bargain problem. While to the host State officials, citizens, and affected communities, the boom price swings look too much like unearned profits, especially when viewed in light of community underdevelopment and the effects of resource exploitation on the environment. Since generally environmental and community development issues can and often do lead to conflicts.[19] Despite these, it is essential to note that disputes seem to be, for many EI projects, an unavoidable part of the life cycle of the contract. *Per se,* depending on the dispute resolution process, disputes can cause much damage in terms of reputation and profitability, both to the investing company and host State. As such, it is worth exploring if and to what extent international arbitration can be a suitable and effective dispute resolution mechanism for typical disputes in the EI.

1. The Typical Disputes of the Extractive Industries

Succinctly, it is common wisdom that each dispute often turns on its facts. For this reason, it is worth considering and classifying the typical disputes in the EI, and the impetus of international arbitration, as a viability and suitability dispute resolution mechanism, to enhance the key relationships between the parties in the process as follows:

A. Disputes with the host State:

Such disputes can either revolve around the extractive concession agreement or other concerned adverse measures of the State against the investors. The first type of dispute generally relates to the extractive company's exploration and exploitation rights and obligations under the extractive concession agreement. Indeed, the violation of such rights can also include security issues like not receiving adequate protection through the host State, the outbreak of war and similar *force majeure* situations preventing performance, as well as incursions on the extractive activities by illegal persons. Similarly, the host State can sue the extractive company, for example, for failing to perform the exploration or exploitation, not paying the concession fees, taxes and bonuses, or for environmental damages. However, if the law of the host State allows for arbitration, as is the case, for example, in Cameroon and other African countries[20], the parties can submit

[14] Van-Harten, G. (2007). *Investment Treaty Arbitration and Public Law* (New York: Oxford University Press); Sornarajah, M., *A coming crisis: expansionary trends in Invest Treaty Arbitration* in Sauvant, K. and Chiswick-Patterson, M. (eds.) (2008). *Appeals Mechanisms in International Investment Disputes*, (New York: Oxford University Press); Stiglitz, J. (2008). "Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalised World Balancing Rights with Responsibilities", 23 Am. *UN International Law Review*. 3, 451.

[15] Sauvant, K. (2009). "FDI Protectionism Is on the Rise", World Bank Policy Research Working Paper 5052 (September).

[16] Anderson, S., Perez-Rocha, M. and Dreyfus, R. (2010). "Mining for Profits in International Tribunals: How Transnational Corporations Use Trade and Investment Treaties as Powerful Tools in Disputes Over Oil, Mining, and Gas", (29 April).

[17] *Ibid.,*

[18] Waelde (2008)., *op cit.*

[19] Recently in Nigeria, the local communities of the Niger Delta demanded a greater share of the oil revenue produced from their land and some of the agitation turned violent. See Ukoha, U. (2007). "From 'Pirates' to 'Militants': A historical perspective on anti-state and anti-oil company mobilisation among the Ijaw of Warri, Western Niger Delta", 106(425) *African Affairs* 587.

[20] For instance, in Cameroon: Section 232 of the Mining Code of 2019; Ivory Coast: Section 190 of the Mining Code of 2014;

the concession agreement disputes to commercial arbitration by using an arbitration agreement - if the concession agreement does not automatically provide for arbitration. In addition to the concession agreement, it is worth noting that the regulations of the EI of the host State, are generally considered as the substantive law to settle disputes. For this reason, the majority of host States have promulgated laws in the EI, which provide the general framework for extractive concessions for domestic and foreign investors.[21] Notwithstanding, international arbitration provides an effective dispute resolution mechanism because it provides, *inter alia*, for a neutral forum, a decision-making body of experts, and a final decision that can be widely enforced. While the second type of dispute revolves around adverse measures from the host State, which may or may not qualify as a breach of the concession agreement. Such adverse measures include expropriation, discrimination or unfair treatment by government agencies or national courts, violations of stabilisation clauses contained in the investment treaties or withdrawals of tax exemptions. Indeed, to the extent that these disputes do not already qualify as a breach of the concession agreement, the extractive company could try to sue the host State in its domestic courts. Although a more attractive forum may result from an investment treaty between the host State and the investor's home State. Africa accounts for about 842 Bilateral Investment Treaties (BITs), with the vast majority of the BITs referring to investment arbitration in case of dispute, which are often in line with the ICSID Rules[22]. However, besides these BITs, are regional investment agreements like the OHADA[23] Uniform Act (UA) on Arbitration, the Investment Agreement for COMESA[24] and the SADC[25] Protocol on Finance and Investment, which also contain provisions for investment arbitration. That being the case, it is worth noting that in investment arbitration cases, the substantive law of the dispute is often contained in the provisions of the investment treaty that the host State potentially violated through its actions as well as public international law.

B. Disputes with other stakeholders:

The extractive company usually collaborates with many service providers, in particular with regard to the project's funding and the construction of the extractive site and other infrastructure. Which can lead to project finance or construction disputes that are both generally suitable for commercial arbitration. In such circumstances, the arbitrability of such disputes will not depend on the national laws of the host State, since most project financers and construction operators are located in third countries. In this sense, it is worth noting that commercial arbitration is traditionally used as a dispute resolution mechanism for construction disputes, as it allows the use of highly qualified arbitrators, counsels and experts. Equally, disputes can also arise with the purchaser of the extractive products - usually traders or refinement companies - because of pricing, quality or compliance issues like no sale of “blood diamonds” or minerals extracted by children, alleged breaches of anti-bribery or anti-corruption legislation. As such, the disputes can be heard in international commercial arbitration, either based on an arbitration clause in the purchase agreement or a subsequently concluded arbitration agreement. On this account, the advantages of international arbitration are, *inter alia,* that it provides for a neutral forum, a decision-making

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Ghana: Section 27(3) of the Minerals and Mining Act of 2006, etc.

[21] In addition, the host States have equally promulgated a series of other laws, for example, environmental and labour laws, and regulations to complement the laws of the extractive industry, which can also play a role in concession agreement disputes, for instance, in determining breaches committed by the extractive company.

[22] http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp. See Burianski, M. and Kuhnle, F-P. (2017). “Arbitration in Africa – Managing Risks in a Growing Market”; investmentpolicyhub.unctad.org/IIA/AdvancedSearchBITResults

[23] OHADA is the French acronym for the Organisation of Business Law in Africa, currently comprising of the following 17 States: Benin, Burkina Faso, Cameroon, Central Africa Republic, Chad, Comoros, Congo-Brazzaville, Democratic Republic of Congo, Gabon, Ivory Coast, Bissau Guinea, Equatorial Guinea, Guinea (Conakry), Mali, Niger, Senegal and Togo. With its purpose being to stimulate and secure investment within the OHADA space at both legal and judicial levels. OHADA was created by a treaty signed in Port-Louis (Mauritius) on 17 October 1993, and modified in Quebec (Canada) on 17 October 2008. It consists of the following four bodies: (i) Council of Ministers (Justice and Finance Ministers of the Contracting States), a legislative body that adopts regulations and common business law called 'Uniform Acts'; (ii) Common Court of Justice and Arbitration (CCJA), a supranational court based in Abidjan (Ivory Coast) that ensures the common interpretation and application of OHADA law and administers arbitration proceedings under the CCJA Rules of Arbitration; (iii) Regional High Judiciary School based in Porto Novo (Benin), which trains judges and other lawyers of Contracting States in the new common business law; (iv) Permanent Secretary based in Yaoundé (Cameroon), in charge of the administration of OHADA.

[24] Common Market for Eastern and Southern Africa (COMESA), with its Members being: Burundi, Comoros, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

[25] Southern African Development Community (SADC), with its Members being: Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

body of experts, a final decision that can be widely enforced, and for the confidentiality of the issues at stake. Similarly, since the extractive operations are often organised as joint ventures or joint operations - sometimes also involving a government agency or state-owned company as a mandatory partner. As a consequence, disputes might also arise from the joint venture or joint operation agreement or as regards the operation of the company used for the joint venture. Thus, subject to the arbitrability of intra-company disputes, it is essential to note that such disputes can be heard in commercial arbitration, which again offers a neutral forum, a decision-making body of experts, a final decision that can be widely enforced, and confidentiality of the issues at stake as the main advantages. Besides, in these cases, it is common to opt for a third-state substantive law for the joint venture or joint operation agreement or organise the joint venture company under the laws of a third state. In addition, an extractive company, just like any industrial operation, may face issues with its employees or third parties, such as indigenous populations claiming violations of their environmental rights. With such disputes generally handled by the local courts. From these, it is worth ascertaining the rights and duties of each party.

2. The Scope of the Substantive Rights and Duties of the Parties

Contemporarily, many are calling for the re-calibration of a regime that, at its inception, was "intentionally unbalanced" in favour of the investor[26] - especially since the host States are having no rights under IIAs to bring claims against the investors, except in the form of counter-claims. That being the case, it is advocated that the original subordination of national sovereignty to certain "acquired rights" of investors should give way to a "re-examination in terms of the respective rights of the investors and host States in which they operate".[27] This is because the claim that States have consented to the regime and, therefore, are subject to it is being challenged by a few nations, who are voluntarily removing themselves from the ICSID system.[28] Although the nations removing themselves may not be the ones most likely to have claims brought against them.[29] In this light, it is worth considering the viable initiatives to balance the right between the investor and host State, the right of the States to counterclaim, before examining the crucial issue of jurisdictional requirements before ICSID.

A. Initiatives to Balance the Right of the Parties:

From this perspective, it is worth noting that at least two notable initiatives stand out as representative: (i) the 2005 "Model International Agreement on Investment for Sustainable Development", created through a consultation process by the International Institute for Sustainable Development (IISD), which aimed to balance the traditional granting of investor rights with investor obligations tied to internationally recognised labour, environmental, and human rights standards; and (ii) the 2006 "Bolivian Government guidelines for a fair trade and cooperation treaty with the US", which aimed to balance the traditional granting of investor's rights with the protection of host State's rights to regulate in the public interest, as well as stripping the investor of the right to directly engage the host State. As the stripping of the investor's right to engage the host State directly often either accompanies, efforts to ensure direct negotiations between the governments, especially for investments that "substantially relate to the public interest" (as seen in the case of the Bolivian Guidelines), or efforts to reinstate direct state-to-state dispute resolution. As such, an example of the latter is the 2004 United States-Australia FTA, which does not include investor-state dispute resolution due to the Australian government's resistance.[30]

On this account, it is observed that the issue that is quite contentious is the initiatives to reform the arbitration process as there has been: a sustained general call for increased transparency of international arbitration and dispute settlements;[31] a demand for more clarity and coherence in the awards

[26] Alvarez, J., "The Evolving Foreign Investment Regime", http://www.asil.org/ilpost/president/pres080229.html.

[27] *Ibid.*

[28] Bolivia denounced the Washington Convention in 2007, thereby withdrawing from ICSID, Ecuador excluded certain claims from the Centre's jurisdiction and Venezuela's Supreme Court issued an opinion limiting the reach of the country's consent to submit to ICSID jurisdiction. *See* Ignacio, V. (2009). "The Uncertain Future of ICSID in Latin America", (20 February). Available at SSRN: http://ssrn.com/abstract=1348016.

[29] Tallent, K. (2010). *State Responsibility by the Numbers: Towards an Understanding of the Prevalence of the Latin America Countries in Investment Arbitration*, TDM (June) ("Bolivia, Nicaragua and Honduras (all members of ALBA that have threatened withdrawal from ICSID) are among the few countries in the region that do *not* exhibit the majority of the characteristics that seemed most likely to be associated with significant participation in arbitration".), p. 39.

[30] Australia has traditionally been a net importer of FDI from the U.S. and has since then required investor-state arbitration clauses in FTAs signed with countries to which it is a net exporter. *See* Nottage, L. and Kate, M. (2010). *'Back to the Future' for Investor-State Arbitrations: Revising Rules in Australia and Japan to Meet Public Interests*, in Nottage, L. and Garnett, R. (eds), *International Arbitration in Australia* (Federation Press: Sydney, 2010).

[31] *Ibid.*

by arbitral tribunals,[32] especially in light of inconsistent decisions arising out of similar or the same set of facts.[33] Thus, reaching even further is the demand that arbitration awards should be subject to an appeal mechanism - since there has been much discussion recently about the potential conflict of interests of arbitrators. In this regard, some view a revolving door between the arbitrators and counsel as a systemic problem. As such, the ICSID in apparent reaction to this criticism recently amended its Arbitration Rules. With the new rule 6 providing for stricter conflict of interest provisions, stating, for example, that arbitrators must disclose "any other circumstance that might cause their reliability for independent judgment to be questioned by a party". Equally, these new rules also note that the obligation to disclose circumstances that may affect their independence and impartiality is a continuing one.

That being the case, other ongoing initiatives focus on building the capacity of the host States to handle the due diligence necessary to know what they are signing onto, as well as to prepare for an effective defence against expert corporate arbitral counsel.[34] As the Vale Columbia Centre has noted in the past that "most Respondent Governments do not have the expertise to defend themselves adequately in such tribunals, as they simply do not have the capacity to do so".[35] In this line of thought, initiatives like the Latin American Advisory Facility on Investor-State Disputes are being discussed to correct the *de facto* imbalance in the international arbitration system. With the purpose of the Facility being to assist countries in actual investor-State disputes, and also to provide capacity building, technical assistance, and legal opinions in connection with the prevention and handling of investor-State disputes through arbitration and otherwise.[36] Likewise, some commentators have urged the host States to utilise international arbitration to redress their grievances and bring claims against the investors, either under the contracts or as a counter-claim in an IIA-based dispute.[37] Despite these, it is observed that the most pertinent issue is whether a host State can prefer to enforce through arbitration or its local courts. An issue that can only be appreciated by considering the jurisdictional basis for a host State before an ICSID tribunal based on the equality of access.

B. Right of the States to Counterclaim:

In this connection, it is essential to note that ICSID does not only permit - but encourages counterclaims and State claimants. This is because the drafters envisioned the Centre as a multidimensional forum. With every provision of the ICSID Convention treating equally, the consenting States and consenting investors. Although inherent points of difference can be deduced concerning the consent of the investor, and any distinction housed within the applicable bilateral investment treaty (BIT) or contract. On that account, the ICSID Convention provides that "*Except as the parties otherwise agree, the tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre".*[38] In this line of thought, the Report of the Executive Directors goes further by encouraging counterclaims and State-initiated claims, clearly stating that, "*While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States. As such, the Convention permits the institution of proceedings by host States, as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases*".[39]

Likewise, it is worth noting that the Preamble and other clauses of the Convention provide equal rights to the investors and States. With the Preamble setting forth the premise of the Convention by stating that, "*Considering the need for international cooperation for economic development, and the role of private international investment therein, and bearing in mind the possibility that from time to time disputes may*

[32] For a commentary, see Kurtz, J. (2007). "ICSID Annulment Committee Rules on the Relationship between Customary and Treaty Exceptions on Necessity in Situations of Financial Crisis", *ASIL Electronic Publication* (volume 11 issue 30). Available at http://www.asil.org/insights071220.cfm

[33] See *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award 12 May 2005; *LG&E Energy Corp., L&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006; and *Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No ARB/01/ 3, Award, May 22, 2007.

[34] *See* IISD's Capacity Building Activities, at http://www.iisd.org/investment/capacity/.

[35] Vale Columbia Centre Newsletter: September 2010, at http://www.vcc.columbia.edu/content/vcc-newsletters.

[36] *Ibid.*

[37] Laborde, G. (2010). "The Case for Host State Claims in Investment Arbitration", *Journal of International Dispute Settlement,* Vol. 1, No. 1, pp. 97–122.

[38] See Article 46 of the ICSID Convention, and ICSID Rules and Regulations. http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp.

[39] See Report of the Executive Directors of the International Bank for Reconstruction and Development on the ICSID, and Article 13 of the ICSD Convention.

arise in connection with such investment between the Contracting States and nationals of other Contracting States'[40], thus, showing that it does not have differential access to the ICSID procedures. Similarly, ICSID's 'purpose' also treats the two equally. Since its purpose is to provide facilities for conciliation and arbitration of investment disputes between the Contracting States and nationals of other Contracting States, per the provisions of the ICSID Convention.[41] With Article 36 of the Convention inviting both the States and nationals to institute proceedings assuming consent is given, thus, listing the State first. For these reasons, there is a clear emphasis on equality of access between the States and investors. Although the current dynamic of investor-State disputes, however, seems to contradict the principle of equality. which on the one hand, it can partly be explained by the evolution of jurisdictional interpretations, which have left the State with limited access to ICSID and the limited recourse to counterclaims. While on the other hand, the unilateral nature of the current International Investment Agreements (IIAs), provides substantive protections exclusively to the investors.

C. Jurisdictional Requirements of ICSID:

Even though the ICSID requirements are simple and open-ended. It is, however, crucial that the investor must consent to its jurisdiction, and the claim must arise directly out of the subject matter of the dispute[42] and directly out of an investment[43]. Although Procedural Rule 40 provides some limits for timing and filing of counterclaims.[44] In this light, it is worth considering the impact and implications of issues like consent, subject matter and investment in investment disputes

a. **Within the scope of the consent of the parties:** It is of utmost importance to reiterate that the ICSID jurisdiction requires consent. Especially as Article 25.1 of the ICSID Convention requires that the parties to the dispute consent in writing to submit to the Centre. For this reason, when the parties have given their consent, no party may withdraw it unilaterally.[45] That being the case, Article 46 of the Convention, thus, requires that a counterclaim should be made within the scope of the consent of the parties. Despite this, it is observed that Article 46 does not explicitly impose any additional consent requirements. From this, it is essential to note that the only textual requirement should be that the investor consent under Article 25.1, which may be done in several ways. For instance, consent can be given in a clause included in an investment agreement, providing for the submission to the ICSID of future disputes arising out of the agreement, or in a *compromis* regarding a dispute that has already arisen. Likewise, nor does the Convention require that the consent of both parties be expressed in a single instrument. For this reason, it is worth noting that the host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of ICSID, with the investors giving their consent if they accept the offer in writing. Succinctly, since consent can be deduced from the "investment agreements" and *compromis*, thus, a State can clearly initiate a claim against a company with which it has an investment agreement or once an investor makes a claim. Despite this, it is observed that the consent of the investors is more difficult to locate since investors are not parties to IIAs – the instruments that often constitute State consent. As such, this presents a critical problem for the ICSID Convention, as the Convention affirms a desire to balance the State and investor rights. Although the drafters have understood the consent of the investor as a flexible concept that should be considered in light of the goals of the Convention. As consent in this case could viably be understood to include only the elements connected to the specific claim of the investor. Which might encompass any violations of international law arising out of the investment underlying the claim, except otherwise.

b. **Arising out of "the subject matter" and "an investment":** The second requirement is that the counterclaim arises out of the subject matter of the dispute and the investment. With Article 25.1 of the ICSID Convention reiterating that "*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State*. Likewise, Article 46 provides that the counterclaim must arise directly out of the subject matter of the dispute. In this connection, the questions that tribunals have struggled with are: What legal violations arise out of the investment, what is the subject matter of the dispute, and what may arise directly out of it? From these, it is observed that the subject matter of the dispute, like consent, may be read narrowly or broadly. On this account, if it is read narrowly, then it refers only to counterclaims that are

[40] See the Preamble of the ICSID Convention. http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp.
[41] See Article 1.2 of the ICSID Convention.
[42] *Ibid.,* Article 46.
[43] *Ibid.,* Article 25.1.
[44] *Ibid.,* Article 40.
[45] *Ibid.,* Article 25.1.

"*indivisible from*" the original investment.[46] But if read broadly, the subject matter of the dispute could just refer to the investment at issue and anything connected to it, which would afford more options for the counterclaims of States. As such, the ambiguity of consent, arising from an investment and subject matter of the dispute can lend itself to the interpretation of the tribunals. In this vein, it is worth considering the nature, substratum and impact of the right of the State to a counterclaim.

3. The Nature and Implications of the Contract-Based State Counterclaim

Aptly, as outlined above, the international investment dispute tribunals have considered a few State claims and counterclaims over the years, which are of great interest to appreciate, as they touch on the pertinent issues that the parties involved in investment adventures, especially in the extractive industry in Cameroon, need to take cognisance of. This is because although the investor has the pre-emptive right to claim, the host State equally has the right to claim or counterclaim. On this account, it is worth examining the bases on which the host State can counterclaim based on the contract. This is done by x-raying the contract-based claims that embody cases limiting jurisdiction and substantive protections. As considered by the international investment dispute tribunals.

A. Nature of early contract-based counterclaims:

Early cases arose from a breach of investment agreements between the investor and the State often referred to as "contract-based claims". In general, these cases usually upheld the jurisdiction for counterclaims without discussion - but rejected the claims on factual grounds. In this vein, the cases of *Adriano Gardella*,[47] *Southern Pacific Properties*,[48] and *Benvenuti*[49], reflect this trend. This is because, in the past, early cases seemed to understand the concept of jurisdiction broadly. As *Benvenuti case*, for example, provides jurisdiction to a counterclaim alleging tax violations and intangible losses. Indeed, the first worth considering is *Adriano Gardella v. Republic of the Ivory Coast*[50]. In this case, Gardella, an Italian company, set up a joint venture hemp factory with Ivory Coast, with the contract providing for ICSID jurisdiction. Subsequently, the investor tried to impose unilateral modifications on the contract, increasing prices and decreasing exports. With the government failing to respond - neither paid the bills nor contested the increased in prices. On this account, Gardella claimed against the government for damages arising from a breach of contract. Which prompted the government to file a counterclaim against Gardella for damages arising from Gardella's termination of the agreement. Despite these, only part of the award was released, since the information as to jurisdiction and substance was limited. As the tribunal reiterated that there is not enough information to extract any principles, other than that the tribunal had jurisdiction over the dispute, with both the claim and counterclaim being rejected on factual grounds.[51] Similarly, in *Southern Pacific Properties Limited v. Arab Republic of Egypt*[52], Egypt as the Respondent State counterclaimed. Which stemmed directly from the contract that underpinned Southern Pacific's claim and ICSID jurisdiction. In support of the counterclaim, the Respondent invokes certain faults alleged to be attributable to the Claimants, namely: (i) the transformation of the project into a housing project; (ii) the absence of touristic elements (hotels, commercial centres and villages) in the project; (iii) the Claimants' abandonment of the Ras El Hekma Project; (iv) the financial deficiencies of the Claimants; and (v) above all, the Claimants' refusal to cooperate, and particularly to consider the solution of an alternative site. Although, there appears to have been no discussion of jurisdiction. Despite these, the tribunal off-handedly dismissed the counterclaims by highlighting that none of the alleged faults was committed and none was imputed to the Claimants, by the Egyptian authorities as a ground for the cancellation or in any other form before 28 May 1978.[53]

By the same token, *Benvenuti v. Congo*[54], represents a broad reading of issues arising from the subject matter of the dispute. Although the counterclaim failed based on factual impropriety, rather than on jurisdictional grounds. In the case, Benvenuti and Bonfant (B&B), an Italian company, contracted with

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[46] See *Saluka Investments BV v. Czech Republic*. Judgment of the Swiss Tribunal, 65, 7 September 2006, Ad hoc-UNCITRAL Rules; IIC 211 (2006).

[47] See *Adriano Gardella SpA (Claimant) v. Republic of the Ivory Coast*. ICSID Case No. ARB/74/1, Award, 29 August 1977.

[48] See *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*. ICSID Case No. ARB/84/3, Decision on Jurisdiction, 27 November 1985.

[49] See *Benvenuti & Bonfant Company v. the Government of the People's Republic of the Congo*. ICSID Case No. ARB/77/2, Award, 15 August 1980.

[50] See *Adriano Gardella SpA v. Republic of the Ivory Coast* (1977).

[51] *Ibid*.

[52] See *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (1985).

[53] *Ibid*.

[54] See *Benvenuti & Bonfant Company v. the Government of the People's Republic of the Congo* (1980).

the Republic of Congo to set up a company to produce mineral water and make plastic bottles. Subsequently, the parties signed an agreement, creating a mixed company, incorporated in Congo. With Congo holding 60% of the company, with the right to purchase B&B's shares in five years. In addition, the government guaranteed the company, *'plasco'*, preferential tax status, and guaranteed any requisite financing. With Article 12 of the agreement providing for recourse to ICSID. Despite these, the government intervention escalated over the years, which led to most of the Italian staff leaving after embassy warnings. As the Congolese army later occupied the head office. On this account, B&B claimed for compensation of shareholdings and non-payment, moral damages, and repayment of loans and advances. While the government counterclaimed for: (a) damages for the non-payment of duties and taxes on goods allegedly imported under cover of 'plasco' but intended for third parties; (b) damages for alleged overpricing of raw materials; (c) damages for alleged defaults in the execution of the agreement with *sodisca*; (d) damages for alleged defects in the construction of the plant; (e) damages for intangible loss, plus interest at 10% per annum.[55]

That being the case, the Tribunal in considering the question of whether one or more of the heads of the counterclaim might be beyond its competence - laid down in Article 12 of the Agreement and Article 25 of the Articles of Association - found that the counterclaim related directly to the object of the dispute and came within the competence of the ICSID. Equally, since B&B had not challenged the competence of the Tribunal. The tribunal was obliged by Article 40.1 of its Rules to hold that the counterclaim came within its competence. Although it dismissed it because the evidence produced by the government failed to substantiate any of the heads of the counterclaim. From this, it is observed that the tribunal understood investment to include actions in furtherance thereof. Thus, taxes, duties and moral damages that "arose from" the investment were fair game. Since anything relating to the investment or its performance was within the scope of a State counterclaim - including breaches of local law or international law. However, this opinion, *albeit in dicta*, provides a good counter-example to later decisions that severely limit the substantive scope of protections for States by introducing a limited reading of "arising from an investment" and "subject matter of the dispute".

[55] *Ibid.*

B. Implications of the cases limiting jurisdiction and substantive protections:

In this regard, the *Klöckner v. Cameroon*[56] and *Amco v. Indonesia*[57] decisions are seen as the first to actively consider counterclaim jurisdiction. With *Klöckner upholding jurisdiction where the counterclaim was closely connected to the original claim, although it stressed that a State could not counterclaim for an equity violation such as misrepresentation.*[58] *While Amco rejected* jurisdiction, based on the requirement that the counterclaim "arise directly from the investment" excluded violations based solely on domestic law.[59] Likewise, *RSM v. Grenada*[60], a recent case, rejected a number of well-supported counterclaims on similar grounds - demonstrating the enduring influence of the two early cases. On this account, it is worth considering the Klöckner case, as it is the first case that analysed the counterclaim jurisdiction. Although it finds jurisdiction, later tribunals, thus, used its considerations to limit jurisdiction to counterclaims, which are "indivisible from" the original claim.[61] Besides, Klöckner is also the first case that finds a breach by the investor - but still rejects the counterclaim by limiting the substantive scope of protections. Indeed, Klöckner upholds jurisdiction where the framework agreement provided for ICSID jurisdiction and the tribunal located a breach therein. Despite this, the tribunal rejected the counterclaim because the States cannot base a substantive claim on "misrepresentation" - as this might push it into the realm of equity. Equally, the annulment committee points out that the original tribunal did *de facto* honour the counterclaim when it refused to award certain damages to the investor.

In fact, Klöckner, a German company, brought a claim against Cameroon under ICSID. This is based on a joint-venture agreement entered into between Klöckner and Cameroon, to supply, erect, and manage a fertilizer company for five years minimum. With the framework agreement providing for ICSID jurisdiction, while a later contract, governing

[56] See *Klöckner Industrie-Anlagen v. United Republic of Cameroon and Société Camerounaise des Engrais*. ICSID Case No. ARB/81/2, Award, 21 October 1983.

[57] See *Amco Asia Corporation and others v. Republic of Indonesia.* ICSID Case No. ARB/81/1, Award, 20 November 1984.

[58] See *Klöckner v. Cameroon* (1983).

[59] See *Amco v. Indonesia* (1984).

[60] See *RSM Production Corporation v. Grenada*. ICSID Case No. ARB/05/14, Award, 13 March 2009.

[61] See, for example, *Saluka Investments BV v. Czech Republic.* Judgment of the Swiss Tribunal, 65, 7 September 2006, Ad hoc-UNCITRAL Rules; IIC 211 (2006), quoting *Klöckner v. Cameroon* (1983).

Klöckner's management duties gave the ICC jurisdiction. Thus, Klöckner bought a claim against Cameroon after Cameroon shut down the factory in 1980 due to a lack of profitability. On this account, Cameroon filed a counterclaim, alleging misrepresentation by Klöckner about its management capabilities, which, among other things, rendered the company unprofitable.[62] Based on this, the 1983 award - sustained by the annulment committee - upheld jurisdiction for the counterclaim. As the tribunal reasoned that the consent of the investor in one contract applies to any duties housed within that contract.[63] And this remained true even though a later contract that explicitly covered those duties provided for jurisdiction in another forum (the ICC). As such, the tribunal gave preference to the first, broad contract (framework agreement) for matters that did not exclusively arise out of the second, narrow contract (management agreement). In justifying its decision, it made a few comments that later tribunals adopt as jurisdictional limitations. As it specifically stated that the counterclaim based on the framework agreement and the primary claim asserted by the Claimant were "an indivisible whole" - as they shared "a common origin, identical sources, and an operational unity", and both sought "the accomplishment of a single goal".[64]

That being the case, although the annulment committee somewhat reluctantly upheld jurisdiction. It, however, affirmed that the tribunal did not manifestly exceed its powers - after having determined that it was possible to locate the breach in the first contract.[65] Thus, the annulment committee affirmed that the first contract was a framework agreement. Since by citing Holiday Inns, the tribunal found that *"there is consequently a single legal relationship, even if three co-successive legal instruments were concluded. Which is so because the first, the Protocol Agreement, encompasses and contains all three"*.[66] On this account, although both tribunals found that they had jurisdiction to hear the counterclaim - they, however, rejected the counterclaim. As the annulment committee explained and upheld the original tribunal's rejection of the counterclaim by stating that, *"the Cameroonian State could not be entitled to claim compensation for 'the fact that it was misled by a private company' - whether it was deceived or not changes nothing - since it acted with either full understanding or with an open eye and if it was 'misled', it would have a 'concurrent responsibility', which excludes the counterclaim. As such, we also seem to find ourselves here in the field of 'equity', relying on the notions of 'preclusions' or 'estoppel'"*.[67]

Consequently, although the Klöckner Tribunal excludes equity from the substantive scope of State counterclaims - *Amco* goes further to exclude violations of law related to the investment. With both *Amco* Tribunals reading "arising from an investment" narrowly, setting a precedent followed by later tribunals. As the *Amco* Tribunal reiterated that "*The obligation not to engage in tax fraud is clearly a general obligation of law in Indonesia - which was not specially contracted for in the investment agreement and does not arise directly out of the investment*".[68] A position that later tribunals follow, represents a significant limitation on substantive legal protections for States under ICSID. Similarly, for new claims in a resubmitted case, the tribunal endorsed a much more restrictive reading than that espoused by *Aron Broches* – an expert. As he argued that "*there is no justification for arbitrarily reading into the Convention a restriction on a party's right to present claims or counterclaims other than the dispositive one of Arbitration Rule 55.3*".[69] He also quoted Article 46 of the ICSID Convention, which he understood to impose few limitations. On this account, the tribunal agreed that Article 46 contains a few limitations on counterclaims. But further stressed that Article 40 imposes procedural limits on Article 46 for original cases - while Articles 52.6 and 55.3 governing resubmitted disputes impose heightened limitations on counterclaims. As such, Article 52 is not a provision for starting a totally new arbitration, as it is restricted only by the requirements of Article 25. Which is the procedure for resubmission of an existing dispute in respect of which Article 25 jurisdiction exists. From this, the Tribunal reads "existing dispute" to include only the causes of action in the original claim, as such, the claim for tax fraud was not a cause of action in the original claim, thus, excluded.[70] Despite this, some relevant points can be extracted from the decision. Firstly, a State that considers counterclaiming needs to raise the claim in the proper format (under Rule 40) as soon as possible; while secondly, under *Amco*, a State can struggle to bring a counterclaim in a resubmitted case that it did

[62] See *Klöckner v. Cameroon* (1983).
[63] *Ibid.*
[64] *Ibid.*
[65] See *Klöckner v. Cameroon*. ICSID Case No. ARB/81/2, Decision on Application for Annulment, 24(c), 3 May 1985.
[66] *Ibid.*
[67] *Ibid.*
[68] See *Amco Asia Corporation, PanAmerican Development Ltd. and PT Amco Indonesia v. Republic of Indonesia.* Resubmitted Case, ICSID Case No. Arb/81/1, Decision on Jurisdiction, § E (2), 10 May 1988.
[69] *Ibid.*
[70] *Ibid.*

not already raise as a counterclaim. And thirdly, a State needs to understand that where a tribunal applies *Amco's* vision of substantive legal protections, it is not on equal footing with an investor. This is because while an investor can point to violations of non-contract domestic law as violations of an investment agreement, a State cannot - even where the applicable law is domestic law. That is why tax fraud was not considered as "arising from the investment" under Article 25, although the tax fraud was potentially based on money owed as a result of or in performing the investment. As such, this reflects a pattern, in which claims are either dismissed on their merits or are dismissed on jurisdictional grounds where they have merit. In this light, it is worth considering the subtractum of State counterclaims under an IIA - as x-rayed by the international investment dispute tribunals.

4. The Subtratum and Tenet of the State Counterclaims Under an IIA

In line with the above, the State counterclaims can also stem from investment contracts, providing space for a more liberal interpretation of consent and issues arising from the subject matter and investment - although BITs do not. This is because, under BITs, tribunals have ruled on counterclaims for breach of contract or breach of the exact transaction underlying the initial investment claim. On this account, BITs do not provide any protections to States for damage arising out of a breach of domestic law, international law, or out of the investment in a capacity not covered by the original claim. In this vein, it is worth considering the situations where the States want such protections, and how they can include additional language to that effect in their IIAs. Since tribunals often struggle to find space for State counterclaims under BITs. A situation that is envisaged in *Mytilineos Holdings SA v. Serbia and Montenegro*, where it stated that *"We are dealing here with a unilaterally accepted obligation of the State to appear before an arbitral tribunal in fulfilment of its obligations and responsibilities related to the protection of investments by Greek investors. It should be noted that YU/SMO may not initiate arbitral proceedings against a Greek investor - it is even questionable whether it could file a counterclaim"*.[71] Indeed, when such a problem is recognised, it often motivates the tribunal to refuse jurisdiction where the investor did not comply with State law, thus, putting the burden of proof on the claimant. As such, the *SGS v. Pakistan* Tribunal identifies the equitable problem. As it considers that the source of jurisdiction to consider the counter-claim and the governing law applicable to such a claim is of capital importance. Since it would be inequitable if, by reason of the invocation of the ICSID jurisdiction, that the Claimant could on the one hand, elevate its side of the dispute to international adjudication, while on the other hand, precluding the Respondent from pursuing its claim for damages by obtaining a stay of those proceedings for the pendency of the international proceedings - if such international proceedings could not encompass the Respondent's claim.[72]

In this connection, it is worth noting that BITs and FTAs, as Mytilineos highlights, do not provide any explicit protections to States - although IIAs provide expansive investor protections. This is because an ICSID Tribunal can make determinations based on the contract and national law, to decide whether a State has violated its international law obligations through a breach of the BIT.[73] As such, all violations must relate to BIT protection. On this account, it is essential to explain such distinction with respect to violations of municipal law. Aptly, an act of a public authority can be unlawful under municipal law but not necessarily so under international law, as a breach of treaty or otherwise. However, in every case, either the provisions of the internal law are relevant as facts in applying the applicable international standard, or they are actually incorporated in some form, conditionally or unconditionally, into such standard. That being the case, it is important to note that BITs clearly elevate domestic law breaches into international law violations. A situation that empowers the investors to bring claims for breach of domestic law, but not the States. This is because BITs guarantee that the States will not violate international law with respect to the investment, with the investors making no such guarantee to the host State. As a result, where the investor violates international or domestic law - it may not constitute a breach of a treaty because treaties provide only protections to investors. Despite this, it is worth noting that BITs now incorporate language defining "investment" as an investment in compliance with local laws, though it only acts as a jurisdictional barrier.

A. Subtratum of finding jurisdiction under a BIT:

As reiterated above, while IIAs do not provide any explicit protections to States, the tribunals have permitted State counterclaims for investor breach of

[71] See *Mytilineos Holdings S.A. (Claimant) v. Serbia and Montenegro,* Serbia. Ad hoc-UNCITRAL Rules (Greece/Yugoslavia BIT), Partial Award on Jurisdiction, 8 September 2006 and Dissenting Opinion, 6 Sept. 2006.

[72] See *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*. ICSID Case No. ARB/01/13, Decision on Jurisdiction, ft 16, 6 August 2003.

[73] *Ibid.*

the disputed contract. This can be appreciated in Saluka - a UNCITRAL case, which provides an excellent overview of current State counterclaim jurisdiction. As the tribunal finds that "all disputes" under Article 8 of the BIT permit counterclaims. However, these counterclaims must be closely related ("indivisible from") to the investor's claim and should not be based on violations of Czech law.[74] As such, Saluka essentially finds jurisdiction for counterclaims under a BIT, but only for a breach of contract. By the same token, like ICSID, the UNCITRAL Rules provide for State counterclaims.[75] As the tribunal found that UNCITRAL Rules coupled with BIT Article 8 language referring to "all disputes" extended jurisdiction to State counterclaims.[76] Thus, to determine jurisdiction under the "other relevant requirements", the Saluka Tribunal explored the Iran-US Claims Tribunal decisions at length. By comparing the base of "interdependence and essential unity of the instruments on which the original claim and counterclaim were based"[77] in successful cases, with unsuccessful cases. With the unsuccessful counterclaims occurring where the second agreement was not closely related to the first (even if the underlying investment was the same) or where the alleged breach was not of a contractual obligation.[78] From this, it is worth noting that the Iran-US Claims Tribunal provides a more limited or at least more explicit definition of jurisdiction for counterclaims. As it provides that tribunals have jurisdiction over "*any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of the national's claims*".[79]

[74] See *Saluka Investments BV v. Czech Republica*. Judgment of the Swiss Tribunal, 65, 67, 79, 7 September 2006, Ad hoc-UNCITRAL Rules; IIC 211 (2006).

[75] *Ibid.*

[76] Indeed, the jurisdiction conferred upon it by Article 8, particularly when read with Articles 19.3, 19.4 and 21.3 of the UNCITRAL Rules, is in principle wide enough to encompass counterclaims. The language of Article 8, in referring to 'All disputes,' is wide enough to include disputes giving rise to counterclaims, so long, of course, as other relevant requirements are also met. See *Saluka Investments BV v. Czech Republic* (2006).

[77] See *Saluka Investments BV v. Czech Republic* (2006), In American Bell International Group, Inc. v. The Government of the Islamic Republic of Iran *et al.,* 9 the primary claim was based on two contracts. The respondent presented counterclaims based on a different contract between the parties. The tribunal upheld its jurisdiction over the counterclaims: it found that all the contracts involved the same project, and the linkage between them was sufficiently strong so as to make them form one single transaction.

[78] Aldrich, G. and Aldrich, J. (1996). *The Jurisprudence of the Iran-United States Claims Tribunal*, 116 (Oxford University Press, New York).

[79] See *Saluka Investments BV v. Czech Republic* (2006).

Likewise, the tribunal also looks to Amco and Klöckner for guidance - noting that they require a close connection between the claim and counterclaim, and that Amco refused jurisdiction over a counterclaim founded on a breach of domestic law.[80] As such, after reviewing these decisions and the language of UNCITRAL, ICSID, and the Iran-US Claims Tribunal, the tribunal affirmed that the provisions, as interpreted and applied by the decisions that have been referred to, reflect a general legal principle as to the nature of the close connection that a counterclaim must have with the primary claim, if a tribunal with jurisdiction over the primary claim is to have jurisdiction also over the counterclaim. On this account and applying this principle, the tribunal refuses jurisdiction over all of the Czech Republic's counterclaims. Since the counterclaim involves non-compliance with the general law of the Czech Republic. As the tribunal finds that breaches of domestic law do not constitute an "indivisible whole" with the primary claim, as found by the Klöckner Tribunal.

B. Tenets of the international tribunal's willingness:

Although some tribunals are willing to hear counterclaims under IIAs. However, IIAs and recourse to early interpretations, like that of Amco, may hamper the ability of the tribunals to uphold counterclaims. In this vein, the tribunal in Sempra, for example, stated that "*The Respondent has argued that the Government also had many expectations in respect of the investments that were not met or were otherwise frustrated. Apart from the question of investment risk, it is alleged that there was, inter alia, the expectation that the investor would bear any losses resulting from its activity, work diligently and in good faith, and not claim extraordinary earnings exceeding by far fair and reasonable tariffs, resort to local courts for dispute settlement, dutifully observe contract commitments, and respect the regulatory framework. The Tribunal notes that to the extent that any such issues would be within the Tribunal's jurisdiction to decide, and could have resulted in breaches of the Treaty, the Respondent would be entitled to raise a counterclaim. While this right has been resorted to by the Respondent States only to a limited extent in cases submitted to ICSID tribunals, nothing prevents its exercise in the light of Article 46 of the Convention and Rule 40 of the Arbitration*

[80] See *Saluka Investments BV v. Czech Republic* (2006), citing *Amco Asia Corporation, PanAmerican Development Ltd. and PT Amco Indonesia v. Republic of Indonesia.* Resubmitted Case, ICSID Case No. Arb/81/1, Decision on Jurisdiction, 10 May 1988. 132 ICSID Reports, 543.

Rules".[81] From this, it is observed that the tribunal clearly encouraged a counterclaim and simultaneously qualifies its ability to rule on counterclaims. By stating *that "If any such issue would be within the Tribunal's jurisdiction, and could have resulted in breaches of the Treaty, the Respondent would be entitled to raise a counterclaim*.[82] On this account, the tribunal clearly wishes to provide the State with an equal opportunity to be heard, although the treaty likely provided for very few, if any, substantive protections for the State. From this, had the tribunal been faced with a counterclaim for "failure to respect the regulatory framework" it might have looked at the treaty language, the resubmitted Amco case, and rejected the claim as outside its jurisdiction. Likewise, the City Oriente case highlights a similar conundrum whereby the tribunal denied Ecuador access to payments that they claimed the investor owed under Ecuadorian Law.[83] As such, in the interest of fairness, the tribunal reiterated that "The *Respondents may obviously file a counterclaim and, should they succeed, the tribunal will render an award ordering City Oriente to make payment of all such amounts, which award may be enforced by execution of any of City Oriente's rights and assets in Ecuador*".[84] Despite these, it is argued whether the tribunal can honour its offer to Ecuador, nor has jurisdiction under the BIT to require the investor to pay local taxes? Although it is affirmed that if the tribunal looks to the Amco case for guidance, it will realise that the taxes owed by the investor under domestic law are generally outside the scope of such jurisdiction. However, a relatively easy solution to remedy such a situation is to enable States to simply incorporate a clause in all IIAs requiring compliance with domestic and international law. After considering the most salient with regards to ISDS, it is worth moving forward by examining the trends and impacts of dispute settlement in the extractive industry in Cameroon, and the way forward to enhance the sustainable settlement of investment disputes.

II. UNRAVELLING THE PURVIEW AND IMPACT OF INVESTMENT DISPUTE SETTLEMENT OF THE EXTRACTIVE INDUSTRIES IN CAMEROON

Aptly, the advent of the 21st Century ignited several African countries like Cameroon, to take serious actions in terms of regulatory or institutional changes, such as amending laws or initiating the renegotiation of contracts with extractive firms or indicating an intention to take one or both steps. Despite these great endeavours, it is observed that in Cameroon just like in other developing countries, the expansion of IIAs is carrying significant risks to the policy space and tools necessary for industrialisation and development. Since such risks to the potential use of sectoral policies, especially in the extractive industries can, if appropriate measures are not taken, impede the realisation of the industrialisation objectives of the countries. In this vein, it is worth stressing that much of the recent debate and controversy in regard to the international investment protection regime, have revolved around their implications on the policy space of the developing countries with regards to the promotion of development. Nevertheless, the rising number of ISDS cases revealed how the rules established under IIAs and the way they have been expansively interpreted by the private investment arbitrators, encroach on the ability of the government to regulate in the public interest. This is because by resorting to the ISDS mechanisms, the investors are challenging a broad range of government measures, especially as the majority of the ISDS cases registered at ICSID are those of the extractive industries. With these not merely challenging outright expropriation, but bringing issues concerning revocations of licenses, alleged breaches of investment contracts, alleged irregularities in public tenders, changes to domestic regulatory frameworks, withdrawal of previously granted subsidies, tax measures and other regulatory interventions. Notwithstanding, it is worth reiterating that the application of the IIAs involves their firm implementation in the Member States. Since they are legally bound to implement the relevant provisions of the IIAs based on the principle of *pacta sunt servanda*. That being the case, Cameroon in upholding such fundamental precept embodied within international law, has enshrined in Section 45 of its 1996 Constitution as amended that *"Duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement"*. What's more, Section 11 of its Investment Charter[85] adds that *"The State shall be a party to bilateral and multilateral agreements which guarantee investments"*. In this connection, it is a signatory to the New York Convention[86]; the Washington (ICSID)

[81] See *Sempra Energy International v. The Argentine Republic*. ICSID Case No. ARB/02/16, Award, 289, 28 September 2007.
[82] *Ibid.*
[83] See *City Oriente v. Ecuador.* ICSID Case No. ARB/06/21, Decision on Provisional Measures, 59, 19 November 2007.
[84] *Ibid.*

[85] See Law N° 2002/004 of 19 April 2002 instituting the Investment Charter.
[86] Cameroon is a signatory to the New York Convention, which was ratified on 24 July 1987 and entered into force on 19 May 1988.

Convention[87]; the MIGA Convention; the OHADA treaty - which has both an *ad hoc* and an institutional arbitration mechanism based on the most effective international instruments, based on the UNCITRAL model rules on international arbitration and the Arbitration Settlement of the ICC. Likewise, it is also a signatory to the Lome Convention as revised in Mauritius on 4 November 1995, setting up an arbitration mechanism for settling disputes between Africa-Caribbean and Pacific States (ACP) and contractors, suppliers and service providers, relating to financing by the European Development Fund (EDF). Despite these, it is worth noting that although they are very instrumental in predicting the law and procedures common throughout the world. Their application, however, has not been smooth in some circumstances. On this account, it is worth examining the key features, purview and impact of ISDS and enforcement in Cameroon, its trends in the extractive industries (EI), and how other alternatives to the arbitration mechanism can enhance sustainability.

1. The Key Features of Investment Dispute Settlements in Cameroon

As highlighted above, the rapid flow of FDI in Cameroon and other African countries has simultaneously witnessed the global recognition of arbitration as a principal mechanism for ISDS. This has led to significant growth in the normative and institutional frameworks regulating the conduct of investment arbitration throughout the continent. In light of these developments, the Member States of OHADA created the CCJA, as the main organ of the Organisation in charge of administering institutional arbitration proceedings and equally adopted the OHADA Uniform Act organising arbitration, as the *lex loci arbitri*[88]. Since arbitration is considered as the most sustainable and viable ISDS mechanism. Despite this, it is worth noting that before the advent of OHADA, most of its Member States applied the inherited French law on Civil and Commercial matters. With the provisions of the *French Code de Procedure Civile of 1806* applying to all commercial matters, and Articles 83 and 1004 of the code unequivocally prohibiting the initiation of proceedings that question the interest of the State.[89] A situation that has propelled the economic operators to remain fastidious about investing in most of the States because of the degree of legal and judicial uncertainty which prevailed. Thus, to revamp this perception, the OHADA legislator initiated legislative changes that accommodated arbitration as an alternative mechanism for ISDS and recognised the role the State and foreign investors play in the economies of the States. Although this raises significant questions regarding the circumstances and conditions under which the States, public corporations and foreign investors can participate in arbitral proceedings conducted under the auspices of the Uniform Act on Arbitration and the CCJA Arbitration Rules. This is because, since the institution and effective functioning of the OHADA system, very few States and their foreign business partners have prioritised the conduct of arbitral proceedings under OHADA rules over those of other Centres. As aggrieved foreign investors often prefer to seek recourse before foreign institutions probably because they do not perceive the OHADA system as one that offers the procedural safeguards they expect.[90] Besides, it is well established that contemporary investment arbitration rules offer a wide scope of procedural safeguards and deviations from classical commercial arbitration rules – as currently reflected in the institutional rules of several arbitration centres and national legislations. As investors expect that all modern arbitration rules and laws portray these guarantees to an acceptable extent. That being the case, a better understanding of the issues within the Cameroonian context, can be appreciated by examining the status of the investment treaties, the legislation protecting inward and outward investments, the attitude of the government towards investment treaty arbitration, and the choice of ISDS.

[87] Cameroon signed the Washington (ICSID) Convention on 23 September 1965 and ratified it on 3 January 1967, which entered into force as of 2 February 1967.

[88] Adopted on 11 March 1999, the Uniform Act that is applicable to all *Ad-Hoc* or institutional arbitration when the seat of the arbitral tribunal is in one of the Member States. It abrogates all anterior legal dispositions contained in different national legislations of Member States governing arbitration proceedings, especially those provisions that are contrary to the spirit of the Uniform Act. See Kenfack-Douajni, G. (2001). « La portée abrogatoire de l'acte uniforme relatif au droit de l'arbitrage », *Revue Camerounais d'Arbitrage*, No. 14 Juillet-Août-Septembre, p.28.

[89] Sossa, D. (2010). « l'Aptitude des personnes morales de droit public à compromettre dans l'arbitrage OHADA: Les mobiles d'une t'elle option », *Revue Camerounaise de l'arbitrage*, Numéro spécial, Février, p, 110. For more on the state of arbitration in OHADA Member States before the advent of OHADA law. See Amoussou-Guenou, R. (2000). *L'état du droit de l'arbitrage interne et International en Afrique avant l'adoption des instruments OHADA*, *L'OHADA et les perspectives de l'arbitrage en Afrique,* (Brulant, Brussels).

[90] Most arbitration agreements signed by the OHADA Member States refer disputes to ICSID. Statistics show for example that Sub-Saharan African States were parties to at least 16% of the cases brought before ICSID in 2016 making it the third region with the most State participation before it. See https://icsid.worldbank.org. Other Centres which have received an unabated increase in ISDS include; The ICC Court of Arbitration, The Stockholm Centre for Arbitration, and the London Court of International Arbitration (LCIA).

A. Status of the investment treaties:

Crisply, the Government of Cameroon (GoC) has entered into 17 BITs[91], although not all are in force. As such, the only nine that are currently in force are those with Belgium, China, Germany, Italy, Netherlands, Romania, Switzerland, the UK and the US. With the latest publicly available treaty being that signed with Italy, since that with China that entered into force in 2014, is not yet available publicly. On this account, it is not easy to draw conclusions on the general attitude of the GoC towards its investment treaty framework. Although from such a number, there is a strong conviction that it favours the investment treaty regime, as it is actively seeking to attract FDI to enhance its economic growth and development. As since 2012, numerous trade delegations have visited Cameroon to explore investment opportunities, including delegations from China, Singapore, India, Thailand, Brazil, and Turkey. With China emerging as the country's largest foreign investor, with significant activities in the areas of infrastructure, extractive industries, and energy. Despite this, the US Department of State indicated in its investment reports that the country is, however, less effective at following through with interested investors to ensure that investments move forward promptly. As a consequence, to boost its investment environment, the GoC adopted an Investment Charter in 2002 to attract international investors, which replaced the existing Investment Code of 1990 - although the full implementation of the Investment Charter is still pending. A situation that was really worrying, especially when a 2009 Presidential Decree postponed the deadline for the implementation of some provisions of the Charter. Nonetheless, to alleviate the situation in the meantime, the GoC adopted Law No. 2013/004 of 18 April 2013 intended to lay down private investment incentives in the country, which supersedes the Investment Code of 1990. Notwithstanding, the investment treaty regime in Cameroon is further supported via its membership to several other conventions like the ICSID Convention, the New York Convention, the OHADA Treaty and so on, which enhance the protection of both inward and outward investments.

B. Legislation protecting inward and outward investments:

The legislation protecting inward foreign investment in Cameroon is Law No. 213/004 of 18 April 2013, which replaced the Investment Code of 1990 by seeking to overcome its numerous bureaucratic hurdles. The law is very attractive as it differs from most African investment codes with respect to the following issues: Firstly, it provides national treatment protection as there is no discrimination between local and foreign investors; secondly, it indicates that no minimum investment is required – although there are certain criteria set forth for the application of the law as: (i) The number of local staff employed, (ii) the percentage of exports, (iii) the use of natural resources and (iv) the contribution to value added. Thirdly, it contains numerous incentives, thus, during the establishment phase (which cannot exceed five years), the law provides for exemptions from VAT and duties on key services/assets (including an exemption from stamp duty on the lease of immovable property). Equally, during the operation phase (which cannot exceed 10 years), further exemptions from or reductions of other taxes (including corporate tax), duties (such as stamp duty on loans) and other fees are granted. In addition, unlike many other African investment codes, the law provides for many additional benefits like non-tax related benefits, the right to open local and foreign currency accounts locally or abroad, the right to freely cash in and keep abroad funds or income, the right to directly pay non-resident suppliers of goods and services abroad.

Likewise, it provides the avenue to facilitate the issuance of visas and work permits, environmental compliance certificates and land titles and long-term leases to attract and further protect foreign investors. Despite these, it is observed that the new law has, however, not resolved the biggest bureaucracy issue of the previous law. For example, the process to qualify for the various benefits of the investment law still requires three different approvals: the one-stop shop body, the Minister of Finance and the Minister of Private Investment. Besides, during the operation phase, the benefits are not automatic as all import and local purchase requests must obtain the visa of the body in charge of incentives promotion first. Finally, the new law provides for the settingup of two other authorities - the Control Committee and a Joint Monitoring Committee. On this account, it is essential to note that although the new investment law looks buoyant, however, it is not as straightforward in its application as it seems. Furthermore, with regards to the legislation protecting outgoing foreign investment, it is observed that the country also has an

[91] Cameroon's 17 BIT contracting parties are as follows: Those in force are BLEU (Belgium-Luxembourg Economic Union) (since 01/11/1981); China (since 24/07/2014); Germany (since 21/11/1963); Italy (since 04/01/2004); Netherlands (since 07/05/1966); Romania (since 24/09/1981); Switzerland (since 06/04/1964); United Kingdom (since 07/06/1985); United States of America (since 06/04/1989). Those not in force are Canada; Egypt; Guinea; Mali; Mauritania; Mauritius; Morocco; Turkey.

investment guarantee scheme or offers political risk insurance that protects the local investors who are investing abroad. This is done through the Multilateral Investment Guarantee Agency (MIGA), which is the political risk insurance and credit enhancement arm of the World Bank Group. In this vein, in July 2014, MIGA announced that it would support investments in three power sector projects in Cameroon. Thus, bolstering the investments in the national electric utility and two existing power generation projects that can help meet the growing electricity demand and improve the overall efficiency and operation of the sector. Equally, the MIGA also allows for guarantees to cover outgoing foreign investment. But if disputes do occur, what is the attitude of GoC towards investment treaty arbitration

C. Attitude of the government towards investment treaty arbitration:

Aptly, over the years, international arbitration law and practice have developed the general rule that the jurisdiction of an arbitral tribunal depends on the consent expressed by the parties. That being the case, the OHADA legislator also follows this trend by instituting that recourse to arbitration is basically consensual irrespective of whether the dispute is over a commercial or investment matter. Besides, a tribunal's jurisdiction over disputes is equally guided by a mandatory legislative requirement referred to as arbitrability. With arbitrability referring to the quality of a dispute being subject to arbitration.[92] What's more, subjective arbitrability refers to whether under an applicable law, a particular entity like a State or public corporation may be a party to an arbitration agreement and thus, whether a dispute to which such entity is a party may be submitted to arbitration. While objective arbitrability denotes whether the subject matter of the dispute is capable of resolution by arbitration in the light of relevant public policy considerations. On this account, the criterion for subjective arbitrability of ISDs is laid down in Article 2 paragraph 2 of the Uniform Act on Arbitration. Which holds *inter alia* that, States, territorial public bodies as well as public establishments may be parties to arbitration. It adds, in conformity with contemporary international law and practice, that once States have decided to make recourse to arbitration, they shall not have the possibility to invoke their own law to contest the arbitrability of the claim, their authority to sign arbitration agreements or the validity of the arbitration agreement.[93] This portrays the desire to deviate from the post-colonial framework that prevailed in the national legal systems of several OHADA Member States – to reassure aggrieved foreign investors of an alternative means to resolve disputes between States and foreign investors. Thus, in permitting foreign investors to freely negotiate arbitration agreements with States, goes a long way in establishing higher levels of certainty. Which gives them hope that upon the occurrence of a dispute, their claims may be heard by an independent and impartial tribunal constituted to serve justice objectively. With some Member States having shown interest in promoting the use of this CCJA under the auspices of the OHADA arbitration law[94].

As a consequence, this evolutionary process in ISDS has prompted the GoC to propel in line with international tenets. Thus, enabling it to take off the changing climate to be open to and accept the binding international arbitration clauses in its specific investment treaties, as demonstrated by the international arbitrations to which it has been a party. As such, there has been no indication to date that that attitude has changed in recent years. But however, this cannot be regarded as conclusive yet, since so far there have been only four investment treaty cases brought against Cameroon under ICSID and none under the CCJA. On this note, given the country's limited experience in the field of treaty arbitration, it would be prudent to await additional developments before drawing conclusions as to its overall attitude. Despite this, it is worth noting that the language used in Cameroon's more recent treaties like that with Italy, is not more restrictive than in previous treaties, with regard to dispute settlement. As it indicates that the country has remained committed to its investment treaty regime and protections, including dispute resolution mechanisms like international arbitration, which is enshrined in all of its treaties. That being the case, in commencing an investment treaty claim against the country, the governmental entities to notify under an investment treaty are the Ministry of Justice and the Prime Minister of Cameroon. While those that manage the investment treaty arbitrations are the Ministry of Justice, the Ministry of Industrial and Commercial Development, and the Ministry of Finance. Thus, although internal or external counsels

[92] Sossa, D. (n.d.). « L'extension de l'arbitrabilité objective aux accords de développement économique dans l'espace OHADA », Ohadata, Reference number D-10-50, p. 1. citing Fouchard, Guillard, Goldman. (1999). *International Commercial Arbitration*, (The Hague, Kluwer Law International, p. 234.

[93] See the position in *NOIC v. Gatoil* case Cour d'appel de Paris 17 December 1991.Also see *Framatome and others v. AEOI* (ICC award n°3896 du 30 April 1982).

[94] For example, the case of *Commercial Bank of Guinea Equatorial (CBGE) v. Republique de Guinee Equatoriale* whose award was rendered in Libreville on the 24 of May 2009 (Unreported) was conducted under the scope OHADA Arbitration.

are used, or expected to be used, by the country in investment treaty arbitrations. It is observed, however, that from the majority of the five publicly reported investment treaty claims against Cameroon, the State was represented by external counsel. As such, the country must revamp and equip its internal counsels to be up to the task. For this reason, the evaluation of the attitude of the local courts in Cameroon towards an investment treaty arbitration and potentially adverse award is not possible, since there are few publicly available investment treaty awards against Cameroon exist to date. Notwithstanding, it is worth noting that as Cameroon has ratified the Washington (ICSID) Convention, as well as the New York Convention, then its courts are mandated to recognise and enforce foreign arbitral awards.

D. Choice and applicable law in the ISDS:

Indeed, building on the arbitrability discussion above, it is worth noting that the vast majority of Cameroon's BITs provide investors with a choice between various dispute resolution options – typically the ICSID arbitration, local courts, ICC arbitration, OHADA arbitration and *ad hoc* arbitration under the UNCITRAL Rules. Despite this, it is observed that the older BITs are unclear as to the applicable dispute resolution mechanism or forum. For example, the Cameroon-Germany BIT provides for disputes to be resolved by the governments of the respective contracting States, and if it fails to be settled that way, then it can be brought before "an arbitral tribunal" chosen by one of the parties. Besides, in some treaties where the investor has a choice between dispute resolution methods like in the Cameroon-Turkey BIT, the choice of the investor is expressly binding and final. What's more, as in the Cameroon-Belgium BIT, each State can give its irrevocable advance consent to the submission of investment disputes to ICSID. Nonetheless, it is worth noting that the consent by the host State to ICSID arbitration in the BIT implies a waiver of the requirement that local – administrative and judicial – remedies should be exhausted.

Notwithstanding, with regards to the applicable law, it is observed that some of Cameroon's BITs, such as the one with Belgium, do not contemplate any applicable law or rules to be relied upon by the arbitral tribunal, with some being vague like the Cameroon-Netherlands BITs - which simply states that the tribunals must rule based on the law. While that with Canada includes in the applicable law provision - the agreement itself and rules of international law. What's more, it is worth noting that some of the BITs contain more descriptive indications and mandate the application of the domestic laws of the territory where the investment was made, including the conflict of laws rules, the provisions of the treaty itself, any other agreement entered into in relation to the investment, and the principles of international law. As seen in Cameroon's BITs with Egypt, Guinea, Mali, Mauritania, Mauritius, Morocco and Turkey. In addition, an essential feature of all Cameroon's BITs is that they provide for a cooling-off period. With most allowing for parties to find an amicable solution within six months (Belgium, Egypt, Guinea, Italy, Mali, Mauritania, Mauritius, Morocco, USA, Netherlands, Switzerland and Turkey); while one provides for three months (UK) and another provides for two months (Canada). Likewise, to enhance sustainability and viability between the parties, all Cameroon's BITs except that with Belgium, contain provisions that require compensation to be given to investors for certain events, such as armed conflict or similar events. Similarly, that with Canada includes express transparency provisions that state that *"The host State must publish its laws, regulations, procedures and administrative rulings, and also provide information on any measure that may have an impact on an investment"*. While that with the United States provides an express clause for consultations along with the exchange of information in relation to the treaty and investments, a clause that is also contained in the Cameroon-Canada BIT. On this account, it is worth considering the extent to which they are implemented and enforced within the legal framework of Cameroon.

2. The Purview of Investment Dispute Settlement and Enforcement

As indicated above, several countries, both developed and developing, are currently reviewing their approach to investment treaties, including looking at ways of reducing their legal liability under BITs, especially given the surge in ISDS cases from these treaties. Since BITs have changed over time from an investment promotion instrument for development in developing countries to an instrument for the protection of investment in the interest of potential investors. That being the case, contemporarily, Cameroon like other African countries has taken actions in terms of regulatory or institutional changes, including amending laws or initiating the renegotiation of contracts with the extractive firms or indicating an intention to take one or both steps. Based on this, it is worth examining the basic legal instruments on investment dispute settlement and enforcement, the main national authority and courts to enforce the arbitral awards, the scope of stay of enforcement and other issues, and an overview of the

arbitration awards or cases initiated involving Cameroon's BITs.

A. Basic legal instruments on investment dispute settlement and enforcement:

As such, the most crucial issue concerning the ISDS, is that concerning the recognition and enforcement of foreign awards. This is because if a dispute is resolved and an award is made that cannot be enforced, it becomes a "dead letter". That being the case, before cascading further, it is worth considering the specific sources of law that are applicable in Cameroon, with regard to the recognition and enforcement of foreign awards. In this vein, the most essentials ones are: Law No. 75/18 of 8 December 1975, adopted to designate a national authority that may recognise or enforce ICSID awards in Cameroon; Decree No. 87/1041 of 24 July 1987 ratifying the New York Convention, which entered into force on the 19 May 1988; and Law No. 2007/001 of 19 April 2007, establishing the conditions for the enforcement of foreign judicial decisions and foreign arbitral awards made in countries not related to Cameroon, by a bilateral or multilateral judicature convention. Thus, it is worth noting that under such conventions - which include the bilateral convention between Cameroon and France, and the multilateral Tananarive Convention between several African countries and Cameroon – the foreign awards are recognised and enforced under the New York Convention. What's more, is the adoption of Law No. 2003/009 of 10 July 2003, which determines the competent jurisdictions referred to in Chapter VI of the OHADA Uniform Act on Arbitration of 11 March 1999 – setting out the basic rules applicable to any arbitration, where the seat of arbitration is located in an OHADA Member State, based on the UNCITRAL model rules. From which, Article 1 of the Uniform Act on Arbitration provides that it applies to arbitration seated in an OHADA Contracting State. While Article 2 paragraph 2 of the Uniform Act, lays down the criteria for arbitrability of disputes, by providing that States, territorial public entities, as well as public establishments can be parties to arbitral proceedings. With Article 34 of the same Uniform Act emphasizing that the awards made under rules other than those in the Uniform Act will be recognised per the Uniform Act or under the conditions provided by the international agreements possibly applicable. On this account, it is observed that the New York Convention will be applied - if an award creditor in an OHADA Contracting State that is also a party to the New York Convention considers the latter to be more favourable to it. Notwithstanding, it is worth highlighting that although the arbitration law of Cameroon is contained in the Third Volume, Section 576 to 601 of its Civil and Commercial Procedure Code - the provisions of the OHADA Uniform Act on arbitration supersede such national laws on arbitration. By the same token, it is observed that even though there is no specific limitation period applicable to the commencement of legal proceedings to recognise and enforce foreign awards in Cameroon. There is a strong argument that the limitation period applicable to legal proceedings for the enforcement of judgements should also apply to foreign awards.[95] A position that was considered in the 2007 Law on the Enforcement of Foreign Judicial Decisions and Arbitral Awards, which provides that the competent judge must make his or her decision within 30 days of being seized.

B. Main national authority and courts to enforce the arbitral awards:

As mentioned above, with regards to investment treaty arbitration, arbitral awards are in principle directly enforceable in Cameroon. This was initially affirmed in Law No. 75/18 of 8 December 1975, to designate a national authority that may recognise or enforce ICSID awards. By providing that the Supreme Court of Cameroon has jurisdiction to recognise and enforce the decisions and awards made by the ICISD Tribunals for the settlement of the disputes between the State and investors. However, by virtue of Section 5 of Law No. 2007/001 of 19 April 2007, and Section 4(2) of Law No. 2003/009 of 10 July 2003, the authority or court having jurisdiction over the recognition and enforcement of foreign awards is the President of the Court of First Instance, or a Magistrate delegated by the said President for such purpose - who can be the judge in charge of the litigation relating to the enforcement of foreign judicial decisions and arbitral awards. On this account, the authority or court having jurisdiction over the recognition and enforcement of the foreign awards - is that with the domicile or fixed assets of the respondent in the jurisdiction of the court. Despite this, the essential pieces of evidence for the recognition and enforcement of the foreign awards to be supplied are the arbitral award and arbitration agreement. For this, it is very necessary to supply the award in its entirety and the relevant pages of the document containing the arbitration clause, which can either be the originals or duly certified copies. However, if the originals are supplied, then the Court of First Instance must keep such original documents filed - unless a written and reasoned request for the return of the originals is submitted and granted. In addition, the documents supplied can be translated, depending on the relevant jurisdiction within

[95] See Section 2262 of the Civil Code.

Cameroon, since Cameroon is a bilingual country with English and French as official languages. That is, French, in French-speaking jurisdictions, and English, in English-speaking jurisdictions within the country. In this vein, the documents must be translated by a sworn translator registered on the list of experts kept by the competent jurisdiction within Cameroon.

That being the case, the first decision granting or denying the recognition and enforcement is obtained through *ex parte* proceedings.[96] In this vein, Article 32 of the Uniform Act on Arbitration enshrines that the decisions granting the recognition or enforcement are not subject to any form of appeal or recourse. While those denying the recognition or enforcement may be appealed in the CCJA. This is because as per Section 11 of Law No. 2007/001 of 19 April 2007, foreign arbitral awards are *res judicata* and may be recognised and made enforceable in Cameroon by the judge in charge of litigation related to the execution of judgments, in accordance with the conditions provided for by the relevant international agreements or, in default, in conformity with similar conditions provided for by the Uniform Act on Arbitration, and Law No. 2003/009 of 10 July 2003, to designate the competent Courts mentioned in the Uniform Act on Arbitration. In this connection, as a general rule, the execution against assets may be obtained after the expiration of the time limit for filing an appeal against the first decision granting enforcement of a foreign award (that is, one month after the decision is officially notified to the other party) or the time limit for filing an application to set aside such an award. While execution is suspended, from the time of the filing.[97] Despite this, it is possible to obtain provisional execution against assets in Cameroon if either the award contains an order for provisional execution or the judge grants an order for provisional execution. In such circumstances, execution against assets may be obtained as soon as the decision granting enforcement or the judge's order for provisional execution is officially notified to the other party.[98]

C. Scope of stay of enforcement and other issues: According to Article 32 of the Uniform Act on Arbitration, where an application to set aside an award has been recognised by the competent court, any decision on the enforcement and recognition of that award is suspended. Similarly, as per Article 33 of the Uniform Act, if the application to set aside the award is rejected, the decision on enforcement and recognition of the award is validated. Nevertheless, if the recognition or enforcement is sought according to the New York Convention, Section VI of the Convention is applicable. On this account, as Cameroon is a party to both the OHADA Treaty and the New York Convention, a party seeking the recognition and enforcement of a foreign award has the choice of relying on either the New York Convention or the OHADA Uniform Act on Arbitration. Despite this, it is worth noting that a partially insolvent debtor may ask the court for a "grace period", within which to pay its debt. Likewise, in the event of total insolvency, legal proceedings for recognition and enforcement against an insolvent debtor may be stayed for the duration of the insolvency proceedings. Besides, the recovery of amounts awarded in arbitration may also be affected by the restructuring plans applicable in Cameroon, especially if the debtor is a State or State-owned corporation. A situation whereby the GoC often systematically seeks a negotiated settlement. Correspondingly, it is worth noting that the rules relating to the provisional enforcement of the court judgements are applicable also to arbitral awards. That is, if the competent judge finds that the interim or partial award is not contrary to public policy, the award will be enforced.[99] In addition, there is no restriction on a party's ability to obtain recognition and enforcement of non-monetary relief in foreign arbitral awards.[100] For this reason, a party can obtain recognition and enforcement of only part of the relief granted in foreign awards, which is possible pursuant to Section V(1)(c) of the New York Convention. Nonetheless, if an award has been set aside by a competent authority, it might not be enforced, in accordance with Section V(1)(e) of the New York Convention. Despite this, it may be argued that Section VII of the Convention allows an award that has been set aside by the authority referred to in Section V(1)(e) of the Convention to be recognised and enforced in the OHADA space, given that Article 26 of the Uniform Act on Arbitration does not mention the setting aside of an award in its country of origin, as a ground for refusing the recognition and enforcement of that award. A position that is strongly affirmed since Article 26 of the Uniform Act on Arbitration was inspired by the French arbitration law

[96] See Section 5 of Law No. 2003/009 of 10 July 2003.
[97] See Section 6 of Law No. 75/16 of 8 December 1975 defining the procedure and organisation of the Supreme Court.
[98] See Law No. 92/008 of 14 April 1992 setting conditions for the enforcement of judicial decisions.

[99] See Section 597 of the Civil Procedure Code, and Law No. 92/008 of 14 April 1992 setting conditions for enforcement of judicial decisions.
[100] See Section 5 of Law No. 2007/001 of 19 Apr. 2007.

and the *Hilmarton* and *Putrabali* cases, applicable within the OHADA space.[101]

D. Arbitration awards or cases initiated involving the BITs of Cameroon:

Concisely, it is worth reiterating that Cameroon has a history of voluntary compliance with adverse investment treaty awards, although additional proceedings are necessary to enforce such awards. On this account, two awards have been rendered in matters involving the GoC. These are both concerning the *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon and others* case, as discussed above, whereby an award was made on the 21 October 1983, and subsequently annulled on the 3 May 1985 and a second award made on the 26 January 1988. In general, with regard to investment arbitration, arbitral awards are supposed to be directly enforceable in Cameroon, in accordance with its fundamental laws as earlier discussed. That being the case, the catalogue of arbitration awards or cases initiated involving the BITs of Cameroon are: (i) *RSM Production Corporation v. Republic of Cameroon* (ICSID Case No. CONC/11/1) and *RSM Production Corporation v. Republic of Cameroon* (ICSID Case No. ARB/13/14), brought under a contract. After a failed attempt at conciliation to resolve a dispute, RSM Oil Company filed an ICSID arbitration request against the State of Cameroon on July 2013. The dispute involves the State of Cameroon's transfer of a portion of its five-year concession to explore the Logbaba natural gas field in Douala to a UK company. Equally, RSM also claimed that Cameroon violated an agreement under the concession on price-fixing of natural gas, although the matter was amicably settled on 19 January 2016; (ii) *Lafarge v. Republic of Cameroon* (ICSID Case No. ARB/02/4), brought under the 1990 Cameroon's Investment Code. The case settled on 13 June 2003; (iii) *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), brought under a contract. The award was rendered on 21 October 1983 and annulled on 3 May 1985. The parties resubmitted the case shortly after and a new award was rendered on the 26 January 1988. However, the final award is not publicly available; and (iv) *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon* (ICSID Case No. ARB/15/18), brought under the Belgium-Cameroon BIT, which is still pending. From these, it is worth considering the trends of ISDS in the extractive industries in Cameroon.

[101] See Cass. civ. 1re civ., 23 Mar. 1994, Hilmarton, Rev. arb. 1994, 327 (Annot. C. Jarrosson), see also A van den Berg, (1998) 9:2 ICC ICArb. Bull. 15); Cass. civ. 1re., 29 June 2007, Putrabali, Rev. arb. 2007, 507 (Rep. P. Ancel, Annot. E. Gaillard).

4. The Trends of Investment Dispute Settlement in the Extractive Industry

Correspondingly, in concord with the discussion so far, it is worth considering some particularities of ISDS in the extractive industries (EI) in Cameroon. Since the EI embodying the mining, oil and gas sectors, are the major source of investments and revenues in the country. Although it has not really succeeded in translating the EI revenues into sustainable economic development. As the EI is posing particular risks to the country for the following three interrelated reasons: (i) the lack of capability in the country to effectively regulate the EI; (ii) the pervasive corruption in the country; and (iii) the presence of the vulnerable populations who often lack access to justice - when affected by the negative consequences of an extractive project. What's more, the problem is aggravated by the lack of international instruments that place concrete enforceable obligations on multinational corporations (MNCs). Similarly, the treaty-based regime of foreign investment protection can also potentially create additional incentives for the host State to ignore the complaints of the local populations. On this account, it is noted that while resolving deep inequalities and endemic corruption in the country may take many years, there are steps that the international community can take now to protect the vulnerable populations close to the extractive projects, to avoid or mitigate any potential dispute. In this vein, as presented earlier, Cameroon has ratified several multilateral and bilateral investment treaties and adopted a number of legislations and regulations. With the aim to enhance the investment climate and the amicable settlement of investment disputes, especially in the EI. As such, it is worth considering some key legal instruments that tackle issues of dispute settlement in the EI in Cameroon.

That being the case, with regards to the hydrocarbon sector, Section 123 of the Petroleum Code of 2019 provides that the petroleum contract and authorisation holders are subject to the laws and regulations of Cameroon - a position that is included in all its BITs. Despite this, Section 124 of the Code provides that the petroleum contracts may provide for special regimes dealing with the stabilisation of economic and tax conditions – particularly, where the conditions for the execution of the said petroleum contract are aggravated by the introduction in Cameroon of new laws or regulations after the contract's effective date. With Section 125(1) of the Code providing that if any dispute arises between the

State and the holder of the authorisation and contractual instruments, the courts in Cameroon will have jurisdiction over such matters and any violation of the provisions of the Code, its implementing instruments and the petroleum authorisations and contracts. Although Section 125(2) provides otherwise that the contract may still include a clause providing for a conciliation and arbitration procedure to settle any dispute between the State and the holder, relating to the interpretation or execution of the said petroleum contract. Notwithstanding, Section 126 of the Code emphasizes that where the petroleum authorisation or contract holder violates the Code or its implementing instruments, authorisation or petroleum contract, or is in a bankruptcy, judicial settlement or disposal of assets situation, the Minister in charge of hydrocarbons (Ministry of Mines, Industry and Technological Development – MINMIDT) will serve the holder with a formal notice to remedy the duly established lapses within three (3) months. But whereupon the expiring of the deadline, the formal notice is not remedied. The Minister will order the withdrawal of the authorisation and/or cancellation of the petroleum contract concerned, without prejudice to the other penalties provided for by the laws and regulations in force. On this account, where the authorisation was granted by decree, it will be withdrawn by decree of the same public authority. What's more, as per Section 127, it is of essence to note that the withdrawal of the authorisation or the cancellation of the petroleum contract does not release the holder from his contractual or third-party obligations due on the date of such withdrawal or cancellation. Since such obligations often include the restoration of the sites, financial, tax and social obligations.

By the same token, the situation in the mining sector is not different from that of the hydrocarbons - whereby without prejudice to the right of the parties to resort to arbitration as enshrined in Section 125(2) of the Petroleum Code, the legal provision applicable in the relations between the State and mining operators or between mining operators in Cameroon, is Section 231 of the Mining Code of 2016. With Section 232 of the Mining Code also providing that disputes arising from the enforcement or interpretation of a mining agreement signed between a mining title holder and the State pursuant to the provisions of the Mining Code, and which have not been settled out of court, may be submitted for conciliation, mediation or arbitration. From these, it is observed that under the aforementioned Codes, in the event of a change in the applicable law that would affect in a significant manner the economic or tax equilibrium of the contract to the detriment of the contractor, the contractor may, after recognising the relevant legislative or regulatory measure, notify the MINMIDT that such change would have a significant detrimental effect on the economic and/or tax equilibrium of the contract. Indeed, this should be in accordance with what the Codes have specified, that is, a significant modification that has the effect of reducing the economic benefits of the contractor resulting from the contract. That being the case, the Minister may accept or reject the justifications brought by the contractor. Notwithstanding, the parties may agree to negotiate an amendment to the contract that is required to preserve its economic equilibrium. But if the parties fail to reach an agreement, then the dispute is settled by way of arbitration. A position that is affirmed in the Petroleum Code, whereby it is noted that the petroleum contracts may include a clause providing for conciliation and arbitration procedures for settling any dispute that may arise between the State and the permit holder relating to the interpretation or application of the contracts. On this account, the State and the contractor must always try to use reasonable efforts to find an amicable settlement to any dispute between them (save for technical disputes that are submitted to an administered expertise procedure held per the expertise regulation of the ICC). As such, if the parties fail to settle their dispute amicably (other than in the case of a technical dispute, for which the expert's decision is final and binding on the parties), then the dispute can be settled by way of arbitration under the ICSID rules or others, as elaborated above. Thus, while the governing law is Cameroonian law, the principles of international law are also applicable - with the seat of arbitration often determined by the parties at the time of negotiating the contract. At this juncture, it is worthwhile considering other alternatives to arbitration in the ISDS process – which is vital for the sustainability of the EI in Cameroon.

5. The Sustainability Criteria of Other Alternatives to Arbitration

Explicitly, as elaborated above, it is worth reiterating that there are important roles for both the host State and investors toward ensuring that the investments in the EI, not only contribute to sustainable development but, perhaps more importantly, are not deleterious to the environment, communities, human rights, and other fundamental aspects of development like access to water, labour rights, gender equality, etc. As such, it is observed that one of the allegedly problematic aspects of the legal framework governing investments in the EI is that, the legal instruments (laws, IIAs, contracts) bind the hands of the government to act in the public interest—or, at least, bind them from doing so without having to compensate the investor for any

decrease in profitability. Since there are times when the IIAs and contracts appear to be at odds with other governmental obligations, including those enshrined in domestic law and international human rights conventions. Especially as seen with some "old generation" BITs, which only allowed for a State-to-State dispute settlement mechanism with little interest in issues of sustainability. But however, in recent BITs like those of Cameroon, the investor-to-state mechanism is currently the rule, imputing and enforcing sustainability issues – though some are still making the availability of the ISDS conditional upon the prior exhaustion of local remedies.

That being the case, *Luke Peterson* - a BIT expert, identifies the various problems with the dispute settlement provisions and implementation in BITs that can affect the sustainability of an investment project as follows: Lack of transparency of the cases and the proceedings (due to difficulties in finding information about the State to State dispute settlements); inappropriate procedures to select arbitrators (as each party can choose their arbitrators and the rules do not require special expertise when sensitive health, environmental or human rights issues are implicated); obstacles for the participation of other parties (for instance, the local inhabitants affected by the case); and accountability (inconsistent decisions on issues relating to government obligations).[102] Similarly, *Obadia* identifies other problems with the ICSID dispute settlements as: Increased uses of juridical manoeuvres questioning the jurisdiction of the ICSID; imprecise definition of expropriation and especially - creeping expropriation, which includes public policy and policy measures.[103] It is for this reason that BITs are signed by the home States of the investors, giving prerogatives to the investors to challenge the States for actions in their jurisdictions, as well as for breach of contracts by the latter rather than the breach of the BITs obligations. On this account, the awards by the arbitrators are seen to be very legalistic and longwinded, such that they seem to lose the swiftness of the ISDS mechanism that was originally sought.

[102] Peterson, L. (2002). "All Roads Lead out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties", Nautilus Institute for Security and Sustainable Development (International Sustainable and Ethical Investment Rules Project), November.

[103] Obadia, E. (2002). "ICSID, Art. Investment Treaties and Arbitration: Current and Emerging Issues", *ICSID News*, Volume 8, nr 2; Rogers, W., speech at the Inter-American Development Bank Conference on Commercial alternative Dispute Resolution in the XXI Century: the Road Ahead for Latin America and the Caribbean, 26-27 October 2002.

In this regard, it is worth noting that the sustainability criteria are gradually gaining more stem in the ISDS endeavours, particularly in the EI – which has led to the usage of other alternatives to arbitration. Since arbitration is currently being avoided, as it is no longer an inexpensive alternative to litigation. As such, most developing countries like Cameroon, and small and medium-sized enterprises, are aptly considering that such expenses are prohibitive. Of course, the same may be true of resolving disputes in local courts, since litigation, in general, is expensive and the domestic legal process involves many tiered appeal processes. What's more, it is observed that arbitration can also damage the reputations of both the host State and investor without any systems in place to arrive at a mutually beneficial outcome.[104] On this account, it is essential to always consider all the possible attempts to prevent disputes before they arise, and endeavour to use other methods or dispute resolution models if the dispute is unavoidable. That being the case, it is worth examining how renegotiation and usage of dispute prevention policies, political risk insurance and alternative dispute resolution, can enhance the sustainability of the EI in Cameroon.

A. Renegotiation and usage of dispute prevention policies:

This is often envisaged when there is a change in the circumstances or assumptions that formed the basis of the contract between the investor and the host State – as enshrined in Section 124 of the Petroleum Code of Cameroon. As such, if they do occur, then the issues are usually referred to a renegotiation clause in the contract. Even though it is observed that these clauses have in many cases led to arbitration because of the difficulty in determining whether there was indeed a "change in circumstances".[105] Likewise, it is realised that even when both parties come to the table, there is often contention over how to determine a new sharing formula in the contract. Despite this, it should be noted that renegotiations can avoid lengthy and costly litigations, lead to the arrival of mutually beneficial outcomes, and preserve the important relationship and mutual trust between the investor and host State. In this vein, another alternative approach to arbitration that the parties can use is the dispute prevention policies (DPPs) – which seek to prevent or reduce

[104] UNCTAD 2010 Report, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, at http://www.unctad.org/en/docs/diaeia200911_en.pdf. Literature on alternatives to arbitration is limited, and this report is the most comprehensive resource and served as the key reference for this section.

[105] Sometimes a hardship clause is used – also referred to as a *"bouleversement"* of the contract.

disputes between the host States and investors before they occur, and to de-escalate conflicts from turning into formal investment disputes. Since DPPs aim to establish an effective early warning mechanism that alerts the government authorities about a possible or emerging conflict with an investor, thus, providing time and flexibility for the government to address the investor's concerns. On this account, a recent UNCTAD report affirmed the role of several DPPs implemented in developing host States, by calling them "information, prevention, and specific coordination" reforms.[106] This is because such reforms suggest that in sectors that are particularly susceptible to disputes like the EI, the host States need to ensure that information sharing occurs among the agencies related to them like between the investment promotion agency and the sector regulator or State Company. What's more, it needs to distribute authority between governmental agencies to guarantee friendly advocates, on behalf of the investor, as well as opposing interests representing the host State, and allow for amicable pre-dispute administrative review of the dispute. In addition, it needs to ensure that all the relevant documents are available on time in any administrative and dispute proceedings, so as to allow quick assessment of the claim, as well as empower the public officials to initiate and execute the settlement procedures and payments. Likewise, a related measure would be to conduct simultaneous dispute-preparedness and government capacity-building initiatives when negotiating IIAs. Most importantly, the host States could augment their investment promotion "after-care" services by creating an *ombudsman*, or mediation commission or officer, to serve as a "one-stop-shop" for complaints by investors.[107]

B. Political risk insurance and alternative dispute resolution:

In this connection, political risk insurance is an additional means by which the investors could mitigate risks and thereby reduce the need to resort to arbitration. As such, rather than asserting claims against sovereigns seeking redress of their grievances, the investors could turn to insurers who provide political risk insurance (PRI) to ensure they are made whole. In this sense, banks often require investors to obtain PRI in order to qualify for financing.[108] Despite this, it is worth noting that the list of risks covered is often limited to risks like currency inconvertibility, expropriation and political violence, which by no means is the exhaustive list of the risks faced by the investors.[109] Besides, some claims are only payable after an investor has invoked a dispute resolution mechanism like arbitration.[110] Nevertheless, an important issue often raised is whether the PRI could be expanded or improved to make it a viable alternative to arbitration. If so, what risks could be included in the PRI that would sufficiently address the most common risks faced by investors. On this account, a widely-discussed alternative to formal arbitration is alternative dispute resolution (ADR). Which typically involves the intervention of a third party to assist the disputants through negotiation, mediation or conciliation. This is because the ADR has many advantages as an alternative form of ISDS, which include procedural and substantive flexibility by which neutral third parties are given space for more creative settlements based upon the mutual interests of the disputants as opposed to arbitrators who are often bound by the arbitration rules, in resolving investment disputes, especially in the EI. Similarly, ADR also affords the possibility of agreements between the host State and the investors that go beyond the payment of compensation and are forward-looking in addressing a conflict in its entirety, with possible modification of a policy. Despite these, one drawback of the ADR is its non-binding nature on the parties and the realisation that the results of mediation or conciliation are not enforceable under any binding international law. From these, it is worth noting that should ADR be desirable for resolving investment disputes in the EI, there is a need to embody and tackle such pertinent challenges. Concerning this innovation, the GoC adopted ADR in its recent legislation and regulations in the EI. But the greatest worry is whether the 'creative' solution is in the best interest of the population that is not involved in the ADR process. In addition, Cameroon has also set up the GICAM Arbitration Centre (*Centre d'arbitrage du Groupement inter-patronal du Cameroun*) in Douala; the Arbitration Centre of the Cameroon Chamber of Commerce and Industry, and the Cameroon Bar Association's Arbitration Mechanism - all of which despite their appellations, do apply ADR together with the arbitration in settling disputes. In this light, it is highly commended that the judiciary in Cameroon should adopt the ADR mechanism, as a pre-requisite to litigation.

CONCLUSION

As the EI is a growing industry in several African States like Cameroon, so is its potential for

[106] UNCTAD 2010 Report, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, p. 75.
[107] *Ibid*., pp. 65-96.
[108] MIGA (2009). World Investment and Political Risk, p. 47.
[109] See Opic Program Handbook 1, 2004, available at www.opic.gov/pdf/publications/04_ProgramHandbook.pdf.
[110] *Ibid*., pp. 47-49.

investment disputes that need settlement. On this account, the paper has considered these salient issues, by initially cascading the spectrum and implications of the ISDS mechanisms – by focusing on the EI, before tackling the purview and impact of investment dispute settlement and enforcement in Cameroon, and the way forward for its EI - in terms of sustainability. From this, it is noted that for many of the potential investment disputes, international investment arbitration provides for an effective dispute resolution mechanism - with features preferable to domestic court proceedings. Since in some cases with unlawful host State intervention, investment arbitration can even be the only most effective remedy. As a result, extractive companies need to be well advised to devise their dispute resolution strategies before disputes arise. This can be done by ensuring that viable dispute settlement clauses are included in the BITs and contracts signed with the host States. Especially, as BITs have changed over time from an investment promotion instrument for development in developing countries - to an instrument for the protection of investment in the interest of potential investors. That being the case, almost all African countries like Cameroon, have taken actions in terms of regulatory or institutional changes, including amending laws or initiating the renegotiation of contracts with extractive firms or indicating an intention to take one or both steps. Despite this, it is noted that in Cameroon like in many other African States, the expansion of IIAs is carrying significant risks to the policy space and policy tools necessary for industrialisation and development. A situation that has ignited strong debate and controversy about the international investment protection regime and its implications on the policy space that developing countries need to promote development. Equally, the rising number of ISDS cases revealed how the rules established under IIAs, and the way they have been expansively interpreted by the private investment arbitrators, encroach on the ability of the government to regulate in the public interest - especially, as the majority of the ISDS cases registered at ICSID are in the EI. Whereby in resorting to the ISDS mechanisms, the investors are challenging a broad range of government measures, which is not limited to challenging outright expropriation – but involve issues related to revocations of licenses, alleged breaches of investment contracts, alleged irregularities in public tenders, changes to domestic regulatory frameworks, withdrawal of previously granted subsidies, tax measures and other regulatory interventions.

As a consequence, ISDS is increasingly used by investors, in the EI in particular, in several developing countries to challenge governmental reform action, such as policy against speculation, as well as tax measures. Despite these, the problem of the investment protection regime is multi-layered and rooted in the following deficiencies: an imbalance in the provisions of the investment treaties (including broad definitions of investment and investor, free transfer of capital, rights to establishment, the national treatment and the most-favoured-nation clauses, fair and equitable treatment, protection from direct and indirect expropriation and the prohibition of performance requirements) - which focus on the rights of the investors and neglecting their responsibilities, while often lacking express recognition of the need to safeguard the regulatory authority of the host State; and vague treaty provisions - which allow for expansive interpretation by arbitrators and the rise of systemic bias in favour of the investors in the resolution of disputes under the investment treaty law. As such trends are often not in line with the original intent of the States negotiating the treaty. Since the ISDS mechanism is led by a network of arbitrators dominated by private lawyers, whose expertise often stems from commercial law. With the arbitrators usually asserting jurisdiction over a wide range of issues, including regulatory measures on which constitutional courts had decided in accordance with the national law. From these, it is noted that the way the ISDS system has operated so far - generates deep concerns about democratic governance and accountability. This is due to the lack of transparency and available public information on ISDS procedures, which limits the space of public participation and accountability.

This is coupled with the fact that most IIAs allow for fully confidential arbitration. A situation that has led to an increase in the number of claims or threats by investors to bring forward a claim against a particular State. This has prompted several developing countries, to review their approach to investment treaties, including looking at ways of reducing their legal liability under the BITs, and equally using their right to counterclaim, especially given the surge in ISDS cases from the treaties. That being the case, although this is feasible, it is noted that between the jurisdictional limitations read into State counterclaims and the scarce protections afforded by IIAs, State counterclaims have failed to effectively enter the ICSID system and others – even though they could play an important role in the ISDS process. As such, great effort must be made to understand the bases of "consent" and "arising out of the subject matter of the dispute" and "an investment", as aptly inclusive to aid in yielding a successful State counterclaim. Notwithstanding, it should be noted that if the States

want the system to truly provide for State counterclaims on a wide swath of issues, then they need to include in their IIAs, a clear language that will require the investors to respect the domestic and international laws in the substantive provisions of their IIAs, not just when defining investment and other related concepts.

In this regard, with respect to the OHADA framework, which is of paramount importance to this paper – as Cameroon is a Member State. It is worth noting that as a treaty, the OHADA prevails over domestic laws - with an international arbitration award prevailing, especially if operating through the OHADA framework. Since the CCJA enforced under OHADA is both an arbitration institution and a judicial court, with a remit covering all the OHADA Member States. As such, the OHADA system serves both as domestic and primary reference legislation for ADR in Cameroon - with its local courts empowered to recognise and enforce foreign arbitral awards issued against the State if found at fault. On this account, in a bid to boost legal and judicial certainty *vis-à-vis* the investors operating within the OHADA zone, the OHADA Uniform Act on Arbitration provide the forum for the investors and Member States to submit investment disputes that occur between them to arbitration. However, it is noted that the expectations of the investors in this regard are often wider than what the Uniform Act probably imagined. As such, the strife to provide certainty to the investors for the administration of proceedings and application of the law has not been very much successful. Since the system has failed to lay down clear rules to address the underlying procedural issues that constitute an elemental part of investment arbitration. Besides, the Uniform Act has also overlooked the need to demonstrate predictability and flexibility by disregarding developments in the domain of ISDS arbitration. As a consequence, this has prompted most foreign investors operating within the OHADA zone, to refer disputes that could occur between them and the Host States to foreign arbitration centres like the ICSID. Nonetheless, it is noted that the OHADA system still has the merit of allowing room for ISDS, if a proper reform is made and implemented that can boost the confidence of the investor and permit profitability. Similarly, it is commended that the Uniform Act on Arbitration should be revised, to make room for investors who do not have a direct contractual relationship with an OHADA Member State, to rely on consent expressed in the national legislations or investment treaties to seek jurisdiction of the tribunal. As this will be in accord with the investment arbitration law and practice that permits investors to rely on consent expressed in national laws and investment treaties, to establish consent to arbitration under the scope of the doctrine of arbitration without privity. Although Cameroon together with several OHADA Member States, has already demonstrated the willingness to use their national legislations to grant consent to arbitration before the ICSID. It is, however, left for the OHADA system to open up and permit that such consent granted through the national legislation, be considered as consent to arbitration proceedings under certain conditions and to the extent that it is granted in the national laws.

In addition, as the experiences of the ICSID and other Centres handling ISDS demonstrate, there is a need to change the regime for confidentiality, publication of awards and third-party participation. That being the case, it is worth commending that the Uniform Act on Arbitration should be revised to include a provision for an open roll of ISDS cases, so as to permit third parties whose rights can be affected by the outcome of an investment dispute to be informed. Since based upon such information, the interested groups or associations can petition to be added to the proceedings as *amicus curiae* to defend their interests. This can be done with all fairness by taking into consideration that the publication of awards should be possible if the parties agree. As such, justice should be done and seen as being done by the parties and the entire public, if the parties agree that the awards should be published. As this can enable the investors, counsels, scholars and other actors in the international investment sphere, to read through them and grasp the arbitrators' reasoning and consequently the credibility of the procedure. On this account, it is worth stressing that some degree of confidentiality needs to be traded for transparency. What's more, foreign investors should be able to obtain forced execution over properties of persons enjoying immunity from execution in cases where such forced execution is sought to give effect to an arbitral award, and when they meet up with some basic procedural conditions. A situation that is inspired by Section 1610(a)(6) of the Foreign Sovereign Immunity Act of the United States, which provides that foreign State property used for commercial activity in the United States, is not immune from execution of a judgment confirming an arbitral award. In this vein, it is commended that similar provisions of that nature should be adopted in Cameroon to boost the confidence of the investors. Most importantly, since the sustainability of ADR in the ISDS process is very vital as an alternative to arbitration - as it is less expensive and enhances a long-lasting amicable settlement of disputes between the parties, and possibly compensates other affected stakeholders. It is highly recommended that the GoC

should adopt legislation to authorise that ADR must be used as a pre-requisite for arbitration and litigation in Cameroon. By doing this it will consolidate its accomplishments along the trajectory towards legal and judicial certainty, thus, bolstering the sustainability of investments in its EI.