EXAMINATION OF ARBITRATION RELATED UNCITRAL TEXTS AND THEIR ADOPTION BY AFRICAN STATES

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1 Background

The purpose of this roundtable discussion with the United Nations Commission on International Trade Law (UNCITRAL), as given in the SOAS 2017 Cairo Conference Discussion Paper, is to interrogate the reasons behind the few adoptions of UNCITRAL texts by African States and suggest possible remedial measures.

Africa has been able to attract considerable foreign investment in the recent past, which has also contributed significantly to the fast growing economy in the region. According to the International Monetary Fund (IMF), two of the main reasons as to why the economies of many countries in the region of Sub-Saharan Africa continue to perform well, are improved business environments and continued strong infrastructure investment in the regions.[1].

However, an increase in investment has also meant an increase in disputes, raising questions about how those disputes should be resolved. Surveys suggest that while African parties often include international arbitration clauses in contracts with foreign parties, the foreign parties mostly avoid agreeing to arbitrate in Africa.

According to the World Bank, the ability to enforce arbitral awards is one of the important factors driving investment decisions.[2] And one of the issues faced by parties entering into contracts with African parties is how likely it is that foreign arbitral awards will be recognized and enforced by African courts.

In this regard it may be pointed out that arbitration related law and practice varies greatly between different regions of Africa. A number of countries have adopted modern arbitration laws based on the UNCITRAL Model Law, but there are also countries that have not. To add to this is the diversity in terms of legal traditions within the African continent, including legal systems based on French, English and Portuguese law, with some jurisdictions also influenced by Sharia law, collectively referred to as 'legal pluralism'.[3] UNCITRAL, however, is one of the most

[1] "Regional Economic Reports: Africa", *International Monetary Fund* (2 November, 2016), available at: <http://www.imf.org/external/pubs/ft/reo/reorepts.aspx?ddlYear=-1&ddlRegions=11>.
[2] Sophie Pouget, "Arbitrating and Mediating Disputes: Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment", *The World Bank* (October, 2013), available at: <http://documents.worldbank.org/curated/en/554271468340163221/pdf/WPS6632.pdf>.
[3] Steven Finizio, Thomas Fuhrich, "Africa's Advance", *African Law and Business*, July 07, 2014, available at: https://www.africanlawbusiness.com/news/5068-africas-advance.

influential institutions in matters of arbitration. Among others, it publishes arbitration rules commonly used in ad hoc international commercial arbitration. It also publishes non-binding Notes on Organizing Arbitration Proceedings.[4]

Arbitration is a contractual method of resolving disputes where parties agree to entrust the differences between them to the decision of an arbitrator or a panel of arbitrators, to the exclusion of the courts, and they bind themselves to accept that decision, once made whether or not they think it right.[5] Ray Turner argues that arbitration as an accepted means of finally resolving disputes in a wide range of areas of commercial and other activity, each area of activity tends to have its own requirements or traditions relating to awards, or to their style of presentation. Accordingly, each arbitration proceeding can also have its own peculiarities which might demand a particular format or sequence for the contents of the award or awards.[6]

Arbitration has been lauded over litigation as a faster, flexible and easier method of settling legal disputes. It offers non-antagonistic outcome to the parties. Unlike with litigation, where the judges are arbitrarily designated, arbitration allows parties to select their arbitrators, which means, in theory, that they can choose individuals with particular expertise who are able to quickly comprehend complex technical issues. Furthermore, arbitration is regarded as the ideal dispute resolution method of choice for cross-border transactions involving parties from different legal and cultural backgrounds.[7] Lack of trust among the parties to a commercial transactions regarding the each other's national court on potential future differences between them, is the main reason why parties bind themselves to accept decision of an arbitrator or a panel of arbitrators, to the exclusion of the courts.

Since cross-border trade and investment transactions involving parties from different legal and cultural backgrounds, is the basis of the arbitration, adoption of appropriate national arbitration laws should be part and parcel of any economic reforms in order to attract and promote competitive economy and direct foreign investments (FDI). Reform in arbitration laws also need to be connected to judicial reforms particularly in ensuring the minimization court's intervention.

At the same time, national arbitration laws need to follow international norms. Parties to the disputes including states have a tendency to choose an arbitration seat whose arbitration law follows the international norms to which most States are accustomed, for example, the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), or the Uniform Act adopted by members of the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* ("OHADA").

[4] David Sutton, et al, Russell on Arbitration, 24th edition, Sweet & Maxwell, 2015, para 3-065, pp. 126-127.
[5] The Government of India v Cairn Energy India Pty Limited, Ravva Oil (Singapore) PTE Ltd, Videocon Industries Limited [2014] 1 AMCR 760 (p. 24).
[6] Ray Turner, Arbitration Awards: A Practical Approach, Blackwell Publishing, Oxford, 2005, p. xx.
[7] Preface to Arbitration in Malaysia: A Practical Guide, 2016.

2 UNCITRAL Model Law on International Commercial Arbitration and Conciliation in Africa: The Status.

It has been established that the arbitral legal framework in Africa is a mix of old and new law with each country having its own unique blend. A general overview of it may be classified into three generations. The first generation arbitral laws are those emanating from the colonial era. For instance, the Arbitration Act Cap 15 of Tanzania is a colonial law which was enacted in 1931 (amended in 1971). Second generation arbitral laws typically find their roots in French and British arbitral laws such as the 1950 Arbitration Act and the French Civil Code and are thought to have been heavily influenced by the proliferation of arbitration in Europe. Third generation arbitral laws are thought to have been heavily influenced by the UN General Assembly's efforts to achieve a recognized standard for arbitral laws and include, amongst others, the UNCITRAL Model Law (or an adaption thereof) (the "Model Law") or the Organization for the Harmonization of Business Law in Africa's ("OHADA") Uniform Act on Arbitration (the "UAA")[8].

In the southern part of Africa, few countries have adopted arbitration laws based on the UNCITRAL Model Law. This includes Madagascar, Mauritius, Zambia and Zimbabwe.[9] Also Angola[10] and Mozambique[11] have recently enacted legislation that heavily borrows elements from the Model Law. Other common law countries in the region (namely, Botswana[12], Lesotho, Malawi, Namibia, South Africa[13] and Swaziland) have arbitration legislation based primarily on

[8]Alexis Martinez, Emma Mason, "Arbitration in Africa: Past, Present and Future", *Kluwer Arbitration Blog*, (Jan 13, 2016), available at: http://kluwerarbitrationblog.com/2016/01/13/arbitration-in-africa-past-present-and-future/.

[9]"Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006", *UNCITRAL*, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

[10] Arbitration in Angola is currently regulated by Law 16/03 of 25 July, entitled the Voluntary Arbitration Law (VAL). The VAL was inspired by the Portuguese Arbitration Law from 1986[2] and, although it cannot be said that this law strictly follows the UNCITRAL Model Law, it includes many solutions that are common to the ones found in that Model Law. See José-Miguel Júdice, Pedro Metello de Nápoles, "Angola", *Global Arbitration Review*, 20 Apr, 2016.

[11] The arbitration law in Mozambique today is based primarily on the (a) Arbitration, Conciliation and Mediation Law (ACML), approved by Law No. 11/99, of 8 July, and (b) Administrative Procedure Law, approved by Law No. 7/2014, of 28 February. Although the ACML is not based in the UNCITRAL Model Law, it is clear that a large number of the legislative solutions are inspired in that Model Law. See Ricardo Guimarães and NunoLousa, "Mozambique", *Global Arbitration Review*, 20 Apr, 2016.

[12]Arbitration in Botswana is governed by the Arbitration Act (Cap 06:01) and this law is not currently based on the UNCITRAL Model Law. The alternative dispute resolution bill, which contains provisions based on the UNCITRAL Model Law, has been placed before parliament but has not yet been passed. The institution for arbitration in Botswana is the Botswana Institute of Arbitrators. The institution publishes its own set of arbitral rules. See Queen Letshabo and Edward William Fashole Luke II, "Botswana", *Global Arbitration Review*, 19 Oct, 2015.

[13]The principal legislation which applies to arbitrations in South Africa is the Arbitration Act 42 of 1965, which applies to international and domestic arbitration proceedings conducted in the country.The South African common law applicable to arbitrations is based largely on English law that has been developed by the local courts.The United Nations Commission on International Trade Law (UNCITRAL) is attempting to modernize and standardize international commercial relations. South Africa has not adopted the Model Law but has instead chosen to enact local legislation (in the form of a draft Bill) that is intended to combine the best features of the Model Law and the UK's Arbitration Act 1996, together with certain features of the Arbitration Act 42 of 1965 which have been found to work well in practice over the years. *See* "Arbitration Procedures and Practice in South Africa: Overview",

the 1950 English Arbitration Act. This legislation allows for greater court interference in arbitration proceedings, and does not expressly provide for the separation and *competenz-competenz* doctrines. However, courts in these jurisdictions sometimes take steps to mitigate the shortcomings of the legislation. For example, South African courts have a reputation for interpreting its law narrowly to avoid interfering with arbitration processes.[14]

Madagascar, Mauritius, Zambia, Zimbabwe, South Africa and Mozambique have adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.[15] However, even amongst these countries some impose grounds for refusing to enforce foreign awards not found in the Convention. For example, South Africa requires permission of the Minister of Economic Affairs for the enforcement of foreign awards, while Zimbabwe does not enforce an award that is in "breach of the rules of natural justice".[16]

Most countries in the West and Central Africa are members OHADA. OHADA was created by a treaty in 1993 to promote foreign investment through harmonization of business laws. The OHADA countries have adopted a Uniform Arbitration Act, which is largely based on the UNCITRAL Model Law.

Outside of the OHADA countries in the West and Central Africa, Nigeria is the only country in the region that has a modern arbitration law based on the UNCITRAL Model Law. Nigeria's economic strength and its energy resources mean that Nigerian parties are frequently involved in international arbitration, and the Nigerian courts are increasingly gaining a reputation for being less adversarial and more cooperative in enforcing arbitral awards. Within the region, a total of fifteen countries in region have ratified the New York Convention.

In East Africa, Kenya, Rwanda and Uganda[17] are the only countries to have adopted arbitration laws based on the UNCITRAL Model Law. Other countries in the region have also revised or adapted their arbitration laws in the last decade. However, these laws retain gaps and other uncertainties, and courts in those countries have reputations for being at best indifferent to, and at worst interfering in, the arbitral process. Five countries in the region have signed the New York Convention.

For instance, in Tanzania the UNCITRAL Model Law of 1985 has had no influence on the principal legislation on arbitration, i.e. the Arbitration Act Cap 15 which was enacted in 1931 and still in force to date. However, the major differences between the Arbitration Act Cap 15 and the Model Law are (a) under the Model Law, three arbitrators are the established requirement, whereas schedule 1 of the Arbitration Act provides that only a single arbitrator is necessary, (b)

Practical Law – A Thomson Reuters Legal Solution, (01 June, 2016), available at: <http://uk.practicallaw.com/4-502-0878?source=relatedcontent>.

[14] Steven Finizio, Thomas Fuhrich, "Africa's Advance", *African Law and Business*, July 07, 2014, p. 27, available at: https://www.africanlawbusiness.com/news/5068-africas-advance.

[15] "Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)", *UNCITRAL*, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

[16] Steven Finizio, n 3, p. 27.

[17] "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006", *UNCITRAL*, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

the Arbitration Act requires arbitrators to proceed in an impartial manner whereas the Model Law prescribes the additional requirement of independence, and (c) unlike the Model Law, the tribunal's determination of its own jurisdiction under domestic law is not a necessary prerequisite to a party's desire to appeal to court.[18] The Civil Procedure Code Cap 33 of the Laws of Tanzania contains a default set of arbitration rules and procedures for parties to a normal dispute before a court of law to refer the dispute to arbitration.[19]

The Arbitration Act of Tanzania still incorporates multilateral agreements like the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.[20] The Arbitration Act governs domestic arbitral proceedings and enforcement of foreign arbitral awards. However, foreign arbitral proceedings are recognised as binding when they are or have been conducted in the territories of any contracting party of the Geneva Convention on the Execution of Foreign Arbitral Awards.[21] At the same time, so far, Tanzania has entered into 17 bilateral agreements relating to arbitration. The New York Convention entered into force in Tanzania on 11 January 1965. There were no declarations made according to articles I, X and XI of the Convention. Tanzania is also a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) of 1965 since 17 June 1992 and to the Multilateral Investment Guarantee Agency of 1985 since 19 June 1992.[22]

All the countries in North Africa, with the exception of Libya, have arbitration laws based on the UNCITRAL Model Law. And other than Libya again, all the countries in the region are signatories to the New York Convention, and courts in the region generally have positive reputations for supporting arbitration, and for enforcing foreign awards under the terms of the New York Convention[23].

3 Why Arbitration should be the Preferred Option for Dispute Resolution in Africa (and the Added Significance of UNCITRAL Model Rules (International Commercial Contracts))

The significance of international commercial arbitration as the most viable approach to international disputes within the African continent owing to the massive cultural and legal diversities (legal pluralism) within the region isindeed great. Combined with some multinational companies' desire to avoid local courts and a strong arbitration tradition in international trade, it

[18]Tanzania: Wilbert Kapinga, Ofotsu A Tetteh-Kujorjie and Kamanga Kapinga, Mkono & Co Advocates.
[19] Erasmo Nyika, 'Enforcement of Arbitral Awards in Tanzania: Applicable Laws and Their Practical Challenges', *LST Law Review*, Vol. 1, Issue No. 2, 2016 at p. 60.
[20] Chapter 15 RE 2002.
[21] Schedule 4 of the Act.
[22]Tanzania: Wilbert Kapinga, Ofotsu A Tetteh-Kujorjie and Kamanga Kapinga, Mkono & Co Advocates.
[23]*Id*, pp. 27-29.

is unsurprising that international arbitration in Africa or involving African companies is on the rise.

However, the off-late increased referrals of African disputes to European or western based arbitral authorities have been indicative of the not-so-much successful current structure of arbitration in Africa. Hence, there is a need that international commercial arbitration in Africa should be able to become credible and efficient, and the internal environments within the regions supportive for the same (favorable executive, legislative and judicial systems), as that would have the capacity to boost cross-border trade and investment, and thus the overall economic situation of the continent.

The essence of the UNCITRAL Model Law is to afford States the opportunity of adopting its provisions subject to their need if they have no arbitration law at all and for those who have their respective laws to modify them based on the opportunity created by the UNCITRAL Model Law. UNCITRAL Model law is grounded on the core principles of party autonomy, *kompetenz-kompetenz* and severability.[24]

The States are not under any legal duty or obligation to adopt the provisions of the Model Law verbatim. After all, decision to enact any law is a sovereign decision. As has been seen above many African countries have taken positive harmonization steps towards fashioning their local arbitration legislations in line with the UNCITRAL Arbitration-related Conventions. However, none of the African countries have enacted the Model Laws 'as is'. Therefore, parties looking for selecting a seat in an African country that has enacted the relevant laws has to first look out for deviations. For example, the Egyptian Arbitration Act No. 27 of 1994, amongst others, is based on the Model Law but deviates from it in a number of ways, including a provision that if the parties to the arbitration agreement have not agreed the language of the proceedings, then the default language is Arabic.[25]

Africa's uniqueness lies in the fact that whereas it is one of the richest countries in terms of natural resources and wealth, its economic growth has not been able to compliment that. This is partly due to several factors including but not limited to the political instability, corruption, and poor leadership. Also, artificial boundaries created during the colonial era have become the source of inter-State and intra-State conflicts resulting in migration and refugee problem. In such a situation a means of dispute resolution that can bring a fair and quick solution to disputes arising out of international commercial transactions become of the utmost importance in the context of judicial and economic reforms.

It is well recognized by international community today that foreign investors are much more likely to be more confident in a forum that is neutral as compared to a forum that is highly laden with national values, laws and inherent culture. As stated above, lack of trust among the parties to a commercial transaction regarding the each other's national court on potential future differences between them, is the main reason why parties bind themselves to accept decision of an arbitrator or a panel of arbitrators, to the exclusion of the courts. Therefore, objective and

[24] Preface to Arbitration in Malaysia: A Practical Guide, 2016.
[25] See Alexis Martinez and Emma Mason, n.4.

equitable arbitration proceedings, is something that is seen as the *sine qua non* for the smooth functioning of international commercial relations.

Speaking firstly about the UNCITRAL model texts, it needs to be mentioned that the UNCITRAL Model Law on International Commercial Arbitration of 1985 was the first model law adopted by UNCITRAL, and has been a very successful example of international preparation of a legal text in the private law area.

The origin of the Model Law can be traced back to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The fundamental rule of that Convention is laid down in its Art. III, which provides that "each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon (…) and that "(t)here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."[26]
The New York Convention too, in that regard, has been remarkably successful although its ambit is limited. For example, a party wishing to enforce an award under the Convention will have to be informed of a number of matters that have not been dealt with in the Convention, such as whether the award will be enforced by a court or by another authority, or which court or which other authority; the procedure to be followed; the conditions or fees that may be charged and how they relate to those imposed on the recognition or enforcement of domestic awards in the country of enforcement.

The UNCITRAL Model Arbitration Law filled in these lacunae. The main purpose of the Model Law is to reduce the discrepancy between domestic procedural laws affecting international commercial arbitration. The UNCITRAL Model Arbitration Law deals with the essential elements of a favorable legal framework for the conduct of arbitration proceedings, such as: arbitration agreement; composition of arbitral tribunal (including appointment, substitution and challenge of arbitrators); jurisdiction of arbitral tribunal (including its competence of arbitral tribunal to rule on its own jurisdiction and its power to order interim measures); conduct of arbitral proceedings (treatment of parties, determination of rules of procedure, hearings and written proceedings, party default, appointment of experts, court assistance in taking evidence); making of award and termination of proceedings (settlement, form and contents of award; its correction and interpretation); setting aside and arbitral award; conditions for recognition and enforcement of awards and grounds for refusing recognition or enforcement.[27]

Another important factor is that UNCITRAL has not established fixed criteria or minimum requirements for determining when a country can be regarded as having enacted the Model Law. Nevertheless, it could be said that generally domestic arbitration statutes are considered to be enactments of the Model Law when it is clear that the legislator took the Model Law as a basis and made certain amendments and additions, but did not simply take the Model Law as one

[26] Jose Angelo EstrellaFaria, "Legal Harmonization through Model Laws: The Experience of the United Nations Commission on International Trade Law", pp. 18-22, available at:
<www.justice.gov.za/alraesa/conferences/2005sa/papers/s5_faria2.pdf>.
[27] *Ibid*.

amongst various models or follow only 'its principles'[28]. Therefore, what this essentially means is that the bulk of the provisions of the Model Law must be enacted and that the domestic statute must not contain any provision incompatible with the basic philosophy of the Model Law. A certain degree of adaptation would be permissible and also necessary.[29]

For instance, the OHADA was established pursuant to the 1993 Treaty.[30] Under this Treaty several uniform laws were adopted, including a uniform law on arbitration, adopted in March, 1999 that repealed all contrary provisions in national legislations. The Treaty provisions also called for the establishment of a 'Joint Court of Justice and Arbitration', with jurisdiction to play the role of an arbitral institution as well as of a court with powers to review arbitral awards.[31]

Almost all of the seventeen members of the OHADA are former French colonies. Hence despite the fact that OHADA has a Uniform Arbitration Act, along similar lines to the UNCITRAL Model Law, its rules and institutions draw strongly on civil law legal traditions and French business law. Accordingly, the OHADA legal framework provides for two regimes by which an arbitration award may be recognized and enforced.

The first adheres to the OHADA "Uniform Arbitration Act". This Act provides, along similar lines to the UNCITRAL Model Law, for the recognition of arbitration agreements and enforcement of arbitral awards where the arbitral seat is in an OHADA member state. The second regime provides for enforcement when the arbitration is subject to the administration of the OHADA Common Court of Justice and Arbitration. This court, based in Abidjan, Ivory Coast, provides overall supervision and rules on the application and interpretation of the Uniform Arbitration Act. However, enforcement under either regime may be challenged only in a narrow set of circumstances, and a restrictive view is taken of the exception for public policy, signaling a pro-arbitration approach. Enforcement may be refused only on public policy grounds where the award manifestly breaches "international public policy", as opposed to the public policy of individual member states.[32]

4 Possible Detractors and Reasons for Non-Adherence to the UNCITRAL Model Rules

Arbitration is considered to be a consensual process, as part of the Alternative Dispute Resolution (ADR) mechanism, as opposed to litigation or adjudicating process. The ADR mechanism, however, as it exists presently, is not completely without its detractors. Some

[28] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration,* 3rd ed. (Sweet & Maxwell, London, 1990), p. 642.
[29] *Ibid.*
[30] Organization for the Harmonization of Business Law in Africa Treaty (OHADA), 1993, revised in 2008.
[31] Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*, (Kluwer Law International, 2003), pp. 264-266.
[32] Kwadwo Sarkodie, "International Arbitration in the Sub-Saharan African Context", *Mayer Brown* (Jul 31, 2014), available at: https://www.mayerbrown.com/files/News/469b450b-52cd-470d-bad6-425cb4203bbf/Presentation/NewsAttachment/799d0574-6bba-43c1-9b22-445a67b5be38/art_sarkodie_jul3114_Int-arb-Sub-Saharan-African-context.pdf.

scholars argue especially from the developing countries' perspective that contradictions exist presently in the informal justice system.[33]

On one hand, the ADR processes are presented as simple models, viable alternatives to litigation, that reduce State interference for a faster and fairer resolution of disputes. On the other hand, such processes may be ambiguous, and indeed open more avenues for State control in order to further foster capitalism. The ADR may end up favoring those with greater bargaining power, oppression, disregard of third party interests, and subversion of public interest. Also arbitration is getting very close to mainstream litigation process which usually yields a zero-sum results.

Some scholars have held the view that the system of international commercial arbitration has been configured in such a way as to consistently favor the economic interest of the developed world. That the only advantage of arbitration appears to be its ability to provide a legitimate medium for the effective disempowerment of national legislative potentials, through progressive delimiting of role of courts in the arbitration processes.[34] Similar views have led to a slower rate of adoption of UNCITRAL model rules within the African continent.[35]

Many African regions have modified their local laws as per the UNCITRAL rules , even though there lies a history of skepticism in Africa with regard to adoption of such model texts. Hence, the adoption of such model texts has not been uniform throughout the region of the African continent.

One of the possible primary reasons for it is the mistrust that generated from the idea that these model arbitration rules were/are an imposition of foreign arbitral standards on unwilling States in the name of harmonization.[36] *Samson Sempasa* has argued that with regard to the harmonization of the international commercial arbitration rules, any approach in that respect should take into account certain prescriptions in the African countries that are apparently different from and also often in conflict with those of the West, owing to the differing political dynamics and cultural characteristics between the two regions, including on the idea of maximum autonomy in contractual relations propagated by the West.[37]

Another possible hurdle in the harmonization of International Commercial Arbitration (ICA) rules is the position of African countries placed on the involvement of State in order to ensure their national development. That is, as against the Western view of maximum autonomy in contractual relations, the emphasis some of the African countries place (or at least placed) is on

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[33]Amazu A. Asouzu, *International Commercial Arbitration and African State: Practice, Participation and Institutional Development*, (CUP, 2001), p. 14. *See* generally Nathan J. Arentsen, Matthew S. Weber, "UNCITRAL Model Law: Still a Model or Second Best?",*Kluwer Arbitration Blog* (1 July, 2014), available at: <http://kluwerarbitrationblog.com/2014/07/01/uncitral-model-law-still-a-model-or-second-best/>.

[34] R. Rajesh Babu, "International Commercial Arbitration and the Developing Countries", *AALCO Quarterly Bulletin* Vol. 2(4) (2006), pp. 385-396. See also, Amr A. Shalakany, "Arbitration and the Third World: A Plea for Reassuring Bias under the Specter of Neoliberalism", *Harvard International Law Journal*, Vol. 21(2) (2000), p. 424.

[35]*See* Amazu A. Asouzu, *International Commercial Arbitration and African State: Practice, Participation and Institutional Development*, (CUP, 2001), pp. 13-14.

[36] Framing of most of these model rules (including the UNCITRAL based rules) have seen little or no participation from the developing countries, including and especially countries from the African region.

[37] Samson L. Sempasa, "Obstacles to International Commercial Arbitrations in African Countries", *The International and Comparative Law Quarterly*, Vol. 41(2) (1992), p. 392.

certain aspects of transnational contracts, which implicate critical areas of their national development. This is coupled with the stark contrast of the strong preference in the West for 'formal' arbitration procedures with strong tendencies in Africa for informal negotiations and conciliation methods. Hence, feeling threatened by the mighty powers of the huge multi-national corporations, the African countries without knowing how the arbitral process would actually benefit them, were unwilling to get too involved in a process that they largely perceived to be benefiting the West. The participatory role of such multinationals in the establishment of some of the popular Western arbitration centers such as the International Chamber of Commerce, as well as their active lobbying for harmonization in favor of the liberal rules of arbitration, further fanned such fears.[38]

Another possible hurdle is the existing closed economic strategies which tend to have less emphasis on cross-border or international transactions as well as foreign investors. As noted above, international arbitration schemes such as UNCITRAL is largely associated with the need to solve disputes arising out of or in connection with the international transactions. Therefore, as long as the volume of foreign investors or international trade is low at the national level, chances are that some particular country may not see the UNCITRAL as a priority. The vice versa is also true, that by adopting the UNCITRAL Model law, countries may encourage foreign investors to invest in that particular country because of neutrality, flexibility and international enforceability of arbitral awards.

It needs to be emphasized that Investment Treaty Arbitration is a major part of commercial transactions and arbitration landscape in Africa under Bilateral Investment Treaties (BITs) or the 'photo-op agreements' (in the language of the then Attorney General of Pakistan, Mr. Makhdoom Khan) as they are often signed without any knowledge of their implications and at the occasions of visiting foreign dignitaries.[39] African experience in BITs arbitration has been dismal as foreign investors have used investor-state dispute settlement claims to challenge measures adopted by the host-state even when they are in public interest.[40] At the same time proliferation of investment treaties is the main reason for dramatic increase in arbitration

[38] See Samson L. Sempasa, "Obstacles to International Commercial Arbitrations in African Countries", *The International and Comparative Law Quarterly*, Vol. 41(2) (1992), p. 392-394, K.B. Asante, "The Perspectives of African Countries on International Commercial Arbitration", *Leiden Journal of Internal Law*, Vol. 6 (1993), p. 331, and Amazu A. Asouzu, International Commercial Arbitration and African State: Practice, Participation and Institutional Development, (CUP, 2001).

[39] Quoted in F.S. Nariman, 'Redefining the Landscape of ADR in Asian Jurisdiction", Kuala Lumpur International ADR Week, 15 May 2017, p. 7.

[40] F.S. Nariman, 'Redefining the Landscape of ADR in Asian Jurisdiction", Kuala Lumpur International ADR Week, 15 May 2017, p. 6-9. Other systemic deficiencies with Investment Treaty Regime as identified in the official report of the United Nations Conference on Trade and Development (UNCTAD) 2013/2014 are: (a) absence of the possibility of erroneous decisions of the arbitral tribunal being corrected on a review, (b) findings in arbitral decisions are inconsistent - with divergent legal interpretations of identical or similar treaty provisions; (c) there is grave concern about the independence and impartiality of arbitrators: and the increasing number of challenges to arbitrators indicates that disputing parties perceive them as biased, or pre-disposed to a particular pre-conceived point of view; (d) the actual practice of the investor-State dispute system has put in doubt the oft-quoted notion that arbitration represents a *speedy* and *low-cost method* of dispute resolution; (e) that investor-state disputes – go on far too long – many of which take several years to conclude; and (f) that large and prosperous law-firms dominate international investment arbitrations – charging high fees and employing expensive litigation-techniques: their representatives also indulge in burdensome and excessive document-discovery and long arguments.

involving states and state entities either before the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC) or ad hoc proceedings pursuant to the UNCITRAL rules. At ICSID as of 2016, it is a public knowledge that 26% of all disputes involves Africa, yet less than 2% of arbitrators are Africans! These treaties confer upon investors some rights aimed at protecting their investments which are directly enforceable against the host state. In practice, these treaties provide a remedy for investors against the host state which may be pursued by arbitration or in the local courts at the investor's option.[41]

5 Possible Steps towards Making Africa More Arbitration-Friendly

5.1 Role of Judiciary

At the outset, it needs to be noted that court proceedings and arbitration or ADR are complementary processes and not competitors. Strong courts' cooperation and control is a prerequisite to the effective arbitration regime. Both need each other. Parties to a dispute choose a method suitable to their dispute according to the circumstances surrounding each contract. Strong and effective judiciaries, such as specialized commercial courts, with 'hand-off' attitude to arbitration awards are a necessity in creating an effective arbitration environment.

All the varying schools of scholarship focusing on dispute resolution in cases of international commercial arbitration (ICA) have at least one common agenda – the question of how access to international commercial arbitration can be seen as part of the rule of law.[42] For instance, according to Dr. Jeswald Salacuse, the objectives of Investment Treaties can be distinguished into primary, secondary, and long-term objectives. Primary objectives are the protection and promotion of foreign investment; secondary objectives encompass market liberalization and the building of closer economic and political relations among contracting states. Yet, all of this is not an end in itself, but geared towards enhancing, on the long run, the economic welfare of contracting states.[43] Investment protection and promotion, in other words, have the objective to lead to economic growth and, ultimately, human development and rule of law. In this regard it may be said that functions of the rule of law can be seen in parallel to the goals of investor protection.[44]

Other scholars have argued that ICA serves as a mechanism to implement the rule of law standards laid down usually in commercial agreements. In this regard, investment related arbitration is seen as a form of access to justice, as a neutral, independent and impartial dispute settlement mechanism that has the function to control government action. In that respect ICA assumes the role that is usually fulfilled by courts exercising judicial review at the domestic

[41] David Sutton, et al, Russell on Arbitration, 24th edition, Sweet & Maxwell, 2015, para 3-018, p. 108.
[42] Stephan W. Schill, "International Investment and the Rule of Law" in Jefferey Jowell, J. Christopher Thomas, et al. (ed.), *Rule of Law Symposium 2014: The Importance of the Rule of Law in Promoting Development*, (Singapore Academy of Law, 2015), pp. 86-87, available at:
https://www.biicl.org/.../654_the_importance_of_the_rule_of_law_in_promoting_devel.
[43] Jeswald W. Salacuse, *The Law of Investment Treaties*, (Oxford International Law Library, 2010).
[44] Stephan W. Schill. n. 29, pp. 87-88.

level. In addition it compensates for a number of limitations that may exist for foreigners concerning access to justice under domestic law, both as regards substance and procedure.[45]

As stated above, arbitration is regarded as the ideal dispute resolution method of choice for cross-border transactions involving parties from different legal and cultural backgrounds.[46] A fundamental prerequisite for investors is a country's framework to achieve a swift disposal of disputes when they arise - through its courts or some other instituted process. ADR is largely seen as an alternative to court system - an exercise by parties of their private law rights. However, the growth of arbitration has brought back and more widely into focus the role of courts, namely the limit of its 'supervisory' role in relation to the ADR processes. The role of courts in relation to arbitration occurs under various headings such as arbitrability, *kompetenz-kompetenz*, judicial review, and others.

Legal supervision over arbitral proceedings has long been recognized as essential so as to not allow the Arbitral Tribunal to become law into itself.[47] For example, it is often argued that the four criteria for public law adjudication – critical for justice to be meted out – accountability, openness, coherence and independence – are relatively absent in the present system of arbitration. In the case of accountability, it is well-known that the scope for judicial review of arbitral decisions is limited. Second, in most arbitral proceedings the standards of openness is not met, as the essential information is required to be withheld. Thirdly, the lack of an appellate body to review awards makes it difficult to unify the jurisprudence into a stable system of state-stability. Lastly, and most critically, it is argued that the arbitrators are financially dependent on executive governments and prospective claimants, and have no security of tenure – thus, unable to being independent like judges. Therefore, some scholars are rather in the favor of accountable and independent courts, as public law adjudication must satisfy basic standards of judicial decision making in a democratic society. Thus, they suggest that domestic courts should assert greater control over investment treaty arbitration, and may over-rule errors of law in addition to errors of jurisdiction or procedural impropriety.[48]

However, under the modern-day international arbitration set-up the trend has been to increasingly restrict the scope of judicial review in case of arbitral awards,[49] as the fear has been of protectionism turning into interventionism. After all there is a fine borderline between helpful assistance of the courts and abuse of the available judicial remedies within arbitration. If crossed, the entire purpose of opting for such an institution is undermined and its essentialness is jeopardized. For example, for some endless and protracted appeals if introduced into arbitration, may steal the gloss of the nature of arbitration as a smooth and less cumbersome method of

[45] Stephan W. Schill. n. 29, pp.93-96.
[46] Preface to Arbitration in Malaysia: A Practical Guide, 2016.
[47]Olawale Adebambo, "Nigeria: The Impact of the Judiciary in Sub-Saharan Africa. To What Extent to Courts Support or Disrupt Arbitration? A perspective of Nigeria", *mondaq*, (June 24, 2016), available at: http://www.mondaq.com/Nigeria/x/503670/trials+appeals+compensation/The+Impact+Of+The+Judiciary+In+SubSaharan+Africa+To+What+Extent+Do+Courts+Support+Or+Disrupt+Arbitration+A+Perspective+Of+Nigeria.
[48]"Otherwise the global economy becomes but a convenient excuse for a method of adjudication that is tainted, in an objective sense, and that consequently fails to deliver on the promise of the rule of law". *See* Gus Van Harten, Investment Treaty Arbitration and Public Law, (OUP, 2006), pp. 152-153.
[49]F.D.J Brand, "Judicial Review of Arbitration Awards", *Stellenbosch Law Review* Vol. 25(2), (January, 2014), pp. 247-264.

dispute resolution. Nevertheless, however, the assurance that in the event of a grave and manifest error or injustice, review is available creates some satisfaction and confidence in the mind of parties. Hence, it would be appropriate to repeat Justice Edward Torgbor's words here that despite the systemic and structural differences between arbitrations and courts of law, they do not warrant a competing relation between the two.[50]

Several countries in the African continent have prioritized the promotion of the rule of law and enhancing access to justice today in order to meet the aspirations of their citizens for a just, safe and secure society, and development approaches that result in sustainable livelihoods. However, though the post-independence constitutions provided for independent judiciaries, these were quickly reduced to handmaidens of the few dictatorial regimes, and were thus incapable of operating as either guardians of the constitution, protectors of human rights or impartial enforcers of the rule of law. Thus, before the1990s, majority African countries operated constitutions without constitutionalism, and in the absence of constitutionalism, the administration of justice virtually collapsed and there was little respect for the rule of law or the protection of human rights.[51]

Africa has witnessed tremendous social, economic and political transformation. It is increasingly becoming interconnected through the African Union and regional economic communities. The size of the African economy has more than tripled since 2000. Multiparty elections have become frequent, accompanied with an improvement in democratic quality. These changes create endless possibilities and tremendous opportunities for African people and for those who want to invest in Africa's future.[52] The continent however is still faced with many risks, and in such a situation Africa's judicial and quasi-judicial mechanisms indeed have paramount roles to play.[53]

Mechanisms of arbitration cannot survive by themselves in any jurisdiction, in the absence of a supportive and reliable court-system, or in what is referred to as 'sophisticated arbitration-friendly and pro-enforcement seat'. [54] Only with the support of courts, arbitration can truly

[50] "Are the roles of arbitration and court collaborative and complementary? They can and ought to be.There is no contradiction in stating however that even a free-standing private arbitration system withclearly defined boundaries of the arbitral mandate and jurisdiction cannot be on equal footing or incompetition with a public state court exercising inherent and statutory powers over a broad spectrumof rights, law-suits involving private and public rights, crime, fundamental freedoms and protections guaranteed by national constitutions, including the much needed support for arbitration". *See* Edward Torgbor, "Courts and Effectiveness of Arbitration in Africa", *SOAS Arbitration in Africa Conference (Rethinking the Role of Courts and Judges in Supporting Arbitration in Africa)*, (22-24 June, 2016), pp. 61-63.

[51]*Rethinking the Role of Law and Justice in Africa's Development,* UNDP (June, 2013), pp. 5-8; Richard Black, J.S. Crush, et al., *Migration and Development in Africa: An Overview*, (Idasa, 2006), p. 38.

[52] Unlike the Charter of the OAU, the preamble of the AU Constitutive Act emphasizes the importance of democracy and human rights. In addition, the basic democratic tenets of the AU are carefully developed in the objectives and principles stated in the Constitutive Act. The basic framework for promoting democracy and good governance among member states of the AU is laid down in a number of instruments, including the Constitutive Act itself, the Declaration on the Framework for an AU, Response to Unconstitutional Changes of Government, the Declaration on the Principles Governing Democratic Elections in Africa, the Guidelines for African Union Electoral Observation and Monitoring Missions, and in 2007, the African Charter on Democracy, Elections and Governance.

[53]UNDP,n 37, pp. 5-8.

[54] Preface to Arbitration in Malaysia: A Practical Guide, 2016, p. vii.

flourish in Africa. Having a trust-worthy and efficient judiciary is the only way foreign parties may prefer Africa as a seat of arbitration instead of anywhere else.[55]

Corruption and lack of knowledge about arbitration for judges are another related serious concern. Some judges have little or no training or experience at all in arbitration law and practice as a result they have scant appreciation or understanding of the processes and purposes of arbitration. Due to these reasons on several occasions some judges with a less general spectrum of knowledge on arbitration are expected to review arbitral awards awarded by arbitrators who have specific knowledge in the concerned filed, creating a considerable backlog of delayed rulings on such awards from the courts.[56] As general rule, and subject to limited exceptions, arbitration is a forum of choice obtained by consent of parties and court should not interfere on the account of an error of fact or wrong interpretation of law or other shortcomings of the award.

An enforcing Court must observe that an "award which is believed to have produced an unjust result – though technically in conformity with the applicable law – cannot be interfered with".[57] Judges when perusing foreign awards given elsewhere must not import their own individual beliefs about the justice of the case and try to fit these beliefs into the *public policy ground* of Article V(2)(b) of the New York Convention. Judges should not attempt to be satisfied about the substantive fairness of the award because the award is neither their product nor their property. It belongs to the parties who consensually choose the arbitrator and not the court. So, the enforcing court should enforce the 'will of the parties'.[58]

The importance of seat of arbitration is paramount as when one chooses a particular arbitration seat, they choose that country's court to supervise their arbitration, potentially decide issues like interim relief and, ultimately, consider any challenge to their award. There needs to be a modern, fit for purpose arbitration law and local judges who are impartial and with the requisite expertise in arbitration related matters, gained through training and/or experience. The parties need to be able to choose international counsel to represent them in the arbitration if they so wish and many laws are silent on that issue. They need arbitrator immunity in order to attract quality arbitrators. They need the parties and lawyers to be able to enter and travel into the country.

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[55] At the 2015 Queen Mary International Arbitration Survey the two most valuable characteristics of arbitration as identified by the respondents were: a) enforceability of awards, and b) avoiding specific legal systems/national courts. When asked why they preferred certain seats to others, three paramount factors stated were: a) neutrality and impartiality of the local legal system, b) national arbitration law, and c) track record of enforcing agreements to arbitrate and arbitral awards. See Queen Mary University of London, "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration", available at: http://www.arbitration.qmul.ac.uk/docs/164761.pdf.

[56] *See* Edward Torgbor, "Courts and Effectiveness of Arbitration in Africa", *SOAS Arbitration in Africa Conference (Rethinking the Role of Courts and Judges in Supporting Arbitration in Africa)*, (22-24 June, 2016), pp. 59-67, and Isaiah Bozimo, "Rethinking the Role of Courts and Judges in Supporting Arbitration in Africa: A Young Practitioner's perspective", *SOAS Arbitration in Africa Conference (Rethinking the Role of Courts and Judges in Supporting Arbitration in Africa)*, (22-24 June, 2016), pp. 89-91.

[57] A Judge in England has recently said that the fact that a foreign judgment is wrong is not a sufficient basis for an enforcing court to refuse to recognize it: Malicorp Ltd. (UK) vs. Government of Arab Republic of Egypt (Extract in ICCA Yearbook 2016 Vol.41 pages 585-589). Quoted in F.S. Nariman, 'Redefining the Landscape of ADR in Asian Jurisdiction", Kuala Lumpur International ADR Week, 15 May 2017, p. 12.

[58] The Hon Attorney General v Hermanus Philippinus Steyn, Misc. Civil Cause No. 11 of 2010, High Court of Tanzania (Commercial Division) at Dar es Salaam, p. 12.

5.2 Role of UNCITRAL

The usefulness of the UNCITRAL model laws has been beautifully exemplified in this regard by authors like Gus Van Harten who attempt to make a point that if legislatures do not amend statutes implementing the New York Convention etc., the courts most likely will not be able to assume an important role in making any ruling on arbitration awards, including in the matters of awarding interim reliefs.[59] Judges like Justice Edward Torgbor also make a similar point saying that specific arbitration laws and rules that properly define a court's role in arbitration matters may be a good and viable option in filling in these lacunae mentioned above.[60]

Modern regional arbitration centers in Africa, which have already made substantial progress over time, can with support from prime institutions such as UNCITRAL continue to act as stalwarts of the evolution of an arbitration-friendly Africa, and more of such institutions may be widely set up. Therefore, this is an additional important area where UNCITRAL may play a role, while continuing with its existing work of conducting arbitration workshops/seminars etc. for judges who are not adequately familiar with arbitration processes and convincing more and African States who have not adopted the relevant UNCITRAL texts to do so.

UNCITRAL can also help in harmonization of laws. The most common justification often referred to in support of harmonization is fairness in trade competition. Scholars argue that that the fairness assertion justifying harmonization comprises both an economic aspect and a justice claim. Also, in international transactions legal costs represent an additional fixed costs and thus difference between legal systems create barriers to trade. Harmonization of the diversity between national legal systems substantially reduces information costs, enabling market entrance for even small transactions.[61] State acknowledgment of investor concerns regarding a predictable investment environment and enforcement of the rule of law, and awareness of preferred international practice with regard to resolution of disputes play an indispensable role.[62]

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[59]Gus Van Harten, *Investment Treaty Arbitration and Public Law*, (OUP, 2006), p. 153.
[60]Edward Torgbor, n 43, p. 65.
[61]See generally Katherine Lynch, *The Forces Of Economic Globalization: Challenges To The Regime Of International Commercial Arbitration* (Kluwer Law International, 2003), Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell, 2004), and David W Leebron, "Lying Down with the Procrustes: An Analysis of Harmonization Claims" in Jagdish N. Bhagwati, Robert E. Hudee (ed.), *Fair Trade and Harmonization: Pre Requisite for Free Trade?*, (MIT Press, 1997).
[62] "Commercial Arbitration in Africa: Present and Future", Herbert Smith Freehills (1 February, 2017), available at: <https://www.herbertsmithfreehills.com/uk/grads/lang-ja/latest-thinking/commercial-arbitration-in-africa-present-and-future>.

UNCITRAL bureau in Africa can help to oversee such activities, support and connect closely with African countries.

5.3 Role of Regional Arbitration Centers

As we have seen that as foreign investment is continuing to boost Africa's economy, many African States recognizing the urgent need for having coordinated policy favoring ADR in Africa and to assuage the obstacles to its use, have adopted the UNCITRAL model law and ratified the New York Convention. There is no doubt that the regional arbitral institutions have indeed provided much assistance towards creating a formalized arbitration mechanism applying harmonized laws.

AALCO envisaged the establishment of a network of Regional Centers for Arbitration functioning under the auspices of AALCO in different parts of Asia and Africa so that the flow of arbitration cases to arbitral institutions outside the Afro-Asian region could be minimized, and these institutions could act as viable alternatives to the traditional institutions in the West.[63]

In pursuance of this, AALCO in cooperation with its Member States has so far established five institutions namely, Kuala Lumpur Regional Arbitration Centre (KLRCA) in Malaysia in 1978, Cairo Regional Centre for International Commercial Arbitration (CRCICA) in the Arab Republic of Egypt in 1979, Lagos Regional Centre for International Commercial Arbitration (LRCSCA) in the Federal Republic of Nigeria in 1980, Tehran Regional Arbitration Centre (TRAC) in the Islamic Republic of Iran in 1997, and the Nairobi Regional Arbitration Centre in the Republic of Kenya in 2016.

AALCO and the UNCITRAL have maintained a close and fruitful relationship, especially in the matters of international commercial arbitration, where they share a common interest. ICA was included as a priority item in the UNCITRAL's session in 1968 on the suggestion of many member States including the Members of AALCC. AALCC has been a regular observer at UNCITRAL sessions since 1970, and has been providing valuable inputs and suggestions. Similarly UNCITRAL has also participated in AALCC's sessions, including in the deliberations of AALCC's Trade Law Sub-Committee. Amongst the most prominent positive results produced by the interaction between the two institutions was the creation of Regional Centers for International Commercial Arbitration.

During AALCC's Tokyo Session in 1974 regionalization of arbitration centers was suggested by the UNCITRAL's Representative[64] to AALCC.[65] In his Report of March, 1972, on the "Problems concerning the application and interpretation of existing multilateral conventions on international commercial arbitration and related matters", Mr. Ion Nestor, UNCITRAL's Special Rapporteur for International Commercial Arbitration, stated that the establishment and

[63] R. Rajesh Babu, "International Commercial Arbitration and the Developing Countries", *AALCO Quarterly Bulletin* Vol. 2(4) (2006), p. 397.

[64] Ion Nestor was the UNCITRAL's representative to AALCC during its Tokyo Session in 1974. He acted as a UNCITRAL's Special Rapporteur on International Commercial Arbitration.

[65] Barry Sen, "AALCC's Scheme for Settlement of Disputes in Economic and Commercial Matters", *Proceedings of the Seminar on International Commercial Arbitration and Promotion and Protection of Foreign Investments in the Afro-Asian Region*, Cairo, 28-31 March, 1988, p. 65.

improvement of, and the cooperation between arbitral institutions would lead to the progressive development of international commercial arbitration.[66] This would be coupled with the uniformity of arbitration laws and procedures as practical means towards the promotion and development of international commercial arbitration. That is, the main commercial arbitration centers around the world would have to encourage the reduction to one standard procedure and rules employed in arbitration practice.

AALCO continues to provide the necessary assistance to and encouraging active work in the regional arbitration centers formed under its patronage, many of which within the African continent. Although in the beginning promotional activities of these Regional Arbitration Centers were primarily carried out by AALCO, in view of the experience accumulated over the years such promotional activities are now mainly carried out by the Centers themselves. Over the years there has been a considerable increase in the number of cases referred to these RACs. Further, the Directors of these RACs act as Appointing Authorities in such arbitrations. The Centers have been organizing international conferences, seminars and training courses in their respective regions. In addition the Directors have actively pursued Cooperation Agreements with other arbitration institutions.[67]

[66]Report by Mr. Ion Nestor (Romania), Special Rapporteur (A/CN.9/64).

[67] For more information on the Regional Arbitration Centers of AALCO, and the work carried out by them, *see* Report on the AALCO's Regional Arbitration Centers (AALCO/56/NAIROBI/2017/ORG3), available at: <http://www.aalco.int/scripts/list-posting.asp?recordid=535>. *See also, generally*<http://www.aalco.int/scripts/view-posting.asp?recordid=4>.