THE PERSPECTIVES OF AFRICAN COUNTRIES ON INTERNATIONAL COMMERCIAL ARBITRATION

SAMUEL K.B. ASANTE*

1. INTRODUCTION

The participation of developing countries in the international legal system poses a perennial dilemma. On the one hand the brutal facts of international economic and commercial interdependence make such participation inevitable. On the other hand, developing countries, for various reasons and with varying degrees of intensity, have articulated their reservations, or indeed experienced considerable difficulties, with respect to such participation. This article considers this dilemma with special reference to the experience of Sub-Saharan African countries in international commercial arbitration.

It is trite that the attainment of political independence in Africa and elsewhere did not mean insulation from the international economic system. Indeed, independence has highlighted the hard fact of international economic interdependence. The internationalization of production and services is a salient feature of the modern world economy, and international transactions, whether they are of a bilateral or multilateral variety, whether they are with foreign governments, international institutions or transnational enterprises, whether they are for trade, investments, technology, finance, debt rescheduling, or for procurement of goods and services, are now essential aspects of the dynamics of international commercial intercourse. More importantly, African countries, like other developing countries, appreciate that these transactions are inescapable for the implementation of their economic and social programmes. African governments and private parties involved in negotiating international business transactions such as loan agreements, petroleum and mining agreements, industrial joint ventures, management agreements, international procurement contracts, international supply contracts, bilateral or international trade agreements and bilateral investment agreements have come to the realization that foreign parties to these transactions, i.e., foreign governments, transnational corporations, international banks, foreign investors, international suppliers and

*Director, Legal Advisory Services for Development, United Nations Department of Economic and Social Development (UNDESD); Formerly Solicitor-General of Ghana. This paper represents the personal views of the author.

contractors, all insist on an appropriate dispute settlement mechanism, which is invariably international arbitration.

Parties to international transactions predominantly prefer international arbitration because of the strong perception that an international forum for settling disputes provides some insurance against possible bias by a national judiciary. Thus, African countries caught in the web of a plethora of international transactions recognize the virtual inevitability of international commercial arbitration. Indeed, the acceptance of international arbitration has become an invariable ingredient of the liberalization package which African countries, and developing countries elsewhere, provide as a sine qua non of their strategies to attract foreign investment and technology, international finance and foreign trade.

Notwithstanding this realism, which is reflected in the acceptance of international arbitration clauses in numerous international transactions and several international conventions, as well as the stipulation of arbitration provisions in national legislation, African reservations about actual participation in the international arbitration process still persist. The endorsement of the concept of international arbitration has not been matched by enthusiastic practice; nor has actual practice been free of considerable difficulty. What follows is an attempt to examine this apparent gap between theory and practice. The writer will rely primarily on his experience of organizing and lecturing at workshops on international arbitration and international negotiations for middle level and senior professionals and executives in Africa. This article therefore dwells on the practical constraints and perspectives. For a scholarly approach to this problem, the reader is referred to an excellent and up-to-date study by Sampson L. Sempasa.1

2. ATTITUDES TO INTERNATIONAL ARBITRATION

The contemporary attitudes of developing countries to international arbitration present a complex heterogenous picture, depending on the history, culture and legal traditions of the various countries, as well as such factors as geography and level of sophistication in international business.

In a recent paper, Nariman2 cited the following sombre assessment of the attitudes of developing countries to international arbitration by Judge Keba Mbaye in 1983:

When, at the 60th Anniversary of the Court of Arbitration of the ICC (in 1983), Howard Holtzmann stressed the idea of Judge and Arbitrator being "partners in a system of international justice", Judge Keba Mbaye (then a Judge of the International

Court of Justice and its former President) responded with some home truths; the notion that there is a system of international justice (he said) was not shared by countries in Africa, Asia and Latin America, who still saw arbitration as a foreign judicial institution imposed upon them: developing countries were rarely the venue of an international arbitration, and, even more rarely, produced arbitrators. He spoke of: the African concept of law being favourable to arbitration, though not as we know it, tribal arbitration rendered by an arbitrator known to both sides, and of the hostility of African Courts to arbitrations by foreign tribunals. In addition, he said, "as everybody knows, arbitration is seldom freely agreed to by developing countries. It is often included in contracts of adhesion, the signature of which is essential to the survival of these countries". However, the Judge from Senegal then predicted that International Arbitration would ultimately obtain third world recognition, but only gradually.

This assessment echoes the findings of a study³ by the Asian-African Legal Consultative Committee on International Commercial Arbitration in the 1970s which concluded:

These institutions had rules which did not work out particularly favourably for the developing countries in the matter of venue, choice of arbitrators, as also fees and charges leviable by the institutions concerned. Since most of these institutions functioned under the auspices of Chambers of Commerce and other associations of trade, it was difficult to visualize the manner or the means by which practical steps could be taken to effect modification of the rules of such institutions to bring them in conformity with the interests of developing countries.

The primary issue is whether the above strictures are valid today.

The traditional objections of Latin America to international arbitration rooted in the Calvo doctrine are well known to every student of international law. Recent developments however indicate a significant modification of this traditional position. Indeed Horatio A. Grigera Naon asserts that:

[...] it appears to be no longer true to speak of Latin American hostility vis-à-vis arbitration and it would be more accurate to say that Latin America is considering arbitration with growing sympathy, although many of the present rules applicable to arbitration in a number of Latin American countries still need to be adapted to this new trend.⁴

---

As evidence of this trend, the author cites the ratification by many Latin American countries of the New York Convention, 1958, on the Recognition and Enforcement of Foreign Arbitration Awards and of the Inter-American Convention on International Commercial Arbitration 1975, several legislative developments favourable to international arbitration in the Andean Pact, Colombia, Brazil, Peru and Venezuela, and the widespread acceptance of arbitration clauses in transactions conducted with foreign entities by Latin American private and public parties. To this evidence should be added the accession of many Latin American countries to the 1965 Convention on the Settlement of Investment Disputes between states and Nationals of other states.

Other developing countries, in particular, Asian and African countries, that attained independence after World War II, had their own reservations about international arbitration although these emanated from doctrinal grounds other than Calvo. As the Working Group on the Permanent Court of Arbitration observed, the main difficulty developing countries have in participating in international arbitration derives from “a perception that they have neither participated in the creation of international law to be applied by the Tribunal in arriving at its decision, nor recognised or endorsed them”.6

Various writers have contended that the attitudes in other developing countries towards international arbitration have changed significantly. Nariman has confidently asserted that Judge Keba Mbaye’s criticism voiced in Paris in 1983 “is now an echo of the historical past”.7 While Nariman recognizes the traditional cultural bias in Asia against the type of adversarial confrontation associated with modern international arbitration, he presents an optimistic picture of the growing acceptance of international arbitration in key Asian countries like Japan, People’s Republic of China, India, South Korea, Singapore and Hong Kong.

An even more sanguine account of the embrace of international arbitration by developing countries generally is provided by Jan Paulsson:

As we approach the last decade of the 20th century, parties from developing countries may face the prospect of international arbitration with an entirely new attitude. By and large, they have learned how to ensure that their interests are defended completely, and have come to view the mechanism of international arbitration as it is: a neutral means for the resolution of conflicts arising in trade and economic development, to be mastered rather than complained about.8

5. Id..
7. F.S. Nariman, supra note 2.
The question which may be raised is whether this evaluation is valid with respect to Sub-Saharan Africa, or whether Judge Keba Mbaye’s characterization of international arbitration as a foreign judicial institution imposed upon Africa is still true.

3. ASSESSING CONTEMPORARY ACCEPTANCE OF INTERNATIONAL ARBITRATION IN SUB-SAHARAN AFRICA

3.1. Participation in the establishment of arbitral institutions

Although African states have participated in the creation of a number of arbitral systems, it cannot be seriously disputed that the main sinews of international arbitration were in fact established before these states attained independence. True, African states participated in the preparatory meetings organised by the World Bank for the negotiation and drafting of the ICSID Convention of 1965; and as many as 42 such states are signatories to the Convention, accounting for about a third of all signatories to the Convention. To a limited extent, African states participated in the formulation of the UNCITRAL Arbitration and Conciliation Rules and the UNCITRAL Model Law. However there was hardly any African participation in the establishment of ICC arbitral system, the PCA, London Court of Arbitration, the AAA or any major European Arbitration Institutions; and the proposition that international commercial arbitration is essentially Western in origin is trite. The New York Convention on the Recognition and Enforcement of Arbitration Awards of 1958 antedated the birth of most African states.

It should be further pointed out that even the historical fact of African participation in the establishment of ICSID and UNCITRAL arbitration systems provides little assurance that these systems have been fully absorbed into African legal or commercial culture. This writer’s experience of organising seminars on international arbitration in African counties for middle level lawyers demonstrates that a number of factors—paucity of training facilities in international arbitration, political instability, rapid turnover of public servants, bureaucratic barriers to transmitting or utilizing valuable international experience—have combined to limit the exposure of African lawyers in the public and private sectors to the intricacies of international arbitration. As discussed below, it is not insignificant that African parties to international commercial arbitration have predominantly retained counsel outside of the African continent.

The familiar contention that African states, like other developing countries, cannot be expected to subscribe wholeheartedly to international institutions and rules established without their participation may strike some commentators as somewhat hackneyed. It may be pointed out, with some justification, that the non-participation argument has not prevented developing countries from accepting and participating vigorously in the UN system, which was of course established prior to the emergence of the overwhelming majority of Asian and African states. However, the critical
criterion for acceptance is not so much the historical fact of participation in the establishment of institutions and rules, as whether the contemporary structure and operation of these institutions and rules fully address the concerns of an expanded international community, in particular, those of the developing countries. It is against this criterion that the international arbitration systems have to be evaluated vis-à-vis sub-Saharan Africa.

3.2. Endorsement of an International Arbitration System

As intimated above, the compelling requirements of international trade, investment and finance have induced many African countries to subscribe to international arbitration through various mechanisms. The overwhelming accession to the ICSID Convention, alluded to above, is clearly a reflection of African strategies to attract international investment. It is regarded realistically by many African Governments as an appropriate signal to give to the World Bank, the sponsor of the Convention, and to prospective investors. Indeed, the French Export Credit Guarantee Agency COFACE insists on the inclusion of arbitration clauses in operating contracts as a precondition for issuing a guarantee for overseas operations. A fair number of African states have acceded to the New York Convention, although only a limited number of them have actually enacted the UNCITRAL Model Arbitration Law.

As far as international transactions are concerned, it would be no exaggeration to assert that the invariable African practice is to accept international arbitration. Contractual provisions for recourse to the ICSID, UNCITRAL, ICC, London Court of Arbitration, etc. or ad hoc international arbitration are an established feature of such transactions as bilateral investment or trade treaties between African states and capital exporting countries, or various international business transactions between African parties (both public and private entities) and foreign parties. Whether these arbitration clauses are accepted as contracts of adhesion or out of a shrewd appreciation of commercial realities, there can be no denying that they are part of the development strategies of African states.

Although in diplomatic conferences, African states have sometimes supported Latin American states in adopting resolutions asserting national jurisdiction over disputes relating to international investments, African states have, on the whole, not manifested a strident, doctrinaire opposition to international arbitration within the context of particular international business agreements. African states have been markedly more receptive to ISCID arbitration than their Latin-American counterparts. However, acceptance of international arbitration provisions does not necessarily mean a full appreciation of the implications of such arrangements. Pragmatism and, in some cases, ignorance, may have triumphed over ideology, without erasing the pervasive reservations and the formidable practical difficulties with respect to the practice of international arbitration, which still retains its character as a foreign system of adjudication in Sub-Saharan Africa.
3.3. Participation in international arbitration

Participation in particular cases of international arbitration has sometimes been cited as evidence of a more congenial attitude to international arbitration in Third World countries. However, apart from the question of the statistical evidence of actual participation, it is submitted that in view of the factors recounted above, there is no logical linkage between empirical data as to the number of African states that have been involved in arbitration proceedings, particularly as respondents or defendants, and African attitudes to international arbitration.

As to the data on participation, it would be meaningful to examine not only the data on African parties to international arbitration, but also the data on African arbitrators and African counsel in arbitration proceedings. In this respect, a clear distinction should be drawn between the data on Sub-Saharan African and North Africa. It would appear that by reason of their proximity to Europe, their long history of close commercial relations with Europe and the development of a comparatively more sophisticated level of international commercial discourse, North African states have been more involved in international commercial arbitration than Sub-Saharan African states.

With respect to parties to international commercial arbitration proceedings, the data on African participation in ICC arbitration for the period 1980-1988 show fairly modest figures. There were 64 African claimants and 149 African defendants. The corresponding figures for North African countries are 94 and 212 respectively. Middle Eastern/Asian countries, excluding North Africa, accounted for 183 claimants and 249 defendants. There were as many as 1610 claimants and 1475 defendants from Western Europe. The only region which was comparable to Sub-Saharan Africa was Latin America, including the Caribbean, which accounted for 89 claimants and 71 defendants.

The data on African participation in ICSID arbitration show a higher profile for African states, though predominantly as respondents. Of the 28 ICSID cases so far, 17 African states account for 17 of the parties, of which 13 are Sub-Saharan African states. Except in one case, all the African parties, both North and Sub-Saharan, are respondents. This would seem to indicate a high incidence of investors presenting their claims against African respondents. It is interesting to note that there has been no definitive ICSID award in favour of any Respondent state.

As far as the number of Africans serving as arbitrators is concerned, the ICC data disclose that there were 203 African arbitrators altogether for the period 1980-1988. However, only 25 of these came from Sub-Saharan Africa. North Africa accounted

for 178. The data for the other regions were: the Middle East and Asia, 296, Eastern Europe 155, Western Europe 3106, and Latin America 45. The figures as to African participation are no less dismal with respect to ICSID arbitration. Of the 97 arbitrators appointed for all ICSID cases, there have been no more than five arbitrators from Sub-Saharan Africa, despite the interesting statistic that African states provided the majority of respondents in these cases (see infra).

Another factor that is overlooked in the statistical analysis of participation in arbitration is the data on counsel acting for parties in international arbitration. While a compilation of statistics on this aspect does not seem to exist, the writer is not aware of any established practice of retaining Sub-Saharan African lawyers as counsel in international commercial arbitration. The evidence overwhelmingly supports the practice of retaining European or American lawyers as counsel for African parties. It is a practice dictated by the sober realization that African lawyers lack the requisite expertise to handle the intricacies of international arbitration before the various international arbitral institutions. However, this overwhelming reliance on foreign counsel to unravel the mysteries of the international arbitration procedures or the laws of some distant country cannot but reinforce the perception of international arbitration as an alien system.

This perception is not diminished by the high incidence of designating European or American towns as the sites of such proceedings. Although, through the efforts of bodies like the Asian African Legal Consultation Committee, and the Preferential Trade Area of Southern and East African states (PTA), arbitration centres have been established in Cairo, Lagos and Djibouti, the predominant practice is to conduct arbitration proceedings in Western cities. Thus, in the period 1980-1988, 1733 arbitrations (i.e. 88.5% of all ICC arbitrations) were conducted in Europe, while 48 (2.0%) took place in Africa. Out of the 48, only 12 were conducted in Sub-Saharan Africa. The location of 8 out of these 12 arbitrations was fixed by the ICC itself.

3.4. International arbitration in African domestic legislation

In his illuminating essay on International Arbitration in Africa, Sempasa points out that Sub-Saharan African countries, (see for example, Kenya, Malawi, Uganda, Zambia, Tanzania, Zimbabwe, Mauritius, Rwanda, Burundi, Somalia), on the whole, have no modern legislation on international arbitration. Their statute books still reflect a colonial legacy in the form of outdated arbitration laws modelled on metropolitan legislation of the nineteenth or early twentieth century. This legacy has not been revised in Africa although the original legislation in the metropolitan

11. See supra note 9.
13. See supra note 9, Table 7.
countries has long been reformed. Among the notable exceptions to this is Nigeria, which promulgated a modern regime on international commercial arbitration with its Arbitration and Conciliation Decree 1988.\textsuperscript{14} This legislation incorporated some of the provisions of the UN\textsuperscript{CITRAL Arbitration Rules 1976 and the Model Law of 1985. Nigeria is also a party to the New York Convention on the Recognition and Enforcement of Arbitral Awards and the Washington Convention on the Settlement of International Investment Disputes, 1965. The above-mentioned Arbitration and Conciliation Decree, in fact, implements the New York Convention in Nigeria.

In Ghana also, the New York Convention was applied as early as 1965 when the local High Court allowed the enforcement of an international arbitral award against a Ghanaian party. Djibouti is perhaps the best example of an African Country that has enacted a comprehensive law on international arbitration as part of its efforts to establish itself as an arbitration centre.

Although comprehensive legislation on international arbitration may not be widespread in Sub-Saharan Africa, several African states have made adequate provisions for international arbitration in respect of investment disputes under their Investment Codes, e.g. Uganda, Namibia and Ghana.

4. AFRICAN RESERVATIONS AND DIFFICULTIES

While the empirical evidence examined above points to a mild flirtation with international commercial arbitration in Sub-Saharan Africa, it is not enough to sustain the sanguine prognosis of a consummated marriage. No sweeping or optimistic declaration about the reception of international arbitration in developing countries can obscure the persistent reservations and the practical constraints that one encounters in any dealings with African authorities in this area.

The feeling still persists among African officials, lawyers and businessmen that international arbitration is essentially a distant and alien system, located in a foreign country, administered by foreign experts and applying foreign law, with little appreciation of the conditions in African countries. In short, it is essentially a proceeding whose outcome African parties are powerless to affect. Some of these reservations are shared by other developing countries,\textsuperscript{15} but there are constraints that are peculiarly characteristic of Sub-Saharan Africa.

The factors that account for this persistent perception will be discussed in the following paragraphs. They pertain to the substantive rules, the appropriateness of arbitration, the legal environment of the arbitral proceedings, the procedural rules, the outcome of the arbitration and limited experience of African lawyers.


4.1. The substantive rules

We have already alluded to the historical factor of limited African participation in the creation of the main institutions of international arbitration. However, the non-participation factor is much more fundamental, and applies to the entire fabric of substantive international legal rules applied by most arbitral institutions. Thus African reservations about international commercial arbitration are but an aspect of the larger issue of the need to reform the general rules governing international business transactions to address the concerns of the developing countries. What this writer said a few years ago, with respect to international law and foreign investment applies with equal force to international commercial arbitration:

The persistent contention of developing countries that the traditional principles of state responsibility were established without their participation and consent and indeed prior to their attainment of independence cannot be dismissed by merely asserting the validity of the traditional principles. Whatever the legal merits of this contention, the viability or functional efficacy of any international legal system depends on the extent to which it enjoys wide international support. The formulation of a new set of norms with respect to foreign companies does provide the developing countries with an opportunity of meaningful participation that can only enhance the viability if not the validity of the principles.

[...]

The traditional concept of state responsibility will be perceived as inequitable so long as it remains primarily preoccupied with the protection of foreign investment against the legitimate sovereign interests of the host state. An international system which exclusively addresses the concerns of one party to an investment relationship cannot inspire confidence as a fair, international regime. Such a system should also protect the interests of host states by imposing appropriate restraints and obligations upon foreign companies and TNCs.16

4.2. The appropriateness of arbitration

The perception that the underlying substantive rules are inequitable raises the whole question of the suitability of arbitration as a mechanism for settling certain categories of disputes arising from an international business transaction between an African Government and a foreign company or a transnational corporation. If the concern of the African party is to readjust the entire transaction, which is regarded as inequitable, or to reform the underlying substantive rules, a reference to an arbitral tribunal

relying on traditional doctrines for the application of legal rules would not seem particularly meaningful. In such circumstances, a renegotiation for the purpose of redressing the inequities of the agreement would seem more profitable. African countries consider the traditional format of a commercial arbitration, predicated on the adjudication of legal disputes on the basis of legal rules, as unsuitable for such a purpose.\textsuperscript{17} The more strategic disputes between African Governments and transnational corporations have in fact been settled by negotiation and other amicable means, (\textit{e.g.} the Renegotiation of the Valco Agreement in Ghana, Renegotiation of the Rutile Mining Agreement in Sierra Leone, the Renegotiation of the Shashi Project in Botswana, the negotiation of the Gambia Telecommunications Project, and the restructuring of the Zambian Copper Agreement). It is also significant that several arbitrations with African parties that were initially instituted before arbitral tribunals have been settled by negotiation, for example, \textit{Gabon v Société Serete S.A.},\textsuperscript{18} \textit{Guadalupe Gas Products Corporation v. Federal Military Government of Nigeria},\textsuperscript{19} and \textit{Seditex Engineering v. Madagascar}.\textsuperscript{20}

A discussion of the appropriateness of international commercial arbitration raises the issue of the African concept of arbitration. African traditional legal and social systems are replete with informal mechanisms for settling disputes which have “been characterized as arbitration”. African customary arbitration in Ghana, for example, has the following basic ingredients:

(a) a voluntary submission of the dispute by the parties to a third party for the purpose of having the dispute decided informally, but on the merits;
(b) prior agreement by both parties to accept the award of the arbitrators;
(c) publication of the award.\textsuperscript{21}

The accent here is on the informality of the traditional proceeding. This ingrained idea of the essentially informal character of traditional African arbitration collides sharply with the modern concept of international arbitration. It comes as a surprise to many African lawyers and executives to realize that a party to international commercial arbitration has to navigate through a bewildering and complex maze of arbitration institutions, rules and procedures, with rigid formalities and set deadlines,

\textsuperscript{18} ICSID Case No. ARB/76/1. \textit{Source ICSID Cases} 4.
\textsuperscript{19} ICSID Case No. ARB/78/1. \textit{Source ICSID Cases} 6.
\textsuperscript{20} ICSID Case No. CONC/82/1. \textit{Source ICSID Cases} 11.
which can only be breached to the great detriment of the unwary party. Modern international commercial arbitration has all the characteristics of a formal adjudication, a far cry from the informality associated with traditional customary arbitration. The highly technical nature of this process again reinforces the idea of an alien system. It is indeed disconcerting for African officials to realize that failure to comply with technical procedures does not arrest the inexorable progression of the arbitral process to a definitive award against the delinquent party.

4.3. The legal environment of the arbitral proceedings

African reservations about modern arbitral proceedings also stem from the legal environment of arbitral proceedings. This has three aspects, namely: (a) the fundamental concept of the underlying transaction, which is the subject of adjudication; (b) the admissibility of certain substantive rules that have been invoked by arbitral tribunals as universal postulates; and (c) the suitability of the rules and procedures governing the arbitration.

Western arbitrators tend to treat international commercial arbitration as essentially the resolution of a dispute arising from a private commercial transaction to be decided by invoking general legal principles without reference to considerations of public policy of the African countries. Such an approach, which focuses exclusively and mechanically on the culture of private commercial transactions and traditional legal principles is invariably favourable to transnational corporations. However, as this writer has said elsewhere:

A long-term investment agreement spelling out comprehensively the relations between the government and the corporation in respect of the development and marketing of a natural resource and specifying all relevant fiscal arrangements is anything but a private contract or an institution of the market place. Governments of less developed countries quite properly regard these agreements as major instruments of public policy and a prominent feature of their development strategies, hardly distinguishable from a development plan. These transactions are a framework for a joint public enterprise in which the government and the foreign partner are engaged in the development of a strategic public resource or the operation of a vital public utility. In short, they lie more in the domain of public law than in the province of private contract. It follows that these transactions cannot be insulated from the pressures which impinge on public institutions such as political changes in the country, changed economic conditions and the general expectations of the public.22

The classification of the underlying transaction as essentially a private commercial arrangement uncomplicated by public policy considerations in a developing country

is fortified by the concept of arbitral autonomy, which is strenuously canvassed in Western legal and commercial circles. While the autonomy of arbitral tribunals from local courts or authorities is indeed an essential ingredient of the integrity of the arbitral process, it also serves to insulate the panel, invariably composed of non-Africans, from the economic and political realities of an African country. Thus, for example, while an African country faced with a chronic shortage of foreign exchange may initiate stern regulatory measures which it considers crucial for controlling or eliminating financial malpractices, such measures may strike a distant panel as constructive or creeping expropriation. The very concept of an economic crime or offense may vary according to the perspectives of the members of the tribunal. An African country which considers that its public interest has been ignored in an arbitration is virtually without a remedy. Most arbitral systems have no international mechanism for review (ICSID is an important exception) and the public policy grounds enunciated in the New York Convention are not likely to be particularly helpful if the forum for the recognition or enforcement proceedings lies outside Africa.

African lawyers who have observed particular instances of international commercial arbitration have come away with an uneasy feeling that the substantive laws of their respective countries have virtually been ignored by international arbitrators even where such laws have been designated as the applicable law of the transaction. This trend is by no means peculiar to cases involving African countries. Indeed there is a discernible trend among the community of international arbitrators to give little weight to the substantive laws of non-industrialized countries. Several ICSID cases have been challenged in annulment proceedings, specifically on the ground of failure to apply the governing national law of a host developing country. Similarly, a recent study of the decisions of the Iran-US Arbitral Tribunal concludes that Iranian law was hardly applied even when it was expressly stipulated in the transaction as the applicable law.23

An obvious factor accounting for this practice is the unfamiliarity of the foreign arbitral panel with nuances of the national law of distant countries. However, a more disturbing phenomenon is the inclination of some western arbitrators to invoke what they conceive as universal principles of commercial law in the form of *lex mercatoria*. Inasmuch as this practice purports to consolidate and apply principles developed out of a commercial or legal culture, which was fashioned by the industrialized world without participation of developing countries, it raises the sensitive issue of equity *vis-à-vis* developing countries generally, and African countries, in particular. A major doctrinal premise of these principles is primacy accorded to the will of the

parties; the individualistic concept that a commercial arrangement shaped by the will of the parties should prevail without reference to the dictates of the public interest. This exaltation of party autonomy may sometimes collide with the exacting demands of development or the impelling requirements of equitable redress.

4.4. Procedural rules

African parties to arbitration derive little comfort from the operation of the procedural rules governing the arbitration. Where the arbitral system does not specify or stipulate the rules governing the procedure, the tendency of many international arbitrators is to apply the law of the forum which is often located in a developed country. This invariably compels African parties to retain counsel from developed countries for the purpose of the arbitration proceedings. However, it is not often realized that the seemingly innocuous procedural rules of some of the major arbitration systems can be burdensome to African parties. A few examples may be cited.

The requirement of advance payment of arbitration costs in modest amounts of $50,000 to $200,000 may be a heavy imposition on an African country or party which suffers from an acute shortage of foreign exchange resources, and has made no provision for such a contingency. A private party which may be obliged by the exchange control law of its country to seek formal governmental approval for the payment of such costs in foreign exchange may well be unable to meet the deadline for such payment, with dire consequences. An African Minister of Finance is not likely to release $100,000 for such costs when confronted with a critical decision to procure medication or equipment for a needy hospital. Arbitration costs are indeed regarded as prohibitive. African Governments recoil at the thought of spending anything between US $400,000 to US $1 million on one arbitration, in respect of administrative costs, arbitrator’s fees and counsel’s fees.

African officials have also complained bitterly about the unrealistic deadlines imposed by arbitral systems. They contend, with some justification, that deadlines of 30 days or thereabouts stipulated by several arbitral systems for the payment of costs, appointment arbitrators, the filing of pleadings or taking various procedural steps are woefully unrealistic having regard to the constraints of time, distance and the normal bureaucratic delays in Africa. It would be instructive to consider the steps involved in complying with the requirement of advance payment of costs.

In a typical scenario, the process is initiated by a memo from the Attorney General or Minister of Justice to the Minister of Finance for his concurrence. This is then followed by a second memo to the Cabinet for its approval, a decision by the Cabinet, an authorization to the Central Bank from the Cabinet to release the funds from the country’s foreign exchange resources, and an instruction from the Central Bank to its correspondent bank overseas to pay the costs.

As intimated above, the choice of a developed country as the forum is detrimental
to African parties for several reasons. The obvious consequence is the high cost of travel which must necessarily be incurred in foreign exchange. A protracted arbitration may impose a heavy burden on the slim foreign exchange resources of an African country. Another consequence of such a choice is the tendency of arbitral panels to rely on the law of the forum as the procedural law of the arbitration, even where the parties have selected another law as the applicable law of the transaction. The choice of a developed country forum carries with it the requirement that counsel chosen must be well-versed in the law and practice of the forum. This inevitably leads to the appointment of a European or American Counsel to represent African parties, which further raises the question as to whether the African party is well-equipped to monitor the work of its foreign counsel.

The difficulties posed by the arbitral rules of various arbitration systems are aggravated, in the African perception, by the sombre realization that the consent of the parties is not a prerequisite to the progression of the arbitral proceedings once the arbitration tribunal is properly seized of the case. Unwary African parties have discovered, to their dismay, that after the initial provision in a treaty, agreement or legislation accepting the jurisdiction of a particular arbitral system, the entire arbitral process can be triggered into full operation up to a definitive award even in the absence of any explicit manifestation of the respondent’s consent to the various consequential steps in the process. Thus, neither delay, default nor non-participation by the respondent or defendant will prevent most arbitration systems from appointing an arbitrator for the erring party, from constituting the full tribunal, from admitting the pleadings of the claimant or plaintiff, from hearing the case or from issuing the final award against the respondent. Furthermore, by virtue of this involuntary process, such an award could be enforced against the respondent in a foreign country whether he contests the proceedings or not. An African party, in these circumstances, feels victimized by the inexorable progression of an alien process culminating in an arbitrary imposition.

While a certain measure of this involuntary process is essential for the viability of the arbitral system, there is considerable unhappiness with the automatic character of some aspects, in particular, procedures for the appointment of the arbitrators. For example, under the UNCITRAL rules, the non-consensual aspect is highlighted by the fact that failure by one party to appoint an arbitrator does not result in the direct appointment of arbitrators by the Secretary General of the Permanent Court of Arbitration, an office formally mentioned in the Rules. Although an appointment by the Secretary General would still constitute an involuntary process, at least he has been explicitly designated in the UNCITRAL rules, a fact which should be known to all parties to UNCITRAL arbitration. It should be pointed out in all fairness to the Secretary General that this provision enables him to designate an appointing authority who is better placed to appoint arbitrators who are closer to the subject matter of the arbitration or the relevant geographical area. Furthermore, the Secretary
General invariably informs the parties of his intention to designate a particular 
appointing authority before doing so.

4.5. The outcome of arbitral proceedings

The various factors discussed above as inhibiting African enthusiasm for internatio-
nal commercial arbitration could have been conceivably tempered by success in these 
proceedings. Unfortunately the indications are that African parties have not been 
markedly successful as litigants. ICSID awards, for instance, have been predominantly 
favourable to foreign investors. It is to be noted that African states have featured in 
17 ICSID cases as respondents. As to the arbitrators in other arbitral systems, Andrew 
Armfelt has observed:

There are no authoritative statistics on international arbitration results, owing to the 
confidential nature of arbitration. Nonetheless, anecdotal evidence indicates that 
international arbitrators have tended to decide in favour of transnational corporations.\(^\text{24}\)

4.6. Limited experience

The burden of the above discussion is that international commercial arbitration has 
not been sufficiently internationalized. It still remains a predominantly Western 
institution located in developed countries. As discussed below, the institution of 
arbitration is unlikely to become more congenial to Africans unless it is truly 
internationalized.

Nevertheless, there can be no realistic discussion of this subject without recognizing 
that a contributory cause of African unease about international arbitration is limited 
experience in this area. Indeed, African expertise in international commercial 
arbitration is closely related to African experience in the whole area of international 
business transactions.

Since independence, African Governments have grappled with the negotiation 
and administration of many kinds of international transactions; loan agreements with 
international and foreign banks, international procurement contracts, supply contracts, 
joint ventures, international construction contracts, management agreements, technical 
assistance agreements, mining and petroleum agreements, licensing agreements and 
the like. Some countries have made impressive strides in handling such transactions 
which require multi-disciplinary teams. Throughout the past fifteen years, this writer 
has organized numerous workshops and seminars on such transactions for developing 
country personnel under the auspices of the United Nations. The negotiation and 
drafting of arbitration clauses are covered in these sessions. However, it was realized

\(^\text{24}\). A. Armfelt, Avoiding the Arbitration Trap, Financial Times, October 27, 1992, at 17.
that the dearth of experience was such that special seminars had to be organized, focusing exclusively on international commercial arbitration. It is evident from these seminars that there is no equivalent of an ‘Arbitration Bar’ in the overwhelming majority of Sub-Saharan African countries. The normal law school curriculum does not address international commercial arbitration, and most African lawyers have not specialized in international business transactions, still less, the intricacies of the various arbitral systems. Apart from the UN efforts referred to above, it does not appear that any concerted efforts have been made by the various arbitral institutions to provide training for African lawyers in international arbitration, although the ICC’s Institute of International Business Law and Practice provides training facilities in this area. The result is that African parties to international arbitration are compelled to hire overseas counsel.

5. FUTURE PROSPECTS: SOME REMEDIAL ACTION

It will be evident from our earlier reference to the African experience of international business transactions, that a discussion of the prospects of international commercial arbitration in Africa should proceed from the inescapable premise that African states cannot insulate themselves from international commercial arbitration, so long as they participate in the international economic or commercial system. The issue then is: what can be done realistically and meaningfully to address African concerns and misgivings about international commercial arbitration?

As discussed above, the pervasive feeling that characterizes African attitudes to international commercial arbitration is that, while it is necessary and inevitable, it is, nonetheless, essentially an alien system, devised and practised in distant lands, substantially to the detriment of African interests. The perception is one of alienation and exclusion. While it is conceded that some aspects of this perception may well be ill-founded or are in any case traceable to African inadequacies, it is submitted that all aspects of this perception have to be addressed by both internal and external action if international commercial arbitration is to play a meaningful role in sub-Saharan Africa. Such action resolves itself into three main categories, viz.

(a) effective internationalization - making African participation effective;
(b) education;
(c) reform of the basic substantive rules and legal culture underpinning international arbitration.

The Permanent Court of Arbitration (PCA) could, as discussed below, play a critical role with respect to some or all of the above recommendations.

25. The beginnings of such expertise and practice are to be found in Nigeria.
5.1. Effective internationalization

The challenge before the international arbitration system, as well as the international legal system generally, is to grapple with the full implications of the major expansion of the international community since the end of World War II. While the propagation of international commercial arbitration in the developing world seems to be a major preoccupation of the capital-exporting countries, no serious effort has been made to modify the rules, the personnel, location, practice, and indeed the entire culture of international commercial arbitration to accommodate the peculiar needs and concerns of African countries. Effective internationalization, that is, the conversion of an essentially Western system to a truly cosmopolitan or international system is necessary to inspire the confidence of African states.

In this respect, as discussed above, non-participation by African states in the establishment of the arbitral system need not be an impediment to genuine internationalization of the system, provided the operation of the system is realistically and meaningfully modified to accommodate the interests of new adherents to the system. The International Court of Justice (ICJ), for instance, now passes the test of internationalization despite the fact that, historically, virtually all Sub-Saharan African states came into existence after the establishment of the Court. The Membership of the ICJ has been expanded to include judges from all regions, with the salutary effect that the principal legal systems of the world are represented in the Court. Elections to the Court attract the enthusiastic participation of all countries. The case-load of the Court is at an all-time high, and parties from developing countries are active litigants before the Court, uninhibited by any perception that the ICJ is an exclusive alien club. The United Nations has established a Trust Fund to assist countries in overcoming any financial difficulties in participating in the proceedings of the Court. The rules of the Court, and indeed the entire Statute of the Court are perceived as eminently fair, and the decisions of the Court cannot be fairly characterized as reflecting any particular regional or cultural bias. In short, the term 'World Court', which is used interchangeably with the ICJ, is appropriate and well-merited.

It is, of course, recognized that the ideal of true internationalization is more easily achieved in the context of a system of inter-state adjudication, applying public international law at a fixed forum, than in the framework of an international commercial arbitration system, dealing with both public and private parties and administering a myriad of legal systems, rules and procedures in a multiplicity of capitals. Furthermore, it may be a pious hope to procure the modification of rules and procedures established over decades as the essential underpinning of an entire tradition of international commercial arbitration. Nevertheless, the conclusion is inescapable that if international commercial arbitration is to be fully accepted and meaningfully practised in Africa, an objective which is actively canvassed in capital-exporting countries, then some modification of the rules of the game to ensure a
genuine internationalization of the arbitral process is imperative.

There are several aspects of this process of internationalization or making international commercial arbitration truly universal.

(a) **Modifying the rules and procedures**

Without launching a major or radical overhaul of the arbitral rules and procedures, it should be feasible to effect such modifications that take due account of the constraints of time, distance, communication, as well as the administrative and logistical inadequacies that pose considerable difficulties to African parties to international commercial arbitration. Thus, the time limits prescribed for compliance with the various stages of the arbitral process, the consequences flowing from delay in such compliance, the involuntary component of such process, the costs of arbitration, including the requirements as to advance payments and the consequences of delinquency in this regard, should be realistically revised to address the genuine concerns of African parties, particularly when these parties are public authorities or governmental agencies hidebound by bureaucratic requirements. Apart from the obvious complications of geography and communication and limited foreign exchange resources, African parties are often unable to proceed as expeditiously as their European and American counterparts because they have to overcome the first hurdle of retaining and briefing European and American counsel before addressing each step of the arbitral process. The added complication of selecting a law firm, having the law firm approved by the relevant governmental authorities, negotiating legal fees, briefing the foreign law firm on the law and background to the case and settling pleadings across continents inevitably causes delay, which should not be objectively characterized as delinquent conduct.

With regard to the costs of arbitration, it is suggested that the major arbitral institutions seriously consider ways of alleviating this burden for African parties. The UN Trust Fund for assisting needy developing countries in financing their costs of litigation before the ICJ is instructive. A recommendation on these lines has already been made by the Group of Experts with respect to the revitalization of the PCA. A similar fund could be established to assist in alleviating the costs of arbitration for African countries.

Such financial assistance should be feasible in view of the obvious interest of international and national arbitral institutions of the industrialized countries in promoting international commercial arbitration in Africa and the developing world generally. Such assistance should, in particular, accommodate the foreign exchange costs of arbitration.

Perhaps another way of addressing this problem is to permit the payment of a substantial part of the costs in local currency, with lenient provision for the repatriation of the amounts in question. Such a measure could, of course, be
combined with the practice of conducting the arbitration in developing country fora.

(b) Internationalizing the fora

Arbitral institutions, to the extent that they are competent, and arbitral parties from outside of Africa, should be amenable to conducting arbitrations in African cities. The perceived logistical and infrastructural difficulties in Africa are grossly exaggerated. Africa has been able to host some of the most elaborate international conferences, and servicing an arbitration should not pose a serious problem. Any misgivings as to the suitability of the local law for purposes of arbitration could be disposed of by prior agreement as to the governing law. However, where the law of the forum is the designated governing law for the purposes of the arbitral proceedings, it should be adhered to faithfully. Conducting international arbitration in Africa would not only substantially reduce costs, but also help to overcome the perception of alien system. It would also have the additional effect of exposing local lawyers to some aspects of the process, thus paving the way for development of local expertise in this area. This recommendation complements the idea of establishing arbitration centres in Africa; particularly, as these centres are not sponsored by the major arbitration systems of Europe and America.

(c) Diversifying the personnel

Although it is conceded that African experts in international business transactions and international commercial arbitration are limited in number, it is submitted that a more determined effort could be made to identify and appoint more African jurists as arbitrators, particularly when the applicable law of the transaction in question is the law of an African state.

African exposure to international legal matters is steadily increasing. Within the past 10 years, African lawyers have participated actively in the annual meetings of the International Bar Association,26 American Society of International Law and numerous seminars where international legal issues, such as international arbitration, are discussed. African jurists have dealt with cases raising both local and external arbitral issues. Lawyers practising in countries such as Nigeria, Ghana, Zimbabwe and Kenya, which have considerable foreign investment activity, have represented overseas clients. This experience is reinforced by the expertise of government lawyers who have represented their respective governments in numerous international negotiations and transactions. Finally, there is the expertise of Africans who have been exposed to international legal practice in international institutions.

This appeal is addressed both to arbitral institutions and African parties themselves.

The appointment of more African arbitrators would be a major step towards the inauguration of a universal and universally accepted arbitral system.

(d) Paying more attention to African legal systems as the applicable law

One important aspect of internationalizing commercial arbitration is to take the legal systems of developing countries and African countries, in particular, more seriously where these are designated as the applicable laws of the transactions giving rise to the disputes. The international community no longer entertains the anachronistic notion of classifying some laws as the laws of ‘civilized nations’. Where parties to an international business transaction, say, a turnkey construction contract, to be carried out in an African country, have, after due deliberation, designated the law of that country (including its tax laws, procurement laws, labour laws and laws governing civil and engineering works) as the law governing the transaction, arbitrators handling the dispute arising from the contract must not brush aside such law in favour of some supposedly universal principles or rules, such as lex mercatoria or other system with which they are more familiar. Nothing raises the spectre of arrogant exclusivity more than such cavalier treatment of the laws of the various members of the international community. With regard to the law governing the procedure, arbitrators should resist the tendency to apply the law of the developed country forum even where the parties have settled for another legal system.

(e) Recognizing the public interest in transactions involving governmental entities

Most of the international commercial arbitrations affecting Africa involve governmental parties. As mentioned above, this raises a serious question as to the extent to which transactions with public authorities can be treated as ordinary commercial transactions between private parties. In a developing region, where public agencies were obliged to take the initiative in undertaking transactions which would normally fall within the province of private parties in the developed world, mainly by reason of the paucity of viable private entities, the public interest in such transactions simply cannot be ignored. A panel exclusively composed of developed country jurists is unlikely to appreciate and be sensitive to the compelling demands of the public interest in such transactions. African countries are unlikely to embrace international commercial arbitration wholeheartedly unless the implications of this public interest are fully recognized even at a time when privatization is proclaimed as an eminently desirable goal.

5.2. Education

Nothing suggested above detracts from the critical importance of national as well international educational programmes to equip African lawyers and businessmen
with knowledge and expertise in the handling of international commercial arbitration. The need here is indeed compelling. In this regard, it might be instructive to mention the efforts of the former United Nations Centre on Transnational Corporations (UNCTC) and the United Nations Department of Economic and Social Development (UNDESD) in organizing training workshops in Africa in the field of international business transactions generally and international commercial arbitration, in particular.

As part of its technical cooperation programme, the former UNCTC elaborated and organised some 200 workshops and seminars in numerous developing countries and economies in transition on the negotiation, structuring and drafting of international business transactions as well as the legal, financial and technical issues arising from such transactions for the benefit of middle level to senior professionals and executives in the public and private sectors. These transactions included international joint ventures and other types of investment agreements, petroleum and mining agreements, management agreements, international construction contracts, consulting contracts, loan transactions, debt rescheduling agreements, international procurement contracts and licensing agreements and compensation trade agreements. The object of this programme was to enhance the capabilities of these countries in handling international business transactions and to demystify the phenomenon of dealing with transnational corporations.

An important ingredient of this programme is the organization of special workshops and seminars exclusively devoted to international commercial arbitration, which specifically target lawyers from the public service and the private Bar. A number of these have been held in various African countries for the benefit of the lawyers in these countries. A typical workshop consists of a 5-day programme of lectures, case studies and simulation exercises covering the following subjects, inter alia:

(a) A description of the main systems of international commercial arbitration, e.g., ICC, London Court of International Arbitration, AAA, UNCITRAL and ICSID: their salient and distinguishing features, their rules and procedures and their areas of concentration. Regional centres of arbitration in Africa.
(b) Negotiating and drafting the arbitration clause in an international business transaction, including arbitrable subjects.
(c) Constituting the arbitral panel.
(d) Evidence in arbitration proceeding.
(e) The law governing the arbitration.
(f) The arbitral award, including enforcement, nullity and challenge.
(g) Special types of arbitration such as arbitration of disputes in construction contracts or investment disputes.
(h) The host country's experience of international commercial arbitration and the problems encountered.
(i) Specific case studies of arbitrations considered instructive.
(j) An evaluation of the workshop by the participants.

Lectures are provided by an international faculty consisting of experts from UNCTC, and later UNDESD, and eminent lawyers retained ad hoc for the workshop.27

Our programmes have been enthusiastically received by the participants and have demonstrated that there is a yawning gap in the knowledge and expertise of Africans in this area. There is an overwhelming need for more intensified efforts in this connection by national authorities and institutions of professional training in Africa, by the main arbitral institutions of the world, by various international organizations and by international professional associations, such as IBA or ILA.28 Whatever the imperfections of the present international arbitral systems may be, African countries cannot afford the luxury of disengagement. The dynamics of international commercial intercourse dictates active African participation in the arbitral process. African governments and legal professions have the responsibility to take appropriate initiatives in this field. In short, the realities of the international economic system make it compelling for officials and other personnel of developing countries to familiarize themselves thoroughly with the institutions, concepts and techniques of international arbitration, whatever their reservations may be about the system.

5.3. The substantive underpinnings of international commercial arbitration

It is a daunting task to call for the reform of the substantive law applied in international commercial arbitration. The first difficulty derives from the fact that analytically one cannot identify a single or uniform body of such substantive law. The applicable substantive law in a particular arbitration could be the national law of a particular country that is designated in the transaction as the applicable law or adjudged by the arbitrators as the governing law. It could also consist of certain relevant principles and rules of public international law that have been designated in the relevant transactions or otherwise adjudged by the tribunal to be the applicable law, particularly in the case of investment disputes. However, as pointed out above, experience has shown that some arbitrators do not feel necessarily compelled to

27. In a workshop held in Accra, Ghana in May 1992, the faculty consisted of Sir Ian Percival, former Solicitor-General of the U.K., Dr. Biswanath Sen, former Secretary-General of the Asian-African Legal Consultative Committee and Senior Advocate in India, Mr. Robert Layton, Senior Partner, Jones, Day, Reavis & Pogue of New York and the author. There were some 50 participants - lawyers from the public service and private Bar in Ghana.
28. The ICC's Institute of International Business Law and Practice and The Institute for Transnational Arbitration of the South Western Legal Foundation could play a critical role in directing special training programmes to Africa.
adhere to the designated national law, while others indeed consider themselves at liberty to invoke and apply principles and rules which cannot be classified as belonging to a particular national legal system or indeed to public international law, i.e. this is the invocation of lex mercatoria or its equivalent.

The plea for reform in this section targets the principles and rules of public international law and the emerging lex mercatoria. As far as the latter is concerned, the objection is fundamental. Many jurists from the developed and the developing world have challenged the doctrinal validity of a system which does not derive from a particular municipal legal system or from international law. But beyond the doctrinal argument, African countries and other developing countries reject the imposition of a body of rules that was fashioned in Europe without their participation and which makes no attempt to accommodate their interests.

With respect to international law governing investment issues, jurists29 from the developing world have pressed for an appropriate modification to reflect the interests of an expanded international community and to ensure a more equitable system that comprehensively addresses the obligations and rights of all actors in the international investment process.

Within the past decade there has been a marked liberalization of foreign investment regimes in most countries, especially in developing countries and economies in transition. Foreign investment is now avidly sought in virtually all countries and appropriate measures have been instituted to provide protection for investments and transnational corporations.

These measures at the national level have been reinforced by a plethora of bilateral investment treaties between capital exporting and capital importing countries. At the multilateral and regional levels, instruments and declarations have been issued to ensure fair and equitable treatment of foreign investment. The World Bank, for instance, has formulated Guidelines on the Legal Framework for the Treatment of Foreign Investment.30 In short, the international legal system is fully equipped with various devices for the protection of foreign investment. However, it can hardly be denied that the international legal system would profit from the formulation of appropriate restraints on corporate conduct, so that the basic ground rules of investment activity would be clarified.

The undoubted virtues of foreign investment and other forms of transnational corporate activity do not detract from the need to make the international legal system more responsive to the concerns of all parties to the investment process, including the host countries. The incidence in Africa of cases where the implementation of


numerous investment projects or the execution of industrial plants or civil works has been vitiated by corporate delinquency or corruption or other forms of misconduct argues for a fair and equitable international regime which does not operate on the simplistic premise that misconduct or default is the exclusive preserve of governmental authorities in Africa. In this connection, it is refreshing to note that the World Bank’s Guidelines on the Legal Framework for the Treatment of Foreign Investment explicitly condemn corrupt practices.

5.4. The possible role of a revitalized PCA

Since the PCA is in the process of devising rules to revitalize arbitration under its auspices, it may well be better placed to address the concerns recounted above rather than other arbitral institutions which may not be disposed to reform at present. In particular, the new rules being devised for state/Non-state arbitration under the PCA could well provide a framework for accommodating the changes recommended above to enhance African participation in international commercial arbitration.

The PCA has several advantages that could make it a congenial forum for international commercial arbitration and an attractive alternative to existing arbitral institutions in this field. First, its location at the Hague, with its tradition as an international centre for the settlement of international disputes, which is not tainted with local or regional bias, would make it an ideal international forum. African states, like other developing countries, do not consider litigation in the ICJ as a proceeding in a European or regional setting, and the same aura of a delocalized, international forum could negate any perception of an alien or exclusive institution as far as the PCA is concerned. A necessary consequence of the choice of the Hague as the forum is that it would arrest any tendency to apply Dutch law to the arbitral proceedings. Second, the PCA is not the creation of any particular trade association. Its status as a creation of an international convention, to which all countries may accede, enhances its claim to universality. Third, the system of appointing members of PCA arbitral panels ensures a greater diversity than some of the nationally based arbitration systems. If the proposal to enlist arbitrators with special expertise in particular areas of international business is implemented, it would enhance the effectiveness of the arbitrators. Fourth, a PCA arbitration, being the product an intergovernmental collaboration, would be more sensitive to the notion of the public interest compared to an arbitration system which is the creation of a purely commercial organization. Fifth, the PCA would enjoy the crucial advantage that, unlike some other arbitral institutions such as ICSID, its jurisdiction in international commercial arbitration between states and non-state parties is not limited to special categories of international business transactions. On the contrary, it would be in a position to embrace new categories of disputes, such as environmental disputes between states and transnational corporations.
Finally, the PCA could employ its impressive facilities in assisting in training programmes for African lawyers in the area of international commercial arbitration.

6. CONCLUSION

The remedial action recommended in this paper is a pragmatic and modest effort to bring Sub-Saharan Africa within the mainstream of international commercial arbitration. It must be acknowledged that reservations about the international arbitration are by no means peculiar to the Sub-Saharan African region. Other regions, outside of Western Europe, have, at some stage or another, manifested either downright hostility or some form of objection to this process. The traditional antipathy of Latin America to international arbitration is well-documented. In Asia, there is a cultural bias against the kind of adversarial confrontation associated with international commercial arbitration, although attitudes are reportedly changing. America is a recent convert to international commercial arbitration, and even in Western Europe, national judicial authorities have not entirely overcome their inclination to scrutinize international arbitration. Attitudes to international arbitration in the Middle East have ranged from outright hostility to resignation. Some countries in this region originally reacted to their disenchantment by attempting to prohibit or restrict international arbitration, but with no enduring success. The evidence now points to active participation by Middle Eastern countries generally in international commercial arbitration by reason of the volume of their international business transactions and the level of their expertise in this field.

Sub-Saharan Africa has chosen a less confrontational path and recognises the inevitability of international commercial arbitration. It only remains for the institutional framework of this process to be appropriately restructured to ensure the effective participation of African states.