



UNIVERSITY *of the*
WESTERN CAPE

FACULTY OF LAW

**ENTRENCHING THE RIGHT TO REGULATE IN THE INTERNATIONAL
INVESTMENT LEGAL FRAMEWORK: THE AFRICAN EXPERIENCE**

A Thesis Submitted in Fulfilment of the Requirements for the Degree of
Doctor of Laws

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DECLARATION


I declare that *Entrenching the Right to Regulate in the International Investment Legal Framework: The African Experience* is my own work, that it has not been submitted before for any degree or examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.


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ABSTRACT

The existing traditional international investment law regime which is largely based on the conventional European and North American Model Bilateral Investment Treaties (BITs) has come under intense criticism. The argument is that this regime, among other things, prioritises the protection of foreign investors and investments while sidelining significant public interest issues of the host countries. The inability to adequately accommodate public interest issues in the international investment law has unduly constrained the host countries' sovereign right to regulate investments in public interests and pursue their public policy objectives. Consequently, arbitral tribunals have gained notoriety for giving preferential treatment to foreign investors and investments' interests, ignoring the state regulation that can advance public interests or protect human rights and promote inclusive and sustainable development within their territories. There has also been a growing body of international arbitration case law where foreign investors have successfully challenged legitimate public welfare measures under investment treaties, causing governments to pay hefty arbitral awards. Therefore, the fear that domestic public welfare regulations will be confronted with international arbitration has dissuaded many governments from adopting legislation or measures aimed at advancing public interests, the so-called 'regulatory chill'. The regime illustrated here resembles the international regulatory framework governing foreign investment in Africa.

Africa's international investment law regime is shaped by a network of investment treaties signed at global, regional and bilateral levels. These treaties are modelled on the traditional western developed countries' Model BITs whose main function is to protect foreign investors and investments. Investment treaties were concluded in order to attract foreign direct investment (FDI) which would create employment, alleviate poverty and promote development in the host economies. However, African countries have signed and ratified investment treaties without careful attention to or analysis of the text and consequences thereof. As a result, African governments have restrained their right to regulate in public interests under the international investment agreements (IIAs). Investors have challenged governments' public policy measures in international investment arbitration under IIAs. Despite attracting increasing FDI, Africa has remained poor. Further, foreign investors have violated human rights and were not held liable.

Against this backdrop, this study proposes the entrenching of the right to regulate in Africa's international investment law regime. By doing so, host states would be able to exercise their regulatory freedom without fear of being exposed to international investment arbitration. Additionally, the right to regulate will augment the role of international investment law in the realisation of sustainable development and in the protection of human rights including public health and safety, labour rights and environmental protection. The study offers some recommendations on how African governments can adequately entrench their right to regulate without undermining the purpose of IIAs to promote and protect foreign investors and investments. To ensure the adoption of such a regime, the study proposes an investment regulatory regime that takes into account the interests of both host states and investors.



DEDICATION

I dedicate this study to my late mother, Julia Masango, who passed away during the early phase of this study. I owe her a great deal for all she has done to prepare and inspire me to wind my way down the path that has taken me to this moment. I will always love and cherish you mom.

I further dedicate this study to my beloved daughter, Nyasha Usandonwabisa Julia Chidede, who enthuses me to do whatever it takes to create a world she would love to live in and inherit.

Lastly, I dedicate this study to African states, academics, scholars and international investment lawyers and policy makers across the world that are committed to negotiate international investment legal frameworks safeguarding the right to regulate.



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May God bless you all.



KEY WORDS

Bilateral investment treaty

Economic development

Foreign direct investment

International investment agreements

International investment law

International investment legal framework

Policy space

Right to regulate

Sustainable development



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ACRONYMS AND ABBREVIATIONS

ACHR	American Convention for Human Rights
ACHPR	African Charter on Human and Peoples' Rights
AfCFTA	African Continental Free Trade Area
AMU	Arab Maghreb Union
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
AU	African Union
AUC	African Union Commission
BEE	Black Economic Empowerment
BITs	Bilateral Investment Treaties
CAADP	Comprehensive Africa Agricultural Development Programme
CEMAC	Economic and Monetary Community of Central Africa
CEN-SAD	Common Market for Eastern and Southern Africa, Community of Sahel-Saharan States
CETA	Comprehensive Economic and Trade Agreement
CIL	Customary International Law
COMESA	Common Market for Eastern and Southern Africa
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRC	Convention on the Rights of the Child
CSR	Corporate Social Responsibility
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of the West African States

EPAs	Economic Partnership Agreements
EU	European Union
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGAD	Intergovernmental Authority on Development
FDI	Foreign Direct Investment
FCN	Friendship, Commerce and Navigation Treaties
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IAs	International Investment Agreements
IISD	International Institute for Sustainable Development
ILC	International Law Commission
ILO	International Labour Organisation
ISDS	Investor-State Dispute Settlement
MAI	Multilateral Agreement on Investment
MERCOSUR	Mercado Común del Sur
MIGA	Multilateral Investment Guarantee Agency
MNEs	Multinational Enterprises
NAFTA	North American Free Trade Area
NEPAD	New Partnership for Africa's Development
NGOs	Non-Governmental Organisations
OAU	Organisation of the African Unity



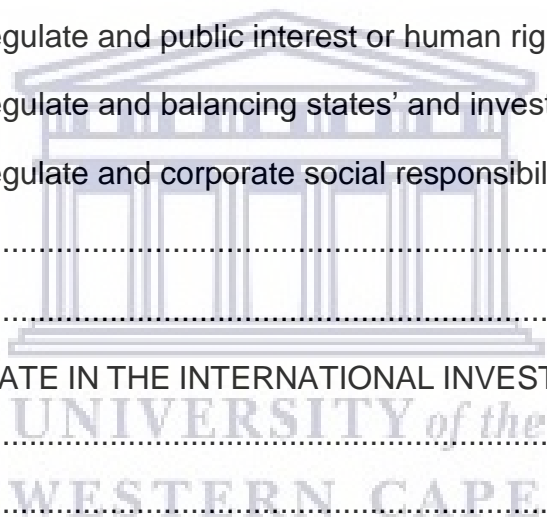
OECD	Organisation for Economic Cooperation and Development
PAIC	Pan-African Investment Code
PCA	Permanent Court of Arbitration
PIDA	Programme for Infrastructural Development in Africa
RCEP	Regional Comprehensive Economic Partnership
RECs	African Regional Economic Communities
SADC	Southern African Development Community
SADC FIP	Southern African Development Community Finance and Investment Protocol
SDGs	Sustainable Development Goals
TFTA	Tripartite Free Trade Area
TPAIA	US-Peru Trade Promotion Agreement Implementation Act
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
TRIMS	Agreement on Trade-Related Investment Measures
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
US	United States
USMCA	United States of America, Mexico and Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

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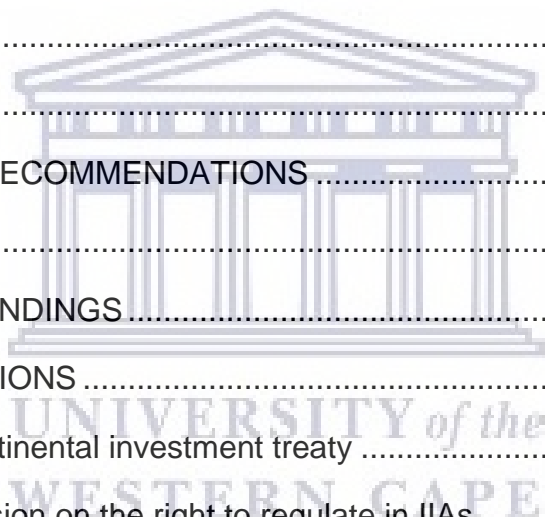
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CHAPTER 1

INTRODUCTION AND OVERVIEW OF THE STUDY

1.1 INTRODUCTION

For many decades, it has been established that foreign direct investment (FDI) is an engine for development.¹ The term FDI has been defined in various ways, but essentially means an investment made to acquire a lasting interest in an enterprise in a country other than that of an investor, the investor's purpose being to have an effective voice in the management of the enterprise.² Likewise, the term development has no universal definition but, at a more general level, entails a 'process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom'.³ FDI developmental impacts include, *inter alia*, employment creation,⁴ economic growth and development,⁵ advanced technology transfer⁶ and managerial skills.⁷ To that end, countries concluded investment treaties to attract FDI,⁸ which in turn would foster

¹ Lall S & Narula R 'Foreign direct investment and its role in economic development: Do we need a new agenda?' 2004 *The European Journal of Development Research* 447. The FDI-development linkage remains much of a debate, see generally Blomstrom M & Kotto A 'Multinational corporations and spillovers' (1998) 12 *Journal of Economic Surveys* 247-77; Moran TH *Foreign direct investment and development* (2002); Moran TH, Graham EM & Blomstrom M (eds) *Does foreign direct investment promote development?* (2005) (hereinafter Moran et al (2005)); and Colen L, Maertens M & Swinnen J 'Foreign direct investment as an engine for economic growth and human development: A review of the arguments and empirical evidence' in De Schutter O, Swinnen J & Wouters J (eds) *Foreign direct investment and human development: The law and economics of international investment agreements* (2013) (hereafter Colen et al (2013)).

² International Monetary Fund *Balance of payment manual* 4 ed (1977) 136. See also United Nations Conference on Trade and Development (UNCTAD) *Training manual on statistics for FDI and the operations of TNCs* (2009) 35; and Organisation for Economic Cooperation and Development (OECD) *OECD Benchmark definition of foreign investment (draft)* 4 ed (2008) 17.

³ Preamble of the Declaration on the Right to Development, GA res A/RES/41/128, December 4, 1986, annex 41 UN GAOR Supplement. (no 53) 186, UN Doc A/RES/41/53, 1986 (hereinafter Declaration on the Right to Development).

⁴ On the correlation between employment creation and FDI, see generally Leibrecht M 'How important is employment protection legislation for foreign direct investment flows in central and eastern European countries?' (2009) 17 *Economics of Transition* 275-95.

⁵ See Colen et al (2013). See also De Schutter O, Swinnen J & Wouters J *Foreign Direct Investment and Human development: The law and economics of international investment agreements* (2012) ch 3.

⁶ For a detailed analysis on the impact of FDI on technology advancement, see generally Blomstrom M *Foreign investment and spillovers: A study of technology transfer to Mexico* (1989).

⁷ See Fu X 'Foreign direct investment and managerial knowledge spillovers through the diffusion of management practices' (2012) 49 *Journal of Management Studies* 970-99.

⁸ Mosoti V 'Bilateral investment treaties and the possibility of a multilateral framework on investment at the WTO: Are poor economies caught in between?' (2005) 26 *Northwestern Journal of International Law and Business* 103.

development. However, the linkage between investment treaties and FDI flows⁹ and evidence of FDI-led development¹⁰ has been ambiguous. In spite of promoting development, FDI has resulted in unintended detrimental effects in the host countries.

For instance, foreign investment activities have had adverse effects on livelihoods including labour rights abuse,¹¹ environmental degradation and abuse of human rights,¹² to mention but a few. This has warranted most governments, governmental and non-governmental organisations and civil society to scrutinise and reconsider the conventional international investment law.¹³ International investment law is generally defined as a set of rules that regulate foreign investment and is shaped by international investment agreements (IIAs), plurilateral investment agreements, regional and bilateral investment treaties (BITs) and customary international law (CIL) norms¹⁴ as well as free trade agreements (FTAs) with investment provisions, international taxation agreements and double taxation treaties, among others.¹⁵ In this study, the term 'IIAs' is used in a very broad context to comprise not only multilateral, plurilateral or BITs but also investment chapters/provisions in modern comprehensive FTAs.

Following a critical review of the existing international investment law regime, a wide consensus has been reached that the regime is asymmetrical and biased towards investors (who often violate human rights and not held accountable) and that it unduly

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⁹ See generally Sachs L & Sauvant KP (eds) *The effect of treaties on foreign direct investment: Bilateral investment treaties, double taxation treaties, and investment flows* (2009). See also Bhasin N & Manocha R 'Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India' (2016) 41 *The Journal for Decision Makers* 275-87.

¹⁰ See generally Moran et al (2005).

¹¹ For example, Ramatex Company's activities in Namibia proves the brutal reality of labour rights abuse by foreign investments. See Jauch H 'The Ramatex closure in Namibia: Hard lessons to be learned' (2008) *Economic News* <https://www.namibian.com.na/index.php?id=46344&page=archive-read> (accessed 17 January 2017). See also Jauch H 'Africa's clothing and textile industry: The case of Ramatex in Namibia' in Jauch H & Traub-Merz R (eds) *The future of the textile and clothing industry in sub-Saharan Africa* (2006).

¹² Innumerable grave human rights abuses by multinational corporations have been recorded over the years. See, for example, Panda B 'Multinational corporations and human rights violations: Call for rebuilding the laws of twenty-first century' (2013) 20 *Journal of Financial Crime* 422-32. More human rights abuses cases by multinational businesses are available at the Business & Human Rights Resource Centre website available at <https://www.business-humanrights.org/>.

¹³ See Morosini F & Badin MRS (eds) *Reconceptualising international investment law from the global south* (2018) 24. See also Schill SW 'Enhancing international investment law's legitimacy: Conceptual and methodological foundations of a new public law approach' (2011) 52 *Virginia Journal of International Law* 57; and Hueckel J 'Rebalancing Legitimacy and Sovereignty in International Investment Agreements' (2011) 61 *Emory Law Journal* 601.

¹⁴ See Sornarajah M *The International Law on Foreign Investment* (1996) 2-3.

¹⁵ See generally Sauvant KP & Sachs S *The effect of treaties on foreign direct investment: Bilateral investment treaties, double taxation treaties, and investment flows* (2009).

constrains the governments' ability to regulate investments in the public interests.¹⁶ Such state of affairs has led to constant critiques of the existing international investment regime 'as not only failing to balance investor rights against the public interests surrounding human rights protection among host state populations, but moreover claiming that investor-state arbitration is complicit in adjudicating claims by foreign investors who are themselves human rights abusers'.¹⁷ By necessity then, preserving the right to regulate has become increasingly an attractive alternative to the status quo.¹⁸ Safeguarding the right to regulate in the realm of international investment law enhances the ability of host governments to leverage the above-mentioned development impact of FDI into their economies and to protect and promote the public interests amid foreign investment regulation.¹⁹ The term 'public interest' is used broadly in this study to include non-investment obligations and human rights norms including public health and safety, labour and environmental protection and sustainable development.

1.1.1 Conceptualising the right to regulate

Despite becoming a critical element in the international investment law and policy realm, the concept of the 'right to regulate' has not yet found its place in legal dictionaries. However, scholars who have written extensively on the subject

¹⁶ Cotula L 'Do investment treaties unduly constrain regulatory space?' (2014) 9 *Questions of International Law* 20 (hereafter Cotula (2014)). See also Miles K 'International investment law: Origins, imperialism and conceptualising the environment' (2010) 21 *Columbia Journal of International Environmental Law & Policy* 11; and Pauwelyn J 'At the edge of chaos? Foreign investment law as a complex adaptive system, how it emerged and how it can be reformed' (2014) 29 *ICSID Review* 380.

¹⁷ 'Call for papers: The legitimate role for investment law and arbitration in protecting human rights' (2019) available at https://worldtradelaw.typepad.com/ielpblog/2019/01/call-for-papers-the-legitimate-role-for-investment-law-and-arbitration-in-protecting-human-rights.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+ielpblog+%28International+Economic+Law+and+Policy+Blog%29 (accessed 28 January 2019).

¹⁸ See generally Spears SA 'The quest for policy space in a new generation of international investment agreements' (2010) 13 *Journal of International Economic Law* 1037 (hereafter Spears (2010)); Desierto DA 'Public policy in international investment and trade law: community expectations and functional decision-making' (2014) 26 *Florida Journal of International Law* 51-149 (hereafter Desierto (2014)); Wagner M 'Regulatory space in international trade law and international investment law' (2014) 36 *University of Pennsylvania Journal of International Law* 1-87 (hereafter Wagner (2014)); and Mayer J 'Policy space: What, for what, and where?' (2009) 27 *Development Policy Review* 373-95.

¹⁹ See Mann H 'The Right of states to regulate and international investment law' A paper presented at the Expert Meeting on the Development Dimension of FDI: Policies to Enhance the Role of FDI in Support of the Competitiveness of the Enterprise Sector and the Economic Performance of Host Economies, Taking into Account the Trade/Investment Interface, in the National and International Context, Geneva, 6-8 November 2002 available at http://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf (accessed 10 January 2017) 10 (hereinafter Mann (2002)).

particularly Mann,²⁰ Mouyal,²¹ Titi²² and the United Nations Conference on Trade and Development (UNCTAD)²³ have attempted to define or contextualise the concept of the right to regulate. Their definitions are striking and will be used as the basis of this study. Mann, for example, expresses the right to regulate in two dimensions: the right to regulate FDI to promote domestic development priorities and linkages; and the right to protect the public welfare from possible negative impacts of investment.²⁴ Mouyal conceptualises the right to regulate as:

An affirmation of states' authority to act as sovereigns on behalf of the will of the people ... The right to regulate thus covers the authority of states to adopt regulation ... the right to regulate is the affirmation of sovereign states to choose their political, social and economic priorities – with certain limits – through the adoption of legislation and administrative practices without violating international rules protecting investments. The scope to which states may regulate without violating international law, the regulatory space of manoeuvre, is also referred to as public policy space of host states, the regulatory scope of manoeuvre or in connection with expropriation, the public power of the host state.²⁵

In addition, Titi notes that 'the right to regulate denotes the legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate'.²⁶ She further opines that the right to regulate is a legal right, which 'encompasses a right with a concrete legal basis, treaty-based exceptions'.²⁷ In her examination of the term, Titi further highlights that the right to regulate is grounded in general international law, and is independent of its express incorporation in an IIA.²⁸ Additionally, the right to regulate functions as a safety valve infusing some flexibility into the international investment law system and bringing about a degree of balance.²⁹

²⁰ Mann (2002) 10.

²¹ Mouyal LW *International investment law and the right to regulate: A human right perspective* (2016) (hereinafter Mouyal (2016) 8-9.

²² Titi C *The right to regulate in international investment law* (2014) 33 (hereinafter Titi (2014)).

²³ UNCTAD Investment Policy Framework for Sustainable Development, 2015.

²⁴ Mann (2002) 10.

²⁵ Mouyal (2016) 8-9.

²⁶ Titi (2014) 33.

²⁷ Titi (2014) 33.

²⁸ Titi (2014) 33. See Chapter 3 of this study for further discussion.

²⁹ Brower CH 'Obstacles and pathways to consideration of the public interest in investment treaty disputes' in Sauvant KP (ed) *Yearbook on international investment law & policy 2008-2009* (2009) 357.

UNCTAD also defines the right to regulate ‘as an expression of a country’s sovereignty. Regulations include both the general legal and administrative framework of host countries as well as sector- or industry-specific rules. It also entails effective implementation of rules, including the enforcement of rights. Regulation is not only a state right, but also a necessity’.³⁰

The overall analysis of the above definitions elucidates that the right to regulate denotes a legal right of the host government to adopt legitimate regulatory or administrative measures designed to promote or enhance public policy objectives without being exposed to investment arbitration. Therefore, accommodating the right to regulate in the international investment legal framework allows host states to regulate investment in accordance with public interests and protect the public from adverse effects of foreign investment activities. Also noteworthy is that the right to regulate is commonly referred to as policy space, regulatory space, regulatory autonomy or regulatory freedom³¹ and these terms will be used interchangeably in this study.

1.2 CONTEXTUAL BACKGROUND

The enthusiasm to reserve policy space in international investment law has been championed by mainly developing countries’ host governments, civil society groups, inter-governmental and non-governmental organisations (NGOs), among other stakeholders, who were concerned ‘about the loss of national sovereignty in the face of broader and deeper trade and investment obligations at international level’.³² The fervour to preserve regulatory space has also been catalysed by the growing investor-state arbitrations where public interest legislations and measures have been challenged by foreign investors on the basis of trade and investment agreements.³³ Notable among others, are the recent prominent and oft-cited *Philip Morris v*

³⁰ UNCTAD Investment Policy Framework for Sustainable Development, 2015 33.

³¹ Hindelang S & Krajewski M ‘Conclusion and outlook: Whither international investment law’ in Hindelang S & Krajewski M (eds) *Shifting paradigms in international investment law: More balanced, less isolated, increasingly diversified* (2016) 381; and Sornarajah M ‘Right to Regulate and Safeguards’ in UNCTAD *The development of FDI: Policy and rule-making perspectives, proceedings of the expert meeting in Geneva from 6 to 8 November 2002* (2003) 205.

³² Mann H ‘The right of states to regulate and international investment law: A comment’ in UNCTAD *The development of FDI: Policy and rule-making perspectives, proceedings of the expert meeting in Geneva from 6 to 8 November 2002* (2003) 211 (hereafter Mann (2003)). See also Cotula (2014) 20.

³³ Mann (2003) 211. See also Schacherer S *International investment law and sustainable development: Key cases from the 2010s* (2018); and Bernasconi-Osterwalder N & Johnson L *International investment law and sustainable development: Key cases from 2000–2010* (2011).

Uruguay,³⁴ *Philip Morris v Australia*,³⁵ *Vattenfall v Germany*,³⁶ *Foresti v South Africa*,³⁷ *Funnekotter v Zimbabwe*,³⁸ *Campbell v Zimbabwe*,³⁹ *Veolia v Egypt*⁴⁰ and *Suez v Argentina*.⁴¹ The proliferation of these international lawsuits has seen host governments paying exorbitant fines to foreign investors and, accordingly, discouraged governments from enacting public policy laws due to fear of being exposed to exorbitant investment arbitration awards, thus creating the so-called regulatory chill.⁴² As a result of these consequences, several governments have amended, terminated, renegotiated or revised their old generation IIAs.⁴³

Worth mentioning is that the debate for policy space under the purview of international investment law has not been confined to developing countries, it has also gripped developed nations including Australia,⁴⁴ Canada, the European Union (EU)⁴⁵ and the

³⁴ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016), where investors challenged Uruguay's regulations (Single Presentation Requirement of 2008 and 80/80 Regulation) alleging that the regulations violated its right to use its legally protected trademark by infringing on intellectual property rights and thus further reduced the value of its investment.

³⁵ *Philip Morris Asia Limited v The Commonwealth of Australia* UNCITRAL, PCA Case N. 2012-12 (hereinafter *Philip Morris v Australia* case), where a tobacco company instituted a legal action against the Australian government for enacting an anti-smoking legislation, the Tobacco Plain Packaging Act, 2011.

³⁶ *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 (31 MAY 2012), where a foreign investor instituted an international arbitration claim against the environmental rules adopted by Germany amounted to an expropriation and a violation of Germany's obligation to afford foreign investors fair and equitable compensation.

³⁷ *Pierro Foresti, Laura de Carli v The Republic of South Africa*, ICSID Case No. ARB (AF)/07/01 (04 August 2010), where a group of Italian investors took challenged a number of black economic empowerment (BEE) policies contending that they violated investment protection standards embedded in BITs concluded by South Africa with Italy and Luxembourg.

³⁸ *Bernardus Henricus Funnekotter v Republic of Zimbabwe*, ICSID Case No. ARB/05/06 (Award of April 22, 2009), where a group of Dutch farmers challenged the land reform policy of Zimbabwe on the basis of the Netherlands-Zimbabwe BIT.

³⁹ *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* SADC (T) Case No. 2/2007 (Judgment of November 28, 2008), where a group of white commercial farmers challenged the compulsory acquisition of their agricultural land by the government of Zimbabwe through the land reform programme.

⁴⁰ *Veolia Propreté v Arab Republic of Egypt*, ICSID Case No. ARB/12/15, where a French company challenged Egypt's new minimum wage law before an ICSID tribunal.

⁴¹ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, ICSID Case No. ARB/03/19, where a French company challenged Argentina's cost controls for basic services such as energy and water.

⁴² See generally Brown JG 'International investment agreements: Regulatory chill in the face of litigious heat?' (2013) 3 *Western Journal of Legal Studies* 1-25.

⁴³ For example, South Africa, Morocco, India, Indonesia, Czech Republic, Argentina, Venezuela, Bolivia and Ecuador. See UNCTAD 'Reforming Investment Dispute Settlement: A Stocktaking' (2019) International Investment Agreements Issues Note 1.

⁴⁴ Australia's determination to safeguard policy space in international investment agreements was largely influenced by the *Philip Morris v Australia* case. Morosini F & Badin MRS 'Reconceptualising international investment law from the global south: An introduction' in Morosini F & Badin MRS (eds) *Reconceptualising international investment law from the global south* (2018) 24.

⁴⁵ See Kleinheisterkamp J 'European policy space in international investment law' (2012) 27 *ICSID Review - Foreign Investment Law Journal* 416-31; and Titi C 'International investment law and the

United States (US), among others. These countries have expressed their dissatisfaction with the existing international investment law and have continuously advocated for or designed international investment legal instruments protecting their regulatory autonomy.⁴⁶

Fundamentally, the application of the right to regulate in the international investment legal system is not only a matter of advancing public interest aspects at the heart of investment regulation. States (and the international community) have a legal right to exercise their sovereignty and/or obligation to promote development within their territories.⁴⁷ States as sovereigns have a right and duty to pursue public policy and sustainable development objectives for the benefit of their citizens and territories in general.⁴⁸ This practice is certainly a legitimate governance issue and is well established in international law.⁴⁹

Human rights law also form a legal basis for the inclusion of the right to regulate.⁵⁰ Human rights law imposes obligation upon states to protect, respect and promote public interests or human rights of their citizens.⁵¹ This obligation entails that states must protect their nationals from human rights violations by third parties such as foreign investors and investment activities.⁵² In this regard, states are required to enforce laws demanding foreign investors and investments to respect human rights, that ensure investment treaties or any other business laws which do not limit but enable foreign investors to respect human rights.⁵³ In addition, human rights law provides a legal basis upon which citizens can claim and hold them accountable for the realisation of their human rights.⁵⁴ Further, the human rights approach to the

European Union: Towards a new generation of international investment agreements' (2015) 26 *The European Journal of International Law* 639-61.

⁴⁶ See Lester JS & Mercurio B 'Safeguarding policy space in investment agreements' (2017) Institute of International Economic Law Issue Brief 12 1.

⁴⁷ Article 3 (1) of the Declaration on the Right to Development.

⁴⁸ Mouyal (2016) 8.

⁴⁹ Desierto DA 'Regulatory freedom and control in the new ASEAN regional investment treaties' (2015) 16 *The Journal of World Investment and Trade* 1050 (hereafter Desierto (2015)).

⁵⁰ See generally Adeleke F *International investment law and policy in Africa: Exploring a human rights based approach to investment regulation and dispute settlement* (2018). This concept will be discussed in detail in part 3.3.

⁵¹ United Nations Guiding Principles for Business and Human Rights, 2011 (hereinafter UN Guiding Principles for Business and Human Rights).

⁵² UN Guiding Principles for Business and Human Rights 3.

⁵³ UN Guiding Principles for Business and Human Rights (2011) 3.

⁵⁴ Warikandwa TV *Enlarging the place of human rights and development in international trade regulation: An evaluation of the problems and prospects of incorporating a social clause in the legal*

integration of the right to regulate in international investment law could allow host governments to hold foreign investors and investments to account for human rights violations through investment treaties.⁵⁵ This is not feasible under the traditional international investment legal regime since the regime does not contain any human rights issues.⁵⁶ Human rights and investment law are often treated as two separate and independent disciplines.⁵⁷ Traditionally, foreign investors were not by nature subjects of international law which is predominantly an inter-state system.⁵⁸ However, as the International Centre for Settlement of Investment Disputes (ICSID) tribunal in *Urbaser v Argentina*⁵⁹ underscored that ‘such principle had its importance in the past, it has lost its impact and relevance in similar terms and conditions as this applies to individuals’.⁶⁰ In fact, recent developments show that corporations operating internationally are increasingly becoming subjects of international law.⁶¹

In addition, it is important to note that although the need for entrenching policy space has fairly achieved global consensus in recent years, governments as well as international investment law and policy makers have been confronted with the challenge of how to strike an appropriate balance between private and public interests under one regime.⁶² That is, the difficulty is to advance investment protection and promotion while at the same time safeguarding host governments’ right to protect public interests in the international investment legal system. Seifu⁶³ observes one of the difficulties is ‘how broad regulatory freedoms should be and how they should be framed so that they balance national interest and the level of protection required for

framework of the World Trade Organisation (2012) (Doctor of Laws thesis – University of Fort Hare) 95 (hereinafter Warikandwa (2012)).

⁵⁵ See generally Adeleke (2018).

⁵⁶ See generally Simma B ‘Foreign investment arbitration: A place for human rights?’ (2011) 60 *The International and Comparative Law Quarterly* 573-596.

⁵⁷ See Toral M & Schultz T ‘The state, a perpetual respondent in investment arbitration? Some unorthodox considerations’ in Waibel M, Kaushal A, Liz Chung KH & Blachin C (eds) *The backlash against investment arbitration: Perceptions and reality* (2010) 577-602.

⁵⁸ See Alvarez JE ‘Are corporations “subjects” of international law?’ (2011) 9 *Santa Clara Journal of International Law* 1-2.

⁵⁹ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, 8 December 2016 (hereinafter *Urbaser v Argentina*).

⁶⁰ *Urbaser v Argentina* para 1189.

⁶¹ *Urbaser v Argentina* para 1194-95.

⁶² Spears (2010) 1037.

⁶³ Seifu G “Regulatory Space” in the treatment of foreign investment in Ethiopian investment laws’ (2008) 9 *The Journal of World Investment & Trade* 405-426 (hereinafter Seifu (2008)).

foreign investment'.⁶⁴ Similarly, Muchlinski⁶⁵ affirms that the challenge in integrating public policy space in IIAs, is to develop a legal regime 'in a manner that ensures the fullest possible benefits from FDI while also allowing for the retention of a degree of national sovereignty in the development and application of economic policy'.⁶⁶

Meanwhile, in spite of this controversy, a new international investment policy framework promoting government regulatory authority, sustainable development and the realisation of human rights is taking shape.⁶⁷ Quite recently, a new generation of IIAs and Model BITs or investment policies designed by international and regional organisations or national governments have been developed to guide governments in this new investment policy trajectory. Notable here are the US Model BIT⁶⁸ and Canadian Model BIT,⁶⁹ UNCTAD Investment Policy Framework for Sustainable Development,⁷⁰ the OECD Policy Framework on Investment,⁷¹ G20 Guiding Principles for Global Investment Policy Making⁷² and the International Institute for Sustainable Development (IISD) Model Agreement on Investment for Sustainable Development,⁷³ among others. These policies have been perceived and utilised by many governments in Africa and beyond as models for designing new generation investment treaties that safeguard their policy space and development objectives.⁷⁴



⁶⁴ Seifu (2008) 417.

⁶⁵ Muchlinski P 'Policy Issues' in Muchlinski P, Ortino F & Schreuer C (eds) *The Oxford handbook of international investment law* (2008) (hereafter Muchlinski (2008)) 3-48.

⁶⁶ Muchlinski (2008) 15.

⁶⁷ See, for example, Echandi R 'A new generation of international investment agreements in the Americas: Impact of investor-state dispute settlement over investment rule-making' available at http://www.cepii.com/anglaisgraph/communications/pdf/2006/20211006/ses_3_echandi.pdf (accessed 07 January 2017); and UNCTAD 'World Investment Report 2012: Towards a new generation of investment policies' 84-5, 99-103 available at http://www.unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf (accessed 07 January 2017).

⁶⁸ Treaty between the Government of the United States of America and the Government of (country) concerning the Encouragement and Reciprocal Protection of Investment, 2012.

⁶⁹ Canada Model Foreign Investment Protection and Promotion Agreement, 2004.

⁷⁰ UNCTAD Investment Policy Framework for Sustainable Development, 2015.

⁷¹ OECD Policy Framework on Investment, 2015.

⁷² G20 Guiding Principles for Global Investment Policymaking, 2016.

⁷³ IISD Model Agreement on Investment for Sustainable Development, 2005.

⁷⁴ See, for example, the SADC Investment Policy Framework, 2012 based on the OECD Policy Framework for Investment. See also the Speech delivered by the Minister of Trade and Industry Dr Rob Davies at the South African launch of the UNCTAD Investment Policy Framework for Sustainable Development at the University of The Witwatersrand available at <https://investmentpolicyhub.unctad.org/IPFSD/EndorsementDetail/30> (accessed 22 February 2018), highlighting that UNCTAD Investment Policy Framework For Sustainable Development provides the policy know-how for moving from a traditional investment model to a new sustainable model.

However, with an exception of a very few countries,⁷⁵ many African countries have not done much in relation to safeguarding their policy space in international investment law. The large body of international investment law regime of African countries is still modelled on the traditional European and North American Model BITs,⁷⁶ which are presently criticised for restricting policy space of host states. It is against this background that this study critically explores the current international investment legal framework of African countries with a view to determining the extent of the protection of policy space and, accordingly, offer some recommendations on how African countries could entrench their regulatory space of manoeuvre under the purview of international investment regulation.

The international investment legal framework for Africa comprises IIAs, BITs, CIL norms, regional investment agreements, double taxation treaties and FTAs with investment provisions.⁷⁷ National legislation aimed at regulating foreign investors and investments also form integral part of this framework. The majority of Africa's IIAs that have been contracted with the developed nations, based on the western developed (European and North American) nations' Model BITs,⁷⁸ limit regulatory freedom.⁷⁹ As an example, Ofodile analyses the BITs concluded between African countries and China, and the traditional Model BITs used by the western counterparts and concludes that they 'do not explicitly circumscribe the ability of governments in Africa to take measures aimed at promoting domestic development objectives, in many respects they limit the capacity of governments in Africa to use policy instruments that China used in the past to regulate FDI in order to build up national industry'.⁸⁰ This may be considered by some as academically inexcusable and to weaken continued public

⁷⁵ In December 2015, South Africa enacted the Protection of Investment Act 22 of 2015 which seeks to provide an investment legal regime balancing the government regulatory power and investor protection.

⁷⁶ Mbengue MM & Schacherer S 'Africa and the rethink of international investment law: About the elaboration of the Pan-African Investment Code' in Roberts A, Stephan PB, Verdier P & Versteeg M (eds) *Comparative international law* (2018) 548 (hereinafter Mbengue and Schacherer (2018)).

⁷⁷ See UNECA (2016) 16-20. See also Denters E & Gazzini T 'The role of African regional organisations in the promotion and protection of foreign investment' (2017) 18 *The Journal of World Investment & Trade* 449. These treaties are available at the UNCTAD International Investment Agreements Navigator available at <https://investmentpolicyhub.unctad.org/IIA>.

⁷⁸ See generally Laryea E 'Evolution of international investment law and implications for Africa' in Botchway FN (ed) *Natural resource investment and Africa's development* (2011).

⁷⁹ UNECA 16-17, noting that the IIAs affords more rights to foreign investors at the detriment of host states and reducing potential benefits for Africa.

⁸⁰ Ofodile UE 'Africa-China bilateral investment treaties: A critique' (2013) 35 *Michigan Journal International Law* 206 (hereinafter Ofodile).

support of such treaties, as it inhibits governments' ability to pursue their public policy and development objectives.⁸¹

The conclusion of IIAs was motivated by many reasons and circumstances which have conceivably informed the nature and text of such agreements.⁸² For example, immediately in the post-independence era, low levels of development in African countries as well as the severe economic conditions, abject poverty and high unemployment triggered countries to attract FDI by all possible means.⁸³ African countries concluded BITs without prudent analysis and reflection of their provisions and at the same time, developing countries lacked sufficient capacity in negotiating public policy and development issues into these IIAs, and analysing the practical legal and policy consequences of negotiating such agreements.⁸⁴ BITs were widely perceived by African countries as an essential tool for attracting FDI from the developed nations,⁸⁵ and such FDI would enhance their economic growth and development, inject capital into their local industries as well as fight poverty and unemployment.⁸⁶ BITs were also used by developing countries as economic

⁸¹ Cotula (2014) 20

⁸² See Dagbanja DN 'The limitation on sovereign regulatory autonomy and internationalisation of investment protection by treaty: An African perspective' (2016) 60 *Journal of African Law* 56, contending that in order to ascertain the reason why IIAs limit regulatory authority and to reform an investment treaty regime that response to the needs of both foreign investors and host states, 'it is necessary to revisit the history of investment protection by treaty and assess the terms of investment treaties in relation to that history.'

⁸³ Desierto (2015) 1020. See also Guzman A 'Why LDCs sign treaties that hurt them: Explaining the popularity of bilateral investment treaties' (1998) 38 *Virginia Journal of International Law* 688.

⁸⁴ Yazbek N 'Bilateral investment treaties: The foreclosure of domestic policy space' (2010) 17 *South African Journal of International Affairs* 103 (hereafter Yazbek (2010)).

⁸⁵ Johnson AR 'Rethinking bilateral investment treaties in Sub-Saharan Africa' (2010) 59 *Emory Law Journal* 919 (hereinafter Johnson (2010)). The linkage between the IIAs and investment inflows in Africa is unclear. Some scholars have recorded that most of Africa's investment comes from countries with which it has no IIAs including China, India and Brazil, rather than its western partners. See, for example, Ofodile (2013) 151; Hurt S 'Why South Africa has ripped up foreign investment deals' *The Conversation* 17 December 2013 available at <http://theconversation.com/why-south-africa-has-ripped-up-foreign-investment-deals-20868> (accessed 10 January 2017); De Gama M 'Draft bill no threat to foreign investors in South Africa' *Business Day Live*, 1 April 2014 available at <http://www.bdlive.co.za/opinion/2014/04/01/draft-bill-no-threat-to-foreign-investors-in-south-africa> (accessed 10 January 2017); and Khor M 'Investor treaties in trouble' *The South Centre Blog*, 24 March 2014 available at <http://blog.southcentre.int/2014/03/investor-treaties-in-trouble> (accessed 10 January 2017).

⁸⁶ Salacuse JW & Sullivan NP 'Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain' (2005) 46 *Harvard International Law Journal* 67 (hereinafter Salacuse & Sullivan (2005)). See also Boone J 'How developing countries can adapt current bilateral investment treaties to provide benefits to their domestic economies' (2011) 1 *Global Business Law Review* 187, indicating that the driving force behind BITs was 'to facilitate... investment flows by the opening up of secure channels for foreign direct investment... stabilising the investment climate, granting protective investment guarantees, and providing neutral dispute mechanisms for "injured" investors'.

diplomacy tools to foster better relations with other countries, particularly industrialised countries.⁸⁷

On the other hand, developed countries concluded BITs because they were primarily 'interested in the protection that these treaties offer to their investors operating in host developing countries'.⁸⁸ As a consequence, emphasis has been placed on promoting IIAs as tools for 'investor protection' with proposals to incorporate regulatory space or development considerations in the investment legal framework being viewed as an impediment to investor protection and promotion.⁸⁹ However, the perception that public policy space is a barrier to free trade and investment might not, in principle and in practice, be correct as the right to regulate and development goals have been reasonably extended into trade and investment treaties.⁹⁰ Further, BITs were designed and provided by developed countries⁹¹ and African countries were merely investment rule consumers.⁹²

However, despite signing a large bulk of BITs and receiving voluminous FDI inflows into the continent for decades,⁹³ the envisaged social and economic development impact of foreign investment in Africa is debatable.⁹⁴ In reality, little has been proven about the role FDI and BITs have played in enhancing the much-needed social and economic development in the continent.⁹⁵ In fact, poor economic growth and development, extreme poverty and high levels of unemployment are still rampant in

⁸⁷ Salacuse & Sullivan (2005) 72.

⁸⁸ Van Duzer A, Simons P & Mayeda G *Integrating sustainable development into international investment agreements: A guide for developing country negotiators* (2013) 1 (hereafter Van Duzer et al (2013)). See also Fox G 'A Future for international investment? Modifying BITs to drive economic development' (2014) 46 *Georgetown Journal of International Law* 229 (hereafter Fox (2014)).

⁸⁹ Fox (2014) 229-59. See also Johnson (2010) 932.

⁹⁰ See generally Desierto (2014); and Wagner (2014).

⁹¹ See Layrea ET & Sucker F 'The important of an African voice in, and understanding and use of, international economic law' in Layrea ET, Madolo N & Sucker F (eds) *International economic law: Voices of Africa* (2012) 10 (hereinafter Layrea & Sucker (2012)). See also Vandeveldt KJ 'A brief history of international investment agreements' in Sauvart KP & Sachs LE (eds) *The effect of treaties on foreign direct investment: Bilateral investment treaties, double taxation treaties, and investment flows* (2009) 13-35.

⁹² See Alschner W & Skougarevskiy D 'Rules takers or rule makers? A new look at African bilateral investment treaty practice' (2016) Swiss National Centre of Competence in Research Working Paper No. 7.

⁹³ FDI inflows in Africa have surged in the last decade. See UNCTAD statistics available at <http://unctadstat.unctad.org/> (accessed 12 January 2017)

⁹⁴ UNECA (2016) 40.

⁹⁵ See Johnson (2010) 932, noting that FDI and BITs appear to have failed in Africa. For a detailed discussion, see Kaulihowa T *Foreign direct investment and welfare dynamics in Africa* (PhD thesis, Stellenbosch University, 2017); and Cleeve EA, Debrah Y & Yiheyis Z 'Human capital and FDI inflows: An assessment of the African case' (2015) 74 *World Development* 1-14.

Africa.⁹⁶ The question that therefore arises is: why did FDI not enhance economic development, job creation and alleviate poverty in Africa? The answer lies in part in interrogating and reconsidering the existing international investment framework governing foreign investment for Africa.⁹⁷

It is submitted that the developmental effects associated with FDI do not accrue automatically to the host economy. Instead, investment laws and policies including IIAs, among other things,⁹⁸ ought to be harnessed as a complementary component of the broader and more integrated development strategy needed by the host nation. In light of this argument, it is viable to argue that the existing international investment policy for Africa is not capable of translating the benefits of FDI into the host economies.⁹⁹ This means that Africa needs a new narrative of international investment law approach. The continent needs an international investment law framework that thoroughly and carefully captures development objectives and reserves regulatory space for host states to pursue their public policy or development goals. In a similar vein, the United Nations Economic Commission for Africa (UNECA) has recommended that African countries, when negotiating IIAs, should 'ensure that a balance is struck between protecting the investors and giving government sufficient policy space to achieve development objectives.'¹⁰⁰ The proposal to establish an African international investment legal framework preserving public policy space has also been of concern in recent African Union (AU) political dialogues.¹⁰¹ The AU has placed emphasis on the need for an international investment legal regime that fosters

⁹⁶ See World Bank 'World Bank data: World development indicators & global development finance' 2017 <http://databank.worldbank.org> (accessed 22 January 2019). See also United Nations Development Programme 'Human Development Index' available at <http://hdr.undp.org/en/content/human-development-index-hdi> (accessed 22 January 2019).

⁹⁷ The answer also lies in fostering good governance, investment regulation and national development priorities.

⁹⁸ It is submitted that IIAs alone do not foster development in Africa, but rather other avenues including attracting development oriented FDI, and addressing infrastructure and political challenges ought to be considered.

⁹⁹ The reasons for Africa's underdevelopment are numerous and include colonialism, political instability, poor and inappropriate policies, limited human capacity, and the workings of the international economic system. Equally, bad governance has been identified as the most important factor that holds back Africa's development. African leaders themselves have recently acknowledged that indeed bad governance in many countries has hampered development efforts.

¹⁰⁰ UNECA (2016) xii.

¹⁰¹ See, for instance, AU A *Concept Note to Initiate a Dialogue on the International Investment Agreements among the African Union Members August 2013. Eighth Ordinary Session of the Conference of AU Ministers of Trade, 21–25 October (2013)* and AU *Report of the Meeting of Trade Senior Officials. Eighth Ordinary Session of the Conference of AU Ministers of Trade, 21–23 October (2013)* (hereafter AU (2013)). This dialogue was spearheaded by AU Ministers of Trade.

the continent's industrialisation and socio-economic transformation process, and importantly one that preserves the government authority to pursue public policy or development objectives.¹⁰²

It is in this context that the AU¹⁰³ and some African regional organisations particularly the Common Market for Eastern and Southern Africa (COMESA),¹⁰⁴ the Southern African Development Community (SADC),¹⁰⁵ the East African Community (EAC)¹⁰⁶ and the Economic Community of West African States (ECOWAS)¹⁰⁷ have designed regional investment policies or agreements which attempt to formulate regulatory freedom.¹⁰⁸ These policies and agreements are a commendable effort by African countries to safeguard their policy space in the international investment regulatory framework.¹⁰⁹ Nevertheless, critics argue that the approach adopted in these regional agreements is weak in leveraging and consolidating the policy space for host states in the international investment law of Africa. Adeleke, for instance, warns that 'African states need to be careful about the development of regulation that ensures the attraction of the right kind of investment and sufficient safeguards are in place to maximise the benefits of such investment for the public interest'.¹¹⁰ UNECA has critiqued that some of the initiatives 'are not binding and a few countries pay more than lip service to them'.¹¹¹ De Brabandere has noted that African states do not make use of their own Model BITs but use the European or North-American Model BITs when negotiating IIAs.¹¹² In addition, the implementation of some of the binding investment treaties have been awaiting ratification for over a decade, and their ultimate

¹⁰² AU (2013).

¹⁰³ See Pan-African Investment Code, 2016.

¹⁰⁴ See the Investment Agreement for the COMESA Common Investment Area, 2007 as revised in 2017.

¹⁰⁵ See the SADC Model BIT Template, 2012, and the SADC Protocol on Finance and Investment (SADC FIP), 2006 as amended in 2016.

¹⁰⁶ See the EAC Model Investment Code, 2006.

¹⁰⁷ See the Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with the ECOWAS, 2008.

¹⁰⁸ This is elaborated in chapter 5.

¹⁰⁹ Adeleke F *International investment law and policy in Africa: Exploring a human rights based approach to investment regulation and dispute settlement* (2018) 163 (hereinafter Adeleke (2018)).

¹¹⁰ Adeleke (2018) 164.

¹¹¹ UNECA (2016) 23.

¹¹² De Brabandere E 'Fair and equitable treatment and (full) protection and security in African investment treaties: Navigating between generally and contextual specificity' (2017) 18 *Journal of World Investment & Trade* 530-1 (hereinafter De Brabandere (2017)).

implementation may take time. All these problems warrant deeper understanding of this study and rethinking Africa's international investment law.

1.3 RESEARCH QUESTIONS

From the above analysis, it can be argued that safeguarding the regulatory autonomy of host states in the realm of international investment law gives host governments the flexibility to pursue their public policy objectives without risk or fear of violating their investment treaty obligations.¹¹³ It also allows host states to regulate foreign investment in accordance with public interest or national development objectives and control the negative effects of foreign investment activities.¹¹⁴

To that end, the key questions posed by this study are:

- Are there any binding standards or legal obligations at international level on the inclusion of public policy space in IIAs?
- What are the practical effects of incorporating the right to regulate in IIAs?
- To what extent does the existing international investment law regime of Africa accommodate the right to regulate of the host governments?
- How can African countries entrench their right to regulate in their international investment law?
- How to strike an appropriate balance between the right to regulate and the protection of investors and their investments in international investment law?

1.4 RESEARCH OBJECTIVES

The main objective of this study is to explore how Africa's international investment law regime constrain policy space and recommend how African countries can adequately entrench their right to regulate in such regime. For that reason, the following are the specific objectives of this study:

- To determine whether the existing international legal framework of Africa adequately safeguards the right to regulate.
- To determine whether there are any international law obligations that compel African countries to reserve their regulatory space of manoeuvre.

¹¹³ Mouyal (2016) 8-9.

¹¹⁴ Mann (2002) 10.

- To identify the legal, social and economic effects of preserving policy space in the international investment regulatory framework.
- To assess the existing problems and opportunities available for African countries to incorporate the right to regulate in international investment law.
- To devise strategies that African countries could employ when striking a balance between policy space and investment protection.

1.5 SIGNIFICANCE OF THE STUDY

The study is significant for a number of reasons. First, the African leaders, regional organisations, governments, NGOs and scholars are questioning the protection of policy space in the existing international investment law. Accordingly, they are calling for the reconsideration of the existing international investment law so that it can allow governments to exercise their right to regulate pursuant to their public policy and is capable of supporting sustainable development across the continent in line with the AU Agenda 2063.¹¹⁵ The entrenchment of the right to regulate in the international investment legal framework has a bearing on the realisation of sustainable development.¹¹⁶ The realisation of sustainable development is particularly important considering that the United Nations (UN) Agenda 2030 for Sustainable Development¹¹⁷ has become a guiding paradigm of international economic policy and foreign investment as a vehicle for financing the realisation of Sustainable Development Goals.¹¹⁸

Equally important, African countries are currently in the process of negotiating the Agreement establishing the African Continental Free Trade Area (AfCFTA), the Agreement establishment the Tripartite Free Trade Area (TFTA) and the Economic

¹¹⁵ Agenda 2063 is the AU's strategic framework or blueprint for Africa's inclusive growth and sustainable development over the next 50 years. More information on the AU Agenda 2063 is available at <https://au.int/en/agenda2063>.

¹¹⁶ See, generally, Dubava I *Reconciling international investment law and sustainable development with respect to host state's right to regulate: The legal impact of sustainable development objective on indirect expropriation standard and its legitimate expectations sub-element* (PhD thesis, European University Institute, 2013). This is further discussed in part 4.2.1.

¹¹⁷ Agenda 2030 was adopted by the UN leaders in September 2015. It mainly aims to eradicate poverty, reduce inequalities and unemployment, tackle climate change and ensure inclusive and sustainable development, among other goals. More information on the UN Agenda 2030 is available at <https://www.un.org/sustainabledevelopment/development-agenda/>.

¹¹⁸ Sauvart KP 'Promoting sustainable FDI through international investment agreements' (2019) Columbia FDI Perspectives No. 251 1.

Partnership Agreements (EPAs) with the European Union (EU), all of which envision investment protocols in their frameworks. Furthermore, some African countries are – individually or collectively – reviewing their traditional international investment policy frameworks or are in the process of negotiating new IIAs with their trade and investment partners. This is therefore an opportune time to think of an appropriate investment regulatory framework that addresses the abovementioned concerns of the African leaders. Recommendations of this study would be helpful in this regard.

In addition, the study contributes to the existing literature proposing for the reform and establishment of an international investment law framework which reserves policy space for host governments while at the same time protecting foreign investors and investments. Under such a framework, governmental actions or regulations taken in the name of public interest or policy cannot amount to an actionable breach of investment protection standards embedded in IIAs. A balanced investment regime would be attractive to both foreign investors and host states and can go a long way in sustaining or restoring the legitimacy of international investment law which is under threat.

However, as noted earlier, much of the debate that has evolved over the years has only focused on encouraging the inclusion of regulatory freedom in Africa's international investment law framework. Legal scholars, academics and policy makers have not yet demonstrated how African countries can adequately carve out their regulatory space in IIAs. Scholars are yet to systematically determine the challenges and opportunities of this inclusion. Not to mention that they are yet to demonstrate how to entrench policy space in the investment legal framework of Africa.

The study therefore attempts to fill this gap by addressing these issues. If these issues are addressed satisfactorily, this study can go a long way in contributing to the debate of incorporating policy space issues in the international investment legal framework and restore the support of international investment law among the public, civil society and other stakeholders in Africa and beyond.

The study will not only provide an appraisal of Africa's international investment legal framework for Africa but also serve as a reference tool for African states already negotiating or reviewing IIAs or adopting their national investment policies. The study will also serve as a reference tool for academics, scholars and international investment

law and policy makers on how to preserve policy space within the domain of international investment legal framework. Thus, contributing to a better understanding of the concept and broader discourse on how to enhance regulatory space for host states in the international investment legal framework.

Overall, the analysis in this study will be used to demonstrate how a continent or country with abundance of natural resources, large inflows of FDI and possibly several IIAs can end up with poor human, social and economic development, if the regulatory framework for investment is not designed in a such way that allows host governments to regulate investments in accordance with their national development priorities.

1.6 RESEARCH METHODOLOGY

This study employs various research methods to address the research questions and objectives stated above.

The study adopts a qualitative desktop research mainly based on literature review and analysis of primary and secondary sources. Primary sources are in the form of international, regional and national legal and policy instruments as well as the official government documents, policies or regulations. Secondary sources include case law, books, peer-reviewed journal articles, discussion and working papers, legal commentaries and online resources, among others.

The study also utilises a legal historical approach to trace the evolution of international investment law and ascertain the integration of the right to regulate within international investment law.

International investment law is multidisciplinary. It combines several academic disciplines including law, economics and sociology. As such, this study adopts an analytical inter-disciplinary approach that involves the application of purely legal, economic and socio-legal approaches to the subject of the thesis. Analyses are both normative and conceptual.

Although a strict comparative analysis and approach was not undertaken in this study, it was employed to draw from other similarly placed jurisdictions or international investment instruments to draw some lessons. The purpose of such comparative analysis in this study was to draw some lessons and use such jurisdictional perspectives or international investment instruments, as persuasive authorities in

entrenching the right to regulate within the realm of international investment legal framework for Africa.

1.7 LIMITATIONS AND SCOPE OF THE STUDY

It is important for the limitations and scope of this study to be clear from the outset. The debate over the reservation of regulatory space in international investment law is a long-standing issue which has been resuscitated by the erosion of sovereign right to regulate in the name of trade and investment obligations.¹¹⁹ The debate has never been an easy one to deal with. Varied opinions exist regarding the possible benefits and disadvantages of entrenching the right to regulate in the international investment legal system, where emphasis has been placed on the promotion and protection of foreign investors and investments. The challenge therefore is how to strike a balance between the protection of investment and preserving the right to regulate. There is no clear-cut answer to this complex question as the consequences of policy space may depend largely on the content and the extent of a specific investment treaty insofar as it accommodates the interests of all concerned parties (host governments and foreign investors). Regardless of this position, a solution must be found. To determine how policy space may be carved out in investment regulatory framework, several existing investment treaty models or policies have to be examined.

As noted earlier, in Africa, the debate about accommodating policy space within the parameters of the international investment law has been prominent in political discussions and not scholarly or academic works. Not much has been written in this area by legal scholars or academics and, therefore, this information is not easily obtainable.

Additionally, Africa does not yet have a continent-wide treaty binding all 55 African countries to the same rules on investment. African countries regulate foreign investment through IIAs, BITs, regional investment treaties and national legislations. These regulatory frameworks vary in scope and text. It is therefore difficult to achieve a uniform approach towards investment where countries with divergent approach towards foreign investment regulation but desire to develop an African investment

¹¹⁹ Cotula (2014) 20.

regulatory approach which reflects the continent's approach towards foreign investment regulation.

Nonetheless, this study has to draw some lessons from several international, plurilateral and mega-regional and sub-regional investment agreements/policies whose significance in international investment law is such that they may influence changes in Africa's international investment treaty practice. For example, the Model BITs of Canada and the US, investment policy frameworks of the G20, UNCTAD, OECD and IISD, as well as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),¹²⁰ the US, Mexico and Canada Agreement (USMCA).¹²¹ The study will also draw some lessons from the African regional investment agreements like the SADC FIP, the COMESA Common Investment Agreement and the ECOWAS Supplementary Act. The justification for paying particular attention to these investment treaties or policies is that they have attempted to incorporate policy space.

More importantly, some treaties and policies in this study apply directly or indirectly to African and non-African investments, trade and investment treaties or policies, and other policy areas including, *inter alia*, industrial policy, tax reforms, intellectual property rights and competition policy. Despite this, the study will be limited to the international investment legal framework applicable to Africa. The study also recognises the need for a broader perspective and discussion on relevant topics including, *inter alia*, human rights protection, sustainable development, immigration laws, international trade, regional economic integration, tax laws, political instability, corruption, adherence to rule of law; however, due to the 100 000-word limit, this study adopts a narrow approach.

¹²⁰ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 2018 (hereinafter CPTPP). The CPTPP is a comprehensive trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. The CPTPP entered into force on 30 December 2018.

¹²¹ USMCA is a comprehensive trade agreement between the US, Mexico, and Canada. It is not yet in force.

1.8 OUTLINE AND OVERVIEW OF CHAPTERS

The study consists of seven chapters:

Chapter 1 provides for the general introduction and overview for the study. It presents the contextual background to the study and conceptualises the right to regulate. Chapter 1 also identifies the research questions, objectives and methodology, and articulates the significance of the study as well as the limitations and scope of the study. Lastly, it gives the outline and a brief overview of the chapters.

Chapter 2 gives a historical account of the exclusion and integration of regulatory space in international investment law. It traces and highlights the historic antecedents that led to the evolution of international investment law. In this regard, the chapter focuses on the regulation of cross-border investment from the colonial era to immediately post-World War II to illustrate why the right to regulate was excluded in investment regulation. Thereafter, the chapter will trace historical events that have resulted in the demand to integrate policy space in international investment law.

Chapter 3 determines the existence of any binding rules or legal obligations at international level on the inclusion of the right to regulate in IIAs. The chapter thus explores CIL norms, general principles of international law, IIAs, and the existing (soft-law) instruments by international organisations such as UNCTAD, OECD and G20 relevant to the safeguard of the right to regulate in IIAs with the objective of establishing whether such norms and instruments constitute binding standards and/or normative or human rights obligations on states.

Chapter 4 examines the practical effects of incorporating the right to regulate in international investment agreements. The objective of the chapter is to determine whether there are any legal, social and economic consequences of accommodating policy space concerns in international investment regulatory framework. The chapter then unpacks the practical legal, social and economic implications for incorporating policy space within the international investment law framework with a view of justifying the inclusion of policy space in Africa's investment regulatory framework.

Chapter 5 examines the existence of regulatory freedom in the contemporary international legal framework for Africa. The chapter particularly explores and analyses the IIAs concluded by African countries at global, regional and bilateral levels (as well

as national investment policies or laws) with a view to determining whether the investment treaty practice reserves the regulatory autonomy of host states.

Chapter 6 evaluates the challenges and opportunities for incorporating policy space in the international investment legal framework for Africa.

Chapter 7 summarises the main findings and draws conclusions to the thesis. Based on contextual factual and legal discussions in the previous chapters, the chapter concludes by making recommendations for the purposes of entrenching the regulatory freedom in IIAs. The chapter proposes how African countries can achieve an international investment legal framework which allows host states to pursue their public policy and national development objectives at the same time protecting investments. Chapter 7 contains an annexure (Annex to Chapter 7) which consists of a proposed model international investment framework that safeguards the right to regulate. Annex to Chapter 7 embodies an international investment legal framework that protects foreign investment and foster sustainable development while at the same time preserving the right to regulate.



CHAPTER 2

THE EXCLUSION AND INTEGRATION OF REGULATORY SPACE IN INTERNATIONAL INVESTMENT LAW IN HISTORICAL PERSPECTIVE

2.1 INTRODUCTION

It appears that the debate about integrating the right to regulate in international investment legal framework has emerged as a modern-day discussion,¹²² yet the existence of international investment law goes back since time immemorial.¹²³ It is argued that the principal *raison d'être* of classical international investment law and investment treaties has always been to promote and protect foreign investors and their investments.¹²⁴ Accordingly, investment treaties such as international investment agreements (IIAs), mainly bilateral investment treaties (BITs), enshrined explicit legal rules stipulating state obligations to protect foreign investments and contained nothing pertaining to regulatory freedom of host states.¹²⁵ Thus, investment treaties were conceived as a legal impetus to attract and protect foreign investors and, as a result, constrained policy space for host states to regulate investments in their national interests.¹²⁶ Titi opines that states' ability to regulate in nationally sensitive areas, such as essential security and public order, human rights, sustainable economic growth, environmental protection, social and labour standards, cultural policy and the capacity to respond to situations of economic emergencies, has been limited to paving the way for investment protection.¹²⁷ This has dissuaded host governments from adopting public policy regulatory measures fearing that they could be challenged by investors before arbitral tribunals based on violation of investment-treaty obligations – the so-called regulatory chill.¹²⁸ Furthermore, arbitral tribunals brought additional concerns to

¹²² See Titi C *The Right to Regulate in International Investment Law* (2014) ch 1 (hereinafter Titi (2014)).

¹²³ For detailed account on the history and development of international investment law, see Miles K *The origins of international investment law: Empire, environment and the safeguarding of capital* (2014). See also Sornarajah M *The international law on foreign investment law* 4 ed (2017) 23-26; and Schefer KN *International investment law: Text, cases and materials* 2 ed (2016).

¹²⁴ Titi (2014) 1. See also Salacuse JW *The law of investment treaties* (2015) 2 ed 85 (hereinafter Salacuse (2015)).

¹²⁵ Spears SA 'The quest for policy space in a new generation of international investment agreements' (2010) 13 *Journal of International Economic Law* 1065 (hereinafter Spears (2010)).

¹²⁶ Titi (2014) 1. See also Spears (2010) 1065.

¹²⁷ Titi (2014) 1.

¹²⁸ See generally Tienhaara K 'Regulatory chill and the threat of arbitration' in Brown C & Miles K (eds) *Evolution in investment treaty law and arbitration* (2011). See also Brown JG 'International investment agreements: Regulatory chill in the face of litigious heat?' (2013) 3 *Western Journal of Legal Studies* 1-25.

this debate as they rarely take into consideration public interest issues when adjudicating investor-state disputes.¹²⁹ A simple analysis of such experience leads to a preliminary observation, that it has been difficult to promote the regulatory freedom of host states in the traditional international investment law. It is against this background that states have gradually begun to question the legitimacy of the conventional international investment law and look at ways in which to safeguard their regulatory autonomy within the realm of international investment law.¹³⁰

The eminence of the right to regulate in international investment law is not confined to the deficiency of policy space, regulatory chill effect nor fear of investment arbitration by host states. Instead, as Titi explains:

The rise in prominence of the right to regulate is not only due to a perceived lack of policy space and the resultant – so called – regulatory chill. The system governed by international investment law is one in constant dynamic evolution. A confluence of factors, among which novel features of this shifting landscape, have in the aggregate conduced to the right to regulate turning into veritable cornerstone of investment negotiations and constituting today a major dilemma of a make-or-break balance in international investment law. The ascent of South as a source of investment and the related blurring of the line between capital exporters and capital importers ... are two initial factors that challenge the typical role that investment treaties have up until now been purported to play; their very one-sided offer of protection to investors from the industrialised world for their overseas ventures in the developing world ceases to be the default mode. (footnotes omitted)¹³¹

In order to understand the exclusion and emergence of the right to regulate in investment law, it is necessary to conduct a brief historical overview of the international investment law: when, how and why it was developed. On this basis, this chapter gives a historical account of the exclusion and integration of the right to regulate in the international legal framework for foreign investment. The chapter proceeds by highlighting historic antecedents that led to the evolution of international investment law with a view of determining why the regulatory space was limited in international investment law. In this regard, importance will be placed on developments relating to

¹²⁹ Korzun V 'The right to regulate in investor-state arbitration: Slicing and dicing regulatory carve-outs' (2017) 50 *Vanderbilt Journal of Transnational Law* 355-414. See also Adeleke F 'Human rights and international investment arbitration' (2016) 32 *South African Journal of Human Rights* 48-70.

¹³⁰ Titi (2014) 1. See also Spears (2010) 1065.

¹³¹ Titi (2014) 19-20.

the history of cross-border investment during the colonial era to post-World War II – when efforts began in earnest to establish international investment standards, the result of which was the signing of first BITs in the late 1950s.¹³² The principal purpose of adopting such an approach is to ascertain the mischief that led to non-inclusion of the right to regulate in investment treaties and the circumstances that eventually gave rise to the contemporary debate pushing for the safeguarding of the right to regulate in international investment treaty practice. The ultimate purpose of this chapter is to elucidate the idea that the question of regulatory space in international investment law is not only relevant to Africa. Instead, it is a universal phenomenon that has been elicited by the political and economic history and evolution of international investment law.

Following this introductory part, the chapter is divided into three parts: The first part briefly explores the historical origin of international rules governing foreign investment – international investment law. This part slightly departs from textual-formalistic reading and interpretation of law but presents a historical account of international political economy and international relations that brought about the international rules on foreign investment. The second part succinctly traces the right to regulate or regulatory space of host states in the existing classical international investment law. In this respect, focus will be placed on the evidence and form of the right to regulate enshrined in traditional international investment law. The last and third part chronicles the contemporary systematic demands to entrench the right to regulate in the international investment law legal framework. To that end, the third part will record some of the major political and investment policy discussions that have evolved at global, regional and national levels as to the relevance of accommodating the regulatory freedom of host states in the international investment law regime.

¹³² The first ever BIT was signed between Germany and Pakistan in 1959. This BIT was later repealed and replaced by the Germany-Pakistan BIT, 2009.

2.2 HISTORICAL ORIGIN OF INTERNATIONAL INVESTMENT LAW

As alluded earlier, international investment law can be traced back since time immemorial. There have been divergent views among mainstream international investment law scholars on the historical evolution of the international law governing foreign investment.¹³³ For this reason, one would agree that providing a reasonably chronological and comprehensive summative account of the origin of international investment law can be a strenuous and complex undertaking. Nonetheless, this chapter has adopted an approach which will identify and succinctly discuss notable historical antecedents or circumstances that have resulted in the establishment of contemporary international rules governing foreign investment. As already highlighted, the overall aim of the discussion in this chapter, as noted above, is to reveal historical experiences that led to the exclusion of the right to regulate in international investment law and the quest for including it in the contemporary international investment legal framework. Quite important in this regard is that, in the discipline of foreign investment regulation, past circumstances are critical to comprehending the present clash of public and private interests in international investment law, the universal design of international investment dispute settlement, the core purpose of investment law principles, and, ultimately, the treatment of investment and non-investment issues within international investment law.¹³⁴ Albeit some scholars argue that international rules governing foreign investment existed in the pre-colonial era,¹³⁵ and received minimal scholarly attention,¹³⁶ this part of the chapter will therefore proceed by exploring international rules on foreign investment in the colonial era.

¹³³ See, for example, Salacuse (2015); Salacuse JW *The three laws of international investment: National, contractual, and international frameworks for foreign capital* (2014) part iv; Douglas Z, Pauwelyn J & Vinuales JE (eds) *The foundations of international investment law: Bringing theory into practice* (2014); Miles K *The origins of international investment law: Europe, environment, and the safeguarding of capital* (2013) (hereinafter Miles (2013)); Brown C & Miles K (eds) *Evolution in investment treaty law and arbitration* (2011); Reinisch A & Knahr C (eds) *International investment law in context* (2008); and Sornarajah M *The international law on foreign investment* (1994).

¹³⁴ Miles (2014) 1.

¹³⁵ See Schefer KN *International investment law* (2013) 5 (hereinafter Schefer (2013)), maintaining that there are centuries that went into global investment law but never received scholarly attention. See also Bishop RD, Crawford J & Reisman M (eds) *Foreign investment disputes, cases, materials and commentary* (2005) 2, affirming the existence of international law on investment during the ancient Egypt, Mediterranean empires and ancient empires of the now China, India and Middle East.

¹³⁶ Schefer (2013) 5.

2.2.1 Colonial period (1600s-1950s)

There is a general consensus among mainstream investment law scholars that international rules on foreign investment emerged 'in the quest for imperial control over the resources and persons of the colonised world'.¹³⁷ Miles perceives that the 'history of colonialism, the calculated, often brutal, use of force, and the manipulation of legal doctrines to acquire commercial benefits ... drove the construction of the international investment law'.¹³⁸ Newcombe and Paradell are of the view that 'much of the expansion of international trade and investment in the eighteenth, nineteenth and twentieth centuries occurred within colonial political and legal regimes'.¹³⁹ The scholars further concur that during this period, imperialists needed access to 'international law processes because political and military power protected colonists and their property from local interference or control'.¹⁴⁰ Moreover, the extra-territorial jurisdiction principle¹⁴¹ allowed foreign powers to apply their laws to their nationals in foreign states.¹⁴² The principle was prominent in China, Japan, Thailand, Iran, Egypt, Morocco, Turkey, Asia and other parts of the Ottoman Empire.¹⁴³

Prior to the colonial era, the European countries had already developed rules on the protection of foreign-owned property within their jurisdictions or treaties with each other.¹⁴⁴ As Adeleke argues 'international rules on the protection of foreign-owned property originated in Europe where there were reciprocal arrangements by European states to secure similar standards of treatment for their citizens investing in other European states'.¹⁴⁵ As an example, Dutch Republic and Spain signed the Peace of

¹³⁷ Schneiderman D & Miles K 'The origins of international investment law: Empire, environment, and the safeguarding of capital' (2014) 25 *European Journal of International Law* 942 945 (hereinafter Schneiderman & Miles (2014)).

¹³⁸ Miles (2013) 32.

¹³⁹ Newcombe & Paradell (2009) 10. See also Lipson C *Standing guard: Protecting foreign capital in the nineteenth and twentieth centuries* (1985) 11-12.

¹⁴⁰ Newcombe & Paradell (2009) 10. See also Sornarajah M *The international law on foreign investment* 2 ed (2004) 19-20.

¹⁴¹ The extra-territorial jurisdiction principle gives governments legal ability to apply their national laws in external territories. The external territory must agree to the application of the national laws of such governments. For an extensive discussion, see Rynjaert C *Jurisdiction in international law* 2 ed (2015) ch 4.

¹⁴² Newcombe & Paradell (2009) 11.

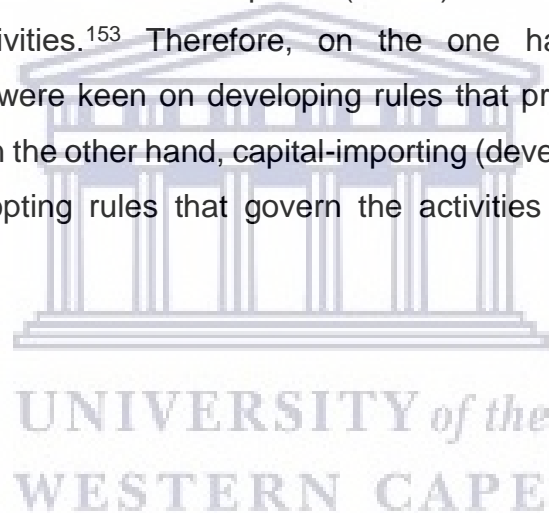
¹⁴³ Newcombe & Paradell (2009) 11.

¹⁴⁴ Miles K 'International investment law: Origins, imperialism and conceptualising the environment' (2010) 21 *Colorado Journal of International Environmental Law & Policy* 3 (hereinafter Miles (2010)).

¹⁴⁵ Adeleke F *International investment law and policy in Africa: Exploring a human rights based approach to investment regulation and dispute settlement* (2018) 5.

Münster Treaty¹⁴⁶ which focused on the protection of merchants in each other's territories. In the same vein, the European Peace of Westphalia treaties¹⁴⁷ contained clauses establishing the restitution of private goods. These rules began to spread beyond Europe during the seventeenth century following the global expansion of European trade and investment activities.¹⁴⁸ This was done to further European political and commercial interests abroad.¹⁴⁹ Thus, the rules became embedded in the processes of colonialism and protection of commercial interests.¹⁵⁰ The expansion of European businessmen across the world, alongside the desire by their home government to protect their commercial interests saw the emergence and development of Eurocentric international investment law.¹⁵¹

In addition, the seventeenth century is very prominent for the expansion of cross-border transactions by multinational enterprises (MNEs).¹⁵² At the time, rules evolved to govern MNEs' activities.¹⁵³ Therefore, on the one hand, capital-exporting (developed) countries were keen on developing rules that protect their enterprises investing abroad, yet, on the other hand, capital-importing (developing) countries were so concerned with adopting rules that govern the activities of MNEs within their territories.¹⁵⁴



¹⁴⁶ Peace of Münster Treaty, 1648.

¹⁴⁷ Peace of Westphalia treaties are a series of post-war peace treaties signed between May and October 1648 in the Westphalian cities of Osnabrück and Münster, effectively ending the European wars of religion.

¹⁴⁸ See De Luca A 'The legal framework for foreign investments in the EU: The EU internal market freedoms, the destiny of member states' BITs, and future European Agreements on protection of foreign investments' in Trakman L & Ranieri N (eds) *Regionalism in international investment law* (2013) 120 (hereinafter De Luca (2013)). For instance, the Treaty of Amity and Commerce between France and the United States from 1778 focused on the protection of vessels in each other's territory.

¹⁴⁹ Miles (2013) 2.

¹⁵⁰ Miles (2013) 2.

¹⁵¹ See Miles K 'Imperialism, Eurocentrism and international investment law: Whereto from here for Asia?' (2012) Submission for the Second Biennial General Conference of the Asian Society of International Law available at http://asiansil-jp.org/wp/wp-content/uploads/2012/07/kate_miles.pdf (accessed 17 April 2017) (hereinafter Miles (2012)).

¹⁵² See Wilkins M 'The history of multinational enterprise' in Rugman AM (ed) *The oxford handbook of international business* 2 ed (2008) (hereinafter Wilkins in Rugman (2008)). The British East India Company and the Dutch East India Company were identified as the first MNEs to invest abroad in the seventeenth century.

¹⁵³ See Wilkins (2008).

¹⁵⁴ See Wilkins (2008).

During the eighteenth century, rules pertinent to investment were contained in the Treaties of Friendship, Commerce and Navigation (FCN treaties),¹⁵⁵ which were intended to establish trade relations between the United States (US) and its trading partners. Although the FCN treaties mostly, as the name suggests, dealt with commercial and navigation matters the treaties also required parties thereto to uphold certain minimum standards with respect to the treatment of foreign investors.¹⁵⁶ In particular, the FCN treaties incorporated provisions providing for: special protection, full and perfect protection of the foreign-owned property;¹⁵⁷ payment of compensation for expropriation;¹⁵⁸ most-favoured-nation treatment and national treatment with respect to the right to engage in certain business activities in the territory of the other party;¹⁵⁹ and sometimes, protection of currency transfers.¹⁶⁰

The proliferation of FCN treaties in the colonial times evolved simultaneously with the emergence of demands for a minimum standard of treatment for foreign investors. The quest for minimum treatment standards was initially reinforced by the judgments of the Permanent Court of International Justice (PCJ) in *Mavrommatis Palestine Concessions*,¹⁶¹ *Case Concerning Certain Germany Interests in Polish Upper*



¹⁵⁵ FCN treaties are bilateral treaties concluded to facilitate commerce, navigation, and investment between the states parties and reciprocally to protect individuals and businesses. The first FCN treaty was between the United States and France on 6 February 1778. After that many FCN treaties were negotiated by the US with its several trading partners. For a detailed discussion on FCN, see Paulus AL 'Treaties of friendship, commerce and navigation' in Wolfrum R (ed) *The Max Planck Encyclopedia of public international law* (2012); Silver GD 'Friendship, commerce and navigation treaties and United States discrimination law: The right of branches of foreign companies to hire executives "of their choice"' (1989) 57 *Fordham Law Review* 765-784; and Coyle JF 'The treaties of friendship, commerce and navigation in the modern era' (2013) *Columbia Journal of Transitional Law* 302-359.

¹⁵⁶ See Walker H 'Treaties for the encouragement and protection of foreign investment: Present United States practice' (1956) *The American Journal of Comparative Law* 229-247 (hereinafter Walker (1956)); and Salacuse JW 'BIT by BIT: The growth of bilateral investment treaties and their impact on foreign investment in developing countries' (1990) 24 *International Lawyer*. To understand the origins of international investment law, see Miles (2013).

¹⁵⁷ For example, Art IX of the US-Paraguay FCN Treaty, 1859; Art VII of the US-Argentina FCN Treaty, 1853; and Art VII of the US-Costa Rica FCN Treaty, 1851.

¹⁵⁸ For example, Art III of US-Congo FCN Treaty, 1891; and Art IX of the US-Nicaragua FCN Treaty, 1867.

¹⁵⁹ For example, Art I of the US-Yugoslavia FCN Treaty, 1881 (. For more examples of MFN provisions in FCN, see Ziegler AR 'Most-favoured-nation treatment' in Reinisch A (ed) *Standards of investment protection* (2008) 62-63.

¹⁶⁰ For example, Art II of the US-Yugoslavia FCN Treaty, 1881.

¹⁶¹ *Mavrommatis Palestine Concessions* (1924) Permanent Court of International Justice Ser.A, No. 2, where the PCJ reaffirmed that diplomatic protection is 'an elementary principle of international law'.

*Silesia*¹⁶² and *Case Concerning the Factory of Chorzow*.¹⁶³ There was a debate as to the minimum standard of treatment of foreign nationals. This debate enlightens the fundamental breakpoint in the history of international investment law – the tension or divide between developed countries and developing countries. On the one hand, developed countries, specifically European nations and the US insisted that there was an existing customary international law (CIL) minimum standard on the treatment of foreign investments.¹⁶⁴ This minimum standard would grant foreign investors absolute protection under which international law and diplomatic protection would be invoked in their defence.¹⁶⁵ This essentially would mean that the protection of foreign investments would be guaranteed by international law rules and not by the laws of host states. In other words, the power of host states to regulate foreign investments was taken away from the domains of their national laws and placed into the scope of international law.

On the contrary, developing countries, particularly Latin American countries opposed the recognition of such standard and declared their intention to adhere to the Calvo standard of treatment.¹⁶⁶ The doctrine was developed by Carlos Calvo, a jurist from Argentina, and it required foreign nationals to be accorded the same level of protection that nationals obtained from their respective legal systems.¹⁶⁷ Consequently, several Latin American countries adopted the Calvo doctrine into their national laws and constitutions declaring their legal position towards an international minimum standard of treatment for foreign investors.¹⁶⁸ From a general point of view, it may be submitted

¹⁶² *Case Concerning Certain Germany Interests in Polish Upper Silesia (Germany v Poland)* Permanent Court of International Justice Ser.A, No. 7, where the PCJ held that rights of foreign nationals must be respected., paras 22 and 42.

¹⁶³ *Case Concerning the Factory of Chorzow (Claim for Indemnity) (Germany v Poland)* (1928) Permanent Court of International Justice Ser.A, No. 17, where the PCJ held that an illegal seizure of property requires reparation, para 47.

¹⁶⁴ Schefer (2013) 272. See also Brownlie I *Principles of public international law* (1998) 527-528.

¹⁶⁵ To understand the CIL minimum standard, see *United States of America (LF Neer) v United Mexican States* (1926) United Nations Reports of International Arbitral Awards 60; *Roberts v United Mexican States* (1926) 4 United Nations Reports of International Arbitral Awards 77; OECD Directorate for Financial and Enterprise Affairs *Fair and equitable treatment standard in international investment law*. Working Papers on International Investment (2004) 8; and Borchard E 'Minimum standard of the treatment of aliens' (1940) 38 *Michigan Law Review* 445-461.

¹⁶⁶ Shea DR *The Calvo Clause: A problem of inter-American and international law and diplomacy* (1955) 17-19 (hereinafter Shea (1955)). See also Hackworth GH 'Responsibility of states for damage caused in their territories to the persons and properties of foreigners' (1930) 24 *American Journal of International Law* 517 (hereinafter Hackworth (1930)).

¹⁶⁷ Shea (1955) 17-19.

¹⁶⁸ Schefer (2013) 272.

that the legal position espoused in the Calvo doctrine somewhat reflects developing countries' regulatory autonomy in investment law.¹⁶⁹

As the debate intensified in the 1920s, concerted efforts were made by the League of Nations,¹⁷⁰ through its Committee of Experts for the Progressive Codification of International Law, to codify the treatment standards. The Committee prepared and submitted a draft proposal to the League of Nations at its First Conference on the Codification of International Law on the Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners, held at Hague in April 1930. However, at the Conference, developing countries maintained the position that foreign nationals ought to be afforded the same treatment and protection as local citizens, while developed countries favoured the recognition of the CIL minimum standard.¹⁷¹ States could not agree on common legal rules and standards for treatment of foreign investment and, consequently, no agreement was reached on the principles of state responsibility and no convention was adopted.¹⁷² Furthermore, in the late 1920s and early 1930s, subsequent series of attempts were made to conclude a Convention on the treatment of foreigners under the auspices of the League of Nations, but failed.¹⁷³ Eventually, at the Seventh Pan-American Conference held at Montevideo in 1933, the Convention on the Rights and Duties of States was adopted,¹⁷⁴ which reaffirmed the minimum standard of treatment of foreign nationals in line with the Calvo doctrine.¹⁷⁵ However, the US and other capital-exporting states made reservations to certain

¹⁶⁹ See Vandeveld KJ 'A brief history of international investment agreements' (2013) 12 *University of California International Law & Policy* 157-194.

¹⁷⁰ The League of Nations was an international organisation established in 1919, after the Paris Peace Conference. Its main objectives was disarmament, prevention of war through collective security and settlement of inter-state disputes via negotiation diplomacy. The League of Nations was replaced by the United Nations in 1946 after World War II, which then inherited a number of the agencies and organisations founded by the League of Nations. For a comprehensive explanation about the foundation, functions and demise of the League of Nations, see generally 'History of the League of Nations (1919-1946)' available at [https://www.unog.ch/80256EDD006B8954/\(httpAssets\)/36BC4F83BD9E4443C1257AF3004FC0AE/%24file/Historical_overview_of_the_League_of_Nations.pdf](https://www.unog.ch/80256EDD006B8954/(httpAssets)/36BC4F83BD9E4443C1257AF3004FC0AE/%24file/Historical_overview_of_the_League_of_Nations.pdf) (accessed 15 June 2017).

¹⁷¹ Hackworth (1930) 57.

¹⁷² Hackworth (1930) 57.

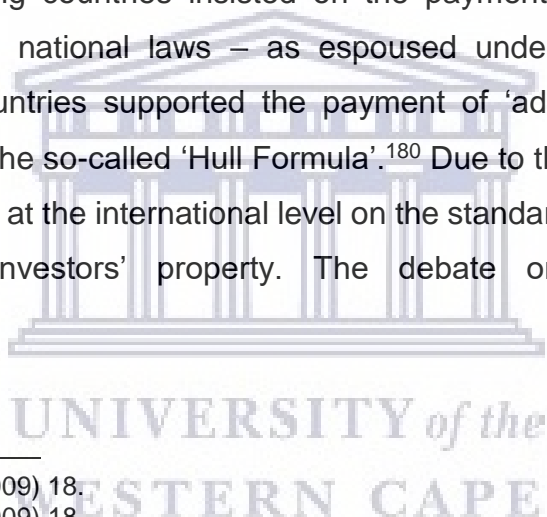
¹⁷³ See efforts, for instance, at the World Economic Conference in Geneva, 1927 and the International Conference on the Treatment of Foreigners held in Paris in 1929.

¹⁷⁴ The Convention on the Rights and Duties of States was signed by Honduras, United States of America, El Salvador, Dominican Republic, Haiti, Argentina, Venezuela, Uruguay, Paraguay, Mexico, Panama, Guatemala, Brazil, Ecuador, Nicaragua, Colombia, Chile, Peru and Cuba on 26 December 1933 and entered into force on 23 December 1934.

¹⁷⁵ Article 9 of the Convention on the Rights and Duties of States.

provisions of the Convention dealing with the minimum standard of treatment.¹⁷⁶ Despite the codification of minimum standard of treatment in the Convention on the Rights and Duties of States, it is important to mention that the dispute between developed and developing countries on the minimum standard of treatment continued to the post-colonial era and is still apparent in contemporary international investment law debate.¹⁷⁷

In the late 1930s, international rules in the context of nationalisation and expropriation of foreign-owned property evolved.¹⁷⁸ The period was marked with a series of progressive nationalisation and expropriations of foreign-owned property mainly in Mexico, Latin America as well as Central and Eastern Europe.¹⁷⁹ Again, developed and developing countries disagreed on the international standard of compensation for expropriation. Developing countries insisted on the payment of compensation for expropriation based on national laws – as espoused under the Calvo doctrine, whereas developed countries supported the payment of ‘adequate, effective and prompt’ compensation, the so-called ‘Hull Formula’.¹⁸⁰ Due to these divided opinions, there was no consensus at the international level on the standard of compensation for expropriated foreign investors’ property. The debate on compensation for



¹⁷⁶ Newcombe & Paradell (2009) 18.

¹⁷⁷ Newcombe & Paradell (2009) 18.

¹⁷⁸ See Francioni F ‘Compensation for nationalisation of foreign property: The borderland between law and equity’ (1975) 24 *The International and Comparative Law Quarterly* 255. See also Ghassemi A *Expropriation of foreign property in international law* (PhD thesis, University of Hull, 1999) ch 2; and O’Connor LA ‘The international law of expropriation of foreign-owned property: The compensation requirement and the role of the taking state’ (1983) 6 *Loyola of Los Angeles International & Comparative Law Review* 355-417.

¹⁷⁹ See Chidede T *Legal protection foreign direct investment: A critical assessment with a focus on South African and Zimbabwe* (2016) 22.

¹⁸⁰ The Hull Formula refers to the standard of “prompt, adequate and effective” compensation. It was formulated by the former US Secretary of State, Cordell Hull in 1938 in response to Mexican nationalisations in 1917. ‘Eduardo Hay and Cordell Hull, Prompt, Adequate, and Effective Payment, 1938’ available at <http://s3-euw1-ap-pe-ws4-cws-documents.ri-prod.s3.amazonaws.com/9781138824287/ch6/7. Eduardo Hay and Cordell Hull, Prompt, Adequate, and Effective Payment, 1938.pdf> (accessed 17 December 2017). For more information on the Hull Formula, see Izzeddin AKE *The Calvo doctrine and the hull formula: Prospects for harmony* (2017); *Abou Lahoud and Bounafteh-Abou Lahoud v Congo, the Democratic Republic of the Congo*, Final award, ICSID Case No ARB/10/4, IIC 637 (2014); *Bosh International, Incorporated and B&P Ltd Foreign Investments Enterprise v Ukraine*, Award, ICSID Case no ARB/08/11, IIC 565 (2012); *CME Czech Republic BV v Czech Republic, Final award and separate opinion*, (2006) 9 ICSID Rep 264, (2006) 9 ICSID Rep 412; *ConocoPhillips Petrozuata BV and others v Venezuela*, Decision on jurisdiction and merits, ICSID Case No ARB/07/30, IIC 605 (2013); *Guaracachi America Incorporated and Rurelec plc v Bolivia*, Award, PCA Case No 2011-17, IIC 628 (2014);

expropriation continued through the dawn of the post-colonial era, and still exists in modern-day investment law debate.¹⁸¹

The overall analysis of the foregoing discussion can lead to a preliminary conclusion that developing countries advocated for a legal framework on the governance of foreign investment that is based on the laws of the host state and, on the other hand, developed countries supported a legal framework that is based on international law. This essentially reveals that the appetite to regulate foreign investment in accordance with national laws have existed among developing countries during the early times of the international investment law – although it did not yield any material results.

2.2.2 Post-colonial era

The post-colonial era marked the beginning of progressive cooperation among developed and developing countries to forge international rules on foreign investment. Strenuous efforts were made during this time, but without success, to adopt multilateral investment rules within the framework of the Havana Charter,¹⁸² Abs-Shawcross Draft Convention on Investment Abroad¹⁸³ and the Declaration on the Establishment of a New International Economic Order, among others.¹⁸⁴ The failure of these efforts was largely attributed to divergent views of developing and developed countries on the interpretation of CIL as well as the scope and content of an

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¹⁸¹ See Nikiema SH 'Compensation for expropriation' (2013) *The International Institute for Sustainable Development Best Practices Series*.

¹⁸² The Havana Charter was signed in 1948 and provided for the establishment of the International Trade Organisation and set out the basic rules for international trade and other international economic matters. It never came into operation because the conditions for the entry into force, set forth in its Article 103, were not fulfilled within the prescribed time-limit. For a comprehensive discussion, see Trofimov ID 'The failure of the International Trade Organisation (ITO): A policy entrepreneurship perspective' (2012) 5 *Journal of Politics and Law* 56-68.

¹⁸³ The Abs-Shaw Draft Convention on Investment Abroad proposed a text based on the international minimum standard, including the Hull standard of compensation, which requires the payment of prompt, adequate and effective compensation for expropriation. The Convention allowed for investors to submit disputes directly to arbitration against their host states. Developing countries disagreed to such terms in late 1960s and, as a result, the Convention failed. For a detailed discussion, see Schwarzenberger G 'The Abs-Shawcross Draft Convention on Investments Abroad: A critical commentary' (1960) 9 *Journal of Public Law* 147; and Seidl-Hovenfeldern I 'The Abs-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the round table' (1961) 10 *Journal of Public Law* 100.

¹⁸⁴ The UN, General Assembly, 6th Spec Sess, Declaration on the Establishment of a New International Economic Order, Res 3201 (S-VI) (1st May 1974), Off Doc GA UN A/9559, Supp. No. 1 (1974) was based on developing countries' proposed New International Economic Order which preserved their permanent sovereignty over their natural resources, UN, General Assembly, 17th Sess, Permanent Sovereignty Over Natural Resources, Res 1803 (XVII) (14 December 1962), Off Doc GA UN A/5217, Supp. No. 17 (1963).

international minimum standard of treatment for foreign investors.¹⁸⁵ Later, in 1995, there was a further attempt to conclude a Multilateral Agreement on Investment (MAI)¹⁸⁶ under the auspices of the Organisation for Economic Cooperation and Development (OECD). However, this attempt failed due to disagreements among developed and developing countries on several issues including, *inter alia*, environment, labour standards and human rights.¹⁸⁷ Environmental, labour and human rights issues were excluded from the MAI, since the primary purpose of the Agreement was ‘to minimise state-based regulations on the ways that foreign corporations invest, to provide compensation to corporations for unfair investment conditions that result in a loss, and to provide access to international arbitration for disagreements falling under the agreement’.¹⁸⁸ In other words, the textual approach adopted in the MAI suggested that the drafters of the Agreement intended to usurp the regulation of foreign investors and investments from the authority of the host governments and place it under the domains of international arbitral tribunals.¹⁸⁹

As one would expect, non-governmental organisations (NGOs) together with other pro-public interest stakeholders heavily criticised the text of the MAI because it did not address social welfare issues.¹⁹⁰ The fact that the text of the MAI explicitly contained state obligations on foreign investment protection and did not include public interest consideration raised some concerns among NGOs, citizens and developing nations

¹⁸⁵ See Schill SW *The multilateralisation of international investment law* 2009 32-35; Hackworth (1930) 500-516; and Wilcox C *A Charter for World Trade* (1949) 145.

¹⁸⁶ Multilateral Agreement on Investment, 1995.

¹⁸⁷ Tieleman K ‘The failure of the Multilateral Agreement on Investment (MAI) and the absence of a global public policy network’ (2000) available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.627.7992&rep=rep1&type=pdf> (accessed 28 July 2017) (hereinafter Tieleman (2000)). See also Institute for International Economics ‘The MAI and the politics of failure; Who killed the dog’ available at https://piie.com/publications/chapters_preview/91/2iie2725.pdf (accessed 28 July 2017); and Compa LA ‘The Multilateral Agreement on Investment and international labour rights: A failed connection’ (1998) 31 *Cornell International Law Journal* 683-712.

¹⁸⁸ Global Nonviolent Action Database ‘International campaign against the Multilateral Agreement on Investment 1996-98’ available at <http://nvdatabase.swarthmore.edu/content/international-campaign-against-multilateral-agreement-investment-1996-98> (accessed 28 July 2017) (hereinafter Global Nonviolent Action Database International campaign against the Multilateral Agreement on Investment 1996-98’).

¹⁸⁹ See Global Nonviolent Action Database International campaign against the Multilateral Agreement on Investment 1996-98’

¹⁹⁰ See ‘Development: NGOs in OECD countries protest MAI’ (1998) available at <http://www.sunsonline.org/trade/process/followup/mai/02190198.htm> (accessed 28 July 2017).

governments, among others, who were worried about the freedom of host governments to pursue their public policy objectives.¹⁹¹

To date, there is not yet a universal and comprehensive multilateral treaty on investment. However, despite the failure to adopt universal investment rules at multilateral level, there were some significant developments made regarding the establishment of IIAs in the post-colonial era. Notable here are the establishment of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in 1958,¹⁹² the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) in 1965¹⁹³ and the Convention establishing the Multilateral Investment Guarantee Agency (MIGA Convention) in 1985.¹⁹⁴ Not surprisingly, these treaties mainly contain substantive provisions on investment protection and no connotations for public interest issues or regulatory freedom of host states. For example, the New York Convention primarily governs the recognition and enforcement of international arbitral (investment) awards, while the ICSID Convention has established the International Centre for Settlement of Investment Disputes (ICSID), a specialised facility for the settlement of investor-state and inter-state disputes. The MIGA Convention provides risk insurance to foreign investors against political risks such as expropriation, transfer restrictions, breach of contract, non-honouring of financial obligations as well as war, terrorism and civil disturbance.

It is also important to mention that some investment-related rules were ultimately incorporated in accepted international legal instruments such as the Universal Declaration of Human Rights (UDHR)¹⁹⁵ and International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁹⁶ and General Agreement on Tariffs and Trade

¹⁹¹ See Tieleman (2000) 1.

¹⁹² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

¹⁹³ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1956.

¹⁹⁴ Convention establishing the Multilateral Investment Guarantee Agency, 1985.

¹⁹⁵ Universal Declaration of Human Rights, 10 December 1948, 217 A (III) was adopted by the UN General Assembly Resolution 217 A(III) of 10 December 1948 (hereinafter UDHR). The UDHR is a non-binding instrument which has significantly informed numerous legally binding international human rights treaties.

¹⁹⁶ International Covenant on Economic, Social and Cultural Rights was adopted by the UN General Assembly Resolution 2200A (XXI) of 16 December 1966 (hereinafter ICESCR). The ICESCR entered into force on 3rd January 1976. It is legally binding international treaty to signatory states.

(GATT),¹⁹⁷ Agreement on Trade-Related Investment Measures (TRIMS)¹⁹⁸ and General Agreement on Trade in Services (GATS).¹⁹⁹ There is a vast amount of legal literature that has accumulated over the years criticising the GATT, GATS and TRIMS because they contain legal rules focusing on purely commercial or economic issues and do not consider any social issues, that is, do not safeguard public policy space.²⁰⁰ The UDHR and ICESCR espouse international rules on human rights and are not considered in the international investment arbitration by tribunals since human rights law and investment law are often treated as two separate legal systems,²⁰¹ which from a practical point of view, is certainly not the case. According to Kriebaum:

Human rights law and international investment law have developed as two separate disciplines. But, despite a certain tendency of fragmentation, these two fields of international law are not hermetically separated. They have the same common goal: the protection of the right to property, which is also a human right. Human rights have the potential to protect opposite sides in certain scenarios: they may operate in favour of investors or against them where investment operations interfere with human rights of the population of the host state.²⁰²

¹⁹⁷ General Agreement on Tariffs and Trade 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700 (hereinafter GATT 1947) was adopted in 1947 and entered in force on 1st January 1948. GATT 1947 was replaced by and incorporated into the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) (hereinafter GATT 1994). In 1955, GATT 1947 contracting parties adopted a Resolution on International Investment for Economic Development, which urged countries to conclude bilateral agreements to provide protection and security to foreign investment.

¹⁹⁸ Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 (hereinafter TRIMS). The TRIMS deals with rules or measures that a country may or may not apply to foreign investors.

¹⁹⁹ GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) (hereinafter GATS). GATS regulates trade in services and contains rules that are relevant to foreign investment, particularly on the Mode 3 services dealing with commercial presence. Article I (2) (c) of GATS. It is binding to signatories.

²⁰⁰ See, for example, Wagner M 'Regulatory space in international trade law and international investment law' (2014) 36 *University of Pennsylvania Journal of International Law* 1-87; Schill SW 'International investment law and comparative public law: An introduction' in Schill SW (ed) *International investment law and comparative public law* (2010); Warikandwa TV *Enlarging the place of human rights and development in international trade regulation: An Evaluation of the problems and prospects of incorporating a social clause in the legal framework of the World Trade Organisation* (LLD thesis, University of Fort Hare, 2012); and Overseas Development Institute 'Policy space: Are WTO rules preventing development?' (2017) *Briefing Paper* 14.

²⁰¹ See a collection of articles in Transnational Dispute Management 'Aligning human rights and investment protection' (2013) available at <http://opiniojuris.org/wp-content/uploads/tm-v10-01.pdf> (accessed 19 June 2017).

²⁰² Kriebaum U 'Foreign investments & human rights - The actors and their different roles' (2013) 10 *Transnational Dispute Management*.

In addition to abovementioned international agreements, numerous international legal instruments relevant to investment have been adopted by several international organisations. For instance, the World Bank Guidelines on the Treatment of Foreign Direct Investment,²⁰³ the OECD Convention on the Protection of Foreign Property,²⁰⁴ OECD Declaration on International Investment and Multinational Enterprises,²⁰⁵ and the UN Transnational Corporations and International Codes of Conduct,²⁰⁶ among others. The first three instruments mainly focus on what host governments ought to do to promote and protect foreign investors and investments in their territories. The UN Transnational Corporations and International Codes of Conduct provides for principles and rules governing the activities of foreign investments. A careful analysis of the Code depicts that it expresses provisions on policy space as it attempts to restrict the activities of foreign companies 'that are viewed as negative by developing countries, while promoting their contributions to economic development'.²⁰⁷ The achievement of such text should be applauded given that the Code was negotiated in a turbulent era – a period where political and economic consensus between developed and developing countries was intricate.²⁰⁸

The lack of consensus on investment rules at the international level, provoked countries worldwide to conclude investment treaties bilaterally and even regionally in the post-colonial era. For instance, the European nations, Canada, Japan and the US began to conclude BITs with developing countries. The first BIT was signed in 1959 between Germany and Pakistan, and since then BITs have multiplied considerably.

²⁰³ World Bank Guidelines on the Treatment of Foreign Direct Investment were adopted in 1992 (hereinafter World Bank Guidelines). The Guidelines aim to increase flows of private foreign investments in developing countries.

²⁰⁴ OECD Convention on the Protection of Foreign Property was adopted on 12 October 1967 by OECD member states. It sets out investment protection standards including expropriation compensation, the minimum standards of treatment and investor-state dispute settlement (ISDS) mechanism. The Convention has not yet entered in force.

²⁰⁵ The OECD Declaration on International Investment and Multinational Enterprises was first adopted by OECD member countries on 21 June 1976 and was reviewed in 1979, 1984, 1991, 2000 and 2011. The Declaration is non-binding. The Declaration focuses on what governments should do to improve the investment climate, encourage the positive contribution multinational enterprises can make to economic and social progress and minimise and resolve difficulties which may arise from their operations.

²⁰⁶ UN Transnational Corporations and International Codes of Conduct 1974 espouses the code of conduct for international investors.

²⁰⁷ Weiss TG 'The UN Code of Conduct for Transnational Corporations' in Forsythe DP (ed) *The United Nations in the world political economy. international political economy series* (1989) 86 (hereinafter Weiss (1989)).

²⁰⁸ Weiss (1989) 86.

As of beginning of 2019, there are over 3000 BITs that have been signed worldwide.²⁰⁹ Equally important is that, over the past several decades, BITs have increasingly become the primary source of international investment law.²¹⁰ Other sources of international investment law include CIL, general principles of international law, treaties and international arbitration and soft law instruments.²¹¹

At the regional level, investment rules have been enshrined in regional investment and trade agreements. Examples of regional investment agreements include, *inter alia*, the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement,²¹² Asia-Pacific Economic Cooperation (APEC) Non-Binding Investment Principles,²¹³ APEC Investment Transparency Standards,²¹⁴ the Colonia Protocol for the Reciprocal Promotion and Protection of Mercado Común del Sur (MERCOSUR) Investments,²¹⁵ Investment Agreement for the Common Market for Eastern and

²⁰⁹ UNCTAD World Investment Report 2017 (hereinafter UNCTAD (2017)).

²¹⁰ Akgul Z *The development of international arbitration on bilateral investment treaties: Disputes between states and investor, ICSID cases against Turkey regarding energy sector* (2008) 8. See also Vandeveldel JK 'Investment liberalisation and economic development: The role of bilateral investment treaties' (1998) *Colombia Journal of Transnational Law* 507-514.

²¹¹ See generally Dolzer R & Schreuer C *Principles of international investment law* 2 ed (2012) ch 2. See also Schill SW 'Sources of international investment law: Multilateralisation, arbitral precedent, comparativism, soft law' in Besson S & D'Aspremont J (eds) *The Oxford handbook of the sources of international law* (2017).

²¹² ASEAN Comprehensive Investment Agreement was signed on 26th February 2009 by and between the ASEAN member countries: Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam. It is a legal instrument to create a free and open investment regime/environment in the ASEAN economic community. It replaced the ASEAN Investment Agreement, 1987. It entered into force on 24th February 2012.

²¹³ APEC Non-Binding Investment Principles were adopted in 1994 and revised in 2011 by APEC members: Australia, Brunei Darussalam, Canada, Chile, China, Hong Kong, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Chinese Taipei, Thailand, US and Vietnam. It is not binding to member states and sets out basic investment principles.

²¹⁴ APEC Investment Transparency Standards, 2002. APEC website notes that 'in 2002, Leaders agreed to a set of General Transparency Standards that committed members to such measures as publishing all laws and regulation, and establishing appeal mechanisms for administrative decisions. In 2003 and 2004, the general standards were mapped onto specific trade policy areas involving nine sets of Area-Specific Transparency Standards, and agreement was reached on incorporating the transparency standards into Individual Action Plan (IAP) templates for annual reporting starting in 2005. At the 19th APEC Ministerial Meeting held in Sydney, Australia on 5-6 September 2007, Ministers welcomed the report on the assessment of APEC economies' implementation of APEC transparency standards and pledged to close those remaining gaps in implementation, including through targeted capacity building activities and other initiatives, where appropriate.' See APEC 'Transparency Standards' available at <https://www.apec.org/Groups/Committee-on-Trade-and-Investment/APEC-Transparency-Standards> (accessed 09 August 2017).

²¹⁵ Colonia Protocol for the Reciprocal Promotion and Protection of MERCOSUR Investments was signed in 1994. The provisions of the Protocol 'cover the following: fair and equitable treatment of foreign investors; national treatment; protection against nationalization or expropriation except for reasons relating to public or social interests; the prompt payment of just and adequate compensation; freedom to transfer in convertible currency, investment capital and profits, compensation, different payments and the remuneration of nationals of the third countries concerned; the settlement of disputes

Southern Africa Common Investment Area (COMESA Common Investment Agreement),²¹⁶ Southern African Development Community Finance and Investment Protocol (SADC FIP),²¹⁷ Economic Community of West African States (ECOWAS) Supplementary Act on Investment,²¹⁸ Arab Maghreb Union (AMU) Investment Agreement,²¹⁹ Economic and Monetary Community of Central Africa (CEMAC) Investment.²²⁰ Investment rules or provisions have been embedded in numerous mega-regional trade agreements such as the North American Free Trade Area (NAFTA),²²¹ the US, Mexico and Canada Agreement (USMCA),²²² the Comprehensive

over the interpretation and application of agreements concluded between a MERCOSUR member State and the State from which the investor originates; the settlement of disputes involving a foreign investor and the host country; and the duration of agreements. Member States have a duty to exchange information on ongoing and future negotiations concerning agreements for the promotion and protection of investment with non-member States'. MERCOSUR members include Argentina, Brazil, Paraguay and Uruguay.

²¹⁶ COMESA Common Investment Agreement was signed on 23 May 2007 by and between COMESA member states: Burundi, Comoros, D.R. Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, eSwatini, Uganda, Zambia, and Zimbabwe. It has not yet entered into force. It is intended to encourage investment into the region. Among other things, it provides for fair and equitable treatment in accordance with customary international law, national and most-favoured nation treatment of investments; allows host states to expropriate investments if it is in public interest, on a non-discriminatory basis, in accordance with due process of law, and on payment of prompt adequate compensation. The COMESA Common Investment Agreement applies to investors from COMESA member states and non-COMESA investors provided they are conducting a substantial business activity in a COMESA member state.

²¹⁷ SADC Finance and Investment Protocol was signed in 2006 by SADC member states (Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, eSwatini, Tanzania, Zambia, except Seychelles and Comoros who joined the regional bloc later. The SADC FIP came into force in 2010. It was adopted with the overarching aim to harmonise the financial and investment policies of the member states to align them with the SADC objectives. The Protocol is legally binding on member states. It is intended to, inter alia, establish SADC as an investment zone with a harmonised investment policy. Thus, states are expected to match their investment policies, laws and practices into a single regional investment regime. The Protocol was recently amended, and the amendments entered into force on 24 August 2017.

²¹⁸ ECOWAS Supplementary Act on Investments was signed in December 2008 by Benin; Burkina Faso; Cabo Verde; Côte D' Ivoire; Gambia; Ghana; Guinea; Guinea Bissau; Liberia; Mali; Niger; Nigeria; Senegal; Sierra Leone; and Togo. It entered into force in January 2009. Among other things, the ECOWAS Supplementary Act on Investments provides for three standards of investment treatment: national treatment, most-favoured-nation treatment and minimum regional standards. It prohibits direct or indirect expropriation of investment except for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and upon payment of an appropriate compensation, which is equivalent to the fair market value of the seized investment immediately before the date of expropriation.

²¹⁹ AMU Investment Agreement was signed in 1990 by AMU members: Algeria, Libya, Mauritania, Morocco, and Tunisia. The AMU Investment Agreement was ratified in 1993 and specified validity duration of 10 years without a renewal mechanism. It is therefore not in force anymore but continues to create obligations on investment made during its validity period. Nevertheless, as the AMU Secretariat has expressed, member states are willing to carry on with the Investment Agreement.

²²⁰ CEMAC Investment Agreement was signed on 14th December 1965 and entered into force on 1st April 1996. Members of CEMAC include Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea and Gabon.

²²¹ NAFTA was signed between Canada, Mexico, and the US. It contains an investment chapter, Chapter 11 of NAFTA. It came into force on 1st January 1994.

²²² The US, Mexico and Canada Agreement, 2018 (hereinafter USMCA). USMCA is a comprehensive trade agreement between the US, Mexico, and Canada. It is not yet in force.

and Progressive Agreement for Trans-Pacific Partnership (CPTPP)²²³ and Transatlantic Trade and Investment Partnership (TTIP),²²⁴ Regional Comprehensive Economic Partnership (RCEP)²²⁵ and Comprehensive Economic and Trade Agreement (CETA).²²⁶ It is of paramount importance to note that most of the contemporary regional agreements like the SADC FIP, COMESA Common Investment Agreement, USMCA and CPTPP contain novel features that are aimed at safeguarding the regulatory autonomy of host countries. This will be discussed further in chapters 3 and 5 below.

Moreover, rules governing foreign investment have been incorporated into national legislation and constitutions. For example, most, if not all, SADC member states have enacted legislation governing both local and foreign investors, and their constitutions entrench property rights which are applicable to foreign investors as well.²²⁷ However, a critical examination of existing African laws related to investment regulation reveal that the multitude of these are still modelled on the Eurocentric investment laws – biased towards foreign investors – and limit the regulatory autonomy of host states to adopt domestic measures aimed at advancing public policy objectives.²²⁸

The above analysis has demonstrated that, to a large extent, the international law rules on investment developed during the colonial and immediately post-colonial era were pro-investor protection and restrict the policy space of manoeuvre for host governments. The rules were negotiated during the times when the colonial masters were seeking to protect their citizens abroad and to advance their political and

²²³ The CPTPP was signed March 2018 and entered into force in December 2018. The CPTPP is a trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

²²⁴ TTIP is negotiated between the EU and the US. The proposed draft contains an investment chapter, Chapter II.

²²⁵ RCEP is a proposed free trade agreement between the 10-member states of the ASEAN (Brunei, Burma Myanmar, Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand, Vietnam) and India, China, Australia, Japan, South Korea and New Zealand. The proposed text includes an investment chapter.

²²⁶ CETA is a free-trade agreement between Canada and the EU. CETA negotiations were concluded in August 2014. All 28 European Union member states approved the final text of CETA for signature, with Belgium being the final country to give its approval. Canada signed in October 2016. It has not been ratified yet.

²²⁷ See Chidede T 'Foreign direct investment policy and governance in the Southern African Development Community' (2017) *Trade Law Centre Trade Brief* No. S17TB14/2017.

²²⁸ See United Nations Economic Commission for Africa 'Investment policies and bilateral investment treaties in Africa: Implications for regional integration' (2016) available at http://www.uneca.org/sites/default/files/PublicationFiles/eng_investment_landscaping_study.pdf (accessed 07 January 2017). This is further discussed in chapter 5.

commercial interests abroad.²²⁹ The following section chronicles this historical development pursuant to the inclusion of the right to regulate in the international investment law parameters.

2.3 THE RISE OF THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW

The right to regulate is not a modern-day concept. Its genesis may be traced back to the period immediately after World War II, in the aftermath of decolonisation.²³⁰ During this period, the newly emerging independent states sought to strengthen their position in international relations and to pursue their social and economic development objectives,²³¹ but they perceived the international law shaped by their former colonial masters as a barrier in that respect.²³² The content and principles of traditional international investment law were therefore subjected to immense criticism by newly independent states.²³³ Salacuse asserts that the newly independent states 'viewed the content of traditional international law – with its emphasis on the protection of foreign investment – as playing an important role in their economic underdevelopment and continued dependence on western countries'.²³⁴ He further notes that international law 'elevated the protection of foreign-owned property and contracts over the right to nationalise ownership of property on their territories and prioritised the commercial and economic freedom of foreigners over the right of the state to regulate economic activities in its own territories'.²³⁵ In other words, newly self-governing states considered classical international investment law and investment treaties as eroding their sovereignty.

²²⁹ See generally Miles (2010); Miles (2012); and Miles (2013).

²³⁰ Salacuse (2015) 78.

²³¹ Schrijver N *Sovereignty over natural resources: Balancing rights and duties* (1997) 1 (hereinafter Schrijver (1997)).

²³² Salacuse (2015) 78.

²³³ Salacuse (2015) 78.

²³⁴ Salacuse (2015) 78.

²³⁵ Salacuse (2015) 78. See also Waelde TW 'A requiem for the "New international economic order": The rise and fall of paradigm' in Hafner G, Loibl G, Rest A, Sucharipa-Behrmann L & Zemanek K (eds) *International economic law and a post mortem with timeless significance, Liber Amicorum Seidl-Hohenveldern* (1998) 774.

Against this background, the newly emerging states sought to regain their sovereign right over natural resources and to regulate foreign investment in accordance with their social and economic development agendas in the early 1950s under the auspices of the UN. This instigated the emergence of the principle of permanent sovereignty over wealth and natural resources which connotes a far broader concept of a country's economic resources. The principle was first introduced in the UN debates to claim former colonies or developing countries and peoples' 'right to enjoy the benefits of resource exploitation and in order to allow "inequitable" legal arrangements, under which foreign investors had obtained title to exploit resources in the past, to be altered or even to be annulled *ab initio*, because they conflicted with the concept of permanent sovereignty.'²³⁶ The increasing pressure for the recognition of this principle resulted in the adoption of the Resolution on Permanent Sovereignty over Natural Resources by the UN General Assembly at its Seventeenth Session in 1962,²³⁷ which contained the Declaration on Permanent Sovereignty over Natural Resources.²³⁸ The Resolution on Permanent Sovereignty over Natural Resources generally covered various principles of international law including, *inter alia*, the exploitation of natural resources by foreign nationals,²³⁹ transfer of capital and profits,²⁴⁰ expropriation of foreign-owned property by host governments,²⁴¹ exhaustion of local remedies and the settlement of investor-state disputes in respect of compensation.²⁴² Particularly relevant to the present discussion, the Resolution stipulated that states and peoples have a right to permanent sovereignty over their natural resources, which must be exercised in the interest of national development and peoples' well-being.²⁴³ Such right ought to be

²³⁶ Schrijver (1997) 1. See also Salacuse (2015) 78, noting that developing countries by so doing sought to secure international recognition of their right to expropriate and re-establish sovereignty over their natural resources without paying compensation. Other relevant General Assembly resolutions on permanent sovereignty include Resolution 626, 1952, Resolution 523, 1952, Resolution 3201, 1972, and Resolution 3201, 1981 and Resolutions 3281, CERDS, 1974.

²³⁷ The General Assembly Resolution 1803 (XVII) on the 'Permanent Sovereignty over Natural Resources' was adopted on 14 December 1962. According to Kilangi, 'the resolution had resulted from the General Assembly's focus on, firstly, the promotion and financing of economic development in under-developed countries and, secondly, in connection with the right of peoples to self-determination in the draft international covenants on human rights. Kilangi A 'Introductory note' available at http://legal.un.org/avl/ha/ga_1803/ga_1803.html (accessed 24 July 2017).

²³⁸ Declaration on Permanent Sovereignty over Natural Resources, 1962.

²³⁹ Paragraph 2 of the Resolution on Permanent Sovereignty over Natural Resources.

²⁴⁰ Paragraph 3 of the Resolution on Permanent Sovereignty over Natural Resources.

²⁴¹ Paragraph 4 of the Resolution on Permanent Sovereignty over Natural Resources.

²⁴² Paragraph 4 of the Resolution on Permanent Sovereignty over Natural Resources.

²⁴³ Paragraph 1 of the Resolution on Permanent Sovereignty over Natural Resources.

strictly and conscientiously respected by states and international organisations.²⁴⁴ Though debatable, there is wide consensus that the provisions of the Resolution on Permanent Sovereignty over Natural Resources pertaining to compensation for expropriation has attained the status of CIL.²⁴⁵

However, the Resolution on Permanent Sovereignty over Natural Resources was criticised by some scholars for not radically departing from the CIL understood by western countries.²⁴⁶ For example, it incorporated international law requirements that 'foreign capital not be subject to discriminatory treatment and it affirmed the binding character of foreign agreements' and that compensation must be paid for expropriation.²⁴⁷ It is submitted that the Resolution did not achieve what developing countries intended and, as a result, they continued to fight for an international investment regime that caters for their interests.

In 1973, the UN General Assembly, under the impetus of developing countries, adopted the Resolution 3171 on Permanent Sovereignty over Natural Resources at its Twenty-Eighth Session,²⁴⁸ which affirmed in Paragraph 3:

... the application of the principle of nationalisation carried out by states, as an expression of their sovereignty in order to safeguard their natural resources, implies that each state is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each state carrying out such measures.

Unlike its predecessor, the Resolution 3171 did not incorporate the guarantee of compensation for foreign investors and any references to international law. This means that host government had wide discretion to regulate, if any, the amount of compensation due in accordance with their domestic laws without regard to the objective standards of international law.

²⁴⁴ Paragraph 8 of the Resolution on Permanent Sovereignty over Natural Resources. For an overview of the evolution process of the Declaration, see Gess KN 'Permanent sovereignty over natural resources: An analytical review of the united nations declaration and its genesis' (1964) 13 *The International and Comparative Law Quarterly* 398-449.

²⁴⁵ See generally Higgins R *The taking of property by the state: Recent development in international law* (1982).

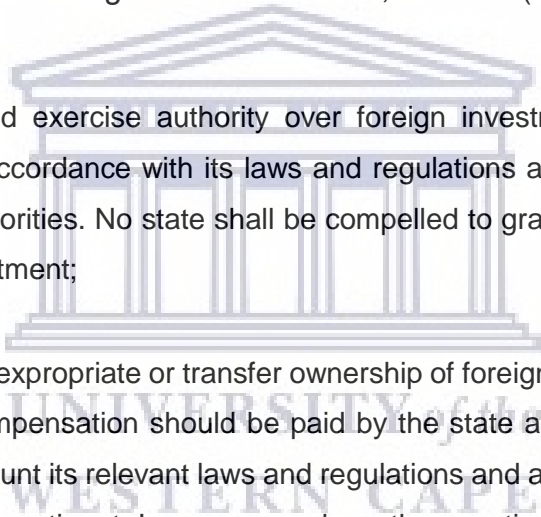
²⁴⁶ Schwebel SM 'The story of the United Nations Declaration on Permanent Sovereignty over Natural Resources' (1963) 49 *American Bar Association Journal* 469 (hereinafter Schwebel (1963)).

²⁴⁷ Salacuse (2015) 80.

²⁴⁸ UN General Assembly Resolution 3171 (XXVIII) (17 December 1973) UN Doc A/RES/9030 (XVIII) (1973).

Again, in 1974, the UN General Assembly adopted the Resolution 3201 containing the Declaration on the Establishment of a New International Economic Order,²⁴⁹ which radically departed from the CIL based on western nations' ideas. In particular, Paragraph 3 of the Resolution 3201 confirmed the right of the state to exercise control and exploit its natural resources, 'including the right to nationalise or transfer ownership to its nationals'.

Subsequently, at the end of 1974, the UN General Assembly adopted Resolution 3281 containing the Charter of Economic Rights and Duties of States,²⁵⁰ which reaffirmed the imperative need to adopt 'generally accepted norms to govern international economic relations systematically' and 'to establish a just order and a stable world as long as a charter to protect the rights of all countries and in particular the developing states is not formulated'. With regards to investment, Article 2 (2) of the Charter allows each state:

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- (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national and priorities. No state shall be compelled to grant preferential treatment to foreign investment;
 - (b) ...
 - (c) To nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of free choice of means.

²⁴⁹ UN General Assembly Resolution 3201 (S-VI) (1 May 1974) UN Doc A/RES/3201 (S-VI) (1974), reprinted in (1974) 13 ILM 715.

²⁵⁰ The UN General Assembly Resolution 29th Sess, Charter of Economic Rights and Duties of States, Res. 3281 (XXIX) (12 December 1974), Off Doc GA UN A/9631, suppl. No. 31 (1975) challenged the Hull standard of compensation and proposed foreign investment disputes on domestic law to be settled in the courts of host states. The developed countries disagreed with such terms. See Bower CN & Tepe JB 'The Charter of Economic Rights and Duties of States: A Reflection or rejection of international law?' (1975) 9 *International lawyer* 304-307 (hereinafter Bower & Tepe (1975)), noting that 'many of the provisions on which agreement had been lacking were fundamental and were unacceptable in their present form. They included the treatment of foreign investment in terms which did not fully take into account respect for agreements and international obligations.'

Nevertheless, the Charter was despised by developed countries who supported the adoption of CIL principles on investment. White maintains that 'many of the provisions on which agreement had been lacking were fundamental and were unacceptable in their present form. They included the treatment of foreign investment in terms which did not fully take into account respect for agreements and international obligations'.²⁵¹ In addition, developed countries contented that the Charter was an attempt to establish principles of international economic law, 'or at least an *opinion juris*, without specific reference to international legal doctrine and practice' and it 'failed to formulate and articulate propositions that would give predictability to international economic transactions'.²⁵² More importantly, the Charter did not provide aggrieved foreign investors with recourse to international arbitration. It must also be emphasised that the legal regime established by the Charter failed to secure the protection standards as well as the predictability and certainty that foreign investors need, hence it was not accepted by developed countries.

The contrasting views of the developed and developing countries on the contents of the Charter jeopardised the effectiveness of the document. According to Salacuse:

The adoption of the Charter provoked a vehement debate not only regarding its content but also its legal nature and effect on existing international law. The original intent of the Charter's sponsors was for it to be a legally binding document. However, as the divergence of opinion between the developing and developed nations became apparent, the latter grew increasingly opposed to creating legally binding obligations in the Charter. The question of the legal nature of the Charter was left to the General Assembly, but it never reached any determination on the matter, leaving developing countries free to try to bring the document into line with their preferences.²⁵³

Today, there are varied views on the legal effect of the Charter of Economic Rights and Duties of States. Some argue that the Charter attained CIL status (binding on all states) and has served as a guide in establishing international law rules,²⁵⁴ while others contend that it enshrines traditional and new principles of international law – but it is not binding on all states.²⁵⁵ Noteworthy is that, according to general principles

²⁵¹ White G 'A new international economic order' (1975) 16 *Virginia Journal of International Law* 335.

²⁵² Salacuse (2015) 82.

²⁵³ Salacuse (2015) 83.

²⁵⁴ Meagher RF *An international redistribution of wealth and power: A study of the Charter of Economic Rights and Duties of States* (1975) 90 (hereinafter Meagher (1975)).

²⁵⁵ Meagher (1975) 90. See also Bower & Tepe (1975) 304-307.

of international law, the UN General Assembly does not have law-making authority,²⁵⁶ therefore, the resolutions, charters or declarations it adopts are not legally binding instruments.²⁵⁷ In *Texaco Overseas Petroleum Co and California Asiatic Oil Co (TOPCO) v Government of the Libyan Arab Republic*,²⁵⁸ when determining the legal effect of the several resolutions on the New Economic Order adopted by the UN General Assembly, Dupuy concluded that only the Resolution 1803 reflected the state of CIL.²⁵⁹ Dupuy further noted that 'Article 2 of the Charter of Economic Rights and Duties of States must be analysed as a political rather than as a legal declaration concerned with the logical strategy of development and, as such, supported only by non-industrialised states'.²⁶⁰

Notwithstanding the uncertainty as to the legal effect of the Charter, it must be emphasised that the document demonstrates some remarkable strength by developing countries in challenging the CIL on investment based on developed countries' ideas. Salacuse supports this argument noting that such a 'challenge, to a greater or lesser extent, served to undermine the solidity of the traditional legal framework for foreign investment and led both investors and their home countries to search for means to strengthen it in order to protect their economic interests in a new era'.²⁶¹ Nevertheless, as will be revealed below, developing countries' subsequent cooperation in concluding IIAs giving strong protection to investor interests, showed that CIL did not evolve in the way developing nations had hoped in the 1970s.²⁶² Since, as alluded to earlier, investment treaties particularly BITs are the primary sources of international investment law today, it is necessary to trace the right to regulate in investment treaties. This is the discussion which the next section will address.

²⁵⁶ See Briery JL *The law of nations* (1963) 110.

²⁵⁷ Bower & Tepe (1975) 304-307.

²⁵⁸ *Texaco Overseas Petroleum Co and California Asiatic Oil Co (TOPCO) v Government of the Libyan Arab Republic* (Award on the Merits) (1997) 17 ILM 1 (1978) (hereinafter *TOPCO v Libya*).

²⁵⁹ *TOPCO v Libya* para 87.

²⁶⁰ *TOPCO v Libya* para 87.

²⁶¹ Salacuse (2015) 84-85.

²⁶² Weston BH 'The New international economic order and the deprivation of foreign proprietary wealth: Some reflections upon contemporary international law debate' in Lillich RB (ed) *International law of state responsibility for injuries to aliens* (1983) 106.

2.3.1 The right to regulate in IIAs

Technically, the concept of the right to regulate – in its general context - has been present in the earlier investment treaties but couched in a limited or indirect way. For instance, the concept of the right to regulate was contained in the provisions of the early BITs which were aimed at granting host states regulatory freedom or flexibility in the treatment and expropriation of investment. For example, the first ever BIT – between Germany and Pakistan – specified that measures taken for reasons of public security and order, public health or morality shall not be deemed as discrimination in the treatment of investments.²⁶³ Be that as it is, it is inappropriate to argue that the right to regulate was completely excluded in the traditional IIAs. It is however not inapposite to argue that the right to regulate in its current form²⁶⁴ was not appropriately carved out in the old IIAs and applies to different circumstances. Titi opines that any discussion pertaining to the right to regulate in the era before the modern IIAs ‘should take into consideration that the right to regulate in that framework applies to arrangements different to the ones that make up today’s international investment regime’.²⁶⁵

The rationale underpinning the conclusion of IIAs are crucial to understanding the way the right to regulate was addressed in the traditional international legal framework for investment. Like any other treaties, conventional IIAs were concluded in a particular historic, economic, political and social context and in response to the then existing needs and challenges. Desierto supports that many of the traditional IIAs were concluded by states pursuant to their respective ‘foreign policy agendas, economic priorities and political programs’.²⁶⁶

To be precise, when most developing countries increasingly began to attain their independence from developed countries immediately post-World War II, they started nationalising and discriminating against foreign- or private-owned property.²⁶⁷ This growing nationalist sentiment triggered developed countries, who were predominantly home states of investments, to conclude IIAs with developing countries (as host

²⁶³ Article 2 of the Germany-Pakistan BIT.

²⁶⁴ As defined in chapter 1.

²⁶⁵ Titi (2014) 53.

²⁶⁶ Desierto DA ‘Public policy in international investment and trade law: Community expectations and functional decision-making’ (2014) 26 *Florida Journal of International Law* 84.

²⁶⁷ See, generally, Domke M ‘Nationalisation of foreign owned property and the act of state doctrine: Two speeches’ 1963 *Duke Law Journal* 281-303.

states) with a view to protecting their investments abroad.²⁶⁸ During this period, as demonstrated above, rules governing foreign investment were primarily found in CIL and, to a limited extent, in the FCN treaties. The then legal framework for investment was not only fragmented, but deficient with respect to foreign investment protection. For instance, the International Court of Justice (ICJ), in *Barcelona Traction, Light and Power Co Ltd (Belgium) v Spain*,²⁶⁹ found that the development of international investment law had not gone further and that no generally accepted rules had yet materialised in the light of the evolution of foreign investment and the expansion of international activities by corporations in the past half-century.²⁷⁰ In the same vein, CIL was silent on foreign investors' right to transfer funds and human capital from their home states to the host countries, and was not specific on how compensation was to be calculated.²⁷¹ Supplementary rules were needed to fill in this gap. IIAs became the alternative.

Developed countries began to negotiate IIAs as legal instruments to protect their investments in developing countries.²⁷² Given that scenario, the treaties enshrined mainly investment protection standards to be maintained by host states.²⁷³ These included standards such as, *inter alia*, fair and equitable treatment, most-favoured-nation treatment, compensation for expropriation and investors' direct access to binding international arbitration. In other words, traditional IIAs, in the oft-quoted words by Salacuse, 'imposed a discipline on host country treatment of foreign investors by obliging them to grant covered investors full protection and security, fair and equitable treatment and expropriation without adequate compensation'.²⁷⁴

In addition, earlier IIAs do not impose any obligations on foreign investors such as respecting human rights as well as promoting public policy objectives, sustainable development and the environment in the host country.²⁷⁵ The IIAs were extensively

²⁶⁸ Van Duzer A, Simons P & Mayeda G *Integrating sustainable development into international investment agreements: A guide for developing country negotiators* (2013) 1. See also Fox G 'A future for international investment? Modifying BITs to drive economic development' (2014) 46 *Georgetown Journal of International Law* 229.

²⁶⁹ *Barcelona Traction, Light and Power Co Ltd (Belgium) v Spain* (1970) ICJ Rep 3 (5 February 1970) (hereinafter *Barcelona Traction v Spain*).

²⁷⁰ *Barcelona Traction v Spain* para 46-47.

²⁷¹ Salacuse (2015) 85.

²⁷² Salacuse (2015) 85.

²⁷³ Salacuse (2015) 86.

²⁷⁴ Salacuse (2015) 88.

²⁷⁵ Giest A 'Interpreting public interest provisions in international investment treaties' (2017) 18 *Chicago Journal of International Law* 323. See also Sornarajah M *The international law on foreign investment* 4

shaped and utilised by developed countries as economic and political instruments;²⁷⁶ developing countries merely became investment rules consumers since they were under colonial or imperialist control.²⁷⁷ Equally important, most of the developing countries lacked sufficient human, technical and financial capacity in treaty negotiations. Petersmann underscores that IIAs signed in the second half of twentieth century were formulated to reduce ‘the legal insecurity resulting from the post-colonial disagreements on the customary international “minimum standard” for the protection of foreign property and the payment of “full, prompt, and effective compensation” in case of expropriation of foreign property’.²⁷⁸ Also important to mention here is the fact that notions to incorporate host states’ regulatory autonomy were considered as an obstacle to investment protection.²⁷⁹

Conversely, developing countries, along with their low levels of development and severe economic conditions caused primarily by the global financial crisis, were desperately in need of foreign direct investment (FDI). It follows that most developing countries signed IIAs as a way of attracting FDI, which was widely perceived as an incentive for economic development, and a tool to fight poverty and unemployment.²⁸⁰ For example, the preamble of the United Kingdom (UK)-Argentina BIT²⁸¹ reveals that the parties concluded the treaty because they ‘desired to create favourable conditions for greater investment’ and because they ‘recognised that the encouragement and reciprocal protection under international agreement of such investments will be

ed (2017) 265-270; and Arcuri A & Montanaro F ‘Justice for all? Protecting the public interest in investment treaties’ (2018) 59 *Boston College Law Review* 2792.

²⁷⁶ See Miles (2010) 4; and Layrea ET & Sucker F ‘The important of an African voice in, and understanding and use of, international economic law’ in Layrea ET, Madolo N & Sucker F (eds) *International economic law: Voices of Africa* (2012) 10 (hereinafter Layrea & Sucker (2012)).

²⁷⁷ Van Harten G ‘A critique of international investment treaties’ in Singh K & Ilge B (eds) *Rethinking bilateral investment treaties: Critical issues and policy issues* (2016) 50.

²⁷⁸ Petersmann E ‘Multilevel trade governance in the WTO requires multilevel constitutionalism’ in Joerges C & Petersmann E (eds) *Constitutionalism* (2011) 289-290.

²⁷⁹ Johnson AR ‘Rethinking bilateral investment treaties in sub-Saharan Africa’ (2010) 59 *Emory Law Journal* 932. See also Mpshe KH *Redressing the asymmetries of international investment treaty regime from a South African perspective* (LLM dissertation, University of Pretoria, 2016) (hereinafter Mpshe (2016)), stating that ‘these BITs were lopsided, based on OECD models, favouring the foreign investor more, while the host state was relegated to the bottom of the equation, and thereby curtailing the policy space of the host state’.

²⁸⁰ Salacuse JW & Sullivan NP ‘Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain’ (2005) 46 *Harvard International Law Journal* 67 (hereinafter Salacuse & Sullivan (2005)). See & Boone J ‘How developing countries can adapt current bilateral investment treaties to provide benefits to their domestic economies’ (2011) 1 *Global Business Law Review* 187; and Gore C ‘The rise and fall of the Washington Consensus as a paradigm for developing countries’ (2000) 28 *World Development* 5.

²⁸¹ United Kingdom-Argentina BIT, 1990.

conducive to the stimulation of individual business initiative and will increase prosperity’.

The result was that developing countries signed IIAs without carefully scrutinising the provisions of such treaties.²⁸² The IIAs placed a few or no restrictions on the operation of foreign investors in their territories. Spero and Hart has expressed that ‘by and large, developing countries accepted the prevailing international liberal regime based on national treatment; prompt, adequate, and effective compensation in the event of expropriation; and the right of foreign investors to appeal to their home country governments for assistance’.²⁸³ At the same time, as highlighted in the introductory chapter of this study, developing country governments often regarded IIAs as an economic diplomacy tool to foster better relations with other countries particularly industrialised countries.²⁸⁴

In light of the foregoing, the logical consequence of signing the IIAs was the erosion of sovereignty,²⁸⁵ and chilling effect on domestic regulation²⁸⁶ in the face of competing for FDI and fostering better relations with developed countries. Accordingly, developing countries, at large, began to question the legitimacy of IIAs after undergoing the callousness of international arbitration.²⁸⁷ That is, they began to realise that the professed advantages of IIAs were over-estimated and that such treaties do not necessarily speak to their domestic development objectives,²⁸⁸ and started demanding balanced investment treaties which safeguard their regulatory powers.²⁸⁹ These concerns combined triggered the recent debate on incorporating the regulatory autonomy of host states in the international investment legal framework. The ensuing

²⁸² Yazbek N ‘Bilateral investment treaties: the foreclosure of domestic policy space’ (2010) 17 *South African Journal of International Affairs* 103.

²⁸³ Spero JEE & Hart JA *The Politics of International Economic Relations* (2010) 312.

²⁸⁴ Salacuse & Sullivan (2005)72.

²⁸⁵ Poulsen LNS *Sacrificing sovereignty by chance: investment treaties, developing countries, and bounded rationality* (LLD thesis, The London School of Economics and Political Science, 2011) 273-313 (hereinafter Poulsen (2011)).

²⁸⁶ See Brown JG ‘International investment agreements: Regulatory chill in the face of litigious heat?’, (2013) 3 *Western Journal of Legal Studies* 1-25

²⁸⁷ Poulsen (2011) 273. See a list of up-to-date international arbitration cases brought by foreign investors against developing host countries at UNCTAD Investment Dispute Settlement Navigator available at <http://investmentpolicyhub.unctad.org/ISDS/FilterByCountry>.

²⁸⁸ Poulsen (2011) 273.

²⁸⁹ Gazzini T *Interpretation of international investment treaties* (2016) 40 (hereinafter Gazzini (2016)). See also Markert L ‘The crucial question of future investment treaties: Balancing investors’ rights and regulatory interests of host states’ in Bungenberg M, Griebel J & Hindelang S (eds) *International investment law and EU law* (2011).

part will now chronicle the historical events in which the integration of the right to regulate in the realm of international investment law has been discussed, in order to understand the historical discussions that shaped contemporary debates on the subject matter.

2.4 CONTEMPORARY CALLS TO INCORPORATE THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW

Although it goes way back, the question of the right to regulate in the international investment regime has become more acute in recent years than ever before. International and regional governmental organisations, individual countries, NGOs or civil societies and academics are increasingly demanding the recalibration of the existing international investment legal system to incorporate the right to regulate. As demonstrated above, the growing need to reform the international investment policy was propelled by increasing loss of national sovereignty in the face of trade and investment obligations, and the growing body of international lawsuits where public policy measures are challenged under trade and investment agreements.²⁹⁰ Discussions on the inclusion of the right to regulate have been happening at global, regional and national levels. As will be noticed below, the term right to regulate has been used in these discussions interchangeably with other terms like policy space, regulatory freedom, space or autonomy. Correspondingly, as alluded in the preceding chapter, these terms are used interchangeably in this study.

2.4.1 Global level

At the global level, discussions about incorporating the right to regulate in international legal framework governing foreign investment have been championed primarily by inter-governmental organisations such as UNCTAD, OECD, G20 and, to a limited extent, the World Trade Organisation (WTO) – to mention but a few.

²⁹⁰ Mann H 'The right of states to regulate and international investment law' A Paper presented at the Expert Meeting on the development dimension of FDI: Policies to enhance the role of FDI in support of the competitiveness of the enterprise sector and the economic performance of host economies, taking into account the trade/investment interface, in the national and international context Geneva, 6-8 November 2002 available at http://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf (accessed 07 July 2017) (hereinafter Mann (2002)).

UNCTAD is the permanent intergovernmental body of the UN dealing with trade, investment and development issues.²⁹¹ It provides a global platform for investment and development – UNCTAD World Investment Forum. The Forum ‘devises strategies and solutions for global investment and development challenges. It facilitates multi-stakeholder collective action to stimulate investment in development. The Forum offers a unique opportunity to influence investment-related policymaking, shape the global investment environment, and to network with global leaders in business and politics’.²⁹² With regards to the right to regulate in international investment law, UNCTAD first coined and interpreted the term ‘policy space’ in the context of investment law in 2002 to mean ‘the room required for sovereigns to govern and regulate as they see fit, while at the same time observing their obligations under international and municipal laws’.²⁹³ Further, in 2004, it was officially mentioned in the UNCTAD’s Sao Paulo Consensus in 2004²⁹⁴ where it was defined as, ‘the scope for domestic policies especially in the areas of trade, investment and industrial development, which might be framed by international disciplines, commitments and global market considerations’.²⁹⁵

In 2003, UNCTAD, discussing how FDI must benefit host states, noted that ‘in order to safeguard the ability of developing countries both to pursue development policies and to reap greater benefits from FDI, the proper balance must be struck between the benefits from entering into international agreements and the need to secure sufficient policy space’.²⁹⁶ UNCTAD further observed that striking a balance between investment protection and regulating investment for economic development is a challenge in IIAs. After a series of discussions with key representatives from intergovernmental organisations, NGOs, civil society, academia and the private sector from across the world,²⁹⁷ UNCTAD ultimately developed an Investment Policy

²⁹¹ More information about the UNCTAD is available at <https://unctad.org/en/Pages/Home.aspx>.

²⁹² More information about the UNCTAD World Investment Forum is available at <https://worldinvestmentforum.unctad.org/homepage/about-wif/>.

²⁹³ UNCTAD ‘Trade and Development Report’ (2002) available at http://unctad.org/en/Docs/tdr2002_en.pdf (accessed 07 July 2017).

²⁹⁴ The Sao Paulo Consensus was adopted by the eleventh session of the UNCTAD, held from 13 to 18 June 2004 with the primary objective to reduce poverty and hunger in least-developed countries, and to the achievement of fair and equitable multilateral trade negotiations.

²⁹⁵ Sao Paulo Consensus, para 8.

²⁹⁶ UNCTAD World Investment Report, 2003.

²⁹⁷ For example, the UNCTAD discussions at the High-level IIA Conference at the Fourth World Investment Forum, held in October 2014, Geneva, Switzerland; the Expert Meeting on the Transformation of the IIA Regime, held in February 2015, Geneva, Switzerland; Multi-year Expert

Framework for Sustainable Development in 2012.²⁹⁸ The UNCTAD Investment Policy Framework for Sustainable Development has been updated in 2013, 2014 and recently in 2015. It is intended to be a point of reference for investment stakeholders and rule-makers in shaping modern investment policies, thus, not to be a legally binding instrument. To date, the UNCTAD Investment Policy Framework for Sustainable Development has received significant attention worldwide as a reference tool for providing political guidance in designing and redesigning a sound investment policy which promotes sustainable development in host states. It is often cited by international organisations and intergovernmental groupings as well as regional and national investment policy-makers in the process of designing or reforming IIAs.²⁹⁹

The UNCTAD Investment Policy Framework for Sustainable Development, among other things, focuses on the integration of sustainable development objectives in IIAs, and balancing the rights and obligations of states and investors. It, therefore, consists of a general set of core principles for investment policy-making including: guidelines for national investment policies; guidelines for the design and use of IIAs; and a menu for the promotion of investment in sectors related to sustainable development goals (SDGs). The UNCTAD Investment Policy Framework for Sustainable Development is described as 'a balanced approach between the pursuit of purely economic growth objectives ..., and the need to protect people and the environment.'³⁰⁰ Several international and regional organisations have developed their own investment policy frameworks.

The OECD is an intergovernmental organisation whose mission is to promote policies that will improve the economic and social well-being of people around the world.³⁰¹ In relation to investment, the OECD seeks to enhance the 'contribution of international investment to growth and sustainable development by advancing investment policy

Meeting: Taking Stock of IIA Reform, held in March 2016, Geneva, Switzerland; the High-level IIA Conference at the Fifth World Investment Forum, held in July 2016, Nairobi, Kenya; and the 63rd Session of the UNCTAD Trade and Development Board, held in December 2016, Geneva, Switzerland.
²⁹⁸ The UNCTAD Investment Policy Framework for Sustainable Development was initially launched in October 2012, and later edited in 2013, 2014 and 2015.

²⁹⁹ UNCTAD Investment Policy Framework for Sustainable Development, 2015.

³⁰⁰ UNCTAD 'Strengthening the capacities of developing country policymakers and investment promotion officials in priority sectors to attract investment for sustainable and inclusive development' available at <http://www.un.org/esa/devaccount/projects/2014/T9%20concept%20notes/T9%20-%20Concept%20notes/UNCTAD%20-%209th%20Tranche%20-%20CN/1415R%20UNCTAD%20investment%20attraction%20concept%20note%20as%20per%20advanced%20draft%20June%202013.doc> (accessed 03 June 2017).

³⁰¹ More information about the OECD is available at <http://www.oecd.org/about/>.

reform and international co-operation'.³⁰² In 2006, the OECD developed a Policy Framework for Investment, which aims 'to mobilise private investment that supports steady economic growth and sustainable development, contributing to the economic and social well-being of people around the world'.³⁰³ It is a non-binding 'tool, providing a checklist of key policy issues for consideration by any government interested in creating an enabling environment for all types of investment and in enhancing the development benefits of investment to society'.³⁰⁴ The OECD Policy Framework for Investment seeks to encourage the implementation of the SDGs and to assist with the mobilisation of financing for development.³⁰⁵ It was updated in 2015. It has been extensively used by several countries and regions across the globe as a reference tool in investment policy making. For instance, the SADC Investment Policy Framework³⁰⁶ is modelled on the OECD Policy Framework for Investment.

The WTO is an intergovernmental organisation dealing with the international regulation of cross-border trade between nations.³⁰⁷ The WTO deals with international investment in as far as it relates to international trade and, as an example, have adopted multilateral treaties underpinning trade and investment issues – TRIMS³⁰⁸ and GATS.³⁰⁹ TRIMS and GATS have been perceived as limited in terms of investment regulation.³¹⁰ Since 1996, WTO member states have been attempting to negotiate a multilateral investment treaty or rules but without success.³¹¹

After the WTO Ministerial Conference in 2003, when the Working Group on the Relationship between Trade and Investment reported that investment is a new complex area which needs more time to negotiate,³¹² talks about investment went

³⁰² OECD 'Investment' available at <http://www.oecd.org/investment/> (accessed 02 February 2017).

³⁰³ Preamble of the OECD Policy Framework for Investment.

³⁰⁴ Preamble of the OECD Policy Framework for Investment.

³⁰⁵ Preamble of the OECD Policy Framework for Investment.

³⁰⁶ The SADC Investment Policy Framework was endorsed during the 6th SADC Investment Policy Framework meeting in July 2015.

³⁰⁷ More information about the WTO is available <https://www.wto.org/index.htm>.

³⁰⁸ TRIMS Agreement: Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1868 U.N.T.S. 18.

³⁰⁹ General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1B, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 284 (1999), 1869 U.N.T.S. 183, 33 ILM 1167 (1994).

³¹⁰ Joseph RK 'Investment facilitation agreement in WTO: What is contains and why India should be cautious' (2017) *ISID Discussion Note 3*.

³¹¹ See Singapore Ministerial Declaration, adopted on 13 December 1996 para 20.

³¹² See Report of the meeting held on 10 and 11 June 2003, Working Group on the Relationship between Trade and Investment, WTO document WT/WGTI/M/22 of 17 July 2003 paras 45, 65 and 80.

quiet at the WTO.³¹³ However, multilateral investment issues within the WTO resumed at the WTO Ministerial Conference in Buenos Aires, Argentina in 2017.³¹⁴ It must be emphasised that such discussions are focusing on investment facilitation³¹⁵ not the protection of investment or the right to regulate.³¹⁶ Be that as it may, some WTO member states and various stakeholders are opposed to the negotiation of a multilateral investment treaty that does not carve out the regulatory space of host governments.³¹⁷ Noteworthy is that the WTO has recently begun to recognise that medium and long-term benefits of cross-border trade and investment could be only achieved if appropriate and effective domestic regulatory policies are put in place.³¹⁸

The G20 is an international forum where advanced and emerging economies meet to strengthen the global economy, reform international financial institutions, improve financial regulation and implement the key economic reforms that are needed in each member economy.³¹⁹ For many years, advanced and emerging economies have emphasised the significance of the right to regulate in international investment policy. In 2016, G20 members agreed on a set of non-binding principles to guide members in investment policy making, the G20 Guiding Principles for Global Investment Policymaking.³²⁰ Guiding Principle VI affirms governments' right to regulate investment for legitimate public policy purposes.

³¹³ South Centre 'Discussions in the Working Group on the relationship between trade and investment (2001-2003)' (2016) *Analytical Note* SC/AN/TDP/2016/3 7.

³¹⁴ See Argentina, Brazil, Chile, China, Colombia, Hong Kong, Kazakhstan, Mexico, Nigeria and Pakistan; *Proposal for a WTO Informal Dialogue on Investment Facilitation for Development, Joint Communication from the Friends of Investment Facilitation for Development*, WTO Document JOB/GC/122. See also Mexico, Indonesia, Korea, Turkey and Australia; *MIKTA Investment Workshop Reflections*, WTO Document JOB/GC/121.

³¹⁵ On investment facilitation, see Lazo RP 'Towards a multilateral investment facilitation framework: Elements in international investment agreements' (2018) available at <https://www.ictsd.org/opinion/towards-a-multilateral-investment-facilitation-framework-elements-in-international> (accessed 23 November 2018) (hereinafter Lazo (2018)).

³¹⁶ Lazo (2018).

³¹⁷ See, for example, Russia: *Proposed multilateral disciplines for investment facilitation* (JOB/GC/120), March 31, 2017; Mexico, Indonesia, Korea, Turkey and Australia (MIKTA): *Reflections on Investment Workshop* (JOB/GC/121), April 6, 2017; China: *Possible Elements for Investment Facilitation* (JOB/GC/123), April 26, 2017; Argentina & Brazil: *Possible Elements of a WTO Instrument on Investment Facilitation* (JOB/GC/124), April 26, 2017; Brazil: *Proposal for an Investment Facilitation Agreement* (JOB/GC/169), February 1, 2018.

³¹⁸ See Nordstrom H & Vaughan S *Trade and environment: Special studies* (1999) 4 (hereinafter Nordstrom & Vaughan (1999)); and Fredriksson P (ed) *Trade, global policy, and the environment* (1999). See also Denters E 'Preferential trade and investment treaties' in Gazzini T & De Brabandere E (eds) *International investment law: The sources of rights and obligations* (2012) 46.

³¹⁹ More information about G20 is available at <http://g20.org.tr/about-g20/>.

³²⁰ G20 Guiding Principles for Global Investment Policymaking, 2016.

2.4.2 Regional level

The issue pertaining to the inclusion of the right to regulate in investment treaties has also become a prominent topic in contemporary regional investment discussions. Notably, in Europe, North America, Trans-Atlantic, Trans-Pacific, Asia and Africa, among others. The debate gained momentum with the growing negotiations of mega-regional agreements with investment provisions such as the Trans-Pacific Partnership Agreement (TPP)³²¹ – which was later adopted as the CPTPP,³²² review and amendment of the NAFTA – resulting in the USMCA, the TTIP, the RCEP and the CETA.

The TPP was a comprehensive free trade agreement negotiated by and between 12 Trans-Pacific region countries.³²³ The draft of the TPP contained an investment chapter³²⁴ which was extensively criticised for limiting host states' right to regulate.³²⁵ Opponents of the TPP alleged that the provisions of these agreements could undermine existing levels of protection in areas such as health and the environment and impinge on the trading partners' right to regulate.³²⁶ In January 2017, the US withdrew from the TPP negotiations and the remaining 11 countries continued with negotiations resulting in the adoption of the CPTPP. The CPTPP was signed in March 2018 and entered into force December 2018. The CPTPP contains an investment chapter³²⁷ containing provisions aimed at safeguarding the right to regulate. For example, the chapter excludes investor-state dispute settlement (ISDS) challenges over Australian tobacco control measures,³²⁸ and government's refusal to issue, renew

³²¹ Trans-Pacific Partnership Agreement, 2016.

³²² Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 2018 (hereinafter CPTPP).

³²³ Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, US and Vietnam.

³²⁴ Chapter 9 of the TPP.

³²⁵ See Zamir N & Barker P 'The Trans-Pacific Partnership Agreement and states' right to regulate under international investment law' (2017) 45 *Denver Journal of International Law & Policy* 205; Stiglitz J 'Beware of TPP's investor-state dispute settlement provision' (2016) available at <http://rooseveltinstitute.org/beware-tpps-investor-state-dispute-settlement-provision/> (accessed 29 August 2017); and Tienhaara K 'Preserving the right to regulate in the Trans-Pacific Partnership agreement and beyond' (2011) available at <http://www.eastasiaforum.org/2011/04/25/preserving-the-right-to-regulate-in-the-trans-pacific-partnership-agreement-and-beyond/> (accessed 29 August 2017).

³²⁶ See Pitschas C 'Transatlantic Trade and Investment Partnership (TTIP): The devil in disguise or a golden opportunity to build a transatlantic marketplace?' (2016) 5 *British Journal of American Legal Studies* 316-340.

³²⁷ Chapter 9 of the CPTPP.

³²⁸ Annex II (Cross-Border Trade in Services and Investment Non-Conforming Measures) of the CPTPP. This followed the *Phillip Morris v Australia* case.

or modify license or permits.³²⁹ It also allows governments to implement legitimate public welfare objectives such as measures to protect public health and safety as well as the environment and such actions do not constitute indirect expropriation and cannot be challenged under ISDS.³³⁰ The CPTPP investment chapter further contains several safeguards aimed at limiting the costs of potential proceedings including, inter alia, procedures for throwing out frivolous claims or claims without legal merit and limits to the monetary awards a tribunal may grant and excludes punitive damages.³³¹

The TTIP is a proposed trade and investment agreement between the EU and the US. The TTIP will contain an investment chapter intended to attract investment and create more investment opportunities in the EU and the US. In 2015, the European Commission proposed a draft text of the TTIP investment chapter.³³² Similar to the TPP investment chapter, the TTIP draft investment chapter has been criticised for undermining the right to regulate.³³³ However, proponents of the TTIP take a different view arguing that the Agreement does not limit the policy space of host states.³³⁴

The CETA is a trade agreement between the EU and Canada also containing an investment chapter³³⁵ which sets out measures to open up investment between the EU and Canada and protect investors and ensure that governments treat them fairly.

³²⁹ It provides that host government's refusal to issue, renew or modify license or permits will not constitute a breach of expropriation and, therefore cannot be challenged in ISDS arbitration.

³³⁰ Annex 9-D of Chapter 9 of the CPTPP.

³³¹ Article 9 (29) of Chapter 9 of the CPTPP.

³³² European Commission 'Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-Commerce' (2015) available at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (accessed 29 August 2017).

³³³ See, for example, Kontinen J & Teivainen 'A Professor: Finland's legislative power may be in jeopardy' *Helsinki Times* (15 December 2013) <http://www.helsinkitimes.fi/finland/finland-news/domestic/8717-professor-finland-s-legislative-power-may-be-in-jeopardy.html> (accessed 29 August 2017) and Stiglitz J 'The secret corporate takeover, project syndicate' (13 May 2015) available at <https://valueedgeadvisors.com/2015/05/17/the-secret-corporate-takeover-by-joseph-e-stiglitz-project-syndicate/> (accessed 29 August 2017). For a discussion, see Gaukrodger D 'The balance between investor protection and the right to regulate in investment treaties: A scoping paper' (2017) OECD Working Papers on International Investment 2017/02, OECD Publishing, Paris available at <http://dx.doi.org/10.1787/82786801-en> (accessed 29 August 2017).

³³⁴ See, for instance, Brower CN & Blanchard S 'What's in a meme? The truth about investor-state arbitration: why it need not, and must not, be repossessed by states' (2011) *Columbia Journal of Transnational Law* 52 748. United States Council on International Business 'Bilateral investment treaties and investor-state dispute resolution: Six key facts' available at http://www.uscib.org/docs/ncs_key_messages.pdf (accessed 29 August 2017); European Federation for Investment Law and Arbitration 'TTIP Consultation Submission' available at http://efila.org/wp-content/uploads/2014/07/EFILA_TTIP_final_submission.pdf (accessed 29 August 2017); and United States Trade Representative 'The facts on investor-state dispute settlement' (March 2014) available at <https://ustr.gov/about-us/policy-offices/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors> (accessed 29 August 2017).

³³⁵ Chapter 8 of the CETA.

However, its provisions are said to limit the regulatory freedom of host states.³³⁶ In particular, the ISDS mechanism allows investors to challenge measures adopted by host states pursuant to public policy.³³⁷

The Seventh World Congress of Education International held in Ottawa, Canada, from 22 to 26 July 2016 called on countries to stop the TTIP, CETA and TPP and other similar trade and investment agreements. The Congress was concerned by the provisions of these agreements which could limit the host states' right to regulate. In particular, the Congress was concerned about the ISDS which 'would allow foreign corporations to sue sovereign states, where an action of an elected government or sub-central authority, or an entity exercising delegated authority such as a licensing and funding agency, taken in the public interest curtails the corporations' ability to maximise their profits.'³³⁸ As a consequence, the Congress called for the countries 'to push for alternative trade and investment policies which fully respect states' obligations under international law and in their constitutions and domestic law to human rights, including the right to education, and that stimulate job-based growth, provide decent work, respect indigenous peoples' rights, raise the living standards of all peoples, and ensure environmentally sustainable development.'³³⁹

The RCEP is a proposed free trade agreement between the 10-member states of the Association of Southeast Asian Nations (ASEAN)³⁴⁰ and India, China, Australia, Japan, South Korea and New Zealand. The proposed RCEP text includes an investment chapter which has faced intense criticism.³⁴¹ For instance, Love has noted

³³⁶ Marwedel M 'Investment protection and dispute settlement in CETA: Power Shift e.V. and Canadian Centre for Policy Alternatives' (2016) available at https://www.foeeurope.org/sites/default/files/eu-us_trade_deal/2016/03_investment_protection_and_dispute_settlement_in_ceta.pdf (accessed 29 August 2017) (hereinafter Marwedel (2016)). See also Patterson B 'CETA does not ensure a government's right to regulate' available at <https://canadians.org/fr/node/13801> (accessed 29 August 2017).

³³⁷ Marwedel (2016) 1.

³³⁸ 'Resolution 1.13: Stop TTIP, TISA, CETA, TPP and other similar trade and investment agreements' available at <http://www.sadtu.org.za/docs/resolutions/2015/RESOLUTION-1-13.pdf> (accessed 17 December 2017) (hereinafter Resolution 1.13: Stop TTIP, TISA, CETA, TPP and other similar trade and investment agreements').

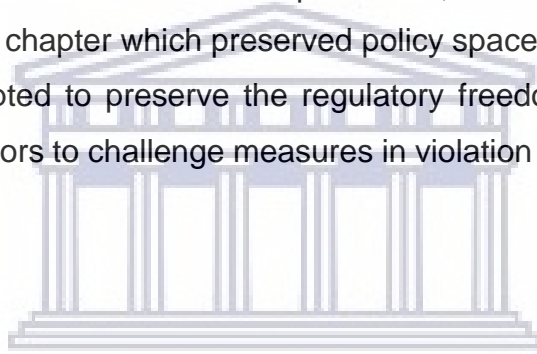
³³⁹ Resolution 1.13: Stop TTIP, TISA, CETA, TPP and other similar trade and investment agreements' 13.

³⁴⁰ Brunei, Burma Myanmar, Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand, Vietnam.

³⁴¹ For example, see 'RCEP investment chapter presents a grave threat to access to medicines' available at <http://isds.bilaterals.org/?rcep-investment-chapter-presents-a&lang=fr> (accessed 17 December 2017). See also 'RCEP: The trade agreement you've never heard of but should be concerned about' available at <http://theconversation.com/rcep-the-trade-agreement-youve-never-heard-of-but-should-be-concerned-about-42885> (accessed 17 December 2017).

that the RCEP investment chapter 'is designed to give private parties the right to extract costly damages from governments that implement policies that harm profits. The issues are complex and consequential, and the potential scope of the government actions covered are very broad. By negotiating the text in secrecy, only a small number of persons have been able to provide feedback to negotiators, creating risks of both intended and unintended harms to the public'.³⁴²

Similar accusations have been levelled against the NAFTA by civil societies, NGOs and academics.³⁴³ The NAFTA has been recently reviewed and amended leading to the adoption of the USMCA in November 2018. The investment provisions of the NAFTA have been perceived as limiting policy space and have seen many governments facing investment arbitration for adopting public interest measures.³⁴⁴ As such, after reviewing the NAFTA investment provisions, the state parties intended to negotiate an investment chapter which preserved policy space issues. Consequently, the USMCA has attempted to preserve the regulatory freedom of host states. For example, it allows investors to challenge measures in violation of certain provisions of



³⁴² Love J '2015 Oct 16 version: RCEP draft text for investment chapter' available at <https://keionline.org/node/2474> (accessed 29 August 2017). See also 'RCEP investment chapter presents a grave threat to access to medicines' (2017) available at <http://isds.bilaterals.org/?rcep-investment-chapter-presents-a&lang=fr> (accessed 29 August 2017).

³⁴³ See, for instance Vandeveld KJ 'A comparison of the 2004 and 1994 US Model BITs: rebalancing investor and host country interests' in Sauvant KP (ed) *Yearbook on international investment law and policy 2008– 2009* (2009) 285-287; Been V & Beauvais JC 'The global fifth amendment? NAFTA's investment protections and the misguided quest for an international "regulatory takings" doctrine' (2003) 78 *New York University Law Review* 30; and Public Citizen 'NAFTA's threat to sovereignty and democracy: The record of NAFTA Chapter 11 investor-state cases 1994–2005' (2005) <https://www.citizen.org/sites/default/files/chapter-11-report-final.pdf> (accessed 29 August 2017); International Institute for Sustainable Development & World Wildlife Fund 'Private rights, public problems: A guide to NAFTA's controversial chapter on investment rights' (2001) http://www.iisd.org/pdf/trade_citizensguide.pdf (accessed 29 August 2017); Alvarez GA & Park WW 'The new face of investment arbitration: NAFTA Chapter 11' (2003) 28 *Yale Journal of International Law* 365.

³⁴⁴ See, for example, *Ethyl Corp. v Canada*, Jurisdiction Award (24 June 1998), 38 ILM 708 (1999), where claimant challenged the proposed ban on ethyl as a carcinogenic substance by Canada; *Metalclad Corp. v Mexico*, ICSID Case No. ARB(AF)97/1, Award (30 August 2000) where Metalclad Corp. challenged refusal by Mexico to issue a waste disposal permit and an order establishing an ecological park); *S.D. Myers Inc. v Canada*, Merits, 8 ICSID Report 4, (13 November 2000) which involves a challenge of a ban on hazardous waste exports; *Methanex Corp. v United States*, Award, 44 ILM 1345, 17(6) (3 August 2005) where US measures to protect public water supplies were contested by Methanex Corp.; *Grand River Enterp. Six Nations Ltd v United States*, UNCITRAL (NAFTA) Decision on Jurisdiction (20 July 2006) where US's tobacco settlement legislation was challenged; *Glamis Gold v United States*, UNCITRAL (NAFTA), Award (8 June 2009) in which US measures to protect indigenous peoples' culture and health were contested.

the USMCA including national treatment, most-favoured-nation treatment and expropriation excluding indirect expropriation.³⁴⁵

Quite recently, the discourse about host governments' regulatory space has also received attention in Africa at both the continental and sub-regional levels. For example, the African Union (AU) has adopted the draft Pan-African Investment Code (PAIC),³⁴⁶ a continent-wide African model investment treaty with the overall aim to promote sustainable development within the continent. Among other things, PAIC seeks to preserve the right to regulate through balancing investment protection and host states regulatory interests.³⁴⁷ In addition, African Regional Economic Communities (RECs), particularly SADC, COMESA and ECOWAS have adopted or reviewed their regional investment agreements with a view to safeguarding their right to pursue specific public policy objectives.³⁴⁸ For example, SADC members have amended Annex 1 to the SADC FIP³⁴⁹ to preserve the right of host states to take regulatory measures to ensure that development in its territory is consistent with the sustainable development goals and legitimate social and economic policy objectives. COMESA has developed and revised the COMESA Common Investment Agreement which provides for investment protection and preserves the regulatory autonomy of the host states.³⁵⁰ ECOWAS has adopted the ECOWAS Supplementary Act which imposes obligations on prospective investors to conduct an environmental and social impact assessment of the project.³⁵¹

³⁴⁵ See also Section F of Chapter 8 of CETA, which limits investment claims only to breaches of national treatment, most-favoured-nation and investment protection standards. CETA is a bilateral comprehensive agreement between EU and Canada which provisionally entered into force in September 2017.

³⁴⁶ Pan-African Investment Code, 2016.

³⁴⁷ See Mbengue MM & Schacherer S 'The 'Africanisation' of international investment law: The Pan-African Investment Code and the reform of the international investment regime' (2017) 18 *The Journal of World Investment & Trade* 414-448. See also Mbengue M 'The quest for a Pan-African Investment Code to promote sustainable development' (2016) available at <https://www.ictsd.org/bridges-news/bridges-africa/news/the-quest-for-a-pan-african-investment-code-to-promote-sustainable> (accessed 28 July 2017).

³⁴⁸ See generally Denters E & Gazzini T 'The role of African regional organisations in the promotion and protection of foreign investment' (2017) 18 *The Journal of World Investment & Trade* 449-492.

³⁴⁹ Agreement Amending Annex 1 (Cooperation on Investment) of the SADC FIP, 2016.

³⁵⁰ COMESA Common Investment Agreement, 2007, revised in 2017.

³⁵¹ Article 12 (1) of the ECOWAS Supplementary Act.

The growing need to reform the international investment legal framework in Africa was triggered by several factors. These include notably, the increasing international lawsuits against African countries from foreign investors,³⁵² erosion of national sovereignty in the wake of cross-border trade and investment commitments,³⁵³ and the prolonged poor economic development, high unemployment rates and abject poverty within the continent despite having signed more than a quarter of the global BITs.³⁵⁴ It is however important to note that the review of the international legal framework of investment in Africa and by countries across the globe is 'by no means a rejection of the international investment regime as a whole' but demonstrates a realisation that the regime's 'current conceptualisation is flawed and is in need of reform to reconcile investor protection with the right of host states to regulate'.³⁵⁵ At the same time, foreign investment is widely accepted by most, if not all African countries as a vital tool to advance economic development as well as a vehicle for job creation, poverty alleviation, industrialisation and infrastructure development. This discussion on the right to regulate in Africa's international investment legal framework is dealt with extensively in chapter 5 of this study.

2.4.3 National level

The right to regulate has also become prominent in national investment discussions in Africa and beyond. After interrogating the authenticity of the traditional international investment law, some governments have begun to review their national investment policies with a view of preserving their regulatory freedom. In Africa, individual countries like Egypt, South Africa, Morocco, Nigeria, Botswana and Namibia have recently examined their investment legal frameworks in order to safeguard their right

³⁵² To date, African countries have faced a total of eighty-nine investor-state disputes, including settled and pending cases.³⁵² Among these countries, Egypt has been respondent in the largest number of cases (twenty-five), followed by the Democratic Republic of Congo (eight cases), Algeria (six cases), and Guinea (five cases). The Republic of the Congo, Gambia, Zimbabwe, Senegal, Tunisia, and Tanzania each has faced four cases, Cameroon, Morocco, Liberia, Ghana, Burundi, and Nigeria (each with three cases), and Central African Republic, Côte d'Ivoire, Gabon, Mali, Seychelles, and Uganda (each with two cases). Equatorial Guinea, Kenya, Madagascar, Niger, South Africa, Mozambique, South Sudan, Sudan, and Togo have had one case each. UNCTAD Investor-state disputes database available at <http://investmentpolicyhub.unctad.org/ISDS?status=1000>.

³⁵³ See Mpshe (2016) 1; and Poulsen (2011) 273-313.

³⁵⁴ See World Economic Forum 'How can Africa achieve sustainable industrial development?' (2015) <https://www.weforum.org/agenda/2015/09/how-can-africa-achieve-sustainable-industrial-development> (accessed 17 December 2017).

³⁵⁵ El-Kady H 'Towards a more effective international investment policy framework in Africa' (2016) 13 *Transnational Dispute Management* 1 4-5 (hereinafter El-Kady (2016)).

to pursue specific public policy objectives.³⁵⁶ South Africa, for example, terminated its BITs between 2013 and 2015 with eight EU countries³⁵⁷ and Switzerland. South Africa argued that the BITs it has signed before and immediately after its independence undermine the government's ability to pursue its development objectives.³⁵⁸ Then, in 2015, the government enacted national investment legislation, the Protection of Investment Act,³⁵⁹ which is intended to protect investment while at the same time preserving the regulatory freedom of the government. Thus, it radically departs from the BITs standards of investment protection. The Protection of Investment Act, among other things, attempts to balance investor protection and the right to regulate, and does not provide for direct recourse to international arbitration. Rather, investor state disputes are to be settled through domestic remedies such as mediation and adjudication by domestic courts or statutory bodies. Inter-state arbitration is only available upon the government's consent, therefore not compulsory or guaranteed.

Beyond Africa, several individual countries have taken or are taking distinct measures to reform their international investment frameworks including, *inter alia*, denunciation, termination and renegotiation of IIAs with the view to addressing public policy space issues in the international investment legal framework. For example, many Latin American countries have terminated and revised IIAs, and withdrew from the ICSID Convention or purported to limit the jurisdiction of the ICSID.³⁶⁰ More recently, India, Indonesia and Norway, among other countries, have announced the termination of their existing IIAs, in order to renegotiate investment treaties that preserve their regulatory autonomy.³⁶¹

³⁵⁶ El-Kady (2016) 4-5.

³⁵⁷ Austria, Belgium-Luxembourg, Denmark, France, Germany, Netherlands, Spain and the United Kingdom.

³⁵⁸ See the speech delivered by Minister of Trade and Industry, Rob Davies at the UNCTAD event held at the University of the Witwatersrand on July 26, 2012 available at <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=29391&tid=77861> (accessed 28 July 2017).

³⁵⁹ Protection of Investment Act 22 of 2015.

³⁶⁰ Bolivia, Ecuador and Venezuela have denounced the ICSID Convention in 2007, 2009 and 2012, respectively.

³⁶¹ Matthews R & Ponniya N 'Withdrawal from Investment Treaties: An omen for waning investor protection in AP?' (2017) <https://www.lexology.com/library/detail.aspx?q=4bdc087c-20f0-4729-9166-1d6de9b8d2de> (accessed 17 December 2017).

2.5 CONCLUSION

This chapter has provided a historical account of the inclusion of the right to regulate in the international investment legal framework. The chapter commenced by offering a historical account of the origin of international investment law with a view to highlighting the historical antecedents that led to the development of international investment law. International investment law emerged in the early colonial period in the quest for imperial control over natural resources and persons of the colonised world.³⁶² During this period, imperialists did not have access to international law, so they applied their national law in foreign states.³⁶³ European trade and investment activities also expanded outside Europe and, as a result, the rules on the protection of foreign-owned property expanded beyond the region to protect property and commercial interests of their nationals in foreign states.³⁶⁴ At the same time, as MNEs expanded across borders, rules were developed to protect and regulate them.³⁶⁵

Later, in the eighteenth and the nineteenth centuries, investment rules – requiring parties to uphold certain minimum standards with respect to the treatment of foreign investors – were enshrined in the FCN treaties.³⁶⁶ In the twentieth century, capital-importing and capital-exporting nations could not agree on the international minimum standards of treatment for foreign investors. On the one hand, the capital-exporting countries, particularly the US and European states, were adamant to apply CIL minimum standards – allowing foreign investors to invoke international law and diplomatic protection.³⁶⁷ To the contrary, capital-importing countries, particularly Latin American nations, maintained that the foreign investors should be treated according to the Calvo doctrine,³⁶⁸ which provides that foreign nationals should be accorded the same treatment as local investors.³⁶⁹

In the late 1920s and early 1930s, concerted efforts were made at the multilateral level to codify the minimum standards for the treatment of foreign investment, but without success. The attempts failed because of the clash between the capital-importing and

³⁶² Schneiderman & Miles (2014) 942-945.

³⁶³ Newcombe & Paradell (2009) 11.

³⁶⁴ De Luca (2013) 120. See also Miles (2013) 2.

³⁶⁵ Wilkins (2008) 14.

³⁶⁶ Walker (1956) 229-247.

³⁶⁷ Schefer (2013) 272.

³⁶⁸ Shea (1955) 17-19.

³⁶⁹ Shea (1955) 17-19.

capital-exporting countries' views on the treatment standards for foreign investors. Nonetheless, in 1933, Pan-American countries adopted the Convention on the Rights and Duties of States granting foreign nationals the minimum standard of treatment in line with the Calvo doctrine which was opposed by the US and other developed countries.³⁷⁰

The late 1930s were marked with a series of expropriations of foreign-owned property developing countries and, consequently, international rules were developed to deal with expropriation compensation. Developing countries insisted on the payment of compensation for expropriation based on national laws, while developed countries supported the payment of 'adequate, effective and prompt' compensation, in terms of the Hull Formula. The debate on compensation for expropriation continued through out the dawn of the post-colonial era.

In the post-colonial period, attempts to adopt international rules governing foreign investment failed. Investment rules were then incorporated in the New York Convention, the ICSID Convention, the MIGA and other international instruments such as UDHR, ICESCR, GATT, TRIMS, GATS as well as the OECD's Convention on the Protection of Foreign Property, Declaration on International Investment, and Declaration on International Investment and Multinational Enterprises, and the UN Transnational Code of Conduct, among others. Failure to adopt a multilateral investment treaty propelled the conclusion and proliferation of BITs in the mid-twentieth century, which became the primary legal instruments for foreign investment.³⁷¹ During this period, there was no or very little emphasis on the right to regulate.

Immediately post-World War II the right to regulate in international law manifested. At the time, newly emerging states were determined to regain their position in international politics and advance their development.³⁷² However, international law was a barrier in this regard and prioritised the protection of foreign investors over the right of the state to regulate economic activities in its own territories.³⁷³ Consequently, developing countries pushed for the recognition of their sovereign right over natural

³⁷⁰ Newcombe & Paradell (2009) 18.

³⁷¹ Spears (2010) 1045.

³⁷² Schrijver (1997) 1.

³⁷³ Salacuse (2015) 78.

resources and to regulate foreign investment for their social and economic development in the early 1950s. This led to the adoption of several UN Resolutions, which generally covered investment issues such as the exploitation of natural resources by foreign nationals, transfer of capital and profits, expropriation of foreign-owned property by host governments, exhaustion of local remedies and the settlement of ISDS in respect of compensation. The Resolutions were fiercely criticised by western countries for radically departing from CIL principles.³⁷⁴

The chapter has also chronicled contemporary global, regional and national investment discussions where the right to regulate is prominent. Global discussions are happening under the auspices of the UNCTAD, OECD, G20 and WTO. The UNCTAD, OECD and G20 have developed policy instruments to serve as guiding instruments for countries when negotiating investment treaties that safeguard policy space. The instruments have been used by many governments and regional organisations in developing their investment treaties. At the regional levels, the incorporation of the right to regulate in international investment legal frameworks has become acute in investment discourses in many regions such as Europe, North America, Trans-Atlantic, Trans-Pacific, Asia and Africa. The right to regulate discourses have also gained attention in national investment policy and law discussion in Africa and beyond. Having established how the demands to integrate policy space in the international regulatory framework for investment have evolved historically, it is important to determine whether there are any international law rules that have evolved in history that compel or place legal obligations on states to accommodate the right to regulate in international investment law. This is the focus of the following chapter.

³⁷⁴ Schwebel (1963) 469.

CHAPTER 3

INTERNATIONAL RULES ON THE INCLUSION OF THE RIGHT TO REGULATE IN INVESTMENT TREATIES

3.1 INTRODUCTION

As demonstrated in the preceding chapter, there is not yet a comprehensive binding treaty on foreign investment regulation at the multilateral level.³⁷⁵ States have failed to reach a consensus on the substantive norms or rules applicable to foreign investment governance due to ideological rifts and clashes of interests in this field of international law.³⁷⁶ However, the absence of a single international agreement of universal application that binds all states to the same standards of investment regulation does not suggest that there are no rules at international level governing investment issues. As established in the previous chapter, international rules on foreign investment regulation are embedded and scattered in customary international law (CIL) norms as well as plurilateral, regional and bilateral investment treaties (commonly referred to as international investment agreements (IIAs)), as well as free trade agreements with investment provisions.³⁷⁷ Other relevant investment standards are established in voluntary, binding and non-binding instruments adopted by inter-governmental and non-governmental organisations such as, *inter alia*, the United Nations (UN), the United Nations Conference on Trade and Development (UNCTAD), the Organisation for Economic Cooperation and Development (OECD), the World Trade Organisation (WTO), the International Labour Organisation (ILO) and the World Bank.

Raeisi and Shahriari underscore that the existence of such different layers of foreign investment rules suggests that the present rules are, on the one hand, a consequence of the different views and opinions in the area of international investment law, and, on the other hand, a result of different political and economic factors in different periods

³⁷⁵ See generally Raeisi L & Shahriari A 'Absence of a universal treaty on foreign investment and movement toward it' (2016) 9 *Journal of Politics and Law* 299-308 (hereinafter Raeisi & Shahriari (2016)).

³⁷⁶ Somarajah M *The international law on foreign investment* 3 ed (2010) 236-7. See discussion in part 2.2 above.

³⁷⁷ See Schefer KN *International investment law: Text, cases and materials* 2 ed (2016) 15-66. Sources of international investment law are not any different from the sources of public international law enshrined in Art. 38 (1) of the Statute of the International Court of Justice, 1945 (hereinafter ICJ Statute) including general principles of international law, CIL, treaties, judicial decisions and teachings of the most highly qualified publicists.

of time.³⁷⁸ As a matter of fact, aspirations to adopt a multilateral investment treaty are still ongoing.³⁷⁹ This is because the present international investment regime is multi-faceted and multi-layered in various rules and norms, and that such rules and norms differ in scope, purpose and interpretation.³⁸⁰

The fact that there is no comprehensive multilateral treaty of universal character correspondingly insinuates that there is no internationally binding treaty compelling states to reserve policy space or preserve their right to regulate in investment treaties. There are nonetheless ongoing multi-stakeholder (governments, intergovernmental organisations, civil society, academia and private sector) discussions within the auspices of UNCTAD to reform IIAs with a view to balance the right of host states to regulate investments and investment protection.³⁸¹ Although there have been a lot of these discussions, there has been little attention paid in the academic literature to the fundamental question of whether the inclusion of the right to regulate in IIAs is in fact an international law norm, custom or principle.

Against this background, this chapter intends to establish whether there exist any binding standards or legal obligations at international level on the inclusion of public policy space in IIAs. This will assist in determining whether there are any international law obligations compelling states to preserve policy space in IIAs. The chapter does not however intend to be exhaustive but succinctly draw attention to international law rules or norms that appear to be more authoritative and normative in relation to state's responsibility or freedom to regulate in public interest. The chapter will thus explore relevant international rules and norms pertinent to the right to regulate derived from the sources of international investment law: treaties, custom, general principles of law, judicial decisions, scholarly writings and soft-law instruments, to mention but a few.

³⁷⁸ Raeisi & Shahriari (2016) 299.

³⁷⁹ For example, the World Trade Institute of the University of Bern hosted a Conference entitled 'Is a Multilateral Investment Treaty Needed?' on 19 June 2017, which debated the many important questions emerging from the negotiation of a possible multilateral framework agreement on investment. See also Åslund A 'The world needs a multilateral investment agreement' (2013) Peterson Institute for International Economics Policy Brief 13, advancing an argument that the world really needs a multilateral agreement on foreign investment regulation.

³⁸⁰ Leal-Arcas R *International trade and investment law: Multilateral, regional and bilateral governance* (2010) 180.

³⁸¹ See United Nations Conference on Trade and Development (UNCTAD) 'Reform of the IIA regime' available at <http://investmentpolicyhub.unctad.org/IIA/KeyIssueDetails/42> (accessed 10 December 2017). See also discussion in part 2.4 above.

In addition, the chapter will adopt a human-rights based approach to support the preservation of the host states' right to regulate in IIAs. To that end, the chapter will utilise pertinent binding human rights norms and treaties as tools to evaluate and ascertain African countries' rights or obligations in relation to regulatory freedom.

Moreover, where necessary, developments in investment arbitral case law and specific IIAs pertaining to the interpretation of international rules and norms will be used to illustrate the use of such rules or norms in investment treaties. It is important to stress that there is no *stare decisis* or formal binding system of precedent in international investment law,³⁸² but investment treaty case law has contributed significantly to the growing body of *de facto* international investment jurisprudence interpreting and elaborating the meaning of states' obligations under IIAs.³⁸³

In addition, where relevant, investment treaties applicable to other regions such as Europe and America, will be referred to as examples, foundational norms and/or best practices upholding right to regulate principles. Moreover, reference to non-binding voluntary norms is precisely to determine whether there may be any lessons which might be derived from the application of such norms. It is important to underline that in a domain where there is no binding treaty on international investment governance, non-binding and voluntary standards on investment adopted by international organisations have an influence on foreign investment regulation.³⁸⁴ Closely related, intergovernmental organisations play a critical role in the international law sphere. For example, they establish international law standards or rules, develop international law and monitor the implementation of treaty obligations.³⁸⁵ In addition, scholarly writings will be used as reference tools of interpretation for the correct interpretation of the international rules and norms.

³⁸² Giest A 'Interpreting public interest provisions in international investment treaties' (2017) 18 *Chicago Journal of International Law* 330. For a detailed discussion on judicial precedence in international, see Cohen HG 'Theorising precedent in international law' in Bianchi A, Peat D & Matthew M (eds) *Interpretation in international law* (2015) ch 13.

³⁸³ See Commission JP 'Precedent in investment treaty arbitration: A citation of a developing jurisprudence' (2007) 24 *Journal of International Arbitration* 129-58; Bernasconi-Osterwalder N & Johnson L (eds) *International investment law and sustainable development: Key cases from 2000–2010* (2010); and Schacherer S *International investment law and sustainable development: Key cases from the 2010s* (2018).

³⁸⁴ Zampeti AB & Sauve P 'International investment' in Guzman AT & Sykes AO (eds) *Research handbook in international economic law* (2007) 211.

³⁸⁵ Hassim A, Heywood M & Berger J *Health & democracy: A guide to human rights, health law and policy in post-Apartheid South Africa* (2007) 138.

Taking into account the fact that international rules, standards or principles on foreign investment regulation remain contested, the ultimate goal of this chapter is to establish whether such norms and instruments constitute binding standards and/or normative obligations on African states to reserve their regulatory freedom in investment treaties. The chapter intends to serve as a lense through which the thesis of this study will be evaluated and understood. The questions to be addressed in the chapter include: firstly, whether there exists any international rules and norms on the right to regulate in international investment law? Secondly, what normative and/or legal obligations do these international rules and norms create for African countries in relation to reserving regulatory freedom in IIAs? Before delving into a discussion that answers these questions it is necessary to ascertain the application of international law or rules in African countries.

3.1.1 The application of international law in African countries

The constitutions of many African countries deal with the application of international law in their municipal levels. The application of international law in domestic law is often interpreted in terms of the monism and dualism dichotomy. Monism holds that international law and domestic law form part of a single universal legal system.³⁸⁶ That is, international law rules are directly applied in the domestic legal system. On the contrary, dualist system treats international and domestic systems of law as separate and independent conceptions of law.³⁸⁷ In such a dualist case, the validity of international law in a domestic system is determined by a rule of domestic law authorising the application of that international norm, or an international law must be domesticated or incorporated by a legislation. African countries adopt a monist or dualist approach towards international law.³⁸⁸ African countries with civil law have conventionally been seen as monists, whereas those with common law as dualists.³⁸⁹

³⁸⁶ Ferreira G & Ferreira-Snyman A 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' (2014) 17 *Potchefstroom Electronic Law Journal // Potchefstroomse Elektroniese Regsblad* 1471 (hereinafter Ferreira & Ferreira-Snyman (2014)).

³⁸⁷ Ferreira & Ferreira-Snyman (2014) 1471. See also Nijman J & Nollkaemper A (eds) *New perspectives on the divide between national & international law* (2007) 52.

³⁸⁸ See Maluwa T 'International law as an aid in the interpretation and application of law in municipal systems in Africa' in Ajibola B & Van Zyl D (eds) *The judiciary in Africa* (1998) 47-63; Kilander M 'The role of international law in human rights litigation in Africa' in Quansah E & Binchy W (eds) *The judicial protection of human rights in Botswana* (2009) ch 2.

³⁸⁹ For example, common law countries like South Africa, Namibia, Botswana, Lesotho, eSwatini and Zimbabwe have dualism approach towards international law.

Nonetheless, Killander and Adjolohoun find that courts in African countries with a dualist approach use international law to a larger degree than explicitly monist countries such as those of Francophone Africa.³⁹⁰ They further observe that, in principle, courts in most civil law countries oppose direct application of international law and make minimal use of international law when interpreting constitutional provisions.³⁹¹

However, CIL is applied directly in many African countries.³⁹² That is, CIL is an integral part of their municipal law. CIL is not created by the decisions of tribunals or courts but rather through the general and consistent practice followed by states from a sense of legal obligations.³⁹³ To prove the existence of CIL one is required to show that a state practice and *opinio juris* has been extensive and virtually uniform.³⁹⁴ In *Gulf of Maine*,³⁹⁵ the International Court of Justice (ICJ) stated that CIL 'comprises a set of customary rules whose presence in the *opinio juris* of states can be tested by induction based on the analysis of a sufficiently extensive and convincing practice and not by deduction from preconceived ideas'.³⁹⁶ It is well-entrenched in international law that CIL operates above all laws, and, thus, is equally and automatically binding on all

³⁹⁰ Killander M & Adjolohoun H 'International law and domestic human rights litigation in Africa: An Introduction' in Killander M (ed) *International law and domestic human rights litigation in Africa* (2010) 4 (hereinafter Killander & Adjolohoun (2010)). Most of the Francophone African countries' constitutions have copied Article 55 of the French Constitution of 1958 which stipulates that 'treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party'. See for example, See the constitutions of Benin (Art. 147), Burkina Faso (Art.151), Burundi (Art. 292), Cameroon (Art. 45), Central African Republic (Art. 69), Chad (Art. 222), Congo (Art. 185), Côte d'Ivoire (Art. 87), DRC (Art. 215), Guinea (Art. 79), Mali (Art. 116), Mauritania (Art. 80), Niger (Art.132), Rwanda (Art. 190), Senegal (Art. 91) and Togo (Art. 140).

³⁹¹ Killander & Adjolohoun (2010) 4.

³⁹² For example, South Africa and Zimbabwe have adopted the approach of directly incorporating CIL. See s. 232 of the Constitution of the Republic of South Africa, 1996; s 326 of the Constitution of the Republic of Zimbabwe, 2013; s 7 (e) of the Constitution of the Republic of Gambia, 1997; s 211 (3) of the Constitution of the Republic of Malawi, 1994; Art. 13 (1) of the Constitution of the Republic of Angola, 2010; and Art. 11 (1) of the Constitution of the Republic of Cape Verde, 1992.

³⁹³ See Rule of Law Institute of Australia 'What is customary international law?' (2017) available at <https://www.ruleoflaw.org.au/what-is-customary-international-law/#note-10498-3> (accessed 20 December 2017); Ferreira AR, Carvalho C, Marhry FG & Rigon PBV 'Formation and evidence of customary international law' (2013) *UFRGS Model United Nations Journal* 182-201; Simma B & Alston P 'The sources of human rights law: custom, ius cogens, and general principles' (1992) 12 *Australian Year Book of International Law* 1988-89; *North Sea Continental Shelf* para 63; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, I.C.J. Reports 1986 paras 176, 194, 237.

³⁹⁴ See generally Talmon S 'Determining customary international law: The ICJ's methodology between induction, deduction and assertion' (2015) 26 *The European Journal of International Law* 417-43.

³⁹⁵ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)*, ICJ

Reports (1984) 246 (hereinafter *Gulf of Maine*).

³⁹⁶ *Gulf of Maine* para 111.

states.³⁹⁷ Equally important is that CIL is not only crucial as a legal basis on investment but as applicable law before international investment tribunals and municipal tribunals.³⁹⁸ In light of this one would therefore argue that tribunals, domestic measures or statutes or IIAs cannot be used to derogate from duties imposed by CIL. Therefore, in the context of this chapter, one would also assert that states are prohibited from derogating from CIL rules that compel governments to exercise their right to regulate. Notwithstanding the foregoing, it must be acknowledged that, with the exception of *jus cogens* norms,³⁹⁹ states may depart from CIL through the conclusion of treaty.⁴⁰⁰ Under such circumstances, the treaty would operate as a *lex specialis* to replace the CIL rule.⁴⁰¹

It is for this particular reason that international rules emanating from general international law and CIL norms relating to the right to regulate will be used to evaluate the international investment law regime of Africa.

3.2 GENERAL INTERNATIONAL LAW AND CIL

General international law and CIL accord states a large degree of regulatory discretion with reference to public interests. The proper starting point for addressing the right to regulate under general international law begins with the proposition that the right to regulate is recognised as a basic attribute of state sovereignty.⁴⁰² The author submits that the principle of sovereignty is at the core of accommodating the concept of the right to regulate in international investment law. As alluded to in the introductory chapter, the right to regulate is classically concerned with what states can or ought to

³⁹⁷ See Art. 38 (1) (b) of the ICJ Statute; *North Sea Continental Shelf case, (Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands)* 1969 ICJ Reports 3 para 71; *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment*, ICJ Reports 1984 para 246; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, Merits, Judgment, ICJ Reports 1986 para 184.

³⁹⁸ Gazzini T 'Role of customary international law in the field of foreign investment' (2007) 8 *The Journal of World Investment & Trade* 691.

³⁹⁹ The concept of *jus cogens* is introduced in Art. 53 of the Vienna Convention on the Law of Treaties, 1969 (hereinafter VCLT), but the precise content and determination of whether a particular rule qualifies as a *jus cogens* is not completely clear.

⁴⁰⁰ Pauwelyn J 'The role of public international law in the WTO: How far can we go?' (2001) 95 *American Journal of International Law* 537.

⁴⁰¹ *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 para 481.

⁴⁰² See Vadi V *Cultural heritage in international investment law and arbitration* (2014) 85 (hereinafter Vadi (2014)); Vadi V *Public health in international investment law and arbitration* (2013) 50 (hereinafter Vadi (2013)); and Sornarajah M 'The right to regulate and safeguards' in UNCTAD (ed) *The development dimension of FDI: Policy and rule-making perspectives* (2003) 205.

do as sovereigns and guardians of general public interest in their jurisdictions.⁴⁰³ As sovereigns, states have the authority to enact legislation, enforce judgments and adopt regulatory policies they deem necessary or essential to promoting the social and economic welfare of the citizens.⁴⁰⁴ The state's regulatory autonomy derives from the principle of sovereignty, which generally connotes a country's right and capacity to make authoritative decisions over its territory.⁴⁰⁵ Further, state sovereignty bestows governments with power to determine the structure of political, economic, social and cultural systems, and formulation of foreign policy.⁴⁰⁶

The principle of state sovereignty is enshrined in Articles 1 and 2 of the UN Charter of Economic Rights and Duties of States,⁴⁰⁷ which prescribe:

Every state has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural system in accordance with the will of people, without outside interference, coercion or threat in any form whatsoever.

Every state has the right:

- (a) to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No state shall be compelled to grant preferential treatment to foreign investment;
- (b) to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its law, rules and regulations and conform with its economic and social policies. Transnational Corporations shall not intervene in the internal affairs of a host state.⁴⁰⁸

The above provisions reveal that states, as sovereigns, have an absolute right to decide the particular method of administration of their economic and social systems

⁴⁰³ Mouyal LW *International investment law and the right to regulate: A human right perspective* (2016) 222 (hereinafter Mouyal (2016)).

⁴⁰⁴ Vadi (2014) 85. See also Vadi (2013) 50.

⁴⁰⁵ See Krehoff B 'Legitimate political authority and sovereignty: Why states cannot be the whole story' (2008) 14 *Res Publica* 283-97; and Roth BR 'The enduring significance of state responsibility' (2004) 56 *Florida Law Review* 1017-50.

⁴⁰⁶ See generally Thomson JE 'State sovereignty in international relations: Bridging the gap between theory and empirical research' (1995) 39 *International Studies Quarterly* 213-33.

⁴⁰⁷ Charter of Economic Rights and Duties of States, 1974 (hereinafter Charter for Economic Rights and Duties of States)). The Charter of Economic Rights and Duties of States is legally binding upon the state parties. Almost every country in the world is a member of the UN and therefore legally bound by the Charter.

⁴⁰⁸ Articles 1 and 2 of the Charter of Economic Rights and Duties of States.

within their territories without foreign interference. Furthermore, by virtue of sovereignty, states have the right to control entry and exit of persons and things in respect of the state terrain, and to regulate the activities of nationals or foreign persons and companies within their borders.⁴⁰⁹ That is, states have a sovereign and legal right to regulate the social, economic, political and environmental activities of their territories. As a result, host states and their governments, in their interactions with foreign investors, therefore enjoy considerable freedom and autonomy in the operation of their territory, as a customary principle of international law.⁴¹⁰ It is argued that the principle of sovereignty has attained the status of CIL.⁴¹¹

In light of the foregoing line of reasoning, one would suggest that the state as a party to an investment treaty is in a position of some considerable power to impose conditions that suit its sovereign interests over and above commercial considerations.⁴¹² Article 2 of the Charter of Economic Rights and Duties of States confirms that host states have a right to regulate and supervise foreign investors in their territories.⁴¹³ This includes an inherent right to supervise foreign investors as well as ensure that they comply with national laws, environmental issues, and other domestic socio-economic requirements. Such regulation can have a considerable influence on the operation of the investment, and thus requires further consideration. Also intrinsic in the state sovereignty principle is the necessary supervision that ensures foreign companies realise that they are not free to behave in a manner which may harm or show disrespect to their host states.⁴¹⁴

Linked to the foregoing argument, the UN Resolution 3201 (Declaration on the New International Economic Order),⁴¹⁵ emphasises 'respect' in the pursuit of economic goals by foreign investors. More precisely, Article 4 of the Declaration on the New

⁴⁰⁹ Articles 2 (b) of the Charter of Economic Rights and Duties of States. See also Salacuse JW *The law of investment treaties* (2010) 191 (hereinafter Salacuse (2010)).

⁴¹⁰ Salacuse (2010) 191.

⁴¹¹ *North Sea Continental Shelf*, Judgment, ICJ Reports 1969 para 63.

⁴¹² But, as demonstrated in the previous chapter, most developing countries have abrogated this power in favour of attracting foreign investors and investments when they signed BITs.

⁴¹³ Article 2 of the Charter of Economic Rights and Duties of States.

⁴¹⁴ Article 2 (b) of the Charter of Economic Rights and Duties of States. See also Al-Adba NM *The limitation of state sovereignty in hosting foreign investments and the role of investor-state arbitration to rebalance the investment relationship* (PhD thesis, University of Manchester, 2014) 60 (Al-Adba (2014)).

⁴¹⁵ UN General Assembly Resolution 3201 (S-VI): Declaration on the Establishment of a New International Economic Order, 1974 (hereinafter Declaration on the New International Economic Order).

International Economic Order declares that the new international economic order must be founded on full respect for the:

Right of every country to adopt the economic and social system that it deems the most appropriate for its own development and not to be subjected to discrimination of any kind as a result;

Full permanent sovereignty of every state over its natural resources and all economic activities. In order to safeguard these resources, each state is entitled to exercise effective control over them and their exploitation with means suitable to its own situation.⁴¹⁶

This emphasises the importance of the protection of national public interest in any investment project.⁴¹⁷ A host state's entitlement to 'exercise effective control' over foreign investments includes such activities as registration, licensing, observation and inspection of corporation records, and as such is an overt and obvious expression of state sovereignty over any international investments on its land.⁴¹⁸ Supervision allows governments to impose their particular economic principles on the investment that they attract, and helps to ensure foreign companies' compliance with the political, public welfare and environmental ethos of their host state.⁴¹⁹

Equally important in this regard is the state's sovereignty over natural resources, which is embedded in the principle of permanent sovereignty over natural resources that evolved through various UN General Assembly Resolutions.⁴²⁰ This principle is construed to entail states' right to regulate natural resources, and is well-entrenched in the UN General Assembly Resolution 1803 on the Permanent Sovereignty over Natural Resources.⁴²¹ Resolution 1803 represents the conventional international law position on the state permanent sovereignty over natural resources, and declares, *inter alia*, that:

⁴¹⁶ Article 4 (d) and (e) of the Declaration on the New International Economic Order.

⁴¹⁷ Al-Adba (2014) 60.

⁴¹⁸ Al-Adba (2014) 60.

⁴¹⁹ Al-Adba (2014) 60.

⁴²⁰ For discussion on the evolution of this principle, see Ng'ambi SP 'Permanent sovereignty over natural resources and the sanctity of contracts, from the angle of *lucrum cessans*' (2015) 12 *Loyola University Chicago International Law Review* 155-7 (hereinafter Ng'ambi (2015)). This was discussed in chapter 2.

⁴²¹ UN General Assembly Resolution 1803 (XVII) on the Permanent Sovereignty over Natural Resources on 14 December 1962 (hereinafter Resolution on the Permanent Sovereignty over Natural Resources).

The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned.

The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorisation, restriction or prohibition of such activities.

In cases where authorisation is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient state, due care being taken to ensure that there is no impairment, for any reason, of that state's sovereignty over its natural wealth and resources.

Nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.

International cooperation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.

Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United

Nations and hinders the development of international cooperation and the maintenance of peace.

Foreign investment agreements freely entered into by or between sovereign states shall be observed in good faith; states and international organisations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.⁴²²

In simple terms, the above provisions endorse the right of citizens and their governments to control and benefit from the exploitation of their natural resources by foreign investors. Overall, the principle of permanent sovereignty over natural resources essentially advances the argument that states (and citizens) must have control over their natural resources and must benefit from the exploitation of such. Ng'ambi argues that such an exertion of control entails the right to: 'freely dispose of natural resources; explore and exploit natural resources freely; use natural resources for development; regulate foreign investment; and settle disputes on the basis of national law'.⁴²³ In addition, states' control over natural resources is largely dependent on a state utilising the resources for national development.⁴²⁴ Thus, states must ensure that their natural resources are used to support and advance their national development objectives.

It must be emphasised that the Resolutions adopted by the UN General Assembly are not formally binding on states.⁴²⁵ Be that as it may, this does not necessarily mean that the principles contained in UN General Assembly Resolutions are irrelevant. As Ng'ambi alleges:

It would be insalubrious, erroneous and ultimately dogmatic to completely disregard the principles espoused in General Assembly resolutions. The General Assembly is a vehicle through which the "formulation and expression of the practice of states in matters pertaining to international law" are manifested. Its procedures include voting

⁴²² Paragraph 1-8 of the Resolution on the Permanent Sovereignty over Natural Resources.

⁴²³ Ng'ambi (2015) 154.

⁴²⁴ Ng'ambi (2015) 154.

⁴²⁵ Kerwin GJ 'The role of the United Nations General Assembly Resolutions in determining principles of international law in United States courts' (1983) 32 *Duke Law Journal* 899.

and the eventual adoption of a resolution. It therefore follows that these resolutions constitute evidence of customary international law.⁴²⁶

It is against this backdrop that the relevant UN General Assembly Resolutions are employed in this study. The following section will determine imperious value or obligations extrapolated from the UN General Assembly Resolutions – whether or not they are obligatory on states.

The principle of permanent sovereignty over natural resources is legitimate under international law, and is firmly perceived by the academic community,⁴²⁷ international arbitral tribunals and the ICJ as a CIL norm.⁴²⁸ This view has been echoed by various tribunals. For example, the tribunal in *Libyan American Oil Co. v Libya*⁴²⁹ confirmed that ‘the said Resolutions, if not a unanimous source of law, are evidence of the recent dominant trend of international opinion concerning the sovereign right of states over natural resources’.⁴³⁰ The tribunal in *Texaco Overseas Petroleum Co. v Libyan*⁴³¹ also affirmed that Resolution 1803 reflected the tenets of CIL. The ICJ has accepted the principle of permanent sovereignty over natural resources as a principle of CIL in *East Timor Case*⁴³² and *Democratic Republic of Congo v Uganda*.⁴³³ On this basis, it is appropriate to argue that the principle of permanent sovereignty over natural resources is firmly recognised as CIL under international law. It is by the exercise of this sovereignty that states can enter into concession agreements with foreign investors.⁴³⁴ However, it is also important to note that states must not only exercise the right through control of natural resources and entering into contracts with foreign investors and governments. Instead, states must also ensure that they do not erode

⁴²⁶ Ng'ambi (2015) 157-8. See also Sornarajah M *The international law on foreign investment* 3 ed (2010) 446; Akinsanya A ‘Permanent sovereignty over natural resources and the future of foreign investment’ (1978) 7 *Journal of International studies* 125; and Bleicher SA ‘The legal significance of recitation of General Assembly Resolutions’ (1969) 63 *American Journal of International law* 444.

⁴²⁷ See, for example, Gess KN ‘Permanent sovereignty over natural resources: An analytical review of the United Nations Declaration and its genesis’ (1964) 13 *International & comparative law quarterly* 411; and Baxter RR ‘International law in “her infinite variety”’ (1980) 29 *International & comparative law quarterly* 564.

⁴²⁸ Ng'ambi (2015) 164.

⁴²⁹ *Libyan Am. Oil Co. (LIAMCO) v Government of Libyan Arab Republic*, 20 ILM 1, 53 1981 (hereinafter *LIAMCO v Libya*).

⁴³⁰ *LIAMCO v Libya* para 29-30.

⁴³¹ *Texaco Overseas Petroleum Co. v. the Government of the Libyan Arab Republic*, Award (19 January 1977), 17 ILM 1, 4 (1978) (hereinafter *Texaco Overseas Petroleum Co. v. Libya*).

⁴³² *East Timor (Portugal v Australia)*, 1995 ICJ 90 (June 30) (dissenting opinion of Judge Weeramantry).

⁴³³ *Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Report of Judgment, 2005 ICJ 168 (December 19).

⁴³⁴ Ng'ambi (2015) 159.

the privilege of this right by entering into contracts with foreign investors and governments that limit their regulatory autonomy to utilise the exploitation of such resources to further their development. That is, states must exercise their permanent sovereignty over natural resources carefully.

In addition, it is also worth underlining that the exercise of such sovereignty should be within the confines of the law as prescribed by general principles of international law or particular treaty. Thus, as a rule, if a state enters into a contract or agreement with a foreign investor or government, the state must respect their obligations enshrined in that contract or treaty – as stipulated in the principle of *pacta sunt servanda*.⁴³⁵ The *pacta sunt servanda* maxim denotes that once a state establishes that the agreement was indeed freely entered into, it has no choice but to enforce and uphold the agreement.⁴³⁶ In other words, states ought to exercise their sovereign powers in such a manner that does not interfere with the interests of investors and state obligations towards foreign investors under an investment treaty or contract.

It is important for the state to recognise its sovereignty, and it is equally important to ensure that the state respects its commitments laid down in IIAs. For example, in *Texaco Overseas Petroleum Co. v Libya*, the tribunal was confronted with a question as to whether the act of sovereignty in the form of nationalisation authorises the Libyan government to disregard its international commitments assumed by it within the framework of its sovereignty. The tribunal held that ‘a state cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty, and cannot through measures belonging to its internal order make null and void the rights of the contracting party which has performed its various obligations under the contract’.⁴³⁷ However, many states cannot claim their sovereignty (right to regulate) under the existing traditional IIAs, in which states have signed away their sovereign right to regulate at the expense of investment protection standards.

⁴³⁵ This proposition is further discussed in part 3.4 below.

⁴³⁶ See Furmston MP *Cheshire, Fifoot and Furmston’s law of contract* (2012) 22-5.

⁴³⁷ *Texaco Overseas Petroleum Co. v. Libya* para 22-4.

Moreover, there is a jurisprudence of investment arbitration case law that has confirmed the host state's sovereign right to regulate in the international investment law.⁴³⁸ For example, in *Marvin Feldman v Mexico*,⁴³⁹ the International Centre for Settlement of Investment Disputes (ICSID) tribunal substantiated that:

Governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognises this.⁴⁴⁰

The right to regulate may, in certain circumstances or if not fairly exercised, contravene international trade and investment interests guaranteed by CIL as well as international agreements. For instance, in the international trade context, use of domestic legislation to increase tariff levels or granting subsidies may be tainted as protectionism, that is, undermining trade liberalisation. In international investment context, the use of domestic legislation to protect the environment,⁴⁴¹ public health, general social welfare or labour may violate investors' interests secured under the IIAs.

The analysis in this part of the chapter can lead to a preliminary conclusion that states have a sovereign right to regulate which is well-established in general international law and CIL. As such, states should depend on their sovereign right to set conditions in investment treaties that will enable them to exercise their regulatory freedom. Also noteworthy in this discussion is that the sovereign right cannot be invoked if there is an investment treaty, eroding the state sovereignty to regulate, has been signed between the host state and the home state or foreign investors. In such circumstances, the states would not be able to invoke its sovereignty to disregard commitments undertaken in an investment treaty or contract.⁴⁴² In other words, rules of CIL or imperative norms of general international law accepted and recognised by the entire

⁴³⁸ See, for instance, *Chemtura Corporation v Government of Canada*, UNCITRAL, Award (2 August 2010).

⁴³⁹ *Marvin Feldman v Mexico*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002) (hereinafter *Feldman v Mexico*).

⁴⁴⁰ *Feldman v Mexico* para 103.

⁴⁴¹ See *Compania del Desarrollo de Santa Elena S.A. v Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000); and *Metaclad Corporation v The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000).

⁴⁴² *Texaco Overseas Petroleum Co. v. Libya* para 22-4.

international community as norms from which no derogation is permitted, may offer states regulatory space or conversely their ability to invoke such.⁴⁴³

3.3 HUMAN RIGHTS APPROACH TO INCORPORATE THE RIGHT TO REGULATE IN INVESTMENT TREATIES

There is a human rights-based approach to support the reservation of the states' regulatory freedom in IIAs.⁴⁴⁴ The approach is deeply rooted in human rights treaties adopted at the international and regional levels constituting a normative framework containing the general principles of law, customs of law recognised by states, as well as legal precedents and doctrine.⁴⁴⁵ It is on this basis that the binding human rights norms and treaties binding to African states at the international and regional levels will be employed in this chapter as tools to evaluate and understand states' right or obligation in relation to regulatory freedom or policy space to regulate in the public interest. This part of the chapter adopts a human rights-based approach to investment regulation with the primary objective to concretise and advance the argument that African countries are legally obliged to conduct or apply international regulatory framework of investment consistently with the basic objective and normative obligation to promote and protect human rights.

The human rights-based approach 'offers a firm foundation for people to make claims on their states and for holding states to account for their duties to improve the access of their citizens to the realisation of their rights'.⁴⁴⁶ Under general international law, states do not only have the right to regulate but have a duty to do so.⁴⁴⁷ This duty is grounded in the international law obligation of states to 'respect, protect and fulfil' human rights. This notion is well-established in international law and has been enshrined in the UN Guiding Principles on Business and Human Rights.⁴⁴⁸ According to the UN Guiding Principles on Business and Human Rights, 'states must protect

⁴⁴³ Titi C *The right to regulate in international investment law* (2014) 270 (hereinafter Titi (2014)).

⁴⁴⁴ See generally Adeleke F *International investment law and policy in Africa: Exploring a human rights based approach to investment regulation and dispute settlement* (2018). See part 1.2 above.

⁴⁴⁵ Article 61 of the ACHPR. See part 1.2 above.

⁴⁴⁶ Warikandwa TV *Enlarging the place of human rights and development in international trade regulation: An evaluation of the problems and prospects of incorporating a social clause in the legal framework of the World Trade Organisation* (2012) (LLD thesis, University of Fort Hare) 95 (hereinafter Warikandwa (2012)).

See also Ferguson C *Global social policy principles: Human rights and social justice* (1999) 23.

⁴⁴⁷ Vadi (2014) 85.

⁴⁴⁸ UN Guiding Principles for Business and Human Rights, 2011 (hereinafter UN Guiding Principles for Business and Human Rights).

against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication'.⁴⁴⁹ This denotes state's regulatory function. To meet their duty to protect, states ought to:

- (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
- (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
- (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
- (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.⁴⁵⁰

Such laws might range from non-discrimination and labour laws to environmental, property, privacy and anti-bribery laws.⁴⁵¹ This is consistent with the current form of the right to regulate which includes the right to protect the public welfare from possible negative impacts of (both foreign and domestic) investments.⁴⁵² In the same vein, the Commentary of the UN Guiding Principles on Business and Human Rights further affirms that:

The state duty to protect is a standard of conduct. Therefore, states are not *per se* responsible for human rights abuse by private actors. However, states may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse. While states generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication. States

⁴⁴⁹ UN Guiding Principles for Business and Human Rights 3.

⁴⁵⁰ UN Guiding Principles for Business and Human Rights 3.

⁴⁵¹ UN Guiding Principles for Business and Human Rights 5.

⁴⁵² Mann H 'The right of states to regulate and international investment law' Paper presented at the Expert Meeting on the development dimension of FDI: Policies to enhance the role of FDI in support of the competitiveness of the enterprise sector and the economic performance of host economies, taking into account the trade/investment interface, in the national and international context, Geneva, 6–8 November 2002 available at http://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf (accessed 12 January 2018).

also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency.⁴⁵³

In addition, the UN Guiding Principles on Business and Human Rights provide that 'states should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations'.⁴⁵⁴ This means that states must, through domestic legislation, regulations or measures, stipulate what is expected of international investors regarding respecting and protecting human rights of the citizens. Such actions are meant to ensure predictability for business enterprises by providing coherent and consistent messages and preserving the state's own reputation.⁴⁵⁵ This confirms the regulatory autonomy of states in relation to protecting public interests and welfare such as environment, public health and related issues.

Most important and relevant to this study is Guiding Principle 9. which requires host states to preserve their policy space. More precisely, Guiding Principle 9 prescribes that 'states should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other states or business enterprises, for instance through investment treaties or contracts'. The Commentary of the Guiding Principles comments that:

Economic agreements concluded by states, either with other states or with business enterprises – such as bilateral investment treaties, free trade agreements or contracts for investment projects – create economic opportunities for states. But they can also affect the domestic policy space of governments. For example, the terms of international investment agreements may constrain states from fully implementing new human rights legislation or put them at risk of binding international arbitration if they do so. Therefore, states should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.⁴⁵⁶

⁴⁵³ UN Guiding Principles for Business and Human Rights 3.

⁴⁵⁴ UN Guiding Principles for Business and Human Rights 3.

⁴⁵⁵ UN Guiding Principles for Business and Human Rights 4.

⁴⁵⁶ UN Guiding Principles for Business and Human Rights 11.

The UN Guiding Principles on Business and Human Rights are non-binding – but intend to provide authoritative global standards and practices for preventing and addressing the risk of adverse human rights impacts linked to business activity.⁴⁵⁷ Albeit non-binding, these Guiding Principles are now seen as the most authoritative statement of the human rights duties or responsibilities of states (and corporations) adopted at the UN level.⁴⁵⁸ The Guiding Principles have also been widely endorsed by business organisations and inter-governmental organisations such as the OECD,⁴⁵⁹ affirmed by human rights treaty bodies,⁴⁶⁰ invoked by civil society organisations several times, and are now subject to a follow-up mechanism within the UN system, through the Working Group on Business and Human Rights.⁴⁶¹

It must be noted that though the Guiding Principles *prima facie* apply to the abuse of human rights by companies, they present themselves as a restatement of norms and human rights obligations imposed on states (and companies) under international law.⁴⁶² However, it must be emphasised that the traditional international human rights law does not impose direct obligations on companies, who are not full subjects of

⁴⁵⁷ UN Guiding Principles for Business and Human Rights 1.

⁴⁵⁸ De Schutter O 'Foreword: Beyond the guiding principles' in Deva S & Bilchitz D (eds) *Human rights obligations of business: Beyond the corporate responsibility to respect?* (2013) xvii (hereinafter De Schutter (2013)).

⁴⁵⁹ The OECD Guidelines on Multinational Enterprises, 2011 includes a chapter on human rights that is based on the 'protect, respect and remedy framework'. See OECD Guidelines on Multinational Enterprises ch IV.

⁴⁶⁰ See, for example, the Committee on Economic, Social and Cultural Rights (CESCR) encouraging states to prevent third parties from violating human rights such as right to health and right to water under the International Covenant on Economic, Social and Cultural Rights. CESCR 'General Comment No. 14 (2000), the right to the highest attainable standard of health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)' E/C.12/2000/4 para 39; CESCR 'General Comment No. 15 (2002), the right to water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' E/C.12/2002/11 para 31; the Committee on the Elimination of Racial Discrimination (CERD), affirming that state parties should protect human rights by preventing their own citizens and companies, or national entities, from violating rights in other countries. CERD 'Concluding observations for Canada' CERD/C/CAN/CO/18 para 17; See also CERD 'Concluding observations for the United States' CERD/C/USA/CO/6 para 30; and the Human Rights Committee encouraging states to set out clearly the expectation that all businesses domiciled in their territories to respect human rights under the International Covenant on Civil and Political Rights. Human Rights Committee 'Concluding observations on the sixth periodic report of Germany' CCPR/C/DEU/CO/6 para 16.

⁴⁶¹ The Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises was established by the Human Rights Council Resolution A/HRC/RES/17/4 (2011).

⁴⁶² For contrary views, see De Schutter (2013) xxii, indicating that 'the Guiding Principles are not a restatement of international law; they are a tool, meant to provide practical guidance both to states and companies, in order to ensure that all instruments at the disposal compliance with human rights in activities if business'.

international law. This has provoked some stakeholders to question the applicability of the norms stated in the Guiding Principles on companies.⁴⁶³

Currently, there are efforts towards adopting a legally binding treaty instrument on business and human rights. In 2014, the UN Human Rights Council adopted, by majority, a Resolution creating an Intergovernmental Working Group to elaborate a 'legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.'⁴⁶⁴ In July 2018, Ecuador's Ambassador acting as chair of the process released a zero draft of an international instrument addressing business and human rights – the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises.⁴⁶⁵ According to Lopez:

The zero draft addresses only the conduct of transnational corporations and other business enterprises that have “transnational activities.” Actions or omissions by businesses acting only within domestic jurisdictions are omitted. The zero draft treaty defines “business activities of transnational character” as those “for-profit activities” that “take place or involve actions, persons or impact in two or more national jurisdictions” (Art. 4(2)). The limitation in scope is in detriment of a broader scope including all business operations, as advocated by some states and non-governmental organisations.

This limited scope has been a matter of contention since the start of the process. The scope has impacts on the reach and consistency of several treaty provisions whose focus is the definition of grounds of legal liability (mainly civil and criminal) for businesses and access to remedy and reparation. Its disruptive effects can be seen more prominently in the definition of corporate criminal offences that state parties are required to enact domestically. Under the current scope and definitions, only criminal conduct (no matter its seriousness) that occurs in more than one jurisdiction may be punishable, which may lead to the absurd outcome that egregious criminal conduct

⁴⁶³ See De Schutter (2013) xvi.

⁴⁶⁴ UN Human Rights Council Resolution 26/9 Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to Human Rights (A/HRC/RES/26/9), 2014.

⁴⁶⁵ 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (2018) available at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> (accessed 21 August 2018) (hereinafter Zero Draft).

(for instance crimes against humanity) may not be punishable if committed by businesses acting only within one jurisdiction.⁴⁶⁶ (footnotes omitted).

The Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises takes a generalised approach towards the preventive measures to be required by states from business enterprises.⁴⁶⁷ It is therefore submitted that the zero draft is a step forward and a viable option in the integration of human rights into international investment law.

Under international human rights law, states, as the principal subjects of international law and custodians of human rights, have the primary responsibility to promote, protect and ensure the fulfilment and respect of human rights.⁴⁶⁸ Traditionally, the state's duty to protect and respect human rights is set forth in several UN treaties and other international instruments including, among others, the UN Charter,⁴⁶⁹ Universal Declaration of Human Rights (UDHR),⁴⁷⁰ the International Covenant on Civil and Political Rights,⁴⁷¹ the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴⁷² and other related instruments. Through these international instruments, states assume the obligations to respect and guarantee people's human rights in their territories.



⁴⁶⁶ Lopez C 'Toward an international convention on business and human rights' (2018) available at https://www.iisd.org/itn/2018/10/17/toward-an-international-convention-on-business-and-human-rights-carlos-lopez/?utm_source=Investment+Treaty+News&utm_campaign=33388461c5-EMAIL_CAMPAIGN_2018_04_24_COPY_01&utm_medium=email&utm_term=0_ce99edb66e-33388461c5-225788469 (accessed 17 October 2018) (hereinafter Lopez (2018)).

⁴⁶⁷ See Art. 5 of the Zero Draft.

⁴⁶⁸ See Osmani SR 'An essay on human rights approach to development' in Sengupta A, Negi A & Basu M (eds) *Reflections on the right to development* (2005) 117 (hereinafter Osmani (2005)); and Gabel SG *A rights-based approach to social policy analysis* (2016) x (hereinafter Gabel (2016)).

⁴⁶⁹ Charter of the United Nations, 24 October 1945, 1 UNTS XVI (hereinafter UN Charter).

⁴⁷⁰ The Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) (hereinafter UDHR) was adopted by the UN General Assembly at its Third Session on 10 December 1948 as Resolution 217 in Paris, France. It was intended to put in motion legal and cultural forces making it clear that the world community would no longer tolerate the atrocities that occurred in preceding decades and especially in the context of the holocaust. See Adams J 'From statutory right to human right: The evolution and current status of collective bargaining' (2008) *Just Labour: A Canadian Journal of Work and Society* 49.

⁴⁷¹ The International Covenant on Civil and Political Rights (ICCPR) is a multilateral treaty adopted by the UN General Assembly with Resolution 2200A (XXI) on 19 December 1966, and entered in force on 23 March 1976.

⁴⁷² The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a multilateral treaty adopted by the UN General Assembly on 16 December 1966, and entered in force on 3 January 1976.

The UN Charter contains various general commitments to human rights but does not define their contents. The preamble of the Charter refers to the determination to 'promote social progress and better standards of life in larger freedom'. Article 1 of the UN Charter declares that one of the purposes of the UN is to 'achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.⁴⁷³

The UDHR is generally regarded as the foundation of international human rights law.⁴⁷⁴ It is a common standard of achievements for all peoples and all nations. The UDHR sets out the fundamental human rights to be universally protected. Similar to the General Assembly Resolutions, Declarations adopted by the UN General Assembly are not formally binding on member states, but have considerable authority, because they are developed by international law experts, negotiated at length by all states and are often adopted by consensus of all members of the UN.

Most UN Declarations are perceived as codifications of general international law. Some Declarations are considered, in whole or in part, to be CIL or general principles of international law. The UDHR is not binding *per se* but its broad international acceptance by states over the years has given its principles some legal status. Some international law scholars perceive that the UDHR has attained the status of CIL.⁴⁷⁵ Others acknowledge that some parts of the UDHR have the status of CIL, such as the UDHR's articles on the right to life⁴⁷⁶ which prohibits genocide and mass killings, and the prohibitions against slavery,⁴⁷⁷ torture,⁴⁷⁸ prolonged arbitrary imprisonment,⁴⁷⁹ and

⁴⁷³ Article 1 of the UN Charter.

⁴⁷⁴ See Petersmann E 'Time for a United Nations "global compact" for integrating human rights into the law of worldwide organisations: Lessons from European integration' (2002) *European Journal of International Law* 621.

⁴⁷⁵ See Hannum H 'The status of the Universal Declaration of Human Rights in national and international law' (1995) 96 *Georgia Journal of International and Comparative Law* 287-397. See also ICJ *Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) (Advisory Opinion) para 76, underlining that 'the affirmations of the Declaration ... can bind States on the basis of custom ... because they constituted a codification of customary law ... or because they have acquired the force of custom through a general practice accepted as law'.

⁴⁷⁶ Article 3 of the UDHR.

⁴⁷⁷ Article 4 of the UDHR.

⁴⁷⁸ Article 5 of the UDHR.

⁴⁷⁹ Articles 9, 10, 11 of the UDHR.

systematic racial discrimination.⁴⁸⁰ The UDHR was by nature and content too brief and, consequently, the international community had to adopt additional broad and binding international instruments to give detail to its contents so as to make it influential. The result was the adoption of the two human rights covenants: the ICCPR and ICESCR. Warikandwa supports that the substantive rights in the UDHR were codified and vested with a monitoring mechanism in the ICCPR and the ICESCR, instruments which give essence to the human rights provisions in the UN Charter.⁴⁸¹ Eventually, the UDHR and the two covenants became the International Bill of Rights.⁴⁸²

The ICCPR commits its parties to respect the civil and political rights of individuals, including *inter alia*, the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial. The ICESCR is a multilateral treaty adopted by the UN General Assembly and binds states that have ratified the treaty. It commits its parties to work toward the granting of economic, social, and cultural rights to the non-self-governing and trust territories and individuals, including *inter alia* labour rights and the right to health, the right to education, and the right to an adequate standard of living. The Committee on Economic, Social and Cultural Rights (CESCR) encourages states parties to 'prevent third parties from violating the right (protected under the International Covenant on Economic, Social and Cultural Rights) ... if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law'.⁴⁸³ This, in essence, denotes the international law obligation of states to protect human rights within their jurisdictions when dealing with third parties, including when signing investment treaties by other state parties. That is, states should ensure they do not derogate from or curtail their right to protect human rights when signing investment treaties or contracts.

⁴⁸⁰ Article 2 of the UDHR.

⁴⁸¹ Warikandwa (2012) 115. See also Tomuschat C *Human rights. Between idealism and realism* (2003) 31.

⁴⁸² The International Bill of Human Rights is an informal name given to one UN General Assembly Resolution (UDHR) and two international treaties (ICCPR and ICESCR) established by the UN. For a discussion, see Howard RE & Donnelly J (eds) *International handbook of human rights* (1987) 9.

⁴⁸³ CESCR 'General Comment No. 14 (2000), the right to the highest attainable standard of health (Art. 12 of the ICESCR)' E/C.12/2000/4 para 39; CESCR 'General Comment No. 15 (2002), the right to water (Arts. 11 and 12 of the ICESCR)' E/C.12/2002/11 para 31.

The above outlined UN human rights treaties coupled with the principles concerning fundamental rights in the ILO core conventions (discussed below) as set out in the Declaration on Fundamental Principles and Rights at Work⁴⁸⁴ also constitute the benchmarks against which the right to regulate in IIAs can be justified. Equally important, the state's duty to respect, protect and fulfil human rights has been widely recognised in regional human rights treaties such as the African Charter of Human and People's Rights (ACHPR),⁴⁸⁵ the American Convention for Human Rights (ACHR)⁴⁸⁶ and the European Convention of Human Rights (ECHR).⁴⁸⁷

While the ACHR and the ECHR will be used as illustrations and/or best practices, this chapter will place special attention and focus will be placed on ACHPR. This is because the ACHPR is the primary and peremptory instrument on human rights norms and standards on the African continent. The ACHPR has opened African countries to supranational accountability with respect to human rights obligations. It sets standards and establishes the groundwork for the promotion and protection of human rights in Africa and has formed the basis for individuals to claim rights in an international forum. The ACHPR has been supplemented by various human rights instruments adopted by the African Union (AU)⁴⁸⁸ pursuant to Article 66 of the Charter.⁴⁸⁹ The normative

⁴⁸⁴ The Declaration on Fundamental Principles and Rights at Work was adopted by ILO in 1998. The Declaration member states to respect and promote principles and rights in four categories: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.

⁴⁸⁵ The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) was adopted by African states members of the Organisation of African Unity (which was replaced by the AU in 2002) on 01 June 1981 and entered into force on 21 October 1986. It is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent.

⁴⁸⁶ The American Convention on Human Rights was adopted in San José, Costa Rica, on 22 November 1969. It serves as one of two principal instruments within the American states that outline states' human rights obligations.

⁴⁸⁷ The European Convention on Human Rights was adopted in 1950 and into force on 3 September 1953. It is an international treaty to protect human rights and fundamental freedoms in Europe.

⁴⁸⁸ These instruments include the: African Charter on the Rights and Welfare of the Child, 1990; Protocol on the African Human and Peoples' Rights Court, 1998; Protocol to the African Charter on the Rights of Women in Africa, 2003; Protocol on the Pan-African Parliament 2001, Protocol on the Peace and Security Council, 2002; Statute of the Economic, Social and Cultural Council, 2004; Convention on the Prevention and Combating of Terrorism, 1999; Convention on the Conservation of Nature and Natural Resources, 2003; Convention on the Prevention and Combating Corruption, 2003; African Charter on Democracy, Elections and Governance, 2007; and the Convention for the Protection and Assistance of Internally Displaced Persons, 2009. The AU and the African Commission on Human and Peoples' Rights have also adopted various declarations and resolutions relevant to the understanding and advancement of the African Charter provisions. For more information on these instruments, see Heyns C & Killander M (eds) *Compendium of key human rights documents of the African Union* (2010).

⁴⁸⁹ Article 66 of the ACHPR allows state parties to adopt protocols or agreements where necessary to supplement the provisions of the Charter.

impact of the ACHPR has been significant. The ACHPR has been ratified by and is legally binding to all African countries.⁴⁹⁰ Human rights obligations for African countries have also been enshrined in sub-regional treaties⁴⁹¹ as well as national constitutions. These constitute the human rights normative framework on the African continent and shall be referred to in illustration and advancement of this Chapter's argument.

In late 2010, AU Commission on Human and Peoples' Rights adopted the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights.⁴⁹² These Principles emphasise that African states are under a general obligation in respect of all the economic, social and cultural rights enshrined in the ACHPR to ensure that all the elements of the rights are guaranteed.⁴⁹³ The Principles further reiterate the obligation imposed by the ACHPR upon African states to 'respect, protect, promote and fulfil' the rights and defines these obligations as follows:

Obligation to respect

The obligation to respect requires that state parties refrain from interfering directly or indirectly with the enjoyment of economic, social and cultural rights. This entails respecting the freedom of individuals and peoples to use all of the resources at their disposal to meet their economic, social and cultural needs and obligations.

The obligation to respect also requires states to take positive measures to ensure that all branches of government (legislative, executive and judicial) at all levels (national, regional and local), as well as all organs of state, do not violate economic, social and cultural rights.

Obligation to protect

The obligation to protect requires the state to take positive measures to ensure that non-state actors such as multinational corporations, local companies, private persons,

⁴⁹⁰ Except for South Sudan. See African Commission on Human and Peoples' Rights 'Ratification table: African Charter on Human and Peoples' Rights' available at <http://www.achpr.org/instruments/achpr/ratification/> (accessed 20 January 2018).

⁴⁹¹ See, for example, the treaties establishing the African Regional Economic Communities: SADC Treaty; EAC Treaty; AMU Treaty; COMESA Treaty; ECCAS Treaty; ECOWAS Treaty; ECCAS Treaty; and CEN-SAD Treaty.

⁴⁹² African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010.

⁴⁹³ African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights 10.

and armed groups do not violate economic, social and cultural rights. This includes regulating and monitoring the commercial and other activities of non-state actors that affect people's access to and equal enjoyment of economic, social and cultural rights and ensuring the effective implementation of relevant legislation and programmes and to provide remedies for such violations.

Obligation to promote

The duty to promote economic, social and cultural rights requires states to adopt measures to enhance people's awareness of their rights, and to provide accessible information relating to the programmes and institutions adopted to realise them. In this regard, the African Charter explicitly places an obligation on state parties "to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

It also includes an obligation to promote the values and objectives of economic, social and cultural rights in administrative and judicial decision-making. The training of the judiciary and administrative officials should expressly include economic, social and cultural rights.

Obligation to fulfil

The duty to fulfil economic, social and cultural rights requires state parties to take positive steps to advance the realisation of the rights. Such measures should be comprehensive, co-ordinated, transparent, and contain clear goals, indicators and benchmarks for measuring progress. This obligation is, "a positive expectation on the part of the state to move its machinery towards the actual realisation of the rights." The state should continually aim at improving both the range of individuals, communities, groups and peoples who have access to the relevant rights as well as the quality of enjoyment.

The duty to fulfil includes the adoption of measures that enable and assist individuals and communities to gain access to these rights on their own. In cases where individual and communities are unable to gain access to these rights by the means at their disposal, the obligation will be, "to take measures necessary to ensure that each

person within its jurisdiction may obtain basic economic, social and cultural rights satisfaction.⁴⁹⁴

The outlined standards above provide a useful understanding of the nature of the negative and positive duties imposed by the ACHPR on African states to 'to respect, protect, promote and fulfil' these economic, social and cultural rights. Furthermore, African states 'have an obligation to ensure the satisfaction of, at the very least, the minimum essential levels of each of the economic, social and cultural rights contained in the African Charter. The minimum core obligation is the obligation of the state to ensure that no significant number of individuals is deprived of the essential elements of a particular right'.⁴⁹⁵

Noteworthy, this part of the study does not intend to provide a comprehensive analysis of the human rights system in Africa. Instead, it seeks to provide a human rights framework on how African countries' responsibility on the promotion and protection of human rights can be used as an authority or justification to safeguard the right to regulate in their international investment legal framework. On this basis, particular attention is therefore paid to peremptory human rights norms or principles that are implicit in the state's duty to protect human rights *vis-à-vis* investment treaties including mainly socio-economic rights such as environment, public health and safety, labour and development, to mention but a few.

3.3.1 Environmental and public health issues

In recent years, exponents of environmental justice have extended the principle of basic human rights into the sphere of the environment.⁴⁹⁶ Under international human right law, states have the right and the duty to enact regulations and to take measures to protect society and the environment from harm by private actors. The Permanent

⁴⁹⁴ African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights 11-2.

⁴⁹⁵ African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights 13.

⁴⁹⁶ See Taylor DA 'Is environmental health a basic human right? Environmental health perspectives' (2004) 112 *Environmental Health Perspectives* 1006-9.

Court of Arbitration asserted that, in *Arbitration Regarding the Iron Rhine ('Ijzeren Rijn') Railway (Belgium v Netherlands)*:⁴⁹⁷

Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm ... This duty ... has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the parties.⁴⁹⁸

The environmental regulation is fundamentally linked to the protection of public health.⁴⁹⁹ For instance, section 24 of the Constitution of South Africa provides that everyone has a right to an environment that is not harmful to their health and well-being; and to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Additionally, environmental rights cover a plethora of other human rights. It is imperative to assert that human rights cannot be tenable in a degraded or polluted environment. For example, the right to life is threatened in an environment with soil degradation and deforestation and exposures to toxic chemicals, hazardous wastes and contaminated drinking water.⁵⁰⁰ According to Toepfer, 'environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to

⁴⁹⁷ *Arbitration Regarding the Iron Rhine ('Ijzeren Rijn') Railway (Belgium v Netherlands)*, Permanent Court of Arbitration – Award of the Arbitral Tribunal (24 May 2005) (hereinafter *Belgium v Netherlands*).

⁴⁹⁸ *Belgium v Netherlands* para 56.

⁴⁹⁹ The linkage between health and environmental protection were apparent at least from the first international conference on the human environment, held in Stockholm in 1972, which led to the adoption of the Stockholm Declaration of the United Nations Conference on the Human Environment, 16 June, U.N. Doc.A/ CONF.48/14/Rev.1 (1973). Principle 1 of the Declaration established a foundation for linking human rights, health, and environmental protection, declaring that a 'man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'. See generally Olawuyi D 'The right to a clean environment under international law: Defining the scope and content of an emerging right' A paper presented at the 4th International Conference of the Canadians Lawyers on International Human Rights, on the 19th February 2008 at the Faculty of Law, University of Ottawa, Canada.

⁵⁰⁰ See generally Shelton D 'Human rights, health & environmental protection: Linkages in law & practice' (2002) A Background Paper for the World Health Organisation, Health and Human Rights Working Paper Series No 1 6-24.

recognise that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well'.⁵⁰¹

Protections from the adverse impact of environmental harm are commonly endorsed in international human rights treaties, which places an obligation on states to ensure that the right to a clean and healthy environment is fulfilled. For instance, the ICESCR guarantees the right to safe and healthy working conditions,⁵⁰² and the right of children and young persons to be free from work harmful to their health.⁵⁰³ Article 12 of the ICESCR expressly calls on state parties to take steps for 'the improvement of all aspects of environmental and industrial hygiene' and 'the prevention, treatment and control of epidemic, endemic, occupational, and other diseases'.

The Convention on the Rights of the Child (CRC)⁵⁰⁴ also provides for environmental protection in respect to the child's right to health. Article 24 (2) (c) of the CRC enjoins states to take appropriate measures to combat disease and malnutrition 'through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution'. The ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries⁵⁰⁵ contains numerous references to the lands, resources, and environment of indigenous peoples. Part II of the ILO Convention No. 169 addresses land issues, including the rights of the peoples concerned to the natural resources pertaining to their lands. Further, governments are to ensure adequate health services are available or provide resources to indigenous groups 'so that they may enjoy the highest attainable standard of physical and mental health'. In the similar vein, the Rio Declaration on Environment and Development⁵⁰⁶ affirms that:

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

⁵⁰¹ See Statement by Klaus Toepfer, Executive Director of the UN Environmental Programme (2002) as cited in Beder S *Environmental principles and policies: An interdisciplinary introduction* (2007) 95.

⁵⁰² Article 7 (b) of the ICESCR.

⁵⁰³ Article 10 (3) of the ICESCR.

⁵⁰⁴ The Convention on the Rights of the Child was adopted by the UN on 20 November 1989 and entered into force on 2 September 1990. It sets out the civil, political, economic, social, health and cultural rights of children.

⁵⁰⁵ See Arts. 2, 6, 7, 15 of the ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.

⁵⁰⁶ The Rio Declaration on Environment and Development was adopted in 1992 by the UN at the Conference on Environment and Development.

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.⁵⁰⁷

The protection of the environment is also included in regional human rights treaties. For example, Article 24 of the ACHPR prescribes that 'all peoples shall have the right to a general satisfactory environment favourable to their development'. Similarly, the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area⁵⁰⁸ recognises the environmental protection as a CIL principle and consistent with the right of host states to regulate. Annex 2 of the COMESA Common Investment Agreement provides that, in line with the right of states to regulate and the CIL principles on police powers, *bona fide* regulatory measures taken by a member state that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation.

Outside Africa, the protection of environment is guaranteed in many human rights treaties including the Additional Protocol to the ACHR in the area of Economic, Social and Cultural Rights⁵⁰⁹ Article 11 of the Additional Protocol to the ACHR in the area of Economic, Social and Cultural Rights proclaims that 'everyone shall have the right to live in a healthy environment and to have access to basic public services. The States parties shall promote the protection, preservation and improvement of the environment'.⁵¹⁰

In light of this discussion and the human rights law in general, one would argue that states have an obligation to protect the environment and public health. This would mean that states should ensure that foreign investors and investments respect and protect the environment. This would require adoption and enforcement of laws that will enable foreign investors and investments to respect and protect, and laws that allow states to prosecute foreign investors should they violate this obligation. It is

⁵⁰⁷ Principles 1 and 2 of the Rio Declaration on Environment and Development.

⁵⁰⁸ The COMESA Common Investment Area Agreement was adopted in 2007 but is not yet in force.

⁵⁰⁹ The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights OQA T.S. 69, 1988.

⁵¹⁰ Article 11 (1) and (2) of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights.

recommended that this obligation would be strengthened if it is couched in investment right and could go a long way in safeguarding the state's right to regulate. The North American Free Trade Agreement (NAFTA)⁵¹¹ provides a good example in this regard. Article 1114 (1) of NAFTA asserts that 'nothing in this chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measures otherwise inconsistent with this chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns'.⁵¹² Article 1114 (2) of the NAFTA goes even further, verging on the imposition of a duty: 'a party should not waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor'. This is a confirmation of the authoritative powers of a participant state to put in place necessary measures to safeguard the environment.

3.3.2 Labour rights

Fundamental principles of labour rights and human rights are set out in the ILO Constitution of 1919 and in the ILO Declaration of Philadelphia of 1944.⁵¹³ The ILO International Labour Conference of 1998 affirmed that all member states have the duty 'to respect, to promote and to realise, in good faith the fundamental rights which are the subject of those advanced in fundamental ILO Conventions'.⁵¹⁴ African countries have ratified and are legally bound by the ILO Conventions⁵¹⁵ covering labour

⁵¹¹ NAFTA is a treaty between Canada, Mexico and the US which was signed on 17 December 1992 and entered into force on 1 January 1994. NAFTA was recently amended by the Agreement between United States, Canada and Mexico, 2018 (hereinafter USMCA). The USMCA is not yet in force.

⁵¹² The same provision has been retained in the USMCA with a few changes to the language. In particular, Article 14 (16) of Chapter 14 of the USMCA stipulates that 'nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives'.

⁵¹³ See ILO 'Protecting labour rights as human rights: Present and future of international supervision' Politakis GP (ed) *International Labour Office Geneva: International Labour Organisation* (2006) 4.

⁵¹⁴ See Article 2 of the Declaration of Philadelphia. Such rights include the freedom of association and the effective recognition of the right to collective bargaining.

⁵¹⁵ See ILO 'Labour standards in Africa' available at <https://www.ilo.org/addisababa/areas-of-work/labour-standards/lang--en/index.htm> (accessed 22 August 2017). In the ILO Declaration on Fundamental Principles and Rights at Work, 1998, African countries (with other ILO member states) agreed to respect, promote and realise core labour standards. These consist of five universally agreed standards which are spelt out in ILO Conventions including the elimination of discrimination in respect of employment and occupation enshrined in the ILO Equal Remuneration Convention 100, 1951 and the ILO Discrimination (Employment and Occupation) Convention 111, 1958; the effective abolition of child labour embedded in the ILO Minimum Age Convention 138, 1930 and ILO Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour Convention 183, 1999; the elimination of all forms of forced and compulsory labour entrenched in the ILO Forced Labour

standards including freedom of association and collective bargaining,⁵¹⁶ forced labour,⁵¹⁷ non-discrimination,⁵¹⁸ and minimum age.⁵¹⁹ These labour rights have been widely accepted as core human rights, and ought to be respected and protected.⁵²⁰ In this context, it is safe to argue that, in the creation and operation of FDI enterprises, a host state must exercise its sovereign authority in securing the labour rights of its domestic workforce. Article 15 of the ACPHR recognised everyone's 'right to work under equitable and satisfactory conditions'. With regards to the right to work every African 'state has the obligation to facilitate employment through the creation of an environment conducive to the full employment of individuals within society under conditions that ensure the realisation of the dignity of the individual. The right to work includes the right to freely and voluntarily choose what work to accept'.⁵²¹

However, as investment flows have risen in prominence, concerns about labour rights have been at stake. Much of the contention surrounding the debate about FDI and labour rights has been either on the impact of FDI on labour conditions in the host states⁵²² or the impact of the race-to-the-bottom of labour standards on FDI flows.⁵²³ Multinational corporations have been seeking to invest in countries with weak or lower labour standards.⁵²⁴ A race-to-the-bottom as anticipated may restrict labour rights in order to enhance a country's comparative advantage in providing a pool of low-cost labour to attract FDI. This is illustrated in the case of Ramatex Company, which relocated from South Africa to Namibia in the early 2000s.⁵²⁵ Ramatex contracted with

Convention 29, 1930 and the ILO Abolition of Forced Labour Convention 105, 1957; and freedom of association and the effective recognition of the right to collective bargaining enshrined in the ILO Freedom of Association and Protection of the Right to Organise Convention 87, 1948; and ILO Right to Organise and Collective Bargaining Convention 98, 1949.

⁵¹⁶ ILO Conventions 87 and 98.

⁵¹⁷ ILO Conventions 29 and 105.

⁵¹⁸ ILO Conventions 100 and 111.

⁵¹⁹ ILO Conventions 138.

⁵²⁰ Warikandwa (2012) 83.

⁵²¹ African Commission on Human and Peoples' Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights 21.

⁵²² See generally Mosley L *Labour right and multinational production* (2011).

⁵²³ See Blanton RG & Blanton SL 'Labour rights and foreign direct investment: Is there a race to the bottom?' (2012) 38 *International Interactions: Empirical and Theoretical Research in International Relations* 267-94.

⁵²⁴ Chidede T 'Decolonising "investment regimes" for development purposes in the contemporary Africa' Warikandwa TV, Nhemachena A; Mpofu N & Chitimira H *Grid-locked African economic sovereignty: Decolonising the neo-imperial socio-economic and legal force-fields in the 21st century* (2019) 399.

⁵²⁵ See Jauch H "Africa's clothing and textile industry: The case of Ramatex in Namibia" in Jauch H & Traub-Merz R (eds) *The future of the textile and clothing industry in Sub-Saharan Africa* (2006) 219-25 (hereinafter Jauch (2006)).

the Namibian government which was bidding against South Africa and Madagascar for the same project. Namibia won the bid through offering even greater concessions seemingly above those granted to other Export Processing Zone companies and that employees in Namibia were paid less than employees in Ramatex factories in South Africa.⁵²⁶

It is for this reason that governments should ensure that, when negotiating or designing investment treaties, they do not curtail or derogate from the protection of labour rights espoused in human rights law. For example, states could include provisions prohibiting states from relaxing their labour standards or obligations in an attempt to woo FDI, and provisions that impose obligations on investors to respect labour rights. The Pan-African Investment Code (PAIC),⁵²⁷ for example, prescribes that:

Member states shall not encourage investment by relaxing domestic labour legislation. Accordingly, each member state shall ensure that it does not waive or derogate from such legislation as an encouragement for the establishment, maintenance or expansion of an investment in its territory

...

Investors shall comply with international conventions and existing labour policies and, in particular, not use child labour and shall support efforts for the elimination of all sort of child labour, including forced or compulsory labour within member states.⁵²⁸

The first part of the above provisions forbids a race-to-the-bottom in domestic labour standards. Article 36 (1) of the PAIC further allows states 'to develop national policies to guide investors in developing human capacity of the labour force. Such policies may include incentives to encourage employers to invest in training, capacity building and knowledge transfer'. Labour rights or provisions are critical in guarantying the right to regulate labour rights under the international investment law. Host states will not be 'hesitant to implement measures in the pursuit of social policy objectives, such as the improvement of labour standards, out of fear that by doing so it might violate the standards of treatment prescribed by an investment agreement'.⁵²⁹ Further, the

⁵²⁶ See Jauch (2006) 219-25.

⁵²⁷ Pan-African Investment Code, 2016 (hereinafter PAIC).

⁵²⁸ Article 34 of PAIC.

⁵²⁹ Zandvliet R 'Linking investment law and labour standards' (2013) available at <https://leidenlawblog.nl/articles/linking-investment-law-and-labour-standards> (accessed 15 June 2017).

alignment of investment law and labour rights offers host governments an opportunity to protect and enforce labour rights through the international investment law.

3.3.3 Right to development

The right to development has long been recognised in international law.⁵³⁰ The first legal acknowledgement of the right to development was recorded in 1981 under the ACHPR. Article 22 of the ACHPR stipulates that 'all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually or collectively, to ensure the exercise of the right to development'.⁵³¹ The right to development was later integrated in the international human rights practice through the Declaration on the Right to Development,⁵³² the Vienna Declaration and Programme of Action,⁵³³ the Millennium Declaration⁵³⁴ and the Durban Declaration and Programme of Action.⁵³⁵ The right to development was eventually enshrined in various human rights legal instruments of the AU including, *inter alia*, the African Youth Charter,⁵³⁶ the Protocol to the ACHPR on the Rights of Women in Africa,⁵³⁷ the African Charter on the Rights and Welfare of the Child.⁵³⁸ In addition, many African countries have encompassed the right to development as a fundamental and legally enforceable right in their constitutions.⁵³⁹

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⁵³⁰ It must be noted that there is no single and universal definition of the right to regulate.

⁵³¹ Article 22 (1) and (2) of the ACHPR.

⁵³² Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128, 1986.

⁵³³ See paragraph 10 of the Vienna Declaration and Programme of Action, adopted by consensus at the World Conference on Human Rights on 25 June 1993 in Vienna, Austria.

⁵³⁴ See para 11 of the Millennium Declaration, UN General Assembly Resolution 55/2 adopted on 8 September 2000.

⁵³⁵ See paragraphs 19 and 78 of the Durban Declaration and Programme of Action, 2001. The Declaration was adopted by consensus at the 2001 World Conference against Racism in Durban, South Africa. It is a comprehensive, action-oriented document that proposes concrete measures to combat racism, racial discrimination, xenophobia and related intolerance. It is holistic in its vision, addresses a wide range of issues, and contains far-reaching recommendations and practical measures; and embodies the firm commitment of the international community to tackle racism, racial discrimination, xenophobia and related intolerance at the national, regional and international level.

⁵³⁶ Article 10 of the African Youth Charter, 2006.

⁵³⁷ Article 19 of the Protocol to the ACHPR on the Rights of Women in Africa.

⁵³⁸ Article 5 of the African Charter on the Rights and Welfare of the Child.

⁵³⁹ See, for example, see the constitutions Angola (Art. 200), Benin (Art. 9); Burkina Faso (Art. 14); Burundi (Arts. 52 and 6); Cape Verde (Art. 1 (4)); Central African Republic (Art. 2); Chad (Art. 19); Congo (Art. 8); DRC (Arts. 16 and 58); Gabon (Art. 1); Ghana (Art. 37(2)(a)); Cameroon (preamble); Ethiopia (s 43); Malawi (section 30); and Uganda (s 8 (a) 1).

The Declaration on the Right to Development constitutes a comprehensive and firm statement for the promotion and protection of right to development at the international level.⁵⁴⁰ It makes a vital contribution in this area with duties of international cooperation informing the logic and shaping the structure of the right to development. Article 1 (1) of the Declaration defines the right to development as ‘an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised’. Overall, the right to development imposes on the state the obligations to: formulate national development policies aimed at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the resultant benefits; to create, as a primary responsibility resting on the state, favourable conditions for the realisation of the right to development; and to undertake all necessary measures for the realisation of the right to development at national level.⁵⁴¹

The right to development has an important juridical contribution to defining features of the international economic order, with the most salient element of this right being found in its potential challenge to existing global political and economic arrangements.⁵⁴² Article 3 (1) of the Declaration on the Right to Development proclaims that states have the primary responsibility for the creation of national and international conditions favourable to the realisation of the right to development. Article 3 (3) of the Declaration refers to the duty of all states to cooperate with each other in ensuring development and eliminating obstacles to development. Further, Article 4 (1) which refers to the

⁵⁴⁰ See Özden M ‘The right to development: Current state of the debates held at the U.N. on the implementation of the historic Declaration adopted in this regard by the General Assembly of the United Nations on 4 December 1986’ (2007) available at <https://www.cetim.ch/wp-content/uploads/Right-to-development.pdf> (accessed 17 January 2017) 2, underscoring that the ‘Declaration on the Right to Development constitutes an international instrument of primary importance, for it asserts the right to development as a human right in all its dimensions and unequivocally clarifies the principles that should regulate international relations, all in a spirit of equality and mutual respect tending toward its full realisation. It emphasizes collective rights, the right of peoples to choose their own development model, and insists on inter-national cooperation among countries, a cooperation which is not reduced to simple international aid, even though such aid may be deemed “essential” In this regard, it constitutes, overall and along with the corpus of human rights instruments, a further instrument for peoples in the struggle against neo-liberalism’.

⁵⁴¹ See generally Declaration on the Right to Development. See also Chowdhury SR & De Waart ‘Significance of the right to development: An introductory’ in Chowdhury SR, Denters EMG & De Waart PJIM (eds) *The right to development in international law* (1992) 13-16.

⁵⁴² Warikandwa (2012) 10.

duty of all states to take steps individually and collectively to formulate international development policies in order to facilitate the full realisation of the right to development. Article 4 (2) explicitly accepts that effective international cooperation is essential 'as a complement to the efforts of developing countries (and) in providing these countries with appropriate means and facilities to foster their comprehensive development'. The right to development demands international cooperation under law for the creation of a structural environment favourable to the realisation of basic human rights for everyone.⁵⁴³

In the ground-breaking case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*,⁵⁴⁴ the African Commission on Human and Peoples' Rights elaborated the right to development as contained in Article 22 of the ACHPR. In this case, the complainants then alleged that their right to development has been violated as a result of the respondent's creation of a game reserve and failing to adequately involve the Endorois in the development process.⁵⁴⁵ The African Commission on Human and Peoples' Rights declared that 'the right to regulate is both constitutive and instrument, or useful as both a means and an end'.⁵⁴⁶

The right to development is made of economic, social and cultural rights as well as freedoms (civil and political rights). Article 22 (2) of the ACHPR, read with Article 3 (3) of the Declaration on the Right to Development and other ancillary human rights treaties, imposes an obligation on African states to ensure the exercise and realisation of the right to development by citizens.⁵⁴⁷ This right to development is well embedded in the African human rights system including national laws and emerged as an obligation for states which could be used to entrench the right to regulate in the international legal framework for foreign investment. States should ensure that that

⁵⁴³ Salomon ME *Global responsibility for human rights: World poverty and the development of international law* (2007) 17.

⁵⁴⁴ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75 (ACHPR 2009) (hereinafter *Endorois v Kenya*). See also *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) para 95; *Bakweri Land Claims Committee v Cameroon, Communication No 260/2002*, AHRLR (2004) para 43; and *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 224.

⁵⁴⁵ *Endorois v Kenya* para 269.

⁵⁴⁶ *Endorois v Kenya* para 269.

⁵⁴⁷ See the recommendations of the African Commission on Human and Peoples' Rights in *Endorois v Kenya*.

their international investment law do not undermine but advance their right to regulate. The preservation of the right to regulate in the international investment legal framework is an ingredient for this.

The right to development is an important legal tool in assessing the levels of recognising development objectives in IIAs of Africa. It is a critical legal mechanism to cement the protection and advancement of the human right to development in international investment law. State obligations under international human rights law could also offer legal foundation for accommodating public interests and development considerations in investment treaties. Therefore, if the right to regulate and development are guaranteed under international human rights law it would be correct to conclude that IIAs should include them in order to enable host states to meet their national development objectives. Granting governments freedom to exercise their human right to development under the purview of international investment law is important for two reasons. First, it provides an opportunity for host governments to pursue their national development objectives amid the regulation of foreign investment. Secondly, it strengthens the sustainable development dimension of international investment law.⁵⁴⁸

3.3.4 Sustainable development

Legal issues concerning sustainable development law are understood as an intersection between three areas of international law, namely, international environmental law, international economic law and international human rights law.⁵⁴⁹ In this part of the study, sustainable development is explored in relation to human rights. This part intends to demonstrate that sustainable development has emerged as an internationally recognised basic human right which 'requires a paradigm shift from the ruling economic-based paradigm where economic concerns trump environmental and social concerns'.⁵⁵⁰ Under international law, the role of sustainable development has to facilitate this public policy purpose. This notion has to be kept in mind when negotiating in investment treaties.

⁵⁴⁸ See Mann H 'Reconceptualising international investment law: Its role in sustainable development' (2013) 17 *Lewis & Clark Law Review* 521-44. This is further discussed in parts 3.3.4 and 4.2.1.

⁵⁴⁹ Tladi D *Sustainable development in international law: An analysis of key enviro-economic instruments* (2007) 66 (hereinafter Tladi (2007)).

⁵⁵⁰ Tladi (2007) 94.

Sustainable development has been defined in many ways, but the most frequently quoted definition is from the Brundtland Report which avers that 'sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.⁵⁵¹ Sustainability is the foundation for today's leading global framework for international cooperation – the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs).⁵⁵² The SDGs are designed to be universal and integrate the social, environmental and economic pillars of development to transform the functioning of societies and economies for a more sustainable future; they call for quality investment to support this transformation.⁵⁵³

The principle of sustainable development is widely hailed as a principle of international law or CIL;⁵⁵⁴ and is contained in several international treaties.⁵⁵⁵ The contemporary liberalism jurisprudence recognises sustainable development as encompassing not only economic, but also social and environmental aspects.⁵⁵⁶ Under international law, sustainable development is perceived to be an unison of international economic law, international human rights law and international environmental law.⁵⁵⁷ The principle of

⁵⁵¹ Report of the World Commission on Environment and Development: Our Common Future available at <http://www.un-documents.net/our-common-future.pdf> (accessed 01 January 2018).

⁵⁵² SDGs are universal set of goals, targets and indicators that UN member states will be expected to use to frame their agendas and political policies over 15 years (thus 2030). They follow and expand on the Millennium Development Goals, which were agreed by governments in 2001 and are due to expire at the end of 2015. See more information on SDGs at <https://sustainabledevelopment.un.org/>.

⁵⁵³ See Open Working Group 'Proposal for Sustainable Development Goals' (2014) available at <https://sustainabledevelopment.un.org/content/documents/1579SDGs%20Proposal.pdf> (accessed 01 January 2018).

⁵⁵⁴ Tladi (2007) 65. See also Lowe V 'Sustainable development and unsustainable arguments' in Boyle A & Freestone D (eds) *International law and sustainable development: Past achievements and future challenges* (1999) 36.

⁵⁵⁵ For example, the UN Convention on Biological Diversity, 1992 and its Cartagena Protocol, 2000; the UN Framework Convention on Climate Change, 1992 and its Kyoto Protocol, 1997; the UN Convention to Combat Desertification and Drought, 1994; the NAFTA, 1994; the Straddling Fish Stocks Agreement, 1995 of the UN Convention on the Law of the Sea, 1982; the Cotonou Partnership Agreement between the European Union and the African Caribbean and Pacific countries, 2000; the Marrakesh Agreement Establishing the World Trade Organisation, 1994; the International Treaty on Plant Genetic Resources for Food and Agriculture, 2001; the Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific, 2002, and many others.

⁵⁵⁶ See Johannesburg Declaration, in Report of the World Summit on Sustainable Development, 26 August–4 September 2002, UN Doc. A/AC.257/32 at 5, 2002; ILA, New Delhi Declaration of Principles of International Law Relating to Sustainable Development, ILA Res. 3/2002, Annex, UN Doc. A/57/329, 2002.

⁵⁵⁷ Tladi (2007) 66. See also the International Law Association New Delhi Declaration on Principles of International Law Relating to Sustainable Development, Resolution 2003/3; Johannesburg Declaration on Sustainable Development, 2002; United Nations Declaration on Environment and Development, Principle 27; Adams WM *Green Development: Environment and sustainability in the third world* (1990) 14; Sands P 'Environmental protection in the twenty—first century: Sustainable development and

sustainable development is linked to the state's permanent sovereignty over natural resources, environmental protection and the right to development.⁵⁵⁸ In the *Gabcikovo-Nagymaros* case,⁵⁵⁹ the ICJ defined sustainable development as the right to development which is limited by the need to preserve the environment.⁵⁶⁰ Tladi asserts that the definition of the ICJ in the *Gabcikovo-Nagymaros* case is important for two reasons:

First, the definition assumes the existence of a right to development. Further, while development is posited as a right, the need to protect the environment is not awarded the same status in this definition. Instead, the "protection of the environment" is said to be a "*sine qua non* for numerous rights". This raised a second point: whether there is space for environmental rights in sustainable development discourse? In exploring the relationship between sustainable development, I will consider the position of both right to development and environmental rights.⁵⁶¹

In this context, it is safe to argue that states have a peremptory obligation to ensure sustainable development in their territories. It can be argued that it is imperative for states to ensure that IIAs and foreign investments assist in the achievement of sustainable development in the territory of the host states. African states have embraced SDGs objectives and principles and commitments in their international, regional and national instruments.

At the continental level, the AU adopted several instruments to advance sustainable development in Africa. The AU adopted the New Partnership for Africa's Development (NEPAD)⁵⁶² – the pan-African strategic framework for the socio-economic development of the continent. NEPAD is regarded as the primary mechanism to

international law' in Revesz RL, Sands P & Stewart RB (eds) *Environmental law, the economy and sustainable development: The United States, the European Union and the international community* (2000) 369.

⁵⁵⁸ Tladi (2007) 65. See also Arts K *Integrating human rights into development co-operation: The case of the Lome Convention* (2000) 40.

⁵⁵⁹ *Case Concerning the Gabcikovo-Nagymaros Dam (25 September 1997) (Hungary v Slovakia)* ICJ Rep., 37 ILM (1998) 162.

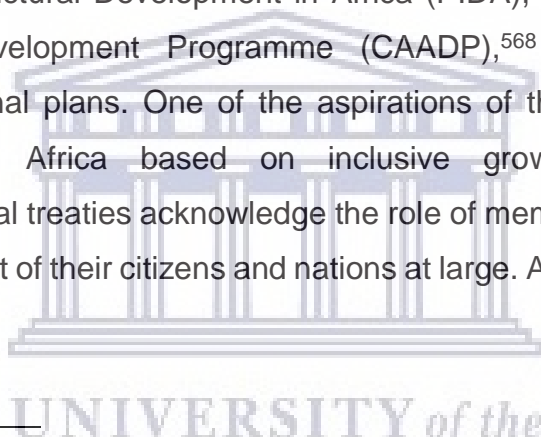
⁵⁶⁰ This reasoning was also affirmed by the Permanent Court of Arbitration in the *Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v Netherlands)* (May 24, 2005) para 59, where the tribunal stated that 'environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment, there is a duty to prevent, or at least mitigate such harm. ... This duty, in the opinion of the Tribunal, has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the parties'.

⁵⁶¹ Tladi (2007) 67.

⁵⁶² New Partnership for Africa's Development, 2002.

coordinate the pace and impact of Africa's development in the 21st century. Its primary objective is to provide a new mechanism, to inter alia, eradicate poverty, place African countries, both individually and collectively, on a path of sustainable growth and development.

In addition, the AU adopted the Agenda 2063, a strategic framework for the socio-economic transformation of the continent over 50 years.⁵⁶³ Agenda 2063 builds on and seeks to accelerate the implementation of past and existing continental initiatives for growth and sustainable development including NEPAD, the Lagos Plan of Action for the Economic Development of Africa (commonly known as the Lagos Plan of Action),⁵⁶⁴ the Treaty Establishing the African Economic Community (commonly known as the Abuja Treaty),⁵⁶⁵ the Minimum Integration Programme (MIP),⁵⁶⁶ the Programme for Infrastructural Development in Africa (PIDA),⁵⁶⁷ the Comprehensive Africa Agricultural Development Programme (CAADP),⁵⁶⁸ regional plans and programmes and national plans. One of the aspirations of the Agenda 2063 is to realise a prosperous Africa based on inclusive growth and sustainable development.⁵⁶⁹ Regional treaties acknowledge the role of member states in ensuring sustainable development of their citizens and nations at large. At national levels, many



⁵⁶³ More information about Agenda 2063 is available at <https://au.int/en/agenda2063>.

⁵⁶⁴ Lagos Plan of Action for the Economic Development of Africa, 1980. The Lagos Plan of Action was an Organisation of African Unity's (OAU) plan towards Africa's self-sufficiency. It was developed as the continent's blueprint through which Africa could, based on the principle of collective self-reliance, achieve rapid economic and social development.

⁵⁶⁵ Treaty Establishing the African Economic Community, 1991. The Abuja Treaty was adopted by OAU in 1991 with the aim to establish and promote economic, social and cultural development among others between African states.

⁵⁶⁶ The MIP is perceived as a mechanism for the convergence of the RECs, formulated on the basis of a number of priority areas to be implemented at regional and continental levels, by which RECs could strengthen their cooperation and benefit from one another's comparative advantages, best practices and experiences in the area of integration consists of different activities which the RECs and the parties concerned should agree to speed up and carry through in the process of regional and continental integration. More information on the Minimum Integration Programme is available at <https://au.int/en/ea/ric/mip>.

⁵⁶⁷ PIDA was developed by the African Union Commission (AUC), NEPAD Agency, African Development Bank as a strategic continental initiative which has the buy-in of all African countries, for mobilising infrastructure development in the continent. Its 51 cross-border infrastructure projects comprise more than 400 actionable sub-projects across four main infrastructure sectors, namely energy, transport, transboundary water and information, communication technology. More information about PIDA is available at www.au-pida.org/.

⁵⁶⁸ CAADP is Africa's policy framework for agricultural transformation, wealth creation and food security. CAADP is about boosting investment to stimulate growth in the agricultural sector. More information on CAADP is available at <https://au.int/en/caadp>.

⁵⁶⁹ Aspiration 1 of the Agenda 2063.

African countries have adopted national development plans which outlines their sustainable development objectives and principles.⁵⁷⁰

Moreover, in the recent international investment discussions, there has been a gradual realisation that foreign investment is an essential tool to achieve sustainable development.⁵⁷¹ Some modern IIAs have incorporated the element of sustainable development as their object and purpose. The element appears, often as an objective and preambular reference, in most IIAs.⁵⁷²

Sustainable development also features in various international statements and declarations related to investment including, *inter alia*, the UNCTAD Investment Policy Framework for Sustainable Development,⁵⁷³ the OECD Policy Framework for Investment⁵⁷⁴ and the G20 Guiding Principles for Global Investment Policymaking.⁵⁷⁵

The UNCTAD Investment Policy Framework for Sustainable Development provides guidance for policymakers in the evolution towards a new generation of investment policies. As its title suggests, the Policy primarily seeks to promote investment for sustainable development. It consists of an overarching set of core principles for investment policymaking that serve as design criteria for three sets of operational guidelines or action menus: guidelines for national investment policies; guidance for the design and use of IIAs; and, perhaps most importantly, an action menu for the promotion of investment in sectors related to the SDGs.⁵⁷⁶

The OECD Policy Framework for Investment was designed to mobilise private investment that supports steady economic growth and sustainable development, contributing to the economic and social well-being of people around the world; and draws on international practices.⁵⁷⁷ The G20 Guiding Principles aim to provide general guidance for investment policymaking in order to: foster an open, transparent and

⁵⁷⁰ See, for example, South Africa's National Development Plan 2030, 2012.

⁵⁷¹ See Centre for International Sustainable Development Law 'The Principles of international law related to sustainable development' available at <http://cisdl.org/tribunals/overview/principles/1.html> (accessed 01 January 2018).

⁵⁷² Käppeli A, Perez J & Vega M 'International investment agreements: Not fit for the 2030 Sustainable Development Agenda' available at <https://www.cgdev.org/blog/international-investment-agreements-not-fit-2030-sustainable-development-agenda>.

⁵⁷³ UNCTAD Investment Policy Framework for Sustainable Development, 2015.

⁵⁷⁴ OECD Policy Framework for Investment, 2015.

⁵⁷⁵ G20 Guiding Principles for Global Investment Policymaking, 2016.

⁵⁷⁶ See UNCTAD Investment Policy Framework for Sustainable Development, 2015.

⁵⁷⁷ For more information, see <http://www.oecd.org/investment/pfi.htm>.

conducive global policy environment for investment; promote coherence in national and international investment policymaking in the absence of a global governance regime, and promote investment for inclusive economic growth and sustainable development.⁵⁷⁸

Worth noting is that these international statements do not bind subjects of international law in the manner of hard law documents, but constitute soft-law or normative claims and provide standards or targets to be achieved.⁵⁷⁹ These international instruments have been used extensively by governments in reference to investment policy frameworks.⁵⁸⁰ Equally important, the adoption of investment policy frameworks by these international organisations illustrates the international community's efforts towards promoting investment for sustainable development, and its work on designing IIAs that will achieve this goal.

African states recognise the critical role played by private investment in fostering sustainable development in their economies. For example, the AU's PAIC acknowledges the role of investment in promoting sustainable development.⁵⁸¹ At REC levels, regional investment agreements have been adopted by COMESA, SADC and ECOWAS member states which are intended to establish regional approach towards foreign investment regulation for sustainable development.⁵⁸² Some African countries



⁵⁷⁸ See Annex III: G20 Guiding Principles for Global Investment Policymaking available at http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154790.pdf (accessed 16 January 2018).

⁵⁷⁹ See Aksar Y 'International economic law' in Aksar Y (ed) *Implementing international economic law: Through dispute settlement mechanisms* (2011) 40.

⁵⁸⁰ According to the UNCTAD, 'the framework has already served as a reference tool for investment policy design and redesign in several regions, and is often cited by prominent experts and investment policymakers in the context of the reform and evolution of the IIA regime. recent World Economic Forum report (The Case for a Multilateral Agreement on Investment) singled out the IPFSD and UNCTAD proposals to incorporate CSR principles in international investment policy as 'significant work' that could help advance a multilateral approach to IIAs 'by providing political and strategic direction'. UNCTAD 'Investment Policy Framework for Sustainable Development (IPFSD)' available at [http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-IPFSD.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-IPFSD.aspx) (accessed 16 January 2018). According to the OECD, the OECD PFI 'is a multilaterally backed instrument that has been used extensively by developing and emerging economies in all parts of the world'.

⁵⁸¹ Paragraph 10 of the preamble of the Pan-African Investment Code.

⁵⁸² For example, Art. 12 of the Amended Annex 1 of SADC Protocol on Finance and Investment, 2016; preamble of the Revised Investment Agreement for the COMESA Common Investment Area, 2017, and Art. 3 of the ECOWAS Supplementary Act. These regional investment agreements are discussed in detail in Chapter 5 of this study.

have even tailored their national investment legislations to achieve sustainable development.⁵⁸³

The above analysis has attempted to outline the human rights-based theory with an objective to advance that reserving the right to regulate for host states in IIAs is crucial in the promotion and protection of human rights and achievement of sustainable development. The human-rights based approach to right to regulate essentially entails that states are obligated to regulate investments and have a duty to implement regulatory measures with the aim to improve the social and economic conditions of their citizens.⁵⁸⁴ Under international human rights law, states carry a legal duty to respect the human rights of their citizens including right to development, labour rights, environmental rights and public health. That is, states are required by international human rights law to regulate the activities of businesses domiciled in their territories and have a duty to take preventative protective and punitive measures against corporate abuses.

However, there is empirical evidence across the world revealing governments abandoning their duty to protect human rights at the expense of business.⁵⁸⁵ In some cases, governments have eroded human rights standards to attract more foreign investment, the so-called 'race-to-the-bottom'.⁵⁸⁶ The failure by states to protect human rights violations by investors may entail legal consequences for the government itself. According to Alborno:

If a human rights violation occurs in a state that has committed to respect and guarantee human rights within one of the regional human rights regimes or the UN regime, the affected person could present her case before an international forum – such as the Human Rights Commission of the United Nations, the Inter-American

⁵⁸³ For example, the Protection of Investment Act 22 of 2015 of South Africa and the Namibian Investment Promotion Act, 2016

⁵⁸⁴ See generally Mouyal (2016).

⁵⁸⁵ See more information at Human Rights Watch <https://www.hrw.org/topic/business>. See also Croser M 'Human rights violations have increased 70% since 2008 globally' (2014) available at <https://www.theguardian.com/sustainable-business/2014/sep/09/human-rights-violations-increase-corporate-responsibility> (accessed 17 January 2018).

⁵⁸⁶ Madsen PM 'Does corporate investment drive a "race to the bottom" in environmental protection? A re-examination of the effect of environmental regulation on investment' (2009) 52 *The Academy of Management Journal* 1297-1318; Mehmet O & Tavakoli A 'Does foreign direct investment cause a race to the bottom?' 2003 8 *Journal of the Asia Pacific Economy* 133–56; and Gurtner B & Christensen J 'The race to the bottom: Incentives for New Investment?' *Tax Justice Network* available at https://www.taxjustice.net/cms/upload/pdf/Bruno-John_0810_Tax_Comp.pdf (accessed 01 January 2018).

Court of Human Rights, the African Court of Human and People's Rights or the European Court of Human Rights – which could declare the international responsibility of the state for that violation. After the legal process is carried out, the competent international human rights authority would be able to sanction the state.⁵⁸⁷

This liability flows from the fact that states are the ones that conclude international human rights instruments. Thus, they are the ones that are primarily duty-bound to enforce these instruments, assuming the role of human rights guarantors, and are the ones responsible in case of human rights violations.⁵⁸⁸ This reasoning explains why it is argued that non-state actors cannot be held responsible for human rights violations under existing international human rights law.⁵⁸⁹ Under some international instruments and domestic legislation, other states or affected persons may enforce a state's duty to protect and gain compliance or compensation upon the showing of a breach through quasi-judicial or judicial procedures.⁵⁹⁰ In order to avoid such responsibility, states must prevent any human rights violation within their territories by international investors. This is possible if human rights obligations are enshrined as part of the substantive provisions in the investment treaties.

As already highlighted, state sovereignty and duty to respect, protect and fulfil rights do not entitle states to disregard their commitments under investment treaties. These rights and duties must be exercised and performed in such a manner that do not violate agreed rules in IIAs. This requires is better understood in the explaining the potential collision between the right to regulate and the duty to honour investment treaty obligations.

⁵⁸⁷ Alborno CAS 'Can foreign investors be held liable for human rights violations? International human rights law and beyond' (2017) available at <https://www.iisd.org/itn/2017/09/26/can-foreign-investors-be-held-liable-for-human-rights-violations-international-human-rights-law-and-beyond-carlos-andres-sevilla-alborno/> (accessed 01 January 2018) (hereinafter Alborno (2017)).

⁵⁸⁸ Alborno (2017). See also Osmani (2005) 117; and Gabel (2016) x.

⁵⁸⁹ See discussions in Deva S & Bilchitz D (eds) *Human rights obligations of business: beyond the corporate responsibility to respect?* (2013); De Schutter O 'The accountability of multinationals for human rights violations in European law' (2004) Centre for Human Rights and Global Justice Working Paper; and Danailov S 'The accountability of non-state actors for human rights violations: The special case of transnational corporations' (1998) available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.461.3550&rep=rep1&type=pdf> (accessed 01 January 2018).

⁵⁹⁰ Spears SA 'The quest for policy space in a new generation of international investment agreements' (2010) 13 *Journal of International Economic Law* 1038.

3.4 CONFLICT BETWEEN THE RIGHT TO REGULATE AND THE DUTY TO ADHERE TO INVESTMENT TREATIES

Although it is important for states to exercise their sovereign right to regulate and protect human rights in their territories, it must also be emphasised that states have an equal obligation to respect their obligations under investment treaties including protecting foreign investors and their investments. In other words, a state cannot be simply relieved from its IIAs commitments by invoking its sovereignty and human rights obligations. This scenario entails the concept of fundamental change of circumstances, *rebus sic stantibus*. According to Article 62 (2) (b) of the VCLT, a fundamental change of circumstances cannot be invoked if the change is the result of a breach by the party invoking it of another international obligation. Thus, the state cannot be exempted from its IIA obligations on the basis of the principle of *rebus sic stantibus*, even when states seek to regulate to live up to their commitments under the duty to regulate within the human rights regime, it does not relieve the state from its obligation.⁵⁹¹

The foregoing argument is also premised on the sanctity of contracts epitomised by the maxim of *pacta sunt servanda*.⁵⁹² The basic rationale for this argument is the very prerogatives that the state has the right, jurisdiction and authority to enter into concessions. As such, if the state chooses to bind itself and therefore temporarily surrender its sovereign prerogatives, it can be said that the duty to protect human rights is accentuated and complimented by the principle of the sanctity of contracts. States are often confronted with such consequences.

The sanctity of contracts is well recognised under international investment law. In the oft-cited case of *Sapphire International Petroleum Ltd. v National Iranian Oil Co*,⁵⁹³ the

⁵⁹¹ Mouyal (2016) 251.

⁵⁹² See discussion about *pacta sunt servanda* in part 3.2 above.

⁵⁹³ *Sapphire International Petroleum Ltd. v National Iranian Oil Company*, 35 I.L.R. 136 (1967) (hereinafter *Sapphire International Petroleum Ltd. v National Iranian Oil Company*). See also *Texaco Overseas Petroleum Co. v The Government of the Libyan Arab Republic*, Award (Jan. 19, 1977), 17 ILM 1, 4 (1978) where Clause 16 of the Concession between the parties read:

'The Government of Libya, the Commission and the appropriate provincial authorities will take all steps necessary to ensure that the Company enjoys all the rights conferred by this Concession. The contractual rights expressly created by this Concession shall not be altered except by mutual consent of the parties. (2) This Concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulations in force on the date of execution of the Agreement of Amendment by which this paragraph was incorporated in this Concession Agreement. Any amendment to or repeal of such Regulations shall not affect the contractual rights of the Company without its consent.'

government of Iran had nationalised assets belonging to Sapphire International Petroleum Ltd. The Concession Agreement between the parties contained a stabilisation clause which specifically stated that the government would not take any administrative or legislative action that would adversely affect the investor. The arbitral tribunal pronounced that the unilateral termination of the contract rendered the state susceptible to pay compensation to Sapphire International. In arriving at their decision, the tribunal primarily relied upon the principle of *pacta sunt servanda*. The tribunal stated:

This rule is simply a direct deduction from the principle *pacta sunt servanda*, since its only effect is to substitute a pecuniary obligation for the obligation which was promised but not performed. It is therefore natural that the creditor should thereby be given full compensation. This compensation includes loss suffered (*damnum emergens*), for example expenses incurred in performing the contract, and the profit lost (*lucrum cessans*), for example the net profit which the contract would have produced. The award of compensation for lost profit or the loss of a possible benefit has been frequently allowed by international tribunals.⁵⁹⁴

A similar line of reasoning was echoed in *Saudi Arabia v Arabian American Oil Company (Aramco)*.⁵⁹⁵ The tribunal in this case opined that 'nothing can prevent a state, in the exercise of its sovereignty, from binding itself irrevocably by the provisions of a concession and from granting to the concessionaire irrevocable rights. Such rights have the character of acquired rights'.⁵⁹⁶ This means that once a state has entered into an agreement/contract/concession it is bound by it.

In some instances, host states have invoked the defence of necessity, claims of *ordre public*.⁵⁹⁷ Article 25 of the International Law Commission Draft Articles on

In this case, the arbitrator disagreed, and contended that it is in fact possible for a sovereign to bind itself through a concession agreement with a foreign investor. The arbitrator focused primarily on the principle of *pacta sunt servanda*. See also *Liberian Eastern Timber Company v Republic of Liberia*, ICSID Case No. ARB/83/2, Award (Mar. 31, 1986), 2 ICSID Rep. 368 (1989).

⁵⁹⁴ *Sapphire International Petroleum Ltd. v National Iranian Oil Company* para 181.

⁵⁹⁵ *Saudi Arabia v Arabian American Oil Company (Aramco)*, 27 I.L.R. 117, 227 (1963) (hereinafter *Saudi Arabia v Aramco*).

⁵⁹⁶ *Saudi Arabia v Aramco* para 168.

⁵⁹⁷ See Titi (2014) 237, highlighting that the 'necessity defence is the most important and the most widely-canvas general public law defence in investment dispute settlement involving voluntary state conduct in non-performance of an international obligation'

Responsibility of States for Internationally Wrongful Acts⁵⁹⁸ codifies the requirements for necessity under CIL.⁵⁹⁹

Necessity may not be invoked by a state as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that state unless the act:

(a) Is the only way for the state to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole.

In any case, necessity may not be invoked by a state as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The state has contributed to the situation of necessity.⁶⁰⁰

The reasoning in the necessity defence is that where host states have expressly committed to international human rights obligations, the investors must generally expect that the state will live up to those commitments.⁶⁰¹ That is, it may be held that investors should be expected to consider the human rights framework at the time of making the decision whether or not to invest. In *Methanex* case, the tribunal stressed that the investor knew or should have known that California attached high political importance to environmental regulation.⁶⁰² The tribunal therefore expressly emphasised the predictability of the regulatory change. All investors in this area – environment – should thus anticipate that activities if found to be detrimental to the environment, would become the subject of public debate and regulation. Consequently, the tribunal concluded that the environmental regulation in California was foreseeable for the investor, which entered a political economy where environmental regulation was widely known.

⁵⁹⁸ International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

⁵⁹⁹ Titi (2014) 235.

⁶⁰⁰ Article 25 (1) and (2) of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts.

⁶⁰¹ Mouyal (2016) 251.

⁶⁰² *Methanex Corporation v. US* para IV.

However, some countries have endorsed that the host state is not responsible for loss or for other economic disadvantage suffered by investors resulting from the exercise of its right to regulate.⁶⁰³ This implies that the right to regulate represents the host states' legal right to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate. In one of the pioneering cases in this matter, *Sedco v National Iranian Oil Company*,⁶⁰⁴ the Iran-US Claims tribunal noted that it was an 'accepted principle of international law that a state is not liable for economic injury which is a consequence of bona fide regulation within the accepted police power of state'.⁶⁰⁵ Similarly, the *Saluka Investments B. V. v Czech Republic*⁶⁰⁶ tribunal affirmed this position stating that 'it is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare'.⁶⁰⁷ The tribunal based its decision on the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens,⁶⁰⁸ the American Law Institute Third Restatement of the Law and an accompanying note to the OECD Draft Convention on the Protection of Foreign Property.⁶⁰⁹

In addition to the foregoing, the *Tecmed S.A. v Mexico*⁶¹⁰ tribunal noted that 'the principle that the state's exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable'.⁶¹¹ In order to determine if the regulatory actions are to be characterised as expropriatory, the *Tecmed S.A. v Mexico* tribunal considered 'whether such actions or measures are proportional to the public interest presumably protected thereby and

⁶⁰³ American Law Institute *Restatement of the law, Third, Foreign Relations Law of the United States* 592, 1965.

⁶⁰⁴ *Sedco, Inc. v. National Iranian Oil Company, Interlocutory*. 117 Award No. ITL 55-129-3 (28 October 1985) Iran-US C.T.R. (hereinafter *Sedco v National Iranian Oil Company*).

⁶⁰⁵ *Sedco v National Iranian Oil Company* para 248.

⁶⁰⁶ *Saluka Investments B. V. v Czech Republic*, UNCITRAL Rules, Partial Award (17 March 2006) (hereinafter *Saluka Investments B. V. v Czech Republic*).

⁶⁰⁷ *Saluka Investments B. V. v Czech Republic* para 256.

⁶⁰⁸ Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, 1961.

⁶⁰⁹ OECD Draft Convention on the Protection of Foreign Property was adopted by the OECD Council on 12 October 1967.

⁶¹⁰ *Tecnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) (hereinafter *Tecmed S.A. v Mexico*).

⁶¹¹ *Tecmed S.A. v Mexico* para 119.

to the protection legally; granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality'.⁶¹² This standpoint was later affirmed by the United Nations Commission on International Trade Law (UNCITRAL) tribunal in *Methanex Corporation v. US*.⁶¹³ The tribunal stated 'as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alia*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation'.⁶¹⁴

More recently, the *Chemtura v. Canada*⁶¹⁵ case confirmed this issue in its absolute sense. The case was brought against Canada by an American firm manufacturing lindane – an agricultural pesticide. Lindane-based products were not allowed to be sold or distributed in the US. As a result of the risks associated with the use of lindane, many steps were taken to restrict the use of lindane on an international level. Following a special review, Canada's pesticide federal agency formed the view that the health and environmental risk assessment findings warranted regulatory action by way of suspension or termination of lindane registrations, and accordingly terminated the use of lindane based products. Canada's agency then terminated the American firm's registrations for authorised lindane-containing products. The tribunal concluded:

In summary, the evidence shows that the measures did not amount to a substantial deprivation of the Claimant's investment. Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers The PMRA (Pest Management Regulatory Agency) took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under

⁶¹² *Tecmed S.A. v Mexico* para 122. The proportionality test is related to the principle of equality with regard to public burdens and may be used to determine whether an expropriation is compensable.

⁶¹³ *Methanex Corporation v. United States of America*, UNCITRAL, Final Award (3 August 2005) (hereinafter *Methanex Corporation v US*).

⁶¹⁴ *Methanex Corporation v. US* para IV.7.

⁶¹⁵ *Chemtura Corporation v Government of Canada*, UNCITRAL, Award (2 August 2010) (hereinafter *Chemtura Corporation v Government of Canada*).

such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation.⁶¹⁶

This position was also cited in several investment arbitral awards,⁶¹⁷ and should possibly be positioned as the qualified doctrine of international jurisprudence.

However, the recognition of this position in contemporary investment discussions is not without criticism. Some practitioners maintain that the exercise of the right to regulate by host states violates the investment protection standards guaranteed in IIAs and precludes the obligation to pay compensation. The practitioners are thus adamant that 'if a governmental measure effectively deprives the owner of control over his property or substantially affects its commercial value, compensation is required even if the state may purport to have adopted the measure in the exercise of its police powers'.⁶¹⁸ Likewise, the ICSID tribunal in *Santa Elena S.A v Costa Rica*⁶¹⁹ strongly maintained that 'expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains'.⁶²⁰

Addressing this controversy therefore warrants a proper balance of the interests of both parties (investors and host states)⁶²¹ – something which traditional international

⁶¹⁶ *Chemtura Corporation v Government of Canada* para 58.

⁶¹⁷ *Too v Greater Modesto Insurance Associates*, Award (29 December 1989), 23 Iran-US C.T.R 187; *Pope & Talbot Inc. v The Government of Canada*, UNCITRAL, Interim Award (26 June 2000) para 21; *Saluka Investments B. V. v Czech Republic*, UNCITRAL Rules, Partial Award (17 March 2006) para 260; *LG & E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. The Argentine Republic*, ICISD Case ARB/02/1, Decision on Liability (3 October 2006) para 238; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) para 238.

⁶¹⁸ Heiskanen V 'The contribution of the Iran-United States Claims Tribunal to the development of the doctrine of indirect expropriation' (2003) 5 *International Law Forum Du Droit International* 177. See also Montt S *State liability in investment treaty arbitration: Global constitutional and administrative law in the BIT generation* (2009) 253; Moloo R & Jacinto J 'Environmental and health regulation: Assessing liability under investment treaties' (2011) 29 *Berkeley Journal of International Law* 13; Titi C (2014) 181; Martinez-Fraga PJ & Reetz CR *Public purpose in international law: Rethinking regulatory sovereignty in the global era* (2015) 45 (hereinafter Martinez-Fraga & Reetz (2015)); and *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (30 June 2009) para 133.

⁶¹⁹ *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000) (hereinafter *Santa Elena S.A. v Costa Rica*).

⁶²⁰ *Santa Elena S.A. v Costa Rica* para 72.

⁶²¹ See Cosbey A, Mann H, Peterson LE & Von Moltke K *Investment and sustainable development: A guide to the use and potential of international investment agreement* (2004) v, opining that 'there needs to be a balance between the rights of investors to be protected from wrongful acts by governments (an

investment law has not yet achieved. The *Saluka Investments B. V. v Czech Republic* tribunal observed that:

The international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered . . . as falling within the police or regulatory power of states and, thus, non-compensable. In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.⁶²²

That is, on the one hand, host states can make binding investment-related commitments through international, regional or bilateral agreements, provided they can still take measures to comply with international obligations to make certain minimum policy prioritisations under the duty to regulate.⁶²³ It must be emphasised here that the regulatory autonomy of host states within the investment legal sphere is not an opportunity for states to decide in an unfettered manner whether to treat investors contrary to the existing IIA commitments. It is rather an acknowledgement or recognition that, under certain circumstances, a state has a discretion to deny the full enjoyment of an investment provided that a legitimate justification is provided.⁶²⁴ On the other hand, investors must expect and accept a certain level of regulation imposed by host states to ensure a minimum standard of living, such as basic health regulation, environmental regulation and labour regulation.

The above analysis reveals the clash between the right to regulate and the states' duty to adhere to agreements within the international investment law which describes the current dilemma of balancing rights and obligations inherent within investment law. Be that as it may, it is submitted that the states' right to regulate investment in public interest is a core responsibility which cannot be derogated from. That said, it is imperative for states to ensure when negotiating investment treaties, they should negotiate treaties that leave enough room for them to exercise their right to regulate. The dilemma presented in this scenario presents a justification why investment treaties should strike a balance between state and investment interests. If all the public interest

important right, given our need for investment), and the rights of citizens to protection from the adverse impacts of some economic activities'.

⁶²² *Saluka Investments B. V. v Czech Republic* para 263.

⁶²³ Mouyal (2016) 223.

⁶²⁴ Wagner M 'Regulatory space in international trade law and investment law' (2014) 36 *University of Pennsylvania Journal of International Law* 68.

issues or host state interest are carved out in the investment treaties, there will not be this conflict of disciplines.⁶²⁵

3.5 CONCLUSION

The principal objective of this chapter was to establish whether African countries have international obligations with respect to the incorporation of the right to regulate in investment treaties. Accordingly, the chapter has confirmed a set of minimum core responsibilities of African states to reserve their regulatory autonomy when dealing with external parties including foreign investors. These core responsibilities are entrenched in general principles of international law, CIL, IIAs and international human rights agreements. The chapter has shown that African countries' right to regulate is embedded in the peremptory norms or principles such as states' sovereignty and human rights obligations in relation to labour, environment, development and sustainable development.

The chapter also discussed norms on the states' right to regulate emanating from soft law instruments of the OECD, UNCTAD and G20. The instruments are non-legally binding but may 'carry significant weight or political weight'⁶²⁶ and highlight the international community's consensus or best practice on investment legal and policy frameworks. Hence their significance should not be understated. The instruments have the potential to further strengthen the concept of right to regulate in international investment law.

The overall analysis of the chapter suggests that the right to regulate, in general sense, is a core responsibility which cannot be eliminated, derogated from or even limited. Preserving the regulatory autonomy of host states in the international investment legal framework is indisputable. However, CIL norms or general international law principles alone cannot force tribunals to interpret the regulatory freedom of the states if it is not included in the investment treaties. It is for this reason that this study proposes for African countries to reserve policy space in their IIAs. The next chapter will undertake a theoretical framework which provides a better understanding and evaluation of the

⁶²⁵ See Yannaca-Small K 'Indirect expropriation and the right to regulate: How to draw the line?' in Yannaca-Small K (ed) *Arbitration under international investment agreements: A guide to the key issues* (2010) 467-77; and Martinez-Fraga & Reetz (2015) 243.

⁶²⁶ United States Department of State 'Guidance on non-binding documents' available at <https://www.state.gov/s/treaty/guidance/> (accessed 15 May 2019).

social, economic and legal effects of accommodating the right to regulate in the international legal framework for investment.



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CHAPTER 4

PRACTICAL EFFECTS OF INCORPORATING THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT AGREEMENTS

4.1 INTRODUCTION

The preceding chapters have expounded that the conventional international investment law constrains policy space,⁶²⁷ despite the existence of an international law right and obligation of states to exercise their regulatory freedom.⁶²⁸ It is submitted that, while there are international law rules and normative standards that bestow and compel states to exercise their regulatory freedom, there are several practical effects in integrating the right to regulate in international investment law. These practical effects are enunciated in the present chapter from economic, legal and social stand points. The chapter will discuss several legal, social and economic effects that are brought about by safeguarding regulatory freedom in international investment law. Before delving into the discourse, it is worth highlighting that such (social, economic and legal) effects are advantageous to host states and their citizens but could possibly be deemed disadvantageous by other stakeholders particularly foreign investors and investments.⁶²⁹ To that end, it is important to reiterate that the right to regulate insofar as it is, to a larger degree, beneficial to host countries and their citizens, it should not be employed to evade compliance with IIAs.⁶³⁰

The thesis of this study – to entrench the right to regulate – does not necessarily intend to undermine the primary purpose of IIAs, which is to promote and protect foreign investors and investments. Instead, the study promotes the inclusion of the right to regulate in IIAs as a safety valve to accord host states flexibility to pursue their public policy goals without fear of investment arbitration. The exercise of the right to regulate should be reasonable and within the confines of international law and must not violate

⁶²⁷ See discussion in chapter 2.

⁶²⁸ See discussion in chapter 3.

⁶²⁹ Heiskanen V 'The contribution of the Iran-United States Claims Tribunal to the development of the doctrine of indirect expropriation' (2003) 5 *International Law Forum Du Droit International* 177. See also Montt S *State liability in investment treaty arbitration: Global constitutional and administrative law in the BIT generation* (2009) 253; Molloo R & Jacinto J 'Environmental and health regulation: Assessing liability under investment treaties' (2011) 29 *Berkeley Journal of International Law* 13; Titi C (2014) 181; Martinez-Fraga PJ & Reetz CR *Public purpose in international law: Rethinking regulatory sovereignty in the global era* (2015) 45; and *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (30 June 2009) para 133.

⁶³⁰ See part 3.4.

the rights of investors under the IIAs. Equally, the ICSID tribunal in *Total v Argentina*⁶³¹ reasoned:

The host state's right to regulate domestic matters in the public interest has to be taken into consideration as well. The circumstances and reasons (importance and urgency of the public need pursued) for carrying out a change impacting negatively on a foreign investor's operations on the one hand, and the seriousness of the prejudice caused on the other hand, compared in the light of a standard of reasonableness and proportionality are relevant. The determination of a breach of the (FET) standard requires, therefore, a weighing of the claimant's reasonable and legitimate expectations on the one hand and the respondent's legitimate regulatory interest on the other (footnotes omitted).⁶³²

This suggests that certain limitations must be placed on the host state when exercising its regulatory autonomy. Such limitations must be translated into concrete legal duties, deriving from the state's duty not to frustrate investment protection, which in turn comes under general international law to protect investors and their investment. This study is also meant to balance public interests of the host states and private interests of foreign investors in international investment law. In other words, the study takes away nothing from the IIAs' original purpose but adds public interest regulation and development considerations into international investment law, and attempts to achieve a balance between investment protection and the right to regulate.

The legal, social and economic practical effects expounded in this chapter are intended to rationalise the inclusion of the right to regulate in IIAs. This is to persuade African governments that entrenching the right to regulate in IIAs gives them breathing space to advance economic development goals and public interests without fear of investment treaty breach and arbitration. The chapter will commence by examining the economic implications of including the right to regulate in IIAs. Thereafter, the chapter will elaborate on the legal implications and, lastly the social practical effects that comes with the inclusion of the right to regulate in IIAs.

⁶³¹ *Total S.A. v The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010 (hereinafter *Total v Argentina*).

⁶³² *Total v Argentina* para 123.

4.2 ECONOMIC IMPLICATIONS

A common rationale for countries attracting foreign direct investment (FDI) by all possible means is to reap the benefits associated with FDI. Many economists, lawyers and politicians largely concur that that FDI plays a significant role in providing capital, advancing economic growth and development, transfer of modern technology and know-how, and creating jobs.⁶³³ It is for this reason that that countries including those in Africa have signed investment treaties, and liberalised their policies to attract FDI inflows over the years.⁶³⁴ The logic here is that if, for example, Zimbabwe wishes to attract FDI from South Africa, it could conclude an investment treaty with South Africa to signal its commitment to protect South African investors – thus encouraging South African investors to invest in Zimbabwe rather than in another country.

There is mixed evidence as to whether investment treaties increase investment flows.⁶³⁵ Van Harten remarks that ‘this mixed evidentiary record demonstrates in part the limitations of quantitative legal research but also that there is at best conflicting evidence that investment treaties actually encourage foreign investment and, in turn, that any signalling effect of the treaties has an actual effect on investor decision-making about where to commit capital’.⁶³⁶ The United Nations Conference on Trade and Development (UNCTAD) conducted a series of econometric studies between 1998 and 2008 to determine the role of IIAs in encouraging FDI,⁶³⁷ and most of the

⁶³³ See, for example, Enright MJ *Developing China: The remarkable impact of foreign direct investment* (2017) ch 3 and 4; Moran TH & Oldenski L *Foreign direct investment in the United States: Benefits, suspicions, and risks with special attention to FDI from China* (2013) 1-13; Jones J & Wren C *Foreign direct investment and the regional economy* (2016) ch 4; Tuluze NS & Dogan I ‘The impact of foreign direct investments on SMEs’ development’ (2014) 150 *Procedia - Social and Behavioural Sciences* 107-15; Knoerich J ‘How does outward foreign direct investment contribute to economic development in less advanced home countries?’ (2017) 45 *Oxford Development Studies* 443-459; Ali N & Hussain H ‘Impact of foreign direct investment on the economic growth of Pakistan’ (2017) 7 *American Journal of Economics* 163-70; and Libanda J, Marshall D & Nyasa L ‘The effect of foreign direct investment on economic growth of developing countries: The case of Zambia’ (2017) 16 *British Journal of Economics, Management & Trade* 1-15.

⁶³⁴ See Johnson AR ‘Rethinking bilateral investment treaties in Sub-Saharan Africa’ (2010) 59 *Emory Law Journal* 919-23.

⁶³⁵ See Van Harten G ‘A critique of international investment treaties’ in Singh K & Ilge B (eds) *Rethinking bilateral investment treaties: Critical issues and policy issues* (2016) 41-50 (hereinafter Van Harten (2016)).

⁶³⁶ Van Harten (2016) 43.

⁶³⁷ See UNCTAD *The role of international investment agreements in attracting foreign direct investment to developing countries* (2009) (hereinafter UNCTAD (2009)). See also Joubin-Bret A, Rey M & Weber J ‘International investment law and development’ in Segger MC, Gehring MW & Newcombe AP (eds) *Sustainable development in world investment law* (2011) 22.

reports established that IIAs actually do influence investment decisions. For example, the 2009 UNCTAD Report notes:

IIAs add a number of important components to the policy and institutional determinants for FDI, and thereby contribute to enhancing the attractiveness of countries to foreign investors. In particular, they improve investment protection and add to the security, transparency stability and predictability of the investment framework. If IIAs liberalise market access, as many of them do (in particular free trade agreements and regional integration schemes) they also improve an important economic determinant of foreign investment – the market size. The geographical expansion of regional integration schemes and/or deepening of integration, can and in a number of cases did, stimulate additional investment inflows.⁶³⁸

Despite wide consensus on its developmental impact, FDI has recently come under criticism in the globalisation era for several reasons. Foreign investment has been increasingly critiqued especially in developing countries for its, *inter alia*: continual crowding effect on domestic investment;⁶³⁹ possible influence on the sovereignty of the host country;⁶⁴⁰ effect on the environment;⁶⁴¹ and its negative impacts on the society – such as deterioration of homelands and culture of the indigenous communities.⁶⁴² It is submitted that the positive and negative effects of FDI are not at all clear. It is also submitted that understanding the effects of FDI is subjective and should be analysed on a case-by-case basis.

⁶³⁸ UNCTAD (2009) 109.

⁶³⁹ See Wu G, Sun Y & Li Z 'The crowding-in and crowding-out effects of FDI on domestic investment in the Yangtze Delta region' (2012) 10 *An International Journal* 119-33; Ahmed KT, Ghani GM, Mohamad N & Derus AM 'Does inward FDI crowd-out domestic investment? Evidence from Uganda' (2015) 172 *Procedia - Social and Behavioural Sciences* 419-26; Acar S, Eris B & Tekce M 'The effect of foreign direct investment on domestic investment: Evidence from MENA countries' (2012) available at <http://www.etsg.org/ETSG2012/Programme/Papers/143.pdf> (accessed 20 January 2018); Jude C 'Does FDI crowd out domestic investment in transition countries?' (2014) available at <http://www.touteconomie.org/afse2014/index.php/meeting2014/lyon/paper/viewFile/86/44> (accessed 20 January 2018).

⁶⁴⁰ See Bezuidenhout H & Kleynhans E 'Implications of foreign direct investment for national sovereignty: the Wal-Mart/Massmart merger as an illustration' (2015) 22 *South African Journal of International Affairs* 93–110.

⁶⁴¹ See generally Viñuales JE *Foreign investment and the environment in international law* (2012). See also Gray KR 'Foreign direct investment and environmental impacts – Is the debate over?' (2002) 11 *Review of European, Comparative & International Environmental Law* 306–13.

⁶⁴² See *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, which illustrates the impact of foreign investment on the indigenous people.

FDI-related benefits do not accrue automatically to the host economy.⁶⁴³ Host states should adopt complementary policies, laws and regulations that leverage the benefits to the host economy.⁶⁴⁴ In the same vein, UNCTAD acknowledges that FDI offers recipient economies vast benefits but 'simply opening up to foreign investment does not guarantee inflows, and even when countries do manage to attract FDI, the implications for development differ considerably, depending on the circumstances'.⁶⁴⁵ A pertinent question that arises in this context is how do recipient countries ensure that the benefits of FDI translate into their economies, or rather what circumstances should be available in the host economies to maximise and leverage the benefits of FDI. In this regard, the present study advances an argument that preserving policy space in IIAs is among the means to ensure that FDI benefits are realised by the host economy.

Safeguarding policy space has the potential to strengthen the development dimension of investment treaties.⁶⁴⁶ That is, FDI recipient countries should preserve policy space in order to have the flexibility to advance their development policies within the framework of the obligations established by the IIAs to which they are parties.⁶⁴⁷ An additional factor in support of this perception is the growing recognition in the World Trade Organisation (WTO) and the World Bank, that medium and long-term benefits of trade and investment liberalisation can only be achieved in the context of appropriate and effective domestic regulatory environments.⁶⁴⁸ Against this backdrop, it can be argued that policy space in investment treaties will allow host states to regulate foreign investments in accordance with their national development objective. Thus, policy space enables the host states to translate FDI benefits into the host

⁶⁴³ Organisation for Economic Cooperation and Development (OECD) 'Foreign direct investment for development: Maximising benefits, minimising costs' (2002) OECD Report was prepared within the framework of the activities of the Committee on International Investment and Multinational Enterprise 2 (hereinafter OECD (2002)).

⁶⁴⁴ OECD (2002) 2.

⁶⁴⁵ See the preface of UNCTAD *The development dimension of FDI: Policy and rule-making perspectives*, Proceedings of the Expert Meeting held in Geneva, 6-8 November (2002) Doc.No.UNCTAD/ITE/11A/2003/4 (hereinafter UNCTAD (2002))

⁶⁴⁶ UNCTAD (2002) 171. See also UNCTAD Investment Policy Framework for Sustainable Development, 2015 77-8.

⁶⁴⁷ UNCTAD (2002) 171.

⁶⁴⁸ Mann H 'The right of states to regulate and international investment law' Comment at the Expert Meeting on the Development Dimension of FDI: Policies to Enhance the Role of FDI in Support of the Competitiveness of the Enterprise Sector and the Economic Performance of Host Economies, Taking into Account the Trade/Investment Interface, in the National and International Context, Geneva, 6-8 November 2002 available at http://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf (accessed 30 January 2018) (hereinafter Mann (2002)) 5.

economy. If leveraged well FDI can contribute significantly to the development of host economies.

4.2.1 Right to regulate and sustainable development

Foreign investment has generally been accepted and identified as a significant tool for achieving sustainable development.⁶⁴⁹ Quite recently, it has become uncommon, if not impossible, to conduct a discussion on investment issues without at least a token reference being made to its relevance to achieving sustainable development.⁶⁵⁰ As a matter of fact, sustainable development has recently become the global paradigm guiding the reform of international investment law and policy.⁶⁵¹ Several model international investment treaties and policies have consequently embraced sustainable development considerations at their core.⁶⁵² The idea of investment as a complementary tool for sustainable development was emphasised in a wide range of international discussions. For instance, the 1992 United Nations (UN) Conference on Environment and Development highlighted:

Investment is critical to the ability of developing countries to achieve needed economic growth to improve the welfare of their populations and to meet their basic needs in a sustainable manner, all without deteriorating or depleting the resource base that underpins development. Sustainable development requires increased investment, for which domestic and external financial resources are needed.⁶⁵³

Likewise, the 2002 UN Plan of Implementation of the World Summit on Sustainable Development classified a conducive investment climate as one of the foundations for

⁶⁴⁹ Mann H 'Reconceptualising international investment law: Its role in sustainable development' (2013) 17 *Lewis & Clark Law Review* 521-44. See also Gehring M & Newcombe AP 'An introduction to sustainable development in world investment law' in Segger MC, Gehring MW & Newcombe AP (eds) *Sustainable development in world investment law* (2011) (hereinafter Gehring & Newcombe (2011)) 3; Cosbey A, Mann H, Peterson LE & Von Moltke K *Investment and sustainable development: A guide to the use and potential of international investment agreements* (2004); and Newcombe A 'Sustainable Development and investment treaty law' (2007) 8 *Journal of World Investment & Trade* 357.

⁶⁵⁰ The definition of sustainable development was discussed in the previous chapter.

⁶⁵¹ Schacherer S *International investment law and sustainable development: Key cases from the 2010s* (2018)

⁶⁵² For instance, UNCTAD Investment Policy Framework for Sustainable Development, 2015; OECD Policy Framework for Investment, 2015; and Annex III: G20 Guiding Principles for Global Investment Policymaking, 2016.

⁶⁵³ Agenda 21: Programme of Action for Sustainable Development, Report of the United Nations Conference on Environment and Development U.N. GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/6/Rev.1 (1992), 31 I.L.M. 874 para 2.23.

sustainable development.⁶⁵⁴ Other similar references to the role played by investment in the realisation of sustainable development are stressed and reflected in many quasi-legal international instruments including the UNCTAD Investment Policy Framework for Sustainable Development, the Monterrey Consensus of the International Conference on Financing for Development,⁶⁵⁵ the G8 Declaration Responsible Leadership for Sustainable Future⁶⁵⁶ and G20 Core Values for Sustainable Economic Activity,⁶⁵⁷ among others.

The very idea of conceptualising investment as a tool for sustainable development focuses on the positive impact of FDI. However, as already mentioned, the development impact of investment is not automatic but complementary laws and policies ought to be adopted. Considering this argument, there must be appropriate international, regional or national regulatory frameworks to facilitate investment-led sustainable development. The existing global investment framework is found wanting in this regard. Gehring and Newcombe observe that 'although there is a general consensus on the importance of foreign direct investment for sustainable development, there is still much to be done to ensure that the current regulatory framework for international investment promotes sustainability'.⁶⁵⁸ It is submitted that, in order to achieve this, the international legal framework must reserve the regulatory autonomy of host states to adopt domestic measures aimed at fostering development in their countries (the right to regulate) while at the same time fulfilling the framework's classical role of promoting and protecting investments.

It is therefore crucial to provide a basic understanding of how the notion of the right to regulate fits into the construction of IIAs as an instrument for sustainable development.⁶⁵⁹ There have been concerted efforts in contemporary international investment law and practice to integrate sustainable development principles,⁶⁶⁰ but

⁶⁵⁴ UN World Summit for Sustainable Development: Plan of Implementation World Summit for Sustainable Development UN Doc. A/CONF.199/L.1 para 4.

⁶⁵⁵ Monterrey Consensus of the International Conference on Financing for Development, Report of the International Conference on Financing for Development (2002) UN Doc. A/CONF.198/11 para 1.

⁶⁵⁶ See G8 Declaration Responsible Leadership for Sustainable Future, 2009 paras 49-53.

⁶⁵⁷ See G20 Core Values for Sustainable Economic Activity, 2009 para 5.

⁶⁵⁸ Gehring & Newcombe (2011) 9.

⁶⁵⁹ See, generally, Dubava I *Reconciling international investment law and sustainable development with respect to host state's right to regulate: The legal impact of sustainable development objective on indirect expropriation standard and its legitimate expectations sub-element* (PhD thesis, European University Institute, 2013).

⁶⁶⁰ Newcombe A & Paradell L *Law and practice of investment treaties: Standards of treatment* (2009) 34.

more still needs to be done to ensure that the investment legal regimes pragmatically promote sustainable development.⁶⁶¹ UNCTAD recommends that IIAs be designed in context of an overall objective of attracting FDI with a view to maximising its contribution to host countries' sustainable development and growth.⁶⁶²

UNCTAD's Investment Policy Framework for Sustainable Development is the most recent, comprehensive and commonly used framework,⁶⁶³ and include far-reaching consideration on the issues pertaining to investment, the right to regulate and sustainable development. The Framework provides a robust background for understanding the relevance of investment to realising sustainable economic growth and development. The UNCTAD Investment Policy Framework for Sustainable Development purports to strengthen the development dimension of IIAs, balance the rights and obligations of states and investors, and to manage the systemic complexity of the IIA regime. It seeks to advance the evolution of investment treaties incorporating concrete commitments to promote and facilitate investment for sustainable development.⁶⁶⁴ The UNCTAD Investment Policy Framework for Sustainable Development therefore contains comprehensive policy options for investment policy-makers including, *inter alia*, options that clarify key IIA protection standards, strengthen the right to regulate, improve investment dispute settlement as well as clauses aimed at promoting and facilitating investment and ensuring responsible investor behaviour.

More important to the present study is UNCTAD's recognition of the need to preserve the right to regulate in order to achieve sustainable development objectives. In particular, the UNCTAD Investment Policy Framework for Sustainable Development recommends:

⁶⁶¹ Gehring & Newcombe (2011) 10.

⁶⁶² UNCTAD (2009) 110.

⁶⁶³ The Framework has been a point of reference at several meetings by intergovernmental organisations and groupings including, *inter alia*: the Asia Pacific Economic Cooperation Investment Expert Group; the European Economic and Social Committee; the Commission on Trade and Investment Policy of the International Chamber of Commerce; the OECD Freedom of Investment Roundtables; the United Nations Commission on International Trade Law Commission Sessions and Working Group Meetings; G8 plus 5 Informational Multilateral Investment Dialogue; Deliberations on the World Health Organisations Framework Convention on Tobacco Control; the Energy Charter Treaty; UN Human Rights Council and its Working Groups; and the International Institute for Sustainable Development South Centre Annual Forums of Developing Country Investment Negotiations.

⁶⁶⁴ UNCTAD Investment Policy Framework for Sustainable Development, 2015 x.

When formulating their strategic approach to international engagement on investment, policymakers need to embed international investment policymaking into their countries' development strategies. This involves deciding whether or not to engage in IIAs, determining how to reform needs concerning existing IIAs, managing the interaction between IIAs and national policies ... and that between IIAs and other international policies or agreements (e.g. ensuring that IIAs do not contradict international environmental agreements or human rights obligations. The overall objective is to ensure coherence between IIAs and sustainable development needs.⁶⁶⁵

UNCTAD further affirms that policy makers need to incorporate sustainable development considerations in IIAs, addressing concerns related to right to regulate, for example, through reservations and exceptions, balancing rights and obligations of states and investors through encouraging compliance with corporate social responsibility standards, reform of investment dispute settlement, and effective investment promotion.⁶⁶⁶ Imposing such actionable responsibilities on investors would reverse the incentive structure of investment treaties, ensuring that sustainable development is the overarching objective of the IIAs in fact, not only in law.⁶⁶⁷

In light of the foregoing argument, one would conclude that embracing the right to regulate at the heart of IIAs is an incentive for the realisation of sustainable development. The right to regulate in IIAs serves as a tool to harness foreign investment for sustainable development. The right to regulate would ensure that foreign investments promote inclusive development and positive linkages with the local economy and respond to a bottom up and strategic vision of sustainable development based on domestic and national aspirations of the host economy.⁶⁶⁸

4.3 LEGAL IMPLICATIONS

From a legal point of view, the right to regulate in IIAs has the potential to entrench the sovereignty right of states in international investment law and bring about legal certainty in investment treaty application. That is, the right to regulate gives host states necessary freedom to exercise their sovereignty, has the potential to limit the

⁶⁶⁵ UNCTAD Investment Policy Framework for Sustainable Development, 2015 72.

⁶⁶⁶ UNCTAD Investment Policy Framework for Sustainable Development, 2015 72.

⁶⁶⁷ Hush E 'Trade, investment, and sustainable development in CETA' (2017) available at <http://cjel.law.columbia.edu/preliminary-reference/2017/trade-investment-and-sustainable-development-in-ceta/> (accessed 04 August 2018).

⁶⁶⁸ Cotula L *Foreign investment, law and sustainable development A handbook on agriculture and extractive industries* 2 ed (2016) viii.

discretionary interpretative powers of arbitral tribunals in investment treaty arbitration and can enhance the public interest regulation in international investment law.⁶⁶⁹

4.3.1 The right to regulate and state sovereignty

Inherent in the principle of the right to regulate is the state sovereignty to determine economic, social, cultural and political systems in accordance with the will of the people.⁶⁷⁰ That means entrenching the right to regulate would allow states to exercise that sovereignty without fear of violating international investment law obligations. Mouyal concurs that ‘the right to regulate is the affirmation of the sovereign right of states to choose their political, social and economic priorities – within certain limits – through the adoption of legislation and administrative practices without violating international rules protecting foreign investments’.⁶⁷¹ The message portrayed here is that the right to regulate in IIAs reinforces the recognition of the sovereignty of states in international investment law. This would reverse the perception that international investment law threatens the sovereign right of host states to regulate investment activities within their territories.

4.3.2 The right to regulate and state immunity in investment arbitration

The right to regulate also affirms states’ immunity (one’s freedom from the legal power of another) under international investment law, customary international law (CIL) and the rules of states’ responsibility.⁶⁷² Observing the right to regulate as a legal tool for recognising state immunity relieves the host state from being held liable, by investors and investment arbitral tribunals, for adopting regulatory measures in certain areas.

⁶⁶⁹ See Adeleke F *International investment law and policy in Africa: Exploring a human rights based approach to investment regulation and dispute settlement* (2018) ch 2 (hereinafter Adeleke (2018)).

⁶⁷⁰ Van Harten G *Investment treaty arbitration and public law* (2007) 131 (hereinafter Van Harten (2007)). See also *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, where the tribunal noted that “it is each state’s undeniable right and privilege to exercise its sovereign legislative power. A state has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited is for a state to act unfairly, unreasonably or inequitably in the exercise of its legislative power”. See also a discussion in chapter 3.

⁶⁷¹ Mouyal (2016) 15.

⁶⁷² Giannakopoulos ‘The right to regulate in international investment law and the law of state responsibility: A Hohfeldian approach’ (2017) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2962686 21 (accessed 17 July 2018) 21 (hereinafter Giannakopoulos (2017)).

This is done in various ways such as, *inter alia*, inserting non-precluded measures⁶⁷³ or exception and reservation clauses such as culture, public health or the environment in IIAs. This could include, for example, incorporating substantive provisions into a treaty, stipulating that the host state shall not be prohibited from adopting or enforcing domestic measures falling within the specific areas (such as public welfare, essential security, culture, public health or the environment). According to Giannakopoulos:

The first way in which the right to regulate operates as an immunity in international investment law is through a series of exceptions to the substantive obligations that the contracting parties have assumed under IIAs. Such exceptions cover a variety of issues, ranging from the state's essential security interests, to matters pertaining to culture, public order, public health, or the environment.⁶⁷⁴

The practical effect of adding these clauses or exceptions in investment treaties is therefore to provide the host state with the power or freedom to regulate certain areas, and the state would not be committing an internationally wrongful act in adopting them.⁶⁷⁵ In other words, the primary function of exceptions is to justify the state's actions during investment arbitration. In the absence of any specific guidance of non-precluded measures, the decision whether or not the measures are legal is a discretion of arbitral tribunals. It is thus for this reason that often-times, investment arbitral tribunals have noticeably ruled differently in this regard, since they have wide discretionary powers induced by ambiguous protections enshrined in investment treaties.⁶⁷⁶

Under the prevailing view, it can be concluded that the right to regulate in form of non-precluded measures or exception and reservation clauses such as culture, public health or the environment in IIAs can counter the risk of host states being exposed to investment arbitration for adopting public policy measures. That is, if an investment

⁶⁷³ Non-precluded measures clauses 'excuse liability for harms caused by a measure, where the measure taken by the host state government was "necessary" and no other measure was available to protect essential security interests'. Bazrafkan A & Herwig A 'Risk, responsibility, and fairness in international investment law' in Ambrus M, Rayfuse R & Werner W (eds) *Risk and the regulation of uncertainty in international law* (2017) 241.

⁶⁷⁴ Giannakopoulos (2017) 19.

⁶⁷⁵ *Continental Casualty Company v The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 para 164 (hereinafter *Continental Casualty Company v Argentina*)

. See also Burke-White WW & Von Staden A 'Investment protection in extraordinary times: The interpretation and application of non-precluded measures provisions in bilateral investment treaties' (2008) 48 *Virginia Journal of International Law* 386-89 (Burke-White & Von Staden (2008)).

⁶⁷⁶ UNCTAD 'World investment report: Reforming International investment governance' (2015) U.N. Doc. UNCTAD/WIR/2015 145.

treaty contains explicit non-precluded measures (or exceptions clauses), the arbitral tribunals have no choice but to dismiss the investor's claim since the state was justified in adopting such measures. This effectively limits the arbitral tribunal's interpretative discretion and ensures consistency in treaty interpretation.⁶⁷⁷

4.3.3 Right to regulate and necessity defence

The manifestation of the right to regulate in IIAs treaties could arguably reinforce the principle of necessity defence in international investment law.⁶⁷⁸ The defence of necessity or *jus necessitatis* is an international law principle which 'in its early enunciation, is an excuse in law from the performance of or for the breach of international obligations, be it under customary law or treaty'.⁶⁷⁹ *Jus necessitatis* is invoked 'when the existence or necessary development of a state stands in unavoidable conflict with such state's treaty obligations, the latter must give way, for self-preservation and development in accordance with the growth and necessary requirements of the nation are the primary duties of every state'.⁶⁸⁰ Necessity defence entitles a state to adopt certain measures for the maintenance of public order or the protection of security interests.⁶⁸¹

The necessity defence principle is well defined in CIL,⁶⁸² specifically the International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally

⁶⁷⁷ Titi C 'International investment law and the European Union: Towards a new generation of international investment agreements' (2015) 26 *European Journal of International Law* 639. See also European Commission 'Investment protection and investor-to-state dispute settlement in EU Agreements' (2013) available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf (accessed 5 January 2018) 6.

⁶⁷⁸ See *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 paras 375-78; *Enron v Argentina*, Award, paras 333, 339; *CMS v Argentina*, Award, paras 315-31; *LG&E v Argentina*, Liability, para 206; *El Paso v Argentina*, Award, para 613; *CMS v Argentina*, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, paras 129-36; *Sempra v Argentina*, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, paras 195-208; and *Continental Casualty Company v Argentina*, Award, paras 164-67.

⁶⁷⁹ Poblador AJ 'The defense of necessity in international law' (1982) 57 *Philippine Law Journal* 332. See also Hill SF 'The "necessity defense" and the emerging arbitral conflict in its application to the U.S.-Argentina Bilateral Investment Treaty' (2007) 13 *Law and Business Review of the Americas* 547.

⁶⁸⁰ Fenwick CG *International law* 2 ed (1934) 356 quoting Oppenheim *International Law* (1912) s 53.

⁶⁸¹ However, necessity defence cannot be invoked 'where the rule from which derogation is sought precludes its invocation, where the state invoking necessity has contributed to peril's onset, or where the act to safeguard the essential interest is contrary to a peremptory norm' Heathcote S 'State of necessity' (2017) available at <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0025.xml#firstMatch> (accessed 14 March 2018).

⁶⁸² International Court of Justice 'Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia): Judgment of 25 September 1997' ICJ Reports (1997) 7-84.

Wrongful Acts.⁶⁸³ Article 25 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts prescribes:

Necessity may not be invoked by a state as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that state unless the act:

- (a) is the only way for the state to safeguard an essential interest against a grave and imminent peril; and
- (b) does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole.⁶⁸⁴

In other words, a state may invoke necessity defence if the sole means by which a state can safeguard an essential interest from grave and imminent peril is by violating international law. Such defence should, however, not seriously impair the essential interests of the state(s) under existing treaty obligations. Noteworthy is that, although Article 25 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts does not mention harm to private entities, the ILC has recognised through commentary the Article's application to private companies or foreign investors.⁶⁸⁵ Some investment treaties have included provisions that allude to, or at least provide for, the necessity doctrine.⁶⁸⁶ The necessity defence clauses in international investment law has been litigated extensively in a series of cases filed against Argentina following the country's financial crisis,⁶⁸⁷ leading to a variety of interpretive approaches and to diverging outcomes.⁶⁸⁸ For instance, the tribunals in

⁶⁸³ International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 (hereinafter ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts).

⁶⁸⁴ Paragraph 1 of Art. 25 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts.

⁶⁸⁵ See Crawford J *The International Law Commission's Articles on state responsibility: Introduction, text, and commentaries* (2002) 180-6.

⁶⁸⁶ For example, Art. 1131 of the North American Free Trade Agreement, 1994 (hereinafter NAFTA); and Art. XI of the Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the United States and Argentina, 1991.

⁶⁸⁷ See, for example, *Enron Corp. & Ponderosa Assets, L.P. v. Republic of Argentina*, ICSID Case No. ARB/01/3, Decision on Application for Annulment (July 30, 2010); *Sempra Energy International v. Republic of Argentina*, ICSID Case No. ARB/02/16, Decision on Application for Annulment, (June 29, 2010); *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (Sept. 25, 2007); *CMS Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, (May 12, 2005).

⁶⁸⁸ See, generally, Kurtz J 'Adjudging the exceptional at international investment law: Security, public order and financial crisis' (2010) 59 *International and Comparative Law Quarterly* 325; Binder C 'Changed circumstances in investment law: Interfaces between the law of treaties and the law of state responsibility with a special focus on the Argentine crisis' in Binder C, Kriebaum U, Reinisch A & Wittich S (eds) *International investment law for the 21st century: Essays in honour of Christoph Schreuer* (2009)

CMS Gas Transmission Company v Argentina,⁶⁸⁹ *LG & E v Argentina*,⁶⁹⁰ *Enron Corporation and Ponderosa Assets, L.P. v Argentina*,⁶⁹¹ *Sempra Energy International v Argentina*⁶⁹² have concluded that the requirements for justifying measures taken for essential security interests as espoused in Article XI of the Argentina-US BIT⁶⁹³ are similar to elements for invoking the plea for necessity in CIL.⁶⁹⁴

Another interesting analysis on the necessity defence in relation to investment is evident in the case of *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*.⁶⁹⁵ In this the government of Tanzania expropriated the water project operated by the Biwater Gauff (the investor). Consequently, the investor initiated these ICSID proceedings alleging that the government of Tanzania has violated its obligations under the UK-Tanzania BIT⁶⁹⁶ to: not unlawfully expropriate property; provide fair and equitable treatment; not impair the investment through unreasonable or discriminatory measures; grant full protection and security; and guarantee the unrestricted transfer of funds.⁶⁹⁷ In defence, the government of Tanzania argued that its actions in taking over the investment could not support any liability under the UK-Tanzania BIT because they were justified under the contract's provision allowing the government of Tanzania to 'take any measures...necessary...to ensure continuity of water supply and sewerage services' when facilitating change to a new system of management.⁶⁹⁸ The tribunal dismissed this defence. It held that that there was 'no necessity or impending public purpose to justify the government's intervention in the way that took place'.⁶⁹⁹

608. See also Alvarez JE & Brink T 'Revisiting the necessity defense: *Continental Casualty v. Argentina*' in Sauvant KP (ed) in *Yearbook on international investment law & policy* (2012) 319.

⁶⁸⁹ *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005.

⁶⁹⁰ *LG & E v Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006.

⁶⁹¹ *Enron Corporation and Ponderosa Assets, L.P. v Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007

⁶⁹² *Sempra Energy International v Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007.

⁶⁹³ Article XI of the Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the US and Argentina, 1991 provides that 'this treaty shall not preclude the application by either party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests'.

⁶⁹⁴ See *CMS Gas Transmission Company v Argentina* para 373; *Enron Corporation and Ponderosa Assets, L.P. v Argentina* para 333; *Sempra Energy International v Argentina* paras 375-8; and *LG & E v Argentina* paras 245-58.

⁶⁹⁵ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* ICSID Case No. ARB/05/22 (Award, 24 July 2008) (hereinafter *Biwater Gauff Ltd. v Tanzania*).

⁶⁹⁶ UK-Tanzania BIT, 1994.

⁶⁹⁷ Articles 3, 4, 5 and 6 of the UK-Tanzania BIT.

⁶⁹⁸ *Biwater Gauff Ltd. v Tanzania* para 428.

⁶⁹⁹ *Biwater Gauff Ltd. v Tanzania* para 515.

In practical sense, the necessity defence clauses in investment treaties function in at least two capacities: first, to provide a basis for balancing the rights of investors with a state actor's interests; and secondly, to distinguish between legitimate regulatory choices and illegitimate excuses for protectionism.⁷⁰⁰ In addition, necessity can be used in investment contexts as a means of determining whether the primary norm has been breached where that norm permits a degree of regulatory freedom for host states. For example, in relation to regulating emerging threats to human health or the environment, rather than as a means of determining whether a measure that is *prima facie* in breach of the host state's obligations is nevertheless permissible in the circumstances.⁷⁰¹ In this respect, necessity functions as a means for tribunals to determine whether measures taken in pursuit of particular public policy objectives impact investment no more than is required to achieve the particular objective.⁷⁰² In other words, the right to regulate provisions in investment treaties could be used as necessity defence mechanisms and justification for state's adoption of regulatory measures in violation of investment treaty obligations.

4.3.4 The right to regulate and certainty in treaty interpretation

The insertion of the right to regulate in IIAs has the potential of reducing the risk of varying, broad and uncertain treaty interpretations by arbitral tribunals. Presently, there is no centralised authority or body in international law that governs investment disputes and, as a consequence, arbitral tribunals have the discretion to consider or ignore public interest goals, free from formal oversight.⁷⁰³ To make it worse, there is no doctrine of judicial precedent in international investment law – that is, arbitral decisions are not binding on future cases.⁷⁰⁴ This leads to legal ambiguity and inconsistencies between case outcomes even within the same fora.⁷⁰⁵ Further, empirical evidence suggests that arbitral tribunals depend more on their earlier decisions than on the language of the particular treaty at hand, further obfuscating the

⁷⁰⁰ Galvez CC “Necessity,” investor rights, and state sovereignty for NAFTA investment arbitration’ (2013) 46 *Cornell International Law Journal* 147.

⁷⁰¹ Mitchell AD & Henckels C ‘Variations on a theme: Comparing the concept of “necessity” in international investment law and WTO law’ (2013) 14 *Chicago Journal of International Law* 104 (hereinafter Mitchell & Henckels (2013)).

⁷⁰² Mitchell & Henckels (2013) 104.

⁷⁰³ Giest A ‘Interpreting public interest provisions in international investment treaties’ (2017) 18 *Chicago Journal of International Law* 328 (hereinafter Giest (2017)).

⁷⁰⁴ Quite often panels refer to earlier arbitral decisions, creating something of persuasive precedent.

⁷⁰⁵ Giest (2017) 328.

legal standards.⁷⁰⁶ Evidence further suggests that arbitral tribunals still produce 'inconsistent interpretations of the same standards of investment protection and differing conclusions as to state liability in relation to cases with identical or similar fact situations'.⁷⁰⁷ Giest maintains that 'the lack of clarity and seemingly desultory decisions by tribunals demonstrate the need for a more coherent line of persuasive precedent and guidance'.⁷⁰⁸

If the right to regulate is expressly embedded in IIAs as a legally binding and enforceable right, tribunals, states and investors are expected to respect it. By and large, traditional references to the right to regulate in investment treaties are limited to general statements – commonly embedded directly or indirectly in the preambles and general exception provisions. For example, the preamble of the Australia-China Free Trade Agreement⁷⁰⁹ affirms the parties' commitment to uphold the 'rights of the governments to regulate in order to meet national policy objectives, and to preserve their flexibility to safeguard public welfare'. In similar fashion, the preamble of the NAFTA refers to the parties' decision to 'preserve their flexibility to safeguard the public welfare'; the preamble of the Belgium-Luxembourg Economic Union-Korea BIT⁷¹⁰ focuses specifically on the parties' right to determine their own policies with respect to the protection of labour and the environment. The preamble of the EU-Canada Comprehensive Economic and Trade Agreement (CETA)⁷¹¹ contains multiple references to the right to regulate: that CETA's provisions are designed to preserve the right to regulate; that the Parties have the right to regulate in matters of cultural policy; and that investment protection under CETA is not meant to undermine the right to regulate in the public interest.⁷¹²

The incorporation of such language represents the states' intention to safeguard their regulatory autonomy, and that the investment policy objectives must be achieved in a manner consistent with the public policy objectives.⁷¹³ Evaluating the implications for

⁷⁰⁶ Schill SW 'Enhancing international investment law's legitimacy: Conceptual and methodological foundations of a new public law approach' (2011) 52 *Virginia Journal of International Law* 82.

⁷⁰⁷ Henckels C *Proportionality and deference in investor-state arbitration: Balancing investment protection and regulatory autonomy* (2015) 3.

⁷⁰⁸ Giest (2017) 346.

⁷⁰⁹ Free Trade Agreement between the government of Australia and the government of the People's Republic of China, 2015.

⁷¹⁰ Belgium-Luxembourg Economic Union-Korea BIT, 2006.

⁷¹¹ EU-Canada Comprehensive Economic and Trade Agreement, 2016 (hereinafter CETA)

⁷¹² Preamble of the CETA.

⁷¹³ Giannakopoulos (2017) 12.

the right to regulate under CETA, the Swedish National Board of Trade contended that 'in the event of a dispute between the state and investors, the arbitration tribunal must consider the underlying principles found in the preamble to the agreement and the other two articles relating to the "right to regulate"'.⁷¹⁴ The Board further asserted that 'the fact that this is established in the agreement preamble means that the subsequent articles on investment protection shall be interpreted in light thereof'.⁷¹⁵

In addition, the right to regulate has been included in IIAs' through the general exception provisions. Lester and Mercurio note that 'general exception clauses are designed to shield measures taken in good faith which are "necessary," "relating to," and "designed and applied for" the protection of certain policy objectives and are not applied in an arbitrary or unjustifiably discriminatory manner.'⁷¹⁶ In similar vein, Newcombe and Paradell opine that 'these exceptions are used to exclude particular sectors or subject matters from IIAs or to permit measures necessary to meet specific objectives, including protecting essential interests, public order, human health and the environment.'⁷¹⁷ Most IIAs contain exception⁷¹⁸ and reservation clauses to the investment treaty obligations including, *inter alia*, national treatment and most-favoured-nation treatment. The provisions may exclude from the treaty obligations certain sectors with particular strategic, political, social or economic significance to the state such as national security and cultural practices. For example, most BITs signed by the US⁷¹⁹ and India⁷²⁰ contain essential security interest exceptions, while Article 2106 and Annex 2106 of the NAFTA include an exception for any measure adopted pursuant to cultural practices.⁷²¹ Other IIAs also make reservations to allow for specific

⁷¹⁴ Swedish National Board of Board of Trade "The Right to Regulate" in the Trade Agreement between the EU and Canada – and its implications for the Agreement with the USA' (2015) available at <https://www.kommers.se/Documents/dokumentarkiv/publikationer/2015/Publ-The-right-to-regulate.pdf> (accessed 05 January 2018) 6 (hereinafter Swedish National Board of Board of Trade (2015)). The two arts. in the Agreement that explicitly mention 'the right to regulate' concerns environmental and labour legislation.

⁷¹⁵ Swedish National Board of Board of Trade (2015) 7.

⁷¹⁶ Lester & Mercurio (2017) 8.

⁷¹⁷ Newcombe A & Paradell L *Law and practice of international treaties standards of treatment* (2009) 481.

⁷¹⁸ See Newcombe A 'General exceptions in international investment agreements' Draft Discussion Paper Prepared for the British Institute of International and Comparative Law Eighth Annual World Trade Organisation Conference 13th and 14th May 2008, London available at https://www.biicl.org/files/3866_andrew_newcombe.pdf (accessed 21 October 2017).

⁷¹⁹ See generally Vandeveld KJ *United States investment treaties policy and practice* (1992) 222-7.

⁷²⁰ See, for example, Art. 12 (2) of the India-Sweden BIT, 2000; and Art. 1 (1) of the India-UK BIT, 1994.

⁷²¹ Article 2107 of the NAFTA states:

'Cultural industries mean persons engaged in any of the following activities:

social policies such as development considerations or the protection of disadvantaged groups.

As a general rule, provisions of the IIAs including exception and reservation clauses are interpreted in line with the object and purpose of the treaty. The tribunal in *Enron Corporation and Ponderosa Assets, L.P. v Argentina*, stated, with reference to the essential security interests contained in Article XI of the Argentina-US BIT:

The tribunal must first note that the object and purpose of the Treaty is, as a general proposition to apply in situations of economic difficulty and hardship that guarantee the protection of the international guaranteed rights of its beneficiaries. To this extent, any interpretation resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory.⁷²²

In other words, the exception clauses of IIAs ought to be interpreted narrowly and in accordance with the object and purpose of IIAs – to promote and protect investment.⁷²³ An interpretation which deviates from such object and purpose is not permissible. The interpretation of the preambles and exception provisions in accordance with the object and purpose of the treaty is compatible with the interpretive guidance, most importantly Article 31 of the Vienna Convention on the Law of Treaties (VCLT).⁷²⁴

Article 31 (1) of the VCLT stipulates that 'a treaty shall be interpreted in good faith in accordance to the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Giannakopoulos insists that 'the object and purpose of a treaty is often used to pinpoint the ordinary meaning that should be given to the terms of the treaty in instances of textual ambiguity or normative

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- (a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine-readable form but not including the sole activity of printing or typesetting any of the foregoing;
 - (b) the production, distribution, sale or exhibition of film or video recordings;
 - (c) the production, distribution, sale or exhibition of audio or video music recordings;
 - (d) the publication, distribution or sale of music in print or machine-readable form; or
 - (e) radiocommunications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services.'

This provision is not retained in the Agreement between the United States of America, the United Mexican States and Canada, 2018.

⁷²² *Enron Corporation and Ponderosa Assets, L.P. v Argentina* para 331.

⁷²³ *Daimler Financial Services AG v Argentina Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012 para 161.

⁷²⁴ Vienna Convention on the Law of Treaties, (1969) 8 ILM 679 (hereinafter VCLT).

disagreement'.⁷²⁵ Article 31 (2) of the VCLT further provides that the context of a treaty includes the text, preamble,⁷²⁶ annexes, any related agreements made between all parties in connection with the conclusion of the treaty, and any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as a related instrument. Thus 'the meaning must merge in the context of the treaty as a whole (including the text, its preamble and annexes, and any agreement or instrument related to the treaty and drawn up in connection with its conclusion) and in the light of its object and purpose'.⁷²⁷

However, in practice, the mere appearance of the right to regulate in the preamble or exception clauses of the IIAs is too weak to cement the place for the regulatory autonomy in international investment legal framework. More precisely, statements in IIAs' preamble are quite clearly linked to political decisions or aspirations by state parties and, as such, may not be immediately relevant under basic rules of treaty interpretation and application espoused in the VCLT.⁷²⁸ Under conventional wisdom, the existing IIAs' were signed with the primary object and purpose to promote and protect investment. As such, tribunals interpreted the text of the IIAs in line with such object and purpose. IIAs were never meant to promote the host states' development objectives. Hence, interpreting the right to regulate within this object and purpose of the traditional IIAs is a fallacy.

Equally important, treaty preambles do not constitute substantive rights or obligations that are legally binding and enforceable.⁷²⁹ Instead, preambles merely offer principled interpretive guidance of substantive rights to tribunals.⁷³⁰ In light of this argument, one would undoubtedly acknowledge that the effect in practice of the recognition of the right to regulate in treaty preambles is limited. Such weak manifestations of the right to regulate will cause investors and tribunals to dismiss any legitimate regulatory

⁷²⁵ Giannakopoulos (2017) 14.

⁷²⁶ In practical, however, arbitral tribunals do not depend on the preamble to influence interpretation of the treaty's text. Beharry CL & Kuritzky ME 'Going green: Managing the environment through international investment arbitration' (2015) 30 *American University International Law Review* 391.

⁷²⁷ Crawford J *Brownlie's principles of public international law* 8 ed (2012) 381.

⁷²⁸ The VCLT defines a treaty, how treaties are made, amended, interpreted, how they operate and are terminated. It however does not intend to create any specific substantive rights or obligations for parties since this is left to the specific treaty.

⁷²⁹ Giannakopoulos (2017) 12.

⁷³⁰ Coppotelli C 'Investor-state adjudication mechanism negotiations in the TTIP: An unpopular endeavour into the potential politicisation of dispute settlement' (2016) 39 *Fordham International Law Journal* 1364. See also *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, ICJ Reports 2009 paras 66-71.

measures taken by states in the context of safeguarding public interests. Therefore, the right to regulate should be integrated in the substantive or hard law provisions of the IIAs for it to be legally binding and enforceable.⁷³¹ This would certainly go a long way in reinforcing the position of the right to regulate in the legal framework for international investment.⁷³²

Weak reference to public policy issues in IIAs could be used to curtail the host state's authority to adopt, enforce or maintain measures in line with its national development goals. Gismondi argues that the US-Peru Trade Promotion Agreement Implementation Act (TPAIA)⁷³³ 'is limited in its explicit incorporation of environmental standards. This presents significant obstacles for the state in enforcing environmental policies without breaching investment protections'.⁷³⁴ In *Renco Group Inc. v Peru*,⁷³⁵ a foreign investor claimed that the measures adopted by the Republic of Peru in the midst of environmental crisis violated the investment standards under the TPAIA. The TPAIA contains a few references to environmental issues. For instance, the preamble of the TPAIA states that the parties 'resolve to implement this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their co-operation in environmental matters'. Further, in Article 10 (11), the TPAIA provides that 'nothing in this chapter shall be construed to prevent a party from adopting, maintaining, or enforcing any measure otherwise consistent with this chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns'. The above-stated provisions permit host states to adopt, maintain and enforce measures in relation environment so long they are compatible with the investment protection standards provided under the TPAIA. The tribunal in this case dismissed

⁷³¹ See, for example, Article 8 (9) of CETA, which states that 'for the purpose of this chapter, the parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity' and 'For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this section'.

⁷³² See European Commission 'Investment in TTIP and beyond – The path for reform' (2015) available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (accessed 05 January 2018) 6.

⁷³³ US-Peru Trade Promotion Agreement Implementation Act, 2007.

⁷³⁴ Gismondi G 'The Renco Group Inc. v. Republic of Peru: An assessment of the investor's contentions in the context of environmental degradation' (2017) 59 *Harvard International Law Journal* 21-32.

⁷³⁵ *Renco Group Inc. v The Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (15 July 2016) (hereinafter *Renco Group Inc. v Peru*).

the foreign investor's claim on jurisdictional grounds but stated that the investors could initiate new arbitration proceedings.⁷³⁶ This means there is a possibility that the investor's claim could be successful.

In light of the above, one would argue that though traditional IIAs reserve some regulatory freedom for host states, such regulatory freedom is limited to the object and purpose of investment promotion and protection and is not used in practice by tribunals.⁷³⁷ Therefore, the author submits that modern investment treaties should attempt to incorporate the right to regulate as a legally binding and enforceable right. This could be possible through including express provisions on the right to regulate. As an example, the Article 8 (9) (1) of the CETA affirms state parties 'right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity'. This provision is crucial to entrench the right to regulate as a legally binding and enforceable right in international investment law. By entrenching the right to regulate as a legally enforceable right, host states could be poised to exercise their right to regulate freely without fear of investment arbitration, and tribunals would be bound to consider the right in investment arbitration. In addition, foreign investors would not be able to challenge legitimate regulatory measures adopted by the host states in exercise of their right to regulate. Furthermore, IIAs must conceptualise the right to regulate as a form of a claim-right not merely a freedom of states to regulate.⁷³⁸ Titi distinguishes as a matter of principle between the general freedom of a state to regulate (described as the right to regulate *lato sensu*), and what may here be called (for convenience) the right to regulate *stricto sensu*, or the right to regulate proper.⁷³⁹ She contends that 'the right to regulate as a

⁷³⁶ *Renco Group Inc. v Peru* para 32.

⁷³⁷ See, for examples, *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award, March 15, 2016; *CC/Devas v. The Republic of India* (PCA Case No. 2013-09), Award on Jurisdiction and Merits, July 25, 2016; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1); *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2; *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5); and *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/2, Award, 30 November 2017.

⁷³⁸ See Titi C 'The European Commission's approach to the Transatlantic Trade and Investment Partnership (TTIP): Investment standards and international investment court system – An overview of the European Commission's Draft TTIP Text of 16 September 2015" (2015) 12 *Transnational Dispute Management* 12 (hereinafter Titi (2015)). See also *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006.

⁷³⁹ Titi (2015) 33.

nascent concept in the field of international investment law is a technical term, one that is much narrower in meaning and which should not be confused with the general regulatory capacity (of states)⁷⁴⁰ and ‘the legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate’.⁷⁴¹ Examining Titi’s work, Giannakopoulos is of the view that ‘she has conceptualised the right to regulate in its proper sense as primarily a claim coupled with an immunity. Specifically, she takes the view that the right’s purpose is to give a “boost” to the host state’s policy space by entitling it to a certain conduct (i.e. acting contrary to international commitments), which other parties are compelled to accept (i.e. no duty to compensate)’.⁷⁴²

4.3.5 The right to regulate, international arbitration and interpretative powers of arbitral tribunals.

Accommodating the right to regulate in IIAs could potentially go a long way in restoring the legitimacy of international arbitration, as arbitral tribunals would be compelled to take into account public interest issues in investment arbitration proceedings. International arbitration particularly *ad hoc* investor-state arbitration has been the common mechanism for resolving disputes in the realm of international investment law. In the last few years, international investment arbitration has been widely criticised and perceived as a threat to state regulatory freedom.⁷⁴³ This is particularly due to the growing suspicion that the international investment arbitration system imposes restrictions on state regulatory powers and that awards rendered by arbitral tribunals seem to favour investors to the detriment of host states.⁷⁴⁴ In particular, developing countries have been concerned about the negative effect of investor-state international arbitrations on issues such as the right to regulate and public interests.⁷⁴⁵ This has been attributed to both the substance and process associated with international investment arbitration. Critics of investor-state dispute settlement (ISDS) have argued that ISDS provisions have been employed by investors

⁷⁴⁰ Titi (2015) 33.

⁷⁴¹ Titi (2015) 33.

⁷⁴² Giannakopoulos (2017) 29.

⁷⁴³ For a discussion on this issue, see Titi (2014) ch vi.

⁷⁴⁴ Titi (2014) ch vi.

⁷⁴⁵ See Glinavos I ‘Public interests, private disputes: Investment arbitration and the public good’ (2016) 13 *Manchester Journal of International Economic Law* 50-62.

as an effective instrument for challenging public interest regulations adopted by host states and have caused developing (including African) nations to pay hefty fines for breaching investment treaties. In addition, ISDS is argued to have shifted power from states towards foreign investors, and from domestic courts to international arbitral tribunals.⁷⁴⁶ Menon and Issac argue that, ISDS mechanisms have faced much criticism because:

They are alleged to increase the power of large corporations at the expense of national sovereignty, and allow corporations to bypass national judicial systems. Further, “regulatory chill” is the fear that ISDS could discourage governments from adopting regulations for public welfare in health, environment, labour and other areas. Investor claims also have a strong impact on the public exchequer, as the average cost of defending an investor claim is estimated at US\$4.5 million. In addition to this, there is no guarantee of recovering costs even if the respondent state is successful. There is also a perception of conflict of interest on the part of arbitrators, many of whom are also practitioners. Lack of procedural transparency is another issue.⁷⁴⁷

Interestingly, even traditional capital-exporting countries like the US, the EU countries, Australia and Canada are sharing the same view. The US and Canada, for example, began to share the same viewpoint after its experience with Chapter 11 of the NAFTA.⁷⁴⁸

The ISDS controversy has spearheaded a growing movement worldwide to remove ISDS international arbitration provisions in investment and related agreements. Notably, states have responded by various means including denouncing the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (commonly known as the ICSID Convention),⁷⁴⁹ exiting or amending BITs or issuing interpretative notes to clarify the provisions of investment treaties.⁷⁵⁰

⁷⁴⁶ Van Harten (2016) 41.

⁷⁴⁷ Menon T & Issac G ‘Developing country opposition to an investment court: Could state-state dispute settlement be an alternative?’ (2018) Kluwer Arbitration Blog available at <http://arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/> (accessed 22 February 2018).

⁷⁴⁸ See Vandeveld K ‘A comparison of the 2004 and 1994 US Model BITs: Rebalancing investor and host country interests’ (2009) *Yearbook of International Investment Law and Policy* 283; and Gagné G & Morin JF ‘The evolving American policy on investment protection: Evidence from recent FTAs and the 2004 Model BIT’ (2006) 9 *Journal of International Economic Law* 363.

⁷⁴⁹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)

⁷⁵⁰ See for example, Annex 11-B(3)(b) of the KORUS Free Trade Agreement (FTA); Annex 10-B(3)(b) of the Australia-Chile FTA; Annex 11-B 4(b) of the Australia-US FTA; Annex B.10 and Article 3 of the

Bolivia, Ecuador and Venezuela, for example, withdrew from the ICSID Convention; Brazil has adopted a model of signing Cooperation and Facilitation Investment Agreements which does not include the ISDS system; India renegotiated its BITs and issued joint interpretative statements to interpret the power of tribunals;⁷⁵¹ South Africa and Indonesia have terminated several of their BITs in a quest for regulatory freedom. In the same vein, SADC member states have recently amended the SADC Finance and Investment Protocol (SADC FIP)⁷⁵² to, *inter alia*, remove investors' access to international arbitration.⁷⁵³

The complete removal of ISDS provisions in the quest for regulatory autonomy in IIAs do not necessarily register the kind of progress desired for the reinforcement of policy space in the international investment legal order. As Titi contends:

Arbitration does not exist in a legal vacuum: its viability and *modus operandi* are predicated on the investment protection agreements that both define it and place more or less specific interpretative tools at its disposal. Criticism, if criticism is due, must be directed not so much at arbitral interpretation but at the indeterminacy and inchoateness of some of the rules under interpretation. Where IIAs are unambiguous about protecting public interest or about not permitting second-guessing of governmental policies designed to protect them, arbitrators have – or should have – little choice but to give effect to a consideration of the public interest and respect a government's regulatory choices under the circumstances. But where no relevant provision has been made, guaranteeing states their policy space is not a foregone conclusion. Therefore, the dissatisfaction with investment arbitration, at the heart of the debate over the right to regulate, is probably only a symptom of a broader problem: the imperfection, or inadequacy, of the underlying rules that leave so much to be desired.⁷⁵⁴ (footnotes omitted).

Canada–China BIT; Annex 12 and Article 4 of the Economic Partnership Agreement between Australia and Japan; Annex B4(b) US Model BIT, 2012; and Annex B.13(1)(c) of the Canada Model BIT, 2004.

⁷⁵¹ See Singh K & Ilge B 'India overhauls its investment treaty regime' *Financial Times* 15 July 2016) available at <https://www.ft.com/content/53bd355c-8203-34af-9c27-7bf990a447dc> (accessed 08 January 2018).

⁷⁵² SADC Finance and Investment Protocol, 2006 (hereinafter SADC FIP).

⁷⁵³ See Arts. 25 and 26 Agreement Amending Annex 1 to the SADC FIP, 2016. Article 25 stipulates that 'state parties shall ensure that investors have the right of access to the courts, judicial and administrative tribunals, and other authorities competent under the laws of the host state for redress of their grievances in relation to any matter concerning their investment including but not limited to the right for judicial review of measures relating to expropriation or nationalisation and determination of compensation in the event of expropriation', and Art. 26 maintains that investment dispute between state parties (inter-state) will be resolved in the manner provided for under the SADC Protocol of the Tribunal.

⁷⁵⁴ Titi (2014) 35.

The above argument points to the fact that the international investment arbitration system does limit the regulatory freedom of host states. It is important to highlight that the freedom is rather limited in the substantive provisions of the IIAs which guide arbitral tribunals to interpret treaties in a manner that dishonour the state's regulatory autonomy. This derives from the reasonable suspicion that IIAs are charters of rights for foreign investors, with no concomitant responsibilities or liabilities for investors, no direct legal links to promoting development objectives, and no protection for the public welfare in the face of environmentally or socially destabilising foreign investment.⁷⁵⁵

Further, the removal of ISDS or termination of IIAs leaves investors without effective legal protection and could deter investors from choosing a country as an investment destination.⁷⁵⁶ Additionally, limiting ISDS to the host state's domestic courts worries international investors who often point out that domestic courts are biased, corrupt, unreliable and subject to the influence of the host governments.⁷⁵⁷ To address this, host states ought to uphold the rule of law, and maintain the impartiality and independence of domestic courts. Most importantly, states must invest 'in the development of greater local expertise and experience in investment arbitration' because this would provide them 'with a strong pool of skilled practitioners, who could ... litigate and arbitrate more cost effectively in investment disputes'.⁷⁵⁸

It is possible that limiting the arbitration power of tribunals could somewhat create certainty in international investment rules or standards. That is, if the interpretative powers of tribunals are limited through treaty provisions, the tribunals would interpret IIA provisions consistently. Additionally, incorporating substantive provisions in investment treaties creating legal rights and obligations could intensify the regulatory autonomy of host governments. The right to regulate must be adequately and effectively formulated to be justiciable. This provides a framework for arbitrators to

⁷⁵⁵ This view was solidified for many civil society groups with the release of the *Metalclad Corporation v United Mexican States*, Award, ICSID (Additional Facility), Case No. ARB (AF)/97/1, 30 August 2000, where the tribunal repeatedly refers to the investment promotion and protection purpose of NAFTA's Chapter 11 in an environmental case of significant importance.

⁷⁵⁶ Chidede T 'Amendments of Annex 1 to the SADC Finance and Investment Protocol: Are they in force yet?' (2017) available at <https://www.tralac.org/discussions/article/11875-amendments-of-annex-1-to-the-sadc-finance-and-investment-protocol-are-they-in-force-yet.html> (accessed 20 January 2018).

⁷⁵⁷ Van Harten (2016) 44. See also Kidane W 'Alternatives to investor-state dispute settlement: An African perspective' (2018) Global Economic Governance Discussion Paper 4.

⁷⁵⁸ Leon P 'Africa needs to resist any temptation to dump investor-state arbitration' (2017) <https://www.businesslive.co.za/bd/opinion/2017-10-06-africa-needs-to-resist-any-temptation-to-dump-investor-state-arbitration/> (accessed 15 January 2018) (hereinafter Leon (2017)).

base their decisions on the actual intent of the state parties, not the subjective opinions of the arbitrators.⁷⁵⁹ Essentially, though their decisions are not binding to future cases, arbitral tribunals could provide an uniform system of rules for investors and host states.⁷⁶⁰ Equally important, it is submitted that unless and until international investment law and arbitration allow public interest issues to thrive, the current system will always face public criticism. Embracing public interest issues in international investment law and practice will continue to place international arbitration in a unique position from which to interpret and implement investment commitments, ultimately contributing to balancing the investor protection and state regulatory freedom.

The conclusion from this analysis is that strengthening the right to regulate will reduce arbitrary interpretations by tribunals, will foster legal certainty, and result in a more balanced international investment legal system. The aim of this contribution is to assess the ways in which the right to regulate may be employed in the process of legal argumentation and to ascertain the practical legal implications that the invocation of that right to regulate has for the state's international responsibility.

4.4 SOCIAL IMPLICATIONS

4.4.1 The right to regulate and public interest or human rights issues

The right to regulate enhances public interest regulation in international investment law.⁷⁶¹ As it stands, traditional IIAs are solely designed to further purely economic interests of foreign investors and investments. Traditional IIAs have not embraced, as their core focus, public interest or human rights issues, since their principal focus has always been to promote and protect foreign investment.⁷⁶² Public interest issues were, for a long time, relegated in investment law arbitrations and discussions. Introducing public interest issues (public policy space) in investment treaties would therefore reinforce their regulation or consideration in international investment law and arbitration. Public interest issues in the international investment legal order allow host governments to adopt and enforce measures necessary to ensure that economic

⁷⁵⁹ Giest A 'Interpreting public interest provisions in international investment treaties' (2017) 18 *Chicago Journal of International Law* 351 (Giest (2017)).

⁷⁶⁰ Giest (2017) 329.

⁷⁶¹ See Adeleke (2018) ch 2.

⁷⁶² Carim X 'International investment agreements and Africa's structural transformation: A perspective from South Africa' in Singh K & Ilge B (eds) *Rethinking bilateral investment treaties: Critical issues and policy issues* (2016) 53 (hereinafter Carim (2016)).

activities carried out by investors within their territory do not negatively impact the human rights of its citizens.⁷⁶³ This view may be placed in the international human rights law and denotes the state's duty to protect individuals from the abuse of human rights by corporations.⁷⁶⁴ Many scholars suggest that the right to regulate is intended to exempt the government from liability when it adopts measures intended to benefit the public.⁷⁶⁵ The public interest for the most part relates to health and environment, among other human rights. IIAs rarely contain provisions relating to human rights or public interest issues which could be used as a right to regulate defence by host states. Conversely, international trade agreements have embraced public interest issues which are generally relied upon by governments in defence of their domestic regulatory measures. For example, Article XX of the WTO General Agreement on Tariffs and Trade⁷⁶⁶ provides:

Nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; (e) relating to the products of prison labour, subject only to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.⁷⁶⁷

These provisions permit member states to adopt trade restrictions and have been heavily criticised for undermining the primary object and purpose of the multilateral trading system – the free trade principle – embedded in WTO Agreements.⁷⁶⁸ The

⁷⁶³ Mann (2002) 10.

⁷⁶⁴ See discussion in part 3.3.

⁷⁶⁵ See Cosbey A 'NAFTA's Chapter 11 and the environment' (2003) Discussion Paper for the CEC's public Workshop on NAFTA's Chapter 11.

⁷⁶⁶ GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

⁷⁶⁷ For a discussion, see Shaposhnikova OS 'The Philip Morris Case and the Right to Regulate (Legislate)' (2016) available at <https://ilsquare.wordpress.com/2016/02/05/the-philip-morris-case-and-the-right-to-regulate-legislate/> (accessed 05 January 2018).

⁷⁶⁸ Doraev M 'The "memory effect" of economic sanctions against Russia: Opposing approaches to the legality of unilateral sanctions clash again' (2015) 37 *University of Pennsylvania Journal of International Economic Law* 378-9. See, for example, *Australia - Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging - Lapse of authority for the establishment of the Panel - Note by the Secretariat* WT/DS434/17, 30 June 2016; and *Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain*

conflict between public and private interest is not only a common phenomenon in international trade affairs but also in the international investment relations.

For a prolonged period, the clash between the interests of the public and those of investors has been a bone of contention in the international investment legal order. This debate has not been resolved yet. Evidence of such debate was apparent in *Dow AgroSciences v. Government of Canada*,⁷⁶⁹ where the Canadian government adopted fundamental regulatory measures to ban pesticides for environmental reasons, which was challenged by foreign investors as a violation of investor rights guaranteed under Chapter 11 of NAFTA. Similarly, public interest regulations were the cause of action in the prominent cases of *Philip Morris v Australia*⁷⁷⁰ and *Chemtura v Canada*.⁷⁷¹ In *Philip Morris v Australia*, the investor challenged Australia's domestic legislation, regulations, acts, policies and practices discouraging the use of tobacco products for health reasons, alleging that they amount to expropriation of its investments in breach of Article 6 of the Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments.⁷⁷² In *Chemtura v Canada*, the investor challenged Canada's environmental regulation claiming that it violated NAFTA's investment protection provisions.

The debate on public interest issues within the realm of investment regulatory framework is perhaps largely due to the absence of substantive provisions on public interest in most IIAs. If IIAs contain investor rights and state regulatory power, arbitral tribunals would be forced to weigh measures taken by a state in exercise of its regulatory power against the economic damage suffered by foreign investors because of those measures.⁷⁷³

Packaging Requirements Applicable to Tobacco Products and Packaging - Communication from the Chairperson of the Panel WT/DS467/22, 21 September 2017.

⁷⁶⁹ *Dow AgroSciences v Government of Canada*, NAFTA/UNCITRAL, Notice of Intent to Submit a claim to arbitration under Chapter Eleven of the North American Trade Agreement (25 August 2008).

⁷⁷⁰ *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.

⁷⁷¹ *Chemtura Corp. v Government of Canada*, NAFTA/UNCITRAL, Award, (Aug. 2, 2010).

⁷⁷² Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments, 1993.

⁷⁷³ Kingsbury B & Schill W *Public law concepts to balance investors' rights with state regulatory actions in the public interest: The concept of proportionality* (2010) 76.

Public interest regulation can either be obligatory or declaratory in nature – it does not create a legally enforceable right to regulate *per se*, but more importantly, heralds the state parties' intentions to the arbitral tribunals.⁷⁷⁴ For instance, Article 5 (1) of the Belgium-Luxembourg Economic Union-Mauritius BIT⁷⁷⁵ provides that state parties 'shall strive to ensure that its legislation provide for high levels of environmental protection and shall strive to continue to improve this legislation'. In similar fashion, Article 12 of Norway's Draft Model BIT⁷⁷⁶ states that 'nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns'. In general, while signalling respect for public interest regulation, such statements do not compel an arbitral tribunal to weigh the public interest against that of the investor's substantive rights under the treaty.⁷⁷⁷ Such provisions tend to be ineffective in reinforcing the right to regulate.⁷⁷⁸ That said, a domestic regulation that breaches the investor's rights can be ruled illegitimate by tribunals.⁷⁷⁹

To remedy such limitation, the right to regulate in public interest ought to be carefully crafted in IIAs. There are numerous ways in which this can be done. An example of such is found in Article VIII of the UK-Colombian BIT which states that 'nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure that it considers appropriate . . . provided such that measures are non-discriminatory and proportionate to the objectives sought'.⁷⁸⁰ In Article VIII, the consideration for public interest is definite because it does not include the phrase 'otherwise consistent with the Agreement'⁷⁸¹ which reduces virtually any right to regulate if it negatively impacts on foreign investment. Provisions like Article VIII of the UK-Colombian BIT could underpin the host states' public interest regulation in the

⁷⁷⁴ Titi (2014) 10-15.

⁷⁷⁵ Belgium-Luxembourg Economic Union-Mauritius BIT, 2005.

⁷⁷⁶ Norway's Draft Model BIT, 2007.

⁷⁷⁷ Giest (2017) 336.

⁷⁷⁸ See Mann H 'International investment agreements, business and human rights: Key issues and opportunities' (2008) available at https://www.iisd.org/pdf/2008/ia_business_human_rights.pdf (accessed 09 January 2018) 19, referring to Art. 43 of the European Free Trade Association- Singapore FTA, 2002.

⁷⁷⁹ Titi (2014) 112-3.

⁷⁸⁰ Titi (2014) 114.

⁷⁸¹ Giest (2017) 338.

international investment legal order. Another positive language regarding a right to regulate in public interest is found in Article 12 of the US Model BIT⁷⁸² which recognises the states' right to enact legislation 'where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources'. Commenting on this provision, Giest opines that 'while a more formal right to regulate appears, it is qualified by ambiguous language like "reasonable exercise." ... There was also increased specificity as to what "environment" means in the context of the treaty'.⁷⁸³

Expanding the public interest philosophy in international investment law by inserting the right to regulate has several positive implications. It enjoins tribunals to exercise judicial functions, like domestic courts, of adjudicating on public welfare issues rather than pure commercial issues. Additionally, the expansion of public interest notions in investment law 'promotes the use of proportionality analysis to balance investors' rights and host states' regulatory interests, and help to relate investment law concepts, such as the protection of legitimate expectations, to principles of public law'.⁷⁸⁴

4.4.2 The right to regulate and balancing states' and investors' interests

Traditional IIAs are deemed to be asymmetrical.⁷⁸⁵ Under traditional IIAs, host governments assume obligations, on the one hand, and foreign investors are entitled to corresponding rights, on the other hand.⁷⁸⁶ According to Carim:

IIAs are structured in a manner that primarily imposes legal obligations on governments to provide wide-ranging rights protection to investment by the countries that are party to the treaty. This pro-investor imbalance can constrain the ability of

⁷⁸² US Model BIT, 2012.

⁷⁸³ According to Art. 12 (4) of the US Model BIT:

'The primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through the:

- (a) prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
- (b) control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or
- (c) protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas.'

⁷⁸⁴ Schill SW 'The Public law challenge: Killing or rethinking international investment law?' (2012) Columbia FDI Perspectives 2.

⁷⁸⁵ See generally Singh K & Ilge B (eds) *Rethinking bilateral investment treaties: Critical issues and policy choices* (2016).

⁷⁸⁶ Gaukrodger D 'Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law' (2017) OECD Working Papers on International Investment No. 2017/03 1.

governments to regulate in the public interest. Under the dispute settlement provisions, only investors can initiate disputes. Governments have no recourse under IIAs to challenge errant behaviour by investors.⁷⁸⁷

The right to regulate is identified by a variety of scholars as a key component in addressing this imbalance – that is, a tool to balance the rights and obligations of both investors and the host state.⁷⁸⁸ Markert⁷⁸⁹ underscores that the insertion of the right to regulate in future investment agreements would make sense for three reasons:

First, the issue of balancing investors' and host states' interests is currently perceived as a serious problem in international investment law. A gradual development of arbitral jurisprudence balancing the interests might possibly come too late. States might decide to significantly weaken or depart entirely from the current regime of investment protection before arbitral jurisprudence can be fully developed. Second, the incorporation of regulatory interests in IIAs would merely take up a process that has already been set in motion. States have become acutely aware of the need to incorporate regulatory freedoms in IIAs and many of the more recent IIAs address the problem, at least to some extent ... Third, an incorporation of a right to regulate in IIAs will provide arbitral tribunals with better guidance on how to deal with regulatory measures of host states. It is not least the current legal uncertainty closely associated with the host states' regulation in the public interest that causes dissatisfaction with the status quo under IIAs and public international law.⁷⁹⁰

The right to regulate in IIAs signifies the balance between private and public interests.⁷⁹¹ The right to regulate or the measures adopted in public interest are expected to be reasonable and legal. That is, the measures should not violate other laws, for example, international investment law.⁷⁹² This, therefore, calls for a need to appropriately balance the investor protection obligations and the right of host states to regulate. As Adeleke opines, 'it is necessary to introduce safeguards to prevent states from elevating all forms of state regulation to public interest regulation and

⁷⁸⁷ Carim (2016) 53.

⁷⁸⁸ See generally Gaukrodger D 'The balance between investor protection and the right to regulate in investment treaties: A scoping paper' (2017) OECD Working Papers on International Investment No. 2017/02 2.

⁷⁸⁹ Markert L 'The crucial question of future investment treaties: Balancing investors' rights and regulatory interests of host states' in Bungenberg M, Griebel J & Hindelang S (eds) *International investment law and EU law* (2011) (hereinafter Markert (2011)).

⁷⁹⁰ Markert (2011) 159.

⁷⁹¹ Titi (2014) 75.

⁷⁹² Mouyal (2016) 15.

consequently, use it as a defence when investment obligation is violated by a state'.⁷⁹³ Many suggestions have been brought forward to balance the rights and obligations of investors and states in international investment treaty and arbitration practice. Kulick proposes the application of proportionality when balancing the interests of investors and the public.⁷⁹⁴ Giest summarises:

Arbitrator scrutiny should concern itself most with three prongs: "(1) suitability; (2) necessity; and (3) proportionality *stricto sensu*." Under the first prong, the state only need prove that the regulation "furthered the (legitimate) purpose as set by the government." Second, the necessity prong looks to whether there are alternative, less restrictive ways to achieve said objective. This is stricter than the first prong because it can be analysed *ex post* and find liability when a government was wrong about the course of action that it took. Third, proportionality *stricto sensu* evaluates how important the interest actually is and evaluates the means and ends⁷⁹⁵ (footnotes omitted).

Correspondingly, Kingsbury and Schill utter that:

While the conceptual approaches used by investment tribunals to deal with conflicts between investors' rights and other public interests often appear insufficient, arbitral tribunals could draw on public law concepts used in various other international and national courts and tribunals, notably by having recourse to proportionality analysis in order to balance rights and rights-limiting policy choices'.⁷⁹⁶ The principle of proportionality has been accommodated and widely applied by investor-state arbitral tribunals as an interpretation tool in resolving conflicts between competing rights and interests in international investment law.⁷⁹⁷

⁷⁹³ Adeleke (2017) 27.

⁷⁹⁴ See, for example, Kulick A *Global public interest and international investment law* (2012). See also Shaposhnikova OS 'The Philip Morris case and the right to regulate (Legislate)' (2016) available at <https://ilsquare.wordpress.com/2016/02/05/the-philip-morris-case-and-the-right-to-regulate-legislate/> (accessed 05 January 2018).

⁷⁹⁵ Giest (2017) 349-50, reasoning that 'this type of analysis raises serious questions about the level of scrutiny that should be applied by the arbitral tribunals. Considerations might include "the gravity of the infringement" by the state; legitimate expectations; "importance of the global public interest"; whether or not the public interest assertion is a guise; and "importance of the investor right." Under a balancing approach, the compensation should not be viewed as all or nothing; rather, compensation to the investor should be adjusted based on these factors. The first two prongs are useful threshold inquiries that a tribunal could engage in before considering the regulation further. The third prong asks several questions that would be helpful in a good-faith inquiry'.

⁷⁹⁶ Kingsbury B & Schill W *Public law concepts to balance investors' rights with state regulatory actions in the public interest: The concept of proportionality* (2010) 77 (hereinafter Kingsbury & Schill (2010)).

⁷⁹⁷ Kingsbury & Schill (2010) 78. See also See *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004 para 113; *Saluka Investments BV v 'e Czech*

Further, balancing the rights and obligations of both states and investors requires consideration of various actors and of the asymmetries in the existing systems. Actors are not limited to states and investors but also include local communities which are particularly involved in matters concerning food security, water, health and environmental issues, among other human rights. Without adequate protection or consideration of the rights of non-investors (states and civil society), it might be acknowledged that international investment law itself is unfair.

It is submitted that the survival of the international investment law largely depends on its ability to balance the clashing interests of investors and host states. The right to regulate is a remedy for this dilemma.⁷⁹⁸ That is, inserting the right to regulate in IIAs could conceivably bridge the gap or imbalance in international investment law. The right to regulate will enable investment policy and law makers as well as arbitral tribunals to strike the balance between rights and obligations of host states and investors.

4.4.3 The right to regulate and corporate social responsibility

The right to regulate in IIA can be a remarkable way to augment social responsibility of foreign investments under international investment law. The growing recognition of multinational companies' role in the advancement and protection of human rights, labour rights, and environmental protections has prompted the development of the corporate social responsibility (CSR) movement.⁷⁹⁹ CSR is a very broad concept and has been described in many definitions and practices by academics, commentators, businesses, civil society, governmental and non-governmental organisations.⁸⁰⁰ Overall, CSR primarily relates to the responsibility of businesses in delivering economic, social and environmental benefits for all stakeholders.⁸⁰¹

Republic, UNCITRAL, Partial Award, 17 March 2006, para 297; *Tecnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003 para 119.

⁷⁹⁸ See Carim (2016) 53.

⁷⁹⁹ De Jonge A *Transnational corporations and international law: Accountability in the global business environment* (2011) 1-2 (hereinafter De Jonge (2011)).

⁸⁰⁰ Moon J *Corporate social responsibility: A very short introduction* (2014) 4 (hereinafter Moon (2014)).

⁸⁰¹ Moon (2014) 5. See also Dubin L 'Corporate social responsibility clauses in investment treaties' (2018) (9) *IISD Online Journal on Investment Law and Policy from a Sustainable Development Perspective* 12, noting that CSR 'refers to practices and rules that companies, particularly multinational enterprises (MNEs), follow voluntarily to limit the negative social, environmental and other externalities caused by their activities'.

Over the past few decades, foreign investments have come under increasing scrutiny and pressure from non-governmental organisations (NGOs), civil society, among other stakeholders, questioning their responsibility and accountability for their economic activities.⁸⁰² The debate of the social responsibility of corporations can be traced back to the Industrial Revolution in 1800s, where there was a tension on the relationship between the business community and civil society.⁸⁰³ While the history of this debate cannot be extensively chronicled here, it is important to note that NGOs and the civil society from developing and least-developed countries were particularly concerned about the impact of foreign investments' economic activities on health, environment, employment and other social issues.⁸⁰⁴ The debate is ongoing. There is recent empirical evidence showing the activities of foreign investments negatively affecting the health, environment, employment and other social issues.⁸⁰⁵ *Alas*, this is happening in cases where foreign investors have generated large amounts of profits from their activities and repatriated them to their home countries, while only limited, and often no, development is being done to the surrounding communities.⁸⁰⁶ This tension has led to significant developments at international, regional and national levels aimed at addressing and/or regulating the social responsibilities of businesses.



⁸⁰² This was the primary concern discussed at the OECD Conference on the Role of International Investment in Development, Corporate Responsibilities and OECD Guidelines for Multinational Enterprises, held in Paris on 20-21 September 1999.

⁸⁰³ Carroll AB 'A history of corporate social responsibility: Concepts and practices' in Crane A (ed) *The oxford handbook of corporate social responsibility* (2008) 21. See also Jenkins R 'Globalisation, corporate social responsibility and poverty' (2005) 81 *International affairs* 526.

⁸⁰⁴ These issues were raised at the Conference on the Role of International Investment in Development, Corporate Responsibilities and the OECD Guidelines for Multinational Enterprises OECD, Paris, 20-21 September 1999.

⁸⁰⁵ See Business and Human Rights Centre website available at <https://www.business-humanrights.org/>.

⁸⁰⁶ For example, in the Chiadzwa district of Zimbabwe, diamond mining operations by foreign companies destructively affected the local communities while the profits were being repatriated abroad. See Chimonyo GR, Mungure S & Scott PD *The social, economic and environmental implications of diamond mining in Chiadzwa* (2014).

At the international level, these developments have taken place in form of soft law rules. Notably, the Global Reporting Initiative (GPI),⁸⁰⁷ the UN Global Compact,⁸⁰⁸ the UN Guiding Principles on Business and Human Rights.⁸⁰⁹ the International Labour Organisation (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,⁸¹⁰ the OECD Guidelines for Multinational Enterprises⁸¹¹ to mention but a few.⁸¹² These international initiatives have been profoundly criticised by NGOs and the civil society from the global south for their voluntary or non-binding (soft law) nature as well as their lack of effective enforcement mechanisms.⁸¹³ Meanwhile, some countries including Germany, the UK, the US and several Nordic countries have enacted hard CSR rules at national levels.⁸¹⁴ However, the effectiveness of domestic CSR rules on foreign investors is limited mainly because arbitral tribunals consider the provisions of IIAs when disputes between investors and host states arise. Investor-state arbitral tribunals often ignore the fact that states have

⁸⁰⁷ GPI is an international independent standards organisation that helps businesses, governments and other organizations understand and communicate their impacts on issues such as climate change, human rights and corruption. More information is available at <https://www.globalreporting.org/>.

⁸⁰⁸ The Global Compact is a UN initiative to encourage businesses worldwide to adopt sustainable and socially responsible policies, and to report on their implementation. More information is available at <https://www.unglobalcompact.org/>.

⁸⁰⁹ UN Guiding Principles for Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, 2011 is voluntary yet provides an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity. See also UN Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 7 April 2008, A/HRC/8/5.

⁸¹⁰ ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 17 ILM 422, 1978, revised in 2000, 2002, 2006 and 2017, is a as a voluntary and non-legally binding instrument, providing standards for employment, training, conditions of work and life, and industrial relations.

⁸¹¹ OECD Guidelines for Multilateral Enterprises, 1976 are voluntary guidelines for multinational enterprises covering a variety of enterprise activities, including general policies of operation, disclosure of information, competition, financing, taxation, employment, industrial relations, science and technology.

⁸¹² The UN drafted an array of codes to regulate the behaviour of transnational corporations between 1974 and 1990 but were never adopted. De Jonge (2011) 29. See also Bilchitz D & Deva S 'The human rights obligations of business: A critical framework for future' in Deva S & Bilchitz D (eds) *Human rights obligations of business: Beyond the corporate responsibility to respect* (2013) 5-10.

⁸¹³ See Zerk JA *Multinationals and corporate social responsibility: Limitations and opportunities in international law* (2006) 29-42.

⁸¹⁴ See, for example, Midttun A, Gjørlberg M, Kourula A, Sweet S & Vallentin S 'Public policies for corporate social responsibility in four Nordic countries: Harmony of goals and conflict of means' (2015) 54 *Business & Society* 464-500; and Federal Ministry of Labour and Social Affairs *CSR Made in Germany* (2012) available at http://download.diplo.de/New_Delhi/csr-made-in-germany.pdf (accessed 12 February 2018).

the sovereign right to protect society and the environment in their territories from harm by foreign investors.⁸¹⁵

The regulation of social responsibilities of corporations has proved to be controversial and difficult in the international investment area.⁸¹⁶ This is primarily because most of the existing IIAs contain investors' rights, and do not explicitly contain CSR provisions establishing substantive (social) obligations of investors.⁸¹⁷ Such status *quo* perpetuates an impression that international investment law established by IIAs is a regime of corporate rights without social responsibility or liability. Given that scenario, a host country's pursuance of CSR initiatives may violate states' substantive obligations under international investment law including the non-discrimination principle, FET standard and indirect expropriation of foreign investments.⁸¹⁸ Equally important, IIAs allows foreign investors to challenge such initiatives before international arbitral tribunals as a breach of international investment obligations, and host states cannot initiate claims against investors under IIAs. This paradigm highlights the tension between international investment law and social responsibility of foreign investments. To avoid this conflict, Zhu suggests:

A more balanced interpretation of international investment obligations should be struck in investment arbitration, by taking account of CSR policies in the assessment of non-discrimination, FET, and indirect expropriation. First, the tribunal should consider non-economic factors in the determination of whether two investors are 'in like circumstances' in the discrimination assessment, and should regard CSR policy as a rational policy that can justify a discriminatory treatment if there is a rational relationship between the differentiation in question and the CSR policy it pursues. Second, investment tribunals should take the dynamic and evolving nature of regulation on CSR issues into consideration, and should refrain from interpreting the stability requirement of the FET standard in an absolute way. Third, the tribunal should take account of the host state's sovereign right to regulate CSR in the assessment of

⁸¹⁵ Spears SA 'The quest for policy space in a new generation of international investment agreements' (2010) 13 *Journal of International Economic Law* 1038 (hereinafter Spears (2010)).

⁸¹⁶ Levashova Y 'The Role of Corporate Social Responsibility in International Investment Law: The Case of Tobacco' in Tench R, Sun W & Jones B (eds) *Communicating corporate social responsibility: Perspectives and practice (Critical Studies on Corporate Responsibility, Governance and Sustainability, Volume 6)* (2014) 131 (hereinafter Levashova (2014)).

⁸¹⁷ Spears (2010) 1045.

⁸¹⁸ Zhu Y 'Corporate social responsibility and international investment law: Tension and reconciliation' (2017) *NJCL* 92 (hereinafter Zhu (2017)).

whether the host state's regulation on CSR issues constitutes indirect expropriation that calls for a compensation paid by the host state to the foreign investor.⁸¹⁹

This is pertinent to the international investment legal framework's role in providing sufficient policy space for host governments to implement the public policies and to ensure that foreign companies adhere to the CSR standards.

This study therefore suggests that incorporating the right to regulate in IIAs is a considerable approach to ensure that the social responsibilities of foreign investors are legally applicable and justiciable within international investment law. This approach is an incentive to address the imbalance or tension between international investment law and the social regulation of foreign investors. Quite often, arbitral tribunals preclude foreign investors from being forced to accept legal responsibility and liability for the activities of their foreign investments. To avoid this, IIAs could include a requirement for foreign investors to respect human rights, environmental protection, labour standards, or health and safety standards existing under the domestic rules of the host states. By so doing, the state reserves its regulatory autonomy to ensure that foreign investors are behaving responsibly towards the society. Countries like Canada,⁸²⁰ Brazil,⁸²¹ and the EU,⁸²² for example, have incorporated provisions into their investment treaties expressing positive obligations for foreign investors to abide by norms that require corporations to behave in ways that account for the public and/or the environment. This sends a positive message to the civil society that international investment law is a system of corporate rights together with responsibility or liability.

Despite evidence of CSR provisions in modern investment treaties, there has not been a uniform and legally enforceable style of the incorporation of the social responsibilities of investors in IIAs. While no investment arbitration cases have interpreted CSR provisions in IIAs, Zhu has apparently observed that all CSR provisions reflected in IIAs 'have one thing in common: they balance competing interests by protecting the

⁸¹⁹ Zhu (2017) 119.

⁸²⁰ For example, Benin-Canada BIT, 2013; Canada-Mali BIT, 2014; and Burkina Faso-Canada BIT, 2015; and Canada-Senegal BIT, 2014.

⁸²¹ For example, Brazil-Angola Agreement on Cooperation and Facilitation of Investments, 2015; Brazil-Mozambique Agreement on Cooperation and Facilitation of Investments, 2015; Brazil-Malawi Agreement on Cooperation and Facilitation of Investments, 2015; and Brazil-Mexico Agreement on Cooperation and Facilitation of Investments, 2015.

⁸²² See the European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy (2010/2203(INI)) [2011] 2012/C 296 E/05 in which it calls for a corporate social responsibility clause to be inserted in every free trade agreement the EU signs.

right of states to regulate (through the exception clauses) social or environmental issues or by imposing obligations on states to regulate (through 'no lowering of standards' provision) such issues, but they do not impose direct obligations on foreign investors themselves to respect social responsibilities'.⁸²³ It is noteworthy that these insubstantial references to social and environmental issues in IIAs has consequently diminished the value of rights and has further weakened their enforcement against investor rights in contemporary investor-state dispute cases.

In light of the above argument, one would argue that a new binding and legally enforceable approach is needed, for example, the right of host state which have a hard law character to impose direct CSR obligations on foreign investors. There should be, for example, direct cause of action against either the investor or the host state for non-compliance, and the obligations of the host state to adopt public interest protections. In other words, there should be mandatory or strict requirements. It must be noted that investment law makers should ensure that these rights and obligations are binding on both investors and host states. Under such circumstances, arbitral tribunals would be compelled to consider obligations of investors and states in parallel with their rights.

4.5 CONCLUSION

This chapter has analysed the practical effects of incorporating the right to regulate in international investment law in three dimensions: economic, legal and social effects. From an economic stance, safeguarding the right to regulate in IIA could foster foreign investment-led sustainable development and allows host governments to leverage FDI benefits into their economies.⁸²⁴ Furthermore, the right to regulate in IIAs would grant the host government the freedom to pursue their development goals under the purview of international investment law.

The chapter further demonstrated that including the right to regulate in IIAs reinforces state sovereignty over its legal, economic, social and cultural issues within the international investment legal framework.⁸²⁵ It also liberates states from being held liable, by investors and investment arbitral tribunals, for adopting regulatory measures

⁸²³ Zhu (2017) 111.

⁸²⁴ See UNCTAD Investment Policy Framework for Sustainable Development, 2015 72; and UNCTAD (2002) 171.

⁸²⁵ Van Harten (2007) 131. See also Giannakopoulos (2017) 11.

in certain areas.⁸²⁶ The right to regulate in IIAs provides a framework for arbitrators to base their decisions on the actual intent of the state parties, not the subjective opinions of the arbitrators.⁸²⁷ The right to regulate reinforces the international law principles of state immunity and necessity defence within the realm of international investment law. Further, the right to regulate, entrenched as hard law, would reduce the risk of varying, broad and uncertain treaty interpretations by arbitral tribunals. It would also restore the legitimacy of international arbitration and limit interpretative powers of arbitral tribunals.

From a viewpoint of social effects, the chapter demonstrated that the right to regulate in IIAs would expand public interest regulation in international investment law. It would compel arbitral tribunals to consider public welfare issues in investment arbitration. The right to regulate also has the potential to bring about the much-needed balance between public and private interests in international investment law. Further, the right to regulate would boost CSR in international investment law.

It must also be noted that the economic, legal and social consequences enumerated above are not the only ones; there could be more. The following chapter will trace the evidence of the right to regulate in the international investment legal framework of Africa.



⁸²⁶ *Continental Casualty Company v Argentina* para 164. See also Burke-White & Von Staden (2008) 386-9.

⁸²⁷ Leon (2017).

THE RIGHT TO REGULATE IN THE INTERNATIONAL INVESTMENT LAW REGIME OF AFRICA

5.1 INTRODUCTION

The international investment law regime of Africa is shaped by a complex, fragmented and heterogeneous network of national,⁸²⁹ bilateral, regional and international legal instruments.⁸³⁰ In particular, the regime comprises several international investment agreements (IIAs) – signed at bilateral, regional and plurilateral levels – and free trade agreements (FTAs) with investment provisions. Double Taxation Treaties (DTTs)⁸³¹ are also an integral part of Africa's international investment law.⁸³² Fundamentally, DTTs have been used by African countries as an essential tool to counter the perception of risk and promote more inward FDI.⁸³³ Customary international investment law (CIL) norms on investment regulation also forms part of Africa's international investment legal framework and, in most instances, establish absolute standards that are binding to states without being party to any agreement.⁸³⁴ The legal instruments moulding the legal investment framework of Africa contain investment promotion and protection standards – mostly geared towards governing and attracting FDI – but the nature, scope and interpretation of such standards may differ.

⁸²⁸ The entirety of this chapter was published as journal article. See Chidede T 'The right to regulate in Africa's international investment law regime' (2019) 20 *Oregon Review of International Law* 437-468.

⁸²⁹ National investment laws interact with international investment law particularly in resolution of investment disputes. United Nations Conference on Trade and Development (UNCTAD) 'Reforming investment dispute settlement: A stocktaking' (2019) UNCTAD International Investment Agreements Issues Note 1 10 (hereinafter UNCTAD (2019)).

⁸³⁰ Denters E & Gazzini T 'The role of African regional organisations in the promotion and protection of foreign investment' (2017) 18 *The Journal of World Investment & Trade* 449 (hereinafter Denters & Gazzini (2017)).

⁸³¹ DTTs are international agreements which make the taxation of certain income by the signatory nations. They are usually signed to prevent double taxation. DTTs normally cover a wide range of issues including: income of a permanent establishment dividends, interest and royalties; remuneration; pension; income from immovable property; and capital gains. See Hearson M 'Tax treaties in sub-Saharan Africa: A critical review' (2015) available at http://eprints.lse.ac.uk/67903/1/Hearson_Tax_treaties_in_sub-Saharan_Africa.pdf (accessed 16 February 2018).

⁸³² Africa's international investment regime is also regulated by other laws related to, *inter alia*, cross-border trade, immigration, intellectual property and competition.

⁸³³ For example, South Africa, Algeria, Botswana, Gabon, Ghana, Lesotho, Malawi, Seychelles, Tanzania, Zambia and Zimbabwe.

⁸³⁴ Caplan LM & Sharpe JK 'United States' in C Brown (ed) *Commentaries on selected model investment treaties* (2013) 776. In South Africa, for example, CIL is law in South Africa, unless it is inconsistent with the Constitution or legislation. Section 232 of the Constitution of the Republic of South Africa, 1996.

African countries have concluded investment treaties among themselves (intra-Africa IIAs) and with countries outside the continent (extra-Africa IIAs) at bilateral, regional and global levels.⁸³⁵ Today, nearly every African country has concluded at least one investment treaty or FTA with investment provisions.⁸³⁶ Most IIAs (particularly Bilateral Investment Treaties (BITs)) signed by African countries immediately post-independence – in the 1960s – were signed with advanced western economies since they were the main sources of foreign direct investment (FDI).⁸³⁷ Such IIAs became popularly known as North-South (or traditional) BITs and were modelled on the early European Union (EU) and the United States (US) Model BITs.⁸³⁸ Even today, African countries are increasingly concluding IIAs⁸³⁹ with developing economies due to growing FDI flows from developing countries like South Africa, Nigeria, China, India, Brazil and Indonesia, among others – the so-called South-South BITs.⁸⁴⁰

Historically, investment treaties have been signed for various reasons.⁸⁴¹ The most common rationale underlying the signing of these investment treaties was to increase FDI flows into their countries from advanced industrialised countries.⁸⁴² FDI has been and is still considered an important impetus to enhancing economic growth and development, injecting capital into local industries, creating jobs and alleviating poverty.⁸⁴³ However, African countries executed thousands of BITs with developed

⁸³⁵ United Nations Economic Commission for Africa (UNECA) 'Investment policies and bilateral investment treaties in Africa: Implications for regional integration' (2016) http://www.uneca.org/sites/default/files/PublicationFiles/eng_investment_landscaping_study.pdf (accessed 13 August 2018) (hereinafter UNECA (2016)).

⁸³⁶ See these IIAs at the UNCTAD International Investment Agreements Database available at <http://investmentpolicyhub.unctad.org/IIA> (hereinafter UNCTAD International Investment Agreements Database). To-date, African countries have signed 845 BITs, and 157 of which are intra-African BITs.

⁸³⁷ Crosato A, Durmaz E & Semertzi A 'Africa's investment regime: Assessing international investment agreements in the light of current trends and needs in Africa' in *The Graduate Institute: Trade and Investment Law Clinic Papers* (2016) 26 (hereinafter Crosato et al (2016)). See also Mbengue MM & Schacherer S 'The "Africanisation" of international investment law: The Pan-African Investment Code and the reform of the international investment regime' (2017) 18 *The Journal of World Investment & Trade* 414-48 (hereinafter Mbengue & Schacherer (2017)).

⁸³⁸ Mbengue MM & Schacherer S 'Africa and the rethink of international investment law: About the elaboration of the Pan-African Investment Code' in Roberts A, Stephan PB, Verdier P & Versteeg M (eds) *Comparative international law* (2018) 548 (hereinafter Mbengue and Schacherer (2018)).

⁸³⁹ These IIAs can be accessed at the UNCTAD International Investment Agreements Database. See also [bilaterals.org](https://www.bilaterals.org/) available at <https://www.bilaterals.org/>.

⁸⁴⁰ UNCTAD *World Investment Report 2018: Investment and new industrial policies* (2018) 38-40.

⁸⁴¹ See part 2.2 above.

⁸⁴² Salacuse JW & Sullivan NP 'Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain' (2005) 46 *Harvard International Law Journal* 72. See also Johnson AR 'Rethinking bilateral investment treaties in Sub-Saharan Africa' (2010) 59 *Emory Law Journal* 919-23 (hereinafter Johnson (2010)).

⁸⁴³ Fox G 'A future for international investment? Modifying BITs to drive economic development' (2014) 46 *Georgetown Journal of International Law* 229 (hereinafter Fox (2014)).

nations and even attracted increasing FDI over the years yet have consistently displayed signs of poor economic growth and development, high levels of unemployment and abject poverty.⁸⁴⁴ Little has been proven with regards to the role FDI has played in enhancing the much-needed social and economic development on the continent.⁸⁴⁵ This may be due to various reasons. First, the type or quality of FDI that has been coming to Africa. Not all FDI is capable of fostering economic growth and development, create jobs or alleviate extreme poverty.⁸⁴⁶ Secondly, as alluded to in the preceding chapter, FDI benefits are not automatic but domestic policies to leverage such benefits into the host economy are required.⁸⁴⁷ Thirdly, the BITs signed by African countries were not focused on leveraging FDI-led economic development in African host states but rather on protecting and promoting FDI.⁸⁴⁸ These are among the reason FDI and BITs have failed to contribute towards social and economic development of most African countries over the years.⁸⁴⁹

The purpose of this chapter is to critically examine whether the existing international legal framework governing foreign investment in Africa constrain the right to regulate. In particular, the chapter explores and analyses the IIAs signed by African countries at global, regional and bilateral levels to determine whether the treaty practice reserves the regulatory autonomy of host states. The chapter will therefore examine the capacity of these IIAs to allow host states to pursue their public policy objectives and development goals. Of course, the discourse of this chapter is not meant to be an exhaustive discussion of all the individual treaties signed by African countries. Instead, the chapter will discuss selected and most relevant global, regional, bilateral and

⁸⁴⁴ Johnson (2010) 919-28, highlighting that 'BITs have failed to achieve their full potential as tools for economic development in Africa'. See also World Bank 'World Bank data: World development indicators & global development finance' (2017) available at <http://databank.worldbank.org> (accessed 12 August 2018), measuring the development level of African countries. See also Ruppel OC & Shifotoka F 'Foreign direct investment protection in Africa: Contemporary legal aspects between BITs and BRICS' (2016) 21 *African Yearbook of International Law* 5-56.

⁸⁴⁵ See generally Kaulihowa T *Foreign direct investment and welfare dynamics in Africa* (PhD thesis, Stellenbosch University, 2017); and Cleeve EA, Debrah Y & Yiheyis Z 'Human capital and FDI inflows: An assessment of the African case' (2015) 74 *World Development* 1-14.

⁸⁴⁶ See Johnson (2010) 919-20.

⁸⁴⁷ Organisation for Economic Cooperation and Development (OECD) 'Foreign direct investment for development: Maximising benefits, minimising costs' (2002) OECD Report was prepared within the framework of the activities of the Committee on International Investment and Multinational Enterprise 2 (hereinafter OECD (2002)).

⁸⁴⁸ See Morisset J 'Foreign direct investment in Africa: Policies also matter' (2000) World Bank Policy Research Working Paper No. 2481 10-11 (hereinafter Morisset (2000)). See also Salacuse JW & Sullivan NP 'Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain' (2005) 46 *Harvard international Law Journal* 79-90, outlining the basic provisions of traditional BITs.

⁸⁴⁹ See Johnson (2010) 928-30.

national investment legal instruments tracing the traits of regulatory freedom. In accordance with the thesis of this study, the ultimate objective of the chapter is to argue for the transformation of Africa's international investment regime into an innovative and dynamic legal system that will allow African host states to exercise their right to regulate and promote sustainable development.

The chapter is divided into six parts. Following this introductory part is the second part which deals with the global investment treaties to which African countries are party. The third part critically examines Africa's investment regulation at the continental level. The fourth part reviews Africa's regional investment law, while the fifth part scrutinises Africa's investment regulation at bilateral and national levels. The final and sixth part provides the concluding remarks of the chapter.

5.2 GLOBAL INVESTMENT LAW FOR AFRICA

At the global level, African countries have signed and ratified several treaties which have a bearing on investment regulation. Examples of these treaties include, among others, the Agreement on Trade-Related Investment Measures (TRIMS),⁸⁵⁰ the General Agreement on Trade in Services (GATS),⁸⁵¹ the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention),⁸⁵² the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)⁸⁵³ and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).⁸⁵⁴ It is submitted that, by virtue of being state parties to these international agreements, African states have accepted to be legally bound by these treaties' terms and to take all political, legal and administrative steps necessary to implement the core imperatives of the treaties as encapsulated in their provisions. Essentially, this entails that state parties are bound both by the procedural reporting requirements as well as the obligation to take

⁸⁵⁰ TRIMS Agreement: Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1868 U.N.T.S. 186 (hereinafter TRIMS Agreement).

⁸⁵¹ GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) (hereinafter GATS).

⁸⁵² Convention Establishing the Multilateral Investment Guarantee Agency, 11 October 1985, 1508 U.N.T.S. 99 (hereinafter MIGA Convention).

⁸⁵³ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965 575 U.N.T.S. 159 (hereinafter ICSID Convention).

⁸⁵⁴ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1959 330 U.N.T.S. 38 (hereinafter New York Convention).

legislative steps, *inter alia*, to ensure that the investment rights and the state obligations as contained in the treaties are realised and implemented in domestic systems. It also means that investors from other contracting states investing in African state parties (that have ratified these treaties) are entitled to enforce their rights enshrined in such treaties.

5.2.1 TRIMS Agreement

As noted in the preceding paragraph, the TRIMS and GATS were negotiated under the auspices of the World Trade Organisation (WTO).⁸⁵⁵ All African countries that are members of the WTO⁸⁵⁶ are legally bound by the investment provisions of the TRIMS Agreement and GATS.

The TRIMS Agreement essentially regulates investment measures having restrictive and distorting effects to trade in goods.⁸⁵⁷ Article 2 of the TRIMS Agreement prohibits WTO member states from applying certain investment measures that would violate the basic principles of national treatment (NT) or quantitative restrictions (QR) requirements enshrined in Articles III and XI of the General Agreement on Tariffs and Trade (GATT),⁸⁵⁸ respectively. In addition, the TRIMS Agreement contains an Annex providing an illustrative list of trade-related investment measures (TRIMs) that are inconsistent with the NT obligation contained in Article III (4) of the GATT⁸⁵⁹ and the QR obligation entrenched in Article XI (1) of the GATT.⁸⁶⁰ The TRIMS Agreement prohibits those measures or disciplines 'which are mandatory or enforceable under

⁸⁵⁵ The WTO is the international organisation established in 1994 which governs international trade between nations. More information about the WTO is available at <https://www.wto.org>.

⁸⁵⁶ See the current WTO membership at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

⁸⁵⁷ Article 1 of TRIMS Agreement.

⁸⁵⁸ General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 1867 U.N.T.S 187, 33 ILM 1153, 1994 (hereinafter GATT).

⁸⁵⁹ Article III (4) of the GATT stipulates that 'the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product'.

⁸⁶⁰ Article XI (1) of the GATT prescribes that 'no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party'.

domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage'⁸⁶¹ in relation to local content requirements,⁸⁶² trade balancing requirements,⁸⁶³ foreign exchange restrictions⁸⁶⁴ or transfer technology or proprietary business information to local persons and export restrictions.⁸⁶⁵ In other words, the TRIMS Agreement significantly constrains the African WTO members ability to impose, on foreign investments, policy measures relating to local content and trade balancing requirements, as well as foreign exchange and export restrictions. Ramdoo argues that the TRIMS Agreement 'can have serious implications for industrial policies that are designed to support the development of domestic industries, or to limit the effects of foreign competition to foster local industrial capabilities and encourage linkages and value addition'.⁸⁶⁶ Thus, the TRIMS Agreement constrains the policy space for governments to support their industrial development through foreign investment.

Conversely, TRIMs are often implemented by governments as a strategic mechanism to protect and support domestic industry or to ensure that foreign investment achieve various policy objectives of the host economy including, *inter alia*, fostering economic growth and development and creating jobs.⁸⁶⁷ It is argued that policy measures which

⁸⁶¹ Paragraphs 1 and 2 of the Annex of the TRIMS Agreement.

⁸⁶² Local content requirements include measures requiring 'the purchase or use by an enterprise of domestic products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production'. Paragraph 1 (a) of Annex of the TRIMS Agreement. The measures are deemed, according to paragraph 1 (a) of Annex of the TRIMS Agreement, to be non-conforming to Article III (4) of the GATT.

⁸⁶³ Trade balancing requirements include measures requiring 'that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports', and measures limiting 'the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports'. These measures are considered to be incompatible with Article III (4) and XI (1) of the GATT, according to paragraphs 1 (b) and 2 (a) of Annex of the TRIMS Agreement, respectively.

⁸⁶⁴ Foreign exchange restrictions pertain to measures that restrict 'the importation by an enterprise of products (parts and other goods) used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise' and, regarded, as non-conforming to Article XI (1) of the GATT. Paragraph 2 (b) of Annex of the TRIMS Agreement.

⁸⁶⁵ Export restrictions include measures inhibiting 'the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production' and is considered a violation of Article XI (1) of the GATT.

Paragraph 3 (c) of Annex of the TRIMS Agreement.

⁸⁶⁶ Ramdoo I 'Local content, trade and investment: Is there policy space left for linkages development in resource-rich countries?' (2016) ECDPM Discussion Paper No.25 18 (hereinafter Ramdoo (2016)).

⁸⁶⁷ See, generally, OECD 'The economic impact of local content requirements' (2016) available at <https://www.oecd.org/tad/policynotes/economic-impact-local-content-requirements.pdf> (accessed 26 April 2019).

impose obligations or require foreign firms to fulfil certain domestic objectives of the host economy are necessary to create a more level playing field, ensure that foreign investment has positive spillover effects in the host economy and encourage sustainable economic growth.⁸⁶⁸ Local content requirements, for instance, compel foreign investors to use locally produced goods. This would, among other things, increase local productivity, create jobs, enhance the supply and value chain as well as encourage linkages of foreign and domestic firms.⁸⁶⁹

Any violation of the obligations enshrined in the TRIMS Agreement leads to dispute settlement under the provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the WTO Dispute Settlement Understanding.⁸⁷⁰ Although the TRIMS Agreement has constrained policy space for applying TRIMs,⁸⁷¹ Article 4 of the TRIMS Agreement permits developing countries to apply TRIMs which are inconsistent with Articles III or XI of the GATT, based on the condition that the measures comply with the conditions stipulated under Article XVIII of the GATT⁸⁷² which, by virtue of the economic development needs of the developing countries, warrants specified derogation from the GATT provisions.

5.2.1 GATS

GATS generally regulates trade in services and contain obligations and disciplines pertinent to investment, particularly in Mode 3 of supplying services. Mode 3 – also known as commercial presence – implies that a service supplier of one member establishes a territorial presence, including through ownership or lease of premises, in another member's territory to provide a service.⁸⁷³ That is FDI. The general obligations and disciplines that WTO member states are to apply in service sectors include most-favoured nation treatment⁸⁷⁴ and transparency,⁸⁷⁵ while national

⁸⁶⁸ Johnson (2010) 949.

⁸⁶⁹ Johnson (2010) 949.

⁸⁷⁰ WTO Dispute Settlement Understanding deals with the settlement of trade disputes between member states. See Annex 2 of the WTO Agreement: Understanding on Rules and Procedures Governing the Settlement of Disputes, 1995.

⁸⁷¹ Ramdoo (2016) 19.

⁸⁷² Article XVIII of the GATT provides for governmental assistance to economic development. The Article allows permits developing countries to take protective or other measures affecting imports in order to implement programmes and policies aimed at achieving their economic development. For a discussion, see Raghavan C 'Comprehensive review of GATT Article XVIII sought' available at <https://www.twn.my/title/xv11-cn.htm> (accessed 26 April 2019).

⁸⁷³ Article I (2) of the GATS.

⁸⁷⁴ Article II of the GATS.

⁸⁷⁵ Article III of the GATS.

treatment⁸⁷⁶ and market access⁸⁷⁷ obligations are undertaken in these sectors according to the specific commitment for each sector and mode.⁸⁷⁸

While GATS provides for the right of WTO member states to regulate the supply of (or trade in) services pursuant to their own domestic policy objectives, it however prescribes that that regulation should be done in a 'reasonable, objective and impartial manner'.⁸⁷⁹ Article XVI of the GATS (provides for market access commitments) requires countries that have undertaken market-access commitments, not to maintain or adopt, on a regional subdivision or national territory basis, any policy measures limiting the number of service suppliers, total value of service transactions, total number of service operations, total number of natural persons that may be employed in a particular service sector.⁸⁸⁰ Member states are also prohibited from adopting or maintaining measures restricting or requiring specific types of legal entity or joint venture of a service supplier, or limiting the participation of foreign capital in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment.⁸⁸¹ In other words, African WTO members that have scheduled commitments in services sectors are restricted in their ability to implement domestic policy measures to protect domestic suppliers,⁸⁸² limit employment of expatriates in lieu of local workforce,⁸⁸³ and impose ownership requirements.⁸⁸⁴ Further, Article XVII of the GATS (NT) prohibits member states from imposing discriminatory measures that benefit domestic services or service suppliers over foreign suppliers. These provisions restrain member states (African countries) policy space to regulate their services, according to their national policy objectives.

⁸⁷⁶ Article XVII of GATS.

⁸⁷⁷ Article XVI of GATS.

⁸⁷⁸ See the WTO Services sectoral classification available at https://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc.

⁸⁷⁹ Article XV (1) of GATS.

⁸⁸⁰ Article XVI (2) (a)-(d) of GATS.

⁸⁸¹ Article XVI (2) (e)-(f) of GATS.

⁸⁸² See Article XVI (2) (a)-(c) of GATS.

⁸⁸³ See Article XVI (2) (d) of GATS.

⁸⁸⁴ See Article XVI (2) (e)-(f) of GATS.

5.2.3 MIGA Convention

The MIGA Convention was signed in 1985 and became effective in 1988. About 53 African countries are members of the MIGA Convention.⁸⁸⁵ The Convention establishes the MIGA, whose objectives include issuing insurance to foreign investments against non-commercial or political risks in the host country and promoting investment flows into developing member countries.⁸⁸⁶ The MIGA Convention provides risk insurance to foreign investors against political risks such as expropriation, transfer restriction, unenforceable breaches of investor-state contract, non-honouring of financial obligations as well as damages from war, terrorism and civil disturbance.⁸⁸⁷ Furthermore, Article 11 (b) and (c) of the MIGA Convention allows MIGA and investors to agree on insurance protection against other non-commercial risks. The MIGA Convention also provides investment dispute resolution on a case-by-case basis.

Overall, the MIGA Convention generally contain investment obligations or standards deemed necessary to satisfy that investment conditions within a country are 'adequate before underwriting an insurance policy for an investment in its territory'.⁸⁸⁸ These obligations or standards rarely have restrictive implications on state sovereignty or policy space.⁸⁸⁹ For example, the Convention does not impose any direct obligations on member states with respect to the treatment of foreign investment.⁸⁹⁰ Schill opines that, this is the reason why the MIGA Convention was largely accepted by several developing countries even at a time when most of them were still rejecting to sign BITs.⁸⁹¹ It is also important to highlight that the MIGA Convention is rarely mentioned in discourses critiquing international investment treaties.

⁸⁸⁵ See MIGA Convention member countries at <https://www.miga.org/member-countries>.

⁸⁸⁶ Article 2 (a) and (b) of the MIGA Convention. MIGA is a juristic person with capacity to contract, acquire and dispose property and institute legal proceedings. Article 1 of the MIGA Convention.

⁸⁸⁷ See Article 11 of the MIGA Convention.

⁸⁸⁸ Shihata IFI *Legal treatment of foreign investment: "The World Bank Guidelines"* (1993) 32.

⁸⁸⁹ Schill SW *The multilateralisation of international investment law* (2009) 48-9 (hereinafter Schill (2009)).

⁸⁹⁰ Schill (2009) 48.

⁸⁹¹ Schill (2009) 48. See also Schlemmer-Schulte S 'The World Bank Guidelines on the Treatment of Foreign Direct Investment' in Bradlow DD & Escher A (eds) *Legal aspects of foreign direct investment* (1999) 89.

5.2.4 ICSID Convention

The ICSID Convention establishes the ICSID, which offers services for the resolution of international investment disputes, primarily between investors and states (investor-state disputes), and also in state-to-state disputes (inter-state disputes). To-date, approximately 49 of the African countries are signatories and contracting states of the ICSID Convention.⁸⁹² Over the past decades, the ICSID has emerged as the most prominent international arbitration institution for investment disputes.⁸⁹³ The ICSID case administration services extend to: arbitrations under the ICSID Convention; arbitrations under the Additional Facility; conciliations under the ICSID Convention; conciliations under the Additional Facility; fact-finding proceedings; non-ICSID investor-state arbitrations (for example under the UNCITRAL Arbitration Rules); non-ICSID state-to-state disputes (for example under free trade agreements); mediations; and other alternative dispute resolution cases. Awards of the ICSID tribunal are binding and final as well as automatically enforceable.⁸⁹⁴ There is no appeal against an ICSID award, but there are limited post-award remedies available under the Convention.⁸⁹⁵ If a party fails to comply with the award, the other contracting party can seek to have the pecuniary obligations recognised and enforced in the courts of any ICSID member state as though it were a final judgment of that state's courts.⁸⁹⁶ Notwithstanding the foregoing, contracting states retain their right to apply national laws relating to sovereign immunity from execution.⁸⁹⁷ ICSID itself has no formal role or responsibility under the Convention with respect to the recognition and enforcement of an award.⁸⁹⁸

However, the ICSID Convention grants the tribunals significant powers to interpret and rule against the public policy measures of the sovereign states and to render decisions

⁸⁹² See the ICSID Member States Database available at <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>.

⁸⁹³ See generally Kinnear MN & Torres LF *Building international investment law: The first 50 years of ICSID* (2016).

⁸⁹⁴ Article 53 (1) of the ICSID Convention.

⁸⁹⁵ See Articles 49-52 of the ICSID Convention.

⁸⁹⁶ Article 54 (1) of the ICSID Convention.

⁸⁹⁷ Article 55 of the ICSID Convention.

⁸⁹⁸ But a party may inform ICSID of the other party's non-compliance with an award, then it is ICSID will contact the non-complying party requesting information on the steps that party has taken, or will take, to comply with the award. ICSID 'Recognition and Enforcement - ICSID Convention Arbitration' available at <https://icsid.worldbank.org/en/Pages/process/Recognition-and-Enforcement-Convention-Arbitration.aspx> (accessed 26 April 2019).

that are binding on host governments.⁸⁹⁹ The ICSID Convention also ‘insulate tribunals from formal or informal checks on their powers’.⁹⁰⁰ As evident in the post-award remedies, if an ICSID tribunal issue an interpretation with which states disagree, there are few, if any, mechanisms through which states can set tribunals back on the correct path.⁹⁰¹ In other words, this has a chilling effect on host governments’ ability to adopt and maintain domestic regulatory measures aimed at achieving public welfare objectives.⁹⁰² These are among reasons why some countries, for example, Venezuela, Bolivia and Ecuador, have recently withdrawn from the ICSID Convention. Discontentment with ISDS has seen some countries concluding investment treaties without ISDS⁹⁰³ with limited ISDS mechanism.⁹⁰⁴ African countries have also expressed their dissatisfaction with the ISDS regime and have adopted regional and/or national instruments which reflect a cautious attitude towards ISDS or have completely omitted the mechanism.⁹⁰⁵

5.2.5 New York Convention

The New York Convention governs the recognition and enforcement of foreign arbitral awards. The Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognise and enforce arbitration awards made in other contracting states. Widely considered the foundational instrument for international arbitration, the New York Convention applies to arbitrations that are not considered as domestic awards in the state where recognition and enforcement is sought. Article 3

⁸⁹⁹ Johnson L & Volkov O ‘State Liability for Regulatory Change: How International Investment Rules are Overriding Domestic Law’ (2014) IISD Investment Treaty News available at <https://www.iisd.org/itn/2014/01/06/state-liability-for-regulatory-change-how-international-investment-rules-are-overriding-domestic-law/> (accessed 28 April 2019) (hereinafter Johnson & Volkov (2014)).

⁹⁰⁰ Johnson & Volkov (2014).

⁹⁰¹ Johnson & Volkov (2014).

⁹⁰² See generally Korzun V ‘The right to regulate in investor- state arbitration: Slicing and dicing regulatory carve-outs’ (2016) 50 *Vanderbilt Journal of Transnational Law* 355-414.

⁹⁰³ For example, the Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between the People’s Republic of China and the Association of South-East Asian Nations, 2009 (with a placeholder for a future ISDS provision); the Agreement on Investment among the Governments of the Hong Kong Special Administrative Region of the People’s Republic of China and the Member States of the Association of Southeast Asian Nations, 2017; the Intra-MERCOSUR Investment Facilitation Protocol, 2017; and the Pacific Agreement on Closer Economic Relations Plus, 2017.

⁹⁰⁴ For example, Argentina–Chile Free Trade Agreement, 2017; Colombia–United Arab Emirates Bilateral Investment Treaty, 2017; Israel–Japan Bilateral Investment Treaty, 2017; Republic of Moldova–United Arab Emirates Bilateral Investment Treaty, 2017; Rwanda–United Arab Emirates Bilateral Investment Treaty, 2017.

⁹⁰⁵ See generally Kidane W ‘Alternatives to investor–state dispute settlement: An African perspective’ (2018) Global Economic Governance Discussion Paper (hereinafter Kidane (2018)).

of the Convention prescribes that each contracting state to recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon. South African and Zimbabwe, among other African countries, have enacted legislation to incorporate or domesticate the New York Convention, thus, to give effect to the provisions of the Convention.⁹⁰⁶

Under international law, incorporation or domestication is a process by which international agreements become part of the municipal law of a sovereign state.⁹⁰⁷ Incorporation means that the provisions of the international agreement can be directly invoked before the national courts and applied by national authorities.⁹⁰⁸ Worth highlighting also is that whether incorporation of international arbitration is necessary depends on a country's domestic (municipal) law.⁹⁰⁹ Thus, for example, in states with monist systems, treaties can become law without incorporation particularly when their provisions are sufficiently self-executing. In contrary, in states with dualist systems – normally countries with a common law tradition – treaties are required to be incorporated before they can have any domestic legal effect.⁹¹⁰ In this regard, an enactment of the required legislation is then typically required.⁹¹¹ Similar to the ICSID Convention, the New York Convention accords wide discretionary powers to international *ad hoc* tribunals to interpret or disapprove public policy measures of the host states.⁹¹² This has a chilling effect on the host states.

An overall scrutiny shows that the global investment and related treaties to which African countries are party do not contain substantive provisions on the right to regulate and sustainable development aspects. The text and content of these

⁹⁰⁶ See the International Arbitration Act 15 of 2017 of South Africa, and the Arbitration Act (Chapter 7:15) 1996 of Zimbabwe.

⁹⁰⁷ For more information on domestication of international treaties, see generally Ferreira G & Ferreira-Snyman A 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' (2014) 17 *PER: Potchefstroomse Elektroniese Regsblad* 1471-96; and Sloss D 'The domestication of international human rights: Non-self-executing declarations and human rights treaties' (1999) 24 *Yale Journal of International Law* 129-221. See also *Glenister v President of the Republic of South Africa* (2011) ZACC 6 and *Government of the Republic of Zimbabwe v Fick* 2012 ZASCA 122 (20 September 2012)

⁹⁰⁸ Committee on the Rights of the Child 'General Comment No. 5: 'General Measures of Implementation for the Convention on the Rights of the Child' CRC/GC/2003/5 (Adopted at the 34th Session on 27 November 2003) para 20.

⁹⁰⁹ See part 3.1.1 above.

⁹¹⁰ See part 3.1.1 above.

⁹¹¹ Young K 'The implementation of international law in the domestic laws of Germany and Australia: Federal and Parliamentary Comparison' in (1999) 21 *Adelaide Law Review* 177.

⁹¹² Johnson & Volkov (2014).

international instruments were heavily influenced by the western capital-exporting economies who were eager to maintain international rules favourable to their social and economic interests.⁹¹³ As noted in the earlier chapters, international agreements on investment were concluded primarily to promote investment (by capital-importing countries),⁹¹⁴ and to protect investors and their investments (by capital-exporting countries).⁹¹⁵ As such, emphasis has been placed on promoting investment treaties as instruments for investment protection and promotion with suggestions to incorporate regulatory space in such treaties viewed as an impediment to investor protection and promotion.⁹¹⁶

Most importantly, global investment treaties were designed by developed countries and developing countries were merely investment rule consumers.⁹¹⁷ At the same time, developing countries lacked sufficient capacity in negotiating public policy and development issues into these IIAs, and analysing the practical legal and policy consequences of negotiating such agreements.⁹¹⁸ Another explanation is the lack of recognition by developing countries that investment treaties constitute more than signalling interest in hosting FDI but also shape the nature of FDI, accruable benefits and the potential liability of the state to treaty violations.⁹¹⁹

However, it is important to underscore that although developed western countries have dominated and dictated the development of the general principles of international investment law, the contribution of developing countries from Asia, Latin America and Africa had a little effect⁹²⁰ but must not be underestimated. It is also critical to point out the recent geographical shift of 'international investment law from a transatlantic

⁹¹³ See also Layrea ET & Sucker F 'The important of an African voice in, and understanding and use of, international economic law' in Layrea ET, Madolo N & Sucker F (eds) *International economic law: Voices of Africa* (2012) (hereinafter Layrea & Sucker (2012)) 10. See also Vandeveld KJ 'A brief history of international investment agreements' in Sauvart KP & Sachs LE (eds) *The effect of treaties on foreign direct investment: Bilateral investment treaties, double taxation treaties, and investment flows* (2009) 13-35.

⁹¹⁴ Desierto DA 'Regulatory freedom and control in the new ASEAN regional investment treaties' (2015) 16 *The Journal of World Investment and Trade* 1020.

⁹¹⁵ See Van Duzer A, Simons P & Mayeda G *Integrating sustainable development into international investment agreements: A guide for developing country negotiators* (2013) 1.

⁹¹⁶ See Fox (2014) 229-59. See also Johnson (2010) 932.

⁹¹⁷ See Alschner W & Skougarevskiy D 'Rules takers or rule makers? A new look at African bilateral investment treaty practice' 2016 Working Paper No. 7 (hereinafter Alschner & Skougarevskiy (2016)) 4.

⁹¹⁸ Adeleke (2018) 156.

⁹¹⁹ Alschner & Skougarevskiy (2016) 4

⁹²⁰ Layrea & Sucker (2012) 10.

to a transpacific core'.⁹²¹ Schill noted that there is no doubt that developing countries are nowadays the focal point in or makers of international investment law.⁹²² This trajectory can be best illustrated by the negotiation of the Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP),⁹²³ despite the withdrawal of the United States, the Regional Comprehensive Economic Partnership (RCEP)⁹²⁴ and the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement.⁹²⁵

In similar vein, African countries are also increasingly becoming prominent players in the development of international investment rules.⁹²⁶ This assessment certainly holds true for Africa, which has adopted a Pan-African Investment Code⁹²⁷ which 'has been drafted from the perspective of developing and least-developed countries with a view to promote sustainable development.'⁹²⁸ Equally, progressive regional investment initiatives in the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of West African States (ECOWAS), and the Southern African Development Community (SADC).⁹²⁹ National investment policy reforms in South Africa, Namibia and Tanzania also support this claim.



⁹²¹ Schill SW 'Special issue: Dawn of an Asian Century in international investment law' (2015) 16 *The Journal of World Investment & Trade* 765 (hereinafter Schill (2015)). See also Salomon CT & S Friedrich 'Investment arbitration in East Asia and the Pacific: A statistical analysis of bilateral investment treaties, other international investment agreements and investment arbitrations in the region' (2015) 16 *The Journal of World Investment & Trade* 800.

⁹²² Schill (2015) 765.

⁹²³ The CPTPP is a trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. It was signed March 2018 and entered into force in December 2018.

⁹²⁴ The RCEP is a proposed free trade agreement among 16 nations in the Asia-Pacific region. It includes ten ASEAN member countries namely Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Vietnam, and the six Asia-Pacific countries with whom ASEAN has existing free trade areas, namely Australia, China, India, Japan, New Zealand and South Korea.

⁹²⁵ The ASEAN Comprehensive Investment Agreement, which was signed in 2009 and entered into force on 29 March 2012, is an instrument to create a free and open investment regime/environment in the context of an integrated economic community and ASEAN's response to increase global competition and enhance the attractiveness of ASEAN as a single investment destination. The ASEAN Comprehensive Investment Agreement is currently being amended by the Fourth Protocol to Amend the ASEAN Comprehensive Investment Agreement, 2018.

⁹²⁶ See generally Denters & Gazzini (2017) 449-92.

⁹²⁷ Pan-African Investment Code, 2016 (hereinafter PAIC).

⁹²⁸ See generally Mbengue & Schacherer (2017) 18 1660-7112.

⁹²⁹ See generally Denters & Gazzini (2017) 449-92.

5.3 CONTINENTAL INVESTMENT REGULATORY FRAMEWORK IN AFRICA

Investment has been identified either directly or indirectly in several policy documents or political discussions of the African Union (AU) as a significant incentive to foster socio-economic development on the continent.⁹³⁰ The AU has emphasised the need to formulate and implement investment policies to promote inter- and intra-African foreign direct investment (FDI), which in turn will promote socio-economic development and reduce poverty on the continent.⁹³¹ Despite the recognition of the importance of investment, there is not yet a legally binding instrument on investment regulation in Africa at the continental level. Africa's continental regulatory framework for investment is piecemeal and fragmented, embedded in BITs and regional investment and trade agreements.

In 2008, the AU Ministers in Charge of Integration adopted a decision requesting the AU Commission, 'to develop a comprehensive investment code for Africa with a view to promoting private sector participation' investment on the continent.⁹³² The decision was subsequently endorsed by the AU Heads of State and Government at the AU Summit held at Sharm El Sheikh, Egypt in 2008.⁹³³ In 2012, the Coordinating Committee of AU, the African Regional Economic Communities (RECs), UNECA and the African Development Bank (AfDB) requested the AU Commission to undertake a study with a view of establishing an African investment code with a view to creating a favourable environment to attract more investment flows in Africa and facilitate intra-Africa cross border investment that are essential to the success of economic integration of the continent.⁹³⁴ It was against this background that the Pan-African Investment Code (PAIC) was adopted. Thus far, the PAIC is the only continent-wide investment instrument developed under the auspices of the AU. The PAIC contains

⁹³⁰ See, for example, the Treaty establishing the African Economic Community, 1991; Agenda 2063; and the Constitutive Act of the African Union, 2000;

⁹³¹ Decision on the report and declaration of the third conference of ministers in charge of integration DOC. EX.CL/436(XIII).

⁹³² Decision on the report and declaration of the third conference of ministers in charge of integration DOC. EX.CL/436(XIII).

⁹³³ UNECA Conference of African Ministers of Finance, Planning and Economic Development, African Union Specialised Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration and Tenth Joint Annual Meetings of the AU, Specialised Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration and the Economic Commission for Africa Conference of African Ministers of Finance, Planning and Economic Development 'Meeting of Member States Experts on the consideration of the Pan African Investment Code (PAIC) and the African Inclusive Market Excellence Centre (AIMEC) 21-23 November 2016 Nairobi, Kenya' para 8.

⁹³⁴ Ninth Meeting of the Coordinating Meeting AU-RECs-UNECA-AfDB, held on January 2012, in Addis Ababa, Ethiopia.

some innovative features which aims to create a balanced investment legal regime which promotes and protects investments at the same time safeguarding policy space for host states.⁹³⁵

The preamble of the PAIC acknowledges that the promotion of sustainable development requires investments.⁹³⁶ It specifically, refers to the right of AU member states to regulate all aspects relating to investments within their territories with a view to promote sustainable development objectives.⁹³⁷ In other words, states are encouraged to attract and admit investments that bring constructive economic and social benefits in their territories. The declared primary objective of the PAIC is 'to promote, facilitate and protect investments that foster the sustainable development of each member state and in particular, the member state where the investment is located'.⁹³⁸ It can be argued that expressing the objective of the treaty in a specific provision can provide added weight to the objective, which in turn has consequences for the treaty interpretation.⁹³⁹ However, preambles do not necessarily constitute normative standards that are legally enforceable, but they have an important role as to how IIAs will be interpreted in the event of a dispute between the parties or between an investor and a host state.⁹⁴⁰ It has been shown, nonetheless, that investment arbitral tribunals do not largely depend on the preamble to influence interpretation of the treaty text.⁹⁴¹

The PAIC prescribes the rights and obligations of AU member states and investors, and several investment principles.⁹⁴² It also contains numerous substantive provisions relevant to policy space including: the right of host governments to regulate admitted investments in accordance with their laws and regulations,⁹⁴³ and to adopt measures concerning preserving the environment, international peace and security, national security interests, and promoting national development (including through

⁹³⁵ Adeleke (2018) 131.

⁹³⁶ Paragraph 8 of the preamble of PAIC.

⁹³⁷ Paragraph 10 of the preamble of PAIC.

⁹³⁸ Article 1 of PAIC.

⁹³⁹ Mbengue & Schacherer (2017) 422.

⁹⁴⁰ Dolzer R & Stevens M *Bilateral investment treaties* (1995) 20. See also Hulme MH 'Preambles in treaty interpretation' (2016) 164 *University of Pennsylvania Law Review* 1296-97.

⁹⁴¹ Beharry CL & Kuritzky ME 'Going green: Managing the environment through international investment arbitration' (2015) 30 *American University International Law Review* 391 (hereinafter Beharry & Kuritzky (2015)).

⁹⁴² Article 2 (2) of PAIC.

⁹⁴³ Article 5 of PAIC.

performance requirements and local content).⁹⁴⁴ Performance requirements and local content are significant in that they can serve as a tool for economic development policies.⁹⁴⁵ For instance, requirements for technology transfer or the employment of local workers can help materialise beneficial spillover effects for the host state.⁹⁴⁶ Johnson rightfully opines that:

Performance requirements – which impose obligations and commitments on foreign firms or policies – also provide a means for ... countries to promote a more level playing field among investors. By ensuring that FDI will have positive spillover effects in the host country, these requirements can encourage sustainable economic growth. They can be used to introduce new technologies, create jobs, transfer skills, increase productivity, improve infrastructure, and encourage domestic industry – all of which are legitimate goals and common to development strategies.⁹⁴⁷

In addition, the PAIC limits the application of the most-favoured-nation treatment (MFN) and NT obligations to investors and investments ‘in like circumstances’.⁹⁴⁸ The PAIC further list exceptions to the MFN clause to preserve public interests. For instance, Article 8 (2) of the PAIC provides that there is no breach of MFN treatment when an AU member state adopts measures that are ‘designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment’. In addition, the PAIC allows the application of measures that are taken by reason of ‘national security, public interest, and public health or public morals to be considered as a less favourable treatment’⁹⁴⁹ with respect to the MFN clause. Article

⁹⁴⁴ Article 17 of PAIC.

⁹⁴⁵ Mbengue & Schacherer (2017) 434.

⁹⁴⁶ UNCTAD Investment Policy Framework for Sustainable Development, 2015 99 (hereinafter UNCTAD Investment Policy Framework for Sustainable Development).

⁹⁴⁷ Johnson (2010) 949-50. Johnson also caution states against the potential of performance requirements to deter FDI and urges host countries to carefully weigh the benefits and risks of imposing performance requirements on foreign investment.

⁹⁴⁸ See Article 7 of PAIC for MFN, and Article 9 of PAIC for NT. In terms of Article 7 (3) and Article 9 (3) of PAIC, the concept of “in like circumstances” requires an overall examination, on a case by-case basis, of all the circumstances of an investment, including, among others:

- a) its effects on third persons and the local community;
- b) its effects on the local, regional or national environment, the health of the populations, or on the global commons;
- c) the sector in which the investor is active;
- d) the aim of the measure in question;
- e) the regulatory process generally applied in relation to a measure in question;
- f) company size; and
- g) other factors directly relating to the investment or investor in relation to the measure in question.

The examination referred to in this Paragraph shall not be limited to or be biased towards any one factor.

⁹⁴⁹ Article 8 (3) of PAIC.

8 (5) of the PAIC also provides that the MFN principle does not oblige a member state to extend to the investor of any other country the benefit of any treatment contained in an existing or future customs union, free trade area or international agreement to which the investor's home state is not a party or that is contained in any international agreement or domestic legislation relating to taxation.

The PAIC also prescribes exceptions to NT to ensure African states the possibility to pursue national development objectives without breaching the NT standard. Article 10 (2) of the PAIC contains a similar provision as for MFN in respect to the right of a member state to adopt measures in order to promote public welfare objectives. Further, Article 10 (3) permits states to grant preferential treatment to investments and investors in order to achieve national development objectives, in accordance with their respective domestic legislation. According to Article 10 (4) of the PAIC, AU member states reserve the right to deny an investor the benefits of the PAIC and to grant special and differential treatment by listing two examples: where there is no substantial business activity in that state; or the investor is engaged in activities inimical to the economic interest of member states. Another exception to NT is outlined in Article 10 (6) of the PAIC – for subsidies or grants provided to a government or a state enterprise, including government-supported loans, guarantees and insurance or secondly, for taxation measures aimed at ensuring the effective collection of taxes, except where this results in arbitrary discrimination. Worth underlining is that the implementation of these exceptions to NT do not entitle an investor to 'compensation for any competitive disadvantages'.⁹⁵⁰

In addition, the PAIC contains a large segment on investors' obligations,⁹⁵¹ something which is rare in traditional BITs.⁹⁵² The PAIC allows host governments to impose certain obligations on investors, including to comply with corporate governance standards,⁹⁵³ to adhere to socio-political obligations,⁹⁵⁴ to refrain from bribery,⁹⁵⁵ to

⁹⁵⁰ Article 10 (8) of PAIC.

⁹⁵¹ Chapter 4 of PAIC.

⁹⁵² See, for example, in *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award (7 December 2011) para 871, where the ICSID Tribunal conceded that 'the BIT imposes no obligations on investors, only on contracting states'.

⁹⁵³ Article 19 of PAIC. Investors are obliged to comply with national and international standards of corporate governance for the sector concerned.

⁹⁵⁴ Article 20 of PAIC. Investors are required to adhere, including for instance the respect for cultural values, the non-interference in internal political affairs as well as the non-interference in intergovernmental relations.

⁹⁵⁵ Article 21 of PAIC.

adhere to corporate social responsibility standards,⁹⁵⁶ to use natural resources in a responsible manner,⁹⁵⁷ and to comply with business ethics and human rights.⁹⁵⁸ The PAIC also contains provision regulating state contracts,⁹⁵⁹ public-private partnerships,⁹⁶⁰ labour issues,⁹⁶¹ human resources development,⁹⁶² and the promotion of technology transfer and clean technologies⁹⁶³ and environmental and consumer protection.⁹⁶⁴ With regards to settlement of disputes, the PAIC gives host governments the discretion to implement ISDS, thereby offering a middle ground solution to African states that are either pro-ISDS or anti-ISDS.⁹⁶⁵ The ISDS provisions of the PAIC express the possibility for a state to file a claim against an investor in an investor-state arbitration, the so-called counterclaim.⁹⁶⁶ This is non-existent in traditional investment treaty practice. The counterclaim provision will make it possible to legally enforce the investor obligations contained in a specific investment treaty. This means, for instance, that a state can invoke any violation of any relevant international treaty protecting the environment, human rights and labour standards under the PAIC's provision on counterclaims. The breadth of potential legal bases of a state's counterclaim is thus very large. The PAIC's dispute settlement provisions seek to establish a better balance between the rights and obligations of investors and host states. Furthermore, the PAIC does not contain the controversial fair-and-



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⁹⁵⁶ Article 22 of PAIC.

⁹⁵⁷ Article 23 of PAIC. Investors are not to exploit or use them to the detriment of the rights and interests of the host State and to respect the rights of local population as well as to avoid land grabbing practices vis-à-vis local communities.

⁹⁵⁸ Article 24 of PAIC.

⁹⁵⁹ Article 26 of PAIC.

⁹⁶⁰ Article 27 of PAIC.

⁹⁶¹ Article 34 of PAIC.

⁹⁶² Article 36 of PAIC.

⁹⁶³ Article 29 and 30 of PAIC.

⁹⁶⁴ Article 37 and 40 of PAIC, respectively.

⁹⁶⁵ See Chapter 6 of PAIC.

⁹⁶⁶ Article 43 (1) of PAIC reads that 'where an investor or its investment is alleged by a Member State party in a dispute settlement proceeding under this Code to have failed to comply with its obligations under this Code or other relevant rules and principles of domestic and international law, the competent body hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.'

equitable-treatment (FET) clause,⁹⁶⁷ and exempts dispute-settlement procedures from the scope of the MFN clause.⁹⁶⁸

It is worth noting that the investment regime reflected by the PAIC is consistent with the contemporary global initiatives⁹⁶⁹ and new generation IIAs⁹⁷⁰ that are attempting to balance the rights and obligations of host states and investors, strengthening the development dimension of IIAs by mainstreaming the protection of human rights, health, labour, environmental standards, and reserving regulatory space of states to pursue their public policies. On the contrary, most investment treaties in Africa do not impose obligations on investors which leads to the potential for investments that are unregulated and can violate legitimately expected compliance with municipal legislative requirements.⁹⁷¹

The idea of incorporating direct obligations on the conduct of a foreign investor has not yet gained real recognition in contemporary investment treaty practice⁹⁷² yet 'it is a legally feasible option to ensure an appropriate balance in the realm of investment treaty practice between the legal protection granted to foreign investors, on the one side, and their responsibilities towards the societies in which they operate, on the other'.⁹⁷³ The majority of modern investment treaties have included, for instance, the general obligation of foreign investors to comply with all applicable domestic law and measures of the host state.⁹⁷⁴ Mbengue and Schacherer emphasise the need to enforce direct obligations for investors by means of measures such as the denial of

⁹⁶⁷ FET has been the most invoked standard in investment disputes and most successful claims pursued in international arbitration are based on a violation of such standard. See also De Brabandere (2017) 530; and Dolzer R & Schreuer C *Principles of international investment law* 2 ed (2012) 130. See also Schill SW & Jacob M 'Fair and equitable treatment: Content, practice, method' in Bungenberg M, Griebel J, Hobe S & Reinisch A (eds) *International investment law: A handbook* (2015) 700-63.

⁹⁶⁸ Kane MM 'The Pan-African Investment Code: A good first step, but more is needed' (2018) Columbia FDI Perspectives (hereinafter Kane (2018)) 2.

⁹⁶⁹ For example, the UNCTAD Investment Policy Framework for Sustainable Development and International Institute for Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development, 2005.

⁹⁷⁰ For example, the Australia-Japan Economic Partnership Agreement, 2014; Austria-Republic of Korea FTA, 2014, Canada-Cameron BIT, 2014; Canada-Ivory Coast BIT, 2014; Canada-Mali BIT, 2014; Canada-Nigeria BIT, 2014; and Canada-Serbia BIT, 2014.

⁹⁷¹ Adeleke (2018) 15. See also Mbengue & Schacherer (2017) 434; and Nowrot K 'Obligations of investors' in Bungenberg M, Griebel J, Hobe S & Reinisch A (eds) *International investment law: A handbook* (2015) 1155 (hereinafter Nowrot (2015)).

⁹⁷² However, there are a few early treaties that include investor obligations: Article 19 of the Community Investment Code of ECGLC, 1982; and Art. 17 of the Charter on a Regime of Multinational Industrial Enterprises of Eastern and Southern African States, 1990.

⁹⁷³ Mbengue & Schacherer (2017) 435. See also Nowrot (2015) 1162.

⁹⁷⁴ For example, Art. 13 of the COMESA Investment Agreement; Art. 10 of Annex 1 of the SADC FIP; and Art. 8 of the Amended Annex 1 of the SADC FIP.

treaty protection for the investor or the possibility of a state to file counterclaims in an arbitral proceeding.⁹⁷⁵ The inclusion of direct obligations in investment treaties is not only necessary to allow host governments to hold foreign investors accountable for violating human rights and other obligations. It is also a legislative technique 'to influence investors and improve the quality of investment, to promote sustainable development, the respect of human rights by foreign investors and environmental protection, and combat corruption'.⁹⁷⁶ It is also a way of striking a balance between the rights and obligations of investors and host governments in investment treaties.⁹⁷⁷

Although the PAIC is an innovative investment regulatory instrument, its major shortcoming is that it is a non-binding guiding instrument to African countries, investors and their investments.⁹⁷⁸ Thus, it is a soft law not legally binding on AU member states. The original goal, contemplated in Article 3 (2) of the PAIC 2016, was to have a binding instrument replacing the existing intra-African investment agreements.⁹⁷⁹ The suggestion to adopt the PAIC as a binding instrument raised some legitimate concerns regarding the potential effect of an African-wide binding code⁹⁸⁰ on the ongoing negotiations of the Agreement establishing the African Continental Free Trade Area (AfCFTA Agreement)⁹⁸¹ and the Agreement establishing the Tripartite Free Trade Area (TFTA Agreement).⁹⁸² Consequently, it was recommended that the PAIC should

⁹⁷⁵ Mbengue & Schacherer (2017) 437.

⁹⁷⁶ Bernasconi-Osterwalder N, Dommen C, Abebe M, Mann H & Zhang J 'Harnessing Investment for Sustainable Development: Inclusion of investor obligations and corporate accountability provisions in trade and investment agreements' Background document for the expert meeting co-hosted by IISD and Friedrich Ebert Stiftung January 11-12, 2018, Versoix, Switzerland 6 (hereinafter Bernasconi-Osterwalder et al (2018)).

⁹⁷⁷ Bernasconi-Osterwalder et al (2018) 6.

⁹⁷⁸ Article 2 (1) of PAIC.

⁹⁷⁹ The legal nature of PAIC stimulated a hot debate, see generally Hedar A 'The legal nature of the Draft Pan-African Investment Code and its relationship with international investment agreements' (2017) South Centre Investment Policy Brief 9.

⁹⁸⁰ Report: Meeting of Experts on the consideration of the Pan-African Investment Code, 30 November to 2 December, Kambala, Uganda 3.

⁹⁸¹ Agreement establishing the African Continental Free Trade Area, 2018 (hereinafter AfCFTA Agreement). The AfCFTA Agreement is a free trade agreement between and among 55 member states of the AU, which aims to establish a single continental market for goods and services, with free movement of business persons and capital. Art. 3 of the AfCFTA Agreement. The AfCFTA Agreement will contain a Protocol on Investment (to be negotiated in Phase II Negotiations), which will form an integral part of the Agreement.

⁹⁸² Agreement establishing the Tripartite Free Trade Area, 2015 (hereinafter TFTA Agreement). The TFTA Agreement is essentially (a trade in goods) agreement between EAC, SADC and COMESA, but contains rendezvous clauses expressing the intention of the TFTA parties to enter discussions (in Phase II Negotiation) pertaining to investment (as well as trade in services; competition policy, trade and development, and intellectual property rights). The TFTA Agreement is not yet legally binding; it will enter into force once ratified by 14 member states.

be adopted as a guiding instrument to be used as a template in the negotiations of the investment protocols in the AfCFTA and TFTA Agreements and other investment treaties negotiated by African countries.⁹⁸³

It can be contented that a binding PAIC would have significantly called for influencing the content of other regional instruments to achieve greater impact on investment regulation.⁹⁸⁴ The development of the PAIC is based on the idea that national, regional and continental dimensions must be taken into consideration in order to propose a conducive legal environment to promote the flow of investments in Africa and facilitate intra-African trade and promote cross-border investment.⁹⁸⁵ It forms part of a broader continental framework, namely Agenda 2063,⁹⁸⁶ based on a coherent strategic framework for development whose foundation is the promotion of a more inclusive and sustainable growth, the engine of structural transformation on the continent.⁹⁸⁷

The development of the PAIC forms part of Africa's attempt to shape a continental investment framework in accordance with its own developmental priorities, the so-called 'Africanisation of international law'.⁹⁸⁸ This was a reaction to the earlier models of investment regulation that have proven unfavourable to Africa's developmental interests.⁹⁸⁹ UNECA notes that the PAIC purports to develop 'a business climate to stimulate investment at national, regional and continental levels, and to develop a roadmap and strategy on how African countries can adopt this code to their own context'.⁹⁹⁰ The PAIC is therefore a guiding instrument for African countries in investment policy-making at the continental, regional and bilateral levels. As noted earlier, the PAIC can be a useful instrument for the envisaged investment protocols

⁹⁸³ See Report: Meeting of Member States Experts on the consideration of the Pan-African Investment Code (PAIC) and the African Inclusive Market Excellence Centre (AIMEC), held from 21 to 23 November 2016, Nairobi, Kenya.

⁹⁸⁴ Kane (2018) 1.

⁹⁸⁵ AU '2017 AU-ECA Conference of Ministers: Committee of experts' meeting' (2017) available at <https://www.tralac.org/news/article/11444-2017-au-eca-conference-of-ministers-committee-of-experts-meeting.html> (accessed 10 July 2018) (hereinafter AU (2017)).

⁹⁸⁶ Agenda 2063 is a strategic framework of the AU for the socio-economic transformation of the continent over the next 50 years. It builds on and seeks to accelerate the implementation of past and existing continental initiatives for growth and sustainable development. More information about Agenda 2063? Is available at <https://au.int/en/agenda2063>.

⁹⁸⁷ AU (2017) 1.

⁹⁸⁸ Mbengue & Schacherer (2017) 414-448. See also MM Mbengue 'The quest for a Pan-African Investment Code to promote sustainable development' (2016) available at <https://www.ictsd.org/bridges-news/bridges-africa/news/the-quest-for-a-pan-african-investment-code-to-promote-sustainable> (accessed 19 August 2018)>

⁹⁸⁹ Adeleke (2018) 8.

⁹⁹⁰ UNECA (2016) 36.

for the AfCFTA Agreement and the TFTA Agreement. Both the AfCFTA and TFTA Agreements are designed as legally binding instruments, thus shall be legally binding on states parties – those who sign and ratify or accede to them.

The non-binding character of the PAIC undermines the ability to forge a continental investment legal framework entrenching policy space. That is, African countries are not legally compelled to adopt the PAIC in negotiating their investment treaties. As an alternative, if African leaders intend to ensure that the PAIC actually becomes the guiding instrument for African countries in negotiating their investment treaties much more than adoption and best endeavour commitments is required. African countries have a record of not using their model investment treaties when negotiating investment agreements.⁹⁹¹ As an alternative, the AU Assembly could adopt a decision obligating African countries to make use of the PAIC when negotiating investment treaties, and the AU Assembly could also retain the authority to review all investment treaties concluded by AU member states subject to nullification if they do not comply with the PAIC standards.

Quite similar to this connotation, the European Union (EU) has adopted a framework for screening foreign direct investments which will see the European Commission approving FDI into EU countries.⁹⁹² This is crucial to ensure that the EU and its member states are equipped to protect their essential interests while remaining one of the most open investment regimes in the world. Another shortfall ancillary to this approach is the absence of supranationalism in Africa.⁹⁹³ Neither the AU Assembly nor its other institutions or organs are endowed with supranational powers akin accorded to the European Commission. African countries, as sovereigns, retain their powers to approve FDI into their territories.

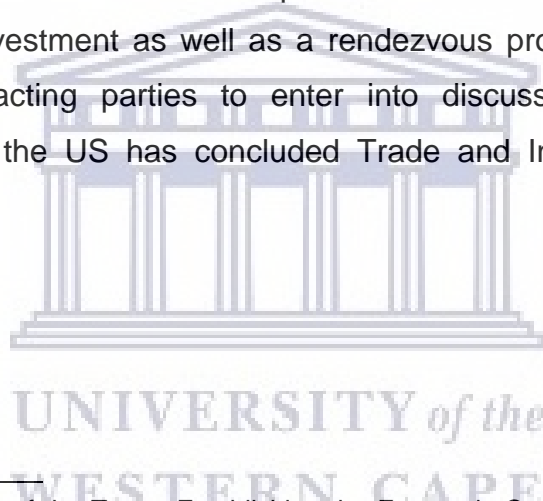
⁹⁹¹ De Brabandere (2017) 531. For example, SADC member states have adopted the SADC Model BIT but, except for South Africa which has partially borrowed from the Model BIT, no other SADC member state has ever made use of the Model BIT in negotiating investment agreements.

⁹⁹² See Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, 2019.

⁹⁹³ See generally Fagbayibo B 'From OAU to AU: Rethinking supranational governance in Africa' in Oloruntoba SO and Falola T (eds) *The palgrave handbook of African politics, governance and development* (2018) 771-80. This issue is discussed further in the next chapter.

5.4 AFRICA'S REGIONAL INVESTMENT LAW

Most founding treaties of the RECs indicate the intention of member states to cooperate in the area of investment.⁹⁹⁴ The EAC, COMESA, SADC and the Economic Community of West African States (ECOWAS) have adopted comprehensive regional investment instruments to establish investor-friendly regional zones and develop regional approaches towards FDI regulation.⁹⁹⁵ In addition to these RECs, there are other African regional blocs whose constituency spread across the continent and beyond that have adopted less detailed and less systematic compilations of substantive and procedural provisions on investment.⁹⁹⁶ Equally important, several central, eastern, western and southern African regional blocs have negotiated or are negotiating the Economic Partnership Agreements (EPAs) with the EU, which are essentially about trade but includes several provisions relevant for the promotion and protection of foreign investment as well as a rendezvous provision expressing the intention of the contracting parties to enter into discussions in the area of investment.⁹⁹⁷ Further, the US has concluded Trade and Investment Framework



⁹⁹⁴ See, for example: Art. 46 of the Treaty Establishing the Economic Community of Central African States, 1983; Art. 3 (2) of the Revised Treaty Establishing ECOWAS, 1993 (hereinafter ECOWAS Treaty); Ch 12 of the Treaty Establishing EAC, 1999 (hereinafter EAC Treaty); Ch 26 of the Treaty Establishing COMESA, 1997 (hereinafter COMESA Treaty); Art. 21 of the Treaty Establishing SADC, 1992 (hereinafter SADC Treaty); Art. 1 of the Treaty Establishing the Community of Sahel-Saharan States, 1998; and Art. 7 of the Treaty Establishing the Intergovernmental Authority on Development, 1996.

⁹⁹⁵ See generally Chidede T 'Investment policy landscape of the African regional economic communities, tripartite free trade area and continental free trade area' (2017) Trade Law Centre Trade Brief No. S17TB19/2017 (hereinafter Chidede (2017)).

⁹⁹⁶ For example, the Community Investment Code of the Economic Community of Great Lakes countries which was adopted on 31 January 1982 and entered into force on 4 October 1987; the Arab Maghreb Union Investment Agreement which was adopted on 23 July 1990 and is not yet in force; the Common Convention in Investments in the States of the Customs and Economic Union of Central Africa, adopted on 14 December 1965 and entered into force 1 April 1966; the Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference, adopted on 5 June 1981, entered into force on 23 September 1986; Agreement on Investment and Free Movement of Arab Capital Among Arab Countries, signed and entered into force 29 August 1970.

⁹⁹⁷ So far, only the SADC EPA between SADC EPA Group (namely Botswana, Lesotho, Mozambique, Namibia and eSwatini) and the EU is in operational. The SADC EPA has been provisionally implemented since 10 October 2016 pending the ratification by all EU members. The SADC EPA Group has ratified. More information on EPAs is available at <http://trade.ec.europa.eu/tradehelp/economic-partnership-agreements-epas>.

Agreements (TIFAs) with the EAC,⁹⁹⁸ COMESA,⁹⁹⁹ SACU¹⁰⁰⁰ and ECOWAS.¹⁰⁰¹ TIFAs do not impose standard investment obligations upon the parties but generally 'provide strategic frameworks and principles for dialogue on trade and investment issues between the United States and the other parties'.¹⁰⁰²

Among the abovementioned African regional investment instruments, only regional investment agreements within COMESA, SADC, ECOWAS and EAC are discussed in this chapter. These instruments will be discussed with a view to determine the extent to which they entrench the regulatory autonomy of host states. These regional instruments have been chosen because they reflect remarkable endeavours by African countries to preserve policy space and incorporate sustainable development considerations in investment regulation that deserve special consideration. These efforts will be critically examined with a view to ascertaining their ability to entrench the right to regulate in Africa's international investment law regime.

5.4.1 SADC

At the regional level, SADC member states¹⁰⁰³ have identified investment as an incentive to finance the projects and programmes designed to further the region's mandate of regional integration and socio-economic development.¹⁰⁰⁴ Further, Article 21 of the SADC Treaty¹⁰⁰⁵ recognises investment as an area of cooperation among member states, and commands SADC institutions to coordinate and harmonise member states' overall macroeconomic and sectoral policies and strategies, programmes and projects in the area of investment. It is for this reason that the SADC

⁹⁹⁸ Trade and Investment Framework Agreement between the US and EAC, which was signed on 16 July 2008 and entered on 16 July 2008.

⁹⁹⁹ Agreement between COMESA and the US Concerning the Development of Trade and Investment Relations, which was signed on 29 October 2001 and entered into force on 29 October 2001.

¹⁰⁰⁰ Cooperative Agreement between the US and the Southern African Customs Union to Foster Trade, Investment and Development, signed on 16 July 2008 and entered into force 16 July 2008.

¹⁰⁰¹ Trade and Investment Framework Agreement between the US and ECOWAS, which was signed on 5 August 2014 and not yet in force.

¹⁰⁰² United States Trade Representative 'Trade & Investment Framework Agreements' available at <https://ustr.gov/trade-agreements/trade-investment-framework-agreements> (accessed 28 April 2018).

¹⁰⁰³ Current SADC member states include Angola, Botswana, Comoros, Democratic Republic of Congo (DRC), eSwatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe.

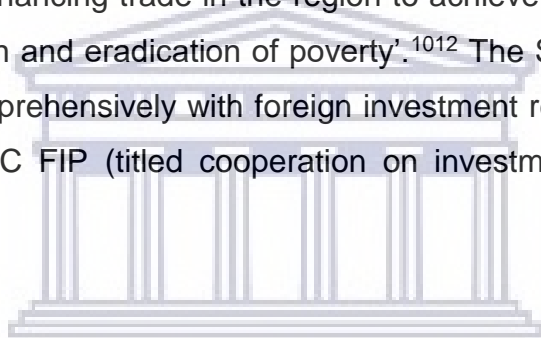
¹⁰⁰⁴ SADC 'Investment' available at <https://www.sadc.int/opportunities/investment/> (accessed 20 July 2018).

¹⁰⁰⁵ The SADC Treaty was signed and entered into force in 1992 and was subsequently amended.

Protocol on Finance and Investment (SADC FIP),¹⁰⁰⁶ the SADC Model BIT¹⁰⁰⁷ and SADC Investment Policy Framework¹⁰⁰⁸ were adopted.

5.4.1.1 SADC FIP

The SADC FIP is a legally binding instrument adopted to establish a favourable investment climate within the region so as to promote and attract FDI in the region.¹⁰⁰⁹ The Protocol aims to harmonise the financial and investment policies of the member states and align them with the SADC objectives,¹⁰¹⁰ and ensure that any changes to financial and investment policies in one state party do not demand undesirable adjustments in other state parties.¹⁰¹¹ Such harmonisation is to be ‘achieved through facilitation of regional integration, cooperation and coordination within finance and investment sectors with the aim of diversifying and expanding the productive sectors of the economy, and enhancing trade in the region to achieve sustainable economic development and growth and eradication of poverty’.¹⁰¹² The SADC FIP contains an Annex which deals comprehensively with foreign investment regulation in the region – Annex 1 of the SADC FIP (titled cooperation on investment). The Annex was amended in 2016.¹⁰¹³



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¹⁰⁰⁶ The SADC FIP was signed in 2006 and entered into force in April 2010 and was amended in 2016.

¹⁰⁰⁷ SADC Model BIT, 2012.

¹⁰⁰⁸ SADC Investment Policy Framework, 2015.

¹⁰⁰⁹ Article 2 of the SADC FIP. See also Chidede (2017) 3.

¹⁰¹⁰ The objectives of SADC are outlined in Article 5 of the SADC Treaty, and include:

- Achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through Regional Integration;
- Evolve common political values, systems and institutions;
- Promote and defend peace and security;
- Promote self-sustaining development on the basis of collective self-reliance, and the inter-dependence of Member States;
- Achieve complementarity between national and regional strategies and programmes;
- Promote and maximise productive employment and utilisation of resources of the region;
- Achieve sustainable utilisation of natural resources and effective protection of the environment;
- Strengthen and consolidate the long-standing historical, social and cultural affinities and links among the people of the Region.

¹⁰¹¹ Article 2 (1) of the SADC FIP. The Protocol ‘outlines SADC policy on investment, requiring member states to enact strategies to attract investors and facilitate entrepreneurship among their population. Member States are encouraged to implement legislation that creates a favourable environment for investment, such as tax incentives that ease financial burdens for private firms seeking to invest in the region’. SADC ‘Investment’.

¹⁰¹² Article 2 (2) of the SADC FIP.

¹⁰¹³ Agreement Amending Annex 1 of the SADC FIP, 2016.

Prior to its amendment, Annex 1 of the SADC FIP initially provided for substantive investment protections commonly found in traditional BITs – particularly aligned to early EU and US BIT Models – including, *inter alia*, expropriation, fair and equitable treatment, and ISDS international arbitration. For example, Article 5 of Annex 1 of the SADC FIP prohibited expropriation or nationalisation of investments ‘except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation’. Article 6 provided that investments and investors shall be accorded fair and equitable treatment (FET) in the territory of host states. Article 28 provided for ISDS through the SADC Tribunal,¹⁰¹⁴ the ICSID, or an international arbitrator or *ad hoc* arbitral tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).¹⁰¹⁵

Annex 1 of the SADC FIP was criticised by SADC member states largely due to the perception that its provisions fail to adequately balance investor protection and the regulatory autonomy of host states.¹⁰¹⁶ It was also mauled for containing investment protection standards inconsistent with the recommendations in the SADC Model BIT.¹⁰¹⁷ For instance, Annex 1 of the SADC FIP contained broad definitions of investments and investors,¹⁰¹⁸ provides for FET¹⁰¹⁹ and prompt, adequate and

¹⁰¹⁴ The SADC Tribunal was disbanded in 2011 by the SADC Heads of States after it ruled against Zimbabwe in 2008 in a dispute involving the expropriation of private land without compensation and found Zimbabwe to be in violation of Art. 4 and 6 of the SADC Treaty. In 2014, a new Protocol on the SADC Tribunal was adopted and signed to revive the SADC Tribunal which will not provide access to private parties for settlement of disputes. See generally Erasmus G ‘The new protocol for the SADC Tribunal: Jurisdictional changes and implications for SADC community law’ (2015) Trade Law Centre Working Paper No. US15WP01/2015.

¹⁰¹⁵ The UNCITRAL Arbitration Rules were initially adopted in 1976 and was amended in 2010 and 2013. ‘The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationship and are widely used in ad hoc arbitrations as well as administered arbitrations. The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.’ UNCITRAL ‘UNCITRAL Arbitration Rules’ available at <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration> (accessed 17 September 2018)

¹⁰¹⁶ Chidede T ‘Amendments of Annex 1 to the SADC Finance and Investment Protocol: Are they in force yet?’ (2017) available at <https://www.tralac.org/discussions/article/11875-amendments-of-annex-1-to-the-sadc-finance-and-investment-protocol-are-they-in-force-yet.html> (accessed 17 September 2018) (hereinafter Chidede ‘Amendments of Annex 1 to the SADC Finance and Investment Protocol: Are they in force yet?’ (2017)).

¹⁰¹⁷ Chidede ‘Amendments of Annex 1 to the SADC Finance and Investment Protocol: Are they in force yet?’ (2017).

¹⁰¹⁸ Article 1 of the original Annex 1 of the SADC FIP.

¹⁰¹⁹ Article 6 of the original Annex 1 of the SADC FIP.

effective compensation for expropriation¹⁰²⁰ as well as ISDS international arbitration subject to exhaustion of local remedies.¹⁰²¹ However, based on their experience with ISDS, SADC member states¹⁰²² raised legitimate concerns about the ISDS international arbitration system.¹⁰²³ The concerns include, *inter alia*, lack of legitimacy and transparency, huge costs of investment arbitration and arbitral awards, inconsistent and erroneous decisions, and forum shopping.¹⁰²⁴ In addition, SADC member states fretted that the Annex's ambiguous provisions such as expropriation and FET were likely to give international tribunals very wide interpretation discretion.¹⁰²⁵

These concerns resulted in the amendment of Annex 1 of the SADC FIP. The Amended Annex 1 of SADC FIP entered into force (became legally binding) in August 2017. The Amended Annex has reformulated the traditional treaty language, added new provisions and omitted certain provisions completely from the original SADC FIP. For example, the Amended Annex has retained provisions of the original Annex regarding the promotion and admission of investments, promotion of local and regional entrepreneurs as well as the use of public private partnerships to ensure development in SADC.¹⁰²⁶ It has also amended and replaced most of the original Annex's investment protection standards. For instance, it has limited the definition of investment and investors to include only those of a SADC member state investing in another member state (intra-SADC investors).¹⁰²⁷ This means that the scope of application of the Annex 1 of SADC FIP is now limited to intra-SADC investors. Kondo critiques that:

The new investor definition limits the usefulness of the SADC FIP. This is because for the most part investment in the SADC comes from investors from other countries rather than from SADC investors. As a result, the SADC FIP, extends protection to the

¹⁰²⁰ Article 5 of the original Annex 1 of the SADC FIP.

¹⁰²¹ Article 27 of the original Annex 1 of the SADC FIP.

¹⁰²² Particularly, Lesotho, Namibia, South Africa, Tanzania and Zimbabwe.

¹⁰²³ Chidede 'Amendments of Annex 1 to the SADC Finance and Investment Protocol: Are they in force yet?' (2017).

¹⁰²⁴ Chidede 'Amendments of Annex 1 to the SADC Finance and Investment Protocol: Are they in force yet?' (2017).

¹⁰²⁵ Chidede 'Amendments of Annex 1 to the SADC Finance and Investment Protocol: Are they in force yet?' (2017).

¹⁰²⁶ See Arts. 2, 3 and 4 of the Amended Annex 1 of the SADC FIP.

¹⁰²⁷ Article 1 of the Amended Annex 1 of the SADC FIP. See also Kondo T 'A Comparison with analysis of the SADC FIP before and after its amendment' (2017) 20 *PER: Potchefstroomse Elektroniese Regsblad* 6-9 (hereinafter Kondo (2017)).

investors who least need it. In addition, the definition also goes against the recommendation by South Africa that all foreign investments from any state be covered, subject to the condition that a dispute between an investor and a member state be adjudicated in terms of the domestic law of such a state. Furthermore, the definition does not resolve outstanding issues in the previous definition on the treatment of dual nationals and companies managed in effect in other jurisdictions.¹⁰²⁸

Furthermore, the Amended Annex replaced the FET standards with NT standards 'with respect the management, operation and disposition of investments in its territory'.¹⁰²⁹ This means that foreign investors and their investments shall be accorded the same treatment as domestic investors of the host states. With regards to expropriation compensation, the Amended Annex has replaced the payment of prompt, adequate and effective compensation with fair and adequate compensation.¹⁰³⁰ Such compensation is assessed in relation to the fair market value of the expropriated investment prior to expropriation.¹⁰³¹ The Amended Annex has removed ISDS international arbitration, and now provides for settlement of investor-state disputes through domestic remedies the host state.¹⁰³² Inter-state investment disputes are to be settled in a manner set out in the SADC Tribunal Protocol.¹⁰³³

However, SADC member states such as the DRC, Mozambique, Tanzania, Namibia and Eswatini still provide for ISDS international arbitration, while Botswana, South Africa, Lesotho, Malawi, Mauritius, Seychelles and Zimbabwe provide for ISDS through domestic courts in their regulatory frameworks.¹⁰³⁴ As such, to maintain a consistent regional investment framework at national level, SADC members must revisit their domestic regulatory frameworks and align them with the regional investment law, the Amended Annex.

¹⁰²⁸ Kondo (2017) 9.

¹⁰²⁹ Article 6 of the Amended Annex 1 of the SADC FIP.

¹⁰³⁰ Article 5 (1) of the Amended Annex 1 of the SADC FIP.

¹⁰³¹ Article 5 (2) of the Amended Annex 1 of the SADC FIP.

¹⁰³² Article 25 of the Amended Annex 1 of the SADC FIP.

¹⁰³³ Article 26 of the Amended Annex 1 of the SADC FIP. As noted earlier, a new SADC Tribunal Protocol is in pipeline provides jurisdiction of the Tribunal over inter-state disputes only. Private parties will not, in their own right, have *locus standi* before the SADC Tribunal. Therefore, if any inter-state investment disputes arise under the SADC FIP now, it cannot be settled in terms of the SADC Tribunal Protocol.

¹⁰³⁴ Ngobeni L & Fagbayibo B 'The investor-state dispute resolution forum under the SADC Protocol on Finance and Investment: Challenges and opportunities for effective harmonisation' (2015) 19 *Law, Democracy and Development* 183-84.

Most important for this study, the Amended Annex 1 of the SADC FIP has elaborated the provisions for host states' right to regulate and domestic health, safety and environmental protection more than the original Annex.¹⁰³⁵ Article 11 of the Amended Annex prescribes that:

State parties recognise that it is inappropriate to encourage investment by relaxing domestic health, safety and environmental measures and agree not to waive or otherwise derogate from, international treaties they have ratified, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in their territories, of an investment.

This provision reiterates state parties' international obligations on the protection of health, safety and environmental standards. The right for a host state to adopt environmental measures has increasingly become part of modern IIA practice and most treaties contain provisions specifically addressing the relationship between investment and the environment.¹⁰³⁶ The non-lowering standards are inserted to prevent race-to-the-bottom actions by host states in a bid to lure investments.¹⁰³⁷ Measures directed at environmental protection in IIAs guarantee the host states' right to regulate in the field of environment.¹⁰³⁸

The Amended Annex preserves the right of host states to take regulatory measures to ensure that development in its territory is consistent with sustainable development goals and legitimate social and economic policy objectives. In particular, Article 12 (1)-(3) of the Amended Annex stipulates that:

In accordance with customary international law and other general principles of international law, the host state has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic objectives.

¹⁰³⁵ See Arts. 13 and 14 of the original Annex 1 of the SADC FIP for environment protection and right to regulate, respectively.

¹⁰³⁶ Johnson L & Sachs L 'International investment agreements, 2011-2012: A review of trends and new approaches' in Bjorklund A (ed) *Yearbook on international investment law & policy 2012-2013* (2014) 234. See also Viñuales JE *Foreign investment and the environment in international law* (2015).

¹⁰³⁷ See Art. 1114 (2) of North American Free Trade Agreement, 1995 (hereinafter NAFTA) and Art. 12 of the US Model BIT.

¹⁰³⁸ See Moloo R & Jacinto J 'Environmental and health regulation: Assessing liability under investment treaties' (2011) 29 *Berkeley Journal of International Law* 1. See also Beharry CL & Kuritzky ME 'Going green: Managing the environment through international investment arbitration' (2015) 30 *American University International Law Review* 383. This issue was dealt with in part 3.3.1.

Except where the rights of a host state are expressly stated as an exception to the obligations of this Annex, a host state's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations and investments and host states, as set out in this Annex.

Non-discriminatory measures taken by a state party to comply with its international obligations under other treaties shall not constitute a breach of this Annex.¹⁰³⁹

Thus, host states preserve the right to regulate investments in accordance with their development goals and in line with CIL and other general principles of international law.¹⁰⁴⁰ This is contrary to the original Annex which merely provided that 'state parties are to exercise their right to regulate in the public interest and to adopt, maintain or enforce any measures that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns'.¹⁰⁴¹ This kind of provision establishes vague standards and can be broadly interpreted. Article 12 of the Amended Annex also requires host states to balance its regulatory autonomy with the rights and obligations on investments provided under the SADC FIP.¹⁰⁴² This is a remarkable attempt to balance the rights and obligations of host states and investors.

5.4.1.2 SADC Model BIT

In 2012, SADC Model BIT was adopted to serve as a guiding instrument to member states when negotiating any investment agreements and is open for use by non-SADC countries as well.¹⁰⁴³ The SADC Model BIT is a model investment treaty and, thus, non-legally binding instrument. It contains numerous provisions relevant to the right to regulate. For instance, it recommends member states to negotiate investment treaties including investor rights and obligations with respect to corruption,¹⁰⁴⁴ provision of

¹⁰³⁹ Article 12 of the Amended Annex 1 of the SADC FIP.

¹⁰⁴⁰ The CIL and general principles of international law on the right to regulate are discussed in Chapter 3 of this study.

¹⁰⁴¹ Article 14 of the SADC FIP.

¹⁰⁴² Article 12 (2) of the Amended Annex 1 of the SADC FIP.

¹⁰⁴³ The specific goal SADC Model BIT 'was to develop a comprehensive approach from which Member States can choose to use all or some of the model provisions as a basis for developing their own specific Model Investment Treaty or as a guide through any given investment treaty negotiation ... Each Member State will ultimately be responsible for its choice of clauses and the final result of any particular BIT negotiation. ... The SADC Model BIT is not intended to be and is not a legally binding document. Rather, it provides advice to governments that they may consider in any future negotiations they enter into relating to an investment treaty. It also provides an educational tool for officials, and may serve as the basis of training sessions for SADC government officials.' Commentary of the SADC Model BIT 3.

¹⁰⁴⁴ Article 10 of the SADC Model BIT.

information,¹⁰⁴⁵ human rights, environment and labour¹⁰⁴⁶ as well as corporate governance,¹⁰⁴⁷ among others. The SADC Model BIT further encourages host states to adopt and negotiate treaties protecting investors and investments, at the same time preserving host states' right to regulate in public interest. Article 20 of the SADC Model BIT provides for the right to regulate in the exact wording of Article 12 of the Amended Annex (indicated above).¹⁰⁴⁸

Further, the SADC Model BIT contains a right to pursue development goals. Article 21 (1)-(3) of the SADC Model BIT affirms:

Notwithstanding any other provision of this Agreement, a State Party may grant preferential treatment in accordance with their domestic legislation to any enterprise so qualifying under the domestic law in order to achieve national or sub-national regional development goals.

Notwithstanding any other provision of this Agreement, a state party may

- a. support the development of local entrepreneurs, and
- b. seek to enhance productive capacity, increase employment, increase human resource capacity and training, research and development including of new technologies, technology transfer and other benefits of investment through the use of specified requirements on investors made at the time of the establishment or acquisition of the investment and applied during its operation.

Notwithstanding any other provision of this Agreement, a state party may take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Agreement.

The above provision is in part from the original SADC FIP. In particular, Article 21 (2) of the SADC Model BIT was borrowed from the original SADC FIP but was extended to ensure that performance requirements may be imposed on foreign investors by host states without fear of breaching investment treaty obligations as well as enable host governments to yield the social and economic benefits of FDI.¹⁰⁴⁹ These provisions will help reinforce the right of states to utilise performance requirement obligations

¹⁰⁴⁵ Article 12 of the SADC Model BIT.

¹⁰⁴⁶ Article 15 of the SADC Model BIT.

¹⁰⁴⁷ Article 16 of the SADC Model BIT.

¹⁰⁴⁸ This confirms the argument that most amendments of the Amended Annex largely derive from the SADC Model BIT.

¹⁰⁴⁹ Commentary of the SADC Model BIT 41.

when imposed at the outset of an investment. In addition, Article 21 (3) of SADC Model BIT encapsulates the national or black economic empowerment (BEE) kind of measures. BEE measures are domestic policies mainly aimed at redressing the historical exclusion of local communities or citizens from participating in the mainstream economic activities and are implemented in many African countries including South Africa¹⁰⁵⁰ Tanzania¹⁰⁵¹ and Zimbabwe,¹⁰⁵² to mention but a few.

Further, the SADC Model BIT encourages member states to adopt fair and administrative treatment instead of FET, and to provide fair and adequate compensation for expropriation. With regards to investment dispute settlement, the SADC Model BIT provides for resolution of disputes through consultation, mediation and arbitration under the ICSID, UNCITRAL or a regional forum of one or both parties or any arbitration institution agreed upon by the parties.¹⁰⁵³ Noteworthy is that the Commentary of the SADC Model BIT warns states against incorporating ISDS through international arbitration. More precisely, Article 26 of the Commentary contains a Special Note which notes:

The Drafting Committee was of the view that the preferred option is not to include investor-state dispute settlement. Several states are opting out or looking at opting out of investor-state mechanisms, including Australia, South Africa and others. However, if a state does decide to negotiate and include this, the text below provides comprehensive guidance for this purpose. This text is drawn primarily from the US and Canadian Model BITs, other recent treaties, and existing arbitration rules.

¹⁰⁵⁰ The BEE policy seeks to remedy historical exclusion of black South Africans (historically disadvantaged persons) from the economic mainstream by increasing their participation in the management, ownership and control of business activities, and it is statutorily enabled through the Broad-Based Black Economic Empowerment Act 46 of 2013.

¹⁰⁵¹ Tanzania's national economic empowerment policies is implemented through the National Economic Empowerment Act 2004.

¹⁰⁵² Zimbabwe indigenisation and economic empowerment policy is statutorily enabled by the Indigenisation and Economic Empowerment Act of 2008. This Act was amended in 2018, see 'Amendments to Indigenisation & Economic Empowerment Act' available at https://www.google.com/search?q=zimbabwe+indigenisation+act&rlz=1C1GCEA_enZA795ZA796&oq=zimbabwe+indigenisation+act&aqs=chrome69i57j0.7601j0j7&sourceid=chrome&ie=UTF-8 (accessed 18 March 2019).

¹⁰⁵³ See Art. 28 of the SADC Model BIT.

Despite the warning, SADC member states are still subscribed to treaties and laws that accords foreign investors recourse to international arbitration.¹⁰⁵⁴ This confirms the argument that African countries rarely make use of their Model BITs when negotiating investment treaties.¹⁰⁵⁵

From the above analysis, one would applaud the SADC Model BIT for attempting to drive public policy space issues into the heart of investment regulation. According to UNCTAD, the SADC Model BIT:

Represents a distinct effort to enhance the sustainable development dimension of future international investment agreements (IIAs), by including provisions on environmental and social impact assessments, measures against corruption, standards for human rights, environment, labour, corporate governance and the right of states to regulate and pursue their development goals.¹⁰⁵⁶

The SADC Model BIT reflects a new thinking about investment governance by recommending an approach to investment governance that deviates quite sharply from the status *quo* provided by the BITs currently in force in southern Africa.¹⁰⁵⁷ Nevertheless, since its adoption, only the South African Protection on Investment Act¹⁰⁵⁸ and the Amended Annex 1 of the SADC FIP have been developed based on the SADC Model BIT. It is therefore submitted that, although the SADC Model BIT reflects concerted attempt to safeguard the right to regulate, it is weak in strengthening the right to regulate in the international legal framework for investment due to its non-legally binding nature.

¹⁰⁵⁴ For example, DRC, Mozambique, Tanzania, Namibia and eSwatini. For a discussion, see Ngobeni L & Fagbayibo B 'The investor-state dispute resolution forum under the SADC Protocol on Finance and Investment: Challenges and opportunities for effective harmonisation' (2015) 19 *Law, Democracy and Development* 183-84.

¹⁰⁵⁵ See De Brabandere E 'Fair and equitable treatment and (full) protection and security in African investment treaties: Navigating between generally and contextual specificity' (2017) 18 *Journal of World Investment & Trade* 531 (hereinafter De Brabandere (2017)).

¹⁰⁵⁶ UNCTAD 'SADC moving forward on model bilateral investment treaty template' (2012) available at <http://unctad.org/fr/pages/newsdetails.aspx?OriginalVersionID=210> (accessed 21 September 2018).

¹⁰⁵⁷ Woolfrey S 'The SADC Model Bilateral Investment Treaty Template: Towards a new standard of investor protection in southern Africa' Trade Law Centre Trade Brief No. D14TB03/2014 1.

¹⁰⁵⁸ Protection on Investment Act 22 of 2015.

5.4.1.3 SADC Investment Policy Framework

In 2015, the SADC Investment Policy Framework was adopted with the objective to facilitate regional coordination in improving investment frameworks and policies in the region. Similar to the SADC Model BIT, the SADC Investment Policy Framework is non-binding. The SADC Investment Policy Framework contributes to the SADC Regional Action Plan on Investment, building upon the best practices from the OECD and non-OECD countries. It was 'developed around four thematic pillars: lessening the costs of restriction to foreign investment; improving legal regimes and mechanisms to enhance investor protection; coordinating effective regimes for tax incentives for investment; and facilitating long-term investment in infrastructure'.¹⁰⁵⁹ It also addresses various investment-related issues such as coherent and transparent investment environment, security and protection of investors' rights, market access and competition, response and inclusive investment, and regional and international integration.¹⁰⁶⁰

From the above analysis, it is safe to conclude that SADC, as a region, has made some progressive strides towards entrenching regulatory autonomy of host states in their regional investment regimes. The SADC Model BIT is a milestone towards this progress, but it is, however, worrisome that the SADC Model BIT is rarely used by the member states in negotiating investment treaties. Additionally, the Amended Annex 1 of the SADC FIP remarkably attempt to enshrine the host state right to regulate in accordance with CIL and general principles of international law, and to take other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic objectives. Against this backdrop, it is therefore commendable for SADC member states to ensure that they include the elements enshrined in the Amended Annex 1 of SADC FIP, SADC Model BIT, SADC Investment Policy Framework in all their investment treaties among themselves or with third parties. This is crucial in entrenching a predictable and coherent investment regime within the SADC region,

¹⁰⁵⁹ OECD 'Investment Policy Framework for the Southern African Development Community' available at <http://www.oecd.org/daf/inv/investment-policy/sadc-regional-investment-policy-framework.htm> (accessed 28 July 2017).

¹⁰⁶⁰ Chidede T 'Amendments of Annex 1 to the SADC Finance and Investment Protocol: Are they in force yet?' (2017).

one that preserves their regulatory freedom and capable of promoting sustainable development within SADC.

5.4.2 COMESA

COMESA member states¹⁰⁶¹ acknowledge investment as an essential tool to achieve their development goals. For example, the member states have agreed, in Chapter 26 of the COMESA Treaty, to cooperate in the promotion and protection of private investments within the region. In 1998, the COMESA leaders declared the regional *bloc* a common investment area. It was in this context that the Investment Agreement for the COMESA Common Investment Area (COMESA Common Investment Agreement)¹⁰⁶² was adopted in May 2007. In 2017, the Common Investment Agreement was revised to integrate modern trends (sustainable development considerations) in the investment arena.¹⁰⁶³ This part of the chapter initially discusses the original COMESA Common Investment Agreement and later the revised version of the Agreement to ascertain the extent to which policy space and development considerations have been carved out therein.

5.4.2.1 COMESA Common Investment Agreement

The COMESA Common Investment Agreement envisages the establishment of a competitive common investment area – with a coordinated investment cooperation programme, free movement of capital, skilled labour and professionals, and technology, and where the private sector fully participate in investment and related activities.¹⁰⁶⁴ With regards to skilled labour and professionals, priority shall be given to workers who possess the same qualifications and are available in the member state or any other member state.¹⁰⁶⁵ This, of course, is aimed at allowing member states to boost investment-led job creation within and among member states.

¹⁰⁶¹ Current COMESA member states are Burundi, Comoros, DRC, Djibouti, Egypt, Eritrea, eSwatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia and Zimbabwe.

¹⁰⁶² Investment Agreement for the COMESA Common Investment Area (2007) (hereinafter COMESA Common Investment Agreement).

¹⁰⁶³ COMESA 'Revised COMESA Common Investment Agreement tabled before Legal Affairs Committee' available at <http://www.comesa.int/revised-comesa-common-investment-agreement-tabled-before-legal-affairs-committee/> (accessed 29 September 2018).

¹⁰⁶⁴ Article 3 of the COMESA Common Investment Agreement.

¹⁰⁶⁵ Article 16 of the COMESA Common Investment Agreement.

The stated objective of the COMESA Common Investment Agreement is to establish a competitive common investment area:

With a more liberal and transparent investment environment among member states in order to: substantially increase the free flow of investments into COMESA from both COMESA and non-COMESA sources; jointly promote COMESA as an attractive investment area; strengthen and increase the competitiveness of COMESA's economic activities; gradually eliminate investment restrictions and conditions which may impede investment flows and the operation of investment projects in COMESA.¹⁰⁶⁶

The COMESA Common Investment Agreement provides for FET in accordance with CIL,¹⁰⁶⁷ NT and MFN treatment standards¹⁰⁶⁸ for investments. Article 14 (1) of the COMESA Common Investment Agreement prescribes that FET 'includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world'.¹⁰⁶⁹ The COMESA Common Investment Agreement prohibits expropriation, except for public interest, on a non-discriminatory basis, in accordance with due process of law, and upon payment of prompt, adequate compensation.¹⁰⁷⁰

The Agreement applies to investments within the region that are owned or controlled by COMESA nationals and by foreign nationals.¹⁰⁷¹ It also applies to investment controlled or owned by foreign nationals (non-COMESA investors and investments) provided they maintain substantial business¹⁰⁷² activity in the member state in which

¹⁰⁶⁶ Article 2 of the COMESA Common Investment Agreement.

¹⁰⁶⁷ CIL standard of treatment of aliens is prescribed as the minimum standard of treatment to be afforded to covered investments and this means that any treatment in addition to or beyond what is required by that standard is not allowed. Article 14 (1) of the COMESA Common Investment Agreement.

¹⁰⁶⁸ Article 17 and 19 of the COMESA Common Investment Agreement, respectively.

¹⁰⁶⁹ Article 14 (3) of the COMESA Common Investment Agreement notes that 'for greater certainty, member states understand that different member states have different forms of administrative, legislative and judicial systems and that member states at different levels of development may not achieve the same standards at the same time' As such, the Art. 14 does not establish a single international standard in this context.

¹⁰⁷⁰ Article 20 of the COMESA Common Investment Agreement.

¹⁰⁷¹ Article 1 of the COMESA Common Investment Agreement.

¹⁰⁷² Article 1 (4) (iii) of the COMESA Common Investment Agreement provides that 'the concept of "substantial business activity" requires an overall examination, on a case-by-case basis, of all the circumstances, including, inter alia: (a) the amount of investment brought into the country; (b) the number of jobs created; (c) its effect on the local community; and (d) the length of time the business has been in operation'.

it is duly constituted or organised. This is contrary to the Amended Annex 1 of SADC FIP which covers only intra-SADC investors and investments.

Furthermore, COMESA member states are allowed to temporarily, partially or wholly exclude certain economic activities from foreign investment.¹⁰⁷³ The limitation of access by foreign investors to certain economic sectors is justified in the context of preserving the regulatory autonomy of the host states. This allows member states to exempt from foreign investment economic sectors which are of relevance to public interest or essential national security. These provisions are applied as exceptions to the NT clause.¹⁰⁷⁴

In addition, COMESA member states are allowed to adopt or enforce measures designed to protect national security, public morals, human, animal, plant life or health, and the environment.¹⁰⁷⁵ The member states are required to adopt and enforce such measures provided they are not arbitrary or unjustifiably discriminatory between investors or restrict investment flows.¹⁰⁷⁶ The COMESA member states are not precluded from applying measures aimed at fulfilling their obligations under the UN Charter with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.¹⁰⁷⁷

The COMESA Common Investment Agreement provides for the imposition of safeguard measures.¹⁰⁷⁸ The tradition of imposing safeguard measures is common in international trade practice¹⁰⁷⁹ and rare or non-existent in international investment treaty practice. In the international trade context, a safeguard is a provisional safety valve providing countries the flexibility to escape legally their liberalisation commitments in order to assist the endangered domestic industry.¹⁰⁸⁰ Such measures are required to be non-discriminatory among member states, consistent with Article

¹⁰⁷³ See Article 1 (13)-(14) of the COMESA Common Investment Agreement. The economic activities temporarily excluded from foreign investment will be annexed in Annex D of the COMESA Common Investment Agreement, while Annex D will contain a list of the sensitive list – partially or wholly excluded from the foreign investment.

¹⁰⁷⁴ Articles 18 of the COMESA Common Investment Agreement.

¹⁰⁷⁵ Article 22 (1) of the of the COMESA Common Investment Agreement.

¹⁰⁷⁶ Article 22 (1) of the of the COMESA Common Investment Agreement.

¹⁰⁷⁷ Article 22 (3) (a) of the of the COMESA Common Investment Agreement.

¹⁰⁷⁸ Article 24 of the of the COMESA Common Investment Agreement.

¹⁰⁷⁹ WTO 'Safeguard measures' available at https://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm (accessed 06 August 2018).

¹⁰⁸⁰ Sykes AO 'Protectionism as a "safeguard": A positive analysis of the GATT 'escape clause' with normative speculations' (1991) 58 *The University of Chicago Law Review* 255.

VIII of the Agreement of the IMF,¹⁰⁸¹ necessary to avoid damage to the commercial, economic or financial interests of any other member states and must be temporary.¹⁰⁸²

However, the COMESA Investment Agreement does not contain comprehensive investor obligations. Rather it merely provides that investors and their investment shall comply with all applicable domestic measures of the member state in which their investments are made or constituted.¹⁰⁸³ This provision is too narrow and vague in ascertaining the obligations of investors and their investments within COMESA.

In relation to dispute settlement, the COMESA Investment Agreement provides for ISDS and inter-state dispute resolution through negotiation and mediation.¹⁰⁸⁴ If a dispute between member states is not settled through negotiation and mediation, such dispute may be referred to an arbitral tribunal constituted under the COMESA Court of Justice in accordance with Article 28 (b) of the COMESA Treaty,¹⁰⁸⁵ an independent arbitral tribunal; or the COMESA Court of Justice.¹⁰⁸⁶ Alike, if a dispute between an investor and the host state is not settled through negotiation and mediation, the investors may submit the dispute to a competent court of the host state, COMESA Court of Justice in accordance with Article 28 (b) of the COMESA Treaty. According to Article 28 (1) (c) (i)-(iv) of the COMESA Investment Agreement, investors have an option to submit the dispute to international arbitration:

- Under the International Centre for the Settlement of Investment Disputes (ICSID) Convention, provided that both the home state of an investor and Member State in whose territory the investment has been made are parties to the ICSID Convention;
- Under the ICSID Additional Facility Rules, provided that either the non-disputing party or the respondent is a party to the ICSID Convention;
- Under the UNCITRAL Arbitration Rules; or

¹⁰⁸¹ Article VIII of the Agreement of the IMF provides the general obligations of the countries in relation to, inter alia, avoidance of restrictions on current payments, avoidance of discriminatory currency practices, convertibility of foreign-held balances, and furnishing of information.

¹⁰⁸² Article 25 (2) of the COMESA Common Investment Agreement. The COMESA Common Investment Area Committee shall determine the rules applicable to the procedures under this provision.

¹⁰⁸³ Article 13 of the COMESA Investment Agreement.

¹⁰⁸⁴ Article 26 of the COMESA Investment Agreement.

¹⁰⁸⁵ Article 28 (b) of the COMESA Treaty provides that the COMESA Court of Justice shall have jurisdiction to hear and determine any matter arising from a dispute between the member states regarding this COMESA Treaty if the dispute is submitted to it under a special agreement between the member states concerned.

¹⁰⁸⁶ Article 27 of the COMESA Investment Agreement.

Under any other arbitration institution or under any other arbitration rules, if the both parties to the dispute agree.

The COMESA Investment Agreement further provides for counter-claims by member states. Article 28 (9) of the COMESA Investment Agreement allows a member state complained against 'to assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages'.

5.4.2.2 Revised COMESA Investment Agreement

The Common Investment Agreement was revised in 2017 and the revised version is undergoing legal scrubbing and is not yet publicly available.¹⁰⁸⁷ This part, therefore, succinctly highlights some of the proposed provisions of the Revised COMESA Common Investment Agreement pertinent to the safeguarding of the right to regulate. The Revised COMESA Common Investment Agreement intends to promote investments that will foster sustainable development in COMESA member states, and designate COMESA as an attractive investment region to investors from within and outside COMESA.¹⁰⁸⁸ The Revised COMESA Common Investment Agreement contains several essential novelties meant to balance the rights and obligations of host states and investors as well as to safeguard host state policy space.

The proposed Article 19 (2) of the Revised COMESA Common Investment Agreement permits member states to adopt BEE-kind of measures aimed at redressing historically based economic inequalities 'suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups'.¹⁰⁸⁹ This is justified in the context of preserving the regulatory autonomy of the host states to support the economic development and equality of their citizens.¹⁰⁹⁰ This provision is applied as a

¹⁰⁸⁷ The Revised COMESA Common Investment Agreement is not in the public domain but on file with the author.

¹⁰⁸⁸ Proposed Art. 2 (a) and (e) of the Revised COMESA Common Investment Agreement.

¹⁰⁸⁹ Proposed Art. 19 (2) of the Revised COMESA Common Investment Agreement.

¹⁰⁹⁰ South Africa and Zimbabwe are among the African countries that have adopted robust policies aimed at redressing historically based economic disparities: the BEE, and the indigenisation and economic empowerment policies.

specific exception to NT and MFN standards embedded in Article 17 and 18 of the Revised COMESA Common Investment Agreement, respectively.

Further, the Revised COMESA Common Investment Agreement explicitly provides for the member states' 'right to deny an investor the benefits' provided under the Agreement 'and to grant special and differential treatment to any investor and investment in such cases, where the investor is engaged in activities inimical to the economic and security interest of the member state.'¹⁰⁹¹

In addition, the Revised COMESA Common Investment Agreement allows member states to adopt or enforce measures designed to protect national security, public morals, human, animal, plant life or health, and the environment.¹⁰⁹²

The proposed Article 24 of the Revised COMESA Common Investment Agreement further provides for the imposition of safeguard measures. COMESA states are allowed to impose safeguard measures if, as a result of opening up economic activities pursuant to the Agreement, the member state is suffering or is threatened with any serious balance of payment or external financial difficulties.¹⁰⁹³ COMESA member states are permitted to adopt such safeguard measures provided they are: temporary and to be progressively eliminated; non-discriminatory among member states; compatible with Article VIII of the Agreement of the IMF;¹⁰⁹⁴ and not detrimental to other members' commercial, economic and financial interests.¹⁰⁹⁵

Perhaps more importantly, the Revised COMESA Common Investment Agreement contains a detailed segment on investor and investment obligations.¹⁰⁹⁶ The proposed Article 25 of the Revised COMESA Common Investment Agreement requires investors and their investments to comply with all applicable domestic measures of the member state in which their investments are made or constituted.¹⁰⁹⁷ COMESA investors and

¹⁰⁹¹ Proposed Art. 22 (3) of the Revised COMESA Common Investment Agreement.

¹⁰⁹² Proposed Art. 22 (1) of the Revised COMESA Common Investment Agreement.

¹⁰⁹³ Proposed Art. 24 (2) of the Revised COMESA Common Investment Agreement.

¹⁰⁹⁴ Article VIII of the Agreement of the International Fund, 1944 (as amended) regulates payment restrictions. Article VIII (2) and (3), for example, hat members shall not impose or engage in certain measures, namely restrictions on the making of payments and transfers for current international transactions, discriminatory currency arrangements, or multiple currency practices, without the approval of the IMF. For a discussion, see Baumgartner U & Hagan S 'Article VIII Acceptance by IMF Members: Recent Trends and Implications for the Fund' (2006) Paper prepared by the Monetary and Financial Systems and Legal Departments 1-18.

¹⁰⁹⁵ Proposed Article 24 (3) of the Revised COMESA Common Investment Agreement.

¹⁰⁹⁶ Proposed Part Four of the Revised COMESA Common Investment Agreement.

¹⁰⁹⁷ Proposed Art. 25 of the COMESA Common Investment Agreement.

investments are also required to comply with national and internationally accepted standards of corporate governance;¹⁰⁹⁸ adhere to socio-political obligations;¹⁰⁹⁹ refrain from bribery and corruption;¹¹⁰⁰ observe the UN Guiding Principles on Business and Human Rights with modifications necessary for local circumstances;¹¹⁰¹ comply with their corporate social responsibility;¹¹⁰² and protect, manage and improve the environment.¹¹⁰³

Although quite unusual in investment treaty practice, the proposed Article 33 of the Revised COMESA Common Investment Agreement permits the host state to initiate proceedings against a COMESA investor or investment in its domestic courts for breaching of obligations under the Agreement.¹¹⁰⁴ This is an innovative provision that gives the host states the right to file a claim against investors and investments for breaching their social, economic or political obligations in the territory of the host state. Such provision is not found in traditional BITs. Equally, Article 36 (7) of the Revised COMESA Common Investment Agreement provides for counter claims by member states.¹¹⁰⁵ The counter claim provision will allow a COMESA member state complained against to 'assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages'.¹¹⁰⁶

It is submitted that the content of the Revised COMESA Common Investment Agreement has been brought more in line with the evolution of international law, especially about the protection of the environment, social and human rights, transparency, corruption, public scrutiny, economic development, and corporate responsibility. Very innovatively, the Revised COMESA Common Investment Agreement introduces some of obligations incumbent upon foreign investors and their

¹⁰⁹⁸ Proposed Art. 26 of the Revised COMESA Common Investment Agreement.

¹⁰⁹⁹ Proposed Art. 27 of the Revised COMESA Common Investment Agreement

¹¹⁰⁰ Proposed Art. 28 of the Revised COMESA Common Investment Agreement.

¹¹⁰¹ Proposed Art. 29 of the Revised COMESA Common Investment Agreement.

¹¹⁰² Proposed Art. 30 of the Revised COMESA Common Investment Agreement.

¹¹⁰³ Proposed Arts. 31 and 32 of the Revised COMESA Common Investment Agreement.

¹¹⁰⁴ Proposed Art. 33 of the Revised COMESA Common Investment Agreement. The application of this provision would largely depend on the application of treaties in the municipal law of the member states.

¹¹⁰⁵ Proposed Art. 36 (7) of the Revised COMESA Common Investment Agreement.

¹¹⁰⁶ Proposed Art. 28 (9) of the Revised COMESA Common Investment Agreement.

home states with respect to their investments in the host states. If the Revised COMESA Common Investment Agreement enters into force and is effectively implemented by member states it will go a long way in facilitating host state policy space implementation in Africa. However, it is worrisome that the COMESA Common Investment Agreement was adopted over a decade ago and is still not in force. This leads one to question the readiness and seriousness of African countries to accept international investment rules that safeguarding the right to regulate.

5.4.3 ECOWAS

ECOWAS member states¹¹⁰⁷ acknowledge that investment is crucial for the region's development.¹¹⁰⁸ Article 3 (2) (ii) of the ECOWAS Treaty requires member states to harmonise their national investment policies 'leading to the adoption of a single community investment code'. As a consequence, the Supplementary Act Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (ECOWAS Supplementary Act) was adopted.¹¹⁰⁹ In 2003, ECOWAS member states also adopted the ECOWAS Energy Protocol¹¹¹⁰ which regulates investment in the energy sector and shall be briefly examined in this part *vis-à-vis* its ability to preserve the regulatory freedom of ECOWAS host states.

5.4.3.1 ECOWAS Supplementary Act

The Supplementary Act¹¹¹¹ is legally binding on ECOWAS member states and institutions. It is one of the most advanced investment treaties that is conscious of the unique context of African countries and adopts a rights-based approach towards development.¹¹¹² The declared objective of the Supplementary Act is to promote

¹¹⁰⁷ Current ECOWAS member states include Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

¹¹⁰⁸ In June 2017, ECOWAS in partnership with the World Bank Group launched an ECOWAS Investment Climate Scorecard aimed at enabling 'both the ECOWAS Commission and national policymakers of the member states to identify investment barriers both nationally and regionally; track the progress of national investment-climate and investment-policy reforms; share good practices and proposed investment reforms both nationally and regionally; and encourage the creation of a transparent and attractive investment climate to enhance private sector-led development in West Africa'. World Bank 'ECOWAS investment climate scorecard roundtable event for member states' (2017) available at <http://www.worldbank.org/en/events/2017/06/13/ecowas-investment-climate-scorecard-roundtable-event-for-member-states-and-the-private-sector-in-west-africa> (accessed 28 July 2018).

¹¹⁰⁹ Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, 2008 (hereinafter ECOWAS Supplementary Act).

¹¹¹⁰ ECOWAS Energy Protocol, 2003 (hereinafter ECOWAS Energy Protocol).

¹¹¹¹ The Supplementary Act was adopted in 2008 and entered into force in January 2009.

¹¹¹² Adeleke (2018) 144.

investment that supports sustainable development of ECOWAS.¹¹¹³ The ECOWAS Supplementary Act applies to intra-ECOWAS investors and investments. It provides for NT, MFN and minimum regional standards of investment treatment.¹¹¹⁴ Minimum regional standards entail that each ECOWAS member state shall accord to intra-ECOWAS investors or their investments, treatment in accordance with CIL, including FET and reasonable protection and security under the domestic law.¹¹¹⁵

Additionally, the ECOWAS Supplementary Act prohibits expropriation of investments except for a public purpose, on a non-discriminatory basis, in accordance with due process of law, and upon payment of appropriate compensation, which is equivalent to the fair market value of the seized investment immediately before the date of expropriation.¹¹¹⁶ Member states are prohibited from relaxing their labour, public health, safety or environmental standards to lure investment into their territories.¹¹¹⁷ In accordance with Article 24 (2) of the ECOWAS Supplementary Act, 'host states may impose performance requirements to promote domestic development benefits from investments. Measures adopted prior to the completion of the host state measures prescribing the formalities for establishing an investment shall be deemed to be in compliance with this Supplementary Act. If such measures are taken after the completion of the host state measures prescribing the formalities for establishing an investment, they shall be subject to the provisions of this Supplementary Act'. Such performance requirements may include conditions to export a given level or percentage of goods or services, to achieve a given level or percentage of domestic content, to purchase, use or accord a preference to goods produced or services provided in its territory, to purchase goods or services from persons in its territory, to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange flows associated with such investment, to restrict sales of goods or services in its territory that such investment produces by relating such sales to the volume or value of its exports or foreign exchange earnings; and similar measures intended to promote domestic development.¹¹¹⁸

¹¹¹³ Article 3 of the ECOWAS Supplementary Act.

¹¹¹⁴ See Art. 5 for NT, Article 6 for MFN treatment, and Art. 7 for minimum regional standards.

¹¹¹⁵ Article 7 of the ECOWAS Supplementary Act.

¹¹¹⁶ Article 8 of the ECOWAS Supplementary Act.

¹¹¹⁷ Article 20 of the ECOWAS Supplementary Act.

¹¹¹⁸ Article 24 (3) of the ECOWAS Supplementary Act.

Additionally, host states can apply measures that it considers necessary for the fulfilment of its obligations under the UN Charter with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.¹¹¹⁹ The ECOWAS supplementary Act do not prohibit host states to adopt or apply any measures aimed at promoting the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by long-term historical discrimination in its territory.¹¹²⁰ Article 38 (2) of the ECOWAS Supplementary Act permits member states to implement measures as are necessary to avoid or abate a balance of payments emergency.

The ECOWAS Supplementary Act provides for ISDS and inter-state dispute settlement through the use of good offices, conciliation, mediation or any other agreed dispute resolution process.¹¹²¹ Article 33 (5) of the ECOWAS Supplementary Act provides that 'member states may also establish national mediation centres to facilitate the resolution of disputes between parties and investors or investments, taking into account regional rules, customs and traditions on investment'. If a dispute between an investor and member state is not settled through good offices, conciliation or mediation, it may be submitted to arbitration under a national court, any national machinery for the settlement of investment disputes, the relevant national court of the member states, or referred to the ECOWAS Court of Justice.¹¹²²

The entire Chapter III of the ECOWAS Supplementary Act is dedicated to obligations and duties of investors. The Chapter contains investors obligations and duties including, among others, complying with environmental and socio-cultural, labour standards, anti-corruption practices, hygiene, security, health and social welfare rules and human rights. Investors are also required to comply with corporate governance and corporate social responsibility practices; and they are liable for any civil actions leading to significant damage, personal injuries or loss in the host state.

¹¹¹⁹ Article 37 of the ECOWAS Supplementary Act.

¹¹²⁰ Article 38 (1) of the ECOWAS Supplementary Act.

¹¹²¹ Article 33 of the ECOWAS Supplementary Act.

¹¹²² Article 33 (6)-(7) of the ECOWAS Supplementary Act.

Quite uniquely, the ECOWAS Supplementary Act contains rights and obligations of home states.¹¹²³ The Act enjoins home states to assist and facilitate cross-border investments and provide information necessary for the host state to meet its obligations, perform its duties in relation to an investor and investment. The ECOWAS Supplementary Act also requires home states to provide 'information relevant to the home state standards that might apply under like circumstances to the investment proposed by its investor, including but not limited to the home state's environmental and social public health impact assessment process'.¹¹²⁴ Home states are also required to provide any relevant information that might help tribunals to determine whether there has been a contravention of an anti-corruption obligation by foreign investors in the host state.¹¹²⁵ Home states are also required to make sure that their domestic legal systems and rules provide for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of foreign investors for damages resulting from alleged acts or decisions made by foreign investors in relation to their investments in the territory of other ECOWAS member states.¹¹²⁶

5.4.3.2 ECOWAS Energy Protocol

The ECOWAS Energy Protocol is a sectoral investment agreement. It is not yet in force, therefore not yet legally binding on member states.¹¹²⁷ The ECOWAS Energy Protocol was inspired by the Energy Charter Treaty.¹¹²⁸ As a matter of fact, most of the substantive provisions contained in the ECOWAS Energy Protocol replicate those of the Energy Charter Treaty.

¹¹²³ Chapter VI of the ECOWAS Supplementary Act.

¹¹²⁴ Article 28 (2) of the ECOWAS Supplementary Act.

¹¹²⁵ Article 30 (3) of the ECOWAS Supplementary Act.

¹¹²⁶ Article 29 of the of the ECOWAS Supplementary Act.

¹¹²⁷ Article 39 of the ECOWAS Energy Protocol. The Protocol will enter into force once ratified by nine member states

¹¹²⁸ The Energy Charter Treaty is a multilateral agreement on cooperation in the energy sector. It signed on 17 December 1994 and entered into force on 16 April 1998. The preamble of the ECOWAS Energy Protocol recognised the Energy Charter Treaty as the 'leading internationally accepted basis for the promotion, cooperation, integration and development of energy investment projects and energy trade among sovereign nations'. The study is written at a time when the European Commission is seeking for the mandate to negotiate the modernisation of the investment provisions of the Energy Treaty Charter. See European Commission Recommendation for a Council Decision authorising the entering into negotiations on the modernisation of the Energy Charter Treaty COM (2019) 231 Brussels. For more publications or excerpts on this subject, see Transnational Dispute Management 'Modernisation of the Energy Charter Treaty (ECT)' (2019) available at <https://www.transnational-dispute-management.com/journal-browse-issues-toc.asp?key=83> (accessed 15 May 2019).

The ECOWAS Energy Protocol exclusively applies to any investment within the energy sector, and seeks to establish a legal framework in order to promote long-term cooperation in the energy field, with a view to achieving increased investment in the energy sector, and increased energy trade in the region.¹¹²⁹ Article 5 of the ECOWAS Energy Protocol prohibits host states from imposing trade-related investment measures inconsistent with the provisions of Articles III or XI of the GATT. Article III of GATT prohibits the application of internal tax and regulatory measures to imported or domestic products so as to afford protection to domestic production. The purpose of the Article is, more precisely, to afford national treatment on internal taxation and regulation or to avoid protectionism by way of applying internal tax and regulatory measures. Article XI of GATT provides for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'. Article XI applies 'to all measures instituted or maintained by a member prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charge'.¹¹³⁰

Chapter III of the ECOWAS Energy Protocol is dedicated to investment promotion and protection. It provides for NT and MFN standards and that investment is admitted in accordance with the domestic law of the host state. The Protocol provides for prompt, adequate and effective compensation to any investment that has suffered loss because of war or other armed conflict, state of national emergency or civil disturbance in the host state. The ECOWAS Energy Protocol prohibits expropriation of investment except for public purpose, in a non-discriminatory manner, in accordance with due process of law and upon payment of prompt, adequate and effective compensation. Such compensation should be equivalent to the fair market value of the investment immediately before expropriation. The Protocol also allows for the transfer of funds related to investments (for example, capital, profits, unspent earnings or payments of compensation). ECOWAS member states recognise their sovereignty over energy resources and undertake to facilitate access to energy resources, inter alia, by allocating licences, concessions and contracts to explore, exploit or extract energy resources.

¹¹²⁹ Article 2 of the ECOWAS Energy Protocol.

¹¹³⁰ Panel Report in *Japan — Trade in Semiconductors* adopted 4 May 1988, BISD 35S/116 para 104.

On the scale of allowing right to regulate and policy implementation, the ECOWAS Supplementary Act can be perceived as a remarkable attempt to answer to some of the main concerns that have been raised regarding the current regulation of foreign investment, namely the need to rebalance the rights and obligations of various stakeholders as well as to better preserve the host state's policy space. The ECOWAS Supplementary Act introduces some of the obligations incumbent upon foreign investors and host states. With regard to the consequence of violations of these obligations by foreign investors, it is worth noting that in the ECOWAS Supplementary Act, a breach of the duties related to corruption may deprive foreign investors of the access to international arbitration. For the time being, however, disputes concerning alleged violations of the obligations imposed upon foreign investors remain outside the scope of arbitral clauses.¹¹³¹

5.4.4 EAC

The EAC Treaty¹¹³² contains provisions relevant to investment. For example, Chapter 12 of the EAC Treaty provides for cooperation in investment and industrial development. Article 80 (f) of the EAC Treaty declares member states¹¹³³ ambition to 'harmonise and rationalise investment incentives including those relating to taxation of industries particularly those that use local materials and labour with a view to promoting the Community as a single investment area'. Further, in Article 127 of the EAC Treaty, member states undertake to improve the business environment through the promulgation and implementation of investment codes. To that end, the EAC Model Investment Code¹¹³⁴ was adopted. The EAC does not yet have a binding regional investment treaty. The EAC Model Investment Code will therefore be discussed in relation to its ability to safeguard the right to regulate.

¹¹³¹ Denters & Gazzini (2017) 492.

¹¹³² The EAC Treaty was signed in 1999 and came into force in 2000.

¹¹³³ Current EAC member states include Burundi, Kenya, Tanzania, Uganda, Rwanda and South Sudan.

¹¹³⁴ EAC Model Investment Code, 2006 (hereinafter EAC Model Investment Code).

5.4.4.1 EAC Model Investment Code

The EAC Model Investment Code is not a binding legal instrument but rather a model whose features may be incorporated by the EAC member states into their national laws.¹¹³⁵ The EAC Model Investment Code was adopted with the overall aim to improve the business climate within the region and to harmonise investment laws and policies of member states. It seeks to facilitate the adoption of transparent, predictable regulations and laws for investors, especially in matters relating to compensation for loss of investment and dispute settlement mechanisms. The EAC Model Investment Code provides for national treatment and non-discrimination of foreign investors, prohibits expropriation except in public interest in accordance to the due process of the law and on payment of fair and adequate compensation within a reasonable time, allows for free transfer of assets and capital, and permits investors to submit investment disputes to international arbitration under ICSID rules.

More importantly, the EAC Model Investment Code incorporates provisions on special economic zones, covering fiscal and non-fiscal incentives allowed, as well as ceilings or limits to them. This provision is quite infrequent in regional investment treaties, regulations, laws or policies not only in Africa but across the globe.

Overall, it must be submitted that the adoption of the EAC Model Investment Code is a step in the right direction towards developing a regional approach to investment – one that safeguards the policy space for host states and promote sustainable development within the EAC region. Then again, history has taught that African states generally ignore their own Model BITs, and when negotiating and signing BITs with third parties, Model BITs of the European or North-American states are followed.¹¹³⁶

5.5 AFRICAN INVESTMENT REGULATION AT BILATERAL AND NATIONAL LEVELS

This part of the chapter briefly discusses the foreign investment regulatory framework for Africa at the bilateral level and national levels with regards to their ability to entrench the right to regulate. This discussion is, of course, not intended to be exhaustive but a mere discussion of bilateral and national investment governance frameworks that are

¹¹³⁵ Chidede 'Amendments of Annex 1 to the SADC Finance and Investment Protocol: Are they in force yet?' (2017) 11.

¹¹³⁶ De Brabandere (2017) 531.

intended to reinforce the host state's right to regulate in the regulation of investments. At the national level, South Africa's national investment regulation approach will be discussed in more detail as an illustration in this regard. Other countries' national investment approaches will be referred to passively or for illustration purposes.

5.5.1 BITs

Despite the extensive legislative infrastructure at the disposal of the international investment community for the promotion and protection of investors, it is well known that BITs have emerged as the main legal instruments to protect investors, provide them with rights and benefits, and deal with investment disputes.¹¹³⁷ Generally, when investing in another jurisdiction, foreign investors deal with legal uncertainty, threat of expropriation and high general transaction costs, among other things. BITs have been a mechanism to mitigate such political risks and uncertainty.¹¹³⁸ Such investment legal instruments protect investors from unlawful expropriation or nationalisation and unfair discriminatory treatment, and guarantee investors with repatriation of their profits as well as recourse to international arbitration in cases where their rights have been violated by the host government.

Traditionally, BITs have been concluded between developing and developed countries (North-South BITs), but the trend has changed in recent decades as BITs are also being concluded among developing countries from Africa, Asia and Latin America (South-South BITs).¹¹³⁹ Alschner and Skougarevskiy reveals that the South-South BITs contain more public policy elements than North-South BITs.¹¹⁴⁰

To date, African countries have signed numerous BITs between themselves and with non-African countries.¹¹⁴¹ The greater part of these treaties were concluded in the late 1990s and early 2000s.¹¹⁴² The content of these BIT have been largely dictated by

¹¹³⁷ Johnson (2010) 920.

¹¹³⁸ Leo B 'Where are the BITs? How US bilateral investment treaties with Africa can promote development' (2010) Centre for Global Development Essay available at www.cgdev.org/content/publications/detail/1424333 (accessed 10 July 2018).

¹¹³⁹ Layrea & Sucker (2012) 10. See also Schill SW 'Special issue: Dawn of an Asian century in international investment law' (2015) 16 *The Journal of World Investment & Trade* 765; and Poulsen L 'The Politics of South-South Bilateral Investment Treaties' in Broude T, Busch ML & Porges A (eds) *The politics of international economic law* (2011).

¹¹⁴⁰ Alschner & Skougarevskiy (2016) 10.

¹¹⁴¹ See UNCTAD International Investment Agreement Database.

¹¹⁴² See UNCTAD International Investment Agreement Database.

developed countries particularly from Western Europe and North America,¹¹⁴³ and African countries were merely investment rule consumers. Van Harten has argued that 'developing and transition states were presented with take-it-or-leave-it offers from major capital exporters to conclude investment treaties that, it was said, would attract foreign investment in exchange for commitment by the capital-importing countries not to expropriate or discriminate against foreign investors'.¹¹⁴⁴ This provides the basis for a reasonable suspicion of pro-investor bias existing in the contemporary international investment law system, which is dominated by BITs.

The current network of traditional BITs concluded by Africa with western partners are biased in favour of foreign investors – who seem to enjoy greater privileges than their African or domestic counterparts when investing in Africa.¹¹⁴⁵ This generally comes at the expense of countries' ability to formulate and pursue autonomous development policies and has not proven to attract more investment into the continent.¹¹⁴⁶ UNECA maintains that:

Host countries also find themselves exposed to the risk of legal disputes ... In the current investor-to-state dispute settlement system (ISDS) which governs many of the BITs African countries are signatories to, disputes arising are often subject to discretionary interpretations on the part of international tribunals, which adds an element of uncertainty around the potential liability of African States. Furthermore, when found liable, African countries are often subject to hefty fines, which put a further strain on scant government resources and narrow the policy space when designing policies which touch on investment.¹¹⁴⁷

BITs signed by African countries are weak in leveraging and imposing obligations on investors and tend to favour foreign investors without addressing questions of economic sustainability for the continent.¹¹⁴⁸ According to Johnson:

¹¹⁴³ Layrea & Sucker (2012) 10.

¹¹⁴⁴ Van Harten G 'A critique of international investment treaties' in Singh K & Ilge B (eds) *Rethinking bilateral investment treaties: Critical issues and policy issues* (2016) 50.

¹¹⁴⁵ Masamba (2014).

¹¹⁴⁶ UNECA 'The Pan African Investment Code and the Investment Chapter of the CFTA: Opportunities for rationalising investment regulation in Africa' Concept Note for the High-Level International Investment Agreements Conference 2017 available at <http://investmentpolicyhub.unctad.org/Upload/Documents/UNECA%20Final%20Side%20event%20Agenda.pdf> (accessed 16 August 2018) (hereinafter UNECA (2017)).

¹¹⁴⁷ UNECA (2017).

¹¹⁴⁸ UNECA (2016) 39.

BITs have failed to achieve their full potential as tools for economic development in Africa ... BITs vary little across individual African countries and rarely deviate from a standard format that has developed over time. They all include five basic provisions: scope of application, conditions of entry of FDI, standards for treatment, protection against expropriation and compensation, and investment dispute settlement ... BITs and the whole discourse surrounding them have become so focused on foreign investment, they tend to ignore important domestic considerations to the detriment of ... host countries.¹¹⁴⁹

Closely related to the foregoing, BITs have established a situation in which foreign investors can bypass local courts of the host states and submit their investment claims directly to international arbitral institutions including, *inter alia*, the ICSID, the UNCITRAL, the International Chamber of Commerce, the International Court of Arbitration, the Permanent Court of Arbitration, the International Court of Justice, the Arbitration Institute of the Stockholm Chamber of Commerce, and the London Court of International Arbitration.

To-date, a growing number of these cases were brought against African countries.¹¹⁵⁰ A recent survey done by UNECA reveals that there have been 111 recorded ISDS cases involving African countries since 1972: 68 of which ended up in awards, settlement or were discontinued, while 44 are still pending.¹¹⁵¹ ICSID has been responsible for 107 cases, while the UNCITRAL tribunals have handled 3 cases.¹¹⁵² The conclusion of BITs comes with great risks. The increase in BITs worldwide correlates with an increase in investment dispute proceedings. The more BITs African countries enter into, the more they will be parties in dispute settlement proceedings. Egypt is the African country with the highest number of BITs, with 100 BITs,¹¹⁵³ and coincidentally, the African country with the highest number of ISDS cases as a respondent with 29 cases.¹¹⁵⁴

¹¹⁴⁹ Johnson (2010) 928-29.

¹¹⁵⁰ See UNCTAD Investment Dispute Settlement Database available at <http://investmentpolicyhub.unctad.org/ISDS>.

¹¹⁵¹ UNECA (2016) 24.

¹¹⁵² UNECA (2016) 24.

¹¹⁵³ See UNCTAD International Investment Agreements Database.

¹¹⁵⁴ See UNCTAD Investment Dispute Settlement Database.

There has been growing opposition of ISDS international arbitration among African countries.¹¹⁵⁵ Overall, this antipathy has recently and widely surfaced across the world, even with traditional capital-exporting countries like the US,¹¹⁵⁶ the EU countries, Australia and Canada sharing the same view.¹¹⁵⁷ Key issues raised by BITs antagonists has been the preference of investor rights over public interest or host state's policy space.¹¹⁵⁸ ISDS international arbitration opponents have also raised concerns about the international arbitral tribunals' legitimacy to assess government actions as well as their lack of transparency, independence, impartiality and inconsistent application and interpretation of investment treaty provisions.¹¹⁵⁹ ISDS international arbitration has caused many African governments to pay hefty fines. For example, African countries like Libya, Tanzania and Zimbabwe have recently been confronted with exorbitant international arbitration claims. For example, in the *Al-Kharafi v Libya* case,¹¹⁶⁰ an international tribunal held the government of Libya liable for over US\$900 million for a cancelled investment project where the investor had only invested US\$100 thousand in fees in Libya.

ISDS international arbitration has also discouraged African governments from adopting regulations for public interests, resulting in regulatory chill effect or undermining state sovereignty.¹¹⁶¹ For example, in *Foresti v South Africa*,¹¹⁶² foreign investors challenged South Africa's set of BEE policies claiming that they violated

¹¹⁵⁵ See Kidane (2018); and Mohamadieh K & Uribe D 'The rise of investor-state dispute settlement in the extractive sectors: Challenges and considerations for African countries' (2016) South Centre Research Paper 65.

¹¹⁵⁶ In the ongoing negotiations to amend the NAFTA, the US wants to opt-out of the ISDS mechanism in the NAFTA.

¹¹⁵⁷ See Vandevelde K 'A comparison of the 2004 and 1994 US Model BITs: Rebalancing investor and host country interests' (2008/2009) 1 *Yearbook of International Investment Law and Policy* 283; Gagné G & Morin JF 'The evolving American policy on investment protection: Evidence from recent FTAs and the 2004 Model BIT' (2006) 9 *Journal of International Economic Law* 363; and Dodge WS 'Investor-state dispute settlement between developed countries: Reflections on the Australia-United States Free Trade Agreement' (2006) 39 *Vanderbilt Journal of Transnational Law* 1-37.

¹¹⁵⁸ Menon T & Issac G 'Developing country opposition to an investment court: Could state-state dispute settlement be an alternative?' (2018) *Kluwer Arbitration Blog* available at <http://arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/> (accessed 22 February 2018) (hereinafter Menon & Issac (2018)).

¹¹⁵⁹ Billiet J *International investment arbitration: A Practical handbook* (2016) 84-5.

¹¹⁶⁰ *Mohamed Abdulmohsen Al-Kharafi & Sons Co and others v The Government of the State of Libya* 2013 available at <https://www.italaw.com/sites/default/files/case-documents/italaw1554.pdf> (accessed 4 September 2018).

¹¹⁶¹ Menon & Issac (2018).

¹¹⁶² *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01 (hereinafter *Foresti v South Africa*).

South Africa's investor protection obligations of no expropriation without compensation, FET and national treatment standards enshrined in BITs signed by South Africa with Italy and Luxembourg.¹¹⁶³ In 2013, South Africa decided to review and unilaterally terminate its BITs with several EU countries and Switzerland.¹¹⁶⁴ The South African government expressed its desire to protect policy space, discontentment with the ISDS international arbitration in relation to arbitrary and inconsistent awards, and a dearth of sufficient evidence that BITs promote FDI in South Africa.¹¹⁶⁵ The South African government argued that the BITs signed by the country immediately after independence (1994), *inter alia*, provided more protection to foreign investors as compared to domestic investors; and allowed foreign investors to challenge the public policy measures of the government before international arbitral tribunals.¹¹⁶⁶

Notwithstanding the foregoing discussion on traditional BITs signed by African countries, it must also be acknowledged that other African countries are negotiating or have recently concluded BITs among themselves or with external investment partners which make reference to right to regulate (regulatory autonomy, policy space, flexibility to introduce new regulations), sustainable development, social investment aspects (human rights, labour, health, corporate social responsibility, poverty reduction), or environmental issues (plant or animal life, biodiversity or climate change). Most of these BITs were concluded in the twenty-first century and refer to the right to regulate, sustainable development, social investment and environmental aspects in their preambles.¹¹⁶⁷ Some of them contain general exceptions, for example, for the protection of human, animal or plant life or health, or the conservation of natural resources.¹¹⁶⁸ These exclusions

¹¹⁶³ *Foresti v South Africa* paras 58 and 70.

¹¹⁶⁴ See Schlemmer EC 'An overview of South Africa's bilateral investment treaties and investment policy' (2016) 31 *ICSID Review - Foreign Investment Law Journal* 167-93.

¹¹⁶⁵ South Africa argued that most of its FDI is originating from countries it has no BITs with. Klaaren J & Schneiderman D 'Investor-state arbitration and SA's bilateral investment treaty policy framework review' (2009) Mandela Institute Comment submitted to the DTI available at <http://wiredspace.wits.ac.za/jspui/bitstream/10539/9205/1/SABITPolicyReviewCommentsKlaarenandSchneiderman10Aug2.pdf> (accessed 10 September 2018).

¹¹⁶⁶ See also Carim X 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa' (2015) South Centre Investment Policy Brief available at https://www.southcentre.int/wp-content/uploads/2015/08/IPB4_IAs-and-Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf (accessed 10 September 2018).

¹¹⁶⁷ See, for example, South Africa-Ethiopia BIT, 2008; Nigeria-Morocco BIT, 2015; Nigeria-Austria BIT, 2013; Angola-Brazil BIT, 2015; Brazil-Malawi BIT, 2015; and Benin-Canada BIT, 2013.

¹¹⁶⁸ For example, Nigeria-Morocco BIT, 2016; Kenya-Japan BIT, 2016; Madagascar-South Africa BIT, 2006; Eritrea-Uganda BIT, 2001; Burundi-Comoros BIT, 2001; and Botswana-Egypt BIT, 2003.

somehow enhance the protection of legitimate public welfare such public health, safety and environment similar to exceptions contained in Article XX of the GATT.

The inclusion of these public policy considerations in BITs with African countries has been because of change in treaty policy by countries such as Canada.¹¹⁶⁹ However, these provisions – specifically the preambles – are weak when it comes to the enforcement of right to regulate in public interest and sustainable development. Under international law, preambles are however crucial in the interpretation of treaties. Article 31 (1) of the Vienna Convention on the Law of Treaties (VCLT)¹¹⁷⁰ stipulates that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’¹¹⁷¹ Article 31 (2) of the VCLT further provides that the context of a treaty includes the text, preamble,¹¹⁷² annexes, any related agreements made between all parties in connection with the conclusion of the treaty, and any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as a related instrument. Thus ‘the meaning must merge in the context of the treaty as a whole (including the text, its preamble and annexes, and any agreement or instrument related to the treaty and drawn up in connection with its conclusion) and in the light of its object and purpose’.¹¹⁷³ Nonetheless, history has shown that international arbitral tribunals, in practice, do not rely on preambular language to influence the interpretation of BITs.¹¹⁷⁴ That said, negotiating substantive treaty provisions which are legally binding and enforceable is of paramount importance, particularly when preserving the right to regulate in public interest. Such strategic considerations will avoid the potential exploitation of BIT rules by foreign investors and arbitral tribunals.

¹¹⁶⁹ See Canada’s BITs with Tanzania, Cameroon, Burkina Faso, Mali, Rwanda, Benin, Ivory Coast, Nigeria, Senegal and Mozambique.

¹¹⁷⁰ Vienna Convention on the Law of Treaties, 1969 (hereinafter VCLT).

¹¹⁷¹ The provisions of Art. 31 (1) of the VCLT strikes a balance between the treaty and its context, object and purpose, and also try to avoid broad interpretation of the provisions of a treaty by tribunals.

¹¹⁷² In practice, however, arbitral tribunals do not depend on the preamble to influence interpretation of the treaty’s text. Beharry & Kuritzky (2015) 391.

¹¹⁷³ Crawford J *Brownlie’s principles of public international law* 8 ed (2012) 381.

¹¹⁷⁴ See Beharry & Kuritzky (2015) 391.

5.5.1 South Africa's approach towards investment regulation

Following the termination of BITs, South Africa enacted the Protection of Investment Act in 2015 to protect (domestic and foreign) investment in accordance with its Constitution, and in a manner which balances the public interests and rights and obligations of investors.¹¹⁷⁵ The Protection of Investment Act has entered into force.¹¹⁷⁶ The Act is consistent, in many variables, with the SADC Model BIT and Amended SADC FIP.¹¹⁷⁷ Among other things, the Protection of Investment Act provides investors with no recourse to international arbitration for the resolution of their investment disputes.¹¹⁷⁸ Disputes between the government of South Africa and foreign investors will be settled through domestic courts and administrative tribunals.¹¹⁷⁹ In terms of section 13 (5) of the Protection of Investment Act, the South African government may provide case-by-case consent¹¹⁸⁰ to inter-state international arbitration.¹¹⁸¹

Importantly, section 12 (1) of the Protection of Investment Act recognises the sovereign right to regulate investments in public interests may include the adoption of measures aimed at:

- a) redressing historical, social and economic inequalities and injustices;
- b) upholding the values and principles espoused in section 195 of the Constitution;¹¹⁸²
- c) upholding the rights guaranteed in the Constitution;

¹¹⁷⁵ Section 4 of the Protection of Investment Act. See, for discussion, Forere MA 'The new South African Protection of Investment Act: Striking a balance between attraction of FDI and redressing the Apartheid legacies' in Morosini F & Badin MRS (eds) *Reconceptualising International Investment Law from the Global South* (2018) 251-283; Woofrey S 'The Emergence of a New Approach to Investment Protection in South Africa' in Schill SW, Tams CJ, Hofmann R (eds) *International Investment Law and Development: Bridging the Gap* (2015) 266-290.

¹¹⁷⁶ See 'Protection of Investment Act in Effect' available at <http://www.sabinetlaw.co.za/economic-affairs/articles/protection-investment-act-effect> (accessed 20 September 2018).

¹¹⁷⁷ The government of South Africa lobbied the other SADC member states to amend the SADC Protocol on Finance and Investment to align it with its national investment legislation, Protection of Investment Act. 'Summary of the key amendments to Annex 1 of the SADC Finance and Investment Protocol' available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150922summary.pdf> (accessed 12 September 2018).

¹¹⁷⁸ Section 13 of the Protection of Investment Act.

¹¹⁷⁹ Section 13 (4) of the Protection of Investment Act.

¹¹⁸⁰ "Under case-by-case consent approach, national laws offer the possibility of ISDS but require additional act of consent by host state government before an ISDS arbitration can go forward". UNCTAD (2019) 10.

¹¹⁸¹ Section 13 (5) of the Protection of Investment Act.

¹¹⁸² Section 195 of the Constitution provides for basic values and principles governing public administration.

- d) promoting and preserving cultural heritage and practices, indigenous knowledge and biological resources related thereto, or national heritage;
- e) fostering economic development, industrialisation and beneficiation;
- f) achieving the progressive realisation of socio-economic rights; or
- g) protecting the environment and the conservation and sustainable use of natural resources.¹¹⁸³

Section 12 (1) of the Protection of Investment Act further allows the government to take measures necessary for the fulfilment of its obligations in regard to the maintenance, compliance or restoration of international peace and security, or the protection of the security interests, including the financial stability of the country. Adeleke has supported these provisions stating that they ensure the protection of investment in South Africa and do not hamper the government's legitimate obligation to protect public interests.¹¹⁸⁴

Worth noting is that section 10 of the Protection of Investment Act provides for investors' right to property in terms of section 25 of the Constitution. This means that foreign investment will be protected from expropriation in accordance with section 25 of the Constitution. However, the government of South Africa is considering amending section 25 of the Constitution to allow expropriation without compensation.¹¹⁸⁵ In the meantime, section 25 (2)-(4) of the Constitution stipulates that:

Property may be expropriated only in terms of law of general application —

- a) for a public purpose or in the public interest; and
- b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court

The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

- (a) the current use of the property;

¹¹⁸³ Section 12 (1) of the Protection of Investment Act.

¹¹⁸⁴ Adeleke (2018) 135.

¹¹⁸⁵ See Parliamentary Monitoring Group 'Join the debate on Section 25 of "The Property Clause"' (2018) available at <https://www.dailymaverick.co.za/article/2018-06-06-join-the-debate-on-section-25-of-the-property-clause/> (accessed 6 September 2018).

- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.

For the purposes of this section—

the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and property is not limited to land.¹¹⁸⁶

However, most – if not all – existing BITs ratified by South Africa demand payment of compensation for expropriation in different terms.¹¹⁸⁷ Equally important, CIL which is municipal law in South Africa,¹¹⁸⁸ recognises states’ right to expropriate foreign property subject to compensation.¹¹⁸⁹ It is not yet certain how section 25 of the Constitution is going to be amended, but there is a risk of violating BITs and customary international investment law obligations if the South African government expropriates investment property without compensation. That is, South Africa could face numerous investor-state arbitration claims. Leon has warned the South African government that the ‘existing foreign investors, in particular, will need to consider what rights and recourse might be available to them under international law to mitigate the risk of expropriation without compensation’.¹¹⁹⁰

5.6 CONCLUSION

The present Chapter has provided a detailed overview of the IIAs concluded by African countries at the global, continental and regional levels with a view to determining whether the agreements maintain policy space for African countries to pursue their public policy goals. This chapter has revealed several issues that need to be considered to ensure that Africa’s efforts to preserve policy space and to achieve investment-led sustainable development are not frustrated.

¹¹⁸⁶ Section 25 (2)-(4) of the Constitution.

¹¹⁸⁷ See BITs signed by South Africa at the UNCTAD International Investment Agreements Database. See also Adeleke (2018) 136-137.

¹¹⁸⁸ Section 232 of the Constitution.

¹¹⁸⁹ See the discussion in chapter 3.

¹¹⁹⁰ Leon P ‘Land expropriation without compensation: SA risks breaching international law, being massively sued’ 2018 available at <https://www.biznews.com/sa-investing/2018/07/25/land-expropriation-risks-breaching-international-law> (accessed 7 September 2018).

First, the chapter has reviewed Africa investment regulation at the continental level. The review has shown that there is not yet an African-wide binding instrument on investment. African states have, under the auspices of the AU, adopted a pan-African investment code, the PAIC. The PAIC is a non-binding instrument shaped in the form of a model investment treaty to serve as a guide for AU members in negotiating investment treaties. An appraisal of PAIC shows that it was designed from an African perspective and in line with the international initiatives to craft investment treaties that promote responsible investments and sustainable development. The PAIC contains several Africa-specific and innovative features which presumably makes it a unique model investment treaty. It contains several important novelties meant to re-balance the rights and obligations of the various stakeholders as well as to safeguard host state policy space. The PAIC includes substantive provisions on right to regulate, sustainable development, social investment and environmental aspects as well as investors' obligations. However, the non-binding nature of the PAIC undermines the impact of this instrument on AU members.¹¹⁹¹ In addition, African countries rarely use their model investment treaties when negotiating investment agreements.¹¹⁹²

After discussing African continental investment law, the chapter considered regional investment governance in Africa with a view to determining the existence of protection of policy space. The discussion has revealed that only a handful of African RECs have espoused regional investment regulations¹¹⁹³ which allow them to determine appropriate investment policies that address their economic interests and protect the right to regulate in public interest at the same time defining applicable rules for investment by being rule providers rather than rule takers.¹¹⁹⁴ These regional investment agreements provide for favourable rules that protect the interests of African countries, such as ensuring the state's right to regulate, the use of domestic courts to resolve investment disputes, the imposition of investor obligations and adherence to human rights.¹¹⁹⁵ These regional agreements provide a robust background to further develop investment rules framework that places policy space, sustainable development and human rights at the centre of investment priorities.¹¹⁹⁶

¹¹⁹¹ Kane (2018).

¹¹⁹² De Brabandere (2017) 531.

¹¹⁹³ ECOWAS Supplementary Act, SADC FIP and COMESA Common Investment Agreement.

¹¹⁹⁴ Adeleke (2018) 158.

¹¹⁹⁵ Adeleke (2018) 158.

¹¹⁹⁶ Adeleke (2018) 163.

SADC and ECOWAS have legally binding regional agreements. COMESA's Common Investment Agreement is not yet operational, while the EAC's Model Investment Code is a non-binding instrument for member states to design their national investment laws and policies. As submitted earlier, African States do not make use of their own Model BITs, but rather follow Model BITs of the European or North-American states when negotiating and signing BITs with third parties.¹¹⁹⁷ Further, other regional blocs have less detailed and less systematic compilation of substantive and procedural provisions on investment. Also important to highlight is that a preponderance of countries with regional investment treaties have national investment regulatory investment frameworks inconsistent with their regional and international investment approach.

Equally important, it is imperative for other RECs with no regional investment policies to adopt their regional investment treaties that will establish a common investment regime at national and international level that speaks to their economic interests and protect their right to regulate investments in public interests. Such investment agreements could be used in negotiating BITs with third parties. Some of the aspects of these aspects which conceivably serve the purpose of preserving policy space best and that may be used in the way forward are enshrined in the Revised COMESA Common Investment Agreement, the SADC Model BIT, Amended Annex 1 of the SADC FIP and ECOWAS Supplementary Act. These treaties contain elements that attempt to rebalance the rights and obligations of the various stakeholders as well as to safeguard host state policy space including provisions on the protection of the environment, social and human rights, transparency, corruption, public scrutiny, economic development, and corporate responsibility.

The present chapter has also shown that, despite having these regional investment agreements, African countries have concluded BITs with African and non-African countries. BITs are designed in a manner that constrains the policy space of governments to implement measures in the public interest where these have a perceived negative impact on investor rights. The BITs concluded by African countries place constraints on government efforts to require investors to build linkages to domestic firms, upgrade skills or transfer technology. Further, these BITs exhibit a pro-investor bias over governments' right to regulate in the public interest.

¹¹⁹⁷ De Brabandere (2017) 531.

The bulk of old generation BITs concluded by African countries are weak in leveraging and imposing obligations on investors and tend to favour foreign investors without addressing questions of economic sustainability for the continent.¹¹⁹⁸ These BITs replicate the agenda of developed countries and have not featured public policy provisions.¹¹⁹⁹ They contain ambiguous provisions which on many occasions have resulted in broad and inconsistent interpretation of treaty rights and obligations by tribunals.¹²⁰⁰ The lack of clarity and precision in the investment treaties maximises the protection of investors by effectively expanding the scope of the treaty, and can also make host states more prone to claims arising out of legitimate state measures for the protection of public policy.¹²⁰¹ Countries signed BITs without careful consideration for the provisions, and traded their regulatory space for investment commitments. In the absence of a binding multilateral treaty on investment, BITs remain the primary source of investment protection in African and across the world. This means that BITs form an integral part of Africa's international investment law regime.

Even today African countries continue to conclude BITs among themselves or with external investment partners which refer to right to regulate and sustainable development. South Africa has terminated several of its BITs with a view to negotiate investment treaties that safeguard the right to regulate and foster sustainable development. The termination of BITs by South Africa was followed by the enactment of the Protection of Investment Act which makes explicit reference to right to regulate and sustainable development suggestive of South Africa's approach towards investment regulation.

Overall, Africa is lagging in integrating the drive towards more policy space into investment treaties that is well underway in other developing and developed regions. Albeit the commendable efforts in the African regional investment agreements to drive policy space at the centre of investment, the Chapter has demonstrated that this approach is weak in leveraging and consolidating the policy space for host states in the international investment law of Africa. Most of the regional investment agreements are not in force yet or are non-binding. In addition, most African countries only pay lip

¹¹⁹⁸ UNECA (2016) 39.

¹¹⁹⁹ Adeleke (2018) 156.

¹²⁰⁰ EI-Kady (2016) 3.

¹²⁰¹ EI-Kady (2016) 3.

service to their regional investment treaties¹²⁰² and do not use their own Model BITs but make use of the European or North-American Model BITs when negotiating investment treaties.¹²⁰³ Incorporating the right to regulate, sustainable development, social investment and environment aspects in such instruments has the potential to cement policy space of African countries in their international investment law. The next chapter will discuss the challenges and opportunities available for incorporating policy space in the international investment legal framework for Africa.



¹²⁰² UNECA (2016) 23.

¹²⁰³ De Brabandere (2017) 531.

CHAPTER 6

CHALLENGES AND OPPORTUNITIES FOR ENTRENCHING THE RIGHT TO REGULATE IN THE INTERNATIONAL INVESTMENT LAW REGIME FOR AFRICA

6.1 INTRODUCTION

While the preceding chapters have demonstrated the effects of safeguarding the regulatory freedom in international investment law,¹²⁰⁴ and that the Africa's international investment regulatory framework, to a large degree, constrains such freedom,¹²⁰⁵ the present chapter will undertake an assessment of the challenges and opportunities of entrenching the right to regulate in the international investment law regime for Africa. This chapter will begin by exploring some of the major challenges that might hinder the construction of an international investment law regime accommodating the right to regulate. Solutions to these challenges will be presented as part of the discussion and/or will be further substantiated as part of the recommendations in the next chapter. The second part of the chapter will discuss the possible opportunities available for African countries to entrench regulatory freedom in their international investment legal framework. This is intended to sensitise African countries to the available policy options to safeguard regulatory autonomy as an integral part of their international investment law and policy.

Safeguarding the right to regulate in international investment law regime would, *inter alia*, enable African countries to regulate foreign investment in accordance with their public policy or national development objectives.¹²⁰⁶ Further, retaining the right to regulate in the investment law would allow African host to governments to accommodate other vital competing interests such as ensuring that foreign investments and investors respect human rights, promote sustainable development, create jobs and eradicate extreme poverty and improve the well-being of the people on the continent.¹²⁰⁷ In other words, it would enable host states to prevent negative effects of foreign direct investment (FDI), and leverage the FDI benefits into their host economies.

¹²⁰⁴ See chapter 4.

¹²⁰⁵ See chapter 5.

¹²⁰⁶ See generally Schill SW, Tams CJ & Hofmann R (eds) *International investment law and development: Bridging the gap* (2015).

¹²⁰⁷ This is discussed in detail in chapter 4.

6.2 CHALLENGES TO SAFEGUARD THE RIGHT TO REGULATE IN THE INTERNATIONAL INVESTMENT LAW REGIME

There is a plethora of challenges that might undercut African countries' endeavours to engrain the right to regulate in their international investment law regime. Notably, these include the absence of a universally accepted definition of the right to regulate, the absence of a binding African-wide investment treaty, weak institutional framework, multiple and overlapping memberships, lack of technical and financial capacity as well as the legal complexities of withdrawal, termination and amendment of investment treaties.

6.2.1 Dearth of consensus on what constitutes the right to regulate

Although the right to regulate has become prominent in international trade and investment discourses, there is not yet a universally accepted definition of what constitutes the right to regulate. Suffice to say that there is no one-size-fits-all approach on how to safeguard the right to regulate in international investment law. There are a significant number of complex factors attributed to the non-existence of a universal definition of or approach to right to regulate. First is the conceptual factor. The introductory chapter of this study has already revealed that the right to regulate is not defined in any single comprehensive legally binding instrument. Nonetheless, various scholars that have attempted to define the concept¹²⁰⁸ yet their definitions sometimes vary and are not universally accepted. It must be emphasised that the concept of the right to regulate is elusive and still in its nascent stages. Therefore, to ascertain its presence or ensure that the right to regulate is adequately carved out in the international investment legal framework may require technical expertise. In the

¹²⁰⁸ For example, Mann H 'The Right of states to regulate and international investment law' A paper presented at the Expert Meeting on the Development Dimension of FDI: Policies to Enhance the Role of FDI in Support of the Competitiveness of the Enterprise Sector and the Economic Performance of Host Economies, Taking into Account the Trade/Investment Interface, in the National and International Context, Geneva, 6-8 November 2002 available at http://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf (accessed 10 January 2017) 10; Mouyal LW *International investment law and the right to regulate: A human right perspective* (2016) 8-9; Titi C *The right to regulate in international investment law* (2014) 33; Brower CH 'Obstacles and pathways to consideration of the public interest in investment treaty disputes' in Sauvant KP (ed) *Yearbook on international investment law & policy 2008-2009* (2009) 357; Hindelang S & Krajewski M 'Conclusion and outlook: Whither international investment law' in Hindelang S & Krajewski M (eds) *Shifting paradigms in international investment law: More balanced, less isolated, increasingly diversified* (2016) 381; and Sornarajah M 'Right to Regulate and Safeguards' in UNCTAD *The development of FDI: Policy and rule-making perspectives, proceedings of the expert meeting in Geneva from 6 to 8 November 2002* (2003) 205.

instances where African countries have attempted to enshrine the right to regulate in investment treaties it is somewhat unclear what is being enshrined.¹²⁰⁹ Further, there is lack of clarity on the thresholds of entrenching the right to regulate. Some academic commentators or African countries, for example, may construe the inclusion of the right to regulate as an enforceable investment principle or a sign of protectionism that undermines the object and purpose of investment treaties to promote and protect foreign investments and investors.¹²¹⁰

It is submitted that the dearth of such a universally accepted definition and commonly understood approach to articulate the right to regulate in international investment law may be problematic and has the potential to undermine the efforts to include the right to regulate. That said, African countries should identify and define what constitutes the right to regulate in their development context and adopt a collective approach on how they can achieve their objective of the incorporating the right to regulate in their international investment law regime. This study reveals that the right to regulate refers to the legal right of host governments to adopt legitimate regulatory or administrative measures intended to promote public policy objectives.¹²¹¹ The study further concurs that there is no single approach to entrench the right to regulate and, accordingly, a holistic approach or careful consideration is required in the negotiation of investment treaties to ensure that the provisions of such treaty do not limit the ability of the host states to regulate in accordance with their national development goals. Options on how African countries may identify and imbed the right to regulate in their investment legal framework will be expounded as part of the recommendations in the next chapter.¹²¹²

6.2.2 Absence of a universal continent-wide investment treaty

As demonstrated in the preceding chapter, Africa, as a collective, does not yet have a single and binding legal instrument that regulates foreign investment on the continent. The legal regime governing foreign investment in Africa comprises a fragmented and heterogenous network of national, bilateral, regional and plurilateral legal

¹²⁰⁹ See the discussion in chapter 5.

¹²¹⁰ See, for example, Fox G 'A future for international investment? Modifying BITs to drive economic development' (2014) 46 *Georgetown Journal of International Law* 229-59; and Johnson AR 'Rethinking bilateral investment treaties in Sub-Saharan Africa' (2010) 59 *Emory Law Journal* 932.

¹²¹¹ See part 1.1.1 above.

¹²¹² See part 7.3.2.

instruments.¹²¹³ These legal instruments exhibit differences in scope and content, but commonly contain substantial provisions meant to promote and protect foreign investors and their investments.¹²¹⁴ A closer scrutiny of these legal instruments reveal that their investment protection standards frequently overlap and limit the policy space of the host states.¹²¹⁵ Further, the regulatory regime for foreign investment in Africa is largely inconsistent.¹²¹⁶ Given this fragmentation, one would assert that the main challenge to having a single foreign investment regulatory framework in Africa which incorporate policy space is the transition from the dominant system of bilateral investment treaties (BITs) to achieve continent-wide investment integration and regulation. In other words, the conclusion of a universal treaty for optimised and institutionalised foreign investment law in Africa.¹²¹⁷

In a policy landscape dominated by BITs and other legal instruments with inconsistent and overlapping standards of investment protection, along with the absence of a binding continent-wide investment treaty, it would be difficult to have a coherent approach towards investment regulation for Africa. This consequence could be exacerbated by the fact that Africa consists of various countries with different social, cultural, legal, economic and political systems. Ehlermann and Ehring,¹²¹⁸ for instance, consider it an illusion to think that African countries with their considerable diversity in

¹²¹³ See generally Seatzu F & Vargiu P 'Africanising bilateral investment treaties ('BITs'): Some case studies and future prospects of a pro-active African approach to international investment' (2015) 30 *Connecticut Journal of International Law* 143-68; and United Nations Economic Commission for Africa (UNECA) 'Investment policies and bilateral investment treaties in Africa: Implications for regional integration' (2016) available at https://www.uneca.org/sites/default/files/PublicationFiles/eng_investment_landscaping_study.pdf (accessed 24 May 2019) (hereinafter UNECA (2016)).

¹²¹⁴ See Economic Commission for Africa Committee on Regional Cooperation and Integration 'Investment agreements landscape in Africa' (2015) 2 available at <https://www.uneca.org/sites/default/files/uploaded-documents/RITD/2015/CRCI-Oct2015/report-on-investment-agreements.pdf> (accessed 30 September 2018) (hereinafter Economic Commission for Africa Committee on Regional Cooperation and Integration (2015)).

¹²¹⁵ Denters E & Gazzini T 'The role of African regional organisations in the promotion and protection of foreign investment' (2017) 18 *The Journal of World Investment & Trade* 449-92 (hereinafter Denters & Gazzini (2017)) 452. See generally Adeleke F *International investment law and policy in Africa: Exploring a human rights based approach to investment regulation and dispute settlement* (2018) (hereinafter Adeleke (2018)).

¹²¹⁶ See Denters & Gazzini (2017) 452.

¹²¹⁷ See Mbengue MM & Schacherer S 'The "Africanisation" of international investment law: The Pan-African Investment Code and the reform of the international investment regime' (2017) 18 *Journal of World Investment and Trade* 414-48 (hereinafter Mbengue & Schacherer (2017)).

¹²¹⁸ Ehlermann C & Ehring L 'Decision-making in the World Trade Organisation: Is the consensus practice of the World Trade Organisation adequate for making, revising and implementing rules on international trade' (2005) 8 *Journal of International Economic Law* 51-75 (hereinafter Ehlermann & Ehring (2005)).

their economic needs and bureaucratic capacity can ever agree on complex new provisions all at once.¹²¹⁹ It is submitted that different ideas and levels of development as well as conflicting interests among African countries may jeopardise the efforts of achieving a binding continental instrument on foreign investment.

Notwithstanding the above, if Africa had a universal treaty with binding rules on the governance of foreign investment for all African states, it would have been easy to entrench the right to regulate of host governments in international investment law and policy for the continent at once. Such a treaty would be designed to preserve policy space and, accordingly, legally oblige every African country to negotiate investment treaties with other African or non-African countries reserving regulatory autonomy. Without the establishment of any investment rules binding everyone at the continental level, standard regulation of foreign investment may be impossible. This discussion does not subscribe to the idea that a continent-wide investment treaty is not possible in Africa. The second part of the chapter will discuss this possibility in the framework of the African Continental Free Trade Area (AfCFTA). That said, perhaps the most important question should not be whether it is possible to establish a binding Africa-wide investment accord, but whether there is an institutional framework at the continental level vested with appropriate powers to solve the most pressing challenges within and enforcing the contemporary investment regulatory framework for Africa.

6.2.3 Weak institutional framework

To have successful cooperation on investment issues at the continental level in Africa, a strong and effective institutional framework is pivotal.¹²²⁰ Institutions endowed with necessary authority, monitoring and oversight powers are central to effective enforcement of the rights and obligations contained in international agreements. They also ensure that policies and decisions of intergovernmental organisations are implemented.¹²²¹ Meanwhile, the overall institutional design of the African Union (AU),

¹²¹⁹ Ehlermann & Ehring (2005) 51. However, this argument can be offset by the current ambitious project by African countries to integrate into a single continental free trade area.

¹²²⁰ Erasmus G 'The AfCFTA institutions: Could the Secretariat hold the key to Implementation?' (2019) Tralac Working Paper No.US19WP01/2019 1 (herein after Erasmus 'The AfCFTA Institutions: Could the Secretariat hold the key to Implementation?'). See also Erasmus G 'The institutional design of the AfCFTA' (2019) Tralac Working Paper No. S19WP03/2019 1 (hereinafter Erasmus G 'The institutional design of the AfCFTA' (2019)).

¹²²¹ See generally Erasmus G 'The AfCFTA Institutions: Could the Secretariat hold the key to Implementation?' (2019) and Erasmus G 'The institutional design of the AfCFTA' (2019), discussing the

which is the body driving continental integration and development, is largely ineffective in this regard.¹²²² The institutional architecture of the AU reveals some considerable weakness as its institutions are not endowed with requisite independence and authority to implement the policies or decisions of the AU. Vanheukelom, Bruce, San and Woolfrey¹²²³ succinctly highlight the weaknesses within the AU particularly in its implementation environment:

For the implementation of decisions taken by the AU Assembly, the AU has to primarily rely on member states. Depending on the policy area or sector, different AU organs come into play ... There are many formal institutions in place to encourage and facilitate implementation. However, the practices of reducing uncertainty, generating mutual trust, providing transparency on actions, offering a framework for dividing labour, interpreting mandates, and facilitating policy coordination remain problematic ... In fact, the formal institutions and mechanisms for monitoring, or for incentivising cooperative behavior or compliance and sanctioning deviance, and the informal institutions such as norms in support of respecting formal agreements may be lacking or insufficiently mutually reinforcing. While member states may be willing to cooperate through regional organisations, they are not prepared to give in on sovereignty. The relationship between the AU and member states remains strictly intergovernmental.¹²²⁴

In the same vein, the AU Heads of State and Government (also referred to as the AU Assembly)¹²²⁵ have recently recognised and acknowledged the deficiencies within the continental organisation.¹²²⁶ In July 2016, the AU Assembly decided to conduct an inquiry of the challenges facing the organisation and to consider possible institutional reforms.¹²²⁷ The incumbent President of Rwanda, Paul Kagame, was then assigned by the AU Assembly to lead this inquiry and create a system of governance capable of addressing such challenges. In January 2017, President Kagame reported the

institutional framework of the African continental free trade area and its capability of contributing to the fulfilment of the objectives of the continental free trade area.

¹²²² See UNECA *African Governance Report II* (2009) ch 4.

¹²²³ Vanheukelom J, Bruce B, San B & Woolfrey S *Political economy of regional integration in Africa: What drives and constrains regional organisations* (2016) (hereinafter Vanheukelom et al (2016)).

¹²²⁴ See Vanheukelom et al (2016) 8.

¹²²⁵ See Article 6 of the Constitutive Act of the African Union, 2000 (hereinafter Constitutive Act).

¹²²⁶ At the Retreat of Heads of State and Government, the Ministers of Foreign Affairs and Ministers of Finance held in Kigali, Rwanda on 16 July 2016.

¹²²⁷ Decision on the Institutional Reform of the African Union Assembly/AU/Dec.606 (XXVII) adopted by the AU Assembly of the Heads of State and Government at the 27th Ordinary Session of the AU held in Kigali, Rwanda on 17 and 18 July 2016 (hereinafter Decision on the Institutional Reform of the African Union Assembly/AU/Dec.606 (XXVII)).

findings to the AU Assembly.¹²²⁸ He reported that the AU is confronted with numerous challenges including, *inter alia*, overdependence on (external) partner funding, fragmentation and multiplicity of focus areas, implementation crisis, unclear division of labour between the AU and the African Regional Economic Communities (RECs), inefficient working methods in both the AU Commission and Assembly and lack of accountability for performance.¹²²⁹ Accordingly, Kagame recommended some institutional reforms required to address the issues hampering the implementation of the policies and decisions of the AU.¹²³⁰ In specific terms, the reforms seek to strengthen the AU and re-position the organisation to better serve the people of the continent. The institutional reforms focus on five areas including sustainable funding of the AU and with full ownership of member states, connecting the AU to African citizens, realigning the AU institutions, managing the AU effectively and efficiently, and focusing on key continental priorities.¹²³¹ These reforms were eventually adopted by the AU.¹²³² The author submits that the reforms are profound, but their effective implementation and outcome remains to be seen.

As noted above, the AU is the continental body driving political and economic development in Africa. It is entrusted by member states with the mandate to promote integration and cooperation of African states based on coordination and solidarity, with a view to achieving peace, security and prosperity for all the people of the continent.¹²³³ The AU is pursuing an integration agenda driven by efforts towards economic cooperation but also a new political emphasis on democratisation, human rights, good governance and the rule of law.¹²³⁴ Nonetheless, the record of African integration has not been satisfactory and without challenges.¹²³⁵

¹²²⁸ See Kagame P 'The imperative to strengthen our Union: Report on the proposed recommendations for the institutional reform of the Africa Union' (2017) available at <https://au.int/sites/default/files/pages/34871-file-report-20institutional20reform20of20the20au-2.pdf> (accessed 14 October 2018) (hereinafter Kagame (2017)).

¹²²⁹ Kagame (2017) 5-7.

¹²³⁰ Kagame (2017) 11.

¹²³¹ For more information on these reforms, see AU 'AU reforms' available at <https://au.int/en/AUReforms> (accessed 14 May 2019).

¹²³² Decision on the Institutional Reform of the African Union Assembly/AU/Dec.606 (XXVII).

¹²³³ See Doumbe-Bille S 'The African Union: Principles and purposes' in Yusuf AA & Ouguerouz F (eds) *The African Union: Legal and institutional framework: A Manual on the Pan-African Organisation* (2012) 53-75. More information about the AU is available at <https://au.int/en/history/oau-and-au>.

¹²³⁴ Olivier M 'The emergence of a right to democracy – An African perspective' in Panara C & G Wilson (eds) *The Arab Spring: New patterns for democracy and international law* (2013) 39-44.

¹²³⁵ Babarinde O 'The African Union: Finally, in the path of the EU?' in Roy J & Dominguez R (eds) *Regional integration fifty years after the Treaty of Rome: The EU, Asia, Africa, and the Americas* (2008)

Notwithstanding the foregoing, the advancement of the objectives of the AU implies the need for supranationalism to achieve the desired outcome.¹²³⁶ Supranationalism is defined as ‘a form of cooperation which results in the creation of a new level of authority whose interests and powers are independent of those participating member states’.¹²³⁷ The elements of supranationalism include the recognition of common values and interests, the creation of an effective power and the autonomy of these powers.¹²³⁸ Supranationalism is key to foster cooperation among states. For example, the often-cited success of integration of the European Union (EU) is, to a large extent, anchored on the supranational powers of the institutions such as the European Commission (EC), the European Parliament, and the European Court of Justice (ECJ).¹²³⁹ In the EU jurisprudence, ‘the *raison d’être* for EU law lies in the transfer of powers from member states to EU institutions. Such powers are not open-ended but limited to specific areas identified in treaties. The primary sources of EU law are thus the main treaties establishing the EU’.¹²⁴⁰

The objectives, principles and the normative prescriptions of the Constitutive Act of the AU¹²⁴¹ conjectures the intention of the African leaders to bestow the AU with supranational authority.¹²⁴² For instance, the Constitutive Act mandates the AU with powers to coordinate and harmonise the policies of the RECs¹²⁴³ and with the right to intervene in member states.¹²⁴⁴ Relatedly, Fagbayibo maintains that the rationale for

55-56 (hereinafter Babarinde (2008)). See also Hartzenberg T, Erasmus G, Kalenga P & Chidede T (eds) *Monitoring regional integration in southern Africa yearbook 2017/2018* (2018).

¹²³⁶ See generally Fagbayibo B ‘From OAU to AU: Rethinking supranational governance in Africa’ in Oloruntoba SO and Falola T (eds) *The palgrave handbook of African politics, governance and development* (2018) 771-80 (hereinafter Fagbayibo (2018)).

¹²³⁷ McCormick J *Understanding the European Union: A concise introduction* 6 ed (2014) (hereinafter McCormick (2014)) 5. See also Rasmond B *Theories of European integration* (2000) 24, defining supranationalism as ‘the development of authoritative institutions and network of policy making activity above the nation state.’

¹²³⁸ Pescatore P *The law of integration* (1974) 51-2.

¹²³⁹ Santiago J ‘Rejection of supranational institutions diminishing regional integration potential’ (2017) The Jean Monnet/ Robert Schuman Junior Paper Series No. 4 1 (hereinafter Santiago (2017)).

¹²⁴⁰ Olivier (2015) 514.

¹²⁴¹ See Olivier (2015) 514-515, contending that the Constitutive Act of the AU determines the AU’s structures, powers and functions but do not establish AU law as such. He further avers that ‘although the Constitutive Act of the AU is silent on the matter, the facts that the AU has entered into treaties, adopted a vast number of treaties and been a party to international disputes are indications of the acceptance of its international legal personality’.

¹²⁴² Fagbayibo B ‘From OAU to AU: Rethinking supranational governance in Africa’ in Oloruntoba SO & Falola T (eds) *The palgrave handbook of African politics, governance and development* (2018) 774 (hereinafter Fagbayibo (2018)).

¹²⁴³ Article 3 (l) of the Constitutive Act.

¹²⁴⁴ Article 4 (h) of the Constitutive Act.

the transformation of the Organisation of the African Unity (OAU)¹²⁴⁵ to the AU was the 'imperative of creating institutions that exercised binding powers and thus were able to assert far-reaching authority over member states'.¹²⁴⁶ In spite of the foregoing submission, an assessment of the *modus operandi* of the AU reveals that the organisation is not a supranational entity.¹²⁴⁷ In practice, the AU serves as a platform for engagement between and among member states.¹²⁴⁸ The AU operates with a state-centric or inter-governmental paradigm which places emphasis on strengthening nation state sovereignty or the primacy of member states in international law and relations.¹²⁴⁹ In a state-centric arrangement 'the inability of taking enforceable decisions prevents the establishment of a regional legal system through institutional action'.¹²⁵⁰ However, in reality, embracing the concept of supranationalism is a very sensitive issue for most African nations; establishment of supranational institutions or subscription to supranationalism can be construed as loss of nation state sovereignty or power to make policies.¹²⁵¹

Furthermore, supranationalism of the AU can be determined through examination of its institutions/organs, their powers and decision-making capacity, as well as sovereign powers transferred from member states to these organs. Key AU institutions such as the Assembly, the Pan-African Parliament (PAP), the AU Commission and the African Court of Justice will now be assessed with a view to ascertaining whether their powers are supranational. These institutions are central to spearheading African integration and cooperation.¹²⁵² *Prima facie*, the normative prescriptions of the Constitutive Act indicate that these institutions are expected to exercise the supranational authority

¹²⁴⁵ The OAU was established by the Charter of the OAU on 25 May 1963 in Addis Ababa, Ethiopia. It was superseded by the AU in 2000.

¹²⁴⁶ Fagbayibo (2018) 771.

¹²⁴⁷ See Olivier GC & Olivier ME 'Models of regional integration: The European Union and the African Union' (2004) 5 *Griffen's View on International and Comparative Law* 44–46. See also Olivier GC & Olivier ME 'Models of regional integration' (2004) 19 *South African Public Law* 351–364. On the contrary, Amao argues that there is a gradual movement from intergovernmentalism to supranationalism in the African Union legal order and explores how this trajectory gradually and incrementally de-emphasises the discourse on nation state sovereignty; a concept that has caused many problems in the African context. See Amao O *African Union law: The emergence of a sui generis legal order* (2018) (hereinafter Amao (2018)).

¹²⁴⁸ Fagbayibo (2018) 773.

¹²⁴⁹ Fagbayibo (2018) 773. See also Olivier ME 'The role of African Union law in integrating Africa' (2015) 22 *South African Journal of International Affairs* 514 (hereinafter Olivier (2015)).

¹²⁵⁰ Olivier (2015) 514.

¹²⁵¹ Duarte C 'The importance of Africa's integration' (2015) available at <https://www.tralac.org/news/article/6852-the-importance-of-africa-s-integration.html> (accessed 20 October 2018) (hereinafter Duarte (2015)).

¹²⁵² Fagbayibo (2018) 774.

including the 'binding interpretation of the AU instruments, determining the modus of intervention in conflict zones, review the standard of governance in member states and the policy initiation and implementation functions of the AU Commission'.¹²⁵³ Nonetheless, the assessment in this part of the chapter is to determine, beyond the formal and theoretical enquiry, whether the said AU institutions exercise their presumed supranational authority in practice.

The AU Assembly consists of all the AU Heads of State and Government and is the supreme body of the organisation.¹²⁵⁴ The Constitutive Act does not provide clarification on the meaning of 'supreme organ', but 'one can assume that it enjoys the highest position in the hierarchy of AU organs, or that its decisions cannot be challenged by other organs which would include the Court of Justice, as in the case of a supreme or sovereign national parliament'.¹²⁵⁵ The powers and functions of the Assembly are enshrined in the Rules of Procedure of the AU¹²⁵⁶ and include policy and decision-making, implementation and compliance by member states, decision to intervention in the affairs member states, power to impose sanctions.¹²⁵⁷ The Assembly also has powers with legal consequences, for example, monitoring of AU policies and decisions; the responsibility to ensure compliance by all member states;¹²⁵⁸ and giving directives to the executive council on the management of conflicts.¹²⁵⁹ Further, non-compliance with decisions and policies may be subjected to sanctions determined by the Assembly.¹²⁶⁰ The Assembly decisions that result in legal instruments become binding after ratification and entry into force, other decisions are only binding on member states or individuals or AU organs affected by the decision.¹²⁶¹ It is however submitted that despite these powers revealing some elements of supranationalism, the AU Assembly do not have full supranational powers and authority over member states. Its decisions are based on consensus.

¹²⁵³ Fagbayibo (2018) 774.

¹²⁵⁴ Article 6 (1) and (2) of the Constitutive Act.

¹²⁵⁵ Olivier (2015) 516.

¹²⁵⁶ Rules of Procedure of the Assembly of the Union, 2002.

¹²⁵⁷ Article 9 of the Constitutive Act.

¹²⁵⁸ Article 9 (1)(e) of the Constitutive Act.

¹²⁵⁹ Article 9 (1)(g) of the Constitutive Act.

¹²⁶⁰ Article 23 (2) of the Constitutive Act.

¹²⁶¹ Amao (2018) 34.

The establishment of the PAP was originally envisaged in the Treaty Establishing the African Economic Community (also known as the Abuja Treaty).¹²⁶² The PAP was further recognised by the Constitutive Act as an organ of the AU.¹²⁶³ In March 2001, the Protocol Establishing the Pan-African Parliament¹²⁶⁴ was adopted and became effective on 14 December 2003. At first, the AU envisioned the PAP to have 'full legislative powers', but to date this institution only 'has consultative and advisory powers'.¹²⁶⁵ To-date, the PAP has not commenced with its envisaged functions as the AU legislative body. Instead, the PAP has only played a consultative, advisory and budgetary oversight role within the AU.¹²⁶⁶

In June 2014, the Assembly reconsidered the scope of the functions and powers of the PAP and, consequently, adopted the Protocol to the Constitutive Act of the AU Relating to the PAP (New PAP Protocol).¹²⁶⁷ The New PAP Protocol provides that the PAP shall be the legislative organ of the AU and gives the PAP quasi-legislative power of formulating model laws for AU member states.¹²⁶⁸ Additionally, the Protocol stipulates that members of the PAP would have to encourage their countries and national parliament to ratify and incorporate the AU legal instruments into their legal systems.¹²⁶⁹ The incorporation of AU legal instruments into national laws of AU member states will make the AU legal system part of the municipal laws of the member states.

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¹²⁶² Article 7 (1) (c) of the Treaty Establishing the African Economic Community, 1991 (hereinafter Abuja Treaty).

¹²⁶³ Articles 5 and 17 Constitutive Act.

¹²⁶⁴ Protocol Establishing the Pan-African Parliament, 2001.

¹²⁶⁵ AU *African Union Handbook 2016* 3 ed (2016) 86.

¹²⁶⁶ See Mohamed SL 'The Pan-African Parliament' in Yusuf AA & Ouguerouz F (eds) *The African Union: legal and institutional framework: A Manual on the Pan-African Organisation* (2012) 95-117.

¹²⁶⁷ Protocol to the Constitutive Act of the African Union relating to the Pan-African Parliament, 2014 (hereinafter the New PAP Protocol). The New PAP Protocol is not yet in force; it will become effective 30 days after ratification by a simple majority of AU member states. Currently, 19 Member States have signed the Protocol and 8 have deposited their instruments of ratification. The countries that have signed the Protocol include Algeria, Benin, Central African Republic, Chad, Comoros, Congo, Djibouti, Ghana, Guinea-Bissau, Mauritania, Sao Tome & Principe, Sudan and Zimbabwe. Among these, Cameroon, Gambia, Madagascar, Mali, Sahrawi Arab Democratic Republic, Sierra Leone, Somalia and Togo have ratified the Protocol.

¹²⁶⁸ Article 8 of the New PAP Protocol. Since the beginning of 2018, PAP has formulated or contributed to the formulation of two model laws and plans to initiate the development of about five such laws. PAP *Pan-African Parliament* 12 ed (2018) 222.

¹²⁶⁹ Article 4 of the New PAP Protocol.

The AU Commission was established by the Constitutive Act as a key component of the institutional structure of the AU.¹²⁷⁰ Albeit not explicitly stipulated, the Commission is essentially the AU Secretariat and the legal representative of the organisation.¹²⁷¹ The functions of the AU Commission include, *inter alia*, to: represent the AU and defend its interests under the guidance of and as mandated by the Assembly and Executive Council; initiate proposals to be submitted to the AU's organs and implement decisions taken by such organs.¹²⁷² In addition, the AU Commission acts as a custodian of the Constitutive Act and AU legal instruments, provides operational support for all AU organs, and assists Member States in implementing the AU's programme.¹²⁷³

However, in spite of the clear normative prescriptions outlined above, the Assembly seemingly is not willing to transfer requisite supranational powers to the other institutions of the AU.¹²⁷⁴ For example, the Assembly refused to cede powers to the PAP, despite the explicit stipulation that PAP should start exercising its supranational legislative functions from 2009.¹²⁷⁵ The Assembly has also rejected the adoption of policy documents that were aimed at the enhancing the implementation powers of the AU Commission.¹²⁷⁶ Thus, the AU Commission has not moved beyond its mandate to initiate policy and strategic documents.¹²⁷⁷

The African Court of Justice was originally envisaged in the Constitutive Act.¹²⁷⁸ In July 2003, the AU Assembly adopted the Protocol of the Court of Justice of the AU

¹²⁷⁰ Art 5 of the Constitutive Act.

¹²⁷¹ Article 7 of the Commission Statutes

¹²⁷² Article 3 of the Statutes of the Commission of the African Union ASS/AU/2(I), 2002 (hereinafter Commission Statutes of the AU. More information about the AUC is available at <https://au.int/en/commission>.

¹²⁷³ Article 3 of the Commission Statutes of the AU.

¹²⁷⁴ Fagbayibo B 'Looking back, thinking forward: Understanding the feasibility of normative supranationalism in the African Union' (2013) *South African Journal of International Affairs* 414.

¹²⁷⁵ Fagbayibo (2018) 775.

¹²⁷⁶ For example, *AU Audit Report of the African Union* (2007), the *AU Strategic Plans of the Commission of the African Union: Volume 1: 2004-2007* (2004), *AU Strategic Plans of the Commission of the African Union: Volume 1: 2009-2012* (2009), and *AU Strategic Plans of the Commission of the African Union: Volume 1: 2014-2017* (2014), which outlined the significance of refining and enhancing the internal administration of the AU Commission 'through strengthening organisational process, granting more autonomy to the Chair of the AU Commission and endowing the Commission with more functional powers to effectively monitor and evaluate the implementation of institutional objectives'. Fagbayibo (2018) 775.

¹²⁷⁷ Fagbayibo (2018) 775.

¹²⁷⁸ Article 5 of Constitutive Act.

(Protocol of the African Court of Justice),¹²⁷⁹ which came into force in February 2009 after ratification by 15 member states. The Protocol of the African Court of Justice became binding only to state parties, that is – those who ratified the Protocol.¹²⁸⁰ The Protocol intended the African Court of Justice to be the principal judicial organ of the AU,¹²⁸¹ with jurisdiction over all disputes and application of all AU legal instruments.¹²⁸² Despite the Protocol's entry into force, the African Court of Justice never became operational because the Assembly decided to merge the African Court of Justice with the African Court on Human and Peoples' Rights¹²⁸³ into a single court, to become the African Court of Justice and Human Rights (hereinafter the merged Court).¹²⁸⁴ For that reason, the Protocol on the Statute of the African Court of Justice and Human Rights (Protocol of the African Court of Justice and Human Rights)¹²⁸⁵ was adopted in 2008. The Protocol superseded both the Protocol of the Court of Justice and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.¹²⁸⁶ The Protocol of the African Court of Justice and Human Rights establishes the merged Court as the main judicial organ of the AU,¹²⁸⁷ with an expansive jurisdiction over all cases and legal disputes that relate to, *inter alia*, the interpretation and application of the Constitutive Act; AU treaties and all subsidiary legal instruments of the AU as well as acts, regulations and directives of the AU organs.¹²⁸⁸ More importantly, only state parties to the Protocol, the Assembly, the PAP, AU organs and appealing AU staff members shall have *locus standi* before

¹²⁷⁹ Protocol of the Court of Justice of the African Union, 2003 (hereinafter Protocol of the African Court of Justice).

¹²⁸⁰ The list of countries who have signed, ratified/acceded to the African Court of Justice Protocol is available at https://au.int/sites/default/files/treaties/7784-sl-protocol_of_the_court_of_justice_of_the_african_union_1.pdf.

¹²⁸¹ Article 2 (1) of the Protocol of the African Court of Justice.

¹²⁸² Article 18 of the Protocol of the African Court of Justice.

¹²⁸³ The African Court on Human and Peoples' Rights was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which was adopted by Member States of the then OAU in June 1998, which came into force on 25 January 2004. The African Court on Human and Peoples' Rights was established as continental court established by African countries to ensure the protection of human and peoples' rights in Africa. More information on the African Court on Human and Peoples' Rights is available at <http://www.african-court.org/en/>.

¹²⁸⁴ See Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union (Doc. Assembly/AU/6 (V)). For a discussion, see Du Plessis M & Stone L 'A court not found?' (2007) 7 *African Human Rights Law Journal* 522-44.

¹²⁸⁵ Protocol on the Statute of the African Court of Justice and Human Rights, 2008 (hereinafter Protocol of the African Court of Justice and Human Rights).

¹²⁸⁶ Article 1 of the Protocol of the African Court of Justice and Human Rights.

¹²⁸⁷ Article 2 (1) of the Protocol of the African Court of Justice and Human Rights.

¹²⁸⁸ Article 28 of the Protocol of the African Court of Justice and Human Rights.

the merged Court.¹²⁸⁹ In other words, individuals and AU member states that have not ratified the Protocol shall not have standing before the merged Court.

The merged Court can play a key role in unifying Africa if it is given effective and supranational powers like the ECJ.¹²⁹⁰ It is submitted that the efficacy of an inter-governmental organisation like the AU largely depends on its ability to hold its member states accountable and the assurance of compliance with their international obligations in terms of its legal instruments. The competence of the merged Court in promoting and protecting cooperation and integration in African remains to be seen. It also remains to be seen whether African governments will comply and enforce the decisions of the merged Court. However, despite the AU leaders' enthusiasm to establish this merged court, the transition has not materialised till today. The transition will take place when at least 15 member states have ratified the Protocol of the African Court of Justice and Human Rights.¹²⁹¹

Lack of supranationalism in integration is not only prevalent in the Africa at the continental level.¹²⁹² Even institutions driving African regional integration are also weak and without supranational powers. Some RECs' operational regional investment instruments expressly provide for institutional commitments and arrangements intended to ensure full implementation and enforcement of the investment obligations enshrined in them. For example, the ECOWAS Supplementary Act provides for the creation of regional structures for the implementation of the investment rules in member states in the promotion and the facilitation of investment.¹²⁹³ Likewise, the SADC FIP¹²⁹⁴ envisages a role for relevant institutions of member states and investment promotion agencies which shall:

¹²⁸⁹ Article 29 of the Protocol of the African Court of Justice and Human Rights.

¹²⁹⁰ Babarinde (2008) 67. See also Sarkin J 'The African Commission on Human and People's Rights and the future African Court of Justice and Human Rights: Comparative lessons from the European Court of Human Rights' (2011) 18 *South African Journal of International Affairs* 281-93.

¹²⁹¹ Article 9 (1) of the Protocol of the African Court of Justice and Human Rights. The list of countries who have signed, ratified/acceded to the Protocol is available at https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_3.pdf.

¹²⁹² See Udombana NJ 'The institutional structure of the African Union: A legal analysis' (2002) 33 *California Western International Law Journal* 69-135 (hereinafter Udombana (2002)).

¹²⁹³ Article 25 of the Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, 2008 (hereinafter ECOWAS Supplementary Act).

¹²⁹⁴ Southern African Development Community Finance and Investment Protocol, 2006 (hereinafter SADC FIP).

- a. Carry out their investment promotion activities, in line with their national and regional development priorities;
- b. Advise the government of that state party, the private sector and other stakeholders in the formulation and review of policies and procedures that affect investment and trade; and
- c. Increase awareness of their investment incentives, opportunities, legislation, practices, major events affecting investments and other relevant activities through regular exchange of information.¹²⁹⁵

Nonetheless, such institutions are not granted supranational powers to perform their functions. The absence of supranational institutions in Africa represent one of the key aspects diminishing the ability to advance deep integration and cooperation among African states.¹²⁹⁶ It is submitted that an institutional architecture without supranationalism or with institutions without supranational authority has the potential to hamper the efforts to establish a coherent international investment regulatory framework incorporating policy space for African host governments. With such a legal and policy milieu, it would be problematic to establish and enforce a consistent body of law. The implication is that relative investment policies and treaties will continue to be implemented in silos and at national levels with no supranational institutions with requisite powers to enforce such body of law.

Against this backdrop, it can be suggested that if African countries are to effectively establish a unified approach towards international investment law which protects the public interests at the same time protecting investment, the establishment of supranational institutions would be a prerequisite. The AU is not, in principle, supranational but has the potential to become one. Olivier suggests that:

The core elements needed to foster a supranational African legal system include direct effect and supremacy over national legislation. These must be supported by a sense of community and willingness to transfer some sovereign powers to a supranational decision-making body. Elements of supranationalism where the AU currently clearly falls short include institutional decision-making within the AU and obligatory settlement of disputes, and were not considered in establishing the development of AU law.

¹²⁹⁵ Article 23 of the SADC FIP. The SADC FIP further provides that the SADC Secretariat will ensure close collaboration with state parties and all relevant institutions on investment and other related matters in the region.

¹²⁹⁶ Santiago (2017) 2.

Although core supranationality is par for the course as far as the development of AU law is concerned, its development does not follow a particular model but instead appears to be rather functionally dependent on strategic needs.¹²⁹⁷

Supranationalism within the AU would go a long way to 'help smaller countries with weak bureaucratic and technical expertise to ensure they conclude BITs that do not compromise on the objectives of sustainable development'.¹²⁹⁸ In similar vein, Adeleke proposes that:

African regional bodies can take this approach further by imposing consequences such as ensuring that if these conditions are not met and if it trumps common regional interest of a human rights based approach to development, the authorisation for a country's BIT is withdraw. This approach extends developments already proposed in model BITs at a regional level into a binding legal norm that ensure BITs do not trump other relevant non-investment obligations.¹²⁹⁹

The EU has enacted a legislative framework for screening foreign direct investment (FDI)¹³⁰⁰ which aims to ensure unified and coherent regulation of foreign investment within the EU, which deserves special attention and could be a good example for the AU. The framework came into force on 10 April 2019¹³⁰¹ and establishes a framework for the screening FDI into the EU based on 'security or public order and for a mechanism for cooperation between member states, and between member states and the Commission, with regard to foreign direct investments likely to affect security or public order. It includes the possibility for the Commission to issue opinions on such investments'.¹³⁰² The EU member states or the European Commission, in determining whether an FDI is likely to affect security or public order, may consider the FDI's potential effects on critical infrastructure and technologies, supply of critical inputs or access to sensitive information.¹³⁰³ They may also take into account whether 'the foreign investor is directly or indirectly controlled by the government including state bodies or armed forces, of a third country, including through ownership structure or

¹²⁹⁷ Olivier (2015) 522.

¹²⁹⁸ Adeleke (2018) 167.

¹²⁹⁹ Adeleke (2018) 167.

¹³⁰⁰ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, 2019 (hereinafter Regulation 2019/452).

¹³⁰¹ European Commission 'EU foreign investment screening regulation enters into force' (2019) available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2008> (accessed 07 May 2019).

¹³⁰² Article 1 (1) of the Regulation 2019/452.

¹³⁰³ Article 4 (1) of the Regulation 2019/452.

significant funding; ... has already been involved in activities affecting security or public order in a member state; or whether there is a serious risk that the foreign investor engages in illegal or criminal activities'.¹³⁰⁴

It would be commendable for the AU to establish the same framework that ensures that FDI admitted by all member states contributes to their sustainable development goals that compel African countries to execute investment treaties that include policy space. In this respect, the proposal would be to establish a supranational continental body or bestow an existing AU organ with powers to ensure that member states execute investment treaties that take into account the development objectives and public interest issues of the host government.

Notwithstanding the foregoing, it should be emphasised that supranationalism is not without challenges. For example, as alluded to earlier, countries may fear to lose their national state sovereignty or powers to make policies and become resistant to the establishment of supranational institutions.¹³⁰⁵ Even in the EU, the best referred supranationalism integration model, integration has gone through a bumpy process. The European integration, for instance, 'experienced many setbacks and periods of stagnation, such as the recent Eurozone crisis, the decline in national economies within the EU' and the ongoing uncertain process of the United Kingdom (UK) to withdraw from the EU or 'to re-negotiate its membership conditions'.¹³⁰⁶ Given that absolute supranationalism can be a very sensitive issues, African countries may achieve supranationalism incrementally through functionalism or decisional supranationalism.

Functionalism promotes 'functional cooperation between states, engaging them in cooperative ventures... to establish functionally specific agencies, transcending national boundaries, managed by technocrats, not influenced by political ideology or individual states'.¹³⁰⁷ Decisional supranationalism deals with the establishment of a procedural mechanism to arrive at decisions through majority voting system rather than consensus.¹³⁰⁸ Overall, this study advances the argument that normative

¹³⁰⁴ Article 4 (2) of the Regulation 2019/452.

¹³⁰⁵ Duarte (2015).

¹³⁰⁶ Olivier (2015) 514.

¹³⁰⁷ Craig P & De Burca G *EU Law Texts, Cases and Materials* (2011) 2.

¹³⁰⁸ Weiler J 'The community system: The dual character of supranationalism' (1981) *Yearbook of European Law* 280 (hereinafter Weiler (1981)).

supranationalism is the effective mechanism to achieve integration and establish a coherent continent-wide investment framework that reserves the right to regulate for African host governments. Normative supranationalism would entail that laws of the AU supersede or nullify the corresponding laws of the member states.¹³⁰⁹

The institutional design of the AU and prescriptions of the Constitutive Act suggest that the AU has the potential to become a supranational institution.¹³¹⁰ The Assembly remains the dominant authority in the AU and exercises exclusive decision-making powers.¹³¹¹ Perhaps it should transfer power to other AU organs specifically, the PAP, AU Commission and the African Court of Justice and Human Rights. The AU Commission should be bestowed with an implementation mandate to monitor and implement AU legal instruments and policies and recommend punitive or deliberate measures which binds other AU organs. In addition, there is a need to establish formal structures through which the AU Commission can participate in monitoring and enforcement at REC and national levels. This is important for alignment of the continental approach to investment regulation. Further, PAP should be granted full legislative powers. The Court should be granted full independence to interpret and enforce the legal instruments of the AU and hold the AU institutions and member states to account for failing to comply with their stipulated obligations. It is submitted that supranationalism of the AU is critical for fostering coherent and predictable investment governance but, as noted earlier, attaining such a goal 'depends on the extent to which political elites are able to merge the rhetoric with concrete actions'.¹³¹²

6.2.4 Multiple and overlapping memberships

Another challenge to entrenching the right to regulate in Africa's international investment regime is that several African countries belong to more than one REC – the so-called multiple membership.¹³¹³ Multiple membership causes many challenges with regards to foreign investment regulation and integration in Africa. For instance, it generates multiple and contradictory investment treaty obligations and legal complexities in relation to investments undertaken in RECs with conflicting legal

¹³⁰⁹ Weiler (1981) 271.

¹³¹⁰ Fagbayibo (2018) 778.

¹³¹¹ Fagbayibo (2018) 775.

¹³¹² Fagbayibo (2018) 780.

¹³¹³ This multiple and overlapping membership is discussed extensively in Chapter 5 of this study.

systems.¹³¹⁴ Multiple, overlapping and inconsistent investment commitments can undermine Africa's integration efforts in relation to investment.¹³¹⁵ It may jeopardise the legal certainty and predictability which is needed by foreign investors,¹³¹⁶ and may create 'a complex entanglement of political commitments and institutional requirements'.¹³¹⁷ According to Ndomo:

Multiple and overlapping memberships in RECs have created a complicated web of competing commitments which, combined with different rules, result in high costs of trade between African countries, in effect undermining integration. Multiple and overlapping memberships occasion resource and effort wastage due to duplication/multiplication of effort. It complicates harmonisation and coordination among member states.¹³¹⁸

The author suggests that the harmonisation and coordination of investment policies is critical considering the increasing divergences of investment treaties across the African continent. In principle, concerted efforts to harmonise and coordinate African regional and national laws and policies have not been satisfactory.¹³¹⁹ Despite the existence of several legal instruments providing for the harmonisation of national policies at regional levels, investment laws and policies across Africa remain divergent. For example, the SADC FIP focuses on harmonising the financial and investment policies of SADC member states,¹³²⁰ yet there are still considerable disparities among member states' investment and financial policies.¹³²¹ It is submitted

¹³¹⁴ See Mbengue & Schacherer (2017) 446.

¹³¹⁵ Mbengue MM & Schacherer S 'Africa and the rethinking of international investment law: About the elaboration of the Pan-African Investment Code' in Roberts A, Stephan PB, Verdier P & Versteeg M (eds) *Comparative International Law* (2018) 547.

¹³¹⁶ Chidede T 'Investment dispute resolution under the Amended Annex 1 of the SADC FIP' (2018) available at <https://www.tralac.org/blog/article/13526-investment-dispute-resolution-under-the-amended-annex-1-of-the-sadc-fip.html> (accessed 01 November 2018).

¹³¹⁷ Draper P, Halleson D & Alves P 'SACU, regional integration and the overlap issue in southern Africa: From spaghetti to cannelloni?' (2007) South African Institute of International Affairs Trade Policy Report No. 15 7 (hereinafter Draper et al (2007)).

¹³¹⁸ Ndomo A 'Regional economic communities in Africa: A progressive overview' (2009) available at http://www2.giz.de/wbf/4tDx9kw63gma/RECs_Final_Report.pdf (accessed 09 November 2018) (hereinafter Ndomo (2009)) 10. See also UNCTAD 'The rise of regionalism in international investment policymaking: Consolidation or complexity?' (2013) IIA Issues Note No. 3 4, claiming that the 'rising regionalism in international investment policymaking presents a rare opportunity to rationalise the regime and create a more coherent, manageable and development-oriented set of investment policies. In reality, however, regionalism is moving in the opposite direction, effectively leading to a multiplication of treaty layers, making the network of international investment obligations even more complex and prone to overlap and inconsistency'.

¹³¹⁹ Ndomo (2009) 10.

¹³²⁰ Article 19 of the SADC FIP.

¹³²¹ See generally Ngobeni L & Fagbayibo B 'The investor-state dispute resolution forum under the SADC Protocol on Finance and Investment: Challenges and opportunities for effective harmonisation'

that harmonisation and coordination of legal frameworks will advance political, social and economic integration and development across the continent and regions.

The overlapping investment commitments or obligations in Africa are further aggravated by inconsistencies between investment treaties concluded among or by African countries especially the intra-African regional investment agreements and BITs. Thus, for instance, on top of regional investment treaties, member states of ECOWAS and SADC have signed intra-BITs, which co-exist with the regional investment agreements.¹³²² Sometimes these treaties contain overlapping and inconsistent obligations, and do not provide for their coordination. For example, the SADC FIP does not provide for coordination provisions dealing with the relationship between the SADC FIP and intra-SADC BITs. Even worse, some of the intra-SADC BITs allow state parties to apply other treaty provisions which are more favourable to foreign investors.¹³²³ Managing relationships of co-existing treaties can be problematic specifically in cases where the treaties differ in content and scope.

Under international law, inconsistencies are settled by resorting to the applicable rules and principles governing treaties, most prominently the *lex specialis* and *lex posterior* principles. The *lex specialis* principle provides that specialised laws prevail over general laws, that is, a law governing a specific subject matter (*lex specialis*) overrides a law governing only general matters (*lex generalis*).¹³²⁴ The *lex posterior* doctrine states that if there are inconsistencies between domestic statutes, treaties, or customary international laws, the most recently enacted will govern.¹³²⁵

As an alternative, states may incorporate a coordination clause in the regional treaty, which presumably favours the regional over BITs in cases of inconsistency. For example, the EU has adopted a Declaration of the Representatives of the

(2015) 19 *Law, Democracy and Development* 175-92, highlighting the inconsistencies and differences in SADC countries investment policies particularly in the area of investment dispute resolution.

¹³²² See UNCTAD 'International Investment Agreements Navigator' available at <http://investmentpolicyhub.unctad.org/IIA> (accessed 19 November 2018).

¹³²³ For example, BITs signed by Mauritius with the Democratic Republic of Congo, Malawi, Mauritius, Comoros, Madagascar, eSwatini, Seychelles, Zambia and Zimbabwe. The BITs can be assessed at the UNCTAD 'International Investment Agreements Navigator' available at <http://investmentpolicyhub.unctad.org/IIA>.

¹³²⁴ See International Law Commission Study Group on Fragmentation Koskeniemi 'Fragmentation of international law' available at http://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf (accessed 05 November 2018). See also *Iran-US Claims Tribunal, Amoco International Finance Corp. v. Iran*, 15 IRAN-U.C.T.R. para 189.

¹³²⁵ See Fellmeth AX & Horwitz M *Guide to Latin in international law* (2009) 22.

Governments of the Member States¹³²⁶ emphasises the precedence of the EU law over intra-EU BITs.¹³²⁷ This Declaration was enacted pursuant to the European Court of Justice's judgement in *Achmea v Slovak Republic*.¹³²⁸ In this case, the European Court of Justice held that:

Articles 267 and 344 ... of the Treaty on the Functioning of the European Union must be interpreted as precluding a provision in an international agreement concluded between member states, ... under which an investor from one of those member states may, in the event of a dispute concerning investments in the other member state, bring proceedings against the latter member state before an arbitral tribunal whose jurisdiction that member state has undertaken to accept.¹³²⁹

Likewise, Article 31 of the ECOWAS Supplementary Act, provides that the Agreements shall not affect the rights and obligations of the member states under existing agreements to which they are parties. The provisions further stipulate that in event of conflict between the agreements, the regional investment treaties shall prevail. Noteworthy is also that the ECOWAS Supplementary Act imposes an obligation upon the state parties to re-negotiate within twenty-four months prior agreements containing provisions inconsistent with this Agreement as well as to ensure that future agreements are fully consistent with it.¹³³⁰

At the continent-wide level, the approach adopted in the PAIC may serve as a guide to solve possible inconsistencies between intra-African investment treaties:

1. This Code does not affect rights and obligations of member states deriving from any existing investment agreement.
2. Notwithstanding paragraph 1, member states may agree that this Code replaces the intra-African bilateral investment treaties (BITs) or investment chapters in intra-African trade agreements after a period of time determined by the member states or after the termination period as set in the existing BITs and investment chapters in the trade agreements.
3. Member states and Regional Economic Communities (RECs) shall take into account as far as possible the provisions of this Code when entering

¹³²⁶ Declaration of the Representatives of the Governments of the Member States, 2019 (hereinafter Declaration of the Representatives of the Governments of the Member States).

¹³²⁷ Declaration of the Representatives of the Governments of the Member States 1.

¹³²⁸ *Achmea v Slovak Republic* Case C-284/16, 6 March 2018 (hereinafter *Achmea v Slovak Republic*).

¹³²⁹ *Achmea v Slovak Republic* para 120.

¹³³⁰ Article 31 (1) and (2) of the ECOWAS Supplementary Act.

into any new agreement with a third country in order to avoid any conflict between its present or future obligations under this Code and its obligations in the other agreement.

4. Member states may agree that in the case of a conflict between this Code and any intra-African BIT, investment chapter in any intra-African trade agreement, or regional investment arrangements, this Code shall take precedence.¹³³¹

The above submission is a holistic and comprehensive approach to investment reform and can reduce the risk of fragmentation and overlaps. It is submitted that if the multiple and overlapping obligations are not addressed or old investment treaties aligned with the modern investment treaties, it can undermine the efforts to integrate the right to regulate in the international investment law regime of Africa. States will be confronted with the reality to adhere to conflicting or overlapping investment obligations, particularly the standard obligations that have evolved over time in the traditional BITs, which constrain the regulatory freedom of host governments. Thus, impeding the effective realisation of the objective to accommodate regulatory freedom in all the legal instruments shaping the international investment regulatory framework for Africa.

6.2.5 Lack of technical capacity

The efforts to enshrine the right to regulate in Africa's international investment law regime may also be hampered by the perceived scarcity of technical expertise among African countries to negotiate investment treaties that support their national development objectives.¹³³² History has demonstrated that African countries generally lack technical capacity and human resources to effectively deal with and understand all issues related to investment law and policy including the complexity, diversity and evolving nature of the issues.¹³³³ This deficiency of technical capacity is evident in the content and nature of the existing traditional investment treaties to which most, if not all, African countries are party.

¹³³¹ Article 3 of the PAIC.

¹³³² See, for example, Alschner W & Skougarevskiy D 'Rules takers or rule makers? A new look at African bilateral investment treaty practice' (2016) Working Paper No. 7 4 (hereinafter Alschner & Skougarevskiy (2016)).

¹³³³ UNECA (2016) 24.

African countries have entered into far-reaching legal commitments or investment treaties expecting to promote foreign investment and better economic diplomatic relations with developed countries without a proper understanding of the consequences thereof.¹³³⁴ The content of these North-South investment treaties was dictated by the developed countries and African countries were merely consumers of the treaties.¹³³⁵ Such treaties are asymmetric and biased towards foreign investors. They focus more on investment promotion, facilitation and protection with limited or no attention to public interest or development considerations.¹³³⁶ The treaties have given investors direct access to international arbitration tribunals challenging a wide range of policy areas including public health, natural resources and land governance, and environmental protection, resulting in host governments paying heavy fines to foreign investors.¹³³⁷

More recently, many African countries have begun to criticise the international investment arbitration system due to the 'perceived lack of transparency and legitimacy of the international arbitration process, conflicting arbitral jurisprudence, the independence of arbitrators and the prohibitive legal costs associated with international commercial arbitration and excessive damages'.¹³³⁸ Egypt, Libya, Tanzania and Zimbabwe are among the African countries that have recently been faced with excessive legal costs and arbitral awards from international arbitration claims filed by foreign investors.¹³³⁹

¹³³⁴ See generally Poulsen LNS *Bounded rationality and economic diplomacy: The politics of investment treaties in developing countries* (2015) (hereinafter Poulsen (2015)).

¹³³⁵ See Van Harten G 'A critique of international investment treaties' in Singh K & Ilge B (eds) *Rethinking bilateral investment treaties: Critical issues and policy issues* (2016) 50 (hereinafter Van Harten (2016)); and Layrea ET & Sucker F 'The important of an African voice in, and understanding and use of, international economic law' in Layrea ET, Madolo N & Sucker F (eds) *International economic law: Voices of Africa* (2012) 10 (hereinafter Layrea (2012)). Egypt, Mauritius and South Africa provide examples of departure from this trend.

¹³³⁶ South-South BITs are said to contain more public policy elements than North-South BITs. See Alschner W & Skougarevskiy D (2016).

¹³³⁷ See generally Poulsen LNS & Aisbett E 'When the claim hits: bilateral investment treaties and bounded rational learning' (2013) 65 *World Politics* 273-313.

¹³³⁸ See 'Summary of the key amendments to Annex 1 of the SADC Finance and Investment Protocol' <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150922summary.pdf> (accessed 27 November 2018). Criticisms against ISDS international arbitration is also common among developed countries today.

¹³³⁹ See UNCTAD 'Investment Dispute Settlement Navigator' available at <http://investmentpolicyhub.unctad.org/ISDS> (accessed 09 November 2018).

There is a strong case for African countries to equip themselves with necessary skills and tools to negotiate investment treaties capturing public interests and fostering sustainable development needs of the continent. As shown in the preceding chapters, the UNCTAD Investment Policy Framework for Sustainable Development,¹³⁴⁰ the new US¹³⁴¹ and Canadian Model BITs,¹³⁴² OECD Policy Framework on Investment,¹³⁴³ IISD Model Agreement on Investment for Sustainable Development,¹³⁴⁴ Comprehensive and Progressive Agreement for Trans-Pacific Partnership,¹³⁴⁵ the Agreement between US, Mexico and Canada,¹³⁴⁶ the PAIC, the SADC Model BIT,¹³⁴⁷ the Revised COMESA Common Investment Agreement¹³⁴⁸ are some of the respectable tools that African governments could utilise in negotiating such kind of investment treaties between themselves or with external partners. However, in practice, African governments tend to use traditional European and US Model BITs more when negotiating their investment treaties with external partners.¹³⁴⁹ If this is not addressed immediately, it will perpetuate the marginalisation of policy space in Africa's international investment legal framework.

In addition, a robust approach towards investment treaty negotiation is needed. Cotula, Weng, Ma and Ren contend that 'China's pragmatic approach to treaty negotiations could provide opportunities for African governments to set their own investment treaty policies and templates, and engage in negotiations on that basis. Cooperation among African states could help address imbalances in negotiating power'.¹³⁵⁰ China has adopted pragmatic, flexible negotiation strategies that are open to taking on board proposals from the other side (North and South).¹³⁵¹ In executing South-South investment treaties, China has developed a distinctive approach to investment treaty making, significantly nuancing conventional investment protections

¹³⁴⁰ UNCTAD Investment Policy Framework for Sustainable Development, 2015.

¹³⁴¹ Treaty between the Government of the United States of America and the Government of (country) concerning the Encouragement and Reciprocal Protection of Investment, 2012.

¹³⁴² Canada Model Foreign Investment Protection and Promotion Agreement, 2004.

¹³⁴³ OECD Policy Framework on Investment, 2015.

¹³⁴⁴ IISD Model Agreement on Investment for Sustainable Development, 2005.

¹³⁴⁵ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 2018.

¹³⁴⁶ the Agreement between US, Mexico and Canada, 2018.

¹³⁴⁷ SADC Model BIT, 2012.

¹³⁴⁸ Revised COMESA Common Investment Agreement, 2017.

¹³⁴⁹ De Brabandere (2017) 531.

¹³⁵⁰ Cotula L, Weng X, Ma Q & Ren P *China-Africa investment treaties: Do they work?* (2016) (hereinafter Cotula et al (2016)) 10.

¹³⁵¹ Cotula et al (2016) 33.

and tackling a combination of non-investment-related public policy aspects including sustainable development, environment, labour, human rights and public health protection.¹³⁵² By adopting the Chinese approach, African states negotiating may have more room to shape treaty formulations that are capable of addressing their needs. This would strengthen the case for African states to invest in preparedness ahead of negotiations, including through developing clear policies and templates.¹³⁵³

It is submitted that to have investment treaties that promote inclusive sustainable development, multi-stakeholder engagement is equally important. This would ensure that the interests of all parties are considered in investment treaty negotiations. That is, parliamentarians, business community, civil society and citizens at large need to get involved in their national debates, so they can scrutinise and influence the way in which their governments shape investment policy which effectively pursue sustainable development aspirations. According to the International Institute for Environment and Development (IIED), 'countries considering negotiating investment treaties need to ensure proper reflection and public debate on these important policy choices. Yet treaty negotiations typically happen behind closed doors, and there is limited oversight by civil society or parliamentarians. There is also limited public awareness about the complex technical issues involved'.¹³⁵⁴ It is therefore imperative for African governments and the AU to ensure that in designing the investment legal framework or investment treaties multi-stakeholder engagement¹³⁵⁵ or trans- and interdisciplinary approach is adopted. This would enhance the potential of the investment treaties to promote sustainable development and take into account the special needs of the broader array of stakeholders.

¹³⁵² See Berger A 'Hesitant embrace: China's recent approach to international investment rule-making' (2016) 16 *Journal of World Investment & Trade* 843-68; Chi M 'The "greenisation" of Chinese BITs: an empirical study of the environmental provisions in Chinese BITs and its implications for China's future BIT-making' (2015) 18 *Journal of International Economic Law* 511-42; Gallagher N & Shan W *Chinese investment treaties: policies and practice* (2009); Kidane W 'China-African investment treaties: Old rules, new challenges' (2014) 37 *Fordham Journal of International Law* 1035-86; Berger A 'The politics of China's investment treaty-making program' in Broude T, Busch M & Porges A (eds) *The politics of international economic law* (2011) 162-85.

¹³⁵³ Cotula et al (2016) 33

¹³⁵⁴ IIED 'Rethinking investment treaties, laws and contracts' available at <https://www.iied.org/rethinking-investment-treaties-laws-contracts> (accessed 14 November 2018).

¹³⁵⁵ The participation of key and relevant stakeholders in investment treaty negotiations process is very important. It allows citizens and other key stakeholders to pressurise their states to make investment concessions which are in the public interest.

6.2.6 Lack of sustainable funding

Lack of sustainable funding as well as little or no political will by African countries to finance development programmes can be an impediment to entrenching the right to regulate in the international investment legal framework for Africa. Inadequate funding remains one of the greatest challenges facing Africa¹³⁵⁶ and the AU member states' contributions to implement AU programmes are insufficient and unsustainable.¹³⁵⁷ In 2015, the AU Assembly affirmed its determination to ensure that the AU is financed in a predictable, sustainable, equitable and accountable manner with the full ownership by its member states. The Assembly then adopted a decision on alternative sources of financing the AU along with a new scale of assessment.¹³⁵⁸ This decision committed members to achieving three targets to finance: 100 per cent of the AU's operational budget; 75 per cent of its programme budget; and 25 per cent of the organisations' peace support operations budget within five years. Further, in 2016, the Assembly adopted another decision, to consider new modalities of financing the programmes of the organisation aimed at easing the pressure on national treasuries.¹³⁵⁹ On the financing of the AU, the Assembly decided, *inter alia*:

- I. To institute and implement a 0.2 per cent levy on all eligible imported goods into the Continent to finance the African Union Operational, Program and Peace Support Operations Budgets starting from the year 2017;
- II. That the amounts collected from the levy shall be automatically paid by the national administration, into an account opened for the African Union with the Central Banks of each Member State for transmission to the African Union in accordance with each Member State's assessed contribution.¹³⁶⁰

¹³⁵⁶ Adeleke (2018) 11.

¹³⁵⁷ Kagame (2017) 13. See also Oyoo S 'The AU's dependency on donors is a big shame' (2015) available at <https://www.pambazuka.org/governance/au%E2%80%99s-dependency-donors-big-shame> (accessed 14 November 2018) (hereinafter Oyoo (2015)).

¹³⁵⁸ Decision on the Scale of Assessment and Alternative Sources of Financing the African Union Doc. Assembly/AU/5(XXV).

¹³⁵⁹ Decision on the Outcome of the Retreat of the Assembly of the African Union Assembly/AU/Dec.605 (XXVII).

¹³⁶⁰ Mauritius entered a reservation on this decision.

Against this background, it was recommended that this decision should be implemented as part of the AU financial reforms.¹³⁶¹ As end 2018, only 14 of the 55 AU member states were collecting the 0.2 per cent levy from eligible imported goods to meet their assessed financial commitments to the AU.¹³⁶² The author concurs that sustainable funding is needed to support Africa's development priorities. However, if governments cannot sustainably fund their economic development programmes, the reality is that they will continue to be over dependent on FDI, development aid and donor funding. Moyo¹³⁶³ has expressed her resentment towards Africa's over-reliance on development aid and donor funding. She maintains that donor funding has not helped Africa to move out of poor economic development and poverty but has rather continued economic problems and escalated poverty across the continent.¹³⁶⁴

When struck with severe economic development challenges, African countries will be desperate to attract FDI particularly from developed countries with the objective to finance their development projects.¹³⁶⁵ One of the ways they will try to do so is through signing investment treaties with the home states of the investors as a legal impetus to attract FDI. The author submits that there is nothing wrong with signing investment treaties with such countries. The real problem is that African BITs rarely deviate from a standard model that has developed over time.¹³⁶⁶ These can be further aggravated if the home developed countries negotiating investment treaties with African countries

¹³⁶¹ Report on the Implementation of the Decision on the Institutional Reform of the African Union by H.E. Paul Kagame, President of the Republic of Rwanda, July 2017 available at https://au.int/sites/default/files/documents/33272-doc-au_reform_implementation_report_july_2017_final_v2.pdf (accessed 23 November 2018).

¹³⁶² These include Rwanda, Kenya, Ethiopia, Djibouti, Chad, Guinea, Sudan, Congo Brazzaville, Cameroon, Gambia, Gabon, Cote d'Ivoire and Sierra Leone and Ghana. Another 23 countries are at various stages of implementation. See AU 'Financial reforms at the African Union lead to massive cuts of the Union's Budget' available at <https://au.int/en/pressreleases/20180706/financial-reforms-african-union-lead-massive-cuts-union%E2%80%99s-budget> (accessed 23 November 2018).

¹³⁶³ Moyo D *Dead aid: Why aid is not working and how there is a better way for Africa* (2009) (hereinafter Moyo (2009)).

¹³⁶⁴ Moyo (2009) ch 3.

¹³⁶⁵ FDI to finance African countries' development has been emphasised in many documents. For example, UNECA (2016) vii; Part VII of the United Nations Millennium Declaration, UNGA Res 55/2 (18 September 2000), adopted at the 55th Session of the United Nations General Assembly; preamble of the Investment Agreement for the COMESA Common Investment Area, 2007; and preamble of the Southern African Development Community Finance and Investment Protocol, 2006. Denters and Gazzini are optimistic that foreign investment still provides Africa with an unprecedented opportunity to boost its economic development. Denters & Gazzini (2017) 449.

¹³⁶⁶ Mosoti V 'Bilateral investment treaties and the possibility of a multilateral framework on investment at the WTO: Are poor economies caught in between?' (2005) 26 *North-western Journal of International Law & Business* 103. See also De Brabandere E 'Fair and equitable treatment and (full) protection and security in African investment treaties: Navigating between generally and contextual specificity' (2017) 18 *Journal of World Investment & Trade* 531 (hereinafter De Brabandere (2017)).

perceive the adoption of policy space as a sign of protectionism that undermines the investment treaties' object and purpose to promote and protect investors.¹³⁶⁷ The implication of this is that African countries will continue to subscribe to investment treaty standards that constrain their regulatory freedom in the name of attracting FDI through investment treaties.

6.3.7 Withdrawal, termination, amendment of investment treaties

As demonstrated in the preceding chapters, the existing international investment law regime of Africa is shaped by several investment treaties concluded by African countries among themselves and with external trade and investment partners.¹³⁶⁸ These treaties are asymmetrical in favour of investors¹³⁶⁹ and constrain the regulatory freedom of African host governments.¹³⁷⁰ Entrenching the right to regulate in Africa's international investment law implies redressing the imbalances and shortcomings of the existing investment treaties. Notable options among others include denouncing, terminating or renegotiating or amending the existing investment treaties, as well as abandoning unratified old treaties. The denouncement, termination and amendment of treaties is governed by public international law expressly enshrined in the Vienna Convention of the Law of Treaties (VCLT).¹³⁷¹ However, each of these options has pros and cons, and such consequence may pose a threat to the incorporation of policy space in the international investment law of Africa.

Amending treaty provisions involves making changes or improvements to specific clauses of existing treaties.¹³⁷² Amending a treaty allows states to expressly carve out their intended policy objectives and priorities. However, amendments of treaty provisions will require agreement among and/or subsequent ratification by contracting

¹³⁶⁷ See, for example, Fox G 'A future for international investment? Modifying BITs to drive economic development' (2014) 46 *Georgetown Journal of International Law* 229-59; and Johnson AR 'Rethinking bilateral investment treaties in Sub-Saharan Africa' (2010) 59 *Emory Law Journal* 932.

¹³⁶⁸ See discussions in chapters 1, 4 and 5.

¹³⁶⁹ See Denters & Gazzini (2017) 454, conceding that investment treaties concluded by African countries 'tend to adhere to the traditional model, which is essentially economic-oriented and often manifestly unbalanced in favour of foreign investors'.

¹³⁷⁰ See Economic Commission for Africa Committee on Regional Cooperation and Integration (2015) 2.

¹³⁷¹ Vienna Convention on the Law of Treaties, 1969 (hereinafter VCLT).

¹³⁷² See generally Dörr O & Schmalenbach K (eds) *Vienna Convention on the Law of Treaties: A commentary* 2 ed (2018). See also Klabbbers J *Treaties, amendment and revision* (2006); Dörr O & Schmalenbach K 'Article 39. General rule regarding the amendment of treaties' in Dörr O & Schmalenbach K (eds) *Vienna Convention on the Law of Treaties*. (2012); and Dixit RK 'Amendment or modification of treaties' (1970) 10 *Indian Journal of International Law* 37-50.

parties,¹³⁷³ and this may be difficult to achieve if there are multiple contracting parties with contrasting views.¹³⁷⁴ The author submits some countries may be reluctant to amend the treaties if such amendments are not in their best interests.

Replacing or substituting outdated investment treaties with new ones is another policy option that has been used by Morocco recently.¹³⁷⁵ According to UNCTAD, 'approaching the treaty afresh enables the parties to achieve a higher degree of change (*vis-à-vis* selective amendments) and to be more rigorous and conceptual in designing an IIA that reflects their contemporary shared vision'.¹³⁷⁶ However, this process 'can be cost- and time-intensive, as it involves the negotiation of the treaty from scratch, does not guarantee inclusion of reform-oriented elements (depends on the negotiated outcome), and requires effective transition between the old and the new treaties'.¹³⁷⁷ To safeguard smooth transition, it is important to include explicit transition clauses clearly defining the time-period for applying old BITs.

Another option available for countries is to terminate existing old treaties. Some African countries have recently terminated their BITs. For instance, South Africa unilaterally terminated its old BITs with nine EU member states between 2013 and 2014 to do away with BITs, enact a law and use BITs in compelling economic circumstances.¹³⁷⁸ Similarly, Tanzania has terminated their BITs with a view of negotiating new ones that are capable of addressing their national development concerns.¹³⁷⁹ It is not assured whether African countries would agree to terminate their

¹³⁷³ Part VI of the VCLT.

¹³⁷⁴ See Bowman MJ "The multilateral treaty amendment process: A case study." (1995) 44 *The International and Comparative Law Quarterly* 540-59.

¹³⁷⁵ For instance, Morocco replaced its 1961 BIT with Germany with a new BIT in 2008.

¹³⁷⁶ UNCTAD 'World Investment Report 2017: Investment and the digital economy' (2017) 134 available at https://unctad.org/en/PublicationsLibrary/wir2017_en.pdf (accessed 16 December 2018).

¹³⁷⁷ Chidede T 'Investment policy reforms in Africa: How can they be synchronised?' (2017) available at <https://www.tralac.org/discussions/article/11779-investment-policy-reforms-in-africa-how-can-they-be-synchronised.html> (accessed 16 December 2018).

¹³⁷⁸ See Schlemmer EC 'An overview of South Africa's bilateral investment treaties and investment policy' (2016) 31 *ICSID Review* 167. See also Forere MA 'The new South African Protection of Investment Act: Striking a balance between attraction of FDI and redressing the Apartheid legacies' in Schill SW, Tams CJ & Hofmann R (eds) *International Investment Law and Development: Bridging the Gap* (2015) 251, indicating that South Africa's new investment legislation intends to achieve a balance between attracting foreign investment and redressing the inequalities injected by the Apartheid regime. For other discussions, see Carim X, 'Lessons from South Africa's BITs Review' (2013) *Columbia FDI Perspectives* No. 109.

¹³⁷⁹ For Tanzania, see 'As Tanzania seeks to overhaul mining regime, the government reportedly moves to terminate a bilateral investment treaty that was up for renewal' (2018) *International Arbitration Reporter* available at <https://www.iareporter.com/articles/as-tanzania-seeks-to-overhaul-mining-regime-the-government-reportedly-moves-to-terminate-a-bilateral-investment-treaty-that-was-up-for-renewal/> (accessed 17 November 2018); and Kidanka C 'Tanzania ends investment treaty with

existing intra-Africa investment treaties. Even when negotiating new investment treaties African countries appear to be reluctant to depart from the traditional model of BITs.¹³⁸⁰ Some recent intra-African BITs, for example, the Egypt and Mali BIT¹³⁸¹ and Mali and Morocco BIT¹³⁸² contain general provisions contained in the conventional North-South BITs.

Withdrawal, termination or amendment of investment treaties are necessary to upgrade the existing treaties to incorporate policy space or reserve the regulatory autonomy of the host state. However, these actions are not without obstacles or legal consequences. Withdrawal, termination or amendment require both procedural and substantive measures. The entire section 3 of the VCLT is devoted to the regulation of the termination of or withdrawal from treaties. Quite often, rules for the termination of or withdrawal from treaties are set out in a specific treaty. Article 54 of the VCLT provides that 'the termination of a treaty or the withdrawal of a party may take place: in conformity with the provisions of the treaty; or at any time by consent of all the parties after consultation with the other contracting states'.¹³⁸³

State parties may unilaterally or mutually agree to terminate a treaty.¹³⁸⁴ The VCLT enshrines procedures regarding the termination or withdrawal from a treaty including notification, judicial settlement, arbitration or conciliation if a dispute arises thereof.¹³⁸⁵ In most instances, a notice must be provided to the other contracting party, upon expiry of which the treaty ceases to be in force.

In practice, exiting from investment treaties is generally difficult.¹³⁸⁶ It has enormous legal ramifications for states and exposes states to international arbitration claims by

Netherlands' (2018) available at <http://www.theeastafrican.co.ke/business/Tanzania-ends-investment-treaty-with-Netherlands/2560-4794614-3ywb8/index.html> (accessed 10 November 2018).

¹³⁸⁰ De Brabandere (2017) 531.

¹³⁸¹ Mali and Egypt BIT, 2014.

¹³⁸² Mali and Morocco BIT, 2014.

¹³⁸³ For a discussion, see Dörr O & Schmalenbach K 'Article 54: Termination of or withdrawal from a treaty under its provisions or by consent of the parties' in Dörr O & Schmalenbach K (eds) *Vienna Convention on the Law of Treaties* (2012); and Villiger ME *Article 54: Termination of or withdrawal from a treaty under its provisions or by consent of the parties* (2008).

¹³⁸⁴ See Articles 57 and 60 of the VCLT.

¹³⁸⁵ Section 4 of the VCLT.

¹³⁸⁶ Giest A 'Interpreting public interest provisions in international investment treaties' (2017) 18 *Chicago Journal of International Law* 333.

investors.¹³⁸⁷ For example, in *Swissbourgh v Lesotho*,¹³⁸⁸ the government of Lesotho was held liable to investors for participating in the disbandment of SADC Tribunal. Usually, it takes a couple of days, months or years to exit some of the investment treaties. There is typically a waiting period in most traditional BITs whereby a country must wait a specified number of years before exiting the treaty.¹³⁸⁹

Some BITs include a 'survival clause' whereby the treaty continues to apply even after termination.¹³⁹⁰ In some instances, 'the contracting states may agree to terminate the treaty together with its sunset clause or modify the latter with the effect of shortening the relevant sunset period'.¹³⁹¹ If a sunset clause persists, matters can continue to be arbitrated for ten to twenty years if they occurred while the treaty was effective.¹³⁹² Consequently, a foreign investor's rights under a specific treaty remain in place even after the treaty has been terminated. For example, Article 14 of the BIT between the UK and South Africa, provides that investors who invest in either country before the BIT is terminated, will continue to enjoy the rights under the Agreement for a further 20 years after the Agreement is terminated. Equally, in *Marco Gavazzi and Stefano Gavazzi v. Romania*,¹³⁹³ foreign investors initiated an arbitration under the Italy-Romania BIT in 2012 after the treaty had already been terminated in 2010, but while the sunset period was still running, and the effectiveness of the sunset clause was not disputed. According to Zarowna:¹³⁹⁴

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¹³⁸⁷ Lavopa F, Barreiros LE & Bruno MV 'How to kill a BIT and not die trying: Legal and political challenges of denouncing or renegotiating bilateral investment treaties' (2013) 16 *Journal of International Economic Law* 869.

¹³⁸⁸ *Swissbourgh Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust and Others v The Kingdom of Lesotho* (PCA Case No. 2013-29).

¹³⁸⁹ Katselas AT 'Exit, voice, and loyalty in investment treaty arbitration' (2014) 93 *Nebraska Law Review* 338. See also Katselas AT 'Exit, voice, and loyalty in investment treaty arbitration: A summary' in Lalani S & Laz RP (eds) *The role of the state in investor-state arbitration* (2015) 211.

¹³⁹⁰ Harrison J 'The life and death of the BITs: Legal issues concerning survival clauses and the termination of investment treaties' (2012) 13 *Journal of World Investment and Trade* 928. See also Nowrot K 'Termination and renegotiation of international agreements' in Hindelang S & Krajewski M (eds) *Shifting paradigms in international investment law: More balanced, less isolated, increasingly diversified* (2016) 242-44.

¹³⁹¹ Zarowna A 'Termination of BITs and sunset clauses – What can investors in Poland expect?' (2017) Kluwer Arbitration Blog available at <http://arbitrationblog.kluwerarbitration.com/2017/02/28/booked-22-february-polish-bits/> (accessed 10 December 2018) (hereinafter Zarowna (2017)).

¹³⁹² See *Easterb Sugar BV v. Czech Republic* (UNCITRAL., SCC 088/2004) Partial Award 27 March 2007.

¹³⁹³ *Marco Gavazzi and Stefano Gavazzi v. Romania* (ICSID Case No. ARB/12/25).

¹³⁹⁴ Zarowna (2017).

One consideration regarding the implications of the termination of sunset clauses on investors' rights would be whether investors have already exercised their rights under a BIT by commencing arbitration. Although Article 70 (1) VCLT indicates a presumption against any retroactive effect of termination, such a presumption can nevertheless be rebutted by the parties' consent to the contrary. However, it may be difficult to convince a tribunal that has already been seized by an investor that a subsequent treaty termination, effectively pulling the rug out from under the investor, was effective. A stronger argument could be made where investors have not yet commenced arbitration at the time of termination.¹³⁹⁵

Despite the challenges outlined above, it is submitted that there is a strong case for African governments to rethink their BITs and carefully decide on whether to conclude new treaties, terminate or renegotiate existing ones and reconfigure their approaches to treaty drafting.¹³⁹⁶ This would provide African countries with an opportunity to address the shortcomings of their existing international investment law regime and to rethink their investment legal framework that preserves their right to regulate. The discussion below explores the policy opportunities for African countries to incorporate their regulatory freedom in the international investment law regime of Africa.

6.3 OPPORTUNITIES FOR ENTRENCHING POLICY SPACE IN THE INTERNATIONAL INVESTMENT LAW REGIME

Notwithstanding the challenges chronicled above, there exist an array of diverse opportunities for African countries to entrench the right to regulate in their international investment legal framework. These opportunities include, but are not limited to, the AfCFTA, the Tripartite Free Trade Area (TFTA),¹³⁹⁷ the Economic Partnership Agreements (EPAs),¹³⁹⁸ as well as the ongoing multilateral initiatives/discussions on the reform of international investment law. Overall, these opportunities provide a platform for African countries to rethink their investment treaty practice in pursuit of their regulatory freedom and development priorities. Most important is that these opportunities are in the form of rules-based arrangements. That means they provide a chance for African countries to cement their right to regulate in legally enforceable

¹³⁹⁵ Zarowna (2017).

¹³⁹⁶ Cotula et al (2016) 10. See also Johnson AR 'Rethinking bilateral investment treaties in Sub-Saharan Africa' (2010) 59 *Emory Law Journal* 919-67.

¹³⁹⁷ TFTA is the free trade area between member states of COMESA, EAC and SADC.

¹³⁹⁸ EPA are trade and development agreements between the EU and African, Caribbean and Pacific regions.

and binding international investment arrangements. In such formalistic legal rules, African states should be encouraged to establish national focal points or institutions that deal specifically with coordinating investment related policy and are thus positioned to interface with the AU or RECs in assessing the levels of progress in implementing or concluding investment treaties that preserve the right to regulate.

6.3.1 AfCFTA Investment Protocol

In January 2012, the AU Assembly decided to fast-track the establishment of the AfCFTA.¹³⁹⁹ Subsequently, the AfCFTA negotiations were launched in June 2015.¹⁴⁰⁰ In March 2018, the AU Assembly launched the AfCFTA and the Agreement establishing the AfCFTA (AfCFTA Agreement) was signed, along with other legal instruments.¹⁴⁰¹ The AfCFTA Agreement intends to facilitate free movement of goods, services, people and investments between and among 55 member states of the AU. The declared general objectives of the AfCFTA include to:

Create a single market for goods, services, and movement of persons in order to deepen the economic integration of the African Continent and in accordance with the Pan African Vision of “an integrated, prosperous and peaceful Africa” enshrined in Agenda 2063;

Create a liberalised market for goods and services through successive rounds of negotiations;

Contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and RECs;

Lay the foundations for the establishment, at a later stage, of a continental customs union;

Promote and attain sustainable and inclusive social and economic development and structural transformation of the state parties;

Enhance the competitiveness of the economies of state parties within the continent and the global market;

Promote industrial development through diversification and regional value chain development, agricultural development and food security; and

¹³⁹⁹ Decision (Assembly/AU/Dec. 394(XVIII) To Fast Track the Establishment of the African Continental Free Trade Area (AfCFTA).

¹⁴⁰⁰ Assembly Decision (Assembly/AU/Dec. 569(XXV)).

¹⁴⁰¹ Other instruments that were signed at the Summit include the Kigali Declaration and the Protocol to the Treaty Establishing the African Economic Community relating to the Free Movement of Persons, Right to Residence and Right to Establishment.

Resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.¹⁴⁰²

The AfCFTA Agreement cover disciplines such as trade in goods, trade in services, investment, intellectual property rights (IPRs) and competition policy.¹⁴⁰³ These disciplines have been and are to be constituted into Protocols, which shall form an integral part of the AfCFTA Agreement.¹⁴⁰⁴ The AfCFTA negotiations were divided into two phases: Phase I covers trade in goods and trade in services, while Phase II covers IPRs, investment and competition policy. Phase I negotiations resulted in the conclusion of the AfCFTA Agreement with its associated legal instruments – the Protocol on Trade in Goods, the Protocol on Trade in Services, and the Protocol on the Rules and Procedures on the Settlement of Disputes. Some Phase I issues such as tariff schedules, rules of origin, and trade in services¹⁴⁰⁵ commitments are yet to be negotiated and completed.¹⁴⁰⁶ Tariff concessions, rules of origin and services commitments are expected to be submitted for adoption in February 2020, and trading under the AfCFTA regime is expected to commence in July 2020.¹⁴⁰⁷

The AfCFTA Agreement entered into force on 30th May 2019, 30 days after the deposit of the 22nd instrument of ratification. Once the negotiations and outstanding issues of the Phase I Protocols are completed, they will be adopted and enter into force. Phase II negotiations are intended to produce Protocols on Investment, IPRs and Competition Policy, and shall form part of the single undertaking, subject to entry into force.¹⁴⁰⁸ Meanwhile, technical issues on Phase II negotiations are under consideration. The AU

¹⁴⁰² Article 3 (a)-(h) of the AfCFTA Agreement. The specific objectives of the AfCFTA are listed in Article 4 of the AfCFTA Agreement, and include to:

- a) progressively eliminate tariffs and non-tariff barriers to trade in goods;
- b) progressively liberalise trade in services;
- c) cooperate on investment, intellectual property rights and competition policies;
- d) cooperate on all trade-related areas between State Parties;
- e) cooperate on customs matters and the implementation of trade facilitation measures;
- f) design a mechanism for the settlement of disputes concerning their rights and obligations; and
- g) establish and maintain an institutional framework for the implementation and administration of the Continental Free Trade Area.

¹⁴⁰³ Article 6 of the AfCFTA Agreement. Any disciplines deemed necessary for the furtherance of the AfCFTA objectives may be added. Article 8 (3) of the AfCFTA Agreement.

¹⁴⁰⁴ Article 8 (1) of the AfCFTA Agreement.

¹⁴⁰⁵ Further, AU Ministers of Trade have agreed on five priority sectors on trade in services namely transport, finance, tourism, communication and business services

¹⁴⁰⁶ These outstanding issues must be finalised by January 2019, according to the AU Decision on the Draft AfCFTA Agreement Doc. Ext/Assembly/AU/2(X).

¹⁴⁰⁷ Paragraph 8 of the Decision on the Launch of the Operational Phase of the African Continental Free Trade Area (AfCFTA) Ext/Assembly/AU/Dec.1(XII).

¹⁴⁰⁸ Article 8 (2) of the AfCFTA Agreement.

Ministers for Trade are expected to submit the draft legal texts for the Protocols on Investment, Competition Policy and IPRs to the January 2021 AU Summit for adoption.¹⁴⁰⁹ These Protocols will 'form part of the single undertaking'¹⁴¹⁰ and 'enter into force thirty (30) days after the deposit of the twenty second (22nd) instrument of ratification'.¹⁴¹¹

The specifications of Article 8 of the AfCFTA Agreement suggest that the Agreement is a single undertaking. Single undertaking is a concept developed during the Uruguay Round of World Trade Organisation (WTO) negotiations and entails that all negotiations should be concluded before new international legal instruments are ratified.¹⁴¹² All State Parties are bound by the results of the complete package.¹⁴¹³ In accordance with the provisions of Article 8 (2) of the AfCFTA Agreement, the Protocols on Trade in Goods, Trade in Services, Investment, IPRs, Competition Policy, and Dispute Settlement shall form part of the single undertaking. This means that, all AfCFTA state parties are bound by all these legal texts.

As noted earlier, cooperation between countries with different levels of economic development, cultures and legal system can be problematic. The AfCFTA Agreement has adopted principles that will govern and perhaps mitigate this including the variable geometry.¹⁴¹⁴ According to Erasmus 'variable geometry means the principle of flexibility which allows progression in cooperation among member/partner states in a variety of areas at different speeds. The principles of variable geometry ... and *acquis* are complementary'.¹⁴¹⁵

¹⁴⁰⁹ Para 13 (ii) of the Decision on the African Continental Free Trade Area Doc. Assembly/AU/4(XXXII).

¹⁴¹⁰ Article 8 of the AfCFTA Agreement.

¹⁴¹¹ Article 23 (3) of the AfCFTA Agreement.

¹⁴¹² Wolfe R 'The WTO single undertaking as negotiating technique and constitutive metaphor' (2009) 12 *Journal of International Economic Law* 835 (hereinafter Wolfe (2009)).

¹⁴¹³ See Wolfe (2009) 835.

¹⁴¹⁴ Article 5 (c) of the AfCFTA Agreement.

¹⁴¹⁵ Erasmus G 'Redirecting the Tripartite Free Trade Agreement negotiations?' (2013) Tralac Trade Brief S13TB02/2013 5 (hereinafter Erasmus (2013)).

6.3.1.1 Building blocs and *acquis* principles

The AfCFTA Agreement acknowledges RECs as the building blocs for the establishment of the AfCFTA.¹⁴¹⁶ Thus, the AfCFTA is not intended to remove what has been achieved within the RECs¹⁴¹⁷ but rather to build on and, where possible, improve on what has been achieved therein, the so-called preservation of the *acquis*.¹⁴¹⁸ *Acquis* is a French term meaning ‘that which has been agreed’.¹⁴¹⁹ In the AfCFTA Agreement context, this means that the AfCFTA Agreement and its Protocols including the Protocol on Investment should both preserve and build on what the RECs have achieved in terms of investment regulation.

The AU has recognised eight RECs as the official building blocs for the AfCFTA: COMESA; EAC; ECOWAS; SADC; the Arab Maghreb Union (AMU); the Intergovernmental Authority on Development (IGAD); the Economic Community of Central African States (ECCAS); and the Community of Sahel-Saharan States (CEN-SAD). Among these RECs, as shown in the previous chapter, only SADC, EAC, ECOWAS and COMESA have already adopted comprehensive regional investment agreements/protocols/regulations/policies.¹⁴²⁰ These regional arrangements encapsulate, *inter alia*, legally binding obligations that member states have assumed pertaining to protecting investments within their territories. These instruments may become the cornerstones or building blocs of a simpler and more coherent continental legal framework for foreign investment for the benefit of the different stakeholders from the standpoint of both efficiency and predictability.

More precisely, the ECOWAS Supplementary Act, the COMESA Common Investment Agreement, the SADC FIP, and non-binding regional instruments like the EAC Model Investment Law and the SADC Model BIT are classic attempts to redress the unbalanced nature of the traditional international investment law.¹⁴²¹ As have been demonstrated in the preceding chapter, these instruments provide for substantial rights and obligations of both host states and investors. They show that investment

¹⁴¹⁶ Preamble and Article 5 of the AfCFTA Agreement.

¹⁴¹⁷ See Erasmus G ‘What will happen to the Regional Economic Communities and other African Trade Arrangements once the AfCFTA is operational?’ (2018) Tralac Trade Brief No. S18TB04/20.

¹⁴¹⁸ Article 5 (f) of the AfCFTA Agreement.

¹⁴¹⁹ Erasmus (2013) 5.

¹⁴²⁰ SADC FIP, SADC Model BIT, EAC Model Investment Code, ECOWAS Supplementary Act and COMESA Common Investment Agreement.

¹⁴²¹ Denters & Gazzini (2017) 481. See also Mbengue & Schacherer (2017) 446.

treaties need not be restricted to investment protection but can harness diverse mechanisms – including collaborative arrangements, investor obligations and safeguards for policy space – to promote investments and ensure they promote sustainable development. The agreements embed conventional investment protection standards and introduce new investor and state obligations, including provisions on: anti-corruption; social and environmental standards; compliance with national law; corporate governance; investor liability; and transparency of contracts and payments.¹⁴²² Such a stance signals the readiness of African countries to move towards a modern investment treaty practice.

In addition, although not binding nor designated as a building bloc by the AfCFTA Agreement, the PAIC can be considered a guiding instrument for the negotiation of the AfCFTA Investment Protocol. Conventionally, investment treaty model laws are very important. They provide acceptable and useful guidance towards achieving harmonisation of legal frameworks which can advance investment-led sustainable development. It can serve as a guide for a continent-wide investment regime which preserves the policy space for African host states. It is worth pointing out that the preamble of the PAIC indicates amongst its objectives the achievement ‘of an overall balance of the rights and obligations amongst member states and the investors.’¹⁴²³ Mbengue and Schacherer perceive the PAIC as ‘an African tuning or recalibration of an IIA’ that ‘reflects the development that new IIAs are no longer based on either the North American or European models, but that other regions also engage in shaping IIAs according to their level of economic development and social needs’.¹⁴²⁴ Mbengue and Schacherer further underscore that:

The elaboration of the PAIC has permitted African countries to deliberate on their vision of the future shape of IIAs and to build awareness amongst them of the broader implications of foreign investment for their sustainable development. The PAIC thus reflects the broad consensus of all AU member states on precise provisions over foreign investment regulation and endows Africa with a voice in the international debate on the future and reform of the international investment regime.¹⁴²⁵

¹⁴²² See Denters & Gazzini (2017) 481.

¹⁴²³ Balanced investment treaties are deemed to be the solution against current criticism of international investment law system. Sornarajah M *Resistance and change in the international law of foreign investment* (2015) 347-365.

¹⁴²⁴ Mbengue & Schacherer (2017) 447.

¹⁴²⁵ Mbengue & Schacherer (2017) 447-8.

Moreover, the PAIC aligned with the evolution of international investment law and contains several novelties meant to rebalance the rights and obligations of the various stakeholders as well as to safeguard host state policy space. Not only does the PAIC contain rights of investors and obligations of the host state, it also includes obligations of investors and rights of host states.¹⁴²⁶ Adeleke concedes that the adoption of the PAIC 'is a remarkable development of ... the Africanisation of investment frameworks' and 'is consistent with other international investment initiatives led by the global South to push back against Eurocentric and North American approaches to corporate liability and the duty to respect and protect human rights'.¹⁴²⁷ Overall, the adoption of the PAIC as a model law by the Assembly is suggestive of the perception that all African countries have agreed to the same standards of investment regulation at a continent-wide level. Even during its development, member states and RECs offered important contributions to the PAIC's content.

By and large, the AfCFTA Investment Protocol is positioned as the fulcrum of adopting a legally binding continent-wide investment regime.¹⁴²⁸ The Protocol is the right platform for the African countries to chart an investment framework that is capable of addressing the public objectives of the host governments. A binding continent-wide treaty would bring uniformity in investment regulation, which could be a legal impetus for attracting FDI in Africa.¹⁴²⁹ It would obviate discrepancies prevalent in the regulation of foreign investment across Africa. Such a treaty would bind all African countries to the same standards of foreign investment regulation. Equally important is that a binding continent-wide treaty should compel countries to negotiate intra or extra-African investment treaties that are in line with the continent's development goals. It

¹⁴²⁶ Details of PAIC are discussed in chapter 5 of this study. See also Mbengue & Schacherer (2017) 414–48; and Mbengue MM 'The quest for a Pan-African Investment Code to promote sustainable development' (2016) available at http://www.ictsd.org/sites/default/files/review/BA_June.pdf (accessed 01 October 2018).

¹⁴²⁷ Adeleke (2018) 9.

¹⁴²⁸ At the moment, the Investment Protocol is being drafted by experts from the AU Commission, the United Nations Commission for Africa, UNCTAD, among others. It is said that they are using the PAIC, UNCTAD Investment Policy Framework for Sustainable Development as well as African regional organisation investment treaties such as the COMESA Common Investment Agreement, Amended Annex 1 of the SADC FIP as their foundational documents. It is also argued that the experts are deliberating on including in the AfCFTA Investment Protocol fundamental investment principles such as investment promotion, investment facilitation and investment protection. It must be noted that this information was communicated to the author during meetings with the AU experts and is not formally recorded in official document and the information is not exhaustive or conclusive.

¹⁴²⁹ UNECA, AU & African Development Bank (AfDB) *Assessing regional integration in Africa V: Towards an African continental free trade area* (2012) (UNECA, AU & AfDB (2012)) 90.

would also increase leverage of African states and to accord with one single voice or common position regarding investment regulation when negotiating IIAs with third parties or the international investment community. This would also minimise the risks related to race-to-the-bottom among individual states in order to attract foreign investors, 'which may lure them into increasingly heavy concessions and unduly incisive limitations to their capacity to protect public interests'.¹⁴³⁰

The AfCFTA Investment Protocol should not prohibit AU member states from executing investment treaties with external partners. Instead, the Protocol should encourage pursuing agendas that are aimed at promoting the sustainable development of their host economies. This should, however, be conditional on the notification of the AU Assembly or Secretariat or any other AU institution as a means of ensuring that member states are signing treaties in tandem with the overall objective and regulation of investment under the AfCFTA arrangement. Without such an institutional design, countries will continue to sign investment treaties without efforts to correspond with the continental objective.

6.3.2 Tripartite Free Trade Area

In 2008, the Heads of State and Government of the EAC, COMESA and SADC (Tripartite leaders) decided to launch the TFTA.¹⁴³¹ In June 2011, the Tripartite leaders signed a declaration launching the negotiations for the establishment of the TFTA.¹⁴³² In June 2015, the TFTA was officially launched by the Agreement establishing the TFTA (TFTA Agreement). The stated general objectives of the TFTA include to:

- Promote economic and social development of the Region;
- Create a single market with free movement of goods and services to promote intra-regional trade;
- Enhance the regional and continental integration processes; and
- Build a strong Tripartite Free Trade Area for the benefit of the people of the region.¹⁴³³

¹⁴³⁰ Denters & Gazzini (2017) 478.

¹⁴³¹ 'Final Communiqué of the COMESA-EAC-SADC Tripartite Summit of Heads of State and Government' (2008) available at <https://www.tralac.org/documents/resources/tfta/1090-tripartite-summit-final-communique-kampala-22-october-2008/file.html> (accessed 07 November 2018).

¹⁴³² 'Declaration Launching the Negotiations for the Establishment of the TFTA' (2011) available <https://www.tralac.org/documents/resources/tfta/1111-declaration-launching-the-negotiations-for-the-establishment-of-the-tripartite-fta-12-june-2011/file.html> (accessed 19 November 2018).

¹⁴³³ Article 4 (a)-(d) of the TFTA Agreement,

The TFTA Agreement contains a rendezvous clause in which member states commit to continue negotiations of other trade-related matters including investment.¹⁴³⁴ The TFTA Negotiations were divided into two phases: Phase I focused on trade in goods; and Phase II will focus on trade in services, competition, cross-border investment, trade and development and IPRs.¹⁴³⁵ The Phase II issues will be negotiated and concluded as Protocols to the TFTA Agreement. That said, it is therefore imperative for SADC, EAC and COMESA countries to start thinking of an investment policy that will preserve their policy space in the context of the TFTA Investment Protocol.

Similar to the AfCFTA Agreement, the TFTA Agreement is a single undertaking and acknowledges building on the *acquis* and variable geometry as governing principles in the establishment of the TFTA.¹⁴³⁶ In the TFTA context, building on the *acquis* means that the negotiations, including on the TFTA Investment Protocol, should start from the point at which the EAC, COMESA, and SADC investment initiatives have reached thus far.¹⁴³⁷ As shown in the preceding chapter, the EAC has adopted a non-binding Model Investment Code, COMESA has a legally binding Common Investment Agreement, while SADC has a legally binding Protocol on Finance and Investment and a non-legally binding Model BIT upon which the TFTA Investment Protocol can build. The single undertaking principle means that all the substantive disciplines negotiated in Phase I and II shall form an integral part of the TFTA Agreement and state parties shall be bound by such legal instruments. The principle of variable geometry provides the flexibility which will allow progression in cooperation between and among TFTA member states in the area of investment regulation.

Further, the TFTA refers to best practices in the RECs and international conventions binding on the member states as one of the principles that shall govern the establishment of the TFTA.¹⁴³⁸ In the context of this study, all the best practices within the (RECs and) international conventions, discussed in chapter 3 of this study, regarding the incorporation of policy space in investment treaties shall be employed as guiding principles for the negotiation and conclusion of the TFTA Investment

¹⁴³⁴ Article 45 of the TFTA Agreement. Other issues include competition policy, trade and development, and IPRs.

¹⁴³⁵ The commencement of Phase II has been delayed pending the conclusion of negotiations on Phase I issues. The investment.

¹⁴³⁶ Article 6 (a) and (b) of the TFTA Agreement.

¹⁴³⁷ See Erasmus (2013) 6.

¹⁴³⁸ Article 6 (f) of the TFTA Agreement.

Protocol. Equally important, given its size – covering 27 countries – and the rules-based framework, the TFTA Agreement may well serve as a milestone towards the development of a legal framework for investment across Africa. Should COMESA, EAC and SADC member states decide to conclude a TFTA Investment Protocol, it is imperative that they fashion an investment regulatory framework that preserve the regulatory autonomy of host governments to pursue their development goals.

6.3.3 Economic Partnership Agreements

The EU is currently negotiating trade and development agreements called EPAs with African (as well as the Caribbean and Pacific) regional groupings.¹⁴³⁹ The EPAs have their roots in the Lomé Convention,¹⁴⁴⁰ which was in force between 1975 and 1999. The Lomé Convention granted the African, Caribbean and Pacific (ACP) countries duty-free access to the European Community market for all products bar agricultural produce. As a non-reciprocal or unilateral preferential trade arrangement, the Lomé Convention was found to be in violation of the most-favoured nation principle of the WTO.¹⁴⁴¹ As a result of this antecedent, the EU was granted waivers in 1996 and 2001 on condition that the Lomé Convention would be replaced by trade agreements in line with WTO rules. For this reason, the Cotonou Agreement¹⁴⁴² was signed in 2000. In 2000, the EU and the ACP countries agreed to negotiate EPAs pursuant to Article 36 (1) of the Cotonou Agreement with a view to designing WTO-consistent trading arrangements.¹⁴⁴³ EPAs are being negotiated within the framework of the Cotonou Agreement. Articles 35 (2) and 37 (3) of the Cotonou Agreement provide a basis for conducting EPA negotiations within the regions rather than bilaterally as part of the

¹⁴³⁹ EPAs are also negotiated with the Caribbean and Pacific regions. See EC 'Economic Partnerships' available at <http://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/> (accessed 11 December 2018).

¹⁴⁴⁰ Lomé Convention between the European Community and the African, Caribbean and Pacific States, 1975.

¹⁴⁴¹ See *European Communities - Regime for the Importation, Sale and Distribution of Bananas* - Request for consultations by Guatemala, Honduras, Mexico and the United States – Addendum G/L/26/Add.1 G/LIC/D/1/Add.1 S/L/14/Add.1 WT/DS16/8 | 12 November 2012. For a discussion, see Clark HR 'The WTO banana dispute settlement and its implications for trade relations between the United States and the European Union' (2001) 35 *Cornell International Law Journal* 291-306; and Grynberg R 'The WTO incompatibility of the Lomé Convention trade provisions' (1998) Asia Pacific School of Economic and Management Working Paper 98/3.

¹⁴⁴² Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed on 23 June 2000 (hereinafter Cotonou Agreement).

¹⁴⁴³ In Article 36 (1) of the Cotonou Agreement, state parties agreed to conclude new WTO compatible trading arrangements, removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade.

Agreement's goal of strengthening regionalism as a strategy of integrating ACP countries better within the international trading system.

The EPAs are intended to stimulate trade and investment between the EU and Africa and ultimately contributing towards sustainable development and poverty reduction. They also aim to support regional integration of African countries and their integration into the global economy. These 'are "tailor-made" to suit specific regional circumstances; WTO-compatible agreements, but go beyond conventional free-trade agreements, focusing on ACP development, taking account of their socio-economic circumstances and including cooperation and assistance to help ACP countries benefit from the agreements'.¹⁴⁴⁴ African countries are negotiating EPAs with the EU as part of their central, eastern, western and southern regional *blocs*. This chapter only discusses the EPAs that the EU has negotiated with African countries.

The EU has negotiated an EPA with the SADC Group (Botswana, Lesotho, Namibia, Eswatini (former Swaziland), South Africa and Mozambique);¹⁴⁴⁵ the EAC countries (Burundi, Kenya, Rwanda, Tanzania, and Uganda);¹⁴⁴⁶ the Eastern and Southern Africa (ESA) Group (Djibouti, Eritrea, Ethiopia and Sudan, Malawi, Zambia and Zimbabwe, Comoros, Mauritius, Madagascar and Seychelles);¹⁴⁴⁷ the Central African countries (Cameroon, Central African Republic, Chad, Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, São Tomé & Príncipe);¹⁴⁴⁸ the West African countries comprising ECOWAS and the West African Economic and Monetary Union (WAEMU).¹⁴⁴⁹ The EPA negotiations with African regional blocs are ongoing and has been met with different challenges.¹⁴⁵⁰ Thus far, only the EPA between the EU and

¹⁴⁴⁴ EC 'Economic Partnerships'.

¹⁴⁴⁵ Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, 2016 (hereinafter SADC EPA).

¹⁴⁴⁶ Economic Partnership Agreement between the East African Community Partner States, of the one part, and the European Union and its Member States of the other part, 2014 (hereinafter EAC EPA).

¹⁴⁴⁷ Interim Agreement establishing a framework for an Economic Partnership Agreement between the Eastern and Southern Africa States, on the one part, and the European Community and its Member States, 2007 (hereinafter ESA EPA).

¹⁴⁴⁸ Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part, 2009 (hereinafter Central Africa EPA).

¹⁴⁴⁹ Economic Partnership Agreement between the West African States, the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (UEMOA), of the one part, and the European Union and its Member States, of the other part, 2014 (hereinafter West Africa EPA).

¹⁴⁵⁰ For more information on these EPAs, see the EC website available at <http://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/>.

the SADC Group (SADC EPA) is operational. The SADC EPA has been provisionally implemented since 10 October 2016, pending the ratification by all EU members.¹⁴⁵¹

The existing EPAs commonly cover trade in goods and development cooperation. They also contain rendezvous clauses for further negotiations on, *inter alia*, investment, trade in services, IPRs, public procurement and competition in the future.¹⁴⁵² These provisions (particularly on investment) provide an opportunity for African governments to forge their international investment regime with the EU. The EU is one of the largest trading and investment partners to Africa.¹⁴⁵³ The majority of investment treaties executed by African countries with external partners are with European countries and, as have been demonstrated throughout this study, limit the regulatory freedom of African host governments. Given such a scenario, one would advance an argument that investment protocols within the EPA legal frameworks would significantly allow African governments to redress the shortcomings of the existing investment treaty practice with European countries and to dictate terms and conditions for the establishment of European investments in their respective countries. In this context, it is therefore essential for African countries to contemplate an investment approach that will preserve their right to regulate investment in order to foster sustainable development within their countries and regions. This is consistent with the objective of the EPAs to foster sustainable development and reduce poverty.

6.3.4 Current global investment initiatives

There are ongoing initiatives to reform the existing international investment regime championed by international organisations such as the WTO, G20, OECD and UNCTAD. These initiatives provide a platform for African countries to raise their concerns and speak with one voice and act collectively at the global level *vis-à-vis* investment regulation. In other words, the initiatives present an opportunity for African countries to create an international investment legal framework that addresses the continent's concerns and development priorities.

¹⁴⁵¹ Department of Trade and Industry, South Africa 'Entry into force of the SADC-EU Economic Partnership Agreement (EPA)' (2016) entry into force <https://www.tralac.org/news/article/10636-entry-into-force-of-the-sadc-eu-economic-partnership-agreement-epa.html> (accessed 16 May 2019).

¹⁴⁵² See, for example, Art. 53 of the ESA EPA; Ch IX of the SADC EPA; Art. 3 of the EAC EPA; Art. 106 of the West Africa EPA; and Title V of the Central Africa EPA.

¹⁴⁵³ UNCTAD World Investment Report (2018) 38.

6.3.4.1 WTO Multilateral Investment Facilitation Agreement

Discussions to establish an investment framework in the realm of the multilateral trading system owe their origin to 1947, when the Charter to establish an International Trade Organisation¹⁴⁵⁴ was drafted in Havana. The Havana Charter extended beyond world trade disciplines to include rules also notably on international investment. The Charter was not ratified and, accordingly, did not enter into force. As such, the 1947 General Agreement on Tariffs and Trade (GATT 1947)¹⁴⁵⁵ was launched and became the only multilateral instrument governing international trade from 1948 until the establishment of the WTO in 1995. GATT 1947 never brought investment issues under its rubric and maintained the dividing line between trade and investment issues. It was during the Uruguay Round of GATT negotiations from 1986 to 1994,¹⁴⁵⁶ that the issue of investment was brought within its framework leading to the incorporation of investment issues. As a result of the Uruguay Round negotiations, the WTO included obligations on governments regarding the treatment of foreign nationals or companies within their territories particularly in the General Agreement on Trade in Services (GATS)¹⁴⁵⁷ and the Agreement on Trade-Related Investment Measures (TRIMS),¹⁴⁵⁸ among others. GATS and TRIMs cover investment in a limited and 'piecemeal manner'.¹⁴⁵⁹



¹⁴⁵⁴ Havana Charter for an International Trade Organisation (1948) UN Doc E/CONF.2/78 (hereinafter Havana Charter).

¹⁴⁵⁵ General Agreement on Tariffs and Trade (1947) 61 Stat. pt. 5 T.I.A.S. 1700 55 U.N.T.S. 194 (hereinafter GATT 1947).

¹⁴⁵⁶ More information on the Uruguay Round is available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.

¹⁴⁵⁷ GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) (hereinafter GATS). The GATS defines four 'modes' of supplying services, one of which is the supply 'by a services supplier of one Member through commercial presence in the territory of another Member'.

¹⁴⁵⁸ TRIMS Agreement: Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1868 U.N.T.S. 186 (hereinafter TRIMS Agreement). TRIMS Agreement prohibits the application of certain investment measures related to trade in goods to enterprises operating within the territory of a member. The TRIMS Agreement is concerned with the discriminatory treatment of imported and exported goods, and trade restrictions. It is not specifically oriented to the treatment of foreign legal or natural persons. But the agreement prohibits, in most instances, WTO members from mandating that enterprises use locally produced goods in their manufacturing or that they impose export requirements on companies.

¹⁴⁵⁹ Joseph RK 'Investment facilitation agreement in WTO: What it contains and why India should be cautious' (2017) *ISID Discussion Note* 3 available at https://www.researchgate.net/publication/321959499_Investment_Facilitation_Agreement_in_WTO_What_It_Contains_and_Why_India_Should_Be_Cautious (accessed 12 November 2018).

In 1996, during the WTO Ministerial Conference held in Singapore, the EU, Japan and Korea successfully pushed for the inclusion of four issues on the WTO Agenda, namely investment, competition, government procurement and trade facilitation. These four issues became popularly known as the 'Singapore Issues',¹⁴⁶⁰ and were also included on the Doha Development Agenda (DDA), and the negotiations were to start after the WTO Ministerial Conference in Cancun, Mexico in 2003 (Cancun Ministerial Conference) based on 'a decision to be taken, by explicit consensus, at that session on modalities of negotiations'.¹⁴⁶¹ However, the WTO members adopted a decision to proceed with negotiations on only one Singapore issue, trade facilitation with the other three issues were dropped from the DDA.¹⁴⁶² As a result, the WTO Trade Facilitation Agreement¹⁴⁶³ was negotiated, and entered into force on 22 February 2017.

During the 1996 Ministerial Conference in Singapore, a Working Group on the Relationship between Trade and Investment (WGTI), was established to examine the relationship between trade and investment.¹⁴⁶⁴ Subsequently, the Doha Ministerial Declaration mandated the WGTI to focus on the clarification of seven elements of a possible future multilateral investment agreement, as well as some other issues: (i) scope and definition; (ii) transparency; (iii) non-discrimination; (iv) modalities for pre-establishment commitments based on a GATS-type, positive list approach; (v) development provisions; (vi) exceptions and balance-of-payments safeguards; and (vii) consultation and the settlement of disputes between members.¹⁴⁶⁵ The Doha Declaration further stipulates that 'any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development

¹⁴⁶⁰ See generally Khor M *The 'Singapore issues' in the WTO: Evolution and implications for developing countries* (2007); and Sandrey R 'WTO and the Singapore Issues' (2006) Trade Law Centre Working Paper No 18/2006.

¹⁴⁶¹ Doha WTO Ministerial 2001: Ministerial Declaration WT/MIN(01)/DEC/1, 20 November 2001, para 20.

¹⁴⁶² Doha Work Programme - Decision Adopted by the General Council on 1 August 2004, WTO document WT/L/579 of 2 August 2004 para 1 (g). See also WTO: Nairobi Ministerial Declaration, WT/MIN(15)/DEC (2015) para 34; Lester S, Mercurio B & Davies A *World trade law: Text, materials and commentary* 2 ed (2012) 758; and Woolcock S 'The Singapore Issues in Cancun: a failed negotiation ploy or a litmus test for global governance?' available at <http://www.lse.ac.uk/internationalRelations/centresandunits/ITPU/docs/woolcocksingaporeissues.pdf> (accessed 22 December 2018).

¹⁴⁶³ WTO Agreement on Trade Facilitation, 2013.

¹⁴⁶⁴ Singapore Ministerial Declaration adopted on 13 December 1996 para 20.

¹⁴⁶⁵ Doha Ministerial Declaration adopted on 13 November 2001 para 22.

policies and objectives of host governments as well as their right to regulate in the public interest'.¹⁴⁶⁶

Prior to the Cancun Ministerial Conference, the WGTI issued a report¹⁴⁶⁷ which recorded that the preparatory work is not complete and that the WGTI should therefore not move to a different level of discussion or rather to start negotiations.¹⁴⁶⁸ It also reported that the WGTI's work was far from complete, countries needed to come to terms with basic concepts, such as definition and scope of investment, and their implications, before members could reach a consensus as to whether the negotiations should proceed or not.¹⁴⁶⁹ The WGTI further recorded that investment is a new area for the WTO, and therefore members needed to understand fully the development implications of the issue before plunging into negotiations.¹⁴⁷⁰ Other countries expressed their concerns regarding the readiness of starting to negotiate a multilateral framework for investment.¹⁴⁷¹ Post-Cancun Ministerial Conference, WTO members agreed to continue negotiations on trade facilitation and to suspend from the Doha Round investment, competition policy and government procurement. Since then the WGTI has been inactive,¹⁴⁷² but multilateral investment issues within the WTO have recently resumed but focusing on investment facilitation and are ongoing.

In April 2017, a group of countries from Asia, Africa and Latin America called the 'Friends of Investment Facilitation for Development', together with Mexico, Indonesia, South Korea, Turkey, and Australia (popularly known as the MIKTA Group) proposed an Informal WTO Dialogue on Investment Facilitation for Development.¹⁴⁷³ According to the WTO, 'the aim of the Dialogue was to discuss the growing linkages between

¹⁴⁶⁶ Doha Ministerial Declaration para 22.

¹⁴⁶⁷ Report of the meeting held on 10 and 11 June 2003, Working Group on the Relationship between Trade and Investment, WTO document WT/WGTI/M/22 of 17 July 2003 (hereinafter WGTI Report).

¹⁴⁶⁸ WGTI Report para 80.

¹⁴⁶⁹ WGTI Report para 65.

¹⁴⁷⁰ WGTI Report paras 45 and 80.

¹⁴⁷¹ WGTI Report paras 50, 51, 73 and 81. See also the WTO Working Group on the Relationship between Trade and Investment: Communication from the European Community and its Member States WT/WGTI/W/89 9 October 2000 available at http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122170.pdf (accessed 23 November 2018).

¹⁴⁷² South Centre 'Discussions in the Working Group on the relationship between trade and investment (2001-2003)' (2016) Analytical Note SC/AN/TDP/2016/3 7

¹⁴⁷³ Argentina, Brazil, Chile, China, Colombia, Hong Kong, Kazakhstan, Mexico, Nigeria and Pakistan; *Proposal for a WTO Informal Dialogue on Investment Facilitation for Development, Joint Communication from the Friends of Investment Facilitation for Development*, WTO Document JOB/GC/122. See also Mexico, Indonesia, Korea, Turkey and Australia; *MIKTA Investment Workshop Reflections*, WTO Document JOB/GC/121.

trade and investment in the global economy, to examine what WTO members are currently doing to facilitate investment, and to explore whether and how the WTO could help members to advance and build upon these efforts'.¹⁴⁷⁴ In December 2017, at the WTO Ministerial Conference in Buenos Aires, Argentina, group of WTO countries submitted a proposal aimed at initiating negotiations on a multilateral investment facilitation agreement for development.¹⁴⁷⁵ The countries proposed the:

Beginning of structured discussions with the aim of developing a multilateral framework on investment facilitation. These discussions shall seek to identify and develop the elements of a framework for facilitating foreign direct investments that would: improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and requirements; and enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention. These discussions shall also seek to clarify the framework's relationship and interaction with existing WTO provisions, with current investment commitments among Members, and with the investment facilitation work of other international organisations. These discussions shall not address market access, investment protection, and Investor-State Dispute Settlement.¹⁴⁷⁶

Since March 2017, several proposals have been submitted by WTO members either individually or collectively.¹⁴⁷⁷ In March 2018, a group of 71 developed and developing WTO countries commenced structured discussions on establishing a multilateral framework on investment facilitation. Such an agreement is aimed at facilitating global investment in the same way that the WTO is meant to facilitate global trade with its Trade Facilitation Agreement.¹⁴⁷⁸ In addition, trade facilitation and investment

¹⁴⁷⁴ WTO 'Investment facilitation: Relationship between trade and investment' available at https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfinvestfac_e.htm (accessed 23 November 2018).

¹⁴⁷⁵ 'Joint Ministerial Statement on Investment Facilitation for Development' available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=240870,240871,240899,240900,240833,240841,240845,240847,240848,240853&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (accessed 23 November 2018).

¹⁴⁷⁶ Joint Ministerial Statement on Investment Facilitation for Development para 4.

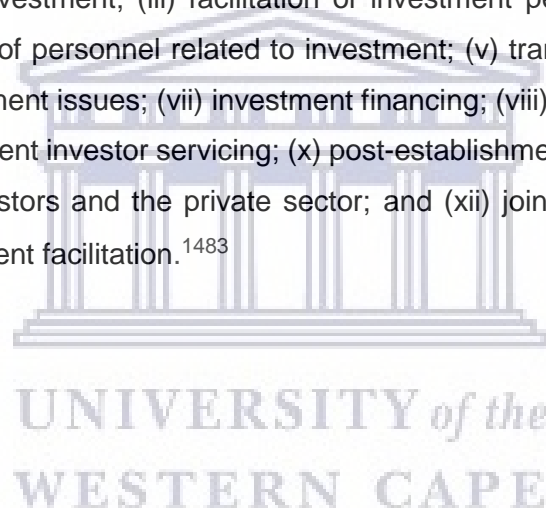
¹⁴⁷⁷ See, for example, Russia: *Proposed multilateral disciplines for investment facilitation* (JOB/GC/120), March 31, 2017; Mexico, Indonesia, Korea, Turkey and Australia (MIKTA): *Reflections on Investment Workshop* (JOB/GC/121), April 6, 2017; China: *Possible Elements for Investment Facilitation* (JOB/GC/123), April 26, 2017; Argentina & Brazil: *Possible Elements of a WTO Instrument on Investment Facilitation* (JOB/GC/124), April 26, 2017; Brazil: *Proposal for an Investment Facilitation Agreement* (JOB/GC/169), February 1, 2018.

¹⁴⁷⁸ WTO 'Investment facilitation: Relationship between trade and investment'.

facilitation are intertwined.¹⁴⁷⁹ Noticeably, the recent approaches calling for a WTO multilateral investment agreement are grounded on investment facilitation.

There is no consensus on investment facilitation. Investment facilitation is a very wide notion, not always clearly defined and sometimes confused with the concepts of investment promotion or investment retention.¹⁴⁸⁰ The UNCTAD, OECD and the G20 have different approaches to the content of investment facilitation.¹⁴⁸¹ Even the IIAs, BITs and trade agreements with the investment chapters have varied in their approaches towards investment facilitation. Generally, investment facilitation focuses on improving the application process of investment.¹⁴⁸² Notwithstanding the divergence, several common elements of investment facilitation can be identified:

- (i) Provisions on improving the investment climate; (ii) removal of bureaucratic impediments to investment; (iii) facilitation of investment permits; (iv) facilitation of entry and sojourn of personnel related to investment; (v) transparency; (vi) capacity-building on investment issues; (vii) investment financing; (viii) insurance programmes; (ix) pre-establishment investor servicing; (x) post-establishment investor aftercare; (xi) relations with investors and the private sector; and (xii) joint cooperation and treaty bodies on investment facilitation.¹⁴⁸³



¹⁴⁷⁹ See also Sauvart, Karl P & Hamdani K *An international support programme for sustainable investment facilitation* (2015) E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.

¹⁴⁸⁰ Lazo RP 'Towards a multilateral investment facilitation framework: Elements in international investment agreements' (2018) available at <https://www.ictsd.org/opinion/towards-a-multilateral-investment-facilitation-framework-elements-in-international> (accessed 23 November 2018) (hereinafter Lazo (2018)).

¹⁴⁸¹ See UNCTAD *Global Action Menu for Investment Facilitation* (2017); OECD *Towards an International Framework for Investment Facilitation* (2018); OECD *The Policy Framework for Investment* (2015); and G20 *Guiding Principles for Global Investment Policymaking* (2016). For a discussion, see Zhang J 'Investment Facilitation: Making sense of concepts, discussions and processes' (2018) *Background Note to the IISD Investment Law and Policy Webinar on Investment Facilitation* available at <https://www.iisd.org/sites/default/files/publications/investment-facilitation-webinar-background.pdf> (accessed 12 November 2018); and Novik A & De Crombrughe A 'Towards an international framework for investment facilitation' (2018) *OECD Investment Insights* available at <https://www.oecd.org/investment/Towards-an-international-framework-for-investment-facilitation.pdf> (accessed 12 November 2018).

¹⁴⁸² Lazo (2018).

¹⁴⁸³ Lazo (2018). See also Siqueira ABP *What can an investment facilitation agreement at the WTO do for sustainable development?* (2018), indicating that investment facilitation 'focuses on improving countries' key institutional determinants for attracting investment, such as transparency, the efficiency of administrative procedures, predictability, and stability of the policy environment'.

Investment facilitation is not about the right to regulate or to formulate investment law; it does not focus on market access, investment protection and investor-state dispute settlement.¹⁴⁸⁴ Other WTO member states are opposed to the idea of investment facilitation in the WTO because it is not part of the current WTO negotiating mandate. India opposed investment facilitation on the grounds that it is inconsistent with the WTO's core objectives and priorities as set out in the Marrakesh Agreement that established the WTO.¹⁴⁸⁵ Moreover, some opponents indicate that a WTO framework could constrain the ability of members to regulate investment coming into their markets.¹⁴⁸⁶

Although it might be unlikely to reach consensus on investment facilitation, it must be advanced that a binding and balanced multilateral investment agreement within the WTO is vital for many reasons. Negotiating a multilateral investment agreement within the WTO could foster investment policy coherence and rules-based investment regulation across the globe. Notwithstanding the current criticism besetting the organisation, the WTO has established itself as a rule-making organisation with an established dispute settlement and transparency mechanisms in the international trade arena. A WTO investment agreement would be negotiated in line with other relevant disciplines including trade in goods and services, IPRs and competition. According to the International Centre for Trade and Sustainable Development (ICTSD):

If members determine that binding investment facilitation disciplines are desirable and that they should be pursued at the multilateral level, then the WTO is at present the venue through which to negotiate and enforce such an agreement ...

Members could consider amending existing WTO agreements. The TFA could be expanded to cover investment so as to become an Investment and Trade Facilitation Agreement. This could perhaps be done through an interpretation of the agreement, or by amending an investment module onto the TFA. To further explore this option, a subsidiary body of the Committee on Trade Facilitation could be established to consult on how to operate the investment module as part of the TFA. The commercial presence provisions (mode 3) of the General Agreement on Trade in Services (GATS) could also

¹⁴⁸⁴ Lazo (2018).

¹⁴⁸⁵ WTO Agreement: Marrakesh Agreement Establishing the World Trade Organisation, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

¹⁴⁸⁶ WTO 'Investment facilitation: Relationship between trade and investment'.

be considered for amendment. It is estimated that two-thirds of global FDI stock is regulated through these provisions. Deepening mode 3 commitments would thus have an important effect.¹⁴⁸⁷

Most importantly, the WTO subscribes to the single undertaking principle.¹⁴⁸⁸ It must be noted that the WTO is the only organisation that has managed to establish a universal rules-based system particularly in the field of trade over time. Most of the cross-border trade that has occurred across the world has occurred within the parameters of the multilateral trading system established by the WTO. Equally, more than two thirds of the African countries are WTO members, some members are in the process of acceding to the WTO while others are observers in the WTO.¹⁴⁸⁹ That said, African countries can unite and act collectively in bargaining their common position at the WTO with respect to international investment regulation. Pursuing a multilateral investment framework outside the ambit of the WTO is highly unlikely due to many variables including, *inter alia*, the fragmented nature of the international investment regime and lack of consensus among developed and developing countries on substantive investment issues.¹⁴⁹⁰

A WTO investment agreement, if appropriately designed and effectively implemented, could advance sustainable investment. Investment facilitation measures can encourage investment flows to developing countries and the investment facilitation agreement should not only be targeted to facilitate investment in general but also the quality and sustainable development-oriented FDI that is beneficial for the host state. The agreement must be flexible, adaptable, and responsive to the evolving investment facilitation priorities of members.¹⁴⁹¹ Policy space must be an integral part of the agreement, giving members their right to regulate in order to meet their policy objectives. The Doha Declaration declared that any such framework 'should reflect in a balanced manner the interests of home and host countries and take due account of

¹⁴⁸⁷ International Centre for Trade and Sustainable Development (ICTSD) 'Crafting a framework on investment facilitation' (2018) ICTSD Policy Brief 8.

¹⁴⁸⁸ See Wolfe (2009) 835–58.

¹⁴⁸⁹ See WTO Members and Observers available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

¹⁴⁹⁰ See generally Bollyky TJ *A role for the World Trade Organisation on regulatory coherence* (2015).

¹⁴⁹¹ Joint Ministerial Statement on Investment Facilitation for Development para 7.

the development policies and objectives of host governments as well as their right to regulate in the public interest'.¹⁴⁹²

Therefore, it is critical for African countries to unite and take a common position at the WTO with respect to global governance of cross border investment. In November 2017, senior officials from ECOWAS and other countries from within (and outside) Africa hosted a 'High-Level Trade and Investment Facilitation Forum for Development' in Abuja, Nigeria. One of the central objectives of the Forum was to examine how the WTO could contribute to facilitating the required investment, as well as trade by developing multilateral approaches to improving transparency, cutting red tape, streamlining procedures and strengthening international cooperation with the aim of expanding sustainable pro-development investment.¹⁴⁹³

The Forum adopted a joint statement (the Abuja Statement) titled 'Deepening Africa's Integration in the Global Economy through Trade and Investment Facilitation for Development' which was submitted to the WTO General Council at the Eleventh Ministerial Conference, in Buenos Aires, Argentina in December 2017. Among other things, the Abuja Statement notes several challenges that Africa is facing including a growing population, demand for jobs and need for prosperity across the continent. It affirmed that trade and investment are inseparable and remain indispensable for economic growth, modernisation and development of Africa. The Abuja Statement urged WTO Members to undertake more focused discussions aimed at developing a multilateral framework to facilitate investment for development.¹⁴⁹⁴

6.3.4.2 International investment issues in other fora

Meanwhile, outside the WTO, there are also ongoing discussions concerning international investment disciplines in other inter and non-governmental fora such as UNCTAD, the G20 and the OECD. The UNCTAD discussions focus on investment cooperation and facilitation for sustainable development. UNCTAD has adopted the policy instruments to facilitate these discussions including the Policy Framework for

¹⁴⁹² Doha Ministerial Declaration para 22.

¹⁴⁹³ See 'Deepening Africa's integration in the global economy through trade and investment facilitation for development' (2017) available at <https://www.tralac.org/images/docs/12361/abuja-statement-deepening-africas-integration-in-the-global-economy-through-trade-and-investment-facilitation-for-development-31-october-2017.pdf> (accessed 16 March 2018) (hereinafter 'Deepening Africa's integration in the global economy through trade and investment facilitation for development' (2017)).

¹⁴⁹⁴ 'Deepening Africa's integration in the global economy through trade and investment facilitation for development' (2017) 2.

Sustainable Development¹⁴⁹⁵ and the Global Action Menu for Investment Facilitation.¹⁴⁹⁶ The UNCTAD Policy Framework for Sustainable Development was designed to provide guidance for policymakers in the evolution towards a new generation of investment policies. It comprises a set of core principles to serve as guidelines for national investment policies, IIAs and an action menu for the promotion of investment in sectors related to the sustainable development goals. The UNCTAD Investment Policy Framework for Sustainable Development has been used as a reference guide for negotiating modern sustainable development-oriented international investment agreements.¹⁴⁹⁷ The UNCTAD Global Action Menu for Investment Facilitation proposes 10 action lines with a series of options for investment policy-makers and government agencies in formulating measures to support investment facilitation.¹⁴⁹⁸ It provides 'actions that countries can choose to implement unilaterally and options that can guide international collaboration or that can be incorporated in IIAs'.¹⁴⁹⁹ It also builds on the UNCTAD Investment Policy Framework for Sustainable Development.

¹⁴⁹⁵ UNCTAD Policy Framework for Sustainable Development was adopted at the Financing for Development Conference in Addis Ababa, Ethiopia, in 2015.

¹⁴⁹⁶ UNCTAD Global Action Menu for Investment Facilitation was adopted at the UNCTAD's 14th Ministerial Conference and the fifth World Investment Forum, held in Nairobi, Kenya, in July 2016 (hereinafter UNCTAD *Global Action Menu for Investment Facilitation* (2016)).

¹⁴⁹⁷ See Muchlinski P 'Negotiating new generation international investment agreements: New sustainable development initiatives' in Hindelang S & Krajewski M (eds) *Shifting paradigms in international investment law: More balanced, less isolated, increasingly diversified* (2016) 41-63. See also Sacerdoti G 'Investment protection and Sustainable Development: Key Issues' in Hindelang S & Krajewski M (eds) *Shifting paradigms in international investment law: More balanced, less isolated, increasingly diversified* (2016) 19-40; Stifter L & Reinisch A 'Expropriation in the light of the UNCTAD Investment Policy Framework for Sustainable Development' in Hindelang S & Krajewski M (eds) *Shifting paradigms in international investment law: More balanced, less isolated, increasingly diversified* (2016) 81-95; and Klager R 'Revising treatment standards – Fair and equitable treatment in light of sustainable development' in Hindelang S & Krajewski M (eds) *Shifting paradigms in international investment law: More balanced, less isolated, increasingly diversified* (2016) 65-80.

¹⁴⁹⁸ The action lines include to: promote accessibility and transparency in investment policies and regulations

and procedures relevant to investors; enhance predictability and consistency in the application of investment policies; Improve the efficiency of investment administrative procedures; build constructive stakeholder relationships in investment policy practice; designate a lead agency, focal point or investment facilitator; establish monitoring and review mechanisms for investment facilitation; enhance international cooperation on investment facilitation; strengthen investment facilitation efforts in developing-country partners, through support and technical assistance; enhance investment policy and proactive investment attraction in developing country partners; and complement investment facilitation by enhancing international cooperation for investment promotion for development, including through provisions in IIAs.

¹⁴⁹⁹ UNCTAD Global Action Menu for Investment Facilitation, 2016 4.

In 2015, the OECD adopted a Policy Framework for Investment¹⁵⁰⁰ to boost sustainable development. The OECD Policy Framework for Investment proposes guidance in policy fields critically important for improving the quality of a country's enabling environment for investment. It connects 12 policy areas: investment policy; investment promotion and facilitation; competition; trade; taxation; corporate governance; finance; infrastructure; developing human resources; policies to promote responsible business conduct and investment in support of green growth; and public governance. Several countries have used the OECD Policy Framework for Investment as a guide in developing their investment policy. In 2012, for instance, SADC member states recognised the OECD Policy Framework for Investment as a reference for developing the SADC Investment Policy Framework.¹⁵⁰¹

In 2016, the G20 adopted Guiding Principles for Global Investment Policymaking. The Guiding Principles provide guidance for investment policymaking with a view to: fostering an open, transparent and conducive global policy environment for investment; promoting coherence in national and international investment policy making; and promoting inclusive economic growth and sustainable development. The conversation about the relationship between investment and sustainable development has mostly focused on the need to close the financial gap needed to achieve most of the SDGs enshrined in the UN Agenda 2030.¹⁵⁰² SDGs have become an integral part of investment policies; national, regional and international agreements are increasingly integrating sustainable development considerations as part of their objectives. This is because investment is arguably considered a tool to achieve the

¹⁵⁰⁰ OECD Policy Framework for Investment, 2015.

¹⁵⁰¹ The SADC Investment Policy Framework, 2016 aims to facilitate regional co-ordination and exploit economies of scale in improving investment frameworks and policies across SADC member states. It was developed around four thematic pillars: lessening the costs of restrictions to foreign investment; improving legal regimes and mechanisms to enhance investor protection; co-ordinating effective regimes for tax incentives for investment; and facilitating long-term investments in infrastructure. OECD 'Investment policy framework for the Southern African Development Community' available at <http://www.oecd.org/daf/inv/investment-policy/sadc-regional-investment-policy-framework.htm> (accessed 18 December 2018). See also OECD 'Addressing development challenges in Southern Africa: An investment policy framework for the Southern African Development Community' (2015) OECD-SADC Policy Brief 1.

¹⁵⁰² UNCTAD and OECD estimate that there is an investment gap of US\$2.5 trillion that needs to be covered by non-public sources of funding for developing countries to achieve the SDGs by 2030. See UNCTAD 'Developing countries face \$2.5 trillion annual investment gap in key sustainable development sectors, UNCTAD report estimates' (2014) available at <https://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=194> (accessed 26 November 2018). See also OECD 'Private finance for sustainable development' (2018) available at <http://www.oecd.org/dac/financingsustainable-development/development-finance-topics/private-finance-for-sustainable-development.htm> (accessed 26 November 2018).

economic, social, and environmental development of host countries and takes place in the framework of fair governance mechanisms.¹⁵⁰³

At the moment, several discussions are taking place at the multilateral level to reform the existing international investment regime. The discussions emphasise the use of the non-binding international investment instruments such as the UNCTAD Global Action Menu for Investment Facilitation, the UNCTAD Policy Framework for Sustainable Development and the G20 Guiding Principles for Global Investment Policymaking in reforming the international investment regime. It is important for African governments to participate in these fora. The reforms are aimed at formulating an international investment law regime that is balanced, enshrining both rights and obligations of investors and host states, and capable of fostering sustainable development. One of the pre-eminent issues discussed in the reforms to international investment law is the investor-state dispute settlement (ISDS) system. The ISDS which has been traditionally acknowledged as the best mechanisms at the international level for dealing with investment disputes has been characterised as exceedingly inequitable, non-transparent, and biased towards foreign investors' interests at the expense of public interest. Countries have complained that the ISDS system allows investors to by-pass local courts and sue host governments for adopting public policy measures claiming that such measures have violated the *erga omnes* obligations embedded in investment treaties.¹⁵⁰⁴ This has led to the regulatory chill effect. SADC countries, for example, have amended the SADC FIP to remove ISDS through international arbitration. That is, disputes between investors and host states are now settled through the domestic courts or tribunals of the host state.¹⁵⁰⁵

The UNCTAD World Investment Forum is the prominent global platform for investment and development dialogues.¹⁵⁰⁶ The Forum began in 2008 and is held biannually under the auspices of the UNCTAD. It convenes participants from the international investment community including Heads of State and Government, ministers, executives of global companies and stock exchanges, sovereign wealth fund managers, investment treaty negotiators, heads of investment promotion agencies,

¹⁵⁰³ See Sauvant KP & Mann H *Towards an indicative list of FDI sustainability characteristics* (2017).

¹⁵⁰⁴ See Paporinskis M 'Investment treaty arbitration and the (new) law of state responsibility' (2013) 24 *European Journal of International Law* 24.

¹⁵⁰⁵ Article 25 of the SADC FIP.

¹⁵⁰⁶ More information about the UNCTAD World Investment Forum is available at <http://worldinvestmentforum.unctad.org/homepage/about-wif/>.

international investment location experts, heads of international organisations, parliamentarians, civil society representatives, eminent scholars, and the international media. The UNCTAD World Investment Forum provides a unique opportunity to influence investment-related policymaking, shape the global investment environment, and to network with global leaders in business and politics.

6.4 CONCLUSION

This chapter has discussed the prevailing challenges and opportunities for African countries to entrench the right to regulate in their international investment law regime. The challenges that could possibly hold back the endeavours to integrate policy space in investment law include the absence of a universal definition of the right to regulate, lack of a binding continent-wide investment treaty, weak institutional framework, multiple and overlapping memberships to the regional economic communities, lack of technical and financial capacity, and the legal complexities of withdrawal, termination and amendment of investment treaties. Without continental instrument binding all countries to the same standards regarding investment, it would be intricate to establish common and legally binding investment rules at the continental level.¹⁵⁰⁷ The weak institutional architecture, with limited capacity and no supranational powers to enforce and implement agreed rules and policies present another challenge for Africa in its effort to integrate policy space in investment law.¹⁵⁰⁸ Further, the multiple and overlapping membership by countries in RECs creates complex and competing commitments, in principle undermining efforts to harmonise and coordinate investment policies across the continent.¹⁵⁰⁹ In addition, the African countries are often confronted by lack of technical capacity to negotiate investment agreements that support their national development goals.¹⁵¹⁰ Another challenge facing African countries is inadequate funding.¹⁵¹¹ African countries also face technical and legal difficulties in withdrawing from, amending or terminating existing treaties that constrain their right to regulate.

¹⁵⁰⁷ UNECA (2012) 1.

¹⁵⁰⁸ Santiago (2017) 2. See also Kagame (2017).

¹⁵⁰⁹ See Chidede (2018); Draper et al (2007) 13; Ndomo (2009) 10; and UNCTAD' (2013) 4.

¹⁵¹⁰ See Poulsen (2015); Alschner & Skougarevskiy (2016); Van Harten (2016) 50; and Layrea (2012) 10.

¹⁵¹¹ See Kagame (2017) 13; and Oyoo (2015).

The opportunities available for African countries to incorporate policy space and sustainable development considerations in their international investment law regimes are plenty. The AfCFTA Investment Protocol provides a unique opportunity for the African countries to adopt a binding continent-wide investment treaty. African countries have an opportunity to develop an African-wide investment agreement legally binding and applicable to all African countries addressing the economic development and social needs of the continent.¹⁵¹² The TFTA Investment Protocol is also another opportunity for 27 African countries to develop a development-oriented investment regime. The EPAs negotiated by many African countries with the EU also provide a platform for Africa to shape its investment law regime with the outside partners preserving policy space. It is also paramount for African countries to actively participate in the contemporary multilateral investment agreement discussions within the WTO, UNCTAD, OECD and G20. These discussions give African countries an invaluable platform to learn, build capacity, influence the current reforms of the international investment regime, international investment policy for sustainable development.

The opportunities mentioned above present Africa with occasions to concretise the right to regulate in their international investment law regime. The advantage is that many of these opportunities are rules-based and provide an opportunity for African countries to enshrine and advance their right to regulate in legally binding and enforceable instruments. The opportunities present a chance for African countries to chart an investment approach not only between and among African states but also with the other countries outside the continent, particularly under the EPA and multilateral investment arrangements. It is therefore commendable for African countries to determine a common negotiation approach on how they will drive the right to regulate at the centre of the investment regulation. Such approach should be used uniformly by African countries when negotiating investment treaties among themselves or individually or collectively with external trade and investment partners.

However, the reality is that the opportunities are not merged, and some investment treaties are negotiated with countries outside the continent which have different motives and negotiating approaches. Further, there is not yet a single comprehensive

¹⁵¹² Mbengue & Schacherer (2017) 447.

concept or approach to the right to regulate. Notwithstanding all this, solutions must be found on how to create a common African approach towards including the right to regulate in the international investment legal framework for Africa. This process will not be easy, but it is practical and possible to embed host governments' right to regulate in the international investment framework for Africa. Therefore, the next chapter, will offer recommendations on how the right to regulate can form part of Africa's international investment law regime of Africa.



CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

7.1 INTRODUCTION

The preservation of the right to regulate has become a topical issue in contemporary international trade and investment law discourses.¹⁵¹³ The argument is that the current international investment law regime does not adequately accommodate the right to regulate. Safeguarding the right to regulate is critical for many reasons. First, it provides host governments with the flexibility to pursue their public policy or national development objectives without fear of being exposed to investment treaty breach or arbitration.¹⁵¹⁴ The right to regulate would also strengthen the development dimension of international investment law and enable host countries to leverage the benefits associated with foreign direct investment (FDI) into their economies.¹⁵¹⁵ In other words, it would propel investment-led sustainable development.¹⁵¹⁶ In addition, the right to regulate would drive human rights or public interest regulation in international investment law; thus, it would balance public and private interests in the international investment law system.¹⁵¹⁷ This would arguably be one of the ways to tackle the legitimacy crisis currently besetting international investment law.

The overall aim of this study was to determine whether Africa's international investment legal framework adequately accommodates the right to regulate and, thus, to propose how African countries can entrench the right to regulate in such framework. The present chapter recapitulates the key findings of this study, and further propose some recommendations in relation to safeguarding the regulatory freedom of host states within Africa's international investment law regime. The recommendations are meant to be a guiding instrument for African states already committed to investment treaties, states that are negotiating and/or intending to negotiate investment treaties as well as academics, scholars and investment law and policy-makers on how to preserve the right to regulate within the domains of Africa's international investment legal framework.

¹⁵¹³ See part 1.1 and chapter 2.

¹⁵¹⁴ See part 4.3.

¹⁵¹⁵ See part 4.2.

¹⁵¹⁶ See part 4.2.1.

¹⁵¹⁷ See part 4.4.

7.2 SUMMARY OF FINDINGS

Chapter 1 set out the contextual background of the study and conceptualised the right to regulate. The background succinctly depicts that the international legal framework governing foreign investment in Africa, by and large, limits the host government's right to regulate.¹⁵¹⁸ In conceptualising the right to regulate, chapter 1 demonstrated that the concept has increasingly become a part of the corpus of international investment law and persuasive in international arbitration jurisprudence but has not yet found place in legal dictionaries nor has it been comprehensively defined in any investment treaty.¹⁵¹⁹ However, some scholars have attempted to define the right to regulate and their definitions depict the concept as a legal right of the host government to adopt legitimate regulatory public policy measures without being exposed to investment arbitration.¹⁵²⁰ Further, the right to regulate allows host states to regulate FDI in accordance with public interests and protect the public from adverse effects of investment activities.¹⁵²¹ Thus, the integration of policy space in international investment law is construed as a safety valve which accords host governments the flexibility to regulate investments in the public interest or pursue their domestic public policy and development objectives without fear of investment treaty breach or arbitration.

Chapter 2 presented a historical account of the exclusion and integration of the right to regulate in the purviews of international investment law in general. In tracing the historical development, particular focus was placed on the historic experiences that influenced the evolution of international investment law.¹⁵²² In doing so, the chapter explored the regulation of foreign investment and investors from the colonial period to the era immediately post-World War II.¹⁵²³ An important discussion that emerged in the chapter is the failed attempts to establish a multilateral agreement on investment

¹⁵¹⁸ See part 1.2.

¹⁵¹⁹ See part 1.1.1.

¹⁵²⁰ As discussed in part 1.1.1, see in general Mouyal LW *International investment law and the right to regulate: A human right perspective* (2016) 8-9; Titi C *The right to regulate in international investment law* (2014) 33, and Mann H 'The Right of states to regulate and international investment law' A paper presented at the Expert Meeting on the Development Dimension of FDI: Policies to Enhance the Role of FDI in Support of the Competitiveness of the Enterprise Sector and the Economic Performance of Host Economies, Taking into Account the Trade/Investment Interface, in the National and International Context, Geneva, 6-8 November 2002 available at http://www.iisd.org/pdf/2003/investment_right_to_regulate.pdf (accessed 10 January 2017) 10

¹⁵²¹ See part 1.1.1.

¹⁵²² See Chapter 2.

¹⁵²³ See part 2.2.

regulation.¹⁵²⁴ Nonetheless, chapter 2 revealed that, despite unsuccessful efforts to establish a multilateral agreement on investment, international rules governing foreign investment and investors were incorporated in an array of international legal and policy instruments, regional trade agreements, and bilateral investment treaties (BITs).¹⁵²⁵ These are the legal instruments shaping the contemporary international investment law. The overall analysis of these instruments revealed that the majority of the traditional investment treaties do not adequately safeguard the right to regulate as they were primarily designed to promote and protect foreign investors and their investments.¹⁵²⁶

Further, chapter 2 traced the historical evolution of the right to regulate in international investment law and found that the right to regulate, in its general context, largely emerged in the aftermath of decolonisation.¹⁵²⁷ During this period, newly independent states perceived the international investment law – predominantly designed by their colonial masters – as a barrier to their social and economic development.¹⁵²⁸ As a consequence, newly independent states sought to regain sovereignty and control over their natural resources.¹⁵²⁹ States' sovereignty over natural resources was subsequently enshrined in various United Nations (UN) instruments, some of which, arguably, became customary international law (CIL).¹⁵³⁰

The concept of the right to regulate was integrated in early investment treaties but in a limited and indirect manner – mainly through the general exception clauses.¹⁵³¹ Chapter 2 demonstrated that during that time the main object and purpose of investment treaties was to promote and protect foreign investments and investors. The chapter further explored contemporary endeavours to incorporate the right to regulate in international investment law.¹⁵³² In this regard, focus was placed on international

¹⁵²⁴ See part 2.2.2.

¹⁵²⁵ See part 2.2.2.

¹⁵²⁶ See part 2.2.2.

¹⁵²⁷ See part 2.3.

¹⁵²⁸ See part 2.3.

¹⁵²⁹ See part 2.3.

¹⁵³⁰ As discussed in part 2.3, see, for example, UN General Assembly Resolution 1803 (XVII) on the 'Permanent Sovereignty over Natural Resources' was adopted on 14 December 1962; Declaration on Permanent Sovereignty over Natural Resources, 1962; UN General Assembly Resolution 3171 (XXVIII) (17 December 1973) UN Doc A/RES/9030 (XVIII), 1973; UN General Assembly Resolution 3201 (S-VI) (1 May 1974) UN Doc A/RES/3201 (S-VI), 1974; and UN General Assembly Resolution 29th Sess, Charter of Economic Rights and Duties of States, Res. 3281 (XXIX) (12 December 1974), Off Doc GA UN A/9631, suppl. No. 31, 1975 to mention but a few.

¹⁵³¹ See part 2.3.1.

¹⁵³² See part 2.4.

investment policy frameworks of several inter-governmental and non-governmental organisations such as the United Nations Conference on Trade and Development (UNCTAD), the Organisation for Economic Cooperation and Development (OECD), the World Trade Organisation (WTO) and G20.¹⁵³³ Regional investment laws were also examined with a view of determining the integration of policy space.¹⁵³⁴ In this respect, particular attention was paid to regional investment treaties of Africa, Asia, the European Union (EU), North-America, Trans-Atlantic and Trans-Pacific.

Chapter 3 explored the existence of binding standards or legal obligations on the international plane compelling (African) states to preserve their right to regulate in international investment agreements (IIAs). Since, as established in chapter 2, there is no universal treaty on investment, international norms and standards were probed from CIL, general principles of international law, IIAs and soft law instruments. It was established that most African countries apply CIL directly as an integral part of their municipal laws and that their constitutions provide for direct or indirect application of international law in their municipal laws.¹⁵³⁵ Although it is well known that international soft-law instruments are non-binding, the normative standards contained therein are sometimes indicative of the international best practices of or international community's consensus on a particular subject or discipline. It was on this basis that the international normative standards aforementioned were determined.

Chapter 3 further demonstrated that the preservation of the right to regulate is justifiable under CIL and general principles of international law.¹⁵³⁶ CIL and general international law recognise nation states' sovereignty, which entails that states have the legal right to enact legislation, enforce judgments and adopt policies they deem necessary or essential to promoting the social and economic welfare of the citizens.¹⁵³⁷ In other words, states enjoy sovereign right to regulate political, social and economic activities within their respective jurisdictions. Placed in international investment law context, the principle connotes that states have a sovereign right to control the economic activities of foreign investors in accordance with their national

¹⁵³³ See part 2.4.1.

¹⁵³⁴ See part 2.4.2.

¹⁵³⁵ See part 3.1.

¹⁵³⁶ See part 3.2.

¹⁵³⁷ See part 3.2.

development plans.¹⁵³⁸ This line of thought is emphasised in a plethora of international instruments, most of which are widely construed to have attained CIL status.¹⁵³⁹

Moreover, chapter 3 has advanced a human rights-based approach as a basis for including the right to regulate in IIAs.¹⁵⁴⁰ This approach derives from international human rights law and impose obligations on states to 'respect, protect and fulfil' human rights.¹⁵⁴¹ By implication, under international law, states do not only have a right to regulate but also a duty to do so. The duty to protect human rights denotes that that states have a legal obligation to 'protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication'.¹⁵⁴² States may therefore breach their duty to protect human rights if they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse.

On the other hand, the human rights-based approach provides a platform for citizens to claim and hold their governments to account for their duties to improve the access to and realisation of their human rights. African countries have accepted the obligation to 'respect, protect and fulfil' human rights under the African Charter of Human and People's Rights,¹⁵⁴³ which is legally binding to all African countries. Furthermore, particular attention was paid to peremptory human rights norms implicit to states' duty to protect human rights *vis-à-vis* investment treaties. In this regard, socio-economic rights such as environment, public health and safety, labour and development were deliberated.¹⁵⁴⁴ Another important discussion that emerged in chapter 3 was that,

¹⁵³⁸ See part 3.2.

¹⁵³⁹ As discussed in part 3.2, see, for example, Article 1 and 2 of the Charter of Economic Rights and Duties of States; Article 1 of the Charter of the United Nations, 24 October 1945, 1 UNTS XVI; Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966; International Labour Organisation Declaration on Fundamental Principles and Rights at Work, 1998; United Nations General Assembly Resolution 1803 (XVII) on the Permanent Sovereignty over Natural Resources, 1962; Article 4 (d) and (e) of the United Nations General Assembly Resolution on the New International Economic Order, 2009; United Nations Guiding Principles for Business and Human Rights, 2011; Chapter IV of the Organisation for Economic Co-operation and Development Guidelines on Multinational Enterprises, 2011.

¹⁵⁴⁰ See part 3.3.

¹⁵⁴¹ See part 3.3. In general, see United Nations Guiding Principles for Business and Human Rights, 2011; and Adeleke F *International investment law and policy in Africa: Exploring a human rights based approach to investment regulation and dispute settlement* (2018) (hereinafter Adeleke (2018)).

¹⁵⁴² UN Guiding Principles for Business and Human Rights, 2011 3.

¹⁵⁴³ The African Charter on Human and Peoples' Rights, 1981.

¹⁵⁴⁴ See part 3.3.1-3.3.4.

although states have a right to exercise their sovereign rights and obligations to protect human rights in their territories, they also have a duty to honour their obligations under investment treaties they negotiate.¹⁵⁴⁵

Chapter 4 evaluated the practical effects of safeguarding the right to regulate in international investment law. In particular, the chapter determined the legal, social and economic implications of incorporating the right to regulate in the international investment legal framework. The economic rationale of safeguarding the regulatory freedom of host governments in international investment law is to allow states to leverage the benefits of FDI into the host economy.¹⁵⁴⁶ Thus, the preservation of the right to regulate in investment treaties would allow host governments to regulate FDI in accordance with their sustainable development objectives and would also strengthen the sustainable development dimension of IIAs.¹⁵⁴⁷

From a legal standpoint, the integration of regulatory freedom would allow states to exercise their sovereign right to control the economic activities of foreign investors within their respective jurisdictions without fear of investment treaty breach and arbitration.¹⁵⁴⁸ The right to regulate would also reinforce the principles of states' immunity and necessity defence under international investment law.¹⁵⁴⁹ Thus, it releases host states from being held liable by investors and arbitral tribunals for adopting regulatory measures aimed at promoting public policy goals.¹⁵⁵⁰ In addition, the inclusion of the right to regulate in IIAs may potentially reduce the perceived risk of varying, broad and uncertain treaty interpretations by arbitral tribunals.¹⁵⁵¹ Chapter 4 further established that right to regulate in IIAs could possibly restore the legitimacy of international investment law and arbitration because arbitral tribunals would be compelled to take into account public interest issues in investment arbitration proceedings.¹⁵⁵²

The social implications for accommodating the right to regulate in IIAs include the protection, fulfilment and realisation of public interests or human rights.¹⁵⁵³ In the

¹⁵⁴⁵ See part 3.4.

¹⁵⁴⁶ See part 4.2.

¹⁵⁴⁷ See part 4.2.1.

¹⁵⁴⁸ See part 4.3.1.

¹⁵⁴⁹ See parts 4.3.2 and 4.3.3.

¹⁵⁵⁰ See parts 4.3.2 and 4.3.3.

¹⁵⁵¹ See part 4.3.4.

¹⁵⁵² See part 4.3.5.

¹⁵⁵³ See part 4.4.1.

meantime, IIAs are designed to further purely economic interests, and public interests or human rights issues appear to counter the object and purpose of the IIAs – to promote and protect foreign investors and their investments.¹⁵⁵⁴ If public interest and human rights issues are embedded in the international investment legal order, host governments would be able to adopt and enforce measures necessary to ensure that economic activities carried out by investors within their territory do not negatively impact the human rights of its citizens.¹⁵⁵⁵ In addition, the right to regulate would redress the asymmetrical nature of the traditional international investment law, that is, it will balance the public and private interests in the realm of international investment law.¹⁵⁵⁶ In addition, the right to regulate would be a commendable way to ensure that foreign investors contribute towards corporate social responsibility.¹⁵⁵⁷

Chapter 5 investigated and explored the existence of the right to regulate in the international investment legal framework for Africa. In this chapter, several instruments including international, regional and bilateral legal instruments constituting the international legal framework governing foreign investment in Africa were examined with the objective to ascertain if they provide host governments with the necessary flexibility to exercise their regulatory freedom. The overall exposition of this chapter was that international instruments such as the WTO's Agreement on Trade-Related Investment Measures¹⁵⁵⁸ and the General Agreement on Trade in Services,¹⁵⁵⁹ the Convention Establishing the Multilateral Investment Guarantee Agency,¹⁵⁶⁰ the Convention of the International Centre for Settlement of Investment Disputes¹⁵⁶¹ and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹⁵⁶² are limited with respect to regulatory freedom.¹⁵⁶³

¹⁵⁵⁴ See part 4.4.1.

¹⁵⁵⁵ See part 4.4.1.

¹⁵⁵⁶ See part 4.4.2.

¹⁵⁵⁷ See part 4.4.3.

¹⁵⁵⁸ TRIMS Agreement: Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1868 U.N.T.S. 186.

¹⁵⁵⁹ GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

¹⁵⁶⁰ Convention Establishing the Multilateral Investment Guarantee Agency, 11 October 1985, 1508 U.N.T.S. 99.

¹⁵⁶¹ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965 575 U.N.T.S. 159.

¹⁵⁶² New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1959 330 U.N.T.S. 38 (hereinafter New York Convention).

¹⁵⁶³ See part 5.2.

Thereafter, chapter 5 examined the investment legal instruments emanating from African regional organisations such as the African Union (AU), the East African Communities (EAC), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC), focusing on their integration of the right to regulate. The chapter found that these instruments have made some concerted efforts to drive the right to regulate at the centre of investment regulation. Despite these commendable efforts, the chapter has revealed some shortcomings that might undermine the consolidation of the right to regulate in the international investment legal framework for Africa.¹⁵⁶⁴ For instance, some of the instruments intended to be binding have not been ratified for over a decade.¹⁵⁶⁵ In addition, most of the instruments have been adopted as non-binding guiding instruments¹⁵⁶⁶ and, as chapter 5 exposed, African countries rarely use their Model BITs when negotiating investment treaties. Instead, they use the traditional Model BITs of the European or North-American states which constrain their regulatory freedom.¹⁵⁶⁷ Chapter 5 also discussed investment regulation at national level with a special attention to South Africa.¹⁵⁶⁸ The chapter revealed that South Africa's Protection of Investment Act makes express reference to the right to regulate and sustainable development indicative of the country's new approach towards investment regulation.

In addition, chapter 5 examined the intra and extra-African BITs, which form the primary source of the international law governing foreign investment in Africa. The chapter illuminated that these BITs are largely influenced by the traditional North-American and European Model BITs that are designed in a manner that constrains the policy space of governments to implement measures in the public interest where these have a perceived negative impact on investor rights.¹⁵⁶⁹ Thus, the BITs concluded by African countries place constraints on host governments' regulatory freedom.

¹⁵⁶⁴ The shortcomings discussed in chapter 5 were more specifically at regional levels, and the general ones applicable to the continent as a collective were outlined in detail in chapter 6.

¹⁵⁶⁵ As discussed in part 5.4.2, see the COMESA Common Investment Agreement, 2007; and the ECOWAS Energy Protocol, 2003.

¹⁵⁶⁶ As discussed in part 5.4, see for example, AU Pan-African Investment Code, 2016; the SADC Model Bilateral Investment Treaty, 2012; the SADC Investment Policy Framework, 2015; the EAC Model Investment Code, 2006

¹⁵⁶⁷ See part 5.4.

¹⁵⁶⁸ See part 5.5.1.

¹⁵⁶⁹ See part 5.5.

Chapter 6 assessed the challenges and opportunities for entrenching the right to regulate in the international investment law regime of Africa. The chapter found that African countries' efforts to entrench the right to regulate may be undercut by many factors including the absence of a universally accepted definition of or approach to the right to regulate, the dearth of a binding African-wide investment treaty, weak African institutional architecture – without supranational powers, multiple and overlapping memberships, deficiency of technical and financial capacity as well as the complexities of withdrawal, termination and amendment of investment treaties.¹⁵⁷⁰ Although existing IIAs that constrain policy space continue to be binding on African countries as a matter of public international law, countries should be thinking of viable options to establish an international investment law framework that protect their right to regulate.

Therefore, chapter 6 has provided some of the policy opportunities available for African countries to consolidate their regulatory autonomy in the international investment legal framework.¹⁵⁷¹ The opportunities include the Agreement establishing African Continental Free Trade Area (AfCFTA),¹⁵⁷² the Agreement establishing the Tripartite Free Trade Area (TFTA)¹⁵⁷³ and the Economic Partnership Agreements (EPAs) in which protocols on investment are envisaged. The chapter also encouraged that African countries should give due regard to and participate in the ongoing multilateral initiatives in which reforms to the existing international investment law is under consideration.¹⁵⁷⁴ The author submits that, at large, the aforementioned policy opportunities provide a platform for African countries to rethink their international investment law regime and concretise the right to regulate in their investment treaties both among themselves and with countries outside the continent. The policy opportunities provide African countries with a platform to adopt an international investment legal framework that strikes a balance between the right to regulate and the protection of investment.

Overall, the study has found that existing international investment law regime for Africa does not entrench the right to regulate. Even the contemporary efforts by African regional economic communities, BITs and national legislations to carve out the right

¹⁵⁷⁰ See part 6.2.

¹⁵⁷¹ See part 6.3.

¹⁵⁷² AfCFTA Agreement, 2018.

¹⁵⁷³ TFTA Agreement, 2015.

¹⁵⁷⁴ See part 6.3.4.

to regulate in international investment law are not adequate. As a consequence, the subsequent section provides some recommendations on how African states could adequately entrench the right to regulate in their international investment legal framework.

7.3 RECOMMENDATIONS

The recommendations of this study focus, more broadly, on the adoption of treaty specific and obligatory language that will guide governments as they regulate, investors as they conduct their investment activities, and tribunals as they assess whether a given regulatory measure is compatible with the investment treaty. In other words, the study discourages the use of hortatory language or non-binding provisions regarding policy space in international investment law. More precisely, the study suggests a compilation of policy options that African countries can utilise to protect the right to regulate by: (1) adopting a binding continental-wide investment treaty safeguarding policy space; (2) inserting a provision identifying and clarifying the right to regulate; (3) including public interest issues in IIAs; (4) incorporating sustainable development provisions in IIAs; (5) inserting general safeguard clauses in IIAs; (6) adopting interpretative annexes to IIAs; (7) excluding public interest issues from investment treaty arbitration; (8) adopting a reformed international investment arbitration mechanism; (9) including investor and investment obligations in IIAs; and (10) reconciling different treaty obligations.

It should be noted that the aforementioned recommendations are by no means exhaustive or comprehensive. Additional comprehensive and more practical options for entrenching the right to regulate are illustrated in the Annex to this chapter.¹⁵⁷⁵

7.3.1 A binding continental investment treaty

The first and foremost option for African countries to preserve the right to regulate in their international investment law regime is through adopting a binding continental treaty containing legally binding rules to all countries on the continent. Meanwhile, Africa does not have a universal treaty governing foreign investment.¹⁵⁷⁶ The suggested continental treaty should borrow from the modern international investment legal and policy instruments of the UNCTAD, OECD, G20 as well as the contemporary

¹⁵⁷⁵ See Annex to chapter 7.

¹⁵⁷⁶ See part 6.2.2.

regional free trade agreements of North America, Trans-Atlantic and Trans-Pacific.¹⁵⁷⁷ Equally important, the author suggests that the continental treaty should build on and improve the contemporary investment instruments of the African regional bodies such as the AU, SADC, COMESA and EAC.¹⁵⁷⁸ This is because, as have been demonstrated throughout the study, the said instruments have made remarkable attempts to forge international investment law regimes accommodating regulatory space of host states.¹⁵⁷⁹

By and large, the recommended African investment treaty should aim to construct an investment legal regime that adequately preserves policy space. More precisely, it must clearly define and articulate public policy objectives in order to visibly understand the appropriate rights and obligations of the foreign investors and host states as well as the expectations of citizens. The development of such universal rules governing foreign investment at the continental level in Africa would serve many purposes. First, it will provide a platform for African governments to tailor an international investment legal framework capable of addressing the specific-needs of the continent.¹⁵⁸⁰ It could bring uniformity in investment regulation, which could be a legal impetus for attracting foreign investment in Africa.¹⁵⁸¹ The existing international investment law regime for Africa consists of several legal instruments which differ in scope and content and sometimes overlaps.¹⁵⁸² A binding continental treaty would be the appropriate place to address these inconsistencies. Suggestions for addressing these inconsistencies or overlaps are derived from the discussion in chapter 6 where the PAIC, the ECOWAS Supplementary Act and the EU Declaration of the Representatives of the Governments of the Member States¹⁵⁸³ were used as a model for this purpose.¹⁵⁸⁴ Above all, this study suggests that such inconsistencies should be harmonised on the primacy of the continental treaty.

¹⁵⁷⁷ See parts 2.3 and 2.4.

¹⁵⁷⁸ See parts 5.3 and 5.4.

¹⁵⁷⁹ See chapters 2 and 5.

¹⁵⁸⁰ See part 6.3.1.1.

¹⁵⁸¹ See part 6.3.1.1.

¹⁵⁸² See parts 5.1 and 6.2.4.

¹⁵⁸³ Declaration of the Representatives of the Governments of the Member States, 2019 available at https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/19_0117-bilateral-investment-treaties_en.pdf (accessed 18 January 2018).

¹⁵⁸⁴ See part 6.2.4.

Equally important is that the continental-wide investment treaty should compel countries to negotiate intra or extra-African investment treaties that are in line with the continent's developmental agenda. The recently adopted EU Regulation for screening FDI¹⁵⁸⁵ could be used as a reference tool in this regard.¹⁵⁸⁶ The Regulation mandates the European Commission and member states to screen FDI into the EU security or public order considerations.¹⁵⁸⁷ African countries, in the suggested continental investment treaty, could adopt a similar approach under the auspices of the AU. However, this endeavour could be undermined by the dearth of supranational powers among the AU institutions.¹⁵⁸⁸ To counteract this, the author suggests that the African investment treaty could enshrine a provision compelling state parties to admit FDI or negotiate IIAs in accordance with the development objectives and, accordingly, establish new institutions or endow existing institutions (for example, the AU Assembly, Pan-African Parliament or the AU Commission or African regional organisations) with the supranational powers to monitor and implement such provision at regional and national levels.¹⁵⁸⁹ Such institutions could also be entrusted with powers to review investment treaties concluded by African countries (intra- and extra-Africa) to ensure they support common public interests and development objectives of the country and continent at large.¹⁵⁹⁰ Moreover, a continental treaty on investment rules would also increase the leverage for African states to accord with one single voice or common position regarding investment regulation when negotiating IIAs with third parties or the international investment community.¹⁵⁹¹ This would also minimise the risks related to race-to-the-bottom among individual states to lure foreign investment.

¹⁵⁸⁵ Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, 2019.

¹⁵⁸⁶ See part 6.2.3.

¹⁵⁸⁷ See part 6.2.3.

¹⁵⁸⁸ See part 6.2.3.

¹⁵⁸⁹ See part 6.2.3.

¹⁵⁹⁰ Admission of FDI is often regulated at national levels.

¹⁵⁹¹ See part 6.3.1.1.

7.3.2 Insert a provision on the right to regulate in IIAs

Inserting a specific clause on the right to regulate in IIAs is suggested as one of the fundamental ways African countries could employ to entrench their right to regulate.¹⁵⁹² Such a clause should explicitly identify and define what constitutes the right to regulate.¹⁵⁹³ The Amended Annex 1 of the SADC FIP provides a useful example in this regard:

In accordance with customary international law and other general principles of international law, the host state has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic objectives.

Except where the rights of a host state are expressly stated as an exception to the obligations of this Annex, a host state's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations and investments and host states, as set out in this Annex.

Non-discriminatory measures taken by a state party to comply with its international obligations under other treaties shall not constitute a breach of this Annex.¹⁵⁹⁴

This kind of wording goes a long way in cementing the right to regulate because it goes further to refer to the CIL and general principles of international law on the regulatory freedom of host states.¹⁵⁹⁵ The author suggests this provision can further be developed by expressly referring to the CIL norms such as the sovereignty of states over their territories and right to development.¹⁵⁹⁶ Such provision could further be enhanced by commonly recognised legally binding international treaties and authoritative UN instruments that recognise the state sovereignty, right to regulate and right to development.¹⁵⁹⁷ Notable here are the African Charter on Human and Peoples' Rights, the Charter of Economic Rights and Duties of States, the Resolution 3201 (Declaration on the New International Economic Order) and the General Assembly Resolution 1803 on the Permanent Sovereignty over Natural Resources, among others. The abovementioned instruments are perceived to have attained the status of

¹⁵⁹² See Article 9 of Annex to chapter 7.

¹⁵⁹³ See Article 9 (2) of Annex to chapter 7.

¹⁵⁹⁴ Article 12 (1)-(3) of the Amended Annex 1 of the SADC FIP.

¹⁵⁹⁵ CIL and general principles of international law on the right to regulate were discussed in part 3.2.

¹⁵⁹⁶ See Article 9 (1) of Annex to chapter 7.

¹⁵⁹⁷ See Article 9 (1) of Annex to chapter 7.

CIL and, accordingly binding on all states including African countries.¹⁵⁹⁸ For this reason, if these instruments are explicitly mentioned in IIAs with reference to the right to regulate they fortify the recognition of the policy space in international investment law. This is because tribunals (investors and states) would be provided with guidance to what tools to use when interpreting what constitutes the right to regulate.

It must be underscored that the insertion of the right to regulate clause in IIAs is important but not the only option to safeguard policy space in international investment law. The author submits that the right to regulate principle should be reflected in various provisions of IIAs¹⁵⁹⁹ and some of these options are presented and expounded below.

7.3.3 Include public interest issues in IIAs

The author further proposes that African states should include public interest issues within investment treaties.¹⁶⁰⁰ Public interest issues commonly include the promotion, respect, protection and fulfilment of specified public policy objectives such as, *inter alia*, sustainable development, public health and safety, environmental protection and labour rights protection.¹⁶⁰¹ Enshrining public interest provisions has the potential to cement the regulatory space of African countries in their international investment law and would provide greater stability for states, investors and tribunals.¹⁶⁰² The absence of public interest issues in IIAs could potentially maximise the protection of investors by effectively expanding the scope of the treaty and can also make host states more prone to claims arising out of legitimate state measures for the protection of public policy.¹⁶⁰³

It is therefore recommended that public interest provisions be specific and indicative of what is concretely required and agreed.¹⁶⁰⁴ It was demonstrated in chapter 4 that the way IIAs are drafted can determine how public interests are interpreted and protected in international investment law.¹⁶⁰⁵ Classical international law rules on treaty interpretation include the concepts of good faith, ordinary meaning, context, object and

¹⁵⁹⁸ See part 3.2.

¹⁵⁹⁹ See preambles as well as Articles 3 (e), 5 (2), 10 and 34 of Annex to chapter 7.

¹⁶⁰⁰ See Annex 1 of Annex to chapter 7.

¹⁶⁰¹ See part 3.3. See also Annex 1 of Annex to chapter 7.

¹⁶⁰² See parts 4.3 and 4.4.

¹⁶⁰³ See part 4.3.

¹⁶⁰⁴ See Annex 1 of Annex to chapter 7.

¹⁶⁰⁵ See part 4.4.

purpose of the treaty, the text of the treaty including its preamble, agreement or instrument made in connection with the treaty, relevant rules of international law and the intention of the parties.¹⁶⁰⁶ Thus, tribunals are required to consider all these stipulated rules when interpreting a specific treaty.

Public interest issues could be included as part of the preambles in IIAs.¹⁶⁰⁷ The preamble of a treaty is pivotal to treaty interpretation as they signal the object and purpose of the treaty.¹⁶⁰⁸ In this regard, African states should ensure that the preambles of their investment treaties recognise the broader objectives of the IIAs to, *inter alia*, promote and protect foreign investors and their investments, protect human rights, realise and support sustainable development, and to safeguard public interest and the right to regulate.¹⁶⁰⁹ This would give arbitrators more guidance as to the intent of the state parties to protect public interest regulatory space.¹⁶¹⁰ It is submitted that where there is positive language on regulation in the preamble, the tribunals could be obliged to weigh the public interest more carefully.¹⁶¹¹ In principle, it is a commonplace that there is an international law obligation for tribunals to consider the preamble when interpreting a treaty.¹⁶¹² However, in practice, arbitral tribunals have constantly ignored preamble provisions as they do not create legally enforceable substantive rights.¹⁶¹³

Given that preambular language does not create legally binding and enforceable rights and obligation, it is submitted that public interest should be also included as part of the substantive provisions on the IIAs.¹⁶¹⁴ As revealed in this study, public interest provisions in traditional IIAs are often ignored by arbitral tribunals when interpreting IIAs in investment disputes arbitration largely due to the fact that public interest issues are captured in ambiguous treaty language¹⁶¹⁵ and provisions which do not create legally enforceable rights to regulate.¹⁶¹⁶ This state of affairs can provide an

¹⁶⁰⁶ See Article 31 of the Vienna Convention on the Law of Treaties, 1969 (hereinafter VCLT).

¹⁶⁰⁷ See preamble of Annex to chapter 7.

¹⁶⁰⁸ Article 31 of the VCLT.

¹⁶⁰⁹ See preamble of Annex to chapter 7.

¹⁶¹⁰ See part 4.3.5 and 4.4.1.

¹⁶¹¹ See part 4.3.5 and 4.4.1.

¹⁶¹² Gazzini T *Interpretation of International Investment Treaties* (2016) 157. See also Crawford J *Brownlie's principles of public international law* 8 ed (2012) 381.

¹⁶¹³ See part 4.3.4.

¹⁶¹⁴ See Article 10 of Annex to chapter 7.

¹⁶¹⁵ See part 4.3.4.

¹⁶¹⁶ See parts 4.3.4 and 4.4.1.

opportunity for arbitral tribunals to outweigh public interests concerns with investors' rights which are captured in substantive provisions of the investment treaty.¹⁶¹⁷

It is also submitted that positive language which signals legally enforceable rights to regulate or adopt public policy measures can go a long way in preserving policy space in IIAs.¹⁶¹⁸ Investment treaties should contain positive regulatory language which is obligatory or declaratory in nature. This would qualify and create legally enforceable rights to regulate and at the same time signal to the tribunals the true intentions of the party states. Article 5 (1) of the Belgium-Luxembourg Economic Union – Mauritius BIT¹⁶¹⁹ provides a model of such provisions. The Article provides for express environmental obligations stipulating that 'each contracting party shall strive to ensure that its legislation provide for high levels of environmental protection and shall strive to continue to improve this legislation'.¹⁶²⁰ This language creates freedom to regulate through a legally enforceable right to adopt and improve environmental measures. This provision is an improvement to the provisions under some existing IIAs prohibiting states from lowering their public interest domestic laws or policies to lure investments.¹⁶²¹ Positive language might, theoretically, compel a tribunal to consider public interest concerns in arbitration process because of specificity and stronger signal of intent. It is therefore important for public interest issues to be incorporated into the substantive or self-standing provisions such that tribunals accord due consideration to public interest matters. This approach can ensure that public interest issues are not trumped by investment norms or obligations contained in the IIAs and tribunals will be compelled to consider public interests during arbitration proceedings.¹⁶²²

¹⁶¹⁷ See part 4.4.1.

¹⁶¹⁸ See parts 4.3 and 4.4.

¹⁶¹⁹ Belgium-Luxembourg Economic Union – Mauritius BIT, 2005.

¹⁶²⁰ Article 5 (1) of the Belgium-Luxembourg Economic Union – Mauritius BIT.

¹⁶²¹ Traditional IIAs merely prevents a state from lowering the public interest regulations but do not expressly prove that a state has an ability to improve such regulations.

¹⁶²² See parts 4.3.5 and 4.4.1.

7.3.4 Include sustainable development issues in IIAs

In addition to promoting, facilitation and protecting investment, IIAs must be supportive of sustainable development.¹⁶²³ Investment treaties are crucial instruments to achieving sustainable development.¹⁶²⁴ In reality, it is not an option that international investment law promotes sustainable development but a necessity.¹⁶²⁵ As Von Moltke has rightfully expressed, 'the imperatives of sustainability must be respected in the investment process. Indeed it can be argued that an investment regime which does not actively promote sustainable development represents an important step back from the widely endorsed principle of sustainable development'.¹⁶²⁶ Spears considers that the core principle of integrating sustainable development in IIAs 'may serve as a type of 'interstitial' norm that facilitates the reconciliation and integration of other norms concerning economic development and the protection of society and the environment'.¹⁶²⁷

The author submits that the concept of including sustainable development in IIAs can go a long way in reconciling and integrating the objectives of the investors, states and society where in competition with one another.¹⁶²⁸ UNCTAD has developed a useful policy instrument – the UNCTAD Investment Policy Framework for Sustainable Development¹⁶²⁹ – to guide states in designing and negotiating their investment agreements to maximise the contribution of investment to the host country's sustainable development and growth. Other useful guidelines on how sustainable development issues can be incorporated into IIAs are provided by the investment frameworks developed by the OECD,¹⁶³⁰ G20¹⁶³¹ and the International Institute for Sustainable Development (IISD).¹⁶³²

In Africa, the foregoing approach is proposed in the SADC Model BIT and PAIC. For example, the preamble of the SADC Model BIT recognises 'the important contribution

¹⁶²³ See preamble, Articles 3 (a), 12 and 34 as well as Annex 1 of Annex to Chapter 7.

¹⁶²⁴ See parts 3.3.4 and 4.2.1.

¹⁶²⁵ See part 3.3.4.

¹⁶²⁶ Von Moltke K 'International investment and sustainability: Options for regime formation' Gallagher K & Werksman J (eds) *International trade & sustainable development* (2002) 349.

¹⁶²⁷ Spears SA 'The quest for policy space in a new generation of international investment agreements' (2010) 13 *Journal of International Economic Law* 1070.

¹⁶²⁸ See parts 3.3.4 and 4.2.1.

¹⁶²⁹ UNCTAD Investment Policy Framework for Sustainable Development, 2015.

¹⁶³⁰ OECD Policy Framework for Investment, 2015.

¹⁶³¹ G20 Guiding Principles for Global Investment Policymaking, 2016.

¹⁶³² IISD Model Investment Agreement for Sustainable Development, 2005.

investment can make to the sustainable development of the state parties, ... and the furtherance of ... human development ... reaffirming the right of state parties to regulate and to introduce new measures relating to investment in their territories in order to meet national policy objectives ...'. The PAIC also acknowledges the importance of framing investment regulation within the framework of sustainable development objectives.

Sustainable development provisions in the preambles could be further enhanced by making reference to the UN Agenda 2030 on Sustainable Development and AU Agenda 2063. This is critical to indicate the intent and purpose of the drafters who negotiated the investment treaty with due regard and objective to fulfil the goals of the Agendas 2030 and 2063, that is, to foster sustainable development.

Nevertheless, it is submitted in negotiating IIAs with sustainable development effect, more concrete hard law provisions imposing legally binding obligations on investors and host states are required.¹⁶³³ Sustainable development provisions couched in preambular or non-binding language are weak in strengthening the sustainable development effect of IIAs.¹⁶³⁴ To that effect, substantive provisions that create legally binding rights and obligations on investors and investments,¹⁶³⁵ and host states to ensure sustainable development of the host state. It is also suggested that the IIAs could further enhance this by making explicit reference to CIL and general principles of international law that recognise the right and obligation to sustainable development.¹⁶³⁶ It is submitted that containing binding rules regarding sustainable development is critical to ensure that countries realise and admit foreign investments that are aligned to their sustainable development objectives. In addition, the espousal of such provisions in IIAs is critical to prevent the predilections of arbitrators to view investment treaties as charters of purely investor rights.¹⁶³⁷

¹⁶³³ See Article 12 of Annex to chapter 7.

¹⁶³⁴ See part 4.3.4.

¹⁶³⁵ See discussion in part 7.3.9 below. See also Article 26 (2) of Annex to chapter 7.

¹⁶³⁶ See part 3.3.3. See also Article 12 (1) of Annex to chapter 7.

¹⁶³⁷ See part 4.2.1.

7.3.5 Include general safeguard provisions in IIAs

African states could also guarantee policy space by including general safeguard provisions in investment treaties. In other words, states could incorporate into investment treaties a series of measures that can be adopted by the host government to counter adverse effects of economic activities pursuant to implementing an investment treaty. For instance, state parties could enshrine a provision which allows host governments to impose safeguard measures in the event that foreign investment activities, for example, transferring capital and funds across the border, has caused the host government to suffer or threatening to cause serious balance of payment or external financial difficulties.¹⁶³⁸ However, such safeguard measures must be temporary and subject to progressive elimination, non-discriminatory among and non-detrimental to other state parties, and should be consistent with the International Monetary Fund disciplines on the same.¹⁶³⁹ The COMESA Common Investment Agreement provides good guidance in this respect.¹⁶⁴⁰ The Agreement allows states to impose safeguard measures when they suffer or are threatened with any serious injury as a result of liberalising investment.¹⁶⁴¹ The COMESA Common Investment Agreement also allows states, when facing serious balance of payment and external financial difficulties or threat thereof, to implement restrictions on investments including payments or transfers for transactions related to transfer of assets, expropriation as well as national and MFN treatment.¹⁶⁴²

In addition, African countries could preserve their regulatory space by including provisions that enable them to adopt measures to counter threats or violation of essential security interests or for maintenance of international peace and security.¹⁶⁴³ This gives countries policy space and flexibility to respond to situations of economic emergencies without undermining their treaty obligations or exposure to investment arbitration.¹⁶⁴⁴ The COMESA Common Investment Agreement contains an example of provisions providing for this and may be used as an example in assisting African countries to safeguard their regulatory space of manoeuvre when their security

¹⁶³⁸ See Article 20 of Annex to chapter 7.

¹⁶³⁹ See Article 20 of Annex to chapter 7.

¹⁶⁴⁰ See 5.4.2.2.

¹⁶⁴¹ Article 24 of the COMESA Common Investment Agreement.

¹⁶⁴² Article 25 of the COMESA Common Investment Agreement.

¹⁶⁴³ See Article 21 (1) of Annex to chapter 7.

¹⁶⁴⁴ See parts 4.3.2 and 4.3.3.

interests are threatened. Instead of simply referring to protecting national essential interests like many BITs,¹⁶⁴⁵ the COMESA Common Investment Agreement stipulates that states are not precluded from applying measures aimed at fulfilling their obligations under the UN Charter with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.¹⁶⁴⁶ Reference to international treaties regarding protection of security interests and restoration of international peace cements the protection of the right to regulate in such instances. This is because it strikes a balance between the public and private international law issues.

Overall, safeguards should constitute *bona fide* public interest regulation or legitimate purpose and should not cause economic harm on investments. In other words, states should assess all options and adopt measures that encourage foreign investment without compromising public interest objectives. In doing so, states should also establish an inquiry mechanism to guide tribunals to consistently determine *bona fide* public interest regulation or legitimate public purpose. Also noteworthy is that this type of provision is better than a simple exception provision in that it allows parties to retain control to prioritise public interest regulation, instead of subjecting themselves to the caprices of an arbitral tribunal. Article 12 (3) of the US Model BIT contains a good example of positive language acknowledging the right to regulate – that each state has to enact legislation ‘where a course of action or inaction reflects a reasonable exercise of such discretion, or the results from a bona fide decision regarding allocation of resources’.

7.3.6 Interpretative annexes clarifying public interest issues

Annexes interpreting public interest and sustainable development issues could be another way of guaranteeing policy space in IIAs.¹⁶⁴⁷ Public interest issues are broad and cannot be clarified within the provisions of IIAs, therefore interpretative annexes clarifying what constitutes public interest and sustainable development issues should be added to IIAs. Interpretative annexes are necessary to guide tribunals in applying the public interest and investment protection provisions. Negotiators of the draft of the

¹⁶⁴⁵ See part 4.3.3.

¹⁶⁴⁶ Article 22 (3) (a) of the of the COMESA Common Investment Agreement.

¹⁶⁴⁷ Annex 1 of Annex to chapter 7 contains details clarifying public interest issues. The right to regulate and sustainable development are clarified within Annex to chapter 7, Articles 9 and 12, respectively.

original Trans-Pacific Partnership Agreement,¹⁶⁴⁸ for example, included annexes providing 'a legitimate exercise of state police powers to protect public welfare, including public health and the environment, will not constitute an indirect expropriation, except in rare circumstances'.¹⁶⁴⁹ These are remarkable measures to fully safeguard public policy measures from resulting in liability. Even though these clarifying language and interpretative annexes might not necessarily prevent investors from initiating arbitration against a host state, they would go a long way to prevent broad interpretations of investment treaty provisions and guide tribunals in applying the IIAs provisions.¹⁶⁵⁰ Furthermore, annexes are an integral part of treaties and, therefore, have legal binding force and effect on state parties.¹⁶⁵¹ Binding annexes to IIAs are necessary for consistency and coherence in the interpretation of IIA provisions.¹⁶⁵²

7.3.7 Excluding public interest measures from investment treaty arbitration

Another commendable option for safeguarding regulatory freedom in the international investment regulatory framework is to exclude government public interest regulatory measures from investment arbitration.¹⁶⁵³ It is submitted that shielding specific public interest issues from arbitration presents African countries with the necessary flexibility to adopt and implement regulatory measures aimed at advancing public interest issues without fear of investment treaty violation or arbitration. In other words, it circumvents the regulatory chill effect distressing most African countries under the purview of the traditional international investment law. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)¹⁶⁵⁴ could provide direction in this regard.¹⁶⁵⁵ The CPTPP excludes ISDS challenges over Australian tobacco control

¹⁶⁴⁸ Trans-Pacific Partnership Agreement, 2016.

¹⁶⁴⁹ Wilensky M 'Potential liability for climate-related measures under the Trans-Pacific Partnership' (2017) iii available at <https://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/Fellows/wilenskypotentialliabilitytpp.pdf> (accessed 16 January 2019) (hereinafter Wilensky (2017)).

¹⁶⁵⁰ Tribunals would be obligated to generate consistent interpretations of the same standards of investment protection and conclusions as to state liability in relation to cases identical or similar fact situations. Wilensky (2017) iii.

¹⁶⁵¹ See, for example, Article 11 of the Treaty concerning the establishment of the Republic of Cyprus, 1960.

¹⁶⁵² See Article 4 of Annex to chapter 7.

¹⁶⁵³ See Article 34 of Annex to chapter 7.

¹⁶⁵⁴ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 2018.

¹⁶⁵⁵ See part 2.4.2.

measures, and government's refusal to issue, renew or modify license or permits.¹⁶⁵⁶ It also allows governments to implement legitimate public welfare objectives such as measures to protect public health and safety as well as the environment and such actions do not constitute indirect expropriation and cannot be challenged under ISDS.¹⁶⁵⁷ The CPTPP also contains several safeguards aimed at limiting the costs of potential proceedings including, *inter alia*, procedures for throwing out frivolous claims or claims without legal merit and limits to the monetary awards a tribunal may grant and no punitive damages.¹⁶⁵⁸ Likewise, the United States–Mexico–Canada Agreement (USMCA),¹⁶⁵⁹ also known as the New NAFTA, permits regular investment claimants only to challenge measures in violation of certain provisions of the USMCA including national treatment, most-favoured-nation treatment and expropriation excluding indirect expropriation.¹⁶⁶⁰

7.3.8 Reformed investment dispute settlement mechanism

Policy space can be safeguarded through the investment dispute settlement mechanism.¹⁶⁶¹ The study has revealed African countries' dissatisfaction with the traditional investor-state dispute settlement (ISDS) system claiming that it undermines state sovereignty, constrains policy space, lacks transparency and accountability, and that arbitral tribunals do not take into account developing countries' specific needs.¹⁶⁶² This study found that the benefits of the ISDS system outweigh the costs of complete denunciation of the system, and thus focuses on the adoption of a reformed ISDS which is specific to Africa.¹⁶⁶³ It is submitted that as African countries move towards the integration of the right to regulate in investment law, there is a need to ensure that they protect their public interests while maintaining a competitive environment for attracting FDI. The author believes that an international investment legal framework with (a reformed) ISDS would be attractive to foreign investors.

¹⁶⁵⁶ The CPTPP provides that host government's refusal to issue, renew or modify license or permits will not constitute a breach of expropriation and, therefore cannot be challenged in ISDS arbitration.

¹⁶⁵⁷ See part 2.4.2.

¹⁶⁵⁸ See part 2.4.2.

¹⁶⁵⁹ The USMCA is trilateral trade agreement between US, Canada and Mexico which replaces and amends various provisions of the NAFTA.

¹⁶⁶⁰ See part 2.4.2. See also Article 14 and 16 of Annex to chapter 7.

¹⁶⁶¹ See Part VI of Annex to chapter 7.

¹⁶⁶² See part 4.3.5.

¹⁶⁶³ See part 4.3.5.

This author perceives that a complete elimination of ISDS provisions in IIAs does not necessarily register the desired kind of an international investment law regime appealing to the investment community, particularly in Africa, where political risks, adherence to the rule of law is weak, and flagrant violation of investment treaty obligations are rampant.¹⁶⁶⁴ Worse still, inter-state arbitration may not be the best option for investors because African states do not litigate against each other due to ‘a belief that an openly declared dispute signifies disrespect or lack of solidarity ... or technical capacity constraints’.¹⁶⁶⁵ Against this backdrop, the study thus proposes some modest options of ISDS mechanisms including the use of domestic judicial systems, ISDS arbitration through African international arbitration institutions and/or regional judicial organs.¹⁶⁶⁶

African countries could consider using African arbitration institutions, regional courts or the continental judicial organs in investment dispute resolution since there is a widespread consensus (among African countries) that overseas international arbitration institutions are biased towards foreign investors originating from overseas. It is therefore submitted that making use of African arbitral institutions¹⁶⁶⁷ or regional judicial bodies would somewhat enable African governments to retain their regulatory control in investment regulation.¹⁶⁶⁸ The use of regional judicial organs in investment arbitration has been proposed in the COMESA Common Investment Agreement,¹⁶⁶⁹ ECOWAS Supplementary Act,¹⁶⁷⁰ and SADC FIP.¹⁶⁷¹ Further, the (revised) COMESA

¹⁶⁶⁴ See part 4.3.5.

¹⁶⁶⁵ Erasmus G ‘Dispute settlement under the AfCFTA’ (2018) Tralac Trade Brief No. S18TB05/2018 2.

¹⁶⁶⁶ See Article 36 of Annex to chapter 7.

¹⁶⁶⁷ For example, the Lagos Regional Centre for International Commercial Arbitration, the Maritime Arbitrators Association of Nigeria, the Lagos Court of Arbitration, the International Centre for Arbitration and Mediation Abuja, the Ghana Arbitration Centre, the Ghana Association of Chartered Mediators and Arbitrators, the Casablanca International Mediation and Arbitration Centre, Cairo Regional Centre for International Commercial Arbitration, the Kigali International Centre of Arbitration, the Nairobi Centre for International Arbitration, and the Arbitration Foundation of Southern Africa, among others. For a detailed list of African arbitration centres, see Onyema E ‘List of Arbitration Institutions in Africa’ (2016) available at https://www.arbitration-icca.org/media/7/14403606533411/list_of_arbitration_institutions_in_africa_-_emilia.pdf (accessed 27 May 2019).

¹⁶⁶⁸ See Papaefstratiou AF, Marsoulies C, Tavaut M & Fouchard C ‘The Africanisation of rule-making in international investment arbitration’ 2018 available at <http://arbitrationblog.kluwerarbitration.com/2018/08/17/africanisation-rule-making-international-investment-arbitration/> (accessed 21 January 2019).

¹⁶⁶⁹ Articles 36 (1) and 35 (1) of the COMESA Common Investment Agreement.

¹⁶⁷⁰ Article 33 (7) of the ECOWAS Supplementary Act.

¹⁶⁷¹ Article 26 of the Agreement Amending Annex 1 of the SADC FIP.

Common Investment Agreement,¹⁶⁷² and PAIC¹⁶⁷³ have adopted a *sui generis* approach to use international arbitration centres in Africa in the ISDS regime. The author submits that use of independent African judicial organs could get an additional buy-in from investors rather than the use of domestic courts that are regarded as biased towards their host governments. In addition, it is submitted that the use of regional judicial organs would help countries with weak technical expertise in investment in their domestic judicial systems to ensure that they provide robust dispute resolution mechanism.

As an alternative, African states could use the continental judicial organs such as the African Court of Justice and Human Rights, similar to the European Court of Justice. The African Court of Justice and Human Rights could act as an appeal court regarding arbitral awards by regional or other arbitral tribunals.¹⁶⁷⁴ This would ensure consistency in international arbitral awards. Arbitral awards would be subject to review of an appellate mechanism. This approach is already considered in EU, where European countries are proposing an investment court system with an appellate mechanism in place of private *ad hoc* arbitrators. In the same vein, the COMESA has recently revised its Arbitration Rules to accommodate the two-tier system of the COMESA Court of Justice. To avoid forum shopping or parallel proceedings international arbitration must be subject to the exhaustion of local remedies or insert a provision in the IIAs aimed at avoiding forum shopping or parallel proceedings. That is, if a dispute is referred to any of the provided arbitral tribunals the same dispute cannot thereafter be referred to any other forum. The CPTPP,¹⁶⁷⁵ the proposed Transatlantic Trade and Investment Partnership¹⁶⁷⁶ and the Indian Model BIT¹⁶⁷⁷ provide excellent examples of how parallel proceedings in investment arbitration can be avoided.

¹⁶⁷² Article 36 (2) (a) of the COMESA Common Investment Agreement.

¹⁶⁷³ Article 42 (1) (d) of PAIC.

¹⁶⁷⁴ See Article 36 (10) of Annex to chapter 7. However, the challenge for this recommendation is the reluctance by African countries to comply with decisions of regional and continental courts.

¹⁶⁷⁵ The CPTPP provides that if investors from Chile, Mexico, Peru or Vietnam elects to submit a claim to a domestic court or administrative tribunal, such an election shall be definitive and exclusive. That is, the claim may not be submitted to arbitration under ISDS of the CPTPP.

¹⁶⁷⁶ Article 14(2) Sub-section 3, Chapter II, Part 3 Transatlantic Trade and Investment Partnership Proposal, 2016.

¹⁶⁷⁷ Article 14.4(i)(B)(f) India Model BIT, 2018.

In order for this system to be effective institutional developments and reforms would be required. For example, regional and continental judicial organs should be given jurisdiction over investment-related disputes and private parties should be given *locus standi* before such judicial organs. Further, there must be effective mechanisms to ensure that decisions of the courts are enforced and complied with. This also requires the development of regional and continental institutions entrusted with supranational powers to do so.¹⁶⁷⁸

Investment arbitration through domestic courts or tribunals is also commendable in the debate of preserving policy space.¹⁶⁷⁹ Ngobeni commends that, 'the courts of host states are indispensable in the settlement of investor-state disputes. The acceptance of the central support role played by domestic courts in ISDS begs the question why, if such courts can be trusted with the support function they lend to ISDS, they cannot be trusted to resolve investor-state disputes entirely'.¹⁶⁸⁰ Despite being a noble idea to use domestic courts in investment dispute resolution, this can be worrisome in the African context. African domestic courts or tribunals are often perceived to be biased towards their governments and lack the technical expertise in international commercial arbitration.¹⁶⁸¹ On the other hand, foreign investors are comfortable in investing in secure and predictable markets, where there is no corruption and the rule of law is guaranteed.¹⁶⁸² In order, for domestic legal systems to be trusted by and attractive to foreign investors, it would be imperative for African governments to uphold the rule of law and maintain the impartiality and independence of domestic courts. Countries would also need to invest 'in the development of greater local expertise and experience in investment arbitration' because this would provide them 'with a strong pool of skilled practitioners, who could... litigate and arbitrate more cost effectively in investment disputes'.¹⁶⁸³

¹⁶⁷⁸ See part 6.2.3.

¹⁶⁷⁹ See part 4.3.5. See also Article 36 (2) (a) of Annex to chapter 7.

¹⁶⁸⁰ Ngobeni (2018) 279.

¹⁶⁸¹ See part 4.3.5.

¹⁶⁸² See part 4.3.5.

¹⁶⁸³ Leon P 'Africa needs to resist any temptation to dump investor-state arbitration' (2017) <https://www.businesslive.co.za/bd/opinion/2017-10-06-africa-needs-to-resist-any-temptation-to-dump-investor-state-arbitration/> (accessed 15 January 2018).

In addition, such a reformed ISDS mechanism should be transparent and embrace public participation since the public or civil society is an important (often affected) stakeholder in investment activities. Tribunal hearings must be open to the public, the tribunals should accept and consider *amicus curiae* submissions by interested parties, and arbitral awards must be made readily and publicly available and reviewable by the public.¹⁶⁸⁴ Including provisions in IIAs guaranteeing these rights would make public hearings, submission of *amicus curiae* briefs and publication of awards mandatory and legally enforceable rights.¹⁶⁸⁵ It is submitted that intervening third parties acting as *amicus curiae* play a critical role because they have legitimate public interest in investment activities and disputes. The authors also concurs with Adekele's proposition that '*amicus* participation should, importantly, not be limited to civil society participation alone but should also include the participation of grassroots movements to represent the interests and voices of the masses'.¹⁶⁸⁶ This would ensure that all the relevant interests of a broader array of stakeholders are taken into consideration in investment arbitration – thus enhancing the balance and consideration of all interests in investment arbitration. This would also help to tackle the absence of public participation in investment arbitration which is among the causes of the current backlash against ISDS.¹⁶⁸⁷

Closely related to the foregoing, states could also preserve their regulatory autonomy in international investment law framework through a provision in IIAs that allows host governments to dismiss investor claims challenging measures that were adopted in good faith for public welfare regulation – the so-called counter claim clauses.¹⁶⁸⁸ For example, the PAIC and the COMESA Common Investment Agreement allow governments to counter-claim or offset a claim when the investors breach their investment treaty obligations.¹⁶⁸⁹ This would give host governments adequate regulatory space to avoid investors from escaping liability of violating public interests in host states through international investment arbitration. It is submitted that counter claim provisions can mitigate, to a large degree, the asymmetry in investment arbitration because a host state can in the same proceedings, enforce public interest

¹⁶⁸⁴ See Article 36 (7)-(9) of Annex to chapter 7.

¹⁶⁸⁵ See Article 36 (7)-(9) of Annex to chapter 7.

¹⁶⁸⁶ Adeleke (2018) 165.

¹⁶⁸⁷ See part 4.3.5.

¹⁶⁸⁸ See Article 38 of Annex to chapter 7.

¹⁶⁸⁹ See parts 5.3 and 5.4.

issues against an investor. Thus, counterclaim enables the host state to enforce public policy issues through international investment proceedings. Inserting counter-claim clauses in IIAs helps investment arbitration to advance the rule of law and has the potential 'to bridge the gap between the lack of effective mechanisms to hold foreign investors accountable for their conduct and the extensive protection of foreign investors in international investment law'.¹⁶⁹⁰ Counter-claim clauses allow host countries to react to the primary claims of investors and directly challenge their wrongful conduct. Thus far, counter-claims have not been very successful in international investment arbitration because of the uncertainty as to whether host country obligations under international law can be enforced on foreign investors. The *Urbaser v. Argentina* case reveals that counter-claims are possible. In this case the arbitrators considered that the obligation to abstain from human rights violations can be of immediate application, not only upon states, but equally to individuals and other private parties.¹⁶⁹¹

7.3.9 Reconciliation of different international law or treaty obligations

As revealed indirectly in chapter 3 of this study, investment protection obligations and public interest issues are different yet intertwined and inseparable regimes. States' obligations under international investment law are likely to encroach upon the obligations incurred by states in other areas of law including public international law, international human rights law and CIL.¹⁶⁹² This exemplifies the careful caption of public law issues into international investment law. Reconciling the international private and public international law requires the adoption of a holistic and interdisciplinary approach to investment treaties.¹⁶⁹³ This study therefore recommends an evolution and development of an international investment law regime which strikes a balance between investment and non-investment (public interest) issues.¹⁶⁹⁴ Until this balance occurs, the right to regulate in international investment law will always be subjected to a legal system that is driven by purely private economic interests and

¹⁶⁹⁰ Ishikawa T 'Symposium on investor responsibility: The next frontier in international investment law' (2019) 113 *American Journal of International Law* Unbound 33-37.

¹⁶⁹¹ *Urbaser and Consorcio de Aguas Bilbao v. Argentina*, ICSID Case No. ARB/07/26, Award, (8 December 2016) para 1210.

¹⁶⁹² For example, policy space concerns such as labour rights, environmental protection, human rights issues are tied to public international and international human rights law.

¹⁶⁹³ See Article 41 of Annex to chapter 7.

¹⁶⁹⁴ See Article 41 of Annex to chapter 7.

people harmed by foreign investment activities will not have clear mechanisms to claim justice and reparation.

It is further recommended that tribunals when interpreting investment law, should adopt a comparative approach. Other legal regimes such as CIL, public international law as well as national laws should be considered. This is critical because many host governments, and the public in general, can no longer sustain the tendency to see IIAs or arbitral tribunals treating international investment law as purely dealing with investor's rights and commercial issues, isolating them from the influence of other relevant legal regimes. The author submits that an international investment law or investment arbitration proceedings that complements and accord due consideration to other legal systems is one way to forge a balanced and legitimate regime. This recommendation is significant in the sense that it supports the evolution and development of international investment law through the influence of other legal systems. Reference to other legal systems will ensure that international investment law is not perceived as an isolated or closed system.

It is also submitted that the systematic integration of other legal systems establishes an obligation for tribunals to consider any relevant rules of international law applicable between the parties.¹⁶⁹⁵ This may require IIAs to be interpreted in light of the requirements of international human rights and environmental law, which impose positive duties on states to protect society and the environment.¹⁶⁹⁶ That said, there must be a systematic integration of relevant rules of international law in IIAs and evaluating whether the objectives of a state measure that limit investor protections are consistent with the factors that constitutes a public interest measure.

One way of doing this is to include provisions in IIAs addressing inconsistent obligations. For example, to include a provision that addresses how parties should seek to balance their obligations under different legal regimes. For instance, Article 20 (10) (3) of the US-Korea Free Trade Agreement¹⁶⁹⁷ provides:

In the event of any inconsistency between a party's obligations under this Agreement and a covered agreement, the party shall seek to balance its obligations under both agreements, but this shall not preclude the party from taking a particular measure to

¹⁶⁹⁵ See part 4.3.5.

¹⁶⁹⁶ See part 3.3.

¹⁶⁹⁷ US-Korea FTA, 2010.

comply with its obligations under the covered agreement, provided that the primary purpose of the measure is not to impose a disguised restriction on trade.

This provision could be used as a point of reference by a state to demonstrate that a regulatory measure is legitimate in accordance to an international obligation incurred by such state. Tribunals are always reluctant to investigate whether obligations from non-investment treaties exempt host states from liability under investment treaty obligations.¹⁶⁹⁸ Be that as it may, the inclusion of a provision like the one in the US-Korea FTA could motivate the tribunal to thoroughly investigate and explore the rationale behind the adoption of the regulatory measure. Without such a provision, African states could be put in a position where they are unable to comply with public interest obligations under international law, human rights and CIL due to risk of liability.

7.3.10 Investor and investment obligations in IIAs

It is further recommended that investment treaties enshrine positive investor obligations¹⁶⁹⁹ explicitly requiring foreign investors to comply with corporate social responsibility (CSR) including, among others,¹⁷⁰⁰ human rights and environmental obligations in accordance with the host state's regulations, home states' standards or international standards on corporate accountability.¹⁷⁰¹ Under traditional international investment law, foreign investors incur no responsibility but only rights.¹⁷⁰² Direct corporate obligations clauses in IIAs could remedy the 'imbalance between overprotective international rights of foreign investors and the corresponding obligations of host states'.¹⁷⁰³ This could also change the corporate duties of multinational corporations by converting investor obligations into enforceable international obligations on foreign investors, making international investment law a useful and unexpected lever to hold foreign investors accountable.

¹⁶⁹⁸ See part 4.3.5.

¹⁶⁹⁹ See Part V of Annex to chapter 7.

¹⁷⁰⁰ Other obligations include responsible business conduct, compliance with corporate governance, socio-political obligations, anti-bribery or corruption, corporate social responsibility, business ethics, human rights, transfer of technology and know-how. The COMESA Common Investment Agreement contains these investment obligations.

¹⁷⁰¹ See parts 5.3 and 5.4. The first two categories conceive corporate obligations to be organised spontaneously through the domestic legal frameworks of the host and home states.

¹⁷⁰² See chapter 2.

¹⁷⁰³ Dubin L 'Corporate social responsibility clauses in investment treaties' (2018) *IISD Investment Treaty News* available at <https://www.iisd.org/itn/2018/12/21/corporate-social-responsibility-clauses-in-investment-treaties-laurence-dubin/> (accessed 17 January 2019) (hereinafter Dubin (2018)).

Several international institutions have developed (soft law) codes of conduct for multinational corporations which could be used by African states as models for corporate social responsibility in IIAs - notably, UN Code of Conduct on Transnational Corporations,¹⁷⁰⁴ the UN Guiding Principles on Business and Human Rights,¹⁷⁰⁵ UN Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises.¹⁷⁰⁶ These instruments arguably constitute the international best practice on corporate responsibility and should be expressly made reference to in IIAs as guidelines on CSR. Express reference to these international instruments in IIAs clause on CSR can play a useful role in interpreting the content and scope of investor obligations with respect to CSR in investment treaties. This may go a long way in cementing and clarifying CSR obligations in international investment law.¹⁷⁰⁷ In addition, CSR provisions could be a useful basis for counterclaims allowing host countries not to avoid their own responsibility but to actively hold investors liable.¹⁷⁰⁸

Furthermore, the imposition of investors and investments' human rights obligations is critical in enabling host states to hold companies to account for human rights violations under international investment law.¹⁷⁰⁹ The conventional international investment law system does not contain human rights provisions directly applicable to foreign investors and, as a result, it is not feasible to enforce human rights through international investment law.¹⁷¹⁰ Article 29 (1)-(2) of the Revised COMESA Common Investment Agreement provides good guidance in this respect:

COMESA investors and their investments shall observe the United Nations Guiding Principles on Business and Human Rights with modifications necessary for local circumstances.

COMESA investors and investments shall among others:

- a) support and respect the protection of internationally proclaimed human rights;

¹⁷⁰⁴ Draft UN Code of Conduct on Transnational Corporations, U.N. Doc.E/C.10/1982/6, 5 June 1982, para 13.

¹⁷⁰⁵ United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protection, Respect and Remedy' A/HRC/17/31, 2011.

¹⁷⁰⁶ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, 2003.

¹⁷⁰⁷ See Part V of Annex to chapter 7.

¹⁷⁰⁸ Dubin (2018).

¹⁷⁰⁹ See Article 28 of Annex to chapter 7.

¹⁷¹⁰ See part 3.3.

- b) ensure that they are not complicit in human rights abuses;
- c) uphold the freedom of association and the effective recognition of the right to collective bargaining;
- d) eliminate all forms of forced and compulsory labour, including the effective abolition of child labour; and
- e) eliminate discrimination in respect of employment and occupation.

The adoption of such provisions is necessary to strengthen the justiciability of corporate human rights obligations in international investment law. The author, however, suggests that this provision could be improved by reiterating the universal human rights treaties¹⁷¹¹ that African countries have ratified including, but not limited to, the UN Charter,¹⁷¹² Universal Declaration of Human Rights (UDHR),¹⁷¹³ the International Covenant on Civil and Political Rights,¹⁷¹⁴ the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁷¹⁵ and the African Charter on Human and Peoples' Rights.¹⁷¹⁶

To establish direct corporate obligations clauses with a force of law, IIAs ought to adopt stronger, not conditional language. This can be achieved through adopting the use of certain formal or imperative verbs associated with binding arrangement under international law such as 'shall, agree, undertake, ought to, should or must',¹⁷¹⁷ not verbs such as 'might or may' that reflect arrangements of political natures and non-binding under international law. Where conditional verbs or language are used, corporate obligation clauses can be relatively weak in substance. Hence states must adopt imperative verbs which are relatively strong in substance and can create legally binding and enforceable obligations. Such language could go a long way in enhancing the responsible business conduct. Inclusion of mandatory language creating legally enforceable and binding effect gives real value addition to the IIAs, as well as certainty and predictability in investment arbitration.

¹⁷¹¹ See Article 28 (2) (a) of Annex to chapter 7.

¹⁷¹² Charter of the United Nations, 1 UNTS XVI 1945 (hereinafter UN Charter).

¹⁷¹³ The Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810, 1948.

¹⁷¹⁴ The International Covenant on Civil and Political Rights (ICCPR), 1966.

¹⁷¹⁵ International Covenant on Economic, Social and Cultural Rights, 1966.

¹⁷¹⁶ African Charter on Human and Peoples' Rights, 1981.

¹⁷¹⁷ These words signal stronger and legally binding commitments.

As noted earlier, corporate obligations in IIAs would be a basis for allowing host governments to counterclaim or initiate arbitration against foreign investors.¹⁷¹⁸ This would provide substantive and procedural rules in international investment law framework that entitles host governments to sue foreign investors for violating treaty corporate obligation as well as provide the victims of these harms with access to justice in the pursuit of restoration and/or reparation.¹⁷¹⁹ The conceptualisation of the right to regulate in this study also confirms that host states should also be able to sue foreign investors under the investment treaty arbitration mechanism or to dismiss investors' claims based on investors' socially irresponsible conduct in breach of their IIAs obligations.¹⁷²⁰

Furthermore, including hard law corporate obligations in investment treaties would ensure that the business community foster sustainable development. The international investment community has been widely identified as an important stakeholder in the achievement of sustainable development goals.¹⁷²¹ In principle, the business community is responsible for contributing towards sustainable development.¹⁷²² Hence, entrenching hard law provisions in IIAs recognising foreign investment's obligations to foster sustainable development would enhance the justiciability of investments' sustainable development obligations in international investment law.¹⁷²³ This could be enhanced further by express reference to internationally recognised normative claims on business' obligations on sustainable development contained as expressed in the Agenda 2030 and UN Guiding Principles for Business and Human Rights.¹⁷²⁴

Moreover, the IIAs should contain binding commitments by home countries to promote and ensure responsible business conduct. That is, home states should undertake to ensure that outward FDI or their businesses when investment abroad engage in responsible business practices. South Africa, for example, has adopted guidelines on corporate governance that will guide the country's outward FDI in conducting

¹⁷¹⁸ See parts 5.3 and 5.4. See Article 38 of Annex to chapter 7.

¹⁷¹⁹ See parts 5.3 and 5.4.

¹⁷²⁰ See part 1.1.1.

¹⁷²¹ See part 4.2.1.

¹⁷²² See part 4.2.1.

¹⁷²³ See Article 26 of Annex to chapter 7.

¹⁷²⁴ See Article 26 (4) of Annex to chapter 7.

responsible business practices.¹⁷²⁵ These guidelines are useful in assisting African governments in building provisions imposing obligations on home states. The author suggests that these guidelines could be enhanced if adopted as binding commitments.

7.4 FINAL THOUGHTS

It can be argued that there is a significant need to incorporate policy space in the international investment framework for Africa in order to address challenges related to development and complex issues that have evolved in international investment law. Therefore, as African countries continue to conclude investment treaties internally and externally, it is imperative that the governments as well as international investment lawyers and policymakers begin to think of an approach of how to preserve policy space for host states. Entrenching policy space into Africa's international investment law regime allows host governments to pursue their national development objectives at the same time promoting and protecting foreign investment. It also allows states to craft an international investment legal framework that strikes a balance between the right to regulate and the protection of investment.

This study has called for the incorporation of policy space concerns in the international investment law framework for African countries. The study has focused on substantive issues – focusing particularly on, *inter alia*, greater drafting precision, hard law obligations, carve outs and exclusions from investment protection standards. It is the perception of this study that substantive public interest issues are necessary in IIAs to achieve the goal of safeguarding the right to regulate of host states. Instead of weak language as well as blanket or broader general exception clauses for public interest issues contained in the traditional investment treaties, this study has proposed that African governments as well as international investment lawyers and policymakers should endeavour to improve the investment treaty text so as to protect legitimate interests matters such as sustainable development, environment, public health and safety, human rights and labour issues, to mention but a few. Host governments should be able to regulate investment in accordance with their national development goals.

In addition, investments and investors when conducting their activities in the host states should be obliged to comply with legal obligations including, *inter alia*, CSR and

¹⁷²⁵ King IV Report on Corporate Governance for South Africa, 2016.

human rights. Investments and investors should be treated as critical subjects of international investment law. Precise drafting of investment texts signals the true intention of state parties and can guide investors when investing as well as arbitral tribunals when assessing the compatibility of regulatory measures with the investment treaty obligations. It can go a long way in addressing the criticisms levelled against the current international investment law regime, that is, restoring or sustaining the legitimacy of international investment law.

This study would have succeeded if it has effectively explored the status *quo* of the right to regulate in Africa's international investment legal framework and is useful as an appraisal and a reference tool for African states, academics, scholars as well as international investment law and policy makers on how to preserve and enhance policy space within the domains of international investment legal framework.

It is also important to note that, at a general level, this study is not only relevant for and specific to Africa's international investment law regime. The study is also relevant for other similarly placed jurisdictions where integration of policy space in international investment law is a necessity. Several regions across the world are moving into a phase where extra-territorial laws are being proposed for regulation of various sectors. The relevance of domestic laws and their role in extra-territorial application of regional laws will be important. In applying these extra-territorial laws, the sovereignty of host states will be questioned. These issues are beyond the scope of this study. This will be significant for other scholarly works that are dealing with the systematic integration of laws. Furthermore, the recommendations nuanced in this study are not the only options for incorporating policy space in international investment law legal framework. Other options exist and will be important for further scholarly research.

ANNEX TO CHAPTER 7
PROPOSED MODEL TEXT FOR AFRICAN COUNTRIES' INVESTMENT
TREATIES¹⁷²⁶

INVESTMENT AGREEMENT

BETWEEN

THE GOVERNMENT OF

AND



UNIVERSITY *of the*
WESTERN CAPE

¹⁷²⁶ Although this study was primarily concerned with interrogating the right to regulate in Africa's international investment law, this Model Investment Agreement was designed to guide African countries in negotiating investment treaties (either at bilateral, regional, continental or international levels) safeguarding policy space. Therefore, the Model does not concern itself only with the provisions relating to the right to regulate. The Model consists of unique provisions drafted with a primary objective to establish an international investment framework that protect foreign investment and foster sustainable development while at the same time preserving the right to regulate. The fact that the Model seeks to balance the public interest of the host states and private interest of foreign investors merits consideration of both international investment law and public international law. To that end, the provisions and language of this Model is adapted from several international (public and private) legal instruments, principles of CIL as well as best practices that have emanated from the investment arbitration and scholarly jurisprudence. The Model could be used in negotiating bilateral, trilateral, regional or plurilateral investment treaties/protocols/chapters among African countries or with external partners.

PREAMBLE¹⁷²⁷

We, the State Parties to this Agreement,

RECALLING the adoption of the AU Agenda 2063, and the UN Agenda 2030 for Sustainable Development;¹⁷²⁸

NOTING the Sustainable Development Goals as well as the Investment Policy Frameworks of the UNCTAD, OECD, the G20 and others, which call for the conclusion of investment treaties that protect investors and investments as well as preserve the right to regulate and support sustainable development.¹⁷²⁹

UNDERSTANDING that sustainable development requires the fulfilment of the economic, social and environmental pillars that are embedded within the concept;¹⁷³⁰

CONSCIOUS of the obligations to advance sustainable development and respect, protect and fulfil human rights assumed under customary international law, general principles of international law and relevant international legal instruments;¹⁷³¹

DETERMINED to achieve an investment legal framework that preserves the right to regulate and balances the rights and obligations between States Parties and the investors;

¹⁷²⁷ The preamble in this Model Investment Agreement has been formulated to preserve the policy space of host states to pursue their public policy and national development goals, as well as to balance national development objectives and investor interests. In other words, the preamble reflects state parties' intent to safeguard regulatory space, while protecting foreign investors and investments. The preamble of an international agreement incorporates the intentions, purposes and considerations that motivated the state parties to negotiate such treaty. The preamble guides the arbitral tribunals when interpreting and applying the substantive provisions of the Agreement. See parts 4.3.5 and 4.4.1.

¹⁷²⁸ Reference to UN Agenda 2030 and AU Agenda 2063 indicates that the intend and purpose of the drafters was to fulfil the goals the agendas – to foster sustainable development. See part 7.3.4.

¹⁷²⁹ This suggests that the drafters have taken into account or adapted certain provisions from the investment policy frameworks developed by the mentioned international organisations in crafting this Model Investment Agreement with the objective to foster investment-led sustainable development. See part 7.3.4.

¹⁷³⁰ This provision is framed to explain that sustainable development cover economic, social and environmental aspects. See part 3.3.4.

¹⁷³¹ Reference to human rights in this Model Investment Agreement enriches the jurisprudence and recognition of human rights issues in international investment regulation. It enhances the human rights-based approach to international investment governance. See part 3.3.

UNDERSTANDING that the guarantees in this Agreement are to be interpreted in such a manner that ensures an overall balance of rights and obligations between investors, host States and home States;

DESIROUS to promote and attract foreign investment that contributes to the sustainable development of the State Parties, including job creation, poverty alleviation, increase productive capacity, inclusive and sustainable economic growth transfer of technology and know-how, and the furtherance of human rights and human development;¹⁷³²

CONSCIOUS of the fact that investment and related activities is one of the avenues for illicit financial flows, corrupt practices and human right violations;

REAFFIRMING the sovereign right of the State Parties to regulate and introduce new measures relating to investments within their territories in order to meet national policy objectives and promote sustainable development objectives;¹⁷³³

HAVE AGREED as follows:



¹⁷³² This provision confirms the orthodox argument that foreign investment is a vehicle for job creation, poverty alleviation, increase productive capacity, inclusive and sustainable economic growth transfer of technology and know-how, and the furtherance of human rights and human development. See part 4.2.
¹⁷³³ This provision affirms the right to regulate in international investment treaty practice.

PART I

DEFINITIONS

ARTICLE 1

Definitions

In this Agreement, unless the context otherwise provides:

1. **Agreement** means the Investment Agreement between the Government of and the Government of
2. **AU** means the African Union.
3. **enterprise or company** means any entity duly constituted or otherwise incorporated, under the applicable laws and regulations of a State Party provided that it maintains substantial business activity in the State Party in which it is located. Substantial business activity requires an overall examination, on a case-by-case basis, of all the circumstances, including, *inter alia*:
 - a. the amount of investment to be brought into the host State,
 - b. the number of jobs to be created,
 - c. its effect on the local community, and
 - d. the length of time the business has been in operation;
4. **home State** means a State Party from where the investment or the investor originates;
5. **host State** is the State Party where the investment is located;
6. **investment** means an enterprise or a company, as defined under Paragraph 1, which is established, acquired or expanded by an investor, including through the constitution, maintenance or acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise or company is established or acquired in accordance with the laws of the host State; An enterprise or company may possess assets such as:
 - a) shares, stocks, debentures and other equity instruments of the enterprise or another enterprise;
 - b) a debt security of another enterprise;
 - c) loans to an enterprise;

- d) movable or immovable property and other property rights such as mortgages, liens or pledges;
- e) claims to money or to any performance under contract having a financial value;
- f) copyrights, know-how, goodwill and industrial property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognised under the law of the host State.

For greater certainty, investment does not include:

- i. debt securities issued by a government or loans to a government;
- ii. portfolio investments;
- iii. claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a State Party to an enterprise in the territory of another State Party, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the
- iv. kind of interests set out in subparagraphs (a) through (f) above;
- v. investments of a speculative nature;
- vi. investments in any sector sensitive to its development or which would have an adverse impact on its economy;
- vii. commercial activities.¹⁷³⁴

In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the substantial commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and significance for the Host State's development.¹⁷³⁵

7. **investor** means any national, company or enterprise of a State Party or a national, company or enterprise from any other country that has invested or has made investments in a State Party;

¹⁷³⁴ The definition adopted in this Model Investment Agreement is an enterprise-based approach, which requires the establishment or acquisition of an enterprise, as one classically associates with FDI.

¹⁷³⁵ This provision is particularly critical to promote investment that stimulates constructive economic and social benefits into the host economy.

8. **local investor** means:

- a) a natural person who is a citizen of the States Parties;
- b) a company incorporated under the laws of the States Parties;
- c) a company incorporated within the States Parties in which the majority of the issue share capital is owned by the citizens of the host State within the meaning of this definitions;
- d) a partnership in which the controlling interest in the partnership is owned by a person who is a citizen of the States Parties;
- e) a person or a company or partnership defined above that has made an investment in the State Parties.

9. **List of Scheduled Investment Sectors** means schedules of excluded sectors of States Parties or any other list submitted by States Parties where applicable as set out in Annex 2 of this Agreement;

10. **measures** include any legal, administrative, legislative, judicial or policy decision that is taken by the central, regional, or local governments or authorities¹⁷³⁶ or a person/state enterprise/body exercising governmental authority¹⁷³⁷ of the State Party relating to and affecting an investment in that State Party.¹⁷³⁸

11. **national** means a natural person who is a citizen of any State Party.

12. **OECD** means Organisation for Economic Cooperation and Development.

13. **portfolio investment** refers to any investment where the investor owns less than 10 per cent of shares in a company or through stock exchange, or otherwise does not give the portfolio investor the possibility to exercise effective management or influence on the management of the investment;

14. **public interest** means the issues covered in Annex 1 of this Agreement.

¹⁷³⁶ Governments or authorities means the organs of a state party, consistent with the principles of attribution under CIL.

¹⁷³⁷ Governmental authority is delegated to any person under the state party's law, including through a legislative grant or a government order, directive, or other act transferring or authorising the exercise of governmental authority.

¹⁷³⁸ This provision covers any measure – adopted by governments or authorities or natural/juridical person exercising governmental authority – that have a direct impact on or relation to investment.

15. **right to regulate** means the right of State Parties to regulate as set out in Article 9 of this Agreement.
16. **right to development** means the right of State Parties to development as set out in Article 11 of this Agreement.
17. **sustainable development** means the fulfilment and realisation of social, economic and environmental aspects of the State Parties.
18. **SMMEs** means small, medium and micro-sized enterprises;
19. **State Party** means a State that has ratified or acceded to this Agreement;
20. **third country** means a State which is not a State Party to this Agreement.
21. **UN means** the United Nations.
22. **UNCTAD** means United Nations Conference on Trade and Development.
23. **WTO** means the World Trade Organisation.



PART II
SCOPE AND OBJECTIVES

ARTICLE 2

Scope

1. This Agreement defines the rights and obligations of State Parties as well as investors, and principles prescribed therein.
2. This Agreement shall apply to and legally bind only the State Parties, as well as investors and their investments in the territory of the State Party that have been established and admitted in accordance with the relevant laws and procedures of the host state.
3. This Agreement shall not be applicable to claims arising out of any measures adopted or investments established in the host State prior to entry into force of the Agreement.
4. This Agreement shall not apply to investments owned or controlled by State-owned enterprises or sovereign wealth funds.

ARTICLE 3

Objectives

The objectives of this Agreement are:

- a. to promote, facilitate and protect investments that foster the sustainable development of State Parties, and in particular, the State Party where the investment is located;
- b. to provide investors, in the conduct of their business, with an overall balance of rights and obligations between investors and State Parties, in accordance with this Agreement;
- c. to encourage the gradual elimination of investment restrictions and conditions, which may impede investment flows and the operation of investment projects in the State Parties and promote a more transparent investment environment; and
- d. to strengthen and increase the competitiveness of State Parties' economic activities.

- e. to establish an investment legal framework that preserve the right to regulate of State Parties.¹⁷³⁹

ARTICLE 4

Status of Annexes to this Agreement

1. The Annexes and any arrangements attached to this Agreement shall form an integral part of this Agreement and shall enter into force on the same day this Agreement enters into force.
2. The Annexes and any arrangements attached to this Agreement, if the content and context so provide, shall have a legal force and effect on State Parties.¹⁷⁴⁰

PART III

PROMOTION AND ADMISSION OF INVESTMENTS

ARTICLE 5

Admission of Investments

1. Each State Party has a sovereign right to admit investments in its territory. In this regard, investments shall be admitted in accordance with its laws and regulations. State Parties shall apply such laws in good faith.¹⁷⁴¹
2. Each State Party shall, in its application of the right to regulate and in view of the need to pursue national policy objectives and public interest based on the principle of progressive liberalisation, identify sectors and business activities where exclusions and restrictions to investment is maintained. Such sectors are annexed to this Agreement as List of Scheduled Investment Sectors, provided it is consistent with the WTO General Agreement on Trade in Services, and shall form an integral part of the Agreement.¹⁷⁴²

¹⁷³⁹ The objectives herein reflect the intention to attract and protect development-oriented foreign investment, to safeguard the right to regulate, and to establish an investment legal framework balancing public and private interests.

¹⁷⁴⁰ This confirms that the Annexes (on public interest issues and List of Scheduled Investment Sectors) form part of the Agreement and, thus, legally binding on state parties. See part 4.3.1.

¹⁷⁴¹ This is a recognition of the sovereign right of states to control the economic activities over its territory. See parts 3.2 and 4.3.1.

¹⁷⁴² This provision allows a state to take measures to fully and partially open its investment markets as it deems fit and in accordance with its national policy objectives and public interest. It entails significant reservation of domestic control over one's economy. Reference to the WTO General Agreement on Trade in Services (GATS) serves to ensure that state parties designate their specific investment sectors in line with their services commitment under the GATS.

3. The process of admitting investment takes place with due respect for national policy and development objectives of State Parties and in line with the List of Scheduled Investment Sectors set out in Annex 2 of this Agreement.

ARTICLE 6

Transparency

1. Each State Party shall make available to the other State Parties relevant measures, which pertain to, or affect, the operation of this Agreement. This shall also apply to international agreements pertaining to or affecting investment to which a State Party is also a signatory.¹⁷⁴³
2. Each State Party shall publish relevant measures, which pertain to, or affect, the operation of this Agreement.
3. Each State Party shall, within 30 days of the enactment or the introduction of any new measure or any changes in existing measures, which affect investments or its commitments under this Agreement, inform the other State Parties and the general public.
4. Nothing in this Agreement shall require any State Party to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.¹⁷⁴⁴

ARTICLE 7

Support of Local Investors

1. State Parties, investors and investments shall support the development of local entrepreneurs and enhance productive capacity within the host State through, *inter alia*:
 - a. skills development and enhancement programmes;
 - b. SMME development; appropriate investments into supporting infrastructure; and

¹⁷⁴³ This provision acknowledges state parties' rights and obligations in other treaties and ensure that rights and obligations are revealed to investors and other state parties. This is necessary to reconcile and ascertain state parties' rights and obligations in different treaties. See part 7.3.9.

¹⁷⁴⁴ This provision preserves the right of host states not to disclose confidential information which might limit the enforcement of law or might be contrary to public interest.

- c. other supply-side measures and policies necessary to enhance global competitiveness.
2. In providing support described in paragraph 1 of this Article, State Parties may place emphasis on industries that provide up-stream and down-stream linkages and have a favourable effect on attracting foreign direct investment and generating increased employment.¹⁷⁴⁵

ARTICLE 8

Performance Requirements

1. State Parties and investors may support the development of domestic industries that provide, *inter alia*, up-stream and down-stream linkages and have a favourable impact on economic growth and development, productive capacity, industrial development, technology and know-how advancement and job creation in the host states.
2. To realise and advance the objectives of Paragraph 1, State Parties may introduce performance requirements, provided such requirements are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction to the WTO international trade and investment agreements, to promote domestic investments and local content including, *inter alia*:
 - a. measures to grant preferential treatment to any enterprise so qualifying under the domestic law of a State Party in order to achieve national development goals;
 - b. measures to support the development of local entrepreneurs;
 - c. measures to enhance productive capacity, increase employment, increase human resource capacity and training, research and development including of new technologies, technology transfer, innovation and other benefits of investment through the use of specified requirements on investors; and
 - d. measures to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive

¹⁷⁴⁵ This is crucial to ensure that investment benefits spill over to the local investors and foster sustainable development of the host states.

measures against such groups prior to the entry into force of this Agreement.¹⁷⁴⁶

PART IV

RIGHTS AND OBLIGATIONS OF STATE PARTIES

ARTICLE 9

Right to Regulate¹⁷⁴⁷

1. In accordance with customary international law norms such as state sovereignty over their territories and other general principles of international law espoused in the Charter of Economic Rights and Duties of States, the African Charter on Human and Peoples' Rights as well as the commonly recognised UN Resolutions including the Resolution 3201 (Declaration on the New International Economic Order) and the General Assembly Resolution 1803 on the Permanent Sovereignty over Natural Resources, each State has the right to regulate.¹⁷⁴⁸
2. The right to regulate, in accordance with the international legal instruments mentioned in paragraph 1 entails:
 - a. to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives;
 - b. to ensure that investment activity is undertaken in a manner that is sensitive to public health, safety, environmental standards, public morals, human rights, labour rights and resource management;
 - c. to redress historic socio-economic injustices of the past;

¹⁷⁴⁶ This preserves host states' freedom to adopt the black economic empowerment measures aimed at redressing the historical exclusion of local communities or citizens from participating in the mainstream economic activities. This provision is included in Art. 21 (3) of the SADC Model BIT.

¹⁷⁴⁷ See part 7.3.2. Entrenching a standalone provision clarifying and guaranteeing the right to regulate significantly enhances the protection of the right to regulate in the realm of a particular investment treaty. See, for example, Art. 12 of the Agreement Amending Annex 1 of the SADC Finance and Investment Protocol, and Art. 20 of the SADC Model BIT, 2012.

¹⁷⁴⁸ See part 3.2.1. Express reference to CIL norms and principles of international law enhances the safeguarding of the right to regulate in investment treaty practice. Such norms and principles are perceived to have attained CIL status and thus legally binding on all states. They further provide arbitral tribunals with interpretative tools for the right to regulate as it is set out in investment treaty and international law in general.

- d. to advance economic development and participation; and
 - e. to promote cultural practices and indigenous knowledge.¹⁷⁴⁹
3. The exercise by the State Party of the right to regulate shall be understood as embodied within a balance of the rights and obligations of investors and investments and States Parties, as set out in this Agreement.¹⁷⁵⁰
 4. Any measures taken by a State Party to exercise the right to regulate as set out in this Article, shall not constitute a breach of this Agreement.

ARTICLE 10

Right to pursue public interest

1. In accordance with customary international law, general principles of international law each State Party has the right to pursue public interest issues, as set out in Annex 1 of this Agreement, within its territory.¹⁷⁵¹
2. The right to pursue public interest issues shall be understood as embodied within a balance of the rights and obligations of investors and investments and State Parties, as set out in this Agreement.¹⁷⁵²
3. Any measures taken by a State Party to exercise the right to pursue public interest issue as set out in this Article and Annex 1 of this Agreement, shall not constitute a breach of this Agreement.

ARTICLE 11

Right to development

1. In accordance with customary international law, general principles of international law particularly the UN Declaration on the Right to Development and the African Charter on Human and Peoples' Rights, among others, State Parties has a right to development.¹⁷⁵³

¹⁷⁴⁹ This provision provides what the right to regulate entails. It is critical particularly in the determination of what constitutes the exercise of the right to regulate.

¹⁷⁵⁰ This is to ensure balance is struck between the exercise of the right to regulate and protection of investors and investments. In other words, it ensures that states do not undermine their obligation to protect investments in pursuit of exercising their right to regulate.

¹⁷⁵¹ See part 7.3.3. This confirms host states' right to pursue public policy objectives as an international law obligation and right and should be read with Annex 1 to this Agreement.

¹⁷⁵² This ensures that the right to public interests and protect the private interests of investors and investments should be balanced.

¹⁷⁵³ See parts 3.3.3 and 3.3.4. This confirms the host states' basic right to pursue development objectives within their territories amid the international investment regulation. Reference to commonly

2. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.¹⁷⁵⁴
3. The human right to development also implies the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.¹⁷⁵⁵
4. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.¹⁷⁵⁶
5. The realisation of the right to development requires full respect for the principles of international law concerning friendly relations and cooperation among States in accordance with the UN Charter.
6. The exercise of right to development shall be understood as embodied within a balance of the rights and obligations of investors and investments and State Parties, as set out in this Agreement.¹⁷⁵⁷
7. Any measures taken by a State Party pursuant to the right to development as set out in this Article, shall not constitute a breach of this Agreement.

ARTICLE 12

Right to Pursue Sustainable Development

1. In accordance with customary international law, general principles of international law State Parties have a right to pursue sustainable development of their territories.¹⁷⁵⁸
2. Pursuant to this Article, a State Party may:

recognised international legal instruments on the right to development denotes the right to development as fundamental and legally enforceable right.

¹⁷⁵⁴ See Art. 1 (1) of the Declaration on the Right to Development.

¹⁷⁵⁵ See Art. 1 (2) of the Declaration on the Right to Development. This affirms the sovereignty or right to regulate natural resources of state parties. See part 3.2.

¹⁷⁵⁶ See Art. 2 (3) of the Declaration on the Right to Development.

¹⁷⁵⁷ This ensures that a balance is struck between exercising the right to development and the obligation protect investors and investments.

¹⁷⁵⁸ See parts 3.3.4 and 4.2.1.

- a. grant preferential treatment in accordance with their domestic legislation to any enterprise so qualifying under the domestic law in order to achieve sustainable development objectives;
- b. support the development of local investors as set out in Article 7;
- c. seek to enhance productive capacity, increase employment, increase human resource capacity and training, research and development including of new technologies, technology transfer and other benefits of investment through the use of specified requirements on investors made at the time of the establishment or acquisition of the investment and applied during its operation; and
- d. take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the entry into force of this Agreement.¹⁷⁵⁹

ARTICLE 13

National Treatment

1. Subject to Annex 2 and Article 14, each State Party shall accord to Investors and their investments treatment no less favourable than the treatment it accords, in like circumstances, to its own investors and their investments with respect to the management, operation and disposition of Investments in its territory.
2. References to 'like circumstances' in paragraph 1 requires an overall examination on a case-by-case basis of all the circumstances of an Investment including, *inter alia*:
 - a. its effects on third persons and the local community;
 - b. its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
 - c. the sector the investor is in;
 - d. the aim of the measure concerned;

¹⁷⁵⁹ This allows states to adopt measures to promote the economic empowerment or development of local citizens that were previously disadvantaged.

- e. the regulatory process generally applied in relation to the measure concerned; and
- f. other factors directly relating to the Investment or Investor in relation to the measure concerned.

ARTICLE 14

Exceptions to National Treatment

1. States Parties may adopt measures that derogate from the national treatment principle provided such measures are in good faith and not arbitrary.
2. Any regulatory measure taken by a State Party that is designed and applied to protect or enhance legitimate public welfare objectives, such as national interests, public health, safety and the environment does not constitute a breach of the national treatment principle.¹⁷⁶⁰
3. States Parties may, in accordance with their respective domestic legislation, grant preferential treatment to qualifying investments and investors in order to achieve national development objectives.¹⁷⁶¹
4. A State Party reserves the right to deny an investor the benefits of this Agreement,¹⁷⁶² and to grant special and differential treatment to any investor and investment in such cases, though not limited to instances where:
 - a. the investor does not have substantial business activities in the Member State; or
 - b. the investor is engaged in activities inimical to the economic interest of Member States.
5. A State Party may deny national treatment if advantages available within the State Party's economy are made for the exclusive benefit of its own nationals within the framework of its national development programs or its list of scheduled investment sectors where applicable.
6. The national treatment principle does not apply:

¹⁷⁶⁰ This enhances the public interest regulation without violation of the national treatment principle.

¹⁷⁶¹ This allows host states to regulate investors and investments in line with their domestic development objectives.

¹⁷⁶² This is a recognition of the right to regulate.

- a. to subsidies or grants provided to a government or a State enterprise, including government-supported loans guarantees and insurance; or
 - b. to taxation measures aimed at ensuring the effective collection of taxes, except where this results in arbitrary discrimination; or
 - c. List of sectors excluded from national treatment principle set out in Annex 2.
7. In accordance with national laws and regulations, State Parties may accord more favourable treatment to address the internal needs of designated disadvantaged persons, groups or regions.¹⁷⁶³
 8. The implementation of these exceptions shall not entitle any investor to compensation for any competitive disadvantages they may suffer.

Article 15

Most-Favoured Nation Treatment

1. Subject to Article 16, Each State Party shall accord to investors of another State Party treatment no less favourable than it accords, in like circumstances, to investors of any other Member State or of a third country with respect to the management, conduct, operation, expansion, sale or other disposition of investment.
2. Subject to Article 16, each State Party shall accord to investments made by investors of another State Party treatment no less favourable than it accords, in like circumstances, to investments made by investors of any other State Party or of a third country with respect to the management, conduct, operation, expansion, sale or other disposition of investments.
3. The concept of 'in like circumstances' requires an overall examination, on a case by-case basis, of all the circumstances of an investment, including, among others:
 - a. its effects on third persons and the local community;
 - b. its effects on the local, regional or national environment, the health of the populations, or on the global commons;
 - c. the sector in which the investor is active;

¹⁷⁶³ This allows states to adopt measures aimed at supporting the needs of disadvantaged persons without contravening the national treatment principle.

- d. the aim of the measure in question;
- e. the regulatory process generally applied in relation to a measure in question;
- f. company size; and
- g. other factors directly relating to the investment or investor in relation to the measure in question.

The examination referred to in this Paragraph shall not be limited to or be biased towards any one factor.

4. The term 'treatment', referred to in Paragraphs 1 and 2, does not include dispute settlement procedures provided for in other treaties.

ARTICLE 16

Exceptions to Most-Favoured-Nation Treatment

1. State Parties may adopt measures that derogate from the most-favoured-nation principle.
2. Any regulatory measure taken by a State Party that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute a breach of the most-favoured-nation principle.¹⁷⁶⁴
3. The measures taken by reason of national security, public interest, public health or public morals are not considered as a 'less favourable treatment'.
4. The Most-Favoured-Nation principle shall not apply to sectors excluded in a State Party's List of Scheduled Investment Sectors set out in Annex 2.
5. The most-favoured-nation principle does not oblige a State Party to extend to the investors of another State Party or of a third country the benefit of any treatment, preference or privilege contained in:
 - a. the existing or future free trade area, customs union, common market agreement or any international arrangement to which the investor's home State is not a Party, or
 - b. any international agreement or domestic legislation relating wholly or mainly to taxation.

¹⁷⁶⁴ This preserves public interest regulation without violating the most-favoured-nation principle.

Article 17

Expropriation and Compensation

1. Investments in State Parties shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation except if the following conditions are met:
 - a. a public purpose related to the internal needs of that State Party;
 - b. on a non-discriminatory basis;
 - c. against fair and adequate compensation; and
 - d. under due process of law.
2. The investor affected shall have the right, under the laws of the State Party expropriating, to prompt review, by a judicial or other independent authority of that State Party, of its case and of the valuation of its investment in accordance with the procedure established by the laws of the State Party.
3. A non-discriminatory measure of a State Party that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute an indirect expropriation under this Agreement.
4. A non-discriminatory measure of general application shall not be considered an expropriation of a debt security or loan covered by this Agreement solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.
5. This Article shall not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the creation, limitation or revocation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property including, but not limited to, WTO Agreement on Trade-Related Aspects of Intellectual Property Rights and other international intellectual property agreements administered by the World Intellectual Property Organisation.

Article 18

Determination of the Value of Compensation

1. Fair and adequate compensation shall be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place (date of expropriation) and shall not reflect any change in value occurring because the intended expropriation had become known earlier.
2. However, where appropriate, the assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard for all relevant circumstances and taking account of:
 - a. the current and past use of the property;
 - b. the history of its acquisition;
 - c. the fair market value of the investment;
 - d. the purpose of the expropriation;
 - e. the extent of previous profit made by the foreign investor through the investment; and
 - f. the duration of the investment.
3. Any payment shall be made in a freely convertible currency. Payment shall include simple interest at the current commercial rate of the host State from the date of expropriation until the date of actual payment. On payment, compensation shall be freely transferable.
4. Awards that are significantly burdensome on a Host State may be paid yearly over a three-year period or such other period as agreed by the parties to the arbitration, subject to interest at the rate established by agreement of the parties to the arbitration or by a tribunal failing such agreement.

Article 19

Transfer of Funds

State Parties shall, in accordance with the rules and regulations stipulated by the host state, permit all transfers relating to an investment to be made freely and without delay. Such transfers may include:

- a. profits, capital gains, dividends, royalties, interests and other current income accruing from an investment;
- b. the proceeds of the total or partial liquidation of an investment;
- c. repayments made pursuant to a loan agreement in connection with an investment;
- d. license fees in relation to investment;
- e. payments in respect of technical assistance, technical service and management fees;
- f. payments in connection with contracting projects;
- g. earnings of nationals of a State Party who work in connection with an investment in the territory of the other State Party; and
- h. compensation, restitution, indemnification or other settlement pursuant to the investments.



ARTICLE 20

Exceptions to the Transfer of Funds¹⁷⁶⁵

1. A State Party shall apply restrictions on international transfers of funds and payments for current transactions relating to investments made in its territory in accordance with its taxation as well as financial laws and regulations.
2. Exceptions to the transfer of funds are permitted under the following conditions:
 - a. capital can only be transferred after a period of five years after full operation of the investment in a State Party unless its national legislation provides for more favourable treatment; or
 - b. proceeds of the investment can be transferred one year after the investment entered the territory of a State Party unless its national legislation provides for more favourable treatment.
3. A State Party may prevent a transfer in a non-discriminatory manner and in accordance with its laws relating to:
 - a. bankruptcy, insolvency or other legal proceedings to protect the rights of creditors;
 - b. criminal or administrative violations; or

¹⁷⁶⁵ This Article provides host states with the flexibility to adopt measures to counter adverse effects caused by the economic activities of investors such as transferring capital, profits and funds across borders. See part 7.3.5.

- c. ensuring the satisfaction of judgments in adjudicatory proceedings.
4. A State Party may adopt or maintain measures not conforming with its obligations relating to cross-border capital transactions:
 - a. in the event of difficult or serious balance-of-payments and external financial difficulties or threat thereof; or
 - b. in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.
5. Measures under paragraph 4 shall be made public, be temporary and be phased out progressively as there are changes in the initial circumstances surrounding the use of the measures.

Article 21

General Exceptions

1. This Agreement does not prevent any State Party from adopting or enforcing measures relating to the protection of human, animal or plant life or health, or to the maintenance of international peace and security, or to the protection of its national security interests provided these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investors in like circumstances or a disguised restriction on investment flows.¹⁷⁶⁶
2. State Parties undertake not to attract investment by relaxing the measures designed to protect human, animal or plant life, domestic health, safety and environmental in pursuit of investments.¹⁷⁶⁷
3. Any interested State Party may request information on the reasons for the measures taken under Paragraph 1. The State Party taking such measures shall respond to the request for information within three months.
4. State Parties agree not to waive or derogate from, international treaties they have ratified, or offer to waive or otherwise derogate from, such measures as

¹⁷⁶⁶ See parts 4.3.2 and 4.3.3. This safeguards the autonomy of host states to adopt and enforce measures relating to the protection of human, animal or plant life or health, or to the maintenance of international peace and security, or to the protection of its national security interests without being exposed to investment treaty breach or arbitration. For example, see Art. 22 (3) (a) of the COMESA Common Investment Agreement.

¹⁷⁶⁷ This prohibits the race-to-the-bottom to attract foreign investors and investments.

an encouragement for the establishment, acquisition, expansion or retention in their territories, of an investment.

PART V

OBLIGATIONS OF INVESTORS AND INVESTMENTS¹⁷⁶⁸

ARTICLE 22

Compliance with domestic laws

Investors and their investments shall comply with all applicable domestic laws and measures of the host State governing the areas set out below.

ARTICLE 23

Corporate Governance

1. Investors and investments shall meet national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices.
2. In this regard, States Parties, public bodies and companies are encouraged to improve the legal, institutional and regulatory framework for corporate governance and any other issues such as environmental or ethical concerns.
3. Investors and their investments shall in accordance with domestic laws and regulations of the host State:
 - a. ensure the equitable treatment of all shareholders, in accordance with national laws;
 - b. encourage active cooperation between corporations and stakeholders in creating wealth, jobs and the sustainability of financially sound enterprises;
 - c. ensure that timely and accurate disclosure is made on all material matters regarding a corporation, including the financial situation, performance, ownership, and governance of the company, risks related

¹⁷⁶⁸ See part 7.3.10. The inclusion of the obligations of investors and investments in an investment treaty enables host states to hold companies to account for human rights violations under international investment law and enables host states to leverage the benefits of foreign investors and investments into the host economy. It also ensures that foreign investors and investments contribute towards the sustainable development objectives of the host state.

- to environmental liabilities, and any other matters in accordance with the relevant regulations and requirements; and
- d. provide information relating to human resource policies, such as programs for human resource development.

ARTICLE 24

Socio-political Obligations

1. Investors and their investments must adhere to socio-political obligations including, but not exclusively, the following:
 - a. respect for national sovereignty and observance of domestic laws, regulations and administrative practices;
 - b. respect for socio-cultural values;
 - c. non-interference in internal political affairs;
 - d. non-interference in intergovernmental relations; and
 - e. respect for labour rights.
2. Investors shall not influence the appointment of persons to public office or finance political parties.
3. Investors shall refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.

ARTICLE 25

Bribery and Corruption

1. Investors and their investments shall not offer, promise or give any unlawful or undue pecuniary or other advantage or present, whether directly or through intermediaries, to a public official of a State Party, or to a member of an official's family or business associate or other person in order that the official or other person act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any other rights in relation to an investment.
2. Investors and their investments shall also not incite, aid or abet a conspiracy to commit or authorise acts of bribery and corruption.
3. State Parties shall adopt such legislative and other measures as may be necessary to establish jurisdiction and enforce laws and procedures against

any criminal offence committed in whole or in part in their territory by a national, or an investor and investment or its agent, or by any other person acting in relation to an investment in a State Party.

4. A breach of this Article by an investor or its investment is deemed to constitute a breach of this Agreement and the domestic law of the host State concerning the establishment and operation of an investment.

ARTICLE 26

Corporate Social Responsibility

1. In pursuit of their economic objectives, investors and investments shall proceed in ways that do not conflict with the social and economic development of host countries. Investors shall be sensitive to changes in the social and economic goals of the host countries.
2. Investors and their investments shall contribute to the economic, social and environmental progress with a view to achieving sustainable development of the host State.
3. Investors and their investments should act in accordance with fair business, marketing and advertising practices when dealing with consumers and should ensure the safety and quality of goods and services they provide.
4. Investors and their investment operating within the territory or subject to the jurisdiction of the State Party shall incorporate into its their policies those internally recognised international standards and principles of corporate social responsibility that have been endorsed or are supported by that Party, which may include, among others, the UN Code of Conduct on Transnational Corporations and OECD Guidelines for Multinational Enterprises, UN Guiding Principles on Business and Human Rights, UN Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises. These standards, guidelines, and principles may address areas such as labour, environment, gender equality, human rights, indigenous and aboriginal peoples' rights, and corruption.¹⁷⁶⁹

¹⁷⁶⁹ See part 7.3.10. This may cement and clarify the kind of corporate social responsibility aspects as enshrined in international best practices in international investment law.

ARTICLE 27

Obligations as to the use of Natural Resources

1. Investors and their investments shall not exploit or use local natural resources to the detriment of the rights and interests of the host State.
2. Investors and their investments shall respect rights of local populations and avoid land grabbing practices *vis-à-vis* local communities.
3. Investors and their investments shall promote the use of their natural resources in a sustainable and an environmentally friendly manner and in accordance with the domestic laws and regulations of the host State.

ARTICLE 28

Business Ethics and Human rights

1. Investors and their investments shall observe the United Nations Guiding Principles on Business and Human Rights with modifications necessary for local circumstances.
2. The following principles should govern compliance by investors and investments with business ethics and human rights:
 - a. support and respect for the protection of internationally recognised human rights enshrined in universally accepted human rights treaties including, but not limited to, UN Charter, Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights;¹⁷⁷⁰
 - b. ensure that they are not complicit in human rights abuses;
 - c. eliminate all forms of forced and compulsory labour, including the effective abolition of child labour;
 - d. eliminate discrimination in respect of employment and occupation; and
 - e. ensure equitable sharing of wealth derived from investments.
3. Where it is necessary to prioritise actions to address actual and potential adverse human rights impacts, investors and investments should first seek to

¹⁷⁷⁰ See part 7.3.10.

prevent and mitigate those that are most severe or where delayed response would make them irremediable.

ARTICLE 29

Transfer of Technology

1. Investors and their investments shall adopt in the course of their business activities, practices that permit the transfer and rapid diffusion of technologies and know-how, with due regard to the protection of intellectual property rights, on reasonable terms and conditions and in a manner that contributes to the research and development goals of the host State.
2. State Parties undertake to cooperate and facilitate the international transfer of technology by various measures such as:
 - a. getting access to available information regarding description, location and, as far as possible, approximate cost of technology;
 - b. establishing or strengthening of technology transfer centres;
 - c. providing training for research, engineering, design and other personnel engaged in the development of national technologies or in the adaptation and use of technologies transferred;
 - d. providing assistance in the development and administration of laws and regulations with a view to facilitating the transfer of technology;
 - e. granting credits on preferential terms for financing the acquisition of capital and intermediate goods in the context of approved development projects involving transfer of technology transaction; and
 - f. assisting in the development of technological capabilities of the companies and their personnel.

ARTICLE 30

Environmental Protection and Improvement

1. Investors and their investments shall ensure that they comply with the laws and regulations of the host State that provide for environmental protection.
2. Investors and their investments shall, in performing their activities, protect the environment and where such activities cause damages to the environment, take reasonable steps to restore it as far as possible.

3. Investors and their investments shall, in keeping with good practice requirements relating to the size and nature of the investment, and as required under the domestic laws, maintain an environmental management system consistent with recognised international environmental management standards and good business practice standards.
4. Investors and their investments shall provide adequate financial resources, including for the transfer of technology needed for implementing measures to assist the State Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to, or mitigation of those adverse effects.

ARTICLE 31

Labour Issues

1. Investors and their investments shall comply with the labour laws and regulation of the host State.
2. In this regard, investors shall:
 - a. consult with the host State authorities and national employers' and workers' organisations in order to keep manpower plans in harmony with national social development policies, making optimal use of labour available locally and within the sub region to provide substantial employment or reduce unemployment;
 - b. ensure the employment and promotion of the host State nationals;
 - c. use technologies that specifically generate employment; and
 - d. promote employment in the State Parties by entering into supply contracts with local enterprises and by prioritising, to the full extent possible, the use and processing of local raw materials.
3. Investors shall comply with international conventions and existing labour policies and, in particular, not use child labour and shall support efforts for the elimination of all sort of child labour, including forced or compulsory labour within State Parties.

ARTICLE 32

Consumer Protection

1. Investors and their investments shall take measures to protect the health, safety and economic interests of consumers and their right to information, education and to organise themselves in order to safeguard their interests.
2. Investors and their investments should act in accordance with fair business, marketing and advertising practices when dealing with consumers and should ensure the safety and quality of the goods and services they provide.

ARTICLE 33

Implications of Breach of Investors' Obligations

Without prejudice to other rights and remedies of a host State or its population, a host State may initiate a proceeding against an investor or its investment in the courts of the host state for breaches of its obligations under this Agreement. By specific written agreement, the disputing parties may submit the dispute to an arbitral tribunal in accordance with PART VI.¹⁷⁷¹

PART VI

DISPUTE SETTLEMENT

ARTICLE 34

Scope of investment arbitration

Measures adopted with a legitimate purpose to pursue public interest as set out in Annex 1 and in pursuit of the right to regulate, right to development and sustainable development as set out in this Agreement shall not be subject to dispute settlement under this Agreement.¹⁷⁷²

¹⁷⁷¹ See 7.3.10. This enables the host state to enforce the obligations of investors and investments through international investment treaty proceedings.

¹⁷⁷² See part 7.3.7. This safeguards the regulatory freedom to pursue public interest and sustainable development objectives without fear of violating investment treaty obligation or international investment arbitration.

ARTICLE 34

Negotiation and Mediation

1. In the event that a dispute arises from the interpretation or application of this Agreement between State Parties, or between a State Party and an investor, the party wishing to raise the dispute shall issue a notice of intention to initiate a claim under the dispute resolution process provided for under Part VI of this Agreement to the other potential disputing party ('notice of intention').
2. For the purposes of this Agreement, there shall be the minimum of a six-month cooling-off period between the date of a notice of intention under this Agreement ('the cooling-off period'), and the date a party may formally initiate a dispute under this Part.
3. The parties shall seek to resolve potential disputes through amicable means, both prior to and during the cooling-off period.
4. Where amicable means fail, the disputing parties shall seek the assistance of a mediator to resolve disputes during the cooling-off period required under this Agreement between the notice of intention and the initiation of dispute settlement proceedings under this Part. The potential disputants shall use a mediator from the list established by the State Parties for this purpose, or another one of their joint choosing. Recourse to mediation does not alter the minimum cooling-off period.
5. If no mediator is chosen by the disputing parties prior to three months before the expiration of the cooling-off period, the State Parties shall appoint a mediator from the list who is not a national of the State Parties party to the dispute. The appointment shall be binding on the disputing parties.
6. If the parties accept a mediation ruling, the ruling shall immediately be implemented thereafter.

ARTICLE 35

Settlement of Disputes between Member States

1. Any dispute between State Parties as to the interpretation or application of this Agreement not satisfactorily settled through amicable means in the cooling-off period may be referred for decision to the Regional Courts applicable to the State Parties sitting as a court of arbitration.

2. Where disputing State Parties are unable to resolve any dispute regarding the interpretation and application of this Agreement through any of the methods under paragraph 1 of this Article within six months, any of the disputing Member State may refer the matter to the African Court of Justice and Human Rights whose decision shall be final and binding.¹⁷⁷³

ARTICLE 36

Investor-State Disputes

1. In the event that a dispute between an investor and a State Party has not been resolved, pursuant to Article 34, an investor may, subject to the exhaustion of local remedies in the host state,¹⁷⁷⁴ submit a claim to arbitration to a regional court applicable to the State Parties;¹⁷⁷⁵ an African international arbitration institution;¹⁷⁷⁶ or under any other arbitration institution or under any other arbitration rules, as both parties to the dispute agree.
2. An investor or its investment may submit a claim to arbitration pursuant to this Agreement, provided that the investor or investment, as appropriate:
 - a. has first submitted a claim before the domestic courts of the host State for the purpose of pursuing local remedies, after the exhaustion of any administrative remedies, relating to the measure underlying the claim under this Agreement, and a resolution has not been reached within a reasonable period of time from its submission to a local court of the host state; or
 - b. demonstrates on a motion to permit arbitration that there are no reasonably available legal remedies capable of providing effective

¹⁷⁷³ Establishing the African Court of Justice and Human Rights as the final court of proceedings ensures consistency in investment dispute settlement jurisprudence. This approach has been adopted in the PAIC (Art. 41 (2)).

¹⁷⁷⁴ Requiring the exhaustion of local remedies is crucial for avoiding forum shopping. See part 7.3.8.

¹⁷⁷⁵ See part 7.3.8. The use of African regional judicial organs enables African countries to retain their regulatory control in investment arbitration. It also helps countries with weak domestic technical expertise in dispute resolution. This approach has been embraced in the COMESA Common Investment Agreement (Arts. 36 (1) and 35 (1)) and ECOWAS Supplementary Act (Art. 33 (7)). However, the application of this provision should take into account the fact some regional judicial organs, for example, the purported SADC Tribunal, only have jurisdiction over inter-state disputes. Thus, investors do not, in their own right, have *locus standi*.

¹⁷⁷⁶ See part 7.3.8. The use of African arbitration institutions is likely to be appealing to investors who perceive domestic courts as biased towards host governments. That is, it takes away investment dispute resolution from the jaws and influence of the host governments. The use of African arbitral institutions has been adopted in the PAIC (Art. 42 (1) (d)) and COMESA Common Investment Agreement (Art. 36 (2) (a)).

remedies for the dispute concerning the underlying measure, or the legal remedies provide no reasonable possibility of such remedies in a reasonable period of time.

3. No claim shall be submitted to arbitration if more than three (3) years have elapsed from the date on which the investor or its investment first acquired, or should have first acquired, knowledge of the breach and knowledge that the investor or its investment has incurred loss or damage.
4. If the investor elects to submit a claim at one of the fora set out in paragraph 2 of this Article, that election shall be definitive, and the investor may not thereafter submit a claim relating to the same subject matter or underlying measure to other fora.¹⁷⁷⁷
5. Each State Party consents to the submission of a claim to arbitration under this Agreement in accordance with its provisions. Each investor or its investment, by virtue of establishing or continuing to operate or own an investment subject to this Agreement, consents to the terms of the submission of a claim to dispute resolution under this Agreement.
6. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a governmental entity of either State Party.¹⁷⁷⁸
7. All documents relating to a notice of arbitration, the settlement or resolution of any dispute pursuant to this Article, and the pleadings, evidence and decisions in them, shall be available to the public, subject to the redaction of confidential information.
8. An arbitral tribunal may take such steps as are necessary, by exception, to protect confidential business information in written form or at oral hearings.
9. If one of the disputing parties is not satisfied with the arbitral award, such party may appeal to the African Court of Justice and Human Rights.¹⁷⁷⁹

¹⁷⁷⁷ See part 7.3.8. This prevents forum shopping or parallel proceedings. This has been adopted in the Transatlantic Trade and Investment Partnership (Art. 14(2) Sub-section 3, Ch II, Part 3) and the India Model BIT (Art. 14.4(i)(B)(f)).

¹⁷⁷⁸ See part 7.3.8. Acceptance of *amicus curiae* submissions allows other stakeholders with legitimate public interest in investment activities and disputes. That is, it allows the broader participation of the public in investment arbitration.

¹⁷⁷⁹ See part 7.3.8. Establishing the continental judicial organ as the appellate court of the regional and ad hoc tribunals is critical for ensuring consistency in international arbitral awards.

Article 37

Applicable Law in Disputes

1. Any claim or dispute arising from this Agreement shall be decided in accordance with the provisions of this Agreement as well as any other applicable rules and principles of national, regional or international laws.
2. Where recourse is made to arbitration under Paragraph 2 of Article 36, the arbitration may be conducted at any established African public or African private alternative dispute resolution centre. Arbitration shall be governed by the United Nations Commission on International Trade Law rules.

Article 38

Counterclaims by State Parties

1. Where an investor or its investment is alleged by a State Party in a dispute settlement proceeding under this Agreement to have failed to comply with its obligations under this Agreement or other relevant rules and principles of domestic and international law, the competent body hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.
2. A State Party may initiate a counterclaim against the investor before any competent body dealing with a dispute under this Agreement for damages or other relief resulting from an alleged breach of the Agreement.¹⁷⁸⁰

Article 39

Awards

1. When a tribunal makes a final award, the tribunal may award, separately or in combination, only:
 - a. monetary damages and any applicable interest; and

¹⁷⁸⁰ See part 7.3.8. The counterclaim provision accords state parties the freedom to dismiss investor claims challenging measures that were adopted in good faith for public welfare regulation. It gives host States adequate regulatory space to avoid investors from escaping liability of violating public interests in host states through international investment arbitration. The PAIC and COMESA Investment Agreement adopted this provision. See parts 5.3 and 5.4.

- b. restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.
2. For greater certainty, if an investor submits a claim to arbitration under Article 36, it may recover only for loss or damage that is established on the basis of satisfactory evidence and that is not inherently speculative.
3. A tribunal may also award costs and attorney's fees incurred by the disputing parties in connection with the arbitral proceedings and shall determine how and by whom those costs and attorney's fees shall be paid, in accordance with this Annex and the applicable arbitration rules.
4. Subject to paragraph 1, if an award is made in favour of the enterprise:
 - a. an award of restitution of property shall provide that restitution be made to the enterprise;
 - b. an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and
 - c. the award shall provide that it is made without prejudice to any right that any person may have under applicable domestic law with respect to the relief provided in the award.
5. An award made by a tribunal has no binding force except between the disputing parties and in respect of the particular case.

ARTICLE 40

Enforceability of Final Awards

Enforceability of final awards and other decisions shall be governed by the rules of civil procedure in force in the State Party in which execution is to take place.

Article 41

Relationship with Other International Agreements

1. 2. This Agreement does affect any rights and obligations of State Parties deriving from any existing any investment agreement legally binding and applicable between State Parties

2. This Agreement does affect any rights and obligations of State Parties deriving from any existing non-investment international agreements legally binding and applicable between State Parties.¹⁷⁸¹

PART VII

FINAL PROVISIONS

Article 42

Entry into Force

1. This Agreement shall enter into force thirty (30) days after the deposit of the instrument of ratification.
2. For any acceding State Party, the Agreement shall come into force in respect of that State Party on the date of the deposit of its instrument of accession.
3. Any notification or information provided pursuant to this Article is without prejudice to whether the measure is consistent with this Agreement.
4. The Depositary shall inform all State Parties of the entry into force of this Agreement.

Article 43

Withdrawal

1. After five (5) years from the date of entry into force in respect of a State Party, a State Party may withdraw from this Agreement by giving written notification to the other State Parties.
2. Withdrawal shall be effective one (1) year after receipt of notification by the other State Parties, or on such later date as may be specified in the notification.
3. Withdrawal shall not affect any pending rights and obligations of the withdrawing State Party prior to the withdrawal.

¹⁷⁸¹ See part 7.3.9 and 3.3. This confirms the reconciliation of investment obligations set out under this Agreement and international law or treaty obligations set out in other international agreements that are legally binding and applicable to State parties. This provision ensures that tribunals and States strike a balance between investment and non-investment (public interest) issues. In other words, it ensures that the provisions of the Agreement be interpreted and applied in line and light of other existing international agreements.

Article 44

Depositary

1. The Depositary of this Agreement shall be deposited with the official/authority (designated by State Parties).
2. The Depositary shall:
 - a. transmit a certified true copy of the Agreement to the Government of each State Party.
 - b. receive instruments of ratification or accession of the State Parties.
 - c. notify State Parties of the deposit of the instruments of ratification or accession.
 - d. shall inform all Member States of the entry into force of this Agreement

Article 45

Review

1. This Agreement shall be subject to review every five (5) years after its entry into force, by State Parties, to ensure effectiveness and adapt to evolving developments pertaining to investment governance.
2. Following the process of review, State Parties may make recommendations for amendments, in accordance with Article 46, taking into account the experience acquired and progress achieved during the implementation of this Agreement.¹⁷⁸²

Article 46

Amendments

1. Any State Party may submit proposal(s) for amendment to this Agreement to the other State Parties.
2. The State Parties shall within thirty (30) days of receipt of the proposal, circulate the proposal to other State Parties.

¹⁷⁸² This gives the host state the flexibility to review, amend and adjust the Agreement in line with evolving standards in investment governance.

3. A State Party that wishes to comment on the proposal may do so within sixty (60) days from the date of circulation and submit the comments to the other State Parties.
4. Amendments to the Agreement shall be adopted by consensus.
5. The amendments to this Agreement shall enter into force in accordance with Article 42 of this Agreement.



Annex 1 on Public Interest Issues

This Annex constitutes the definition and scope of all references to public interest for all purposes under this Agreement. Any reference to any such term elsewhere in this Agreement shall be applied and interpreted in accordance with this Annex.

1. Public interest shall include the promotion, respect, protection and fulfilment of specified public policy objectives such as, *inter alia*, sustainable development, public health and safety, environmental protection and labour rights protection.¹⁷⁸³
2. State Parties have a legitimate right to protect public welfare, including public health, environment and labour.¹⁷⁸⁴
3. State Parties have a legitimate right to support sustainable development in their territories.¹⁷⁸⁵
4. The exercise of state rights mentioned in paragraphs 2 and 3, shall not constitute a violation of this Agreement.



¹⁷⁸³ See part 7.3.6. This Annex is important to clarify and guide host states, investors and arbitral tribunals in the interpretation and application of the public interest regulation and terms in this Agreement. This Annex is crucial to ensure that public interest aspects are not undermined by investment obligations in the Agreement. In other words, it enhances the recognition of public interest in the international investment governance. See part 3.3.

¹⁷⁸⁴ This affirms the states' right to regulate in public interest.

¹⁷⁸⁵ This confirms states' right to support sustainable development. Thus, it guarantees the host states' right to regulate investors and their investments in accordance with their domestic sustainable development objectives.

Annex 2 (List of Scheduled Investment Sectors)¹⁷⁸⁶

1. This Annex contains a list of:
 - a. sectors for the liberalisation commitment;
 - b. sectors that are excluded from the commitment; and
 - c. sectors that are excluded from the National Treatment principle under this Agreement.

designated by State Parties taking into account their national policy space and development objectives.

2. This Annex shall form an integral part of this Agreement and State Parties agree to respect it.
3. The Annex shall be interpreted in accordance with the domestic laws and regulations of the State Parties.
4. This Annex shall be consistent with the State Parties commitments under the WTO General Agreement on Trade in Services.

- **List of sectors for the liberalisation commitment**

(This part includes a list of sectors that individual State Party has designated fully or partially open to foreign investment. In designating this list State Parties are urged to enlist sectors that are strategic and in line with their development objectives)

- **List of sectors that are excluded from the commitment**

(This part includes a list of sectors that each State Party has designated are excluded from investment liberalisation. That is, the sectors in which foreign investment are not allowed. In most instances, this could be sectors which are exclusively reserved for local investors or governmental control in pursuit of right to regulate such sectors)

¹⁷⁸⁶ This Annex provides state parties with the appropriate flexibility to prescribe their investment sectors open for liberalisation, in line with their policy space and development situation. A properly constructed provision for investment liberalisation would also include a list of existing or future potential measures that are excluded from the scope of the treaty, at the national level, plus a clear statement on how any existing non-conforming measures at subnational levels are to be treated. This exclusion list should also note that any amendments to these measures would remain excluded as long as they are not more inconsistent than allowed by the original exclusion.

- **List of sectors that are excluded from the National Treatment principle**

(This part includes a list of sectors that are not subject to the national treatment principle under this Agreement)

- **List of sectors that are excluded from the most-favoured-nation principle**

(This part includes a list of sectors that are not subject to the most-favoured-nation principle under this Agreement)



UNIVERSITY *of the*
WESTERN CAPE

IN WITNESS WHEREOF, WE the Heads of State and Government or duly authorised representatives of the State Parties have signed and sealed this Agreement in four original texts in Arabic, English, French, Swahili and Portuguese languages, all texts being equally authentic.

SIGNED at Cape Town, on this ... day ofin the year 2019.

.....

Government of

Government of



UNIVERSITY *of the*
WESTERN CAPE

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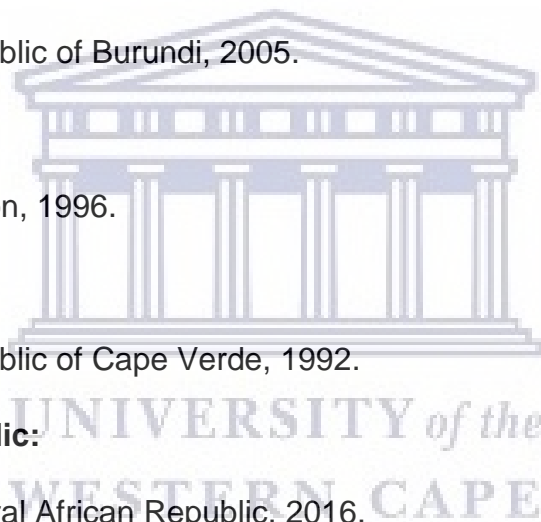
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