Prospects and Pitfalls of BITs, and the Quest for a Multilateral Framework in Africa

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Abstract

Bilateral Investment Treaties (BITs) are the main regulatory frameworks for Foreign Direct Investment (FDI) in Africa. Their effectiveness has been questioned because they seem to overcompensate and empower foreign investors to effectively override legitimate state expectations and concerns. This paper demonstrates that the normative underpinnings of most BITs appear unsuitable for the promotion of modern sustainable investment and development in Africa. The paper argues that the divergent states' interests and other complexities surrounding the security of investment are better resolved via a regional multilateral platform where states can negotiate around these concerns. The African Continental Free Trade Area Agreement (AfCFTA) has offered African states the opportunity to produce such a modern regional multilateral (plurilateral) investment framework that strikes an appropriate balance between the protection of states' interests, investment security, and sustainability considerations. Besides, the establishment of one of the biggest regional markets with a consolidated and less fragmented investment framework could provide the 'quantum leap' for reordering the existing power asymmetry in the international investment regime in Africa.

I. Introduction

The underlying structure of international investment law (IIL) points to an unstable and fragmented framework. They are fragmented because of how the legal norms are interpreted and applied by different actors in practice.[1] An analysis of the ordering paradigm of the IIL questions the legitimacy of the investment regime if there is any regime in the first place, and the disparate patchworks of treatymaking and dispute settlement mechanisms without linkages to a holistic structure.[2] The paradigm presents itself in the form of bilateralism and multilateralism. While bilateralism focuses on quid pro quo relations between pairs of states, multilateralism refers to the structure of international legal relations that are universal amongst several actors.[3] A cursory look at the

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1 Stephen Schill, *Ordering Paradigms in International Investment Law-Bilateralism-Multilaterislism-Multilateralization, in* The Foundations Of International Investment Law: Bringing Theory Into Practice 109 (Zachary Douglas, Joost Pauwelyn & Jorge E. Vinuales eds., 2014).

2 *Id.*

3 *Id.* at 110.

investment regime presents a "lateralism paradox".[4] The regime is populated by bilateral investment treaties (BITs).[5] While states appear to agree on certain provisions at the bilateral level they often disagree on almost identical provisions at the multilateral level.[6]

The IIL regimes are evident in the network of treaties and non-treaty sources that give rise to the regimes.[7] Although the dominant investment protection rules can be found in bilateral and multilateral treaties, customary international law remains important in contemporary investment law, thereby assuming a source of IIL.[8] Its relevance can be identified in the Amoco Case following the dispute between Iran and the US wherein the court stated that "the rule of customary law may be useful in order to fill in possible lacunae to the treaty, to ascertain the meaning of undefined terms in the text, or more generally, to aid the interpretation and implementation of its provisions".[9] Furthermore, customary international laws are considered where a BIT fails to cover the full spectrum of foreign investment protection, and in the total absence of a BIT.[10]

Nonetheless, BITs are identified as the predominant source of foreign investment law.[11] In some cases, BITs incorporate other general sources of international law, for example, general principles of law; human rights treaties such as the International Covenant on Civil and Political Rights; and the Vienna Convention on the Law of Treaties which provides the rules on treaty interpretation.[12] The International Centre for Settlement of Disputes (ICSID) Convention is also considered a source of law where state parties to a BIT agree to settle disputes through the ICSID.[13]

The common reason developing countries sign BITs is the belief that the treaties are means of foreign investment promotion, and consequently will bring an increased amount of capital, and technological development to their territories.[14] However, developing countries are more involved in bilateral negotiations where they have little leverage of gaining concessions. Engagements with these BITs have seen the liberalisation of investment controls and the reduction of policy space.[15]

4 Jean- Frederic Morin & Gilbert Gagne, *What Can Best Explain the Prevalence of Bilateralism in the Investment Regime?,* 36(1) Int'l J. Pol. Econ. 53 (2007).

5 Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties,* 38(4) Va. J. Int'l L. 640 (1998).

6 Morin & Gagne, *supra* note 4, at 54.

7 Jose E. Alvarez, *Beware! Boundary Crossings'- A Critical Appraisal of Public Law Approaches to International Investment Law,* 17 J. World Inv. & Trade 172 (2016).

8 Patrick Dumberry, The Formation and Identification of Customary International Law 2 (Cambridge University Press, 2016).

9 *Id.*

10 *Id.*

11 *See generally* Guzman, *supra* note 5.

12 Alvarez, *supra* note 7, at 173.

13 Mohammad Hamdy, *Redesign as Reform: A Critique of the Design of Bilateral Investment Treaties,* 51(2) Geo. J. Int'l L. 263 (2020).

14 Jeswald Salacuse, *The Treatification of International Investment Law,* 13(1) L. & Bus. Rev. Americas 158 (2007).

15 Peter Chowla, *Comparing Naughty BITs: Assessing the Developmental Impact of Variation in Bilateral Investment Treaties* 2 (Dev. Stud. Inst., Working Paper No. 05-67, 2005).

Legal claims brought against governments by foreign investors under BITs leading to the imposition of million-dollar fines against states have led to concerns that BITs restrict the policy space of host states.[16] Substantive provisions and standards in BITs constitute the yardstick against which state conducts are measured in order to determine their legality or otherwise.[17] A strong argument can be made that these standards grant unfettered discretion to arbitrators to make decisions that have far-reaching effects on a state's ability to make laws for her sovereigns.[18] Therefore, to obviate the issue of policy space constraint; two options present themselves: a more pragmatic and strategic approach to bilateral treaty-making or a multilateral framework on investment. Given the political economy of bilateral negotiations, a multilateral rule on investment appears to be more promising if the retention of policy space must materialise.[19]

African states negotiate international investment agreements (IIAs), most especially BITs to improve their investment climate,[20] and because of the perception that their legal systems do not provide the frameworks and institutions that are necessary to attract and simultaneously retain foreign investments and integrate their economies into the global market.[21] Hence, investment treaties were developed to respond to the need and interests of foreign investors and the desire of host states to attract foreign investments.[22] Nevertheless, the role of BITs in generating the much desired foreign investment for greater economic development and transformation of the African economy remains vague. It appears that both FDI and BITs have failed to achieve the intended purposes in Sub-Saharan Africa. FDI will only promote meaningful development if the economic growth it fosters is sustainable, as many periods of economic expansion have diminished much of the gains achieved.[23] In addition, African BITs have failed to convince foreign investors because these BITs rarely deviate from a standard model that has developed over time.[24]

Debates around the usefulness of BITs in generating much-desired investments have led to the questioning of the legitimacy of the international investment regime by legal scholars.[25] The

16 Julia Calvert, *Constructing Investors Rights? Why some states (fail to) Terminate Bilateral Investment Treaties,* 25(1) Rev. Int'l Pol. Econ. 75 (2018).

17 Stephan W. Schill, *System-Building in Investment Treaty Arbitration and Law-making,* 12(5) Ger. L. J. 1093 (2011).

18 Jan Kleinheisterkamp, *Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions,* 78(5) Modern L. Rev. 793–94 (2015).

19 *See generally* Chowla, *supra* note 15.

20 Laura Paez, *Bilateral Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment Area,* 18(3) J. World Inv. & Trade 380 (2017).

21 Schill Stephan, The Multilateralization of International Investment Law 5 (Cambridge University Press, 2009).

22 *Id.*

23 Alec R. Johnson, *Rethinking Bilateral Investment Treaties in Sub-Saharan Africa,* 59(4) Emory L. J. 920 (2010).

24 *Id.*

25 David Schneiderman, *Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?,* 2(2) J. Int'l Disp. Settlement 471–95 (2011); Charles N. Brower & Stephan Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?,* 9 Chi. J. Int'l L. 471–98 (2009); Stephan Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach,* 52 Va. J. Int'l L. 57–100 (2011).

dilemma surrounding the practicalities of investment laws is further entrenched in the bias against foreign investments laws as serving the imperialist interests of multinational corporations to the detriment of host states, and that contrary to the economic developments it advocates, the investment regime entrenches the interest of the foreign investors, mainly.[26] Also, there are concerns that African arbitrators are underrepresented at the Investor-State Dispute Settlement (ISDS) platforms, and more contemporaneously, marginalised in the ongoing ISDS reform process.[27] Critical issues surrounding this concern are found from scholarships which opine that Africans are important actors in the establishment of ICSID, albeit without its complexities. Contributions to the ISDS have emerged from the routine casting of African countries as respondents, wherein the determination of substantive issues, awards or procedural orders reinforces the ICSID, and investment rules, thereby showcasing African states as reverse contributors, a not-so-positive attribute.[28] This is because African states accepted ICSID to attract foreign investments to aid their ailing economies and also affirm their sovereign status in the wake of the post-colonial era.[29] Thus, any substantive contribution to the investment landscape is derived from being disputants. For, example, in the 2022 ICSID Caseload Statistics, Sub-Saharan African states were parties in 15% (131) of ICSID cases, thereby driving jurisprudence and advancing substantive concepts in international investment law.[30]

There has been a growing literature on the harmonisation of investment laws in Africa, and the usefulness of such a regional multilateral framework, especially in the light of the recently formed African Continental Free Trade Area. This paper seeks to contribute to the body of literature through an examination of the extant investment protection frameworks in Africa. It seeks to demonstrate that the normative underpinnings of most bilateral investment treaties appear unsuitable for the promotion of modern sustainable investment and development in Africa. The paper argues that a regional integration arrangement which sees the introduction of a plurilateral (or regional multilateral) investment treaty that is designed to balance the needs and interests of African states and foreign investors will foster economic and non-economic developments for the continent. It is the contribution of this article that a regional market, bolstered by a harmonized continental legal instrument will be helpful in creating a consistent goal in attracting more capital for Africa's economic transformation and development

26 Olabisi D. Akinkugbe, *Africanization and the Reform of International Investment Law,* 53 Case W. Res. J. Int'l L. 9 (2021).

27 *Id.* at 10.

28 Olabisi D Akinkugbe, *Reverse Contributors? African State Parties, ICSID and the Development of International Investment* Law, 43(2) ICSID Rev. 436 (2019).

29 *Id.* at 438; It is posited that BITs are not the sole determinants of FDI in developing countries, there are other important economic determinants of FDI, if BIT plays any role, it is to strengthen the policy and institutional framework determinant of a country, which in itself is a dependent variable of a country. UNCTAD, *The Role of International Investment Agreement in Attracting FDI to Developing Countries,* UNCTAD Series on International Investment Policies (2009), https://unctad.org/system/files/official-document/diaeia20095_en.pdf.

30 World Bank Group, *The ICSID Caseload – Statistics* (last visited Sept. 20, 2022), https://icsid.worldbank.org/sites/default/files/publications/The_ICSID_Caseload_Statistics_2022-2_ENG.pdf.

This paper is divided into five parts. Part II discusses the failure of multilateral frameworks and the growth of BITs. Part III examines the regulatory frameworks for investment in Africa, the perceived imbalance in these frameworks and the response of some African states. Part IV considers how African states can find the right balance through a common market and harmonised plurilateral investment law and policy. Part V concludes the paper.

II. The Failure of Multilateralism and the Growth of Bilateralism

Bilateralism and multilateralism are harmonious means of international cooperation. The dissimilarity between both forms of international corporation points to the number of contracting parties. From a purely formal perspective, bilateralism functions on a dyadic basis while multilateralism concerns "the practice of coordinating national policies in groups of three or more states".[31] With respect to the nature of substantive obligations, unlike bilateralism which in some cases involves the imposition of unilateral principles by one hegemon on another state, multilateralism defines principles without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence.[32] Their main characteristics are based on the application of generalised and non-discriminatory rules to all contracting parties.[33] Expanding this conceptual distinction, we consider a multilateral agreement to be based on general obligations that apply to many states across the globe, while bilateral agreements apply only to particular states.[34] Yet, there is a specie of multilateral agreements which are negotiated by a much less number of states with certain geopolitical interests. These are often referred to as plurilateral agreements. Unlike monetary and trade relations, there is a dearth of holistic multilateral rules on foreign direct investment.[35] The closest multilateral protection of FDI can be found in the WTO rules for FDI- the Agreement on Trade-Related Investment Measures (TRIMs), which was negotiated and signed by WTO members in 1995[36] and the investment protection under GATS (Mode 3).

Thus, foreign investment law is a clear case of an international regime that is established as a result of a patchwork of bilateral, plurilateral, multilateral rules and free trade agreements with investment chapters; and they are all geared towards the protection of foreign investments even though their scope, content and interpretation may differ.[37] In some cases, rulemaking has taken place on all levels most of the time, while in some, the focus has shifted between different levels, for instance, the focus of activity moving from the plurilateral to the regional and up to the multilateral and then back down again to the regional or bilateral. [38]

31 Stephan, *supra* note 21, at 9.

32 *Id.*

33 *Id.*

34 Alexander Thompson & Daniel Verdier, *Multilateralism, Bilateralism, and Regime Design,* 58 Int'l Stud. Q. 15 (2014).

35 Helen V. Milner, *The Global Economy, FDI and the Regime for Investment,* 66(1) World Pol. 3–4 (2014).

36 Hung-Gay Fung et al., China and the Challenge of Economic Globalisation 121 (Routledge, 2005).

37 Stephen Woolcock, *Making Multi-Level Rules Work: Trade and Investment Rules in Regional and Bilateral Agreements, in Multilateralism, Regionalism* and Bilateralism in Trade and Investment 38 (Philippe de Lambarde ed., 2006).

38 *Id.*

The foundation of modern international investment law can be traced back to the period when European empires started trading with and doing business with local communities in Asia, Africa and Latin America.[39] Considering that these continents did not become independent from their colonial rulers until the early 20th century, it is not surprising that much of the early development of the principles of foreign investment law dealt mainly with investment protection and protection of aliens on the basis of state responsibility and diplomatic protection of citizens abroad.[40] Sovereign European states sought to impose and advance the interests of their nationals in other countries through the negotiation of commercial and trading rights for their nationals. During this period, treaties served the dual purpose of establishing mutual economic relationships amongst nations and as instruments of economic domination between colonial masters and their colonies.[41] Although, the agreements presented themselves as being based on principles of equality and mutuality, in fact, they favoured Europeans.[42]

The shift in global power after the First World War meant that the Western powers, in this case, the European states, encountered more difficulties in trying to impose their views on the appropriate standards for the treatment of foreign investors.[43] Since force and gunboat diplomacy could not be used in the absence of direct colonial rule, multilateral agreement on investment was considered an option, but repeated attempts by Western states (within the League of Nations) to negotiate it failed due to stiff opposition from developing countries.[44]

The attempt to propose a multilateral investment treaty was launched at the Bretton Woods conference, where the Havana Charter was proposed to help rebuild the post-war economies through foreign investments.[45] Plans by the United States to initiate an investment chapter that will protect foreign investments from nationalisation and discrimination met pushback from developing countries who sought the maintenance of their regulatory rights. The failure of the United States to achieve its aim led to the abandonment of the Havana Charter.[46]

Another attempt after the Second World War to push for a multilateral investment treaty at the World Trade Organisation level by the United States failed because the scope of the General Agreement on Trade and Tariff's (GATT) Trade-Related Investment Measures (TRIMs) could not

39 Nida Mahmood, *Democratizing Investment Laws: Ensuring 'Minimum Host Standards' for Host States,* 14(1) J. World Inv. & Trade 80 (2013).

40 *Id.*

41 Dominic N Dagbanja, *The Limitation on Sovereign Regulatory Autonomy and Internationalization of Investment Protection by Treaty: An African Perspective,* 60(1) J. African L. 65 (2016).

42 *Id.*

43 Lauge Skovgaard Poulsen, *The Significance of South-South BITs for the International Investment Regime: A Qualitative Analysis,* 30(1) N. Western J. Int'l L. & Bus. 103 (2010).

44 *Id.* at 104.

45 M. A. Forere, *New Developments in International Investment Law: A Need for a Multilateral Investment Treaty?,* 21 PELJ 6 (2018).

46 *Id.*

be broadened and was not comprehensive enough to cover all areas of investment.[47] Thus, falling short of the United States' expectation, as they had pushed for a comprehensive agreement on investment. The TRIMs majorly have nothing to do with investment protection and is only limited to measures which violate national treatment and qualitative restriction of the GATT.[48] Although these rules prohibit the discriminatory treatment of FDI, they are however regarded as weak.[49] Developing states feared that the TRIMs would undermine their ability to structure their economies as they wish, thereby disrupting their sovereignty.[50] They also feared that the restrictions on TRIMs will not adequately protect them from the activities of foreign investors that they perceived as restrictive or invasive. This fear is entrenched in the belief that foreign investors are able to engage in activities that are inimical to a host state's interest which may manifest in lower efficiency, monopoly of profits and may be barriers to other potential competitors.[51] Hence, the perception by developing countries that TRIMs would likely undermine their sovereignty, and the inability to agree on a holistic FDI agreement signified the unrecognised significance of the regulation, and the necessity of FDI regulation in the first place.[52]

The most recent attempt to draft a multilateral investment agreement (MAI) has failed woefully, most notably the draft multilateral agreement on investment, which was negotiated under the auspices of the Organisation for Economic Co-operation and Development (OECD) in 1998.[53] The OECD was given the mandate to provide a multilateral framework for international investments. Preceding this mandate were long years of tedious preparatory works undertaken most especially by the OECD's Committee for International Investments and Multinational Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT).[54] It was therefore hoped that an MAI would consolidate all that had been cumulatively achieved so far on foreign investment laws in one single document.[55]

The MAI was designed as a panacea to the ills of global investment and to make the world a more liberalised and open marketplace. Between 1995 to 1998, an MAI was under negotiation amongst the OECD- constituents of thirty of the world's most developed countries.[56] Nine developing countries joined in the negotiation with a view to becoming founding members of MAI. However, negotiations ended abruptly in the face of objections from different stakeholders and primarily

47 *Id.*

48 *Id.*

49 Milner, *supra* note 35, at 3.

50 Scott S. Quillin, *The World Trade Organisation and Its Protection of Foreign Direct Investment: The Efficacy of the Agreement on Trade-Related Investment Measures,* 28 Okla. City Univ. L. Rev. 880 (2003).

51 *Id.*

52 *Id.*

53 Valentine Nde Fru, The International Law on Foreign Investments and Host Economies in Sub-Saharan Africa 45 (LIT Verlag Munster, 2011).

54 *Id.*

55 *Id.*

56 Glen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations,* 39(2) Colum. J. Transnational L. 484 (2001).

because of critical differences between the negotiating partners.[57] Between 1997 and 1998, it was the subject of intense public debate in many parts of the world; It had strong advocates as well as strong critics. A panellist at a law symposium introduced it as an example of 'multilateral sovereignty' to achieve commonly held goals of economic integration.[58] While its critics referred to it as a 'slow motion *coup d' etat',* a bill of rights and threat to sovereignty, because it empowers foreign investors to challenge the law-making authority of nation states and subnational governments. [59]

Also, the scope of the MAI was a matter of concern. It included real estate investments and rights under statute and contract and also sought to cover all stages of the investment cycle.[60] This meant that there was a likelihood that feasibility studies or obtaining a licence to initiate an activity could easily be caught by the definition. All parties could incur liability or obligations to each other under the MAI provisions.[61] Also, the inclusion of portfolio investments under its scope was another area of concern as they raised entirely different issues from those relating to foreign direct investment. The inclusion of portfolio investment within the scope of the MAI would have precluded a host state from taking appropriate action to control the destabilising effects of rapid flows of capital in a crisis. A far-reaching ban on performance requirements was considered problematic for developing countries. It would have erected legal obstacles in the way of a host state which wanted to enhance the rights of its indigenous people.[62] Indeed, the MAI was far-reaching in every aspect. In the end, negotiations for the MAI were jettisoned mainly because they were considered over-ambitious in their proposal. [63]

Despite a growing interest in MAI in academia and policy circles, the future of MAI remains uncertain.[64] Another attempt to address this issue under the WTO auspices failed again when the so-called 'Singapore issue' of investment was taken off the negotiating agenda of the Doha Round in the summer of 2004.[65]

Following the initial failures in the development of a multilateral agreement on investment, the United States expanded its Friendship, Commerce and Navigation treaties. Even though the treaty had no central effect on the treatment of foreign investments in developing countries, it did provide inspiration for European states to develop legally binding standards for investment abroad.[66] West Germany in 1959 entered into a BIT (the first of its kind) with Pakistan in order to protect the

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57 *Id.*

58 Robert Stumberg, *Sovereignty by Subtraction: The Multilateral Agreement on Investment,* 31(3) Cornell Int'l L. J. 493 (1998).

59 *Id.*

60 Nil Lante Wallace-Bruce, *The Multilateral Agreement on Investment: An Indecent Proposal and not the Lessons of History,* 34(2) Compar. & Int'l L. J. S. Africa 214–15 (2001).

61 *Id.* at 214–17.

62 *Id.*

63 Nil, *supra* note 60, at 210.

64 Zdenek Drabek, *A Multilateral Agreement on Investment. Convincing the Sceptics* 4 (WTO Staff, Working Paper No. ERAD-98-05, 1998), https://states.econstor.eu/bitstream/10419/90669/2/776116495.pdf.

65 Anne van Aaken, *Perils of Success? The Case of International Investment Protection,* 9(1) European Bus. Org. L. Rev. 4 (2008).

66 Lauge Skovgaard Poulsen, *The Significance of South-South BITs for the International Investment Regime: A Qualitative Analysis,* 30(1) N. W. J. Int'l L. & Bus. 103 (2010).

investments of its nationals abroad, having lost all of its investment after the defeat in the Second World War.[67] Since then, many countries from the global north have followed suit. At present, the report from UNCTAD suggests that 2861 BITs have been signed globally out of which 2219 are still in force.[68] BITs ultimately became the most dominant regulatory framework for the regulation of cross-border investments because of the inability of states to successfully negotiate multilateral investment treaties.[69]

African countries have keyed into BITs, and they are now the most used means of investment protection and promotion.[70] These treaties have not been balanced due to the asymmetry of powers between developed and developing countries.[71] Asymmetry in this sense equates to the contracting position of the parties which are usually, a strong developed country and a weak developing country wherein powers from the developed countries are fully exerted.[72]

III. The Regulatory Framework on Investment in Africa

BITs are the means of investment protection and promotion in Africa.[73] African countries sign BITs based on the perception that they are an integral part of the development strategy that Africa so desires.[74] An objective of many states in negotiating BITs is for the development of positive rights and protections for foreign investment and the development of international law on investment as a whole. Thus, the meteoric rise of BITs may be seen as a response to the demands of a new global economy.[75]

BITs contain substantive investment rights such as the fair and equitable treatment (FET) standard, the full protection and security standard, the national treatment and most-favoured nation treatment standard, provisions against uncompensated expropriation and provisions for the transfer of capital.[76] Given that a large majority of African states have ratified the Washington 1965

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67 Jeswald Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Direct Investment in Developing Countries,* 24(3) Int'l Law. 657 (1990).

68 *See* UNCTAD, *Investment Policy Hub* (last visited Sept. 15, 20022), https://investmentpolicy.unctad.org/international-investment-agreements.

69 Todd Allee & Clint Peinhardt, *Evaluating Three Explanations for the Design of Bilateral Investment Treaties,* 66(47) World Pol. 50 (2014).

70 Won Kidane, *China's Bilateral Investment Treaties with African states in Comparative Context,* 49(1) Cornell Int'l L. J. 143 (2016).

71 *Id.*

72 A. Todd Allee & Clint Peinhardt, *Evaluating Three Explanations for the Design of Bilateral Investment Treaties,* 66(47) World Pol. 61–62 (2014).

73 Mosoti Victor, *Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between,* 26(1) Nw. J. Int'l L. & Bus. 102 (2005).

74 Rukia Baruti, *Investment Facilitation in Regional Economic Integration in Africa: The Cases of COMESA, EAC and SADC,* 18(3) J. World Inv. & Trade 494 (2017).

75 Kelley, *supra* note 56, at 490.

76 Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries,* 33(10) World Dev. 1570 (2005); Jennifer L. Tobin & Marc L. Busch, *A BIT is Better than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements,* 62(1) World Pol. 4 (2010).

Convention, recourse is made to ICSID as an option for investor-state arbitration.[77] Although most BITs have rules which are very similar, they have been interpreted differently when they are determined by investment arbitration.[78] The consequent rise in investment dispute arbitration has made clear the binding nature of BITs compared to other international obligations, [79]thus, goading all countries to be more concerned about the extent of their BIT obligations.[80] The surge in investment cases, wherein host states are routinely sued as a respondent shows the effect of an unequal BIT regime where the benefits of compliance are doubtful.[81]

A glimpse into the panes of history points toward the fact that the primary purpose of investment treaties has long been for the protection of investments from developed countries who are majorly capital-exporting states.[82] The European nations during the historic moments (after the treaties of Westphalia of 1648) had less 'equal bargaining power' and sought to secure minimum standards of treatment for their citizens engaged in investment activities within the region.[83] These capital-exporting states subsequently undertook the effort to create an international investment regime because they believed that the prevailing investment regime at the end of World War II failed to adequately protect the foreign investments of their nationals from expropriation by host countries.[84] It has also been argued that there is a plausibility that the conception of international standards of treatment of foreign investments was intended to serve the interests of the states that had the capacity to expand overseas trade.[85] Thus, there were advocates for a standard of treatment of foreign capital that was higher than domestic treatment due to the fear that domestic legal systems were incapable of investment protection.[86]

It is not surprising that many BITs signed by African countries are lopsided. This reflects the bargaining power of parties. Most African states do not have the technology and technical know-how to develop their resources. They lack the financial muscle to pursue their economic, infrastructural, and other developmental goals. They mainly rely on the patronage of investors from capital-exporting countries. It is natural for foreign investors to leverage their bargaining power to push

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77 Makane Moise Mbengue, *Africa's Voice in the Formation, Shaping and Redesign of International Investment Law,* 34(2) ICSID Rev. 459 (2019).

78 Emmanuel Laryea, *Evolution of International Investment Law and Implications for Africa, in* Natural Resource Investment and Africa's Development 307 (Edward Elgar & Francis N. Botchway ed., 2011).

79 Jarrod Wong, *Umbrella Clause in Bilateral Investment Treaties Clauses: of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries,* 14(1) Geo. Mason L. Rev. 136 (2006).

80 Laryea, *infra* note 87, at 307.

81 Olivia Chung, *The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration,* 47(4) Va. J. Int'l L. 955 (2007).

82 Julie Kim, *Balancing Regulatory Interest through an Exceptions Framework under the Right to Regulate Provision in International Investment Agreements,* 50(2) Geo. Wash. L. Rev. 289 (2017).

83 Won Kidane, *Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code,* 50(3) Geo. Wash. Int'l L. Rev. 523 (2018).

84 Jeswald Salacuse, *The Emerging Global Regime for Investment,* 51(2) Harv. Int'l L. J. 436–37 (2010).

85 *Id.*

86 *Id;* Salacuse, *supra* note 67, at 659–60.

favourable terms in the BITs at the expense of the host countries. This trend also features in some south-south BITs. For instance, the Mauritius - South Africa BIT represents standard traditional BITs.[87] In such BITs, pertinent issues that are germane to the socio-economic development of African states are either not addressed or the powers of the host countries to regulate them are curtailed. These issues include corruption and transparency, sustainable development, corporate social responsibility, health and environmental issues, labour standards, and regulatory autonomy/ policy space. On the other hand, these BITs have standard terms that give maximum protection to foreign investment, repatriation of funds and subjecting African states to the jurisdiction of ICSID for dispute settlement. Many African states sign these BITs on 'take it or leave it' basis.

As a response to investment and development concerns and the need to balance the interests of the host states and foreign investors, some states have terminated their agreements[88], refused to ratify BITs[89] and awards or even pay compensation[90], while other states have focused on mitigating uncertainty in the investor-state dispute settlement scheme (ISDS) by changing treaty-drafting practices in the negotiation.[91] For instance, South Africa has passed the South African Protection of Investment Act,[92] which fundamentally reformulates standards of protection and also introduced a rule of exhaustion of local remedies, making international investment arbitration a last resort. And, in the event that parties have to resort to international arbitration, South Africa has jettisoned the investor-state dispute settlement mechanism and introduced a state-state settlement mechanism.[93] In addition, some regional economic blocs[94] have also signed investment agreements which either shall apply uniformly within the bloc or serve as a model law for host countries within the bloc.[95]

The efficacy of these different approaches is open to question. The complexities of investment regulation in the continent have led to an investment climate that is unpredictable, as investors

87 UNCTAD, *Mauritius – South Africa BIT (1998)* https://investmentpolicy.unctad.org/international-investment-agreements/treaties/tips/2527/mauritius---south-africa-bit-1998-.

88 Indonesia has terminated most of its BITs; David Price, *Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?,* 7(1) Asia J. Int'l L. 125–26 (2017).

89 Nancy A. Welsh et al., *Using the Theories of Exit, Voice, Loyalty, and Procedural Justice to Reconceptualize Brazil's Rejection of Bilateral Investment Treaties,* 45 Wash. Univ. J. L. & Pol. 121 (2014).

90 Bernado Sepulveda-Amor & Merryl Lawry-White, *State Responsibility and the Enforcement of Arbitral Awards,* 33(1) Arb. Int'l 51 (2017). Argentina is known to have failed to compensate ICSID award creditors; Moshe Hirsch, *Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach,* 19 J. Int'l Econ. L. 682 (2016).

91 South Africa's investment policy reforms were engineered by exposure to international arbitration following claims by European investors over "black economic empowerment" requirements in the mining sector. This brought about the re-evaluation of its approach to BITs; Yoram Z. Haftel & Alexander Thompson, *Why do states Renegotiate Investment Agreements? The Impact of Arbitration*, 13(1) Rev. Int'l Orgs. 30 (2018).

92 *See* Republic of South Africa, *Protection of Investment Act No. 22 of 2015,* (Dec. 15, 2015), https://www.gov.za/sites/default/files/gcis_document/201512/39514act22of2015protectionofinvestmentact.pdf.

93 Tarcisio Gazzini, *Travelling the National Route: South Africa's Protection of Investment Act 2015,* 26(2) African J. Int'l & Compar. L. 248 (2018).

94 Notably, including the Southern African Development Community (SADC), Economic Community of West African States (ECOWAS) and Common Market for Eastern and Southern Africa (COMESA).

95 For instance, see the Investment Agreement for the COMESA Common Investment Area 2007, SADC Protocol on Finance and Investment (2006), and ECOWAS Common Investment Code (2018).

have to deal with how to navigate between multiplicities of national laws and courts.[96] Perhaps, the conclusion of multilateral investment treaties will offer balanced investment relations between both developed and developing countries since such treaties will involve many actors in the investment arena which may constitute a check on the disproportionate incentives offered to, and advocated by the more powerful states.[97] As shown in the preceding section, the reality is that such a multilateral framework may not be feasible in the foreseeable future. Therefore, Africa needs to work out a framework that works for Africa.

IV. Balancing the Interests: The Role of a Common Market and Harmonised Investment Law

a. Regional Economic Integration in Africa: A Necessity for a Regional Multilateral Framework

Paradigms have changed in the global economy and the concept of a new geography of investment is generating important discussions in the global market as developing countries are now becoming major players in the investment landscape. The centre-periphery relationship between the North and South- a hallmark of the old geography of trade and investment is now being replaced by economic relations between developing countries.[98] This new trade relations are viewed as mutually beneficial and bound to yield huge development for all participants. It is not surprising that December 19 is now recognised by the United Nations as a day for South-South Cooperation.[99] However, most South-South BITs are modelled after the traditional BITs which were introduced and applied by the developed countries. And as shown in earlier discussions, capital-exporting and importing states operate from different perspectives.[100] Thus, African countries must contemplate a treaty that balances the interests of the contracting parties, the investors, and the public.

African states foster investment relationships with other developing states through the conclusion of South-South treaties and with industrialised countries through the conclusion of North-South treaties.[101] The contents of both types of treaties are cognisant of the economic and socio-political realities of many African countries, and the nature of the relationship between state parties to treaties in most cases, define the parameters of transnational capital's operation, rights and obligations, albeit to a limited extent.[102] States' oscillating position as capital importers or exporters might influence their choices as they make investments and this also explains the ambivalence and inconsistency in their relationship with other states and investors through investment treaties.[103]

96 Malebakeng Agnes Forere, *Move Away from BITs Framework: A Need for Multilateral Investment Treaty?*, (World Trade Institute, Working Paper No. 15/2017), https://states.wti.org/media/filer_public/eb/4a/eb4ae7db-3f2b-483d-9151-0ae41bdaf2a0/working_paper_no_15_2017_forere.pdf.

97 Eustace Chikere Azubuike, *The Place of Treaties in International Agreement,* 13 Ann. Surv. Int'l & Compar. L. 173 (2013).

98 Uche Ewelukwa, *South-South Trade & Investment: The Good, the Bad and the Ugly-African Perspectives,* 20(2) Minn. J. Int'l L. 522 (2011).

99 *Id.*

100 *Id.* at 521.

101 Ibironke T. Odumosu-Ayanu, *South-South Investment Treaties, Transnational Capital and African Peoples,* 21 African J. Int'l & Compar. L. 179 (2013).

102 *Id.*

103 *Id.*

Developed and developing countries operate from different perspectives: developed countries wish to protect their citizens' investment; while developing countries who are usually import-dependent seek to attract investments and maintain regulatory autonomy. Thus, in the absence of a multilateral investment framework, the international investment regime has developed unsystematically.[104] One may then wonder if the South-South legal instruments are structured to regulate foreign investors and safeguard the public interest in Africa.

The paradigm shift in the investment geography demands a nuanced approach to reflect development-oriented and people-centred economic arrangements and not a model of the relationship in the investment agreements Africa has always had with the rest of the world. Some authors have discussed the feasibility of an alternative to the current network of investment treaties and some scholars who are in support of an MAI have argued that mega-regional international investment agreements are necessary to address key substantive challenges and will eventually serve as a foundation for a more coherent and harmonized system of international investment law.[105] Advocates for a multilateral framework on investment postulate that it will provide a more secure and predictable framework for long-term cross-border investment.[106] However, critics of the treaty argue that there is no evidence to suggest such a treaty will improve capital flows and that the disparities in the economies in African states make BITs and regional agreements more suitable.[107] Often cited is the fact that homogenous countries such as OECD countries could not conclude a multilateral investment treaty.[108] Although these arguments are valid, one may consider that, since developing countries tend to sign treaties that are not actively negotiated, there are likely to bear unrestrained demands from home countries who may impose extreme investment standards.[109] More so, modern economies are now interdependent and it appears that only multilateral institutions and rules can adequately regulate investment activities.

African investment law is one of a wide variety lacking coordination and clarity in some cases even though it is intended to assure each country of the largest volume of foreign investments possible.[110] The economic benefits and incentives that are granted by African investment laws to (foreign) enterprises highlight the competitive and inimical nature of African investment laws. African countries are almost at similar stages of under-development and the fact that foreign resources are finite does not serve the interest of the host states concerned or sub-regional and regional economic development.[111] This is because countries that are too focused on enabling foreign investments may

104 Silvia Karina Fiezzoni, *Striking Consistency and Predictability in International Investment Law from the Perspective of Developing Countries,* 7(4) Frontiers L. China 526 (2012).

105 Facundo Calvo, *The Most Feasible Way Towards a Multilateral Investment Treaty,* 3(1) European Inv. L. & Arb. Rev. 62 (2018).

106 Paul Kuruck, *Investment Issues in the West Africa-European Union Economic Partnership Agreement Negotiations: Is a Harmonised Regional Investment Framework the Answer?,* 20(3) African J. Int'l & Compar. L. 456 (2012).

107 *Id.*

108 Forere, *supra* note 45, at 5.

109 *Id.*

110 A. M. Akiwumi, *Plea for the Harmonization of African Investment Laws,* 19(1&2) J. African L. 135 (1975).

111 *Id.* at 138.

become too dependent on them at the expense of more national economic development, inter-African economic cooperation and multinational African enterprise.[112] Developing countries when united as a group stand to benefit more from foreign investors as host states. By this, developing countries as a group have sufficient material power in the use of their resources when they work collectively than when they compete with one another,[113] as there are studies that show a strong link between regional integration and capital mobility in the context of developed countries.[114]

Contemporary international cooperation has changed the way states interact and it has disrupted the traditional understanding of states and borders. This new trend limits unilateralism while fostering mutual cooperation and ensuring that all parties fully meet their obligations under international accords.[115] Where economic opportunities and political stability exist, there is a natural tendency to depart from unilateralism and embrace multilateralism. [116] Unilateralism in this sense, is an obstacle to international cooperation and the rule of law because it is a state's conduct that considers only that state's own interests in the international community.[117] Taking a cue from Europe, the European Union is pushing to eliminate intra-EU investment treaties and establish a permanent investor-state court in its free trade agreement. Legal agreements have also emerged from these prisms. The Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), and the EU-Canada Comprehensive Economic and Trade Agreement (CETA) are all endeavours geared towards multi-regionalism.[118] It is posited that these regional arrangements can spur and solidify the quest for multilateral rules on investment in the long run.

Africa has however not been left out in this global trend of regional integration. As far back as 1980, the Organisation of African Unity had a blueprint for the progressive development of Africa- the Lagos Action Plan for the Economic Development of Africa 1980-2000. However, the first concrete step towards integration was taken in 1991 when African states adopted the treaty establishing the African Economic Community (AEC) (Abuja Treaty) which later came into force in 1994. [119] This treaty has been regarded as one of the most ambitious efforts to create an economically integrated Africa.[120] In the Abuja Treaty, six regional economic communities were perceived as the main

112 *Id.*

113 Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties,* 38 Va. J. Int'l L. 643 (1998).

114 Saten Kumar et al., *Does Economic Integration Stimulate Capital Mobility? An Analysis of Four Regional Economic Communities in Africa,* 29 J. Int'l Fin. Mkts., Insts. & Money 34 (2014).

115 Ali Z. Marossi & Marisa R. Bassett, Economic Sanctions Under International Law 166–67 (Springer, 2015).

116 *Id.*

117 *Id.*

118 Odysseas G. Repousis, *Multilateral Investment Treaties in Africa and the Antagonistic Narratives of Bilateralism and Regionalism,* 52(3) Tex. Int'l L. J. 315–16 (2017).

119 Chukwuma Okoli & A. Yekini, *Nigeria and AfCFTA: What Role has Private International Law to Play?,* ConflictofLaws.net (Nov. 18, 2020), https://conflictoflaws.net/2020/nigeria-and-afcfta-what-role-has-private-international-law-to-play/.

120 *Id.*

building blocks for such a continent-wide integration initiative.[121] The intent to form continent-wide unity continues unabated as shown in the Sirte Declaration of September 1999 and that of Lomé held in July 2000, which were aimed at a speedy implementation and concretisation of the Abuja treaty.[122] It was in furtherance of the objectives of this treaty that the Agreement Establishing the African Continental Free Trade Area (AfCFTA) was concluded in 2018.[123] As of today, the African Union (AU) recognises eight regional and sub-regional arrangements even though they have overlapping memberships. These regional bodies are: the Community of Sahel-African States; Common Market for Eastern and Southern Africa (COMESA), East African Community, Economic Community of Central African States, Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development, Southern Africa Development Community, and the Arab Maghreb Union.[124]

The pursuit of the Abuja Treaty objectives and the examination of the prospects of a regional investment code for long-term economic growth has been vigorously pursued by the sub-regional bodies. For instance, Article 3 of the Revised ECOWAS treaty provides as one of its objectives, the promotion of cooperation and integration of an economic union in West Africa in order to improve the standard of living of its people and the development of the African continent.[125] The treaty requires free trade, movement of persons, a customs union and a common market as necessary in the actualisation of its objectives. Indeed, treaties have emerged from the aspirations of these regional economic communities (RECs) as a result of concerns over the legitimacy of international investment law and investor-state arbitration in the middle and late 2000s, and to enhance economic growth. These treaties are: the Protocol on Finance and Investment of the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa Investment Agreement (CCIA Agreement), and the Supplementary Act on Investment of the Economic Community of West African states.[126] Take the CCIA Agreement as a case study, it aims to foster foreign investments within economically viable states and also introduce a more liberal and transparent investment environment. The drafters anticipate that the treaty will establish a closer customs union and the formulation of a common market amongst COMESA members.[127] It introduced significant innovations with respect to arbitral procedures available to states so as to strike a balance between the rights and obligations of parties in proceedings. The CCIA Agreement further reiterates its underlying objectives by providing that treaties should be drafted having

121 Alemayehu Geda & Haile Kebret, *Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA,* 17(3) J. African Econ. 358 (2007).

122 *Id.*

123 *See* African Union, Preamble to the Agreement Establishing the African Continental Free Trade Area, https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (last visited Sept. 15, 2022).

124 Charles Chernor Jalloh, Regional Integration in Africa, 7 African J. Legal Stud. 2 (2014).

125 Paul Kuruck, *Investment Issues in the West Africa-European Union Economic Partnership Agreement Negotiations: Is a Harmonised Regional Investment Framework the Answer?,* 20(3) African J. Int'l & Compar. L. 464 (2012).

126 Paolo Vargiu & Francesco Seatzu, *Africanizing Bilateral Investment Treaties (BITS): Some Case Studies and Future Prospects of a Pro-Active African Approach to International Investment,* 30(2) Conn. J. Int'l L. 148 (2015).

127 *Id.*

taken into consideration the realities of poor countries and the peculiar conditions which have an impact on the approaches generally adopted to international commercial arbitration in the African continent.[128]

A transformation of the African economies will involve a shift in the factors of production and other resources from low to high productivity activities across all sectors of the economy. Regional integration can contribute to this transformation agenda in many ways. Given the small and fragmented size of African economies, domestic manufacturing enterprises cannot exploit the advantages of scale and that has a negative impact on their competitiveness in global markets.[129] Although there is significant evidence to show that countries benefit from an open and integrated approach to participation in the global economy, there are also known factors that could hamper the actualisation of these ideals.

There are some complicated issues which militate against a successful economic integration, all of which revolve around political, social, economic, territorial and religious differences amongst and within African states. There are legitimate concerns about weak economic structures among African states, differing macro-economic policies, low levels of intra-African trade and uneven economic strengths.[130] Many of the Sub-Saharan African economies are small and fragmented,[131] and as such economic integration may likely polarise benefits towards some countries at the expense of others.[132] For some countries, economic liberalization may be unwelcomed if they see no potential economic gains, because economic integration comes with an implied cost of sovereignty diminution.[133] Also, African states have struggled with being able to materially diversify their economic structures. Commercial patterns tend to favour the production and export of raw materials in exchange for imports of finished goods. The patterns show a trend toward South-North flows over intra-continental flows, thus, running the risk of 'Dutch Disease'.[134] To overcome the constraints of fragmentation in order to effectively participate in a global economy, regional integration holds the promise of increasing the size of the markets to achieve the critical mass that can enable diversification and stimulate greater competition to spur productivity.[135]

Thus, the first step in striking a balance between the interests of African states and foreign investors is the strengthening of African countries' bargaining positions. For African countries to improve

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128 *Id.*

129 Patrick N. Osakwe & Karl Wohmuth, *Towards Transformative Regional Integration in Africa, in* Africa's Progress in Regional and Global Economic Integration-Towards Transformative Regional Integration in Africa 4 (Achim Gutowski et al. eds., 2016).

130 Babatunde Fagbayibo, *Exploring Legal Imperatives of Regional Integration in Africa,* 45(1) Compar. & Int'l L. J. 67 (2012).

131 Michael Takudzwa Pasara, *An Overview of the Obstacles to the African Economic Integration Process in View of the African Continental Free Trade Area,* 12(1) Africa Rev. 1 (2020).

132 *Id.*

133 *Id.* at 4.

134 Hasan Tuluy, *Regional Economic Integration in Africa,* 8(3) Glob. J. Emerging Mkt. Economies 336–37 (2016).

135 *Id.* at 338.

their competitive positions, regional economic integration becomes a necessity. Many African countries are spectators in the South-South trade and investment relationship.[136] The countries at most risk are the resource-poor low-income developing countries in the continent which risk being marginalised within the South-South economic framework. Egypt, South Africa, Nigeria, Angola, Morocco, Ethiopia and Sudan have cumulatively accounted for countries that are major capital exporting while other countries appear to be left behind.[137] Regional integration is known to enable portfolio risk diversification and capital mobility. If capital mobility is high, then there is the likelihood that countries cannot pursue independent monetary policies. In the context of advanced countries, evidence points to a strong relationship between regional integration and capital mobility.[138] In addition, in the North-South framework, African most African countries including the major economies mentioned above may become vulnerable when negotiating with capital-exporting countries from the global north.

Besides bolstering Africa's bargaining positions, regional integration through the respective regional blocs and investment frameworks are a stepping stone to achieving a continental market with harmonised investment laws and policies as presented in the next section. Thus, if regional integration is well pursued and these countries negotiate as a bloc, the size of their market and the harmonisation of their investment regime can deliver optimum results and they may be able to effectively negotiate around their national/regional interests and policies.

b. The Imperative for a Holistic Investment Framework

Multilateralism in investment law is desirable, as harmonisation of laws will complement other positive trends in FDI flows to Africa.[139] Harmonised laws are likely to create predictability and promote cross-border transactions (between and outside Africa), private sector development and regional integration. An inter treaty consistency amongst South-South BITs is desirable as a streamlined treaty landscape with predictable and consistent treaty commitment across boards will facilitate a country's compliance with international obligations rather than a patchwork of possible conflicting commitments.[140]

A holistic-themed African regional investment treaty can potentially work effectively where there is a regional integration arrangement. Regional economic integration in this instance is the unification of different economies of states in order to promote and facilitate the free movement of goods within the countries.[141] The cross-border flow of private capital is one of the main pilots of the

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136 Uche Ewelukwa, *South-South Trade & Investment: The Good, the Bad and the Ugly-African Perspectives,* 20(2) Minn. J. Int'l L. 551 (2011).

137 *Id.*

138 Kumar et al., *supra* note 114, at 34.

139 Adesegin A. Akin-Olugbade, *The African Development Bank's Contribution in the Harmonization of Investment Laws in. Africa and Prospects for Future Harmonization of Such Laws,* 101 American Soc. Int'l L. Proc. 451 (2007).

140 Wolfgang Alschner & Dimitry Skougarevskiy, *Rule-takers or rule-makers? A new look at African bilateral investment treaty practice* 5 (World Trade Institute, Working Paper No. 7, 2016).

141 Martha Belete Hailu, *Regional Economic Integration in Africa: Challenges and Prospects,* 8(2) Mizan L. Rev. 300 (2014).

global economy in the twenty-first century. African countries are active participants in the global regime that protects and regulates the flow of FDI, contributing to the regime mostly as recipients of capital.[142] The North-South treaties have dominated the legal aspects of the investment regime while the South-South investment treaties have proliferated with African countries participating actively in the rapid conclusion of these treaties.[143] Thus, the argument advanced in this paper is that a unified regional or plurilateral agreement on investment will likely increase the transparency of government policies and create a level playing field for Africans and hopefully liberalise the pathways to FDI. The potential for advanced economic growth may well be found in regional integration as most African countries are small, thus, their individual bargaining power and economic feasibility in the global sphere are much limited.[144] The regional framework offers an opportunity for African states, irrespective of their size, to advance their common interests and balance the same with those of investors, and deliver a template of investment laws and policy that can regulate both intra-African investments and those from outside Africa.

Harmonization of laws is particularly important in order to promote cross-border transactions, regional integration and private-sector development.[145] Issues such as fragmented markets, small market sizes, and heterogenous regulatory environments can be overcome by harmonization and integration of regional agreements, while regional cooperation can prevent any race to the bottom in investment incentives.[146] A plurilateral investment code or treaty will definitely assist in simplifying investment rules and regulations thereby creating a more conducive environment for investment. It is believed that establishing a continental law would solve the problem of capital controls and liquidity problems that may arise when foreign investments flow into Africa, therefore raising low intra-African investment.[147]

It is important to note that the size of the market is not entirely a decisive factor for a foreign investor as he has to take into consideration different permutations. Policy credibility also influences the decision of foreign investors to invest in a country. Improving the economic ecosystem or providing incentives may not be enough to gain investor confidence if the country has a history of bad policies. A positive action in this regard will require 'policy harmonization which entails replacement of national policies with common policy and coordination of national polices'.[148] Countries must be unanimous on essential economic points. Therefore, signing a regional integration agreement serves to gain the trust of investors as the agreement will consolidate the efforts in the reforms made under

142 Odumosu-Ayanu, *supra* note 101, at 172.

143 *Id.*

144 Alemayehu Geda & Edris Hussein Seid, *The Potential for Internal Trade and Regional Integration in Africa,* 2 J. African Trade 20 (2015).

145 Adesegun A. Akin Olugbade, *Investment Law, Dispute Resolution, and the Development Promise: Back to the Future, in* Proceedings of the Annual Meeting 451 (American Soc'y of Int'l L., 2007).

146 Addis Ababa, *Investment Policies and Bilateral Investment Treaties in Africa-Implications for Regional Integration,* UN Econ. Commission for Africa (Aug. 2008), https://states.uneca.org/sites/default/files/PublicationFiles/eng_investment_landscaping_study.pdf.

147 *Id.*

148 Hailu, *supra* note 141, at 300, 307.

the regional agreement.

The non-ratification and implementation of existing agreements among African countries[149] is also a serious source of concern. It is therefore important that legal imperatives are taken into consideration so as to ensure the even distribution of the benefits of integration. The nexus between concepts of democratic governance and the effective operationalisation of integration initiatives cannot be overstated. Both go hand in hand. Thus, constitutionalism in African states must develop to minimise the undue attachment to national sovereignty. Integrational goals must be incorporated into the national development policy of all states and there must be a synergy between regional and national institutions.[150] African integration should promote adherence to democratic principles at the national level and also aim to create common standards based on state practices. This is because, without commitment to constitutional development at the national level, it is unrealistic to expect an effective transnational promotion and monitoring of democratic norms and standards.[151]

c. The Pan African Investment Code - A Step Towards the Right Direction?

The Pan African Investment Code (PAIC) is the codification of the continent's first model investment treaty. Though not officially adopted, the code represents an African Consensus on the shaping of international investment law.[152] The code has been drafted from the perspective of developing countries and least developed countries with a focus on sustainable development government goals.[153] It contains innovative features, specifically tailored to address Africa's needs and challenges, which presumably makes it a unique legal instrument. The development of PAIC was a response to the earlier mode of investment regulation which was considered unfavourable to Africa's developmental challenges.[154]

The investment regime espoused in PAIC is in tandem with the current global initiatives and the new generation of international investment agreements aimed at balancing the rights and obligations of host states and investors alike.[155] Though not a conventional investment treaty practice, it is a viable mechanism for striking an appropriate balance between investment protection and corporate responsibility in host states.[156] While this is a laudable innovation, this code presents some challenges to the actualisation of an effective multilateral framework in Africa. The choice of a soft law instrument will increase the fragmentation of the investment law regime in Africa and

149 Yoram Z. Haftel, *Ratification Counts: US Investment Treaties and FDI Flows into Developing Countries,* 17(2) Rev. Int'l Pol. Economy 348 (2010).

150 Fagbayibo, *supra* note 130, at 68.

151 *Id.* at 69.

152 Makana Moise Mbengue & Stefanie Schacherer, *The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime,* 18(3) J. World Inv. & Trade 415 (2017).

153 Erik Denters & Tarcision Gazzini, *The Role of African Regional Organizations in the Promotion and Protection of Foreign Investment,* 18(3) J. World Inv. & Trade 452 (2017).

154 *See generally* Mbengue & Schacherer, *supra* note 152.

155 *Id.*

156 *Id.*

in turn, impair one of the code's core objectives. It is a mere code and therefore not binding, only adding to a myriad of existing rules. It will also reduce the effectiveness of numerous substantive provisions of the current text, including but not limited to the ISDS which gives host states the discretion to implement the ISDS, thus, offering a middle-ground solution to African states that are either pro-ISDS or anti-ISDS.[157] Also, the exclusion of the controversial fair and equitable treatment provision in the code will probably be re-introduced in new bilateral investment treaties negotiated by African countries.[158]

The appropriateness of a legal structure to order intra-African economic relations have not been meaningfully debated. The code appears to proffer old solutions to a new problem. Much of its contribution is influenced by the experiences of states as recipients of investments and not as exporters of capital.[159] The code's restriction of foreign investors' rights with the aim of preserving host states' regulatory space would have been a desirable solution to the perceived one-sidedness of the investment protection regime because of the advantaged position occupied by foreign investors from the North. But as long as the objective of the code is to encourage intra-African investment, denying itself of some of the incentives Africa historically accorded to the foreign investor from the North may be depriving oneself of benefits for the perceived wrongs of another.[160] The over-appreciation of regulatory space in the intra-African investment context assumes that the challenges of regulating intra-African investments are similar to the regulation from outside the region.[161] Also, the lack of well-developed and efficient institutional arrangements to facilitate and consolidate the harmonization of business laws in Africa and the difficulty of enforcing laws across legal boundaries in the absence of continent-wide supra-national enforcement or interpretation mechanisms[162] is enough to scuttle the aims of the PAIC.

Beyond the PAIC, it is believed that the African Continental Free Trade Agreement (AfCFTA) will play an important role in navigating the continent towards economic development as it offers prospects of regional integration.[163] The AfCFTA could provide a legal premise to rewrite the rules of investment so as to encapsulate the peculiarities of the African states.[164] It is argued that the AfCFTA will build resilient economies by reducing excessive reliance on external funding, creating more value for local economies and invariably increasing potential for exports.[165] Advocates for

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157 *Id.*

158 Mouhamadou Madana Kane, *The Pan-African Investment Code: A Good First Step, but Much is Needed,* Columbia Academic Commons (2018), https://academiccommons.columbia.edu/doi/10.7916/D8H14HXV.

159 Kidane, *supra* note 83, at 571.

160 *Id.* at 571.

161 *Id.* at 571–72.

162 Akin-Olugbade, *supra* note 139, at 451.

163 African Union, *African Continental Free Trade Agreement* (Part II, Article 3) (adopted Mar. 21, 2018, entered into force May 30, 2019) https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf.

164 Katrin Kuhlmann & Akinyi Lisa Agutu, The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development, 51 Georgetown J. Int'l L. 784 (2020).

165 *See* African Union, *supra* note 163, at Part II, Article 3.

the treaty have argued that the institution of this regional trade agreement has the potential of increasing the value of FDIs in African countries.[166] Though there exists literature supporting the claim that regional trade agreements lead to increased extra-regional FDIs, the situation is more ambiguous in the case of intra-regional FDIs.[167] An important cause of this ambiguity lies in the fact that multinational firms are more concerned with cost advantages and the enjoyment of economies of scale rather than merely jumping tariff barriers.[168] According to Te Velde and Benzemer, though membership of a region is not significantly related to inward FDI, it could nonetheless be crucial in attracting more FDIs where there exists a sufficient number and level of trade and investment provisions covering critical issues such as: the description of the treatment of foreign firms and significant trade preferences.[169] Thus, the AfCFTA must consider such elements in order to attract good investments by providing a level playing ground for both potential investors and state interests. While the AfCFTA primarily addresses trade concerns, its Investment Protocol attempts to regulate intra-African investment relationships, which appears promising as AU member states may have to obviate the need to conclude new BITs once they come into force.[170] The AfCFTA Investment Protocol's pillars are investment promotion and facilitation; investment protection; investor's obligations and state commitments.[171] They stipulate requirements in investment protection and the upholding of state commitment to avoid the 'race to the bottom' approach to regulatory issues.[172] Indeed, AfCFTA offers African states the opportunity to produce a modern regional multilateral investment framework cemented by regional integration, and a golden opportunity to harmonise and coordinate investment policymaking. Moreover, the establishment of a consolidated and less fragmented investment framework could provide the 'quantum leap' for Africa while ensuring a balance between investment protection and the right of African states to regulate their public interests.[173]

The investment protocol (which is yet to be implemented) if well-established will go a long way towards winning the trust of investors by guaranteeing legal certainty on investments. It is anticipated that it will draw inspiration from the PAIC and the existing Regional Economic Cooperation (REC) treaties already in place. For Prudence Sebahizi, Chief Technical Advisor and Head of the Continental Free Trade Area (CFTA) Unit of the AU stated that; 'PAIC will inspire the drafters and negotiators of the AfCFTA Investment Protocol'.[174] PAIC provides for significant protections for

166 Dirk Willem Te Velde & Dirk Benzemer, *Regional Integration and Foreign Direct Investment in developing countries,* 15(2) Transnational Corps. 41–70 (2006).

167 *Id.*

168 Dirk Willem Te Velde, *Investment: Definitions and Economic Effects, in* AFCFTA INVESTMENT NEGOTIATIONS: NOTES ON CONCEPTS 13 (Max Mendez-Parra & Addis Ababa eds., May 2020).

169 *Id.*

170 Kuhlmann & Agutu, *supra* note 164, at 785.

171 Te Velde, *supra* note 168.

172 *Id.*

173 Hamed El-Kady, *The New Landmark African Investment Protocol: A Quantum Leap for African Investment Policy Making?*, Kluwer Arb. Blog (Sept. 24, 2020), https://arbitrationblog.kluwerarbitration.com/2020/09/24/the-new-landmark-african-investment-protocol-a-quantum-leap-for-african-investment-policy-making/.

174 Hogan Lovells, *Report on the African Continental Free Trade Agreement 2019: Implications for the Continent,* Hogan Lovells (London, Nov. 2019), https://states.hoganlovells.com/en/knowledge/topic-centers/-/media/2e3f5059b0c44b3c84d8e5bc375abbf8.ashx.

the state as well as for investors, a characteristic of modern trends in global investments, set to be emulated in the Investment Protocol.[175]

The widely clamoured Sustainable Development Goals (SDGs) have been incorporated over the years in investment treaties. Considering recent trends across the continent in the increased incorporation of Sustainable Development provisions in BITs such as the Morocco – Nigeria BIT and the SADC's Model BIT that associates Investment to Sustainable Development, it is expected that the AfCFTA will contain similar provisions.[176] With regards to the scope of the Investment Protocol, the definitions of the terms 'investor' and 'investment' will play a major role in determining the level of security accorded to investors. PAIC defines an investor as; 'any national, company or enterprise of a Member state or a national, company or enterprise from any other country that has invested or has made investments in a Member state', and an investment as a company or enterprise 'established, acquired or expanded' by an investor.[177] The AfCFTA is predicted not to drift too far away from these definitions, and by so doing, accords no preferential treatment to African investors.[178]

VI. Conclusion

Africa's regional agreements discussed in this article are not linear, however, they make good arguments for the facilitation of holistic investment rules at a multilateral level. In order to have a sustainable development of its economies, Africa has to devise ways of engaging and benefiting from the global capitalist system.[179] In addition to regional integration, a multilateral approach to investment making can facilitate a global approach to capital flows issues by taking into account country-specific macroeconomic and financial stability considerations in determining the appropriate policy response and the most important path to capital account liberalization. Such can only be effective when all African states have a unified commitment. Beyond a large market and rich natural resources, global standard practices and democratic norms must be adhered to. The continent's untapped development potential can only be reached through a strong political will to design and implement policies. Although the AfCFTA is expected to build on the considerable successes already achieved by Africa's regional economic communities; however, it fails to clarify how the overlapping treaty and investment regimes will be reconciled and harmonized. More so, it appears to be majorly premised on trade concerns. International Investment Law needs to envelop the broader developmental aspirations of Africans without losing focus on the practicalities and underpinnings of foreign investment.

175 *Id.* at 9.

176 *Id.* at 16.

177 African Union Commission, *Draft Pan-African Investment Code,* Art. 4 (Dec. 2016), https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf.

178 Kuhlmann & Agutu*, supra* note 164, at 786.

179 Samuel Oloruntoba, Regionalism and Integration in Africa: EU-ACP Economic Partnership Agreements and Euro-Nigeria Relations 192 (Palgrave Macmillan, 2016).