Investment Law and Treaty Reform In Africa: Fragments and Fragmentation

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Umoja ni nguvu, utengano ni udhaifu[1]
Swahili Proverb

This article reviews how African states have proceeded with foreign investment law and treaty reform since at least 2016. It highlights examples of reforms at the domestic, sub-regional, regional and global levels. It argues these reforms do not cohere around one approach and as such there is no distinctly African approach exemplified in these fragmented efforts. It notes that this may be because of the diversity of interests within, and between African states. This essay also discusses the reform efforts occurring at different levels – domestic, sub-regional and regional while also noting those in other regions and at the international level. The article includes a brief review of the Pan African Investment Code, (PAIC), that may very well form the basis of the African Continental Free Trade Agreement negotiations on investment. Ultimately, it welcomes the increased participation of African states in investment law reform but argues that African states can best advance their collective pan-African interest in harmony rather than disunity.

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1 Unity is strength, division is weakness.

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Introduction

This essay definitively shows how African states are proceeding with reforms of their foreign investment laws and treaties. From Algeria to Angola, Tunisia to Tanzania, states are reviewing and amending their investment laws and treaties.[1] Underpinning the reform is the classic tension between promotion and protection of investments. African states are engaged in a delicate dance between attracting foreign direct investment (FDI), on the one hand, and rebalancing rights and obligations between investors and states, on the other.[2]

These processes of reform are occurring at different levels – domestic, sub-regional, regional, and international.

Some commentators have referred to the continent-wide reform process as the "Africanisation" of international investment law.[3] By this, scholars mean that African states are taking control of the reform process and infusing it with an African approach to international investment law. This African approach is to be distinguished by its content, which on this argument reflects the interests of African states.[4]

1 *See, e.g.*, Hamed El-Kady, *Mustaqeem De Gama, The Reform of the International Investment Regime: An African Perspective*, 34 ICSID REV. –FOREIGN INV. L.J. 482–95 (2019).

2 *See generally* Tomoko Ishikawa, *Counterclaims and the Rule of Law in Investment Arbitration, Symposium on Investor Responsibility: The Next Frontier in International Investment Law*, 113 AJIL UNBOUND 33–37 (2019); Andrea Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17 LEWIS & CLARK L. REV. 361 (2013); Yaraslau Kryvoi, *Counterclaims in Investor-State Arbitration*, 21 MINN. J. INT'L L. 321 (2012). On African states' right to regulate, see Talkmore Chidede, *The Right to Regulate in Africa's International Investment Law Regime*, 20 OREGON REV. INT'L L. 437 (2019); Abdulqawi Yusuf, Balancing Rights and Obligations of States and Investors: Challenges Facing LDCs, Lecture at Cornell University (Oct. 23, 2017), https://www.cornell.edu/video/justice-abdulqawi-yusuf-challenges-facing-least-developed-countries; Donald McRae, *Balancing Rights and Obligations of States and Investors*, 111 PROCEEDINGS OF THE ASIL ANNUAL MEETING 44–46 (2017); Brigitte Stern, *The Future of International Investment Law: A Balance Between the Protection of Investors and the State's Capacity to Regulate, in* EVOLVING INTERNATIONAL INVESTMENT REGIME: EXPECTATIONS, REALITIES, OPTIONS (&eds., 2011).

3 Makane Mbengue & Stephanie Schacherer, *The 'Africanization' of International Investment Law,* 18 J. WORLD TRADE INV. 414 (2017); Makane Moïse Mbengue, *Africa's Voice in the Formation, Shaping and Redesign of International Investment Law*, 34 ICSID REV. 455–81 (2019); Olabisi D Akinkugbe, *Reverse Contributors? African State Parties, ICSID and the Development of International Investment Law*, 34 ICSID REV. – FOREIGN INV. L.J. 434–54 (2019).

4 *See*, *e.g.*, Meg Kinnear & Paul Jean Le Cannu, *Concluding Remarks: ICSID and African States Leading International Investment Law Reform*, 35 ICSID REV. –FOREIGN INV. L.J. 542 (2020); Gudrun Zagel, *IIAs and Sustainable Development: Are the African Approaches A Possible Way Out of the Global IIA Crises?*, AFRONOMICSLAW (Oct. 31, 2019), https://www.afronomicslaw.

My argument is that the ongoing reform processes do not reveal a distinctly African approach to reform. While there is increased participation of African states in the reform process at different levels, the participation does not cohere around one approach. Where there should be a coordinated approach guided by common principles and policy objectives, there is instead a fragmented ad hoc approach to reform. As a result, rather than designing a streamlined investment law framework that reflects African interests, African states are spinning an ever more complex web of interlocking rights and obligations.

The challenge in designing a coherent system may stem from the diversity of interests within, and between, African states. This challenge is perhaps best illustrated by the failure to agree on a binding Pan African Investment Code (PAIC).[5] The PAIC, an initiative of the African Union, which is often held up as an illustration of the "Africanisation" of investment law,[6] was conceived as a binding instrument, but is today a non-binding instrument. Critics of the PAIC also note that by adopting its provisions, African states would create two types of investor rights and obligations—one applicable to African investors, and another, more favourable, applicable to non-African investors. As Kidane says, it is difficult to see how this difference in treatment can be justified.[7]

The PAIC is likely to be the basis of the negotiations of the Investment Protocol of the African Continental Free Trade Agreement (AfCFTA) ("Investment Protocol").[8] The AfCFTA is a central pillar in Africa's regional integration project, and it follows that the Investment Protocol should encourage cross-border investment in Africa.9 Drafters of the Investment Protocol should be careful to overcome the shortcomings of the PAIC, especially the burden it places on African investors, and its provisions on dispute resolution.

The interaction between the Investment Protocol and existing laws and treaties should be a priority for policymakers. While the Investment Protocol can coexist with other investment laws and agreements, it should not burden states by multiplying their obligations. African policymakers may benefit from the experience of the European Union as it grapples to streamline its framework for international investment law, a

org/2019/10/31/international-investment-agreements-iias-and-sustainable-development-are-the-african-reform-approaches-a-possible-way-out-of-the-global-iia-crisis/.

5 See meeting documents at https://au.int/en/documents/20161231/pan-african-investment-code-paic.

6 *See* Mbengue, *supra* note 4.

7 Won Kidane, *Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code*, 50 The Geo. Wash. Int'l L. Rev. 538 (2018).

8 U.N. Economic Commission for Africa, Next Steps for the Africa Continental Free Trade Area: Assessing Regional Integration in Africa | Aria IX, E.19.II.K.3 (2019), https://www.uneca.org/sites/default/files/PublicationFiles/aria9_en_fin_web.pdf

9 *See* Agreement Establishing the African Continental Free Trade Area, https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf.

process which has culminated in EU Member States signing an agreement to terminate intra-EU BITs.[10]

This paper sets out my findings based on a review of the investment law and treaty reforms by African states at the domestic, sub-regional, regional and global levels in the last few years. I conclude that even though there does not yet exist an African approach to reform of international investment law, African states should strive to identify their collective interests. My objective is not to provide a comprehensive review of the reform process, but rather to illustrate the process by highlighting a few examples at each level of reform. The paper highlights the reforms in Part I, makes some observations on the reforms in Part II, before drawing some brief conclusions.

I. INVESTMENT LAW AND TREATY REFORM IN AFRICA – A REVIEW

A. Domestic Reform

Algeria[11], Angola,[12] Burkina Faso,[13] Côte d'Ivoire,[14] Egypt,[15] Namibia,[16] South Africa,[17] and Tunisia[18] have all amended their domestic investment laws in the last five years. Tanzania has not amended its investment law, but has enacted a series of amendments in other laws related to investment and investor-state dispute resolution,

10 EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties, European Commission (May 5, 2020), https://ec.europa.eu/info/publication/200505-bilateral-investment-treaties-agreement_en.

11 Promotion de l'investissement, Loi no2016–09 (Aug. 3, 2016) (Algeria) https://investmentpolicy.unctad.org/investment-laws/laws/204/algeria-promotion-de-i-investissement.

12 Private Investment Law, Law No. 10/18 (June 26, 2018) (Angola) https://investmentpolicy.unctad.org/investment-laws/laws/252/angola-private-investment-law.

13 Loi N° 038–2018/AN Portant Codes des Investissements au Burkina Faso (Oct. 30, 2018) (Burkina Faso) https://investmentpolicy.unctad.org/investment-laws/laws/276/burkina-faso-burkina-faso-investment-code-2018-.

14 Ordonnance N° 2018–646 du 1er août 2018 Portant Code des Investissements (Aug. 1, 2018) (Côte d'Ivoire) https://investmentpolicy.unctad.org/investment-laws/laws/284/c-ted-ivoire-code-des-investissements-c-te-d-ivoire.

15 Investment Law No. 27 of 2017 (May 31, 2017) (Egypt) (unofficial UNCTAD translation) https://investmentpolicy.unctad.org/investmentlaws/laws/167/egypt-investment-law-.

16 Investment Promotion Act, Law No. 199 of 2016, Official Gazette No. 6110 (Aug. 31, 2016) (Namibia) https://investmentpolicy.unctad.org/investment-laws/laws/178/namibia-investment-promotion-act.

17 Protection of Investment Act 22 of 2015, GN 39514 of GG 606 (15 Dec. 2015) (S. Afr.) https://investmentpolicy.unctad.org/investment-laws/laws/157/south-africa-investment-act.

18 Loi de l'investissement 2016, Loi n°2016–71 (Sept. 30, 2016) (Tunisia) https://investmentpolicy.unctad.org/investment-laws/laws/179/tunisia-loi-de-l-investissement.

that are illustrative of its approach to reform. The laws in this section are reviewed in alphabetical order of the name of the state. This part of the paper is not intended to be a comprehensive review of the laws. Instead, it highlights the salient features of each legal reform to facilitate comparison. I begin by examining domestic law reforms. Domestic laws may be considered a good indicator of a state's investment policy because they are unilateral, and not a product of negotiations at bilateral and multilateral levels, where the outcome may very well be compromise between the negotiating parties.

Algeria (2016)

The Algerian law of 2016 replaced a more restrictive regime, and clearly aims at promoting investment. It contains a broad definition of investment and a broad provision on fair and equitable treatment,[19] not a restrictive one as can be seen in newer generations of laws and treaties. While the law no longer contains a provision on national treatment, it does not prohibit investors from benefitting from a national treatment clause contained in another instrument, for example a bilateral investment treaty (BIT). The law provides for dispute resolution in Algerian domestic courts, unless there is an applicable bilateral or multilateral treaty providing for arbitration or conciliation, or the investor and state have agreed to *ad hoc* arbitration.[20] The 2016 law is applicable to both domestic and foreign investors, and does not contain any provisions on sustainable development.

Angola (2018)

Angola's private investment law of 2018 applies to both domestic and foreign investors, but precludes companies which are majority owned by the state, and sectors of the

19 Promotion de l'investissement, Loi n°2016–09, art. 21 (Aug. 3, 2016) (Algeria) ("Sous réserve des conventions bilatérales, régionales et multilatéral signées par l'État algérien, les personnes physiques et morales étrangères reçoivent un traitement juste et équitable au regard des droits et obligations attachés a leurs Investissements.").

20 *Id.* art. 24 ("Tout différend né entre l'investisseur étranger et l'État algérien, résultat du fait de l'investisseur ou d'une mesure prise par l'État algérien à l'encontre de celui-ci, sera soumis aux juridictions algériennes territorialement compétences, sauf conventions bilatérales ou multilatérales conclues par l'État algérien, relatives à la conciliation et à l'arbitrage ou accord avec l'investisseur stipulant une clause compromissoire permettant aux parties de convenir d'un compromise par arbitrage ad hoc.").

economy governed by special law.[21] Like the Algerian law it focuses on attracting investment, but goes further by specifying benefits to investors depending on priority sectors and regions.[22] So, while the law does not contain specific wording on sustainable development, it does provide for benefits and concessions for certain social and economic goals, such as growth and diversification of the economy and development of the most deprived areas of the country.[23] On dispute resolution, the Angolan law guarantees access to domestic courts and all forms of alternative dispute resolution.[24] The law contains substantive provisions on expropriation (with compensation),[25] and stipulates that investors must abide by domestic law,[26] but it does not contain other familiar provisions such as fair and equitable treatment or national treatment.

Burkina Faso (2018)

Burkina Faso enacted a new investment law in 2018. The Burkinabè law clearly states that its objective is to promote investments which contribute to economic and social development in Burkina Faso.[27] The law specifies the activities that it covers and those that it excludes.[28] Like the Angolan law, the activities include those related to development in remote regions. Investors can also access special privileges which are granted by the ministries of industry and finance — this leaves room for ministerial discretion and allows investors to negotiate privileges on a case-by-case basis. The Burkinabè law contains a broad provision on fair and equitable treatment, but restricts national treatment to commercial and intellectual property.[29] On dispute resolution, the Burkinabè law provides for international arbitration for foreign investors at the

21 Private Investment Law, Law No. 10/18, art. 2 (June 26, 2018) (Angola).
22 *Id.* arts. 28–29.
23 *Id.* art. 22.
24 *Id.* art. 15.
25 *Id.* art. 14.
26 *Id.* arts. 13, 17, 18.
27 Loi No 038–2018/AN Portant Codes des Investissements au Burkina Faso, art. 2 (Oct. 30, 2018) (Burkina Faso) ("Elle a pour objet la promotion des investissements productifs concourant au développement économique et social du Burkina Faso.").
28 *Id.* arts. 3–4.
29 *Id.* art. 12 ("Les entreprises étrangères bénéficient de la même protection que les entreprises burkinabè, en ce qui concerne les propriétés commerciales et la propriété intellectuelle. Elles jouissent d'un traitement juste et équitable, d'une sécurité et d'une protection constante, excluant toute mesure injustifiée ou discriminatoire qui pourrait entraver, en droit ou en fait, la gestion, l'entretien, l'utilisation, la jouissance ou la liquidation de leurs Investissements.").

Common Court of Justice and Arbitration of the Organisation for the Harmonisation of Business Law (OHADA), or ICSID.[30]

Côte d'Ivoire (2018)

In Côte d'Ivoire, the 2018 investment law clearly states that its objective is to promote sustainable development through profitable and socially responsible investments. It goes further to include promotion of local content, regional development, and competitiveness as objectives.[31] The law contains several options for tax incentives, and other benefits to investments based on the region of the investment. The specific benefits and excluded categories of investments are to be defined by decree. The Ivorian law contains a broad definition of fair and equitable treatment, subject only to provisions in applicable bilateral and multilateral investment treaties.[32] The law also prohibits expropriation, except for public interest subject to fair and prior compensation.[33] Notably, the law contains a chapter on investor obligations, which stipulates that investors must respect laws and regulations in force on human rights, social responsibility, labour law, environmental protection, taxation and the fight against corruption and illegal activities.[34] Finally, the law provides for dispute resolution using the UNCITRAL Conciliation Rules or arbitration under the Common Court of Justice and Arbitration of the Organisation for the Harmonisation of Business Law (OHADA).[35]

30 *Id.* arts 3–4.

31 Ordonnance N° 2018–646 du 1er août 2018 Portant Code des Investissements, art. 3 (Aug. 1, 2018) (Côte d'Ivoire) (Le présent code a pour but de favoriser: le développement durable par des Investissements productifs et socialement responsables en Côte d'Ivoire, le développement régional, le contenu local, la compétitivité des entreprises.).

32 *Id.* art. 25 ("Sous réserve des conventions bilatérales, régionales et multilatérales signées par l'État, les personnes physiques et morales étrangères reçoivent un traitement juste et équitable au regard des droits et obligations attachés à leurs investissements.»).

33 *Id.* art. 33 (Aucun investisseur ne peut être privé de la propriété de ses investissements si ce n'est pour cause d'utilité publique et sous la condition d'une juste et préalable indemnisation.).

34 *Id.* art. 33 (L'investisseur doit respecter les lois et règlements en vigueur relatifs notamment aux droits de la personne, au droit du travail, à la responsabilité sociétale, à la protection de l'environnement, à la fiscalité et à la lutte contre la corruption et les activités illicite.).

35 *Id.* art. 50.
"Tout différend entre l'État de Côte d'Ivoire et l'investisseur de l'interprétation ou de l'application des dispositions du présent code est réglé selon les modalités suivantes:
Les parties s'efforceront de résoudre par des négociations amiables, les divergences de point de vue et les différends auxquels pourront donner lieu, entre elles, l'interprétations ou l'exécution du présent code. Lorsque les parties concluent un accord de transaction, ledit accord tient lieu de loi à leur égard et elles s'engagent à l'exécuter de bonne foi et dans les meilleurs délais.

Egypt (2017)

The Egyptian law dates to 2017 — after the revolution — and applies to both domestic and foreign investors. It seeks to promote investment that leads to comprehensive and sustainable development.[36] The law provides certain investment guarantees to foreign investors including fair and just treatment, national treatment, and non-discrimination and non-arbitrariness in decisions — the wording of these guarantees remain broad and vague.[37] The law contains a chapter on social responsibility of the investor which provides that the investor may dedicate a tax-deductible portion of its profits — not exceeding 10% — towards projects that contribute to the goal of comprehensive sustainable development.[38] The law contains detailed provisions on

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A défaut de parvenir à un règlement amiables dans un délai qui ne peut excéder douze mois, le règlement de la Commission des Nations Unies pour le droit commercial international sur la conciliation s'applique.

Toutefois, les parties peuvent convenir de soumettre leur différend en règlement au Centre d'Arbitrage de la Cour Commune de Justice et Arbitrage d l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires.

L'investisseur doit au moment de l'obtention de l'agrément remettre à l'agence chargée de la promotion des investissements une lettre d'engagement portant sur les modalités de règlement de litige qu'il choisit. Cet engagement vaut renonciation au recours à tout autre centre d'arbitrage pour le règlement du litige qui l'oppose à l'État.»

36 Investment Law No. 27 of 2017, art. 2 (May 31, 2017) (Egypt) (unofficial UNCTAD translation) ("Investment in the Arab Republic of Egypt aims at improving the national economic growth rates and the domestic production rates, as well as provision of employment opportunities, promotion of exports, and boosting of competitiveness which contribute to achieving the comprehensive and sustainable development.").

37 *Id*. art. 3 ("All the investments established within the Arab Republic of Egypt shall receive fair and just treatment. The State shall ensure to the foreign investor the same treatment given to the national investor. Under a decree issued by the Cabinet of Ministers, an exception can be made granting the foreign investors a preferential treatment in application of the principle of reciprocity. The invested funds shall not be governed by any arbitrary procedures or discriminatory decisions.").

38 *Id.* art. 3.
"Toward achieving the goals of the comprehensive and sustainable development, the Investor may dedicate a percentage of his annual profits to create a social development system, outside of his Investment Project, by participating in the following fields, in whole or in part:

1. Take the necessary action to protect and enhance the environment;
2. Provide services or programs in the areas of healthcare, social care, or cultural care, or other development areas;
3. Support the technical education or the funding of research, studies, and the awareness campaigns aiming at developing and improving the production, in agreement with any of the universities or scientific research institutions; and
4. Training and scientific research.

The amounts spent by an Investor on any of the fields provided for in the previous paragraph shall not exceed 10% of his annual profits after excluding the costs and expenses which are deductible in accordance with Paragraph (8) of Article (23) of the Income Tax Law promulgated by Law No. 91 of 2005. In coordination with the concerned ministries, the Competent Minister may dispute resolution, and a foreign investor has several options for dispute resolution including, amicable settlement of the dispute through negotiation, a Grievance Committee, a Ministerial Committee on investment dispute resolution, a Ministerial committee on investment contracts dispute resolution, or through arbitration or mediation as agreed between the investor and the state. The parties may also wish to make use of an arbitration and mediation centre created by law, with its seat in Cairo.[39]

Namibia (2016)

The title of the Namibian law — *Namibia Investment Promotion Act 2016* — intimates the objective of the law, which is to promote, not protect, investment. Its stated aims include to provide an effective dispute resolution mechanism involving investment, and to promote sustainable economic development through domestic and foreign investment.[40] The law contains some investor obligations, including that investors must comply with Namibia law at all times.[41] The law foresees its incompatibility with other obligations that Namibia may have, and stipulates that act may not apply where there exists a BIT or other investment agreement.[42] Finally on dispute resolution, a foreign investor may choose mediation and the minister responsible for investment would designate a mediator. Alternatively, the foreign investor may make use of domestic courts. The law grants exclusive jurisdiction to the domestic courts, but the minister and investor may agree in writing to arbitration under the Namibian Arbitration Act 1965.

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create a list of the best Investment Projects that conduct social development activities, whether by the geographic area or sector or other criteria, and announce this list to the public. In all cases, it is prohibited to use the projects, programs, or services delivered under the social responsibility umbrella to pursue political, party-related, or religious purposes or which entail discrimination among the citizens. The Executive Regulations of this Law indicates the controls and rules necessary to enforce the social responsibility system."

39 *Id.* arts 82–91.

40 Investment Promotion Act, Law No. 199 of 2016, Official Gazette No. 6110, Preambular Paragraph, Section 2 (Aug. 31, 2016) (Namibia) ("To provide for the promotion of sustainable economic development and growth through the mobilisation and attraction of foreign and domestic investment to enhance economic development, reduce unemployment, accelerate growth and diversify the economy; to provide for reservation of certain economic sectors and business activities to certain categories of investors; to provide for dispute resolution mechanisms involving investment; and to provide for incidental matters.").

41 *Id.* at Section 18.

42 *Id.* at Section 20.

South Africa (2015)

The title of the South African Act — *South African Protection of Investment Act 2015* — contrasts with the title of the Namibian Act, although its provisions focus on both protection and promotion. The act was enacted after the South African government reviewed its trade and investment policies and announced that it would terminate its BIT programme and withdraw ISDS from investors, replacing it with domestic dispute resolution. The law focuses on the relationship between the South African Constitution and the promotion and protection of investors and investments. In it preamble, the law references the goal of achieving a balance of rights and obligations that apply to all investors, the need to promote rights enshrined in the South African Constitution, the importance of investment in sustainable development, the obligation to take measures to protect and advance persons or categories of persons historically disadvantaged due to discrimination, the government's right to regulate, and the government's commitment in international law to protect human rights, fundamental freedoms and people's resources.[43]

That protection of investment must comply with the Constitution and that the state has a right to regulate are emphasised in the Act.[44] Instead of fair and equitable treatment, the act provides for fair administrative treatment — which is also referenced in the SADC Model BIT as we will see below — by which the government is obliged to ensure that administrative, legislative and judicial processes are not arbitrary and do not deny administrative or procedural justice.[45] Investments must be created in compliance with South African laws, and the Act states that it does not create a right for an investor to establish an investment. The Act provides for national treatment, but only in like circumstances, and specifies certain exceptions, such as deriving benefits from tax agreements, or government procurement services.[46] Foreign investors have a right to security for their investments in accordance with the minimum standard under international law.[47] On dispute resolution, the foreign investor may have recourse to mediation and domestic courts and tribunals. Once the investor has

43 Protection of Investment Act 22 of 2015, GN 39514 of GG 606, Preambular Paragraphs (15 Dec. 2015) (S. Afr.).

44 *Id.* at Section 4. ("The purpose of this Act is to: a. protect investment in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors; b. affirm the Republic's sovereign right to regulate investments in the public interest; and c. confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.").

45 *Id.* at Section 6.

46 *Id.* at Section 8.

47 *Id.* at Section 9.

exhausted local remedies, the state may consent to state-state arbitration with the home state of the investor.[48]

Tunisia (2016)

In Tunisia, the objective of the law clearly links investment and sustainable development.[49] The law contains a broad provision for national treatment,[50] and while the provision refers to 'like circumstances,' it does not specify any conditions to evaluate what those circumstance might be, in contrast to the South African law. The law contains obligations on the investor to comply with domestic laws in force, including laws on transparency, health, labour, competition, environment, and protection of natural resources.[51] On dispute resolution, the law provides for conciliation using the UNCITRAL Rules for conciliation — this is similar to the Ivorian law. If conciliation does not result in the resolution of the dispute then the investors and state may agree to international arbitration. If the dispute has an international character, the parties may agree to international arbitration via an arbitration agreement under the Tunisian investment law. Otherwise, the dispute will be resolved by the domestic courts.

Tanzania (2017 onwards)

Finally, we look at the special case of Tanzania. While Tanzania has not enacted a new investment law, it has enacted new laws to proclaim its permanent sovereignty over its natural resources. These laws have an impact on ISDS because they alter

48 *Id.* at Section 13(5).

49 Loi de l'investissement 2016, Loi n°2016–71, art. 1 (Sept. 30, 2016) (Tunisia).
«La présente loi a pour objectif la promotion de l'investissement et l'encouragement de la création d'entreprises et de leur développement selon les priorités de l'économie nationale, notamment à travers: l'augmentation de la valeur ajoutée, de la compétitivité et de la capacité d'exportation de l'économie nationale et de son contenu technologique aux niveaux régional et international, ainsi que le développement des secteurs prioritaires; la création d'emplois et la promotion de la compétence des ressources humaines; la réalisation d'un développement régional intégré et équilibré; la réalisation d'un développement durable.»

50 *Id.* art. 7 («Dans des situations comparables, l'investisseur étranger jouit d'un traitement national non moins favorable à l'investisseur tunisien en ce qui concerne les droits et les obligations prévus par la présente loi.»).

51 *Id.* art. 10 («L'investisseur doit respecter la législation en vigueur relative notamment à la concurrence, la transparence, la santé, le travail, la sécurité sociale, la protection de l'environnement, la protection des ressources naturelles, la fiscalité et l'aménagement territorial et de l'urbanisme. Il doit en outre fournir toutes les informations demandées dans le cadre de l'application des dispositions de la présente loi tout en garantissant la fiabilité, l'exactitude et l'exhaustivité des informations fournies.»).

the balance between investor and state obligations and take away the option of international arbitration for disputes that involve Tanzanian natural resources. The first act is the Natural Wealth and Resources (Permanent Sovereignty) Act No 5 of 2017 by which Tanzania asserts its sovereignty over its natural resources and stipulates that the resources should be exploited for the benefit of the Tanzanian people. The law states that the authority for this permanent sovereignty lies in international law and the Tanzanian constitution and includes the text of the UN General Assembly Resolution on Permanent Sovereignty over Natural Resources as its First Schedule, and the Charter of the Economic Rights and Duties of States as its Second Schedule.[52]

The act includes a section on the protection of permanent sovereignty which stipulates that '*permanent sovereignty over natural resources shall not be the subject of proceedings in any foreign court or tribunal.*'[53] It goes on to say that disputes arising from natural wealth and resources '*shall be adjudicated by judicial bodies or other organs established in the United Republic and in accordance with laws of Tanzania.*'[54] The Act also grants the National Assembly the power to review agreements or arrangements related to natural wealth and resources.[55]

The second act is the Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act.[56] It asserts Tanzania's permanent sovereignty over its natural resources, and reiterates the power of the National Assembly to review contracts related to natural wealth and resources and ensure they have been '*concluded in good faith and fairly and, at all times, observe the interests of the People and the United Republic*.'[57] Should the National Assembly find that certain provisions of the agreement or arrangement are unconscionable, it may advise the Government to re-negotiate the agreement or arrangement. In turn the Government shall serve notice of intent to negotiate. The types of terms that can be deemed unconscionable include those that restrict the state's right to exercise permanent sovereignty over its wealth, natural resources and economic activity,[58] and those that subject the state

52 U.N. GAOR, 29th Sess., Supp. No. 31 at 50, U.N. Doc. A/RES/3281(XXIX) (Dec. 12, 1974).

53 The Natural Wealth and Resources (Permanent Sovereignty) Act, No. 5 of 2017, Section 11(1) (July 7, 2017) (Tanz.).

54 *Id.* at Section 11(2).

55 *Id.* at Section 12.

56 The Natural Wealth and Resources Contracts (Review and Re-Negotiation of Unconscionable Terms) Act, No. 6 of 2017 (July 7, 2017) (Tanzania).

57 *Id.* at Section 4(2).

58 *Id.* at Section 6(2)(a).

to the jurisdiction of foreign laws and fora.[59] If the state and the other party cannot agree on renegotiating the terms, they shall cease to have effect and shall be treated as if they had been expunges.[60]

The third act is the Written Laws (Miscellaneous Amendments) Act[61] which amends the Tanzanian Mining and Petroleum laws to give the Tanzanian government greater control and oversight over natural resources. It amends Section 47 Petroleum Act and Section X Mining Act to stipulate that agreements shall observe certain principles, including, favouring the interest of the nation, and, sustainability and care for the environment.[62]

The fourth act is the Public Private Partnership Amendment Act[63] which eliminates international arbitration and provides that any disputes that arise in the course of the agreement shall be settled by negotiation or '*in the case of mediation or arbitration, be adjudicated by judicial bodes or other organs established in the United Republic and in accordance with the laws of Tanzania*.'[64]

The reforms in Tanzania have extended to its BIT programme, which will be discussed in the section below.

B. Bilateral Reform

A review of ten of the latest BITs signed by African countries[65] available in either English or French on the UNCTAD Investment Policy Hub reveals that while there has been a change in some of the language in the treaties as a reaction to criticism of earlier generations of treaties, the changes have not been coherent even within states.

While there are generally references to sustainable development, they usually appear in the preambular paragraphs and are not reproduced in the substantive

59 *Id.* at Section 6(2)(i).

60 *Id.* at Section 7.

61 The Written Laws (Miscellaneous Amendments) Act, No. 2 of 2017 (Mar. 3, 2017) (Tanzania). *See also* Special Bill Supplement, No. 4 (June 28, 2017) (Tanzania).

62 The Written Laws (Miscellaneous Amendments) Act, No. 2 of 2017, Section 30 (Mar. 3, 2017) (Tanzania). *See also* Special Bill Supplement, No. 4 (June 28, 2017) (Tanzania).

63 The Public Private Partnership (Amendment) Act, No. 9 of 2018 (Sept. 25, 2018) (Tanzania).

64 *Id.* at Section 14.

65 Japan–Morocco BIT 2020; Brazil–Morocco BIT 2019; Burkina Faso–Turkey BIT 2019; Cabo Verde–Hungary BIT 2017; Morocco–Congo BIT 2018; Brazil–Ethiopia BIT 2018; Mali–UAE BIT 2018; Mali–Turkey BIT 2018; Rwanda–UAE BIT 2017; Burundi–Turkey BIT 2017.

provisions.[66] One of the treaties contains a reference to the rebalancing of rights and obligations in its preamble.[67] Most of the preambular paragraphs in the treaties contain provisions on a state's right to regulate with specific reference to safeguarding public health, the environment and labour.[68] These concerns are repeated in the substantive provisions which stipulate that the encouragement of investment should not lead to a relaxation of health, safety, environmental and labour standards.[69]

Classic provisions on national treatment, most favoured nation treatment, and fair and equitable treatment are recurring. Sometimes there are restrictions so that national treatment only applies in 'like circumstances', with an indication of what those might be.[70] At least one treaty excludes national treatment.[71] On MFN, several treaties restrict access to dispute resolution mechanisms in other investment treaties.[72] The FET clause has been restricted in various ways, including by equating it to the minimum standard under customary international law,[73] by providing a list of measures that may constitute a breach of FET,[74] and by defining FET as access to justice through tribunals and laws.[75] One treaty leaves out FET altogether,[76] and two treaties mention FET in the preambular paragraph.[77]

Only two treaties contain provisions on anti-corruption,[78] and the two treaties

66 *See, e.g.*, Cabo Verde–Hungary BIT, Preambular Paragraph; Congo–Morocco BIT, Preambular Paragraph; Brazil–Ethiopia BIT, Preambular Paragraph; Rwanda–UAE BIT, Preambular Paragraph.

67 Rwanda–UAE BIT, Preambular Paragraph.

68 *See, e.g.*, Japan–Morocco BIT, Preambular Paragraph; Burkina Faso–Turkey BIT, Preambular Paragraph; Cabo Verde–Hungary BIT, Preambular Paragraph; Burundi–Turkey BIT, Preambular Paragraph.

69 *See, e.g.*, Japan–Morocco BIT, art. 19; Burkina Faso–Turkey BIT, art. 5; Cabo Verde–Hungary, art. 2; Brazil–Ethiopia BIT, art. 16; Mali–UAE BIT, art. 18; Mali–Turkey BIT, art. 5; Rwanda–UAE BIT, art. 9.

70 Japan–Morocco BIT, art. 3; Brazil–Morocco BIT, art. 5; Burkina Faso–Turkey BIT, art. 4; Cabo Verde–Hungary BIT, art. 4; Congo–Morocco BIT, art. 3; Brazil–Ethiopia BIT, art. 5; Rwanda–UAE BIT, art. 5; Burundi–Turkey BIT, art. 4.

71 Mali–UAE BIT.

72 Japan–Morocco BIT, art. 3; Brazil–Morocco BIT, art. 5; Burkina Faso–Turkey BIT, art. 4; Cabo Verde–Hungary BIT, art.4; Congo–Morocco BIT, art. 3; Brazil–Ethiopia BIT, art. 6; Mali–Turkey BIT, art. 4.

73 Japan–Morocco BIT, art. 4 (includes definition of customary international law); Burkina Faso–Turkey BIT, art.3; Rwanda-UAE BIT, art. 6.

74 Cabo Verde–Hungary BIT (parties may review content of obligation to provide FET); Rwanda–UAE BIT, art. 4.

75 Mali–UAE BIT, art. 3.

76 Brazil–Morocco BIT.

77 Mali–Turkey BIT, Preambular Paragraph; Burundi–Turkey BIT, Preambular Paragraph.

78 Japan–Morocco BIT, art. 7; Brazil–Ethiopia BIT, art. 15.

with Brazil contain a reference to corporate social responsibility, which is linked to sustainable development, respect for human rights, and adhering to voluntary international standards.[79]

On dispute resolution, most of the treaties provide a menu of options for investors that include international arbitration. The provisions provide for amicable settlement, leading to a choice between domestic courts and international arbitration at ICSID, or *ad hoc* arbitration using UNCITRAL Rules.[80] At least one treaty lists local arbitration institutions as options.[81] At least two treaties stipulate time limits for making claims,[82] and one provides that a non-disputing contracting party may make submissions on the interpretation of the treaty.[83] One treaty reiterates that arbitrators should be independent.[84]

The two treaties with Brazil do not allow investors access to ISDS. Instead they provide elaborate mechanisms for the amicable settlement of disputes between the parties through conciliation, mediation and negotiation, which can be escalated to state-state arbitration should they be unsuccessful.[85]

These examples do not reveal any uniformity in the approach that African states take in negotiating new BITs. Rather, they reveal a diversity of approaches between and even within states, as observed in the three Morocco and two Mali BITs. An example of potential internal investment policy incoherence is provided by Burkina Faso, which appears to have concluded its BIT with Turkey after terminating its BIT with the Netherlands, but without developing an investment policy in the interim — at least not one that it made public. The point here is not that Burkina Faso should not conclude any more BITs, but rather that after it has identified the potential pitfalls with the provisions in BITs — as it had with its BIT with the Netherlands — it should only conclude additional BITs after a developing an investment policy.

As noted in the previous section, Tanzania' reforms have extended to its BITs. In September 2018, Tanzania notified the Netherlands that it intended to terminate the Netherlands-Tanzania BIT.[86] The termination clause in the treaty stipulated

79 Brazil–Morocco BIT, art. 13; Brazil–Ethiopia Article, art. 14.

80 Cabo Verde–Hungary BIT, art. 9; Congo–Morocco BIT, art. 9; Mali–UAE BIT, art. 11; Mali–Turkey BIT, art. 10; Burundi–Turkey BIT, art. 12.

81 Burkina Faso–Turkey BIT, art. 10.

82 Japan–Morocco BIT, art. 16; Cabo Verde–Hungary BIT, art. 9.

83 Japan–Morocco BIT, art. 16.

84 Cabo Verde–Hungary BIT, art. 9.

85 Brazil–Morocco BIT, art. 19–20; Brazil Ethiopia BIT, art. 23–24.

86 Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom

that if either party intended to terminate the BIT, it had to do so 6 months before the expiry date of 1 April 2019, otherwise the BIT would tacitly renew for another ten years.[87] The Netherlands-Tanzania BIT had a 15-year survival, or sunset clause, so Dutch investors have protection under the old treaty until 1 April 2034.[88] Some commentators view Tanzania's termination of its BIT with the Netherlands as a triumph for the state, and for civil society, which had been at the forefront of the campaign to terminate the treaty.[89] If one considers the onerous termination provisions, and the broad rights granted to investors in the treaty, it is obvious why terminating the BIT would be attractive. But, that picture is incomplete. Tanzania terminated the treaty in a context where the Netherlands had started negotiations with Tanzania, Burkina Faso, Uganda and Nigeria on the basis of a new progressive Dutch Model BIT that *inter alia* rebalances rights between investors and states and contains provisions on sustainable development. Tanzania eschewed the opportunity to negotiate a new BIT with more favourable terms, in favour of guaranteeing the status quo for another fifteen years. It is difficult to see how this can be viewed as a positive outcome for the state.

Tanzania is not the only African country to terminate its BIT with the Netherlands. South Africa[90] and Burkina Faso[91] have also done so. But, of the three countries, only South Africa has done so after a review of its bilateral investment treaty framework.[92]

C. Sub-regional and Regional Reform

of the Netherlands and the United Republic of Tanzania, July 31, 2001 [hereinafter Netherlands–Tanzania BIT].

87 Netherlands-Tanzania BIT, art. 14(2).

88 Netherlands-Tanzania BIT, art. 14(3), See also Tanzania Faces a New ICSID Claim under Terminated Netherlands BIT, Kluwer Arbitration Blog (June 21, 2019), http://arbitrationblog.kluwerarbitration.com/2019/06/21/tanzania-faces-a-new-icsid-claim-under-the-terminated-netherlands-bit-2/?doing_wp_cron=1594601503.9595611095428466796875
5.

89 *See, e.g.,* James Thuo Gathii, *Understanding Tanzania's Termination of Its BIT With the Netherlands in Context,* AfronomicsLaw (Apr. 1, 2019), https://www.afronomicslaw.org/2019/04/01/understanding-tanzanias-termination-of its-bit-with-the-netherlands-in-context/?fbclid=IwAR1TM0qjNg7wOQ2Q4RcEREC_r8sUIVD-NBk_cenOmXIktWiNx0EDjzcyZztw.

90 Terminated April 30, 2014. Netherlands–South Africa BIT, art. 14(3), Sept. 5, 1995 (containing a "survival" or "sunset" clause for 15 years).

91 Terminated January 1, 2019. Burkina Faso–Netherlands BIT, art. 14(3), Oct. 11, 2000 (also containing a "survival" or "sunset" clause for 15 years).

92 South Africa has terminated its BITs with Argentina, Austria, Belgium–Luxembourg Economic Union, Denmark, France, Germany, Italy, Spain, Switzerland and the United Kingdom. *See* South African Department of Trade and Industry, Government Position Paper on Bilateral Investment Treaty Policy Framework Review (Pretoria, June 2009), http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090626trade-bi-lateralpolicy.pdf.

There is great divergence in the reform at the sub-regional and regional levels in Africa. Although some sub-regions have taken inspiration from others — the East African Community has drawn on the work of South African Development Community — reform at the regional level remains fragmented. This section highlights the reforms at the African Union (AU), East African Community (EAC), Common Market for Eastern and Southern Africa (COMESA), Economic Community for West African States (ECOWAS), and Southern African Development Community (SADC).

The reforms by the regional economic organisations (RECs) aim to address the concerns raised by member states on rebalancing the rights and obligations between investors and states, linking investment to sustainable development, tightening the broad definitions of provisions like FET, and restricting, or removing, access to investor-state dispute resolution.

African Union Pan African Investment Code (PAIC)

AU member states adopted the Pan African Investment Code (PAIC) in 2017. Initially intended as a binding instrument, it was adopted as a non-binding instrument as states could not reach consensus on its provisions. The PAIC can be considered as the first pan-African expression of investment policy. [93] As stated in the introduction to this paper, the PAIC has been hailed as an illustration of the "Africanisation" of international investment law in Africa, but its critics, including this author, are concerned that it creates a two-track system of investor protection that disadvantages African investors.[94]

The PAIC was drafted in the context of pre-existing rights and obligations expressed in other laws and treaties across the continent, and member states were concerned about how this new instrument would related to existing agreements. The solution was a provision that explicitly states that the PAIC would not interfere with the rights and obligations of member states arising from other investment obligations.[95]

The text of the PAIC reveals that its drafters were ambitious in their quest to reshape international investment law in Africa, for example in restricting protection

93 Adopted in October 2017 by the Specialised Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration of the African Union.

94 Won Kidane, *Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code*, 50 The Geo. Wash. Int'l L. Rev. 538 (2018).

95 African Union, Pan African Investment Code, art. 3 (Oct. 2017) [hereinafter PAIC].

to investments and investors that contribute to sustainable development.[96] The PAIC repeates references to sustainable development in its preambular paragraphs and throughout its text.

The PAIC excludes the FET on the basis of the controversy of its content and uncertainty in its interpretation.[97]The FET provision has been the source of great controversy in its interpretation, especially where it has been broadly drafted.[98] In this context, elimination of FET from the PAIC seems progressive. But, if one considers that investors should still be entitled to protection that is the equivalent to the minimum standard under international law, it is not immediately clear why the PAIC attempts to exclude this protection for African investors. As other commentators have noted elsewhere,[99] it is possible to clarify the interpretation of the FET standard by equating it to the minimum standard under customary international law, or providing an interpretation of the FET in the text of the instrument.

The PAIC deals with another problematic provision, MFN, by specifying that it does not extend to access to dispute settlement provisions in other treaties.[100] It also contains provisions on national treatment, but with exceptions.[101]

A unique feature of the PAIC is its chapter on 'development related issues',[102] which contains performance requirements, and a list of investment sectors that are open for liberalisation.[103] The PAIC also contains a comprehensive chapter on investor obligations.[104] These include a framework for corporate governance, socio-political obligations, bribery, corporate social responsibility, obligations as to the use of natural resources, and business ethics and human rights.[105]

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96 PAIC, art. 1.

97 Makane Moïse Mbengue, *Africa's Voice in the Formation, Shaping and Redesign of International Investment Law*, 34 ICSID Rev. 455, 472 (2019).

98 *See generally* Ioana Tudor, The Fair and Equitable Treatment Standard in the International Law of Foreign Investment (2008); Fair and Equitable Treatment Standard in International Law (OECD Working Papers on International Investment, 2004/03, 2004), https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf.

99 Won Kidane, *Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code*, 50 The Geo. Wash. Int'l L. Rev. 538 (2018).

100 PAIC, art. 8.

101 PAIC, art. 9–10.

102 PAIC, chpt. 3.

103 PAIC, art. 17-18.

104 PAIC, chpt. 4.

105 PAIC, arts. 19–24.

The PAIC also contains a chapter on "investment related issues",[106] which include *inter alia* competition law and policy, transfer of technology, environment and technology and labour issues. Notable in these provisions is one which encourages investors to bear the costs of climate change adaptation and mitigation.[107]

Finally, the PAIC's contains a chapter on dispute settlement which contains provisions on both state-state dispute settlement, and investor-state dispute settlement.[108] The availability of investor-state dispute resolution is conditioned on a state's domestic policies. Where investor-state dispute settlement is agreed upon by the state, it may be provided in accordance with another existing agreement, or in accordance with the PAIC.[109] Dispute resolution under the PAIC, the investor and state shall seek to resolve the dispute through negotiations and consultations. If no agreement is reached within 6 months, the parties may seek to resolve their disputes through arbitration subject to the applicable laws of the host state or mutual agreement of the disputing parties, and the exhaustion of local remedies. If the parties go to arbitration, it should be at an African centre under the UNCITRAL Rules.[110] The PAIC explicitly allows for counterclaims by states.[111]

COMESA Investment Agreement

In 2007, COMESA member states adopted a common agreement for the COMESA Investment Area, but none of the states have ratified it.[112] In 2017, COMESA revised the agreement in a quest to align it with the PAIC. In its preamble, the COMESA Investment Agreement affirms the importance of both sustainable economic growth through intra-COMESA trade and investment flows, and sustainable development. It also includes a provision which stipulates that members must accede to the New York Convention, the ICSID Convention, the MIGA Convention, the African Trade Insurance Agency, and any other multilateral agreement designed to promote or protect investment.[113]

106 PAIC, chpt. 5.

107 PAIC, art. 30(2).

108 PAIC, chpt. 6.

109 PAIC, art. 42.

110 PAIC, art. 42.

111 PAIC, art. 43.

112 Common Market for Eastern and Southern Africa, Investment Agreement for the COMESA Common Investment Area (May 23, 2007) [hereinafter COMESA Investment Agreement].

113 COMESA Investment Agreement, art. 6.

The COMESA Agreement explicitly states that it sets out to balance rights and obligations between states,[114] and contains obligations for investors to comply with the host state's domestic law.[115] FET is equated to customary international law and includes a prohibition on denial of justice.[116] The agreement also includes provisions providing national treatment and most favoured nation treatment.[117]

Finally, the COMESA Investment Agreement includes dispute resolution provisions that allow for ISDS. The dispute resolution process starts with an attempt at negotiation or mediation.[118] The investor then has a choice between domestic courts, the COMESA Court of Justice or international arbitration under ICSID Rules, the ICSID Additional Facility Rules, the UNCITRAL Rules, or the rules of any other arbitral institution agreed to by the parties. The COMESA Agreement also contains a fork-in-the-road provision, and stipulates that procedural and substantive hearings shall be open to the public. Under the agreement, a respondent state may make a counterclaim or request a set-off.[119]

East African Community (EAC) Draft Model BIT

The East African Community (EAC) has a draft Model Investment Treaty ("EAC Model Treaty") dating to February 2016, which is intended to guide negotiations between EAC member states and third states.[120] In its preamble, the EAC Model Treaty declares that investment can contribute to sustainable development and that parties seek to promote investment that enhances sustainable development. The model treaty affirms the state's right to regulate, and explicitly states that it seeks to rebalance the rights and obligations between states and investors. The model treaty goes on to say that treaty objectives can be met without compromising public interest objectives like health, safety and environment measures. The model treaty states its objectives in a separate section, which are identified as promoting investment that supports employment generation, technology and skills transfer and contribute to poverty reduction in a sustainable way.

114 COMESA Investment Agreement, art. 11.
115 COMESA Investment Agreement, art. 13.
116 COMESA Investment Agreement, art. 14.
117 COMESA Investment Agreement, art. 17–19.
118 COMESA Investment Agreement, art. 26.
119 COMESA Investment Agreement, art. 28.
120 The treaty text draws on the SADC Model BIT 2012, the COMESA Common Investment Area Agreement and the Indian Model BIT. The draft also acknowledges input from the International Institute for Sustainable Development (IISD).

The substantive provisions of the EAC Model Treaty reflect the ambitions in its Preamble. The national treatment provision precludes the pre-establishment phase, and allows a state to deny national treatment to investors in particular sectors. The same principles apply to the MFN provision which precludes access to provisions in other international agreements.

The EAC Model Treaty contains a provision that sets out a host state's obligation to provide good governance, including by ensuring that administrative, legislative, and judicial processes are not arbitrary and do not deny investors due process. The provision also refers to the 'level of development of the State party' as a qualifier for the state's obligations, but does not clarify why this relativism should appear here.

Other notable provisions are a requirement for investors to comply with domestic law,[121] an obligation against corruption,[122] and a requirement to provide information, including about affiliates, ownership and governance.[123] The model treaty also includes a provision on liability of the investor in its home state for actions or omissions in the host state,[124] and provisions on transparency of contracts and payment.[125] The model treaty goes further to include a provisions that affirm the state's right to regulate,[126] and the right to pursue development goals.[127]

The EAC Model BIT contains an ISDS provision, but states that the preferred option is not to include ISDS.[128] The ISDS provision encourages investors and states to resolve their disputes amicably, including through mediation. Arbitration is only available to investors where an investor can demonstrate that it has exhausted local remedies or, in the alternative, that there are no viable local remedies available. An investor also has to waive recourse to other methods of dispute resolution, and consent to arbitration in writing. The provision also contains a limitation period of three years from the time when the investor became aware of the dispute. The detailed ISDS provision in the EAC Model BIT also provides for *inter alia* amicus briefs, expert

121 East African Community, Model Bilateral Investment Treaty, art. 10 (Feb. 2016) [hereinafter EAC Model BIT].
122 EAC Model BIT, art. 11.
123 EAC Model BIT, art. 12.
124 EAC Model BIT, art. 13.
125 EAC Model BIT, art. 14.
126 EAC Model BIT, art. 15.
127 EAC Model BIT, art. 16.
128 EAC Model BIT, art. 23.

reports, transparency, an appeal mechanism, submissions by the non-disputing state party, and consolidation.[129]

ECOWAS Supplementary Act

In West Africa, the Economic Community of West African States (ECOWAS) has a Supplementary Act on Investments[130] ("Supplementary Act"). The Supplementary Act is a binding instrument that applies to investments within the ECOWAS region. The act explicitly links investment to sustainable development. It contains provisions on national treatment,[131] in like circumstances, with identical conditions as those contained in the SADC Model BIT. The act also contains an MFN clause,[132] with exceptions such as for benefits accruing from agreements on taxation.

The Supplementary Act provides for 'minimum regional standards' which are linked to the minimum standard under customary international law. It includes fair and equitable treatment and, notably, reasonable protection and security under domestic law.[133] The Supplementary Act also contains a chapter on obligations and duties of the investors and investments which includes, compliance with domestic laws and obligations,[134] pre-establishment impact assessment (environmental and social impact),[135] anti-corruption,[136] post-establishment obligations,[137] corporate governance and practices,[138] corporate social responsibility,[139] and investor liability.[140] The Act also contains a provision entitled 'relation of investor's liability to dispute

129 EAC Model BIT, art. 24.

130 Economic Community of West African States, Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for Their Implementation with ECOWAS (signed Dec. 19, 2008) (entered into force Jan. 19, 2009) [hereinafter ECOWAS Supplementary Act].

131 ECOWAS Supplementary Act, art. 5.

132 ECOWAS Supplementary Act, art. 6.

133 ECOWAS Supplementary Act, art. 7.

134 ECOWAS Supplementary Act, art. 11.

135 ECOWAS Supplementary Act, art. 12.

136 ECOWAS Supplementary Act, art. 13.

137 ECOWAS Supplementary Act (including compliance with health and social welfare rules, upholding human rights, and complying with the ILO Declaration on Fundamental Principles and Rights of Work, 1988).

138 ECOWAS Supplementary Act, art.15.

139 ECOWAS Supplementary Act, art. 16.

140 ECOWAS Supplementary Act, art. 17.

settlement,' which sets out the consequences of breaching investor obligations, and provides that a state may make a counterclaim.[141]

The Supplementary Act goes on to set out a host state's obligations and rights, including procedural fairness,[142] maintenance of environmental and other standards,[143] minimum standards for environmental, labour, and human rights protection,[144] performance requirements,[145] and access to investor information.[146] The Supplementary Act also has a Chapter on home state rights and obligations,[147] which notably include an obligation for the home state to provide for investor liability in the home state,[148] and a list of offences that shall be considered criminal and subject to criminal enforcement and sanctions.[149]

The ECOWAS Supplementary Act is binding on parties, and member states are required to ensure that all their future agreements are consistent with the Act.[150]

Finally on dispute resolution, the Act provides for arbitration, where amicable dispute resolution has failed. The investor may submit the dispute to arbitration, to a national court, any national machinery for the settlement of investment disputes, or the relevant court of the Member States. If there is a disagreement on the method of dispute settlement to be adopted, then the dispute is referred to the ECOWAS Court of Justice.[151]

South African Development Community Model BIT

SADC Model BIT 2012[152] was drafted as an attempt to harmonise the investment policies and laws of members states. The draft is comprehensive and includes a

141 ECOWAS Supplementary Act, art. 18.
142 ECOWAS Supplementary Act, art. 19.
143 ECOWAS Supplementary Act, art. 15.
144 ECOWAS Supplementary Act, art. 15.
145 ECOWAS Supplementary Act, art. 24.
146 ECOWAS Supplementary Act, art. 26.
147 ECOWAS Supplementary Act, chpt. VI.
148 ECOWAS Supplementary Act, art. 29.
149 ECOWAS Supplementary Act, art. 30.
150 ECOWAS Supplementary Act, arts. 31–32.
151 ECOWAS Supplementary Act, art. 33.
152 Southern African Development Community, SADC Model Bilateral Investment Treaty Template (July 2012) [hereinafter SADC Model BIT]. Drafted by representatives from Malawi, Mauritius, Namibia, South Africa and Zimbabwe. Representatives from Angola, Botswana, Mozambique and the Seychelles attended the final drafting meeting. Support from IISD. Funded by EU and the GIZ on behalf of the German Government.

commentary that explains the different draft provisions. In its preamble, it links investment to sustainable development and affirms the state's right to regulate, and the particular need for developing countries to exercise this right, and notes that it seeks to balance rights and obligations between investors and states.[153] The model also contains a standalone article on the state's right to regulate which, it notes, derives from customary international law and other principles of general international law. This right to regulate, it is stipulated, shall be understood as embodying the balance of rights between investors and states.[154]

The SADC Model BIT also contains a provision on national treatment, which it calls 'non-discrimination, in like circumstances. Like circumstances are to be determined on a case by case basis, considering elements such as the measure concerned and the sector of the investment.[155] The model excludes Most Favoured Nation treatment because it can lead to "unintended multilateralization." However, should states wish to include an MFN clause, the model offers language that could be used – the language suggested does not restrict the MFN clause to non-dispute settlement provisions, as has been seen elsewhere.

The Model offers a choice between a provision on fair and equitable treatment (FET) and one on fair administrative treatment (FAT).[156] The FET option links the treatment to customary international law. It restricts the provision by stipulating that for an investor to claim a breach of FET, it must demonstrate "an act or actions by the government that are an outrage, in bad faith, a wilful neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognise its insufficiency."[157] The FAT focusses on administrative, legislative and judicial processes and stipulates that they should not be arbitrary or deny administrative and procedural justice or due process to an investor.[158]

The Model also contains a chapter on the rights and obligations on investors and states, which include a common obligation against corruption,[159] compliance

153 SADC Model BIT, Preambular Paragraphs.
154 SADC Model BIT, art. 20.
155 SADC Model BIT, art. 4.
156 SADC Model BIT, art. 5.
157 SADC Model BIT, art. 5.
158 SADC Model BIT, art. 5.
159 SADC Model BIT, art. 10.

with domestic law,[160] environmental and social impact assessment,[161] environmental management and improvement,[162] minimum standards for human rights, environment and labour,[163] corporate governance standards,[164] investor liability,[165] transparency of contracts and payments,[166] relation to dispute settlement,[167] right to regulate,[168] right to pursue development goals,[169] and obligations of states on environment and labour standards.[170]

Finally, the SADC Model BIT contains a detailed provision on dispute resolution. The provision provides for attempts at amicable settlement, mediation, and conditions which must be met before an investor can make a claim in arbitration. The conditions include a six-month cooling-off period, a fork-in-the-road provision, and a time limit for making a claim. The provision offers a menu of options for arbitration which include ICSID Rules, UNCITRAL Rules, and regional arbitration centres. The provision also excludes arbitration where the investor has a contract or authorisation containing a choice of forum clause.

Organisation for Islamic Cooperation (OIC) Investment Protocol

The Organisation for Islamic Cooperation (OIC) has recently announced that it has developed a protocol to the OIC Investment Agreement[171] to govern dispute resolution between its member states. While the OIC is not an African regional organisation, twenty-seven African countries are member states.[172] The new protocol would replace the current *ad hoc* dispute resolution mechanism provided for by OIC Investment

160 SADC Model BIT, art. 11.
161 SADC Model BIT, art. 13.
162 SADC Model BIT, art. 14.
163 SADC Model BIT, art. 15.
164 SADC Model BIT, art. 16.
165 SADC Model BIT, art. 17.
166 SADC Model BIT, art. 18.
167 SADC Model BIT, art. 19.
168 SADC Model BIT, art. 20.
169 SADC Model BIT, art. 21.
170 SADC Model BIT, art. 22.
171 Organisation of Islamic Cooperation, Agreement for Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference (June 5, 1981).
172 Twenty-seven African states are members of the OIC: Algeria, Benin, Burkina Faso, Cameroon, Chad, Comoros, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Ivory Coast, Libya, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Togo, Tunisia, and Uganda.

Agreement. The aim of the protocol is to limit access to ISDS, and it stipulates that investors would have to exhaust local remedies before gaining access to state-state dispute settlement. And only if the state-state mechanism failed would investors gain access ISDS. The ISDS system itself would have two instances — a first instance and an appellate mechanism.[173] More will be known about the protocol when it is made public, but it is included here to illustrate another layer of complexity for those African states that are members of the OIC.

D. International Reform

African states are also involved in reform processes involving non-African states. There are two such processes — procedural reform through the United Nations system at UNCITRAL, and the revision of the ICSID Rules. The UNCITRAL reform process may last a few more years, but the ICSID process is nearly at an end. African states are not actively engaging in these processes, which may largely stem from a lack of capacity. It may also be that the interlocking web of rights and obligations that African states are subject to, coupled with an incomplete knowledge of those obligations are, impedes African states from fully participating in these processes.

i. ISDS Reform at UNCITRAL

At its 50th Session in July 2017,[174] the UNCITRAL Commission gave Working Group III a broad mandate to work on the possible reform of procedural aspects of the ISDS system. The discussions were to be government led, consensus-based, and fully transparent.[175] The reform topics for discussion include, appellate and multilateral court mechanisms, a code of conduct for arbitrators,[176] third party funding, establishment of an advisory centre, selection and appointment of ISDS tribunal members, dispute prevention and mitigation, security for costs and frivolous claims, and a multilateral instrument on ISDS reform.

173 The OIC Investment Protocol is not yet publicly available, and it is unclear whether it also contains amendments to the substantive provisions of the OIC Investment Agreement. One of the drafters of the Protocol spoke at a conference where he outlined the main features of the OIC, and it is from these remarks that this information has been drawn. Yusuf Kumtepe & Riccardo Loschi, *Investment Dispute Settlement Body of the Organisation of Islamic Cooperation: A Dead End for Claims under the OIC Investment Agreement?*, Kluwer Arbitration Blog (Dec. 29, 2019).

174 Report of the United Nations Commission on International Trade Law (UNCITRAL) at Its Fiftieth Session, U.N. Doc. A/72/17 (2017).

175 *Id.* at para. 264.

176 On May 1, 2020, the secretariats of ICSID and UNCITRAL jointly released a draft Code of Conduct for public comment. The text of the draft can be found at https://icsid.worldbank.org/en/Documents/Draft_Code_Conduct_Adjudicators_ISDS.pdf.

UNCITRAL ("the Commission"), which is supported by a Secretariat in Vienna, carries out its work in annual working sessions alternating between Vienna and New York. Its work is based on the recommendations it receives from the various working groups. It is composed of 60 member states, each serving for a six-year term.[177] There are currently fourteen African states that are members of Commission.[178]

Since its first session in 2017, Working Group III has held five sessions alternating between Vienna and New York, with an extra session held in January 2020. Attendance by African states — members of the Commission and observer states — has increased between the 34th Session when only nine states attended, and the Resumed 38th Session when twenty one states attended.[179] Except for generally widespread support for the establishment of an advisory centre, it is not possible to discern a common position between the African states.

Only three African states have submitted working papers — Mali,[180] Morocco,[181] and South Africa.[182] A summary of their submissions is instructive. Mali highlights the challenges faced by developing states because of the imbalance between states which are always the recipients of foreign investment. It notes that this creates an imbalance in the treaties which should be rebalanced. The submission also highlights that developing states lack expertise and preparation and when defending claims, and this could be resolved by developing internal strategies for negotiation and training.

177 G.A. Res. 2205 (XXI), Establishing United Nations Commission on International Trade Law (Dec. 17, 1966).

178 Current African states membership of the Commission (expiry of term in parenthesis): Algeria (2025), Burundi (2022), Cameroon (2025), Côte d'Ivoire (2025), Ghana (2025), Kenya (2022), Lesotho (2022), Libya (2022), Mali (2025), Mauritius (2022), Nigeria (2022), South Africa (2025), Uganda (2022), and Zimbabwe (2025). African states membership at the thirty-fourth session (expiry of term in parenthesis): Burundi (2022), Cameroon (2019), Côte d'Ivoire (2019), Kenya (2022), Lesotho (2022), Liberia (2019), Libya (2022), Mauritania (2019), Mauritius (2022), Namibia (2019), Nigeria (2022), Sierra Leone (2019), Uganda (2022), and Zambia (2019). Algeria, Ghana, South Africa, and Zimbabwe replaced Liberia, Mauritania, Namibia, and Zambia in 2019.

179 Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fourth Session, U.N. Doc. A/CN.9/930/Rev.1, at II (Dec. 19, 2017); Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Resumed Thirty-Eighth Session, U.N. Doc. A/CN.9/1004/Add.1, at II (Jan. 28, 2020).

180 Government of Mali, Possible Reform of Investor-State Dispute Settlement (ISDS), U.N. Doc. A/CN.9/WG.III/WP.181 (Sept. 17, 2019).

181 Government of Morocco, Possible Reform of Investor-State Dispute Settlement (ISDS), U.N. Doc. A/CN.9/WG.III/WP.161 (Mar. 1, 2019).

182 Government of South Africa, Possible Reform of Investor-State Dispute Settlement (ISDS), U.N. Doc. A/CN.9/WG.III/WP.176 (July 17, 2019).

Mali also raises concerns about the language used in arbitration, the conduct of the arbitrators and the costs and duration of arbitration.

Morocco outlines the reforms that it has made in its model BIT to rebalance rights and obligations between states. The reforms include provisions for states to make counterclaims, and summary dismissal of frivolous claims. As it notes, Morocco has also introduced limits on the type of disputes that may be submitted to ISDS as well as time limits for making the claims. It also highlights issues that it believes should be discussed in Working Group III, including the cost of arbitration, scrutiny of awards, and the availability of an appellate mechanism.

South Africa for its part, uses its submission to focus on the link between investment and sustainable development. It offers several reform solutions and reiterates its view that states should re-think the ISDS system, including whether it is necessary. It proposes an alternative to the creation of an ISDS system that focuses on sustainable development and calls for an expansion of the discussion in Working Group III to include substantive issues.

These submissions have been made by the individual states without support or coordination with other African states. To date, there have been no efforts to coordinate positions and submissions from African states at Working Group III, except for an invitation-only event that is organised by the Organisation for the Francophonie (OIF), to which only Francophone African states are invited.

The OIF collaborated with the Government of the Republic of Guinea and UNCITRAL to organise a regional inter-sessional meeting[183] from 25–26 September 2019 in Conakry, Guinea. The objective of the meeting was to familiarise African states with the work of Working Group III and highlight the reform options being discussed. It was also meant to provide an opportunity for African states to share their experiences with ISDS and identify their priorities for reform.[184] The session was attended by representatives from twenty nine African states,[185] Belgium, Canada, France and the United States.

183 There have been two previous regional inter-sessional meetings: (1) First Inter-sessional Meeting, September 10–12, 2018 (Incheon, Republic of Korea), and (2) Second Inter-sessional Meeting, February 13–14, 2019 (Santo Domingo, Dominican Republic).

184 Government of Guinea, Summary of the Inter-Sessional regional meeting on Investor-State Dispute Settlement (ISDS) Reform, U.N. Doc. A/CN.9/WG.III/WP.183 (Oct. 4, 2019).

185 Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Egypt, Eswatini, Gabon, Gambia,

The African Union did not attend the first four sessions of Working Group III. It has since attended the 38th Session and the Resumed 38th Session in Vienna but has not yet made any interventions.

Various other observer organisations from Africa have also attended Working Group III.[186] To date, they have not been part of any co-ordinating effort between African States. The Commonwealth Secretariat is also an observer state in Working Group III, but unlike its homologue, the OIF, it has not embarked on any co-ordination efforts between African states.[187]

In sum, it is not possible to discern any coordination between African states at UNCITRAL Working Group III, despite the efforts at coordination at the inter-sessional meeting in Conakry, Guinea. It is not known how long the reform process at UNCITRAL will take, but it could be up to five years if previous work programmes are of any indication.

ii. ICSID Rules Amendment Project

On 3 August 2018, the International Centre for the Settlement of Investment Disputes (ICSID) announced a series of proposed changes to its rules and invited public comment. ICSID noted that the proposed changes amendments were designed *inter alia* simplify the rules by improving drafting and language, to reduce time and cost by introducing electronic filing, to require disclosure of third-party funding. The proposed amendments would also give access to ICSID arbitration to regional economic integration organisations through the ICSID Additional Facility and Rules. Notably, the proposed amendments also include a set of rules on mediation.

Almost all African states are ICSID contracting states (signed and ratified). The exceptions are Angola, Eritrea, Ethiopia (signatory state), Equatorial Guinea, Guinea Bissau (signatory state), Libya, Namibia (signatory state), and South Africa.

ICSID Member states were invited to give comments on the ICSID Rule

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Ghana, Guinea, Libya, Mali, Morocco, Mauritania, Mauritius, Namibia, Nigeria, Rwanda, Senegal, Tunisia, Zambia, and Zimbabwe.

186 The list of observer organisations can be found for each Working Group Session at https://uncitral.un.org/en/working_groups/3/investor-state.

187 Elsewhere, the Commonwealth Secretariat has been involved in an annual forum for developing country investment negotiators convened by the International Institute for Sustainable Development (IISD). Other partners at this annual forum include the West African Economic and Monetary Union (UEMOA), the Common Market of Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC), and the United Nations Economic Commission for Africa (UNECA).

Amendment process. Only eight African states provided comments on the first version of the amendments Algeria, Democratic Republic of Congo, Mauritius, Morocco, Nigeria, Somalia, Togo, and Tunisia. The African Union also gave comments. No African states or the African Union gave comments on the second version of the rules.[188]

The African Union (AU) expressed its support for extending the ICSID Additional Facility Rules to regional economic international organisations (REIOs) and reiterated the need for diversity in the nomination of arbitrators. It did not appear from its submission, that the AU had coordinated with its member states before making its submission.

African states generally supported the introduction of mediation rules, but states varied in their interventions. Mauritius responded only to say that it was in agreement with the proposals. The DRC urged ICSID to propose rules against claims by vulture funds. Nigeria urged ICSID to consider longer timeframes to allow developing states to gather relevant documents. It noted that it would provide further comments on other issues but did not make any further written submissions. Somalia expressed its support for electronic filing, shared its concerns about third party funding, and welcomed the amendment to permit a standalone application for security for costs – not linked to provisional measures. Togo noted that there may be good reasons not to disclose the identity of a third-party funder, and that disclosure should therefore not be systematic.

The written contribution of African states to the ICSID Rule Amendment process has been limited in scope and depth and is illustrative of a wider challenge in engaging with ISDS reform as is evident in the UNCITRAL Reform process.

II. WHITHER ISDS REFORM IN AFRICA?

Five observations can be drawn from the foregoing overview of the reform processes. First, while it is possible to identify some recurring themes in the reforms across the different investment law instruments reviewed in Part I — such as reference to sustainable development, state's right to regulate, rebalancing of rights and obligations between investors and states, including through allowing counterclaims — there are no reforms that can be classified as uniquely African.

188 All submissions are available at https://icsid.worldbank.org/en/amendments.

Second, except for South Africa, and perhaps Egypt, reforms at the national level do not appear to be driven by clearly defined investment policies in their reform efforts. They act in an *ad hoc* uncoordinated manner, which only thickens the complex web of rights and obligations that bind African states. This approach may be convenient in the short term, but is unsustainable and inefficient in the medium to long term.

Third, where African states have been assertive in rebalancing the rights and obligations between investors and states, they have not considered the impact this may have on African investors and intra-Africa investment. If some of the proposed reforms, such as those in the PAIC, were to be implemented, non-African investors would be treated more favourably than African investors in Africa.

Fourth, in a context where African states are already disadvantaged by a shortage of expertise in international investment law, there appears to be no attention paid to the burden borne by African states as a result of negotiating and implementing reform at different levels. States are simultaneously amending their domestic laws, negotiating BITs, negotiating investment provisions of RECs, negotiating the Investment Protocol and participating in global reform efforts. All this without a clearly defined internal policies or negotiation strategies.

Fifth, while African states are active in reforming domestic, sub-regional, and regional instruments, they are relatively passive at the global level.[189]

CONCLUSIONS

It is difficult not to celebrate the increased participation of African states in the reform of investment laws and treaties, especially in the context of their passive role in the past. It is this increase in participation that has led to the celebration of the "Africanisation" of international investment law, and the transition of African states from 'rule takers' to 'rule makers'. However, the review of these reforms at the national, bilateral, and multilateral — I am less optimistic that there is something uniquely African in these reforms.

We can draw an analogy with the world of classical music. If African states are the members of a symphony orchestra, we can imagine them with their instruments in hand, each playing from a sheet of music. Each musician plays well, but she is playing

189 *See*, e.g., Hamed El-Kady & Mustaqeem De Gama, *The Reform of the International Investment Regime: An African Perspective*, 34 ICSID Rev. – Foreign Inv. L.J. 482–95 (2019).

alone and the piece has been composed for a full orchestra. Occasionally, the wind instruments play together, and every so often, the percussion instruments appear to be playing together even though that is not the intention of the players. It does not take long to realise that it is only when the whole orchestra starts playing in harmony, led by a conductor, that the beautiful music delights the audience.

Similarly, while I applaud African states for carrying out reforms on their own, or in sub-regional groupings, the goal of a true harmonisation of investment law across Africa — as intended by the Investment Protocol will only be possible when all states participate in the process. Otherwise, there can only be fragments and fragmentation. Indeed, just as an individual musician has to practice on their own before joining the rest of the orchestra, so too must African states identify their individual interests before participating in the definition of collective pan-African interests.

Like in an orchestra, African states can find harmony in diversity. Unless collective interests can be defined, the ambitious regional integration project, with the AfCFTA as a key pillar, cannot be realised.