The Legal Efficacy of Investment Treaty Reforms in Africa

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Abstract

The assumption underlying ongoing reforms of international investment agreements (IIAs) is that the flexibilities and exceptions constituting the reforms offer effective protections to host states' duty to regulate. This assumption has neither been tested ex-ante or ex post facto the making of new IIAs nor coherently explored in the literature. I explore the question whether the reforms of IIAs offer effective protections to the duty to regulate, using IIAs with African countries as a case study. Do IIA reforms in Africa guarantee that the objective of preserving the duty to regulate can be achieved in practice? Africa's reforms of IIAs are comprehensive, encompassing features aimed at preserving the duty to regulate. I argue that many aspects of the reforms compromise their efficacy. The soft law and precatory nature of, and the provisos embedded in key regulatory safeguards constituting the reforms intended to secure states with regulatory autonomy place contentious limitations on how the new provisions may operate in practice.

Keywords: Africa, investment treaties, investor-state arbitration, reform, duty to regulate.

I. Introduction

The concept of the duty to regulate is about the authority of states to make laws and policies and to implement them to protect the public interest and the rights of their citizens and maintain public order. It is about a state's entitlement or freedom to act as it considers appropriate in pursuit of its national interest, public welfare or to advance other purposes. This duty is sourced from state sovereignty, domestic law and international law.[1]

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1 Useful readings on the concept of the duty or right to regulate include: Charalampos Giannakopoulos, *The Right to Regulate in International Investment Law and the Law of State Responsibility: A Hohfeldian Approach, in* PERMUTATIONS OF RESPONSIBILITY IN INTERNATIONAL LAW 148 (Photini Pazartzis & Panos Merkouris eds., 2019); YULIA LEVASHOVA, THE RIGHT OF STATES TO REGULATE IN THEIR

The reform of international investment agreements (IIAs) and domestic investment policies and legislative frameworks to accommodate the duty of states to regulate in the public interest is a top-most issue in recent international investment rule making globally.[2] This is due to the use of investor-state dispute settlement (ISDS) mechanism and absolute substantive terms of investment treaties by foreign investors to challenge regulatory measures adopted in the public interest in exercise of the sovereign duty to regulate.[3] As stated by Federica Cristani:[4]

> The concept of the right to regulate has become a critical element in the development of international investment law and policy. The growing body of cases where public welfare legislation has been challenged under international investment agreements i.e. the arbitration case law arising out of the grave financial and economic crisis of Argentina in 2001; … arbitration cases brought by Philipp Morris against Uruguay in 2010 and against Australia in 2011 following the introduction of innovative tobacco packaging regulations to reduce smoking and prevent noncommunicable diseases in those countries and, in the EU area, the *Vattenfall* case involving Germany and dealing with host State's environmental restrictions on a coal fired power plant in Hamburg raises the question on where to find the right balance between the need to protect foreign investments and the need to preserve the host State's right to regulate. Moreover, the fear that international investment regulation could constrain[t] the host State's right to regulate has been (one of the elements) at the heart of decision of Bolivia, Ecuador, Venezuela to withdraw from the International Centre for [the] Settlement of Investment Disputes (ICSID) Convention, as well as of the denunciation of bilateral investment treaties by Ecuador and South Africa.

Moreover, the standing given to investors to challenge regulatory measures has the potential to give rise to what has been termed in the literature as "regulatory chill", which arises when states, in the words of Robert Brew, "refrain from regulating

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PUBLIC INTEREST AND THE RIGHT OF INVESTORS TO RECEIVE FAIR AND EQUITABLE TREATMENT: THE SEARCH FOR A BALANCE IN TREATIES AND CASES ON INTERNATIONAL INVESTMENT LAW (2018); LONE WANDAHL MOUYAL, INTERNATIONAL INVESTMENT LAW AND THE RIGHT TO REGULATE: A HUMAN RIGHTS PERSPECTIVE (2016); AIKATERINI TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW (2014).

2 U.N. Conference on Trade and Development, *World Investment Report 2012: Towards a New Generation of Investment Policies,* UNCTAD/WIR/2012 (2012) [hereinafter UNCTAD, World Investment Report 2012].

3 Dominic N. Dagbanja, *The Limitations Environmental Protection Duty Places on Investment Treaty Making and Interpretation: Perspectives from Ghana,* 21 AFR. Y.B. OF INT'L L. 110 (2016); Jorge E. Vinuales, *Access to Water in Foreign Investment Disputes,* 21 GEO. INT'L ENV'T L. REV. 733 (2009); Audrey Gaughran, *Business and Human Rights and the Right to Water*, 106 PROC. ANN. MEETING AM. SOC'Y INT'L L. 52 (2012); and JORGE E. VIŇUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW (2012).

4 Federica Cristani, Book Review, 6 EUR. J. RISK REGUL. 329 (2015) (reviewing AIKATERINI TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW (2014).

adequately to achieve policy objectives in fear of otherwise being sued by investors."[5] Thus, Eric de Brabandere was right when he stated that the duty to regulate "is without doubt a hotly debated issue in contemporary investment law. It lies at the heart of the 'legitimacy crisis' or 'backlash' against investment arbitration which has kept, amongst others, scholarship busy the past years."[6] This backlash has led to various efforts to reform the investment treaty regime to accommodate states' duty to regulate principally because when these agreements were initiated and concluded in the 1960s through to the 1990s and even early 2000s, their predominant focus was on investment protection. Policy space and the duty to regulate were not known under the old generation of investment treaties as these treaties sought to secure absolute standards of investment protection for investors. Today, "new IIAs converge in their efforts to formulate provisions that are more refined and more specific and take into consideration the right of host States to regulate investment for public policy objectives."[7]

The United Nations Conference on Trade and Development's (UNCTAD) *World Investment Report 2019: Special Economic Zones* documents the nature of investment treaty, ISDS and investment policy reforms.[8] According to UNCTAD:[9]

> Twenty-seven of the 29 IIAs concluded in 2018 contain at least six reform features and 20 of the 29 contain at least nine reform features … Highlights of modern treaty making include a sustainable development orientation, preservation of regulatory space, and improvements to or omissions of investment dispute settlement. The most broadly pursued area of reform is preservation of regulatory space.

Globally, the elements of the new treaties, which cover both the substantive terms of IIAs and ISDS, that aim to preserve regulatory space include clauses that: (1) make general exceptions; (2) limit the scope of investment treaties; (3) limit or clarify obligations (e.g. by omitting indirect expropriation); and (4) make exceptions to the right to transfer funds.[10] Sustainable development objectives have also been accommodated in

5 Robert Brew, *Exception Clauses in International Investment Agreements as a Tool for Appropriately Balancing the Right to Regulate with Investment Protection,* 25 CANTERBURY L. REV. 205, 211 (2019).

6 Eric De Brabandere, Book Review, 52 COMMON MKT. L. REV. 1152 (2015) (reviewing AIKATERINI TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW (2014)).

7 Hamed El-Kady & Mustaqeem De Gama, *The Reform of the International Investment Regime: An African Perspective,* 34 ICSID REV. – FOREIGN INV. L.J. 482, 486 (2019). The authors noted that "[d]espite a global environment that is conducive to BIT reform, only a handful of African countries have effectively tackled their existing stock of outdated BITs through renegotiations, amendments or terminations." Id.

8 U.N. Conference on Trade and Development, *World Investment Report 2019: Special Economic Zones,* 84-115, UNCTAD/WIR/2019 (2019) [hereinafter UNCTAD, *World Investment Report 2019].*

9 *Id.* at 105.

10 *Id.*

recent investment treaties that make general exceptions for the protection of human rights and the environment (e.g. no relaxation of health, safety and environmental standards in order to attract or maintain investment).[11] Investment treaties concluded in 2018 reveal four approaches to the reform of ISDS mechanism: (1) no provision for ISDS at all or the right to ISDS is subject to the state's right to give or withhold consent; (2) replacement of the system of *ad hoc* arbitration and party appointment of arbitrators with a court-like, standing ISDS tribunal; (3) removing direct access to ISDS or conditioning access to ISDS on the exhaustion of local remedies; and (4) improving ISDS procedures, for example by increasing the control of the state over arbitral proceedings.[12] However, this Article is limited to an analysis of the reform of the substantive terms of investment treaties. The state of the reform of ISDS would have to be considered in a separate piece.

The reforms of investment treaties have been pursued for some time now.[13] Yet, the efficacy of these reforms have received very limited research, none in particular in relation to Africa. Louis-Marie Chauvel has grouped the existing scholarship into two groups:[14] scholars who have treated the general exceptions as interpreta¬tive statements serving more as a guide to the meaning of investment treaty provisions without much having effect on the scope and legal effect of treaty core standards[15] and those who consider the exceptions as restrictive and operative exceptions that have effect on the interpretation of standards of investment protection.[16] As revealed in this Article, the former perspective is more reflective of IIA reforms than the latter perspective.

This Article is concerned, then, with the legal efficacy of investment treaty reforms in Africa. Efficacy in jurisprudence or legal philosophy has been defined as "a condition on the existence of law."[17] The efficacy is assessed in this Article in terms of whether the

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11 *Id*.

12 *Id*. at 106.

13 UNCTAD, **World Investment Report 2012,** *supra* note 2.

14 Louis-Marie Chauvel, *The Influence of General Exceptions on the Interpretation of National Treatment in International Investment Law,* 14 BRAZILIAN J. INT'L L. 140, 144 (2017).

15 Levent Sabanogullari, *The Merits and Limitations of Gen¬eral Exception Clauses in Contemporary Investment Treaty Prac¬tice,* INT'L INST. FOR SUSTAINABLE DEV.: INV. TREATY NEWS (May 21, 2015), https://www.iisd.org/itn/en/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice (last accessed Apr. 4, 2023).

16 Céline Lévesque, *Influences of the Canadian FIPA Model and the US Model BIT: NAFTA Chapter 11 and Beyond,* 44 CANADIAN Y.B. INT'L L. 249 (2007); Céline Lévesque, *The Inclusion of GATT Article XX Exceptions in* IIAs: A Potentially Risky Policy, in PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 363 (Roberto Echandi & Pierre Sauvé eds., 2013).

17 Thomas Adams, *The Efficacy Condition,* 25 LEGAL THEORY 225, 227 (2019); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (2nd ed. 2009); HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1999); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E. Rumble ed., 1995); and EUGENIO BULYGIN, ESSAYS IN LEGAL PHILOSOPHY (Carlos Bernal et al. eds., 2015).

new features constituting the reforms remove or limit the scope of investors' duty to initiate claims against states, and whether ultimately the reforms are capable of securing states' right to regulate by precluding regulatory measures from constituting breaches of IIAs. Legal norms are efficacious if they can be enforced and if they practically operate to protect and preserve the rights and interests the protect of which they were designed to secure. If a provision of a law cannot be enforced or its enforcement fails to secure protection of the rights and interests, it was designed to protect then the law is inefficient or inefficacious.[18]

As stated by Julie Kim, the absence of carve-outs for states' duty to regulate became obvious when investor-state arbitrations were initiated against both developing states and developed states.[19] According to UNCTAD, there were up to 1,104 known cases with 124 countries as respondents to one or more ISDS claims as of 01 January 2021.[20] About 60 per cent of investment arbitrations in 2018 were brought under BITs signed in the 1990s or earlier while the remaining cases were based on investment treaties signed between 2000 and 2011.[21] In 2018, about 70 per cent of arbitral decisions on jurisdiction and merit were made in favour of investors.[22] Investment treaty and ISDS reforms seek to remedy this mischief to ensure that administrative and regulatory measures are not subject to challenge in investor-state arbitration or that if they are challenged states can legally defend or justify their actions based on the new features constituting the reforms.

As a large number of African states' bilateral investment treaties (BITs) concluded from 1960s to mid-2000s remains in force[23] with absolute investment protection terms and provision for investor-state arbitration as shown in Section II below,[24] measures

18 *See* HARRY W. JONES., THE EFFICACY OF THE LAW (1969).

19 Julie Kim, *Balancing Regulatory Interests Through an Exceptions Framework Under the Right to Regulate Provision in International Investment Agreements,* 50 GEO. WASH. INT'L L. REV. 289, 290 (2018).

20 U.N. Conference on Trade and Development, *World Investment Report 2021: Investing in Sustainable Recovery,* 129, UNCTAD/WIR/2021 (2021). *See also* U.N. Conference on Trade and Development, *IIA Issues Note: Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019,* 1 (July 2020).

21 UNCTAD, *World Investment Report 2019, supra* note 8, at 103.

22 *Id.* at 102.

23 Dominic Npoanlari Dagbanja, *Africa, in* RESEARCH HANDBOOK ON FOREIGN DIRECT INVESTMENT 336, 341 (Markus Krajewski & Rhea Tamara Hoffmann eds., 2019).

24 *See* Convention Concerning the Reciprocal Promotion and Protection of Investments, Belgo-Lux.-Cameroon, arts. 2-6, Mar. 27, 1980, 1284 U.N.T.S. 139 (entered into force Nov. 1, 1981) (hereinafter Cameroon-Belgo-Luxembourg Economic Union BIT); Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Ger.-Eth., art. 3, Jan. 19, 2004, 2771 U.N.T.S. 215 (entered into force May 4, 2006); Agreement on the Promotion and Protection of Investments, Austl.-Egypt, arts. 3-4, May 3, 2001, 2208 U.N.T.S. 347 (entered into force Sept. 5, 2002); and Agreement for the Promotion and Protection of Investments, U.K.-Ghana, arts. 3-5 and 8, Mar. 22, 1989 (entered into force Oct. 25, 1991) [hereinafter Ghana-United Kingdom BIT].

adopted by African states that may have adverse effects on covered investments stand being challenged in investor-state arbitration. Available data shows that between 1993 and 2017, 100 arbitral cases have been brought against African states as respondents. Meanwhile, African states have been home countries to only sixteen investors that have brought investor-state claims against their host states between 2000 and 2017. Except Canada, most of these host states against which investors based in Africa have brought claims are developing countries with a significant number of them being African host countries.[25]

In response to these claims and the global backlash against investment treaties based on the limitations they place on the duty to regulate in the public interest, African countries have begun to make investment treaties to preserve public interest regulatory autonomy.[26] Indeed, as observed by Makane Mbengue, a "multi-layered system of initiatives is bourgeoning on the continent to revamp the architecture of international investment law field according to African states' policy and development priorities."[27] This is reflected in some of the recent BITs African states have entered into which have far-reaching provisions on the duty to regulate and corporate legal and social responsibilities in an effort to balance investment promotion and protection with the need for domestic policy space and corporate accountability. An example is the Benin-Canada BIT of 2014.[28] In the preamble to the BIT, the parties recognise that the promotion and protection of investments "are conducive to the stimulation of mutually beneficial economic activity, the development of economic cooperation between both countries and the promotion of sustainable development." The BIT not only provides for the usual standards of investment protection but actually qualifies them (except in the case of the concept of investment, which is very broadly defined[29]) in order to accommodate domestic regulation as may be appropriate.[30] How legally efficacious are the new IIAs in terms of the space they create for the duty to regulate in Africa?

25 El-Kady & De Gama, *supra note* 7, at 493-95.

26 THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel et al. eds., 2010).

27 Makane Moïse Mbengue, *Africa's Voice in the Formation, Shaping and Redesign of International Investment Law,* 34 ICSID REV. –FOREIGN INV. L.J. 455 (2019).

28 Agreement for the Promotion and Reciprocal Protection of Investments, Can.-Benin, Jan. 9, 2013, (entered into force May 12, 2014) [hereinafter Benin-Canada BIT].

29 *Id*. at art. 1.

30 *Id*. at arts. 7, 10 and 12.

There is extensive research on Africa, the development and the reform of investment treaties and investor-state arbitration.[31] It is significant for purposes of establishing the originality and contribution of this article to state that the existing literature on Africa and the reform of international investment law focuses on Africa's contribution to the reforms (with authors such as Olabisi Akinkugbe describing African states as "reverse contributors")[32], rather than the operative effect and efficacy of the reforms. Some of the extant literature seems more favourable of the reforms simply by focusing on the newness and unique nature of the reforms rather than engaging with how the reforms operate in practice to achieve the desired objective of preserving the duty to regulate.[33] In fact, Mbengue has observed that existing literature does "not pretend to deal with all the issues regarding investment law in Africa."[34] The legal efficacy of these reforms in Africa is one of such unexplored issues. This Article fills this lacuna by analysing the issue of whether the textual terms the reforms are legally efficacious, that is can lead to the attainment of the desired goal of preserving the duty to regulate supposedly underlying the reforms. The reforms of IIAs seem essentially to be aimed precluding regulatory measures from being treated as amounting to a breach of states' obligations under investment treaties. To what do extent do core exceptions and flexibilities constituting the reforms ensure that such policy measures do not constitute a breach of the terms of investment treaties in which the reforms are contained?

31 Mbengue, supra note 27; Antonio R. Parra, *The Participation of African States in the Making of the ICSID Convention,* 34 ICSID REV. – FOREIGN INV. L.J. 270 (2019); Won Kidane, *The Culture of Investment Arbitration: An African Perspective,* 34 ICSID REV. – FOREIGN INV. L.J. 411 (2019); Meg Kinnear & Paul Jean Le Cannu, *Concluding Remarks: ICSID and African States Leading International Investment Law Reform,* 34 ICSID REV. –FOREIGN INV. L.J. 542 (2019); Makane Moïse Mbengue, *Special Issue: Africa and the Reform of the International Investment Regime,* 18 J.WORLD INV. & TRADE 371 (2017); Okechukwu Ejims, *The 2016 Morocco–Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?,* 34 ICSID REV. – FOREIGN INV. L.J. 62 (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 (2019); Makane Moïse Mbengue & Stefanie Schacherer, *The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime,* 18 J. WORLD INV. & TRADE 414 (2017); J. Anthony VanDuzer, *Canadian Investment Treaties with African Countries: What Do They Tell Us About Investment Treaty Making in Africa?,* 18 J. WORLD INV. & TRADE 556 (2017); Eric De Brabandere, *Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity,* 18 J. WORLD INV. & TRADE 530 (2017); Erik Denters &Tarcisio Gazzini, *The Role of African Regional Organizations in the Promotion and Protection of Foreign Investment, 18 J. WORLD INV. & TRADE 449 (2017); and Won Kidane, Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code,* 50 GEO. WASH. INT'L L. REV. 523 (2018).

32 Reverse contributors according to Akinkugbe, "denote the fact that while these states may not have been the claimants, their role as respondents who were actively involved in the cases, and in particular, the arguments they advanced and the reports of the tribunal in affirming or rejecting them, have advanced our understanding of international investment law rules and concepts." Akinkugbe, *supra note* 31, at 440.

33 Stefanie Schacherer, *The Investment Court System Proposed by the European Union: What Does It Mean for Africa,* in AFRICAN PERSPECTIVES IN INTERNATIONAL INVESTMENT LAW 226, 259-61 (Yenkong Ngangjoh Hodu & Makane Moïse Mbengue eds., 2020).

34 Mbengue, *Special Issue: Africa and the Reform of the International Investment Regime, supra* note 31, at 378.

This Article argues, in the main, that the broad and soft law nature of core IIA reform elements (in the sense of not being binding obligations[35]) and the qualifications or provisos to some of these elements and general exceptions stand to defeat or undermine the operative effect and the attainment of the objective of preserving the duty to regulate which underlies the new features or terms in the IIAs. This is because the elements are less likely to preclude regulatory measures from constituting a breach of the terms of IIAs. The conditions, qualifications, exceptions or provisos in these regulatory safeguards allow foreign investors to continue to initiate claims against states for adopting measures the reforms were supposedly meant to protect. The successful pursuit of such claims depends on the formulation of the exceptions and the interpretive approach adopted by the tribunal because there is no unitary jurisprudence in investment treaty arbitration. The qualifications, provisos and exceptions also significantly weaken the defensive or justificatory role of the new reform features. Even if these new IIAs were legally efficacious in preserving African states' duty to regulate, the gains to be derived from them would be eroded by the older BITs given the absolute protections they secure for investment protection as shown in Section II. Therefore, not only must the terms of the new IIAs be effective in preserving the duty to regulate, this must also be accompanied by the reform of existing IIAs.

The duty to regulate cannot be secured or reclaimed in situations where foreign investors retain the right in all cases to institute an investor-state claim challenging the taking of every measure, the public purpose and legal justification for which are not disputable. If the duty to regulate must be preserved, then investors must let go or must not have certain claims or must have effectively qualified claims against states; otherwise, a 'balance' cannot be maintained in the protection of investors' rights and states' duty to regulate.

Krzysztof Pelc in his seminal book, *Making and Bending Rules: The Design of Exceptions and Escape Clauses in Trade Law,* stated that "one of the constants running through all types of agreements is the inclusion of formal clauses that specify just how signatories will be allowed to break the very rules they have agreed on."[36] Flexibilities in international agreements allow for the contracting states to be able to temporarily suspend compliance with their obligations without incurring

35 *Hard law*/soft law, EUR. CTR. FOR CONST. & HUM. RTS., https://www.ecchr.eu/en/glossary/hard-law-soft-law/#:~:text=Soft%20law%20instruments%20are%20predominantly,legally%20enforced%20before%20a%20court (last accessed Apr. 4, 2023).

36 Krzysztof J. Pelc, MAKING AND BENDING INTERNATIONAL RULES: THE DESIGN OF EXCEPTIONS AND ESCAPE CLAUSES IN TRADE LAW 1 (2016).

international legal responsibility and liability. If the use of exceptions and flexibilities is limited to their intended purposes only, they can work to achieve the objects underlying them. However, flexibilities can be abused. As stated by Pelc, "[i]f flexibility is over-provided, it can water down the agreement, diminishing the gains … it would otherwise produce … More subtly, the share existence of flexibility, quite independently from its use, can inject considerable uncertainty."[37] An analysis of the flexibilities constituting the reform of the international investment regime shows that the flexibilities are not overworked or over-provided. On the contrary, the flexibilities are rather too loose, precatory and uncertain/indefinite to achieve the objective of securing the duty to regulate underlying the reforms. In the context of flexibilities in international trade law, Pelc has found that "the wide availability of unconstrained flexibility has not led to the regime's collapse, even in the midst of the Great Recession. Even those countries that could significantly raise their tariff rates overnight without falling foul of their obligations have in most cases turned to contingent flexibility mechanisms instead."[38] This allows the suggestion to be made that concrete and operative flexibilities and exceptions genuinely and effectively securing the duty to regulate may not necessarily lead to a watering down of the international investment regime's protections to foreign investors and that there is the need for ongoing reforms of IIAs to be more responsive to the preservation of the duty to regulate through more concrete and enforceable exceptions in IIAs.

The investment treaties analysed have been selected based on their relevance for establishing the point about Africa's participation in the making of investment treaties from their inception. Others have been selected because they constitute some of the most recent treaties that incorporate terms seeking to preserve the duty to regulate in the public interest. The exceptions are the primary subjects of review and analysis in this Article.

The rest of the Article is organised as follows. Section II addresses the subject of the making of investment treaties in Africa. It establishes that the first generation of investment treaties focused predominantly on investment protection and that the terms of those treaties and investor-state arbitration claims against states founded on them necessitated ongoing reforms of international investment law in Africa and beyond.

37 I*d*. at 206.

38 *Id*. at 16.

Section III analysis the reforms of the substantive terms of investment treaties in Africa at the bilateral, regional and continental levels. The analysis shows that the fact that exceptions have been made for the duty to regulate and the adoption of regulatory measures by one provision in an investment treaty does not really secure a state the free, unencumbered or unrestricted exercise of regulatory autonomy or the duty to regulate. The supposedly preserved duty to regulate could be taken away by another provision of the same investment treaty guaranteeing protections to investments and investors or by a qualification or proviso in the very provision seeking to preserve the duty to regulate.

Section IV concludes the Article. It makes the point that the weaknesses and limitations of investment promotion and protection by treaty require alternatives to this regime to be considered rather than sticking to the regime or proposing reforms that entrench the questionable view that investments can be effectively promoted and protected solely by investment treaties and investor-sate arbitration. This Article thus provides a legal and normative basis for reflecting and rethinking the efficacy of the reform of IIAs both within and outside the African continent since most IIAs are between African countries and non-African countries.

II. Africa and Investment Treaty Law and Arbitration

The making of investment treaties with African countries has a post-colonial backdrop and started about the same time that the first BIT was signed in November 1959 by Pakistan and Germany and entered into force in April 1962.[39] No single colonial power had to conclude a BIT with its colony in Africa while it still exercised colonial power and dominion over that colony. Thus, as noted by Muthucumaraswamy Sornarajah, it was only after decolonization and the dissolution of colonial empires that the need for BITs in the manner known today came to be felt by the former colonial and Western powers, which now became the 'exporters' of capital to Africa and the developing world.[40] Also, Laura Páez has argued that the "[f]irst generation BITs primarily sought to protect and lock in investment interests of developed country partners already present in the region, in particular in sectors that showed typical features of enclave economies, such as minerals, fuel and other commodities, in order to guarantee and sustain the export of primary inputs for the industry of the source country after independence."[41]

39 Treaty for the Promotion and Protection of Investments, Ger.-Pak., Nov. 25, 1959, 6575 U.N.T.S. 24.

40 M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 21 (3rd ed. 2010).

41 Laura Páez, *Bilateral Investment Treaties and Regional Investment Regulation in Africa: Towards a Continental Investment Area?,* 18 J.WORLD INV. & TRADE 379, 382 (2017).

African countries began to gain political independence from the late 1950s. For example, Ghana and Nigeria gained independence from Great Britain in 1957 and 1960 respectively. The acquisition of independence and sovereignty by the new states changed the nature of the legal regime for foreign direct investment protection in the former colonies, including in Africa. Colonial foreign companies now had to be regulated by the municipal law of the newly independent states which asserted control over their natural resources.[42] European countries then started 'negotiations' and conclusion of 'reciprocal' BITs with some of their former colonies and other African countries.

Specifically, African countries began to enter into BITs in the 1960s.[43] The first BIT to be *signed* in Africa is the Togo-Germany BIT.[44] It was signed on 16 May 1961 but it did not enter into force until 21 December 1964. The now terminated Morocco-Germany BIT was the second BIT to be signed in Africa, having been signed on 31 August 1961 and entered into force on 21 January 1968.[45] Thus, the first and second African BITs were signed less than two years after the 1959 Germany-Pakistan BIT was signed and about a year before the Germany-Pakistan BIT entered into force in1962. The first BIT in Africa to have legal effect is Niger-Switzerland BIT that was signed on 28 March 1962 and entered into force on 17 November 1962,[46] two years after Niger gained independence. The Côte d'Ivoire-Switzerland BIT, which was signed on 26 June 1962, entered into force on 18 November 1962,[47] two years after Côte d'Ivoire's independence. It is the second BIT to enter into force in Africa. African BITs thus took legal effect in the same year as the first ever BIT between Germany and Pakistan which came into force eight months earlier than the Niger-Switzerland BIT and Côte d'Ivoire-Switzerland BIT. The Guinea-Switzerland BIT, which was signed on 26 April 1962, came into force on 29 July 1963. Therefore, the Guinea-Switzerland BIT[48] was the third

42 ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 224 (James Crawford et al. eds., 2005).

43 Mbengue, *supra* note 27, at 456-58; Páez, *supra* note 41, at 382-84.

44 Traite entre la Republique tederale d'Allemagne et la Republique Togolaise relatif a l'encouragement des investissements de capitaux [Treaty on the encouragement of capital investment], Ger.-Togo, May 16, 1961 (entered into force Dec. 21, 1964).

45 Vertrag zwischen der Bundesrepublik Deutsdland und dem Konigreich Marokko uber die Forderung von Kapitalanlagen [Treaty on the demand for capital investment], Ger.-Morocco, Aug. 31, 1961.

46 *Accord de commerce, d'investissements et de coopération technique entre la Confédération Suisse et la République du Niger* [Agreement on trade, investment, and technical cooperation], Switz.-Niger, Mar. 28, 1962.

47 *Accord de commerce, de protection des investissements et de coopération technique entre la Confédération Suisse et la République de Côte d'Ivoire* [Agreement on trade, investment protection, and technical cooperation], Switz.-Côte d'Ivoire, June 26, 1962.

48 Abkommen über den Handel, die Investitionen und die technische Zusammenarbeit zwischen der Schweizerischen Eidgenossenschaft und der Republik Guinea [Agreement on trade, investment, and technical cooperation], Switz.-Guinea, Apr. 26, 1962.

BIT to enter into force in Africa. Cameroon signed its first BIT with Germany on 29 June 1962, which entered into force on 21 November 1963.[49] Between that year and 1989, eight other BITs entered into force between Cameroon and: Switzerland, 1964;[50] The Netherlands, 1966;[51] Belgium-Luxembourg Economic Union, 1981;[52] Romania, 1981;[53] United Kingdom, 1985;[54] and United States, 1989.[55]

The making of BITs has continued in Africa since then to the present day. Since 1962, African countries have signed around 900 IIAs, which represent about 26% of the over 3000 IIAs in existence at the end of 2019.[56] Most of Africa's earlier BITs concluded from the 1960s to 1990s are in still force. The terms of these earlier BITs represent the most classical standards of treatment of investments because the early treaties "dealt exclusively with foreign investment."[57]

A number of the first-generation BITs concluded in Africa between 1960s and 1990s had very broad scope in terms of the subject matter of coverage, although some of them had reasonable qualifications to the scope of application of the terms. The Cameroon-Belgo-Luxembourg Economic Union BIT states in Article 3(1),(2) and (3) as follows:[58]

> *All investments, present and future, direct or indirect*, made by individuals or corporations of one Contracting Party shall be accorded fair and equitable treatment in the territory of the other Contracting Party.

49 Traite entre la Republique federale d' Allemagne et la Republique federale du Cameroun relatif a l' encouragement des investissements de capitaux [Treaty relating to the encouragement of capital investment], Ger.-Cameroon, June 29, 1962.

50 Accord de commerce, de protectiondes investissements et de coopération techniqueentre la Confédération Suisse et la République fédérale du Cameroun [Agreement on trade, investment protection, and technical cooperation], Switz.-Cameroon, Jan. 29, 1963.

51 Accord de coopération économique et technique entre le Gouvernement du Royaume des Pays-Bas et le Gouvernement de la République Fédérale du Cameroun [Agreement on economic and technical cooperation], Neth.-Cameroon, July 6, 1965.

52 Cameroon-Belgo-Luxembourg Economic Union BIT, *supra* note 24.

53 Accord entre la gouvernement de la Republique unie du Cameroun et la gouvernement de la Republique socialiste de Roumanie sur la garantic reciproque des investissements [Agreement on the Reciprocal Guarantee of Investments], Rom.-Cameroon, Aug. 30, 1980.

54 Agreement for the Promotion and Protection of Investments, U.K.-Cameroon, June 4, 1982, 1442 U.N.T.S. 260.

55 Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Cameroon, Feb. 26, 1986 [hereinafter U.S.-Cameroon BIT].

56 Dagbanja, *supra* note 23, at 345.

57 JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 94 (1st ed. 2010).

58 Cameroon-Belgo-Luxembourg Economic Union BIT, *supra* note 24, at art. 3 (emphasis added).

> Such investments shall be safeguarded and protected *at all times* and shall not be subject to any unreasonable or discriminatory measure that might, *de jure* or *de facto,* impede their management, maintenance, use, enjoyment or liquidation, with the exception of measures necessary for the maintenance of public policy.
>
> The treatment and protection guaranteed in paragraphs 1 and 2 above shall be no less favourable than those enjoyed by individuals or corporations of a third State and in no case less favourable than those recognized by international law.

According to Article 8 of the Ghana-United Kingdom BIT:[59]

> Each Contracting Party shall, in respect of investments, guarantee to nationals or companies of the other Contracting Party the *unrestricted* transfer to the country where they reside of their investments and returns. Transfers of currency shall be effected without undue delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Unless otherwise agreed by the investor, transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

The friendship and commerce treaty between Liberia and Swiss Confederation (FCT)[60] was intended, to cover both trade and investments and the protection of private property rights, and to promote peace and amity between the parties.[61] Article 2 of the FCT entitles the nationals of the contracting parties the right to enter, travel, reside, to acquire, possess and dispose of movable and immovable property, and to engage in trade and industry. Article 2 of the FCT also entitles the nationals of the contracting parties the right to "enjoy, in matters of procedure, the same treatment as is accorded to the nationals of the Other, with respect to the protection and security of their person and property and with regard to all judicial, administrative and other legal proceedings." With respect to investments, Article 6 of the FCT provides for national treatment, most-favoured nation treatment (MFN), the duty to repatriate investment and returns and the right against nationalization or expropriation "except when such measures are taken in the

59 Ghana-United Kingdom BIT, *supra* note 24, at art. 8 (emphasis added).

60 Treaty of Friendship and of Commerce, Switz.-Liber., July 23, 1963 (entered into force Sept. 22, 1964).

61 *Id.* arts. 1 and 3.

public interest and unless it is done against payment of an effective and adequate indemnity, in conformity with international law." The FCT is completely silent on the question of investment dispute resolution. Presumably disputes would be resolved diplomatically or in the domestic courts of the respective parties. This is probably the reason the FCT provides for national treatment with respect to judicial, administrative and other legal proceedings.

The Liberia-Switzerland FCT contrasts with the Liberia-Germany BIT[62] which deals solely with the promotion and protection of investments, providing for: (1) a wide definition of investment[63]; (2) full protection and security (FPS) subject to 'the law in the territory of the other contracting party'[64]; (3) prohibition against non-public purpose and uncompensated expropriation[65]; (4) national treatment and MFN in respect of restitution, indemnification and compensation for loss of investments owing to war or hostilities[66]; (5) MFN generally[67]; (6) the right of repatriation of investment and returns;[68] (7) subrogation;[69] and (8) umbrella clause.[70] The unique aspect of this BIT is that it limits the scope of FPS to such protection as may be available under the laws of the contracting parties and fair and equitable treatment (FET) arises only in respect of governmental determination of the exchange rate when transfers are to be made.[71] The Liberia-Germany BIT is also silent on investor-state dispute resolution but it does provide that disputes between the contracting parties concerning the application or interpretation of the BIT are to be resolved amicably or by arbitration if an amicable settlement fails.[72] The BIT also secures absolute protection for investment, stating that covered investments shall be governed by international law in the event of conflict between the contracting parties and that measures permitted by such law shall continue to operate only over the period of the conflict.[73]

62 Treaty for the Promotion and Reciprocal Protection of Investments, Ger.-Liber., Dec. 12, 1961 (entered into force Oct. 22, 1967).

63 *Id.* at art. 8.

64 *Id.* at art. 3(1).

65 *Id.* at art. 3(2).

66 *Id.* at art. 3(3).

67 *Id.* at art. 3(5).

68 *Id.* at art. 4.

69 *Id.* at art. 5.

70 *Id.* at art. 7.

71 *Id.* at art. 6(3).

72 *Id.* at art. 11.

73 *Id.* at art. 12.

Foreign investors have used investor-state arbitration claims against states mostly under these old generation BITs concluded between the 1960s and early 2000s because these BITs made less room for the duty to regulate. According to El-Kady and De Gama:[74]

> between 1980 and 2012 (and negotiated on the basis of developed countries models) still exist today, with outdated, broad and all-encompassing standards that clearly limit the right of host African States to regulate investment in their territories, and that expose them more openly to investor–State disputes. Outdated BITs continue to exist despite growing international consensus on the need to reform and to modernize past approaches to investment protection policies.

Foreign investors' reliance on these absolute standards of investment protection to challenge states' adoption of domestic regulatory measures in the public interest under municipal law before private arbitrators have influenced ongoing reforms of investment treaties in Africa.[75]

III. The Duty to Regulate and Investment Treaty Reforms in Africa

Efforts aimed at reforming the investment treaty framework to accommodate states' duty to regulate are taking place globally.[76] At the United Nations level, the UNCTAD is leading the way by developing frameworks to guide investment treaty reforms and this is reflected, for example, in its *Investment Policy Framework for Sustainable Development.*[77]

Africa is awake on this matter.[78] Upon reviewing a number of recent investment treaties, El-Kady and De Gama concluded that African countries were now "taking

74 El-Kady& De Gama, *supra* note 7, at 485.

75 *See also* Waste Mgmt., Inc. v. United Mex. States, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004); Philip Morris Asia Ltd. v Commonwealth of Austl., PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015); Yukos Universal Ltd. (Isle of Man) v. Russ. Federation, PCA Case No. AA 227, Final Award (Jul. 18, 2014); Cont'l Cas. Co. v. Arg. Republic, ICSID Case No. ARB/03/9, Award (Sept. 5, 2008).

76 UNCTAD, *World Investment Report 2019, supra* note 8, at 99-115.

77 U.N. Conference on Trade and Development, *Investment Policy Framework for Sustainable Development,* UNCTAD/DIAE/PCB/2015/5 (2015).

78 For a discussion of the reforms in Africa *see, e.g.,* Mbengue, *supra* note 27; Mbengue & Schacherer, '*Africanization' of International Investment Law, supra* note 31; El-Kady & De Gama, *supra* note 7; Páez, *supra* note 41; Kinnear & Cannu, *supra* note 31; Parra, *supra* note 31; De Brabandere, supra note 31; Kidane, *Contemporary International Investment Law, supra* note 31.

a more active approach in the formulation of their international investment commitments at the national, bilateral and regional levels. Africa is becoming a laboratory for innovative and sustainable development-oriented investment policy-making."[79]

This Section examines the efficacy of the new features of recent investment treaties and Model BITs in Africa. In summary, the reforms of the substantive terms of investment treaties in Africa have taken the form of:

- regionalisation and harmonisation of investment protection.
- developing model BITs.
- general exceptions for the duty to regulate.
- qualifying the scope of the usual terms of investment protection such as national treatment, expropriation and repatriation of investments and returns.
- provision for corporate accountability and requiring investors to comply with domestic law.
- giving standing to public institutions and citizens to institute civil actions against foreign investors for non-compliance with their obligations.
- defining investment to include contribution to development.
- encouraging contracting parties to create jobs through the other contracting party's investors' investments in the territory of the contracting party.
- imposing pre-establishment obligations on investors to conduct social impact assessment of the potential investment.
- abandoning the usual standards of investment protection such as fair and equitable treatment and full protection and security.
- exempting social welfare and social services from the coverage of national treatment, most-favoured-nation treatment and performance requirement obligations.
- requiring investors to strive through their policies and practices to contribute to the development of the host state.

79 El-Kady & De Gama, *supra* note 7, at 382.

The scope of these reforms demonstrates that Africa fully appreciates the nature of investment treaties and their effects on regulatory space and the need to reform IIAs to preserve that duty to regulate.

i. Bilateral Investment Treaty Reforms in Africa

At the bilateral level, African countries have negotiated new BITs that contain innovative and flexible provisions to accommodate development policy space and the states' duty to regulate in the public interest.[80] For example, South Africa-Nigeria BIT makes exception to the scope of application of national treatment and MFN stating they are not applicable to laws and other measures aimed at achieving equality and protecting persons or categories of persons who have been disadvantaged by unfair discrimination.[81]

The Cameroon-Canada BIT provides that the parties "shall encourage the creation of jobs in Canada through Cameroonian investments and the creation of jobs in the Republic of Cameroon through Canadian investments."[82] The BIT's provisions on performance requirements, expropriation and transfer of funds do not guarantee absolute right to foreign investors and provision is made to accommodate some flexibility in the area of taxation.[83] The national treatment, MFN and performance requirement obligations do not apply to: (1) social services (such as public law enforcement, social and income security or insurance; social welfare; public education; public training; health and child care); (2) the rights or preferences provided to aboriginal peoples; and (3) the rights or preferences provided to socially or economically disadvantaged minorities.[84] Similar general exemptions can be found in the Kenya-Japan BIT[85] and Egypt-Mauritius BIT[86] in respect of national treatment and MFN.

These qualifications help shape the scope of national treatment and MFN. However, the legal efficacy of these new exceptions as safeguards for the duty to

80 *Id*.

81 Agreement for the Reciprocal Promotion and Protection of Investments, S. Afr.-Nigeria, art. 4, Apr. 29, 2000.

82 Agreement for the Promotion and Protection of Investments, Can.-Cameroon, art. 3(2), Mar. 3, 2014 [hereinafter Canada-Cameroon BIT]; *see also* VanDuzer, *supra* note 31 for analysis on investment treaties between Africa and Canada.

83 Canada-Cameroon, *supra* note 82, at arts. 9-11, 14 and 16.

84 *Id*. at art. 16 and Schedule II.

85 Agreement for the Promotion and Protection of Investment, Japan-Kenya, arts. 3-5, Aug. 28, 2016.

86 Agreement on the Reciprocal Promotion and Protection of Investments, Mauritius-Egypt, art. 5(4), June 25, 2014.

regulate is yet to be fully tested in investor-state arbitration. The qualifications or conditions to the texts of some of these general exceptions might defeat their purposes concerning preserving the duty to regulate. For example, Article 3(2) of the Kenya-Japan BIT provides that the obligation of national treatment "shall not be construed so as to prevent" contracting parties "from adopting or maintaining a measure that prescribes special formalities in connection with investment activities of foreign investors in its Area in accordance with its laws and regulations, *provided that such special formalities do not impair the substance of the rights of investors"* (emphasis added). By this qualification or proviso, measures that prescribe special formalities in connection with investment activities of foreign investors may not be adopted if the measures will impair the substance of investors' rights, even though they may not be aimed directly at impairing the investments. Such measures may be adopted at the risk of an investor-state suit for indirect expropriation, for example. Therefore, the scope left for this provision seeking to preserve the duty to regulate to be exercised in practice could be very narrow depending on the nature of the effect of the measure on the rights of foreign investors.

Some BITs, for example some of those concluded in the 1960s provided for absolute prohibition against performance requirements[87] and absolute duty to transfer funds.[88] Recent investment treaties have softened these positions by providing for exceptions to prohibition against performance requirements and transfer of funds. However, the qualifications to these exceptions weaken their efficacy. The Benin-Canada BIT, for example, prohibits performance requirements, providing that a contracting party may not "impose requirement on an investor to "transfer technology, a production process or other proprietary knowledge to a person in its territory."[89] This prohibition is not absolute. Thus, a measure requiring "an investment to use a technology to meet generally applicable health, safety or environmental requirements is not inconsistent with" this performance requirement prohibition.[90] This particular prohibition "does not apply if the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of domestic competition law."[91] These are innovative exceptions that make room for the duty to regulate on matters of public health and safety and for administrative tribunal or judicial decisions to be respected and enforced under domestic law.

87 U.S.-Cameroon BIT, supra note 55, at art. II(6).

88 Treaty Concerning the Promotion and Reciprocal Protection of Capital Investment, Ger.-Benin, art. 6, June 29, 1978, 1459 U.N.T.S. 284; Agreement for the Promotion and Protection of Investments, U.K.-Benin, Nov. 27, 1987, 1556 U.N.T.S. 184.

89 Benin-Canada BIT, supra note 28, at art. 10(1)(f).

90 *Id*. at art. 10(2).

91 *Id*. at art. 10(4)(b).

However, the same BIT that gives also more or less takes away the same duty to regulate. Article 12(1) of the Benin-Canada BIT requires the contracting parties to "permit all transfers relating to a covered investment to be made freely, and without delay, into and out of its territory." The BIT significantly qualifies this right to transfer investment and returns. It provides that a party may prevent a transfer in accordance with its law relating to: (1) bankruptcy, insolvency or the protection of the rights of a creditor; (2) issuing, trading and dealing in securities; (3) a criminal or penal offence; and (4) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities or ensuring compliance with an order or judgment rendered in judicial or administrative proceedings.[92] A state may also prevent or limit transfers by a financial institution through a measure relating 'to maintenance of the safety, soundness, integrity or financial responsibility of financial institutions'.[93]

A contracting party may only prevent such a transfer through the "equitable, non-discriminatory and good faith application of its domestic law."[94] A state might restrict a transfer believing that it is acting equitably, non-discriminatorily and in good faith. Ultimately, it is for an investment tribunal to decide if a state applied its domestic law equitably, non-discriminatorily and in good faith. This may end up defeating the object of the exemption of this type of limiting transfer available to the contracting parties. Arbitral tribunals have expressed the view that a "party invoking the allegedly self-judging nature of … [an] exemption can thereby remove the issue, and hence the claim of a treaty breach by the investor against the host state, from arbitral review. This would conflict in principle with the agreement of the parties to have disputes … settled compulsorily by arbitration."[95] This means the state adopting the measures in question is not "the sole arbiter of the scope and application" of the exemption relied on.[96] It is for a tribunal to evaluate whether impugned measures fall within the exemption[97] and this means it is for the tribunal itself to determine whether the state acted equitably, non-discriminatorily and in good faith in applying its law to limit a transfer of funds. In analysing similar language to the effect that non-discriminatory measures designed and applied to protect legitimate public welfare objectives including public health and safety do not constitute expropriation, Brew noted the "low nexus threshold" of such a

92 *Id.* at art. 12(3).

93 *Id.* at art. 12(6).

94 *Id.* at art. 12(3) and (6).

95 Cont'l Cas. Co. v. Arg. Republic, ICSID Case No. ARB/03/9, Award, ¶ 187 (Sept. 5, 2008).

96 CMS Gas Transmission Co. v. Arg., ICSID Case No. ARB/01/8, Award, ¶ 366 (May 12, 2005).

97 *Id.* ¶ 189.

clause and the condition that the measures be non-discriminatory'".[98]

The object of the requirement for equity, non-discrimination and good faith in exercising the right to restrict transfer of investment funds might be to prevent the abuse of this power of the contracting states to restrict the transfer of investment capital and returns. However, by making the authority to restrict transfer subject to good faith, equity and non-discrimination, the investor's right to transfer is thereby made absolute in the event that any one of these conditions is not met. The prudence of having a qualification to the right to restrict transfer is questionable. If the legitimacy of seeking to restrict the transfer is not disputed, it is less clear why a state should not have absolute right to restrict the transfer. Again, if the legitimacy of the restriction on transfer is not disputed, it is less clear why a state should not be entitled to discriminate between investors to secure the object of restricting transfer, if the state is otherwise acting in accordance with law and due process.

ii. Regional Investment Treaty Reforms in Africa

Regional investment treaties have also undergone some reform in Africa. Many of them are development policy space friendly, but some are templates or model investment treaties and the extent of their influence in the making of investment treaties entered into has not been researched yet. James Gathii has fully treated the subject of regional trade and investment law in Africa in his book, *African Regional Trade Agreements as Legal Regimes* although the book was published before the most recent investment treaty reform.[99]

The Southern African Development Community Protocol on Finance and Investment (SADC PFI) is one search regional investment agreement. It was adopted by SADC member states on 18 August 2006 and entered into force on 16 April 2010. The SADC PFI is aimed at harmonising investment policies among member states of the SADC to promote the region's economic integration objective. Twelve members of SADC signed the Agreement Amending Annex 1 (Cooperation on Investment) of the Protocol on Finance and Investment on 31 August 2016[100] (Agreement Amending SADC PFI).

98 Brew, supra note 5, at 237; see also Chauvel, supra note 14, at 153 (drawing a similar conclusion in relation to general exceptions and national treatment standard).

99 JAMES THUO GATHII, AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES (2011).

100 Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment, Aug. 31, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5527/download.

The Agreement Amending SADC PFI prohibits nationalisation or expropriation of investment.[101] However, measures of general application do not constitute expropriation of a debt security or loan even if they impose costs on the debtor and cause the debtor to default on its debt.[102] Also, measures of general application by a state party "designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation."[103] To limit the factors that must be taken into consideration when determining whether foreign investors and domestic investors are in like circumstances for purposes of the national treatment standard, the Agreement Amending SADC PFI provides that such a determination shall be done on a case-by-case basis based on specified factors.[104] Furthermore, notwithstanding the national treatment standard, a state party may in accordance with "domestic legislation grant preferential treatment to domestic investments and investors in order to achieve national development objectives."[105] Above all, investors and their investments "shall abide by the laws, regulations, administrative guidelines and policies of the Host State for the full life cycle of those investments."[106] In the absence of these exceptions, preferential treatment of domestic investors for the same development objectives could constitute breach of the applicable IIA.

The 2012 SADC Model BIT specifically addresses the issue of the right of states to pursue development goals. Article 21 of the Model BIT provides that "[n] notwithstanding any other provision"[107] of the agreement, a state party may grant preferential treatment based on domestic legislation "in order to achieve national or sub-national regional development goals."[108] State parties may also take measures that:[109] (1) support the development of local entrepreneurs; (2) increase employment; (3) increase human resource capacity and training; or (4) are necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures.

101 *Id*. at art. 5(1).

102 *Id*. at art. 5(6).

103 *Id*. at art. 5(7).

104 *Id*. at art. 6(2).

105 *Id*. at art. 6(3).

106 *Id*. at art. 8.

107 S. AFR. DEV. CMTY., SADC MODEL BILATERAL INVESTMENT TREATY TEMPLATE WITH COMMENTARY art. 21.1 (July 2012), https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf.

108 *Id*. at art. 21.1

109 *Id*. at arts. 21.2-21.3.

These are all important safeguards for the duty to regulate in Africa if adopted in BITs. However, some features of SADC Model BIT entrench the limiting effect of investment treaties on the duty to regulate through such terms as expropriation (direct and indirect). As Sornorajah has stated, indirect expropriation "takes place within a wide variety of circumstances … It cannot be identified through a single principle."[110] Yet, the SADC Model BIT seeks to provide for investors' right against indirect expropriation, stating in Article 6 that a state "shall not directly or indirectly nationalize or expropriate investments in its territory except: (a) in the public interest; (b) in accordance with due process of law; and (c) on payment of fair and adequate compensation within a reasonable period of time." Jeswald Salacuse has defined indirect expropriation as arising "in situations in which the host states invoke their legislative and regulatory powers to enact measures that reduce the benefits investors derive from their investments but without actually changing or cancelling investors' legal title to their assets or diminishing their control over them."[111]

According to Salacuse, "all host countries have a legitimate duty to regulate investors and investments in their territory, but the precise boundary between legitimate regulation and acts that violate a Treaty's expropriation provisions is often difficult to determine."[112] This is the more reason *indirect* expropriation provisions should not be encouraged in investment treaties. If regulation adversely affects domestic investors and foreign investors in like circumstances and domestic investors go without compensation, it is less clear why foreign investors should be singled out for privileged treatment, especially when they assert a right to national treatment. Moreover, it is extremely unlikely that governments would be in a position to know and therefore assess the adverse impact that a measure constituting indirect expropriation might have on an investment before the measure is taken. In the absence of such prior knowledge, governments would likewise not be in a position to determine the compensation to pay an investor before the measure is taken. Thus, by making explicit provision for indirect expropriation for foreign investors, the duty to regulate that could be reclaimed under some of the features of the Model BIT preserving that right could unreasonably be taken away. If Model BITs prove ineffective, they will perpetuate the problems they were meant to cure in IIAs.

110 M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 437 (4th ed. 2017).

111 JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 525 (2nd ed. 2015).

112 *Id*. at 326.

The Economic Community of West African States (ECOWAS) has Community Rules on Investment (CRI), which have been in force since 2009.[113] The objective of the CRI "is to promote investment that supports sustainable development" in the ECOWAS region.[114] Like the Agreement Amending SADC PFI, the CRI provides that a measure of general application does not constitute expropriation of a debt security or loan even if it imposes costs on the debtor thereby leading to the debtor defaulting on its debt.[115] The duty to transfer funds is not absolute as it may be limited in specified circumstances.[116] Investors and their covered investments "are subject to the laws and regulations"[117] of the host state and "shall strive through their management policies and practices, to contribute to the development objectives of the host States and the local levels of government where the investment is located."[118] The CRI imposes pre-establishment obligations on investors and investments to conduct social impact assessment of the potential investment and comply with minimum standards on socio-cultural impact of the assessment.[119] In addition, investors "shall be subject to civil actions for liability in the judicial process of their host State for acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host State."[120] The ECOWAS Common Investment Code of July 2018, a soft instrument, contains similar provisions like ECOWAS CRI.[121] The ECOWAS Common Investment Code imposes substantive obligations on foreign investors, including Article 27 which states significantly that:

> 27(1) Investors doing business in the ECOWAS territory shall comply with the following environmental obligations under this Code to: (a) carry out their business activities in strict conformity with the applicable national environmental laws, regulations, and administrative practices of the Member States and other multilateral agreements applicable to their investments; (b)

113 Supplementary Act Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, A/SA.03/12/08, Dec. 19, 2008, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3266/download [hereinafter Community Rules on Investment].

114 *Id*. at art. 2.

115 *Id.* at art. 8(7).

116 *Id*. at art. 10.

117 *Id*. at art. 11(1).

118 *Id.* at art. 11(3).

119 *Id*. at art. 12(1).

120 *Id*. at art. 17.

121 ECOWAS Common Investment Code (ECOWIC) arts. 31-32 (July 2018), https://ecotis.projects.ecowas.int/wp-content/uploads/2020/06/ECOWIC-JULY-2018-FINAL-ENG2.pdf.

> undertake pre-investment environmental and social impact assessments of their proposed business activities and investments with respect to the natural environment and the local population in the relevant jurisdiction; (c) apply the precautionary principle to their environmental and social impact assessments and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approaches to such investment; (d) make the investor environmental and social impact assessments available to the general public and accessible to the affected local communities and to any other affected interests in the Member State of the proposed investment; (e) perform the restoration, using appropriate technologies, for any damage caused to the natural environment and to pay adequate compensation to all affected interested persons

These are novel features that seek to secure states the duty to regulate and at the same time bring about corporate legal accountability.[122] However, they are effective only among countries which are members of ECOWAS and do not affect the rights available to foreign investors under BITs concluded by member states of ECOWAS with other non-ECOWAS countries. Moreover, the same CRI that seeks to preserve the duty to regulate also require member states to accord investors "treatment in accordance with customary international law, including fair and equitable treatment and reasonable protection and security under the domestic law"[123] of a member state. This obligation "prescribes the customary usage of international law minimum standard of treatment of aliens as the minimum standard of treatment to be accorded to investments."[124] The content of the international minimum standard of treatment of aliens is difficult to identify.[125] More fundamentally, the existence of the standard itself has been a matter of division among states for a very long time to date.[126] The inclusion of terms in investment treaties that lack precise boundaries creates the risk of the duty to regulate which could have been preserved by the more qualified protections to investors under the CRI never being preserved.

122 *See also* Revised Investment Agreement for the COMESA Common Investment Area (CCIA), https://www.comesa.int/wp-content/uploads/2020/10/English-Revised-Investment-agreement-for-the-CCIA-28.09.17-FINAL-after-Adoption-for-signing.pdf.

123 Community Rules on Investment, supra note 113, at art. 7(1).

124 *Id*. at art. 7(2).

125 SORNARAJAH, supra note 110, at 155-57 and 405.

126 *Id*. at 150-54 and 405-11.

iii. Continental Investment Treaty Reforms in Africa

At the continental level, an important soft law instrument the African Union (AU) has put in place in furtherance of the objectives of the AU primary treaty, especially on economic integration, is the 2016 Draft Pan-African Investment Code (PAfIC).[127] The PAfIC seeks "to promote, facilitate and protect investments that foster the sustainable development of each Member State."[128] It provides for various qualifications to the usual standards of investment protection to limit the scope of their application[129] and abandons standard investment treaty terms such as full protection and security and fair and equity treatment.

The PAfIC provides, quite uniquely, that in order to qualify as an investment, the business undertaking must, among other factors, make "a significant contribution to the host State's economic development."[130] The addition of contribution to the development of the host state as an element of investment in the PAfIC should help settle the issue whether or not an investment is entitled to protection under an IIA if it does not make a contribution to the development of the host state.[131] Arbitral tribunals are divided on the subject into those that support contribution to development as an element of investment[132] and those that do not.[133] The position adopted by the AU is in accord with the very conventional wisdom underlying the making of BITs and other IIAs, namely that they are necessary to attract investment for development. The PAfIC also has provisions specifically on the obligations of investors.[134]

127 Afr. Union Comm'n, Draft Pan-African Investment Code (Dec. 2016) [hereinafter PIAC].

128 *Id*. at art. 1.

129 *Id*. at arts. 7-12 and 15-17.

130 *Id*. at art. 4(4)(vi).

131 Dominic Npoanlari Dagbanja, *The Development Objective as an Imperative in Interpretation of International Investment Agreements,* 44 U.W. AUSTL. L. REV. 144 (2018).

132 Salini Costruttori S.P.A. v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001); Fedax N.V. v. Republic of Venez., ICSID Case No. ARB/96/3, Decision of the Tribunal on Objection to Jurisdiction (July 11, 1997); Patrick Mitchell v. Dem. Rep. Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (Nov. 1, 2006); Malaysian Historical Salvors Sdn, BHD v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007); Alex Genin v. Est., ICSID Case No. ARB/99/2, Award (June 25, 2001); Pantechniki S.A. Contractors & Eng'rs (Greece) v. Alb., ICSID Case No. ARB/07/21, Award (July 30, 2009); Amco Asia Corp. v. Indon., ICSID Case No. ARB/81/1, Decision on Jurisdiction (Sept. 25, 1983); Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (Jan. 14, 2010).

133 Société Générale v. Dom. Rep., LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction (Sept. 19, 2008); Consorzio Groupement L.E.S.I.-DIPENTA v. Alg., ICSID Case No. ARB/03/08, Award (Jan. 10, 2005); Electrabel S.A. v. Hung., ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 30, 2012).

134 PIAC, *supra* note 127, at arts. 19–24.

Thus, the PAfIC was designed to assure investment promotion and protection within the context of member states' duty to regulate in the public interest and to ensure that investment ultimately contributes to the development of the host state. The terms of the PAfIC give effect to its drafters' recognition in the preamble that the AU member states have the right "to regulate all the aspects relating to investments within their territories with a view to meeting national policy objectives and to promote sustainable development objectives."[135] The PAfIC now provides a framework for ongoing negotiation of the Investment Protocol to the Agreement Establishing African Continental Free Trade Area.[136]

These reform efforts point to Africa giving primary consideration to sustainable development as an overarching objective of investment treaties, defining investment in terms of its contribution to the development of host states, abandoning or qualifying the usual standards of investment protection and providing for binding obligations on investors.[137] However, as Meg Kinnear and Paul Cannu pointed out, the "effectiveness of these new treaty obligations, including new obligations weighing on investors, will depend in large part on the tools used for their enforcement."[138] The broad nature of most standards of investment protection such as fair and equitable treatment and full protection and security remains unaffected by the general exceptions for the duty to regulate because the exceptions are not directly related to these standards.[139]

These reforms may not be directly aligned with the requirements of national constitutions from which the duty to regulate derives. These reforms in Africa are general and based on the challenge posed by absolute standards of investment protection and investor-state arbitration. It does not seem the reform efforts have been informed by the specific dictates of national constitutions in Africa, except in the case of South Africa.[140] Investment treaty reforms to accommodate development policy space and the duty to regulate in Africa must be informed by the nature of the constitutional duty to regulate. Unless ongoing reforms are

135 Dagbanja, *supra* note 23, at 354-55.

136 Mbengue, *supra* note 27, at 473.

137 Kinnear & Cannu, *supra* note 31, at 544.

138 *Id*. at 545.

139 Julien Chaisse, *Exploring the Confines of International Investment and Domestic Health Protections - Is a General Exceptions Clause a Forced Perspective?*, 39 AM. J.L. & MED. 332, 356-59 (2013).

140 Protection of Investment Act 22 of 2015, Preamble, § 3-4, 6, 10 and 12 (S. Afr.); S. AFR. DEP'T OF TRADE & INDUS., BILATERAL INVESTMENT TREATY POLICY FRAMEWORK REVIEW: GOVERNMENT POSITION PAPER 24, 32-33 and 41 (June 2009).

done in the context of specific constitutional rights and obligations, the terms agreed to and flexibilities incorporated into investment treaties may not lead to compatibility between the duty to regulate under national constitutions and obligations under those investment treaties. Thus, the extent of constitutional public interest obligations must determine treaty negotiation and conclusion as along as national constitutions retain supremacy in the hierarchy of legal norms and dictate international economic relations at the national level.

IV. Conclusion

Almost every country or region of the world that is party to or has IIAs is now taking some steps to reform its IIA regime to accommodate the duty to regulate.[141] Outside of the African continent, various proposals have been made for the reform of investment treaties and investor-state arbitration. The UNCTAD has not only developed rules on transparency[142] but has also proposed various ways in which investor-state arbitration could be reformed.[143] The European Union and its partners' inclusion of investment dispute provisions in the Comprehensive Economic and Trade Agreement[144] and the Transatlantic Trade and Investment Partnership Agreement[145] received significant public opposition. This forced the European Union to propose changes to investment dispute settlement procedures and the creation of an Investment Court System (ICS).[146]

These European reforms seem to be a replica of what has long been advocated for by Africa and the developing world generally. Africa and the developing world have long stood for their sovereign duty to regulate the activities of multinational businesses entities within their jurisdiction and to control the exploration, development and disposition of their natural resources and wealth under domestic law.[147] This is reflected in the *Declaration on the Establishment of a New International Economic*

141 UNCTAD, World Investment Report 2019, supra note 8, at 99-115

142 U.N. Commission on International Trade Law, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014).

143 U.N.Conference on Trade and Development, IIA Issues Note: Reform of Investor-State Dispute Settlement: in Search of a Roadmap, UNCTAD/WIR/2013 (2013).

144 Comprehensive Economic and Trade Agreement (CETA), Can.-E.U., Oct. 30, 2016.

145 The Transatlantic Trade and Investment Partnership negotiations were launched in 2013. Negotiations ended without definite agreement at the end of 2016. See Council Decision (EU) 6052/19 of Apr. 9, 2019, Authorising the opening of negotiations with the United States of America for an agreement on the elimination of tariffs for industrial goods, https://www.consilium.europa.eu/media/39180/st06052-en19.pdf.

146 Lisa Diependaele et al., *Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System,* 24 NEW POL. ECON. 37 (2019).

147 Mbengue, *supra* note 27, at 459-560.

Order[148]*; the Charter of Economic Rights and Duties of States;*[149] and *Permanent Sovereignty over Natural Resources.*[150] The values embodying these norms include respect for sovereignty over natural wealth and resources,[151] the need to respect domestic law and exhaust local remedies[152] and the sovereign duty to regulate and exercise authority over foreign investment and the activities of investors and other multinational business entities.[153] These are the values and principles that underlie current global reforms of investment treaties pursued by developed countries that initially promoted IIAs and their ill-defined terms as the preferred international rules for investment protection.

The current reform of investment treaties in Africa as analyzed above are consistent with these earlier efforts for the sovereign right of developing countries to regulate the activities of multinational business entities operating in their territories. Current investment treaty reforms in Africa make general exceptions for the duty to regulate. These reforms certainly make a huge difference from the absolute standards of investment protection contained in the investment treaties concluded in the 1960s to the early 2000s. It is not certain, however, the scope of policy pace that in practice can be assured African states under these reforms given the qualifications characteristic of the reforms that seek to preserve African states' duty to regulate.

The limitations inherent in investment promotion and protection by treaty and arbitration which have necessitated ongoing global reforms of the IIA regime, even by regions of the world that originally championed these as the best mechanisms, impel African countries to rethink the utility and necessity of this regime in the first place. The powers of governments in Africa must be exercised first to promote the welfare of the people by and for whom these governments are constituted. This imperative must govern investment treaty reforms in Africa. International investment promotion and protection treaties and policies must align with fundamental human rights such as the duty to development and a clean and safe environment and corresponding duties of African states. This is

148 G.A. Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order (May 1, 1974) [hereinafter New International Economic Order].

149 G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States (Dec. 12, 1974) [hereinafter Charter of Economic Rights and Duties of States].

150 G.A. Res. 1803 (XVII), Permanent Sovereignty over Natural Resources (Dec. 14, 1962).

151 *Id.*

152 *Id.*

153 *Id.*; Charter of Economic Rights and Duties of States, *supra* note 149, at art. 2(1)(a); New International Economic Order, *supra* note 148.

because the advancement of the welfare of the people is or should be the reason African countries enter into investment treaties in the first place. Since states, within and outside Africa, are now willing to limit the protections available to investors and their covered investments under investment treaties, the question arises as to what remains under those treaties for investors that cannot be achieved for them under municipal investment laws and policies. Therefore, the debate in Africa about reforming investment laws and policies must consider the potential role of regulating foreign investment under municipal law. The limitations of investment treaty law make a case for serious reforms or alternatives to this regime to be considered rather than sticking to the existing regime or proposing reforms that entrench the wrong notion that without investment treaties foreign investors cannot be assured of effective protection.