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"Reform der Investitionsabkommen für eine nachhaltige Entwicklung: Die afrikanische Perspektive"

"Reforming Investment Agreements for Sustainable Development: The African Perspective"

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ABSTRAKT

Internationale Investitionsabkommen waren und sind in den meisten Fällen in erster Linie dazu geneigt, Anlegern, die im Ausland investieren möchten, ein zusätzliches Maß an Rechtsschutz zu bieten, einschließlich eines starken Nachdrucks auf ihre Interessen und Rechte im Gegensatz zu ihren Verpflichtungen. Das offensichtliche Ungleichgewicht zwischen dem Interesse des Investors und den Rechten der Regierung bei der Formulierung der Politik und der Investitionsregulierung, einschließlich in diesem Fall der Ausrichtung der Investitionen auf die nachhaltige Entwicklung, ist einer der Gründe für die Reform der IIAs.

Das Regime befindet sich heute in einem Umfeld, das von der Notwendigkeit geprägt ist, eine nachhaltige Entwicklung zu fördern und den Klimawandel aufzuhalten. wachsende wirtschaftliche Ungleichheit; größere wirtschaftliche und politische Interdependenz, wobei ausländische Direktinvestitionen zunehmend zu einer Einbahnstraße werden; und eine stärkere Beteiligung der Öffentlichkeit an der Politik und der Regelsetzung. Diskussionen über die notwendige Reform der IIAs, die in Afrika seit über einem Jahrzehnt intensiv durchgeführt werden, haben dazu beigetragen, die Debatte darüber, wie Afrika seine Ziele für eine nachhaltige Entwicklung erreichen könnte, aufzuklären und zu gestalten. und Harmonisierung der bestehenden Investitionspolitik in Afrika und Bereitstellung von Leitlinien dazu.

Die Dissertation beinhaltet eine Literaturrecherche zur Reform der IIAs für nachhaltige Entwicklung. Es analysiert die aktuellen Entwicklungen beim Mainstreaming der nachhaltigen Entwicklung in Investitionsabkommen. Eingehende Analyse der laufenden IIAs-Reform für nachhaltige Entwicklung in Afrika, um die relevanten afrikanischen Modelle für neue Investitionsabkommen der Afrikanischen Union und regionaler Wirtschaftsgemeinschaften (RECs) zu überprüfen. Die RECs-Ansätze zur Reform der IIAs unterscheiden sich jedoch in gewissem Maße und verursachen Überschneidungen, Inkonsistenzen und Inkohärenzen, die sich negativ auf das Erreichen der gewünschten Ergebnisse auswirken könnten.

Die Schlussfolgerungen der Dissertation lauten, dass ein kollektiver multilateraler Ansatz und Konsens, der auf der Anlagepolitik aufbaut und die Anlagevorschriften harmonisiert, der beste Weg ist, um die IIAs-Reformen für eine nachhaltige Entwicklung zu erreichen und die SDG-Agenda zu erreichen. Das Abkommen zur Errichtung der Afrikanischen Kontinentalen Freihandelszone (AfCFTA) bietet daher eine panafrikanische Lösung in dieser Hinsicht, indem es einen regionalen und kontinentalen integrierten Ansatz bietet.

ABSTRACT

International Investment Agreements (IIAs) were and in most cases, predominately inclined to providing an extra measure of legal protection to investors seeking to invest in foreign countries, including much emphasis on their interest and rights as opposed to their obligations. The apparent lack of balance between the investor's interest and the government's rights in formulating policy and investment regulation, including in this case, aligning investment with sustainable development forms part of the reasons for IIAs reforms.

Today, the regime exists in an environment marked by the imperative to promote sustainable development, the need to halt climate change; growing economic inequality; greater economic and political interdependence, with foreign direct investment increasingly a two-way street; and greater public involvement in policy and rule-making. Discussions on the needed IIAs reform which have been going on intensively for over a decade in Africa have helped to elucidate and shape the debate on how Africa might achieve its sustainable development objectives; and harmonize the existing investment policies in Africa and providing guidelines thereto.

The thesis research involves a literature review focused on the IIAs reform for sustainable development. It analyse the current developments in mainstreaming of sustainable development in investment agreements. In-depth analysis of the ongoing IIAs reform for sustainable development in Africa, thereby reviewing the relevant African new investment agreements models from the African Union and regional economic communities (RECs). However the RECs approaches on reforming the IIAs to a certain extent differ, causing overlaps, inconsistencies and incoherencies which could negatively affect achieving the desired results.

The thesis conclusions are that, a collective multilateral approach and consensus building on investment policy, harmonising investment regulations, is the best way in approaching the IIAs reforms for sustainable development and achieving the SDG agenda. The Agreement establishing the African Continental Free Trade Area (AfCFTA) Investment Protocol thus offers a pan African solution in this regard by offering a regional and continental integrated approach.

1. CHAPTER ONE

1.1 Introduction

1.1.1 International Investment Agreements

International Investment Agreements (IIAs) are treaties between States to promote and protect foreign investment under international law. These could be in a form of multilateral or bilateral nature. By concluding IIAs, capital-exporting countries (home States) aim to offer an additional layer of protection to their domestic companies investing abroad, while capital importing countries (host States) aim to attract additional foreign investment to their economy. Over 2,500 IIAs are currently in force, mostly in the form of Bilateral Investments Treaties (BITs) or as investment chapters in broader commercial agreements that address trade as well as other matters (Free Trade Agreements, or FTAs).[1]

IIAs like most other treaties are a product of the time when they are negotiated. They are concluded in a specific historic, economic and social context and respond to the then-existing needs and challenges. As more than half a century has passed since the first bilateral investment treaty (BIT) was concluded, it is no surprise that IIAs have gone through a significant evolutionary process during this period of which four main phases of IIAs conclusions can be identified. [2]

Over the course of the past 35 years, the BIT has emerged as the single most important innovation in international law for the governance of foreign investment. In general, BITs were mostly signed between a developed and developing country, its purpose being to protect and promote foreign investment. [3]

Typically, IIAs whether in the form of BITs or as chapters in FTAs have three main components:[4]

- Definitions of what constitute an 'investment', a 'foreign' investor, and the scope of protection offered by the treaty.
- Several standards of investment protection (e.g. protection against expropriation, fair and equitable treatment standards, non-discrimination standards, etc.).
- A dispute settlement mechanism, often providing foreign investors the possibility to bring claims against the host State before an international private tribunal (arbitration

[1] International Investment Agreements & Sustainable Development: Safeguarding Policy Space & Mobilizing Investment for a Green Economy, UN Environment, 2018

[2] World Investment Report 2015: Reforming the Investment Regime: An Action Menu Chapter IV. The Report classifies the evolution of IIAs regime in four phases being: 1950-1964 Era of Infancy, Independence Movements, with a total of 37 IIAs; 1965-1989 Era of Dichotomy, New International Order, with a total of 404 IIAs; 1990-2007 Era of Proliferation, Economic Liberalization, with a total of 3067 IIAs; 2008-today Era of Re-orientation, Development Paradigm Shift, with a total of 3271 IIAs.

[3] S. Kirayoglu, The Bilateral Investment Treaty: Its Origins and Effects, Florida State University, 2014

[4] International Investment Agreements & Sustainable Development: Safeguarding Policy Space & Mobilizing Investment for a Green Economy, UN Environment, 2018

tribunal) formed for each specific dispute for violation of one or more standards of investment protection.[5]

Foreign investments can be structured differently. They can be short or long term commitment to the host State. Short term commitments include certain contractual rights which may sometimes not involve any actual or significant presence by the investor in the host State. Minority shareholding in publicly traded foreign companies is also assets that can be held for only short durations, representing only fleeting ties to the host State. Foreign Direct Investment (FDI) and portfolio investment are other types of investments.[6]

In contrast with portfolio investment, which could be a shareholding of less than ten percent and other forms of investment such as contract rights, FDI is defined as an equity interest and other capital that gives the investor a lasting interest and effective voice in the management of the foreign enterprise. FDI can produce a number of important benefits for the host State economy that can be key for sustainable development, including increasing employment, transferring technology to the host country, and increasing the host State's competitiveness. Yet those advantages do not flow automatically from FDI. Rather, a country's ability to attract and benefit from FDI depends on various complex factors, including the policies and circumstances of the host and home countries, and conduct of the investor.[7]

The international investment law regime governing the IIAs therefore evolved out of the customary international law rights of aliens and in particular their economic rights linked to these investments which are assets, a property of the foreign investor. A foreign national whose investment was threatened by the actions of a host State had little recourse but to petition his or her home State to espouse the claim. Not only was the investor's petition subject to goodwill of home State's government and the vagaries of international relations, there was also no mechanism for the investor to represent oneself in any resulting exchange between the home and host State. This unbalanced relationship between the host State and the investor was compounded by the fact that the investor would typically have no political voice regarding changes in the host State domestic laws affecting the investment. Contemporary foreign investment arose to address, albeit imperfectly this imbalance.[8]

The bilateral Friendship, Commerce and Navigation (FNC) Treaties of the late 18th, 19th, and early 20th centuries which were the forerunners of today's BITs evolved as a tool beginning to address some of these shortcomings. FCN began as largely commercial instruments but after World War II embraced a wider range of areas including trade, investment, navigation, human rights, and later consular relations. Although FCNs granted a number of rights to the

[5] Ibid
[6] Investment Treaties and Why they Matter to sustainable Development, IISD, 2012
[7] Ibid
[8] Frank J. Garcia, et.al., (2015), *Reforming the International Investment Regime*: Lessons from International Trade Law, Journal of International Economic Law, 18, 861-892, Oxford University

nationals of the signatories, they did not create a private right of action. Even if a private right of action could be construed, it was before the domestic courts.[9]

Modern IIAs arose during the 20th century which was the decolonisation period, when newly independent States were eager to eliminate the political and economic influence of their former colonisers and assert the power of their own laws. This obviously led to anxiety among investors, often nationals of former colonial States. The BITs addressed that anxiety through clauses granting foreign investors fair and equitable treatment, national and most-favored-nation treatment, as well as rules governing expropriation. In most cases when the former colonisers were the exclusive exporters of foreign direct investment, BITs were therefore a one-way protection system benefitting the nationals of these former colonisers.[10]

From the 1950s, when the first BIT was concluded, to the 1970s only a small number of BITs entered into force. A massive surge in the number of concluded BITs was not until the 1980s as more developing countries concluded more BITs. The IIA rush defined as the Era of Proliferation from 1990 to 2007 gradually slowed down and from 2008 to 2015 the IIA regime had grown close to 3,300 treaties, an Era of Re-orientation caused by many countries refining IIA content, States were increasingly being exposed to ISDS cases, coupled with the global financial crisis and lastly, a paradigm shift towards sustainable development. [11]

Several developments in the second half of the 2000s had lead to a new era of IIA rule making, hence being characterized as a period of reorientation. The experience of Canada and the United States as respondents in NAFTA investment arbitrations, prompted them to create, already in 2004, new Model BITs aimed at clarifying the scope and meaning of investment obligations, including the minimum standard of treatment and indirect expropriation. In addition, these new models included specific language aimed at making it clear that the investment protection and liberalization objectives of IIAs must not be pursued at the expense of the protection of health, safety, the environment and the promotion of internationally recognized labour rights.[12]

Countries such as Canada and the United States also incorporated important innovations related to ISDS proceedings such as open hearings, publication of related legal documents and the possibility for non-disputing parties to submit amicus curiae briefs to arbitral tribunals. Also included, following on from NAFTA, were special regimes of substantive protection and dispute resolution for investments in the financial services industry, as well as specialized mechanisms for disputes by investors based on host State tax measures. The United States Model BIT was slightly revised in 2012.[13]

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[9] Ibid
[10] Ibid
[11] Supra
[12] World Investment Report 2015: Reforming the Investment Regime: An Action Menu Chapter IV
[13] Ibid

The global financial and economic crisis that broke out in September 2008, following the Asian and Argentine financial crises emphasised the importance of solid regulatory and growing dissatisfaction with the existing IIA regime and its impact on contracting parties' regulatory powers to pursue public interests and to enhance sustainable development led countries to reflect on, review and reconsider their policies relative to IIAs.[14]

By the end of 2014, ISDS cases rose from 326 in 2008 to 608. These cases involved both developed and developing countries as defendants. In addition, investment disputes became more complex, raising difficult legal questions about the borderline between permitted regulatory activities of the State and illegal interference with investor rights for which compensation has to be paid. At the same time, as the number of ISDS cases began to rise sharply, so did the amount of compensation sought by investors in their claims and awarded by arbitral tribunals in a number of high-profile cases.[15]

Consequently, governments entered into a phase of evaluating the costs and benefits of IIAs and reflecting on their future objectives and strategies as regards these treaties. Mounting criticism from civil society played a role as well. As a result, several countries have embarked on a path of IIA reform by revising their BIT models with a view to concluding "new generation" IIAs and renegotiating their existing BITs.[16]

The treaty-based system for investment protection therefore came under increasing scrutiny as high-profile disputes involved more social issues implicated by investment. These include many cases arising from the Argentine economic crises of the early 2000's involving investment and human rights, in Tanzania involving investment and public health, in Mexico involving investment and environmental protection etc.[17]

Despite this increasing scrutiny, today it is widely recognised that, IIAs can however play a useful role in mobilizing and channelling the investment needed for countries to transition to inclusive green economy pathways. The UN Conference on Trade and Development (UNCTAD) estimates that between US$ 5-7 trillion worth of investment a year is needed to realize the Sustainable Development Goals (SDGs) adopted in 2015, including those necessary for infrastructure, clean energy, water and sanitation, and agriculture. Yet, too much investment is still taking place in high-carbon and resource-intensive polluting sectors, placing additional burdens on the environment. By creating the appropriate incentives, IIAs have the potential to facilitate investments that contribute to sustainable development and that support a country's transition towards an inclusive green economy which improve human

[14] Ibid
[15] Ibid
[16] Supra
[17] Frank J. Garcia, et.al., (2015), *Reforming the International Investment Regime*: Lessons from International Trade Law, Journal of International Economic Law, 18, 861-892, Oxford University

well-being and social-equity, while significantly reducing environmental risks and ecological footprint.[18]

Currently, most IIAs are still designed in a way overlooking the importance of environmental and social considerations. Moreover, in their present form and operation, to a large extent, they still restrict the ability of States to implement enabling policies for inclusive green economy pathways, particularly in the energy, transportation, agricultural, industrial, water, and waste sectors.[19]

In response to discussions that have taken place thus far, a still small but growing share of the entire body of IIAs, particularly the most recent agreements, have started to take into account environmental, social and labour issues in their text and structure. This has been done, for example, by inserting clauses stating that countries should not seek to attract foreign investment by lowering their environmental and social protection standards or by stating that the powers of countries to regulate for the common good are reserved. This is an encouraging trend towards a re-conceptualisation of IIAs based on the understanding that, like trade, foreign investment is not a goal in itself but an instrument to promote sustainable development[20]

1.1.2 The Concept of Sustainable Development

The concept of sustainable development formed the basis of the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro in 1992. The summit marked the first international attempt to draw up action plans and strategies for moving towards a more sustainable pattern of development. The elements of sustainable development were viewed as the solution to the problems of environmental degradation discussed by the Brundtland Commission in the 1987 report Our Common Future.

For the first time, the United Nations system examined both environmental protection and economic development on an equal footing at the same Conference. Based on the concept of sustainable development, that is, development that is consistent with future as well as present needs, the general recognition that development is an urgent priority for third world countries, but recognising also that the environmental consequences of development must be taken into account. This analysis therefore shaped the international environmental agenda post the UNCED Conference.[21]

The results of the UNCED were embodied in the global programme of action, Agenda 21, the Rio Declaration on Environment and Development and the Non-legally Binding

[18] International Investment Agreements & Sustainable Development: Safeguarding Policy Space & Mobilizing Investment for a Green Economy, UN Environment, 2018

[19] Ibid

[20] Ibid

[21] P. Chasek, (1997), *The United Nations Commission on Sustainable Development:* The First Five Years, Columbia University International Institute for Sustainable Development

Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (also known as the Forest Principles). These developments tried to promote and operationalise this concept of sustainable development and change the way the international system looks at environment and economic development. At the international level, the main responsibility for monitoring the implementation of the Rio accords and, hence the implementation of sustainable development, fell to the Commission Sustainable Development.[22]

Sustainable development has been defined in many ways, but the most commonly used definition is from the Brundtland Commission Report also known as Our Common Future, which state that:

"Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

The term "sustainable development" is thus said to comprise of four elements namely:[23]

- The principle of intergenerational equity within states.
- The principle of sustainable use of natural resources.
- The principle of equitable use or intra-generational equity amongst/between states.
- The principle of integration of environmental considerations into developmental strategies and policies by states.

The Brundtland Commission was established by the United Nations General Assembly Resolution 38/161/1983. The Resolution was adopted on the backdrop of decision 11/3 made on 23 May 1983, by the Governing Council of the United Nations Environment Programme on the process of preparation of the Environment Perspective to the year 2000 and Beyond. Relevant to the issue of sustainable development, the Commission was amongst others mandated to:

- *To propose long-term environmental strategies for achieving sustainable development to the year 2000 and beyond;*

- *To recommend ways in which concern for the environment may be translated into greater co-operation among developing countries and between countries at different stages of economic and social development and lead to the achievement of common and mutually supportive objectives which take account of the interrelationships between people, resources, environment and development;...*[24]

[22] Ibid
[23] P. Sands; Principles of International Environmental Law: Frameworks, Standards and Implementation, vol 1 (1985), Manchester University Press
[24] https://www.un.org/documents/ga/res/38/a38r161.htm (assessed 20/07/2019)

The Commission in its report defined the concept of sustainable development as implying limits though not absolute but limitations to be imposed by the present generation when deploying technology and social organization on environmental resources. The technology and the social organization have to be managed and improved to make way for the new era of economic growth.

The Commission envisaged widespread poverty as inevitable, and recognised sustainable development as a means to curb poverty by meeting the basic needs of all and extending to all the opportunity to fulfil their aspirations for a better life. The Commission further envisaged a world in which poverty is endemic and will always be prone to ecological and other catastrophes.[25] Meeting essential needs in this regard requires not only a new era of economic growth for nations in which the majority are poor, but an assurance that those that are poor get their fair share of the resources required to sustain that growth. Such equity would be aided by political systems that secure effective citizen participation in decision making and by greater democracy in international decision making.[26]

Sustainable global development further requires that, those who are more affluent adopt such life-styles taking into consideration the planet's ecological means in their use of energy for example. Furthermore, rapidly growing populations can increase the pressure on resources thus sustainable development can only be pursued if population size and growth are in harmony with the changing productive potential of the ecosystem.

The Commission concluded that, sustainable development is not a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs and that, sustainable development must therefore rest on political will.[27]

The Bruntland Report is said to have distinguished development from economic growth. Sustainable development clearly requires economic growth in places where such needs are not being met. Elsewhere, it can be consistent with economic growth, provided the content of growth reflects the broad principles of sustainability and non-exploitation of others. But growth by itself is not enough. High levels of productive activity and widespread poverty can coexist, and can endanger the environment. Human needs are manifold, but the Brundtland

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[25] The UN Sustainable Development Agenda reports that, while global poverty rates have been cut by more than half since 2000, one in ten people in developing regions are still living with their families on less than the international poverty line of US$1.90 a day, and there are millions more who make little more than this daily amount. Significant progress has been made in many countries within Eastern and South-eastern Asia, but up to 42% of the population in Sub-Saharan Africa continues to live below the poverty line. https://www.un.org/sustainabledevelopment/poverty/ (accessed on 20/07/2019)

[26] https://www.un.org/sustainabledevelopment/ (accessed on 20/07/2019)

[27] Ibid

Report goes further to speak of essential needs such as for food, clothing, shelter, and jobs, etcetera. [28]

The United Nations Framework Convention on Climate Change which is also highly relevant on the concept of sustainable development however does not limit the right to sustainable development to meeting basic needs. Rather it reference energy intensive and poverty eradicating economic growth. In its preamble the Convention claims to be "taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty;" and it recognizes "that all countries, especially developing countries, need access to resources required to achieve sustainable social and economic development and that, in order for developing countries to progress towards that goal, their energy consumption will need to grow." The paragraph that follows the declaration of the right holds that "The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change."[29]

In the Brundtland Report the qualifier "sustainable" expresses a limitation on development in order to maintain intergenerationally the human capacity to satisfy needs. Sustainability contains a core notion of fairness to other (future) persons, not first and foremost natural preservation. The Brundtland Report explicitly provide that: "Every ecosystem everywhere cannot be preserved intact. A forest may be depleted in one part of a watershed and extended elsewhere, which is not a bad thing if the exploitation has been planned and the effects on soil erosion rates, water regimes, and genetic losses have been taken into account." Preserving the capacity of future generations to meet their needs may require the conservation of some natural resources but also the transformation of others into capital assets. This anthropocentric conception of sustainability is said to be echoed in Principle One of the Rio Declaration, that is, "Human beings are at the centre of concerns for sustainable development.[30]

The principle of sustainable development is therefore seen by many as being at the very heart of international environmental law. This principle not only recognizes the right to economic development of the developing countries but also emphasizes the importance of environmental protection. Critics of economic globalization have identified that the competition between countries for investment may result in a neglect of environmental concerns; that national governments are gradually losing their influence over important

[28] See D. Moellendorf, (2011), "A Right to Sustainable Development", *The Monist*, vol. 94, no. 3, pp. 433–452, Peru, Illinois. The criticisms made by Darrel herein is that, this list of essential needs might be taken to rest on a conception of human nature, but it is not most charitably read that way. People do not need jobs in virtue of our nature. And although people need nutrition and shelter naturally, food has other, more socially rich, connotations. This list or at least some the items on it might be better understood to refer to the basic needs of typical persons in modern societies. Further that, the Brundtland Report speaks more expansively of "human needs and aspirations."

[29] Ibid

[30] ibid

domestic issues; and that globalization undermines the traditional balance of power between rich and poor.[31]

Over the years, the Brundtland Commission definition of sustainable development has been broadened beyond highlighting the importance of intergenerational equity wherein the concept of conserving resources for future generations is held as one of the major features that distinguish sustainable development policy from traditional environmental policy, which also seeks to internalise the externalities of environmental degradation. The overall goal of sustainable development is now widely understood as the long-term stability of the economy and environment and that, this is only achievable through the integration and acknowledgement of economic, environmental, and social concerns throughout the decision making process.[32]

The key principle of sustainable development underlying all others is therefore analysed as the integration of environmental, social, and economic concerns into all aspects of decision making. All other principles in the sustainable development framework have integrated decision making at their core. It is this deeply fixed concept of integration that distinguishes sustainability from other forms of policy.[33]

The idea of integration nationally requires government institutions which are typically organized into sectoral ministries and departments to have a coherent policy making and implementation of sustainable development elements. The aim is the integration of economic, environmental, and social objectives across these sectors, territories, and generations. Therefore, sustainable development requires the elimination of fragmentation; that is, environmental, social, and economic concerns must be integrated throughout decision making processes in order to move towards development that is truly sustainable.[34]

In September 2015, 193 member-states of the United Nations adopted seventeen Sustainable Development Goals (SDGs) as the organizing principle for development policy and cooperation through 2030. The SDGs provide time-bounded goals and targets in key sectors including health, education, agriculture, energy, infrastructure and the environment.

The SDGs are a call for action by all countries, whether poor, rich and middle-income to promote prosperity while protecting the planet. They recognize that ending poverty must go hand-in-hand with strategies that build economic growth and address a range of social needs including education, health, social protection, and job opportunities, while tackling climate change and environmental protection.[35]

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[31] A. Zakia (2004), "Foreign Direct Investments and Sustainable Development in the Least-Developed Countries," Annual Survey of International & Comparative Law: Vol. 10: Iss. 1, Article 9

[32] Brief for GSDR 2015: The Concept of Sustainable Development: Definition and Defining Principles Rachel Emas, Florida International University.

[33] ibid

[34] Ibid

[35] https://www.un.org/sustainabledevelopment/ (accessed on 20/07/2019)

The SDGs are integrated and inclusive. They move away from siloed development approaches, recognizing the interconnectedness between the pillars of sustainable development and the role state and non-state actors play in achieving it. The SDGs encourage countries to benefit from synergies across sectors that naturally build partnerships between ministries, institutions and stakeholders.[36]

Achieving this ambitious post-2015 development agenda, including all the sustainable development goals, will require an equally ambitious, comprehensive, holistic and transformative approach with respect to the means of implementation, combining different means of implementation and integrating the economic, social and environmental dimensions of sustainable development.[37] Achieving the SDGs will also not only require improved policies and effective governance for Africa, but also increased public and private investments. Just as financing alone will not deliver the SDGs, neither will improved policies that are not backed by increased investments.[38]

1.1.3 The Link between Investment and Sustainable Development

The link between investment and sustainable development and the importance of investment for sustainable development cannot be overstated. It is currently evident also that, sustainable development requires structural economic change, which can only be brought about by investment in new forms of energy production, transport, manufacturing and resource extraction. Thus the promotion of sustainable development is ultimately the promotion of investment that improves sustainability and promotes equitable social and economic development.[39]

Unfortunately, not all investment works toward the goals of sustainable development. Policy-makers often use the narrow benchmark of increased volumes of investment to judge success, yet few States would knowingly welcome investment that is footloose, that degrades the environment and depletes natural resources, that treats workers poorly or that creates few in-country economic benefits. In the end, the appropriate focus from a sustainable development perspective is not just on the quantity of investment, but equally if not predominately also on its quality.[40]

The 2030 Agenda, adopted by Heads of State in 2015, recognizes the importance of mobilizing adequate financial flows in order to realize the SDGs. In particular, the 2030 Agenda recognizes the importance of private finance 'leveraged' by international public funds. Leveraging can be understood as a process by which international public funds (e.g.

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[36] Africa 2030: How Africa Can Achieve the Sustainable Development Goals; Sustainable Development Goal Center for Africa (SDGC/A), 2017
[37] Ibid
[38] Ibid
[39] Investment Treaties and Why they Matter to sustainable Development, IISD, 2012
[40] Ibid

from a multilateral agency or a development bank) are allocated to a project or an initiative in order to reduce the risk for the private sector to either invest funds or lend funds to the project promoters. This is the main approach that has been pursued so far by environmental funds, such as the Global Environmental Facility (GEF) or the Green Climate Fund (GCF), in their efforts to engage with the private sector in order to help mobilize the investment required for mitigating climate change and enhancing environmental sustainability.[41]

The 2030 Agenda also sets concrete goals and targets in SDG 17 as well as in a number of substantive SDGs. Trade and investment are seen as means for promoting sustainable development in SDG targets 2.a, 7.a and 10.b, which relate to food security, energy and inequality among countries. SDG 17 refers more generally to finance, technology transfer, capacity-building, trade and a number of systemic issues (policy and institutional coherence, multi-stakeholder partnerships, as well as data, monitoring and accountability) as a means to 'revitalize the global partnership for sustainable development'. Although investment is not singled out, it is implicit in these references, not only with respect to finance and technology transfer but also to trade, which is a key component of many IIAs in the case of FTAs.[42]

SDG targets 17.3 and 17.5 emphasise the need to mobilize resources from a variety of sources for developing countries, particularly least developed countries. SDG target 17.15 also explicitly references the need to respect each country's policy space and leadership to establish and implement policies for poverty eradication and sustainable development. This reference partly resulted from the debate over the so-called 'regulatory chill', that is, the constraints that may be imposed by trade and investment liberalization agreements on countries' ability to adopt regulatory measures, including for environmental and social protection. As such, the 2030 Agenda clearly recognizes trade and investment as a means for achieving sustainable development that must be aligned with sustainable development objectives and a country's legitimate regulatory function.[43]

The 2030 Agenda also expressly refers to the Addis Ababa Action Agenda, adopted at the Third International Conference on Financing for Development in 2015, as an integral part of the 2030 Agenda for Sustainable Development. The Addis Ababa Action Agenda specifically links investment to sustainable development. For example, it invites the private sector 'to invest in areas critical to sustainable development' and recognizes 'the important contribution that direct investment, including foreign direct investment, can make to sustainable development, particularly when projects are aligned with national and regional sustainable development strategies'.

The Addis Ababa Action Agenda was a follow-up to the 2002 Monterrey consensus and the 2008 Doha Declaration on Financing for Development. The Heads of State and Government affirmed their strong political commitment to address the challenge of financing and creating

[41] International Investment Agreements & Sustainable Development: Safeguarding Policy Space & Mobilizing Investment for a Green Economy, UN Environment, 2018
[42] Ibid
[43] Ibid

an enabling environment at all levels for sustainable development in the spirit of global partnership and solidarity. They reiterated the 2002 Monterrey Consensus and the 2008 Doha Declaration. The goal is to end poverty and hunger; to achieve sustainable development in its three dimensions through promoting inclusive economic growth, protecting the environment, and promoting social inclusion; committing to respecting all human rights, including the right to development.[44]

The Heads of State and Government further recognised that; private business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creation; the important contribution that direct investment, including foreign direct investment, can make to sustainable development, particularly when projects are aligned with national and regional sustainable development strategies; that the nature of international portfolio investment has evolved over the past 15 years; that foreign investors now play a significant role in some developing countries' capital markets, and the importance of managing volatility associated with these; that foreign investors should share risks and reward fairly, include clear accountability mechanisms and meet social and environmental standards; need to build capacity to enter into public-private partnerships, [45]

South-South cooperation was recognised as an important element of international cooperation for development as a complement, not a substitute, to North-South cooperation. This includes recognition of the significant potential of regional economic integration and interconnectivity to promote inclusive growth and sustainable development, and commit to strengthening regional cooperation and regional trade agreements. The Conference undertook to strengthen coherence and consistency among bilateral and regional trade and investment agreements.[46]

The Conference recognised that, international trade and investment offers opportunities but also requires complementary actions at the national level. The Conference undertook strengthen domestic enabling environments and implement sound domestic policies and reforms conducive to realizing the potential of trade for inclusive growth and sustainable development. It further recognised the need for value addition by developing countries and for further integration of micro, small and medium-sized enterprises into value chains. It reiterated the important role of the United Nations Conference on Trade and Development (UNCTAD) as the focal point within the United Nations system for the integrated treatment of trade and development and interrelated issues in the areas of finance, technology, investment and sustainable development.[47]

The 2030 Agenda further describes a number of steps that could be taken at the national level such as the national investment promotion agencies and at the international levels (e.g. through the World Bank Group's Multilateral Investment Guarantee Agency (MIGA). Importantly, the Addis Ababa Agenda emphasises the need to safeguard the ability of States

[44] Addis Ababa Action Agenda of the Third International Conference on Financing for Development, 2015
[45] ibid
[46] Ibid
[47] Supra

to regulate in pursuance of sustainable development. It affirms that States will respect each country's policy space and leadership to implement policies for poverty eradication and sustainable development, while remaining consistent with relevant international rules and commitments'. It specifically makes reference to the need to regulate in order to align private investment and public goals by developing policies and, where appropriate, strengthen regulatory frameworks to better align private sector incentives with public goals, including incentivizing the private sector to adopt sustainable practices, and foster long-term quality investment'.

Some other international initiatives have also more clearly expressed the idea that sustainable development is the end goal and investment promotion and protection is a means to achieve that goal. For example, the International Institute for Sustainable Development (IISD) as back as 2005 already developed the Model International Agreement on Investment for Sustainable Development. This Model emphasises the right of States to regulate for social and environmental matters and even includes a chapter setting obligations for investors. In a subsequent effort, UN Environment and the IISD jointly developed a 'Sustainability Toolkit for Trade Negotiators,' which contains a number of sustainable development clauses included in investment chapters of FTAs.

In both efforts, the focus is clearly on the international level on reform of IIAs. Significantly, the reforms recommended and the tools do relate to the post-entry stage of the investment process. The discretionary power of States as to whether to admit investment or not (market access) is fully preserved. The IISD Model and the tools offered in the toolkit focus instead on how to 'treat' investment once it has already gained access to the host country.[48]

UNCTAD in 2012 launched the most comprehensive work undertaken in this area, which covers both domestic and international policies. In its 2012 World Investment Report, UNCTAD launched the 'Investment Policy Framework for Sustainable Development' (IPFSD) with the aim of bringing together investment policies and the economic, social and environmental aspects of development. The IPFSD comprised of three components, namely:

- Core principles for investment policymaking.
- National investment policy guidelines.
- Several 'policy options' to design IIAs.

The core principles clarified that foreign investment must lead to inclusive growth and sustainable development and therefore that investment may not be regarded as an end in itself. The national policy guidelines and policy options proposed by the IPFSD specifically called for governments to negotiate 'sustainable development-friendly IIAs' and provided a detailed analysis of how certain standards and terms commonly employed in IIAs can operate so as to make room for sustainable development considerations.

[48] Addis Ababa Action Agenda of the Third International Conference on Financing for Development, 2015

The IPFSD was revised in 2015 and complemented by another policy tool, the "Road Map for IIA Reform", which focused mainly on the substance of IIA reform. The Road Map set out the following five priority areas for reform:

- Safeguarding the right to regulate in the public interest while providing protection.
- Reforming investment dispute settlements to address the legitimacy crisis of the current system.
- Promoting and facilitating investment.
- Ensuring responsible investment to maximize the positive impact of foreign investment and minimize its potential negative effects.
- Enhancing the systemic consistency of the IIA regime so as to overcome the gaps, overlaps and inconsistencies of the current system and establish coherence in investment relationships.

UNCTAD's subsequent stocktaking of reform efforts showed that while key reform options were increasingly incorporated in new IIAs, policy attention needed to focus also on how to modernize the stock of over 2,500 existing old-generation treaties. UNCTAD responded to this policy need by analysing and discussing 10 reform mechanisms as part of "Phase 2 of IIA Reform" in its 2017 World Investment Report. The 2018 UNCTAD's World Investment Report presented policy options to enhance the coherence of IIAs with national investment policies and other bodies of international law affecting investment. More recently, UNCTAD's updated Reform Package for the International Investment Regime brought together UNCTAD's recommendations for the three phases of reform, covering the full range of policy options, and the pros and cons in the design of new, as well as the reform of existing older IIAs. [49]

These various initiatives reflect that investment, including FDI, and sustainable development, are increasingly recognized as closely interrelated issues. In particular, more recent initiatives have clarified the relationship between investment-related policies or 'means' to the ends pursued. That is, the promotion of sustainable development and the transition to inclusive green economy pathways. There is therefore a wide recognition at the international level that domestic and international investment law should not limit the space within which sustainability policies can be developed and adopted. Rather, whenever investment agreements hinder sustainable development or the transition to inclusive green economy pathways, they should be reformed. Indeed, when there is inconsistency between the overall goal pursued and the means to achieve it, it is the means and not the goal that require adjustment. Therefore, in order for investment policies and, in particular, for IIAs to realise their potential as an instrument to promote sustainable development and encourage the transition to inclusive green economy pathways, they must be suitably reformed to allow for sufficient policy space.[50]

[49] Ibid pg 8
[50] Ibid pg 9

2. CHAPTER TWO

2.1. Reforming International Investment Regime

The conservation of natural resources, environmental protection and social well-being did not feature about 50 years ago. Today, however, these objectives have become universally recognized guiding principles for all policymaking in developed and developing countries, including in investment policymaking. This include the need for the IIA regime to respond to pressing social needs, and the need to follow the basic rule of law criteria such as coherence, predictability, neutrality and accountability.[51] Accordingly, investment policies and IIAs can no longer be designed in isolation, but need to be harmonized with, and made conducive to, the broader goal of sustainable development.[52]

This is even more so, given the importance of international investment for achieving the SDGs as part of the post- 2015 development agenda, and for living up to the commitments of the 2030 Agenda. As the global community's views on development have evolved, societies' expectations about the role of foreign investment have become more demanding. Today, it is no longer enough that investment creates jobs, contributes to economic growth or generates foreign exchange. Countries increasingly look for investment that is not harmful for the environment, which brings social benefits, promotes gender equality, and which helps them to move up the global value chain.[53]

Moreover, concerns about the strength and conduct of individual foreign investors have brought foreign investment in general under closer domestic and international scrutiny. Investors are increasingly expected to do more than the minimum required by law. Increasingly, investment behaviour is assessed on whether it complies with international standards, such as the UN Guiding Principles on Business and Human Rights, the revised OECD Guidelines on Multinational Enterprises, and the FAO/World Bank/UNCTAD/IFID Principles on Responsible Agricultural Investment (PRAI). In addition to standards developed by international organizations, investors are expected to develop their own Corporate Social Responsibility (CSR) codes and to report on the actions they have taken in order to comply with them .[54]

There is therefore the growing unease with the current status of the IIA regime, together with today's sustainable development imperative, the greater role of governments in the economy and the evolution of the investment landscape, have triggered a move towards reforming international investment rule making to make it better suited for today's policy challenges. As a result, the IIA regime is going through a period of reflection, review and revision.[55]

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[51] F. J. Garcia, et.al., (2015), *Reforming the International Investment Regime:* Lessons from International Trade Law, Journal of International Economic Law, Vol 18, 861-892, Oxford University
[52] World Investment Report 2015:Reforming the Investment Regime: An Action Menu Chapter IV
[53] Ibid
[54] Ibid
[55] Supra

The UNCTAD's October 2014 World Investment Forum Report, indicated ongoing heated public debate taking place in many countries, and from various parliamentary hearing processes, including at the regional level, wherein a shared view is emerging on the need for reform of the IIA regime to ensure that it works for all stakeholders. The question is not about whether to reform or not, but about the what, how and extent of such reform.[56]

The initial reforms centred around five main reform challenges, which are: safeguarding the right to regulate for pursuing sustainable development objectives, reforming investment dispute settlement, promoting and facilitating investment, ensuring responsible investment, and enhancing systemic consistency.[57]

In light of the current global discussions on re-shaping or reforming the international investment regime, governments and the relevant international organisations continue to consider ways to shape the reform of the international investment policy regime, including the investment dispute settlement towards sustainable development objectives.

Many challenges arising from the international investment regime has been apparent. This is a matter relevant to both developed and developing countries though the key drivers for wanting a reform and the approach thereto somehow differs based on different levels of development of both the developed and developing countries including different development goals and policies.

IIAs were and in most cases, predominately inclined to providing an extra measure of legal protection to investors seeking to invest in foreign countries, including much emphasis on their interest and rights as opposed to their obligations. The apparent lack of balance between the investor's interest and the government's rights in formulating policy and investment regulation, including in this case, public good when viewed from the perspective of sustainable development augmented for the said reform.

Additionally, the continuing structural change in the global economy further amplified the IIAs reforms. As the distinction between capital-exporting and capital-importing countries continues to fade, many countries are now "a bit of both", therefore countries' perceived self-interests in relation to investment treaties have evolved.[58]

Investment protection have gained importance to countries with emerging capital export activities while management of legal risks have assumed a greater importance to countries that have traditionally been capital exporters but now receive significant capital inflows.

[56] Ibid
[57] Ibid
[58] Gordon, K. and J. Pohl (2015), "Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World", *OECD Working Papers on International Investment*, 2015/02, OECD Publishing, pg 9

These structural changes have therefore lead to a re-evaluation of treaty practice and also promote a greater commonality of interests among treaty partners.[59]

Furthermore, to a certain extent, some of the investment regime's weaknesses are a legacy issue. The regime was framed at a time of significant power asymmetries between the principal capital exporting (mostly developed) and most capital importing (mostly developing) countries, and long involved overwhelmingly unidirectional (i.e., North-South) FDI flows.[60]

Today however, the regime exists in an environment marked by the imperative to promote sustainable development, including the need to halt climate change; growing economic inequality; greater economic and political interdependence, with FDI increasingly a two-way street; greater public involvement in policy and rule-making; and a desire for the preservation of policy space and balanced rights and responsibilities on the part of governments and international investors.[61]

UNCTAD in its World Investment Report of 2018 reported that, the year 2017 concluded with the lowest number of new IIAs since year 1983, signalling a period of which most Governments singularly or collectively are reflecting, reviewing, and reforming the international investment policies and agreements.[62]

UNCTAD classifies the IIAs reforms in three phases, to wit: improving the approach to new treaties; modernizing existing treaties; and lastly ensuring coherence with national investment policies and with other bodies of international law.

As part of the first phase of IIA reform, countries have built consensus on the need for reform, identified reform areas and approaches, reviewed their IIA networks, developed new model treaties and started the second phase consisting of negotiating new, more modern IIAs, thereby modernising the stock of outdated, first-generation treaties.[63]

Further that, with phase one consolidating and phase two under way, the time has come to consider phase three of the IIAs reform which consists of enhancing investment policy coherence and synergies holistically across two dimensions:

- First, maximizing synergies between IIAs and the national legal framework for domestic and foreign investment.

[59] ibid
[60] Karl P. Sauvant, "Reforming the International Investment Regime: Two Challenges", in Julien Chaisse, Tomoko Ishikawa and Sufian Jusoh, eds., *Asia's Changing Investment Regime: Sustainability, Regionalization, and Arbitration* (Singapore: Springer, 2017)
[61] ibid
[62] UNCTAD World Investment Report of 2018, pg 88
[63] ibid

- Second, managing the interaction between IIAs and other bodies of international law that also touch upon investment. [64]

Overall, these reforms therefore entail Government's formulation of new or different strategic approach to international engagement on investment and embedding international investment policymaking into their countries' development strategies. This involves deciding whether or not to engage in IIAs, determining how to respond to reform needs concerning existing, managing the interaction between IIAs and national policies (e.g. ensuring that IIAs support industrial policies and that between IIAs and other international policies or agreements (e.g. ensuring that IIAs do not contradict international environmental agreements or human rights obligations). In this case, the overall objective therefore is to ensure coherence between IIAs and sustainable development needs.[65]

Most of the new IIAs therefore include sustainable development oriented reform elements; ensuring the State's right to regulate which entail among others regulation through reservations and exceptions; balanced rights and obligations of States and investors such as through encouraging compliance with corporate social responsibility standards and improvements to or omissions of investor–State dispute settlement (ISDS), thereby minimizing the risk of the State's exposure to ISDS.[66]

However, there are some of the systemic challenges stemming from the multi-layered and multi-faceted nature of the IIA regime, including the gaps, overlaps and inconsistencies in the system, its multiple dispute resolution mechanisms, and its progressively and inconsistent expansion.

A collective multilateral approach and consensus building on investment policy is seen as the best way to reform the IIA regime with a view to making it work for sustainable development. This approach include any multilateral engagement, support structure that could offer backstopping functions, through policy analysis, coordination among various processes at different levels and dimensions, management of the interaction with other bodies of law, technical assistance and consensus-building.[67]

With a new era of development comes the need for new approaches to public planning in African countries and across the world. For instance, the SDGs call for planning methods that effectively incorporate multiple interests, coordinate work across ministries, support the localisation of goals, and scaling up efforts. World leaders have historically made promises about sustainable development that have fallen short of being met. In this regard, initiatives

[64] Ibid pg 104
[65] Investment Policy Framework for Sustainable Development, UNCTAD, 2015, pg 72
[66] ibid
[67] ibid

like the SDGs provide an opportunity for leaders to revisit implementation practices and remedy divergences between commitments and results.[68]

Although all stakeholders are responsible for operationalising the SDGs, African national and city governments will play the leading role in setting priorities and steering progress. Government strategies provide a pathway for sustainable development that directs resources, incentivises behavior, and guides understanding of complex challenges. Additionally, the use of public planning has changed in response to new global and national realities. Sustainable development now requires long-term planning, protected from political disruption, to address issues like climate change, to define responsibilities and accountability mechanisms for multi-stakeholder partnerships, and to integrate thinking that puts to rest futile debates that pit one dimension of sustainable development against another.[69]

This new era of development also includes the dawn of a fourth industrial revolution, propelled by frontier technologies and robotization advances that make production better, cheaper and faster than ever before. This new industrial revolution offers enormous opportunities for economic growth and sustainable development with potential benefits on a scale that is difficult to imagine. New technologies promise possibilities of industrial upgrading and leapfrogging. Cheaper transportation and communication, coupled with more efficient logistics, can also help developing countries better link to global value chains. Some of the most advanced emerging economies are already on the verge of becoming global technological leaders in a number of industries. Yet, the new economic age and the accelerating pace of technological innovation could also result in serious economic disruption and more inequality.[70]

Existing investment patterns, for instance, might go through profound and far-reaching changes, in terms of both flows and content. There is an emerging structural impact of the digital economy on foreign direct investment. In this context, developing countries, and least developed countries in particular, face considerable challenges. They range from structural constraints, such as the lack of adequate infrastructure and scarce access to finance, to strategic issues. Offshoring and relocation towards destinations offering cheaper domestic labour become less relevant in a world of increasingly automated manufacturing. At the same time, improving living conditions requires creating jobs, which in turn still relies heavily on manufacturing. Developing countries with small markets face additional pressure on their investment policies as companies increasingly look for investment locations offering the best conditions to deliver new and high-quality products rapidly, close to the customer and through flexible production processes.[71]

[68] Africa 2030: How Africa Can Achieve the Sustainable Development Goals; Sustainable Development Goal Center for Africa (SDGC/A), 2017
[69] ibid
[70] World Investment Report, UNCTAD, 2018
[71] Ibid

Challenges are particularly pronounced in Africa. Despite a period of strong economic growth, the level of economic transformation is still somewhat low. The share of manufacturing in the GDP of African countries is small, and in some cases it has further declined or stagnated over the past decade. However, manufacturing has the potential of creating a large number of jobs in the formal sector and therefore raising living conditions. African countries are also confronted with an altering global economic landscape and deep structural reconfiguration that includes governments' industrial policies in recent years. There is a growing consensus that structural transformation does not occur by itself, but rather requires a proactive investment policy that facilitates a transition towards new sectors and activities with higher productivity and more value added, while fostering sustainable and inclusive development.[72]

2.2. Mainstreaming Sustainable Development in Investment Agreements

A significant number of countries have undertaken investment reforms aligned to mainstreaming sustainable development in investment policymaking and concluding the new IIAs. The UNCTAD Report indicates further that, since 2012, over 150 countries have undertaken at least one action in the pursuit of sustainable development-oriented IIAs.[73]

Mobilising investment and ensuring that it contributes to the sustainable development has therefore become a priority for most countries. The new generation policies place inclusive growth and sustainable development at the heart of the efforts to attract and benefit from the investment. These new generation policies addresses specific investment policies challenges at the national and international levels including, integrating investment policy into development strategy, incorporating sustainable development objectives in investment policy, and ensuring investment policy relevance and effectiveness.[74]

The new generation policies further incorporate innovation investment promotion and facilitation mechanisms at the national and international levels to stimulate investment specifically geared towards sustainable and inclusive growth, including infrastructure, renewable energy, water and sanitation, food security, health and education (sustainable development goals- related sectors).[75]

These include direct requirement that, a covered investment contribute to the host State's economy or sustainable development. Some of the specific clauses thereto make reference to the protection of health and safety, labour rights, environment or sustainable development in

[72] Ibid
[73] World Investment Report of 2018, UNCTAD, pg 96
[74] Investment Policy Framework for Sustainable Development, UNCTAD, 2015, pg 6
[75] ibid

the treaty preamble; general exceptions, such as, for the protection of human, animal or plant life or health or the conservation of exhaustible natural resources.[76]

The detailed design of sustainable development provisions in investment agreements principally implies four areas of evolution in treaty-making practice. These new elements and clauses into IIAs include among others the following:[77]

- **Incorporating concrete commitments to promote and facilitate investment for sustainable development:**

Promoting and facilitating investment is crucial for the post-2015 development agenda, with developing countries facing an annual SDG-financing gap of $2.5 trillion.[78] Thus far, however, the majority of existing IIAs do not include efficient investment promotion and facilitation provisions, and reserve this issue for domestic policymaking. Another reform objective, therefore, is to expand the investment promotion and facilitation dimension of IIAs together with domestic policy tools, and to target them towards foreign investment capable of promoting sustainable development.

IIAs mostly promoted foreign investment only indirectly through the granting of investment protection. Now most treaties include hortatory language on encouraging investment in preambles or non-binding provisions on investment promotion. Options thereto to improve the investment promotion aspect of treaties include concrete facilitation mechanisms like information sharing and investment promotion forums; outward investment promotion schemes like insurance and guarantees; technical assistance and capacity-building initiatives targeted at sustainable investment, supported by appropriate institutional arrangements for long-term cooperation.

- **Balancing State commitments with investor obligations and promoting responsible investment:**

Ensuring responsible investment has several dimensions. First, this reform objective may refer to maximizing the positive contribution that investors can bring to societies and/or to avoiding investors' negative impacts like on the environment, human rights and public health. Second, this reform objective may relate to investors' obligation to do what is required by law and/ or to investors' response to societies' expectations that businesses comply with voluntary standards, that is, they do more than what is required by the law. The relevance and suitability of the policy options below differ depending on which of these aspects is the prime objective.[79]

[76] Some of the African countries BITs applicable hereto are Burundi - Turkey BIT; Mozambique - Turkey BIT; Rwanda – United Arab Emirates BIT, which were signed in 2017.
[77] Investment Policy Framework for Sustainable Development, UNCTAD, 2015, pg 77
[78] World Investment Report, UNCTAD, 2014
[79] World Investment Report 2015:Reforming the Investment Regime: An Action Menu Chapter IV

IIAs mostly provided for State obligations but do not specify investor obligations or responsibilities. Legally binding obligations on companies and individuals are stipulated by national law but are absent in international treaties, which traditionally do not apply to private parties directly. However, currently there are examples where IIAs impose obligations on investors or where international conventions establish criminal responsibility of individuals. An example here is the Rome Statute of the International Criminal Court. Another example is the Human Rights Council resolution 26/9 of 2014 which mandated the negotiation of a legally binding instrument to ensure that transnational corporations can be held accountable for abusing human rights.[80]

These examples, together with the changes in the understanding of the nature and functions of international law, would suggest that international treaties can, in principle, impose obligations on private parties. Without framing IIAs so as to impose outright obligations on investors, a few options may be considered. For example, IIAs could include a requirement for investors to comply with investment-related national laws of the host State when making and operating an investment, and even at the post-operations stage such as environmental clean-up, provided that such laws conform to the host State's international obligations, including those in the IIA. Such an investor obligation could be the basis for further stipulating in the IIA the consequences of an investor's failure to comply with domestic laws, such as the right of host States to make a counter-claim in ISDS proceedings with the investor. In addition, IIAs could refer to commonly recognized international standards such as the UN Guidelines on Business and Human Rights.[81]

This would not only help balance State commitments with investor obligations but also support the spread of CSR standards which are becoming an ever more important feature of the investment policy landscape. Options for treaty language in this regard could range from commitments to promote best international CSR standards to ensuring that tribunals consider an investor's compliance with CSR standards when deciding an ISDS case.[82]

- **Ensuring an appropriate balance between protection commitments and regulatory space for development:**

IIAs protect foreign investment by committing host country governments to grant certain standards of treatment and protection to foreign investors; it is the very nature of an IIA's standards of protection, and the attendant stabilizing effect, to place limits on governments' regulatory freedom. For example, where host governments aim to differentiate between domestic and foreign investors, or require specific corporate behaviour, they would be constrained by IIA provisions on non-discrimination or on performance requirements.

[80] The UN Guidelines on Business and Human Rights are an example of such international standards relevant in this regard, including Corporate Social Responsibility (CSR) standards, which are becoming an ever more important feature of the investment policy landscape.
[81] ibid
[82] Ibid

Additionally, countries can safeguard some policy space by carefully crafting the structure of IIAs and by clarifying the scope and meaning of particularly vague treaty provisions such as the fair and equitable treatment standard and expropriation as well as by using specific flexibility mechanisms such as general or national security exceptions and reservations. IIA models, such as the one adopted by the United States in 2004, offer early examples in this regard. More recently, newly negotiated and recent policy proposals stress the need to safeguard the right to regulate.[83] The right balance between protecting foreign investment and maintaining policy space for domestic regulation should flow from each country's development strategy, ensuring that flexibility mechanisms do not erode a principal objective of IIAs.

- **Reforming the ISDS system:**

Most IIAs reinforce their investment protection provisions by allowing investors directly to pursue relief through ISDS. The strength of IIAs in granting protection to foreign investors has become increasingly evident through the number of ISDS cases brought over the last decade, most of which are directed at developing countries. Host countries have faced claims of up to $114 billion and awards of up to $50 billion. Added to these financial liabilities are the costs of procedures, all together putting a significant burden on defending countries and exacerbating the concerns related to policy space.[84]

A number of recent cases have challenged measures adopted in the public interest (e.g. measures to promote social equity, foster environmental protection or protect public health), and show that the borderline between protection from political risk and undue interference with legitimate domestic policies is becoming increasingly blurred.[85]

2.3 Stock Exchanges ESG Activities

Capital market policies and instruments designed to promote investment in sustainable businesses and support the achievement of the SDGs are an increasingly important feature of the investment landscape. Key actors in promoting new policies, tools and instruments are stock exchanges, institutional investors including both asset owners and asset managers and security market regulators. The sustainability practices of stock exchanges is seen as a useful benchmark for monitoring innovation in sustainable finance, given stock exchanges' position at the intersection of portfolio investors, listed companies and capital market authorities.[86]

An examination of stock exchange-related instruments around the world focusing on environmental, social and governance (ESG) factors indicates that 54 exchanges have in place at least one mechanism for promoting corporate ESG practices. Many exchanges

[83] These include among others new approaches by the European Union, Germany, Indonesia or Norway
[84] Investment Policy Framework for Sustainable Development, UNCTAD, 2015, pg 77
[85] Ibid
[86] United Nations Conference on Trade and Development (UNCTAD) World Investment Report of 2018, pg 116

provide sustainability indices or some form of guidance or training to listed companies regarding ESG factors. The United Nations Sustainable Stock Exchanges (SSE) initiative, which has now grown to include most of the stock exchanges in the world, provides an indicator of the growing attention that exchanges are giving to sustainability in their markets. Launched in 2009, the SSE is a UN Partnership Programme administered by UNCTAD, UN Global Compact, UN Environment and Principles for Responsible Investment. Through the SSE's multi-stakeholder platform, exchanges engage in consensus and capacity-building activities with portfolio investors, listed companies, capital market regulators and policymakers.[87]

As of the second quarter of 2018, public commitments to advancing sustainability in their markets have been made by 72 partner exchanges from five continents, listing over 45,000 companies and representing a market capitalization of more than $80 trillion. This includes 9 of the 10 largest exchanges in the world, as well as a number of small exchanges from developing countries.[88]

Promoting green products and "greening" the mainstream financial markets are currently regarded as critical ways that stock exchanges and other capital market stakeholders are contributing to meeting global goals to combat climate change and also contributing to sustainable development. These efforts were further augmented by the SSE which released a guidance document at the UN Climate Summit (COP23) in November 2017, providing an action plan thereto to help stock exchanges start or enhance their work on green finance. A significant feature of green finance is the continuing rapid growth of the market for green bonds, which provide investment for a diverse range of environmentally themed projects.

The experience of the green bond market is also leading to innovations with other sustainability-themed bonds, such as "water bonds" which is a subcategory of green bonds used to finance clean and sustainable water supplies and "gender bonds", a new subcategory that includes, for example, the Women's Livelihood Bond.[89] There is a growing investor demand for sustainability-themed bonds which has led the International Capital Market Association to issue new guidelines called "The Social Bond Principles" in 2018.[90]

In another indication, the International Finance Corporation has merged its Banking on Women programme into a broader social bond programme in an effort to expand the investor base. Environmental issues are also increasingly affecting equity markets, with portfolio investors beginning to incorporate climate risk and other environmental risks and opportunities into their analyses and asset allocations. For example, global efforts to combat climate change, in line with the outcomes of the UN Paris Agreement and the SDGs, have some major asset owners concerned about the medium to long term viability of fossil fuel

[87] Ibid
[88] ibid
[89] The example of these gender bonds include those which were listed in Singapore Exchange in August 2017, and QBE Insurance's Gender Equality Bond, launched in Australia in 2017.
[90] United Nations Conference on Trade and Development (UNCTAD) World Investment Report of 2018, pg 116

companies. This is leading some portfolio investors to exclude such companies from their portfolios. This investor behaviour is giving rise to a new class of environmentally themed equity indices and the performance of these indices against their conventional benchmarks gives an indication of the growing materiality of sustainability issues. Fossil fuels, gender equality, renewable energy, human rights and water management are just a few of the diverse and rapidly growing themes addressed by ESG indices. ESG indices therefore remain the most popular sustainability instrument among stock exchanges with 40 of the 87 exchanges in the SSE database providing them.[91]

[91] Ibid

3. CHAPTER THREE

3.1 African Agenda on Sustainable Development

The pursuit of sustainable development is the defining challenge for Africa in the 21st century, this entail integrating economic growth, social inclusion and environment sustainability. African nations need to forge a new model of progress – one that is needed for the continent, and around the world.[92]

Africa has in the past been associated with high levels of poverty, conflicts, corruption, and heavy dependency on aid. The data to change this perception exist. For instance, five of the 12 fastest-growing economies in the world are in Africa, FDI is five times what it was a decade ago, and there is an emerging middle class. Africa is now the second most attractive investment destination in the world according to global business leaders. However there is still a perception that Africa is a high risk thus being an obstacle for foreign investment.[93]

The challenges are evident and despite significant economic progress, reduction of poverty and improvement of infrastructure since the year 2000, African nations still struggle with widespread poverty, disease, lack of energy and basic infrastructure, and growing environmental stress. As of 2012, 43% of Africans live under the poverty line, according to the World Bank, 600 million people do not have access to electricity, and millions die every year from preventable diseases. The relentless population growth in Africa, and the increasing impacts of climate change, presents two major threats to continued economic progress for the continent.[94]

Within the pursuit of sustainable development, SDGs are seen as presenting a significant opportunity for Africa to lead the world in problem-solving on sustainable development. Africa's natural resources are abundant, its people are entrepreneurial, and its political governance is improving. These resources, if properly managed and directed, can create break-through solutions for the long-term sustainable development of the continent. To achieve the SDGs, African governments, businesses, civil society and universities will need to collaborate in unprecedented ways.[95]

On this notion, in 2013 during the commemoration of the 50th anniversary of the Organization of African Unity (OAU), African Heads of State and Government launched Agenda 2063. It is the blueprint and master plan for transforming Africa into the global powerhouse of the future. It forms a framework for inclusive growth and sustainable development for Africa to be realized in the next fifty years. It continues the pan-African goal

[92] Dr. Belay Begashaw, Director General of the Sustainable Development Goals Center, his foreword *in the Report,* Africa 2030: How Africa Can Achieve the Sustainable Development Goals; Sustainable Development Goal Center for Africa (SDGC/A), 2017
[93] United Nations Conference on Trade and Development (UNCTAD) World Investment Report of 2018, pg 116
[94] ibid
[95] Ibid

which has been pursued by Africans over centuries, for unity, self-determination, freedom, progress and collective prosperity pursued under Pan-Africanism and African Renaissance. It builds on and seeks to accelerate the implementation of past and existing continental initiatives for growth and sustainable development. Member States emphasized a guiding vision 'to build an integrated, prosperous and peaceful Africa, driven and managed by its own citizens and representing a dynamic force in the international arena'.[96]

In 2012, African Heads of State and Government, recognizing that 'the promotion of intra-African trade is a fundamental factor for sustainable economic development, employment generation and effective integration of Africa into the global economy', decided to establish the Continental Free Trade Area (CFTA) by 2017. On 21 March 2018, the Establishment of the AfCFTA was signed in Kigali, Rwanda, by 44 Heads of State and Government of the 55 African Union (AU) Member States. The AfCFTA entered into force on 30 May 2019, thirty days after having received the 22nd instrument of ratification on 29 April, 2019 in conformity with its legal provisions.[97]

The AfCFTA seeks to deepen economic integration of the African continent by creating a single continental market with free movement of business, people and investments. The AfCFTA is a testament to the power of cooperation and a shared vision. The projected benefits of the agreement are significant. The target market for the AfCFTA is projected to rise from an estimated 1.27 billion to 1.7 billion by 2030, out of which about 600 million will be in the middle class. In terms of aggregate gross domestic product (GDP), this will range from $2.1 trillion to $3.4 trillion or $6.7 trillion at Purchasing Power Parity terms. In terms of investments and consumer spending, the AfCFTA is expected to attract an estimated $4 trillion.[98]

This rising integration is also between Africa and the rest of the world thereby contributing largely to realising Africa's full potential and realising its true economic prospects. Africa may be the least globalised region of all, but the region has started opening up to the rest of the world. This increased economic openness and integration over the past ten years has contributed toward Africa's economic rise. Over the past decade Africa has increasingly opened up the spread of exports to international markets. According to Visa Report (2013), export volumes have grown at an average of 8.8 percent per year since 2000, as compared to the world average of 3.7 percent. This reflects rising global demand for African products and services.[99]

Moreover, given that Africa's export growth exceeded economic growth, albeit modestly, over the period, it follows that exports have become a relatively more important component of the region's economy since 2000. This is indicative of the importance of economic

[96] https://au.int/agenda2063/overview (accessed 1/8/2019)
[97] https://au.int/en/pressreleases/20190707/operational-phase-african-continental-free-trade-area-launched-niger-summit (accessed 1/8/2019)
[98] ibid
[99] AFRICAN CONTINENTAL FREE TRADE AREA: Some Issues in Liberalizing Trade in Services, UNCTAD, 2016

openness as a component of sustained economic growth. Africa's economic growth and the region's rising competitiveness is evidenced further by the increased trade diversification and sophistication that has come about following important reforms during the 1990s and early 2000s, and subsequent relations with new trade partners who are also the new drivers of global economic growth.[100]

With expectations of a virtuous cycle of increasing intra-African trade and international investment, the AfCFTA has the potential to make a concrete impact on the lives of ordinary citizens across the continent. By facilitating job creation and greater competitiveness of African micro, small and medium-sized enterprises (MSMEs), the AfCFTA will be a crucial ingredient in lifting people out of poverty and invigorating Africa's growth trajectory. These objectives are to be achieved through successive rounds of negotiations that progressively eliminate tariffs and non-tariff barriers to trade in goods and liberalize trade in services.[101]

The AfCFTA is a key step towards achieving the vision of establishing the African Economic Community (AEC) by 2063, as set out in the Abuja Treaty. The AEC was established by Article 3 of the Treaty with the following objectives:

- To promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote an endogenous and self-sustained development.
- To establish, on a continental scale, a framework for the development, mobilization and utilization of the human and material resources of Africa in order to achieve self-reliant development.
- To promote cooperation in all fields of human endeavour in order to raise the standard of living of African people, and maintain and enhance economic stability, foster close and peaceful relations among Member States and contribute to the progress, development and the economic integration of the Continent.
- To coordinate and harmonize policies among existing and future economic communities in order to foster the gradual establishment of the Community.[102]

The formation of the AfCFTA and its implementation therefore presents another catalyst to sustaining African economic growth potential. It can provide the necessary sustaining energy to boost trade, raise economic growth and foster development that is inclusive and sustainable and help Africa to reach common goals established under Africa's Agenda 2063 and the United Nations 2030 Agenda for Sustainable Development and the SDGs.[103]

The AfCFTA will include a protocol on investment which is part of phase II negotiations. Meanwhile, the technical issues on investment are under consideration, and the draft legal

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[100] Ibid

[101] International Trade Centre, (2018), A business guide to the African Continental Free Trade Area Agreement. ITC, Geneva

[102] ibid

[103] AFRICAN CONTINENTAL FREE TRADE AREA: Some Issues in Liberalizing Trade in Services, UNCTAD, 2016

text is expected to be ready for adoption by January 2021. Thereafter, the AfCFTA Investment Protocol will form an integral part of the AfCFTA and enter into force 30 days after the deposit of the 22nd instrument of ratification as per Article 23(3)).[104]

The Protocol should establish an investment governance framework to facilitate intra-Africa investment, which would promote sustainable socio-economic and industrial development as well as enhance the competitiveness of the African countries. This contributes to the needed FDI to promote economic growth and development, create jobs and alleviate poverty.

In conclusion, the AfCFTA Member States reaffirm their existing rights and obligations under other trade agreements of which they are members. Similarly, two of the principles outlined in Article 5 refer to the 'RECs' Free Trade Areas as building bloc[k]s for the AfCFTA and that best practices in the RECs are recognised. Another Principle mentions the "preservation of the acquis", which means that what has already been achieved as part of the implementation of REC obligations will have to be respected.[105]

Article 19 of the AfCFTA states that 'State Parties that are members of other regional economic communities, regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain such higher levels among themselves.' A similar formulation is used in the goods protocol with respect to the elimination of customs duties and trade barriers – suggesting that REC members shall maintain higher levels of liberalisation and where possible improve upon them among themselves.[106]

New tariff liberalisation under AfCFTA will only occur among Member States that do not have an existing agreement with one another. For example, SACU Member States do not have any existing preferential trade arrangements with ECOWAS Member States, so tariff concessions need to be determined. The AfCFTA does provide for the eventual establishment of a continental customs union, but this is seen as a long way off.[107]

3.2 African Investment Policy Frameworks

One of the objectives of the AfCFTA under Article1 is to resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes involving the Regional Economic Communities (RECs). African countries are making important strides towards accomplishing their regional integration agenda, and most RECs are working towards setting up free trade areas, customs unions, or even a common market,

[104] https://www.tralac.org/blog/article/14065-how-can-the-afcfta-investment-protocol-advance-the-realisation-of-the-afcfta-objectives.html (accessed 10/08/2019)
[105] International Trade Centre, (2018), A business guide to the African Continental Free Trade Area Agreement. ITC, Geneva
[106] Ibid
[107] Ibid

all steps in realizing an Africa Economic Community. Promoting investment among RECs through investment protocols is therefore a key feature.[108]

One of the examples of the RECs regional integration on investment agenda is the South African Development Community Protocol on Finance and Investment (FIP) which was signed in 2006 and came into force in 2010 after two-thirds of member states had ratified it. the Protocol objective is to "foster harmonization of the financial and investment policies of the State parties in order to make them consistent with the objectives of SADC", to be achieved through "facilitation of regional integration, co-operation and co-ordination within finance and investment sectors with the aim of diversifying and expanding the productive sectors of the economy, and enhancing trade in the Region to achieve sustainable economic development and growth and eradication of poverty".[109]

The regulatory environment for investments in Africa is heavily cluttered given the numerous BITs and DTTs. Pleas for harmonizing investment regulations are not new: 40 years ago Akiwumi (1975) recognized the disparities, and that the absence of coordination at national and subregional levels was hindering economic development.[110] Linking IIA reform to the domestic policy agenda is therefore imperative. IIA reform does not exist in isolation, investment policies interact with numerous other policy areas, including trade, finance, taxation, industrial policy, intellectual property, environmental protection, social and labour policies, human rights, health and cultural policies. It is critical that different government authorities work together in identifying common IIA reform goals and implementing a joint reform strategy. In particular, IIA reform needs to take into account the following linkages with the domestic policies of host and home countries.[111]

Some RECs, such as ECOWAS, SADC, COMESA, and EAC, have tried to address this weakness in part by promulgating common investment regulation and model laws (even if the latter are unenforceable). A common element of regional investment regulations is that wider economic space is a powerful means for attracting investment. The economic rationale is that economies of scale can be harvested better, particularly for small and fragmented national markets. Needless to say, intra-regional trade barriers, including non-tariff barriers, would have to be removed. External investment, attracted to these regional markets, could help provide funds for regional integration projects.[112]

But beyond regional models for investment treaties, policymakers recognize that there are limits to what RECs can do and that a pan-African approach to negotiating contracts and investment treaties is needed. Senior African officials dealing with trade have thus initiated a

[108] International Trade Centre (2018). A business guide to the African Continental Free Trade Area Agreement. ITC, Geneva, pg 28

[109] Economic Commission for Africa (2016), Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration, pg 30

[110] Ibid

[111] World Investment Report 2015:Reforming the Investment Regime: An Action Menu Chapter IV

[112] Economic Commission for Africa (2016), Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration, pg 30

dialogue in the context of the AU on the role of international investment agreements, especially to support a regulatory environment that fosters Africa's industrialization and transformation process and crucially, one that does not reduce the policy space for the shift.[113]

Deepening regional integration significantly enhances the attractiveness of Africa as an investment destination. Well-known issues concerning fragmented markets, small market sizes, and heterogeneous regulatory environments can be overcome by harmonization and integration, while regional cooperation can help avoid any "race to the bottom" in investment incentives. Finally, removing these obstacles can help unlock the potential for intra-African investment, which already accounts for 23% of FDI projects on the continent.[114]

RECs' investment policy frameworks have helped to attract FDI to many African countries. However some of these frameworks fail to promote equitable distribution of investments among the regions of their countries. Investment is mostly concentrated in urban areas where the infrastructure is. Linked to this, is the fact that some of the challenges hindering more equitable distribution of investments across the continent, including beyond poor infra-structure are tariff and non-tariff trade barriers; limited movement of persons and capital; high transaction costs of doing business; still-high risk perceptions of investing in Africa; limited access to credit; and corruption.[115]

The investment climate in Africa has experienced great dynamism during the past two decades. A shift towards a more positive view of FDI has led to significant changes in the investment policy framework. African governments have implemented numerous reforms targeted at attracting foreign investors, including domestic reforms, regional integration initiatives, and BITs with potential FDI source countries.[116]

Despite the challenges mentioned, Africa has still experienced a surge in investment inflows in recent years largely because of its growth performance over the last decade, rising consumer markets and middle class, and high rates of return on investment, coupled with its abundant natural resources, including recent discoveries of minerals, gas, and oil. These intrinsic endowments are major pull factors for investment against a backdrop of increasing demand for Africa's natural resources from emerging economies such as the BRICS. But the continent has traditionally failed to use these abundant resources well, given its weak savings and capital base, creating an opening for foreign investors.[117]

Although investment has surged, FDI is still overwhelmingly in extractive industries, especially minerals, gas, and oil; and because these industries have minimal links to local

[113] Ibid pg 34
[114] International Trade Centre (2018). A business guide to the African Continental Free Trade Area Agreement. ITC, Geneva,
[115] Economic Commission for Africa (2016), Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration.
[116] Ibid
[117] ibid

economies, FDI has not elevated these millions of people out of poverty. There is therefore a need for African policymakers to guide investors into productive sectors such as manufacturing and agriculture. However, to reap the rewards fully, African governments first need to reform their investment codes and streamline bureaucratic procedures associated with approving new investment projects.[118]

Attracting investment is not an end in itself, but it should support development goals and structural transformation. Liberalization, including reduced barriers to trade and investment, needs to be balanced with those goals. Most African countries are calling for a review of the agreements they signed many years ago to make them more compatible with their current stage of economic development, country specific needs or national development frameworks. Some of these agreements were negotiated and signed without considering the complexities of socioeconomic challenges or national development policies.[119]

African governments are aware also of the inequities and inadequacies in some existing bilateral agreements between developed and developing countries due to the unequal bargaining power during negotiations. Further, most treaties have no time limit, which makes them hard to amend. New investment agreements models are therefore being negotiated with clear analysis, taking into consideration national development strategies and changing socioeconomic development, striking a balance between the targets of national policies and development needs.[120]

Most bilateral investment treaties which were signed or implemented by African countries favoured foreign investors. To a large extent, these treaties focused on issues such as protection of foreign investments and national treatment of foreign investors. Issues of how to deal with environmental or social problems created by investments were not clearly specified, and African countries had limited power to leverage and create obligations on the investors in case such environmental problems were created. In addition to BITs, it has become evident that, African countries need to improve features vital to attracting other forms of investment, such as infrastructure, political environment, and macroeconomic policies and governance.[121]

The general perception also is that, the impact of BITs has been minimal, most African countries that have signed these treaties see little impact on the ground. Today, most of Africa's investment comes from emerging economies such as China, India, and Brazil, rather than Western countries with which African countries have signed treaties. The common view was that BITs defend and promote investment from abroad by protecting foreign investors and reducing investors' exposure to political risk and uncertain business environments,

[118] Economic Commission for Africa (2016), Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration
[119] Ibid
[120] Ibid
[121] Supra

without necessarily addressing some of the core programs or initiatives in African developing countries.[122]

African governments are also aware of evident categories of instabilities within their territories, which include among others political, macroeconomic, and governmental. These instabilities incite foreign investors to look for protections before making key investment decisions. These instabilities therefore to some extent require governments to give incentives to potential investor. However, the new African investment models recognise that incentives should direct investments to specific sectors or areas, particularly those less attractive for investment. To become more useful, incentives need to be well structured, time bound and transparent. Governments are putting in place clear guidelines on how they provide incentives to companies that do not invite suspicions and doubts.[123]

African policymakers are further cognisant of the increase in a number of concluded BITs though the same increase fails to show a corresponding increase in FDI inflows. This is in addition to gradual increase in the number of investor-State arbitrations involving African States. This raises concerns not only about the ability for African States compliance with BIT obligations, but given their developing status, it raises concerns about the negative impact on their economies as a result of the amount of money spend on defending claims and paying damages to successful investor claimants.

The investment agreements reforms in Africa also include review of provisions being negotiated with counterparts to strike a balance between protecting investors and giving governments the sufficient policy and regulatory space for development objectives. This includes the need not to crowd out or discriminate against domestic and regional investors, and to consider pan-African solutions to existing investment agreements challenges. Lastly to ensure a greater transparency in investor-state dispute settlement.

These ongoing reforms need to take into consideration the issue of lack of proper coordination among government ministries and institutions involved in the planning, coordination and implementation of investment policies and agreements. Another issue is where the government isolates or not intensively involve the private sector in the preparation and negotiation of investment agreements.

3.3 African International Investment Agreements Reforms

The African Union and some of the African regional economic communities (RECs) developed regional instruments or models relating to a large extent mainstreaming sustainable development in investment policymaking and concluding the new IIAs, in an attempt to address the challenges within the investment regime. These include:

[122] Ibid
[123] Economic Commission for Africa (2016), Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration

3.3.1 The Pan-African Investment Code

In line with the recommendations of the Ninth AU-RECs-ECA-AfDB Committee meeting held in Addis Ababa, Ethiopia, in January 2012, the African Union Commission undertook a study on drafting a Pan-African Investment Code, based on international best practice, to establish a business climate to stimulate investment at national, regional, and continental levels, and to develop a roadmap and strategy on how African countries can adopt this code to their own contexts. The study's primary objective was to find the elements of an enabling environment in the sectors that have the greatest potential to promote economic and social development in Africa.[124]

The Pan-African Investment Code (PAIC) is the first African innovative model investment treaty developed under the auspices of the African Union with the aim to promote sustainable development within the investments agreements regime. It was developed in line with the African attempts undertaken at the regional level to develop "new generation" international investment instruments, many of which are being negotiated or amended simultaneously among African countries and RECs. The effort is in addition to IIA reform efforts at the national level under way in most African countries.

The PAIC demonstrates the African desire to approaching the IIAs reform in a way addressing specifically the African unique challenges, which makes the Code today a distinctive legal instrument. Its unique features include reformulation of traditional investment treaty provisions and the introduction of direct obligations for investors. The most important characteristic of the Code is trying to find a balance between providing an effective and substantive protection for investors and investments, while preserving the right of the host State to maintain its public interests in achieving its goals in sustainable development.

It also balances rights and obligations of States and investors in the context of investment protection and promotion. To achieve this balance the approach taken was to draft the rules and general provisions first, where most of the provisions begin by stating the general objective rule or the general principle of the protection of investors and investments, such as rules prohibiting expropriation or nationalization, Most-Favored-Nation Treatment, National Treatment, Transfer of Funds.

Then exceptions are placed to the rule or the general principle allowing host States to take special procedures and measures in case there is a public interest that requires the adoption of these procedures or measures in order to maintain, among others, national security, environmental and health standards, or other public interests. This approach protects policy space of the host State to adopt necessary measures to protect the public interests in achieving their objectives on sustainable development.

[124] Economic Commission for Africa (2016), Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration

However, PAIC is being criticised for not having given enough attention to the issue of establishing a mechanism to help African countries to adopt the model rules contained in it. It has been proposed to establish a mechanism to provide assistance and technical support to AU Member States to adopt the model rules of the PAIC when they enter into negotiation of new international investment agreements, whether bilaterally or multilaterally, or when they negotiate amendments to existing bilateral agreements which represent 840 bilateral investment treaties (BITs).[125]

Additionally, it is criticised for not entirely being aligned to the direction being taken by AfCFTA, which will usher a continent-wide free trade area and a single regulatory regime for foreign investment. The AfCFTA Investment Protocol will significantly reduce any value that the PAIC was meant to offer, however limited.[126] However PAIC is seen as still having relevance if the AfCFTA Investment Protocol allows Member States to continue concluding intra-Africa BITs.[127]

3.3.2 The Southern African Development Community Model Bilateral Investment Treaty

The Southern African Development Community (SADC) Model Bilateral Investment Treaty was completed in June 2012 by its members. The Model is not binding but is intended as a guide to the member States in their future investment treaty negotiations. It comes as a template with commentary and availed publicly as a tool for other African and non-African governments alike.

The template fits squarely in this classification of next generation investment models, for instance, it is the first model to explicitly incorporate investor obligations before PAIC. The model goes beyond providing a form of analysis and general recommendations but provides guidance in the form of specific textual language along with a commentary explaining the choices made.

The preamble and objectives reflects the orientation of the template which is to relate FDI to sustainable development through the fuller text of the model. This orientation is maintained throughout the text and was used as a benchmark when examining other draft provisions for the text. It was thus not simply a question of inserting the words sustainable development, but also of seeking throughout the process what this meant in practical terms for drafting various articles. The result is a concrete draft text for an investment treaty that incorporates sustainable development thinking from the beginning to the end of the text. It therefore allocates rights and obligations in accordance with this relationship.

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[125] Dr. Hedar, (2017), *The Legal Nature of the Draft Pan-African Investment Code and its Relationship with International Investment Agreements*, South Centre, issue no. 9

[126] http://www.afronomicslaw.org/2019/01/11/the-relevance-of-the-draft-pan-african-investment-code-paic-in-light-of-the-formation-of-the-african-continental-free-trade-area/ (accessed 28/05/19)

[127] Ibid

Some of key sustainable development reform features include: [128]

- ✓ ***The establishment of investments***: any performance requirements imposed or undertaken by a foreign investor or its investment shall not be considered a breach of the Agreement as long as this was done before the investment was authorized and acted upon by the investor.

- ✓ ***Investor protections***: on fair and equitable treatment, which has been controversial in its application in developing countries, the template recommends to avoid such a provision. A narrowly constructed version of a fair and equitable treatment clause is provided as an alternative option. The template sets out an entirely different approach based on the recognition of administrative law approaches to fair administrative treatment and due process of law instead of the international law language of fair and equitable treatment.

- ✓ ***Sustainable development approaches*** are reflected in different parts of the template, such as a requirement to balance the right of investors to engage foreign personnel with domestic programs to train local employees wherever feasible. This reflects the development goals associated with FDI of skills development and transfer as well as higher value-added employment.

- ✓ ***The obligations of investors*** include among others anti-corruption, compliance with domestic law, environmental assessment and management, human rights, social and economic development issues, corporate governance etc. The question of enforcement of these obligations is addressed in three ways which include:
    - o Making the obligations part of domestic law if they are not already so, and therefore enforced through domestic courts.
    - o Depending on the specific obligations, a breach may vitiate the jurisdiction of an investor-state tribunal if one is established (for example a breach of the anti-corruption obligation) or enable a State to take counterclaims for breaches related to the conduct of the investor.
    - o The template calls for the investor to accept the possibility of civil liability in its home State for decisions and acts taken by the investor that impact the conduct of the investment and may lead to damage in the host State. This is not a standard of liability, but simply a requirement to wave the use of such doctrines as *forum non conveniens*in order to allow such a case to be heard on the merits in the home State.

- ✓ ***State right to regulate and the right to pursue development goals:*** this provision balance the investor rights with the State rights commonly recognized by international law.

[128] https://iisd.org/itn/2012/10/30/the-sadc-model-bit-template-investment-for-sustainable-development/ (accessed 28/05/19)

- ✓ ***Recognition of Extractive Industries Transparency Initiative (EITI)*** by requiring transparency in contracts and revenues flows between the government and investor. This is seen as an increasingly important element in avoiding corruption and promoting more sustainable conduct and relationships.

- ✓ ***Dispute settlement:*** the template recommends against the inclusion of investor-state arbitration in future treaties, and ties this to a limited MFN provision that, if included, ensures against future tribunals importing investor-state rights through the MFN provision.

- ✓ ***Investor-state arbitration:*** for States that might want to include investor-state arbitration, the template constructed process that circumscribes investor-state arbitration rights to alleged breaches of the treaty and not other permits or authorizations, as set out in the United States' model BIT of 2012. The template further recommends the inclusion of a provision that requires treaty arbitration tribunals to recognize and give primacy to dispute settlement mechanisms identified in any investment contracts for any matters related to the alleged breach of such contracts, even if restated as a breach of the treaty.

- ✓ ***Umbrella clause:*** the template recommends against the inclusion of an umbrella clause and the transfer through this provision of domestic law issues into international law issues.

- ✓ ***An exhaustion of local remedies rule*** is also put in place, subject to a tribunal being able to assess whether the claims relating to the underlying measure can be addressed in a domestic court.

- ✓ Overall, the template rejects the old style approach of 8 page treaties popular in the 1990s and into the 2000s. It puts in place a comprehensive approach that reflects the relationship between investment and sustainable development, and allocates rights and obligations in accordance with this relationship. It also rejects the view that because something was done before it must be done the same way again. The template thus demonstrates a new approach not just in principle, but through concrete language and recommendations that are clearly set out.[129]

3.3.3 COMESA Common Investment Agreement (CCIA)

The Common Market for Eastern and Southern Africa is an organisation of 20 African States established in 1994. It replaced the previous Preferential Trade Area between its members and had since taken an active role in the economic integration of its members. The COMESA Common Investment Agreement (CCIA) was adopted in 2007 and aims to attract higher levels of investment from within and outside the region, but has not yet been enforced.

[129] ibid

In its preamble, the CCIA reaffirms the importance of having sustainable economic growth and development in all its Member States and the region through joint efforts in liberalising and promoting intra-COMESA trade and investment flows. It further aims to create a stable region and good investment environment; promote cross border investments and protect investment; enhance COMESAs attractiveness and competitiveness within COMESA Region, as a destination for Foreign Direct Investment (FDI); and encourages domestic investments. FDI is recognised as an important source of finance for sustaining the pace of economic, industrial, infrastructure and technology development.

The CCIA showcases the evolving shift in African States roles from mere observers to a more hands-on role in the development of investment arbitration.[130] Among the key pillars of the Agreement is the settlement of investment disputes through negotiations and arbitration mechanism. Dispute settlement is governed by Part Three of the CCIA Agreement. Part Three offers two principal methods of dispute settlement: state-to-state and investor-state.

CCIA is said to offer a new approach to investor-state dispute settlement and that it is a significant new model for these purposes, in that, it proposes an approach that is sensitive to the realities of developing States and of the particular conditions that influence approaches to international commercial arbitration in Africa. It seeks to reconcile the concerns both of investors, African host countries and other stakeholders in the fair and effective resolution of disputes through regional dispute settlement mechanisms. It offers to the investor the choice of international arbitration based on a balance of rights and obligations between them and the respondent State. [131]

It further obliges investors to comply with and ensure their investments comply with all applicable domestic measures of the host State. "Measures" are defined in the treaty as:

"... any legal, administrative, judicial, or policy decision that is taken by a Member state, directly relating to and affecting an investment in its territory".

It affirms the right of a host State to regulate for the public good by providing that regulatory measures taken by a host State 'designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment' will not constitute an indirect expropriation. It further, enjoins foreign investors from getting involved in any corruption practice.

Finally, it obligates investors to uphold human rights in the workplace and community in which they decide to invest. CCIA therefore offers an alternative formulation and points to how future generations of IIAs might be drawn up so as to provide, in the words of the

[130] P. Muchlinski, (2010), The COMESA Common Investment Area: Substantive Standards and Procedural Problems in Dispute Settlement of Oriental and African Studies, University SOAS School of Law Legal Studies Research Paper Series Research Paper No. 11, London
[131] Ibid

Agreement, "investors with certain rights in the conduct of their business within an overall balance of rights and obligations between investors and Member States."

The Agreement was revised by its Member States in 2017 to strengthen the sustainable development dimension of the Agreement and to safeguard the right of host Sates to regulate investment in their territories.

3.3.4 Economic Community of West African States (ECOWAS)

In ECOWAS, a Supplementary Act A/SA.3/12/08 on the Common Investment Rules for the Community was adopted in 2008. As is customary in BITs, the Supplementary Act includes protection against uncompensated expropriation. ECOWAS investors are guaranteed free transfer of assets, which includes in essence all payments related to the investment. In investor–state and state–state disputes, the parties can refer their case to a national court or tribunal or to the ECOWAS Court of Justice.

The Supplementary Act is different from most BITs in that it contains a designated chapter on "obligations and duties of investors and investments". These include a provision for a "pre-establishment" environmental and social impact assessment. The investor obligations also include "post-establishment" requirements, including the protection of human rights and respect for fundamental labour standards. Some of these investor obligations are mirrored in the subsequent chapter on "host state obligations", which also calls on member States to refrain from competing against each other using investment incentives.[132]

Article 31 of Supplementary Act A/SA.3/12/08 is noteworthy in that it calls on member States to renegotiate all existing investment agreements that are not consistent with it and ensure that all future investment agreements signed by member States are consistent with it "particularly with the balance of rights and obligations it establishes". The draft ECOWAS Investment Code and Policy are being validated with relevant stakeholders before being presented to the ECOWAS Council of Ministers for adoption. The harmonization of investment codes and regulations in the region according to the draft ECOWAS Investment Code and Policy would constitute a further key improvement of the regional investment climate.[133]

3.3.5 East African Model Investment Code

The East African Model Investment Code was adopted in 2006. This Code is not legally binding, but is rather a reference guide for the design of national investment policies and laws. Member States could therefore use or supplement their investment laws and policies

[132] Economic Commission for Africa (2016), Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration
[133] Ibid pg31

borrowing from any or all of the Code's provisions. Its goal is to improve the business climate in the EAC region and to harmonize investment laws and policies of member States. The Model also includes provisions for the free transfer of assets and protection from un-compensated expropriation. According to the code, investors can apply for an investment certificate to the designated national investment agency. The EAC Investment Code of 2006 is therefore the precursor of the EAC Model Treaty of 2016.

The EAC Model Investment Treaty of 2016 came about pursuant to directives of the EAC Sectoral Council on Trade, Industry, Finance and Investment made on 30th May 2014 and on 22nd May 2015. The aim of the Treaty is to serve as a template for investment negotiations of the EAC and/or individual EAC Partner States with third countries or a bloc of countries; or as an instrument to help guide the EAC's negotiating position with a third country when it accepts the third countrys's negotiating text as the basis of negotiations.

Like the previous 2006 Code, this Treaty is not legally binding, it still provides guidance for the Partner States in any negotiations they enter into relating to an investment treaty. For the most part the Treaty draws from the earlier discussed approaches of the SADC Model Bilateral Investment Treaty Template of 2012, the COMESA Common Investment Area Agreement and the Model Text for the Indian Bilateral Investment Treaty.

The Treaty preamble recognise the important contribution investment can make to the sustainable development of the Sates Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology and the furtherance of human development and human rights. The preamble further goes beyond the traditional mentioning of protecting the investment but rather mentions also the objective to promote, facilitate, encourage and increase investment opportunities that enhance sustainable development within the territories of the State Parties. In this regard, the preamble clearly articulates the three elements of sustainable development being economic, social and environmental pillars.

The Treaty provides for the right of Sate Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives and taking into account any asymmetries with respect to the measures in place. It further recognises the needed overall balance of the rights and obligations among the State Parties, the investors, and the investments under the Treaty. The conduct, management and operations of investors and the investments are to be consistent with the law of the host State and enhance the contribution of investments to inclusive growth and sustainable development of the host State.[134] The Treaty objectives specifically are to attract not just any type of foreign investment but only those investments that effectively support the sustainable development of both parties, particularly in the host State party.

[134] Economic Commission for Africa (2016), Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration

4. CHAPTER FOUR

4.1 Conclusions

4.1.1 Collective Multilateral Approach

Re-shaping or reforming the international investment regime for sustainable development continues and has gained a great momentum nationally, regionally and internationally. It has evolved, and continues to do so, in response to experiences, pressures and changing interests and it has shown its more impact through its investor-State dispute-settlement mechanism.[135]

However approaches to these reforms still differ, and to a certain extent causing overlaps, inconsistencies and incoherence which could negatively affect achieving the desired results. Substantial improvements are still required to make the regime more widely accepted by all stakeholders.

A collective multilateral approach and consensus building on investment policy is therefore most desirable. This approach is the best way to reform the IIA regime with a view to making it work for sustainable development. A collective approach affords a comprehensive reform of the investment regime. Included herein is aligning investment policy making with the SDGs and developing a set of principles to foster and harness the positive contribution of investments to achieving the SDG agenda.

A collective approach further includes any multilateral engagement, support structure that could offer backstopping functions, through policy analysis, coordination among various processes at different levels and dimensions, management of the interaction with other bodies of law, technical assistance and consensus-building. This approach includes also the advancement and incorporation of the south-south principles on investment for sustainable development.

IIA reform should also take into account the interaction between IIAs and other bodies of international law in order to foster sustainable development-oriented policy coherence. Addressing this relationship in IIA reform can help avoid conflicts and provide arbitral tribunals with guidance on how to interpret such interaction.[136] However, investment policy consistency should not be pursued for its own sake, but rather in a way that is coherent and mutually supportive for investment as a driver of sustainable development.[137]

Some experts have expressed concern about the neoliberal idea of coherence in investment principles as suggested by UNCTAD and the G20, and stressed the importance of taking into

[135] Karl P. Sauvant, "Reforming the International Investment Regime: Two Challenges", in Julien Chaisse, Tomoko Ishikawa and Sufian Jusoh, eds., *Asia's Changing Investment Regime: Sustainability, Regionalization, and Arbitration* (Singapore: Springer, 2017)
[136] UNCTAD World Investment Report of 2018, pg 114
[137] Ibid pg 115

account each country's peculiarities, level of development and historical context.[138] A balanced approach herein is therefore necessary.

4.1.2 Enabling Policy Framework

It is a priority for all countries to mobilise investment and ensures that, it contributes to its sustainable development. The reforms are therefore mostly based on this priority, which is predominantly the purpose of the IIAs, whether in relation to bilateral, regional, or multilateral investment agreements. Post the adoption of the Sustainable Development Goals in 2015, it is only logical that, the international investment regime should be to encourage the flow of increased amounts of sustainable FDI in the framework of a widely accepted enabling investment framework that regulates the relationships between governments and international investors in a balanced manner. FDI is still the approach to maximise contribution to development.[139]

Policymakers are also cognisant that attracting and guiding private investment into priority areas for sustainable development requires the creation of an enabling policy environment. Such attraction and guidance is based on the host country's attractiveness, such as: political; economic and social stability; clear, coherent and transparent rules on the entry and operational conditions for investment; effective business facilitation; rule of law; transparency; participation and sound institutions that are competent, efficient and immune to corruption. These are prominent issues to be considered in Africa in order to attract the needed investment for sustainable development.

At the same time, alleviating policy constraints for private investment in priority sectors must not come at the price of compromising legitimate public interests concerning the ownership structure and the regulatory framework for related activities. This calls for a gradual approach towards liberalization of SDG-related sectors and proper sequencing.[140]

The enabling policy framework should also clearly stipulate in what areas private investment is permitted and under what conditions. While many SDG-related sectors are open to private investment in numerous countries, important country-specific limitations persist. One case in point is infrastructure, where public monopolies are common. More privatisation can open up new investment opportunities, but may require a gradual approach, starting from those sectors where private involvement faces fewer political concerns. Host States may first allow service and management contracts and move to public-private partnerships once contractual partners have gained more experience.[141]

[138] Tenth Annual Meeting Report of Forum of Developing Country Investment Negotiations: Reshaping Investment Law and Policy to Support the 2030 Development Agenda, 2016
[139] World Investment Report 2015:Reforming the Investment Regime: An Action Menu Chapter IV
[140] ibid
[141]Ibid

It must also be recalled that, the legislative framework within which all investors exist, the primary conditions for their admission and operations is created at the national level. This internal environment, which includes the ability of domestic institutions to maintain and enforce applicable laws and regulations, is a crucial factor determining investors' decisions about the location of their investments. IIAs act as a complement but do not replace the need for a high-quality domestic policy environment and effective institutions. IIA clauses that emphasize the importance of such a well-functioning regulatory environment, including modern environmental, health or labour standards, can help support States in their efforts in this regard.[142]

Additionally, the domestic policy framework is key for determining how much regulatory freedom a country requires in order ensuring that its current and future regulatory needs are not inhibited by IIA obligations. This has emerged as a particularly important issue in respect of pre-establishment IIAs. It is important therefore, that IIA negotiations are informed by a proper assessment of its existing and potential future, domestic regulatory environment.[143]

IIA obligations must therefore be aligned with the relevant domestic laws and regulations. Thus, for example, if IIA reform seeks a clarification of the FET standard or of the concept of indirect expropriation, care needs to be taken in how these principles are dealt with under domestic law in order to avoid differences. This is especially important if the country follows the "no greater rights" philosophy in relation to IIAs. In addition, if IIA reform limits investor access to ISDS, it becomes important to ensure that local remedies are adequate.[144]

Finally, in some cases, IIAs may trigger reform steps at the national level. One case in point is IIA-driven investment liberalization, which may necessitate changes in the host countries' entry policies for foreign investment. Another example is the possible need for modifications in host State' domestic investment guarantee schemes if IIAs call for environmental or social impact assessments.[145]

4.1.3 African Investment Policy Frameworks

The regulation of foreign investments in Africa is said to be still in a state of flux, mainly due to the regional integration efforts spearheaded by the Treaty for the Establishment of the African Economic Community. However, the AfCFTA which is a huge milestone in the continent offers an investment protocol yet to be finalised. It is clear that, this Protocol will have to be aligned or harmonised with the PAIC to avoid any overlaps or inconsistencies and create a pathway for regulating foreign investments at a continental level, augmenting harmonization and African regional integration.

[142] World Investment Report 2015:Reforming the Investment Regime: An Action Menu Chapter IV
[143] Ibid
[144] Ibid
[145] Supra

A common investment protocol at the continental level is without doubt imperative in assisting in simplifying investment rules and regulations, making them clearer and easier to understand, creating an environment more conducive to investment. As foreign investment flows into Africa and economies grow, capital controls and liquidity are becoming important issues. Establishing continental or regional investment codes should help here and in raising low intra-African investment.[146]

It is desirable therefore if the AfCFTA Investment Protocol is designed as an instrument that will treat all investors equally, and that will also foster harmonisation at continental level from the top down. However, there will still be issues of divergent policies and questions on whether investor State disputes should be referred to arbitration or litigation. Central to this issue is that African States have different levels of the rule of law. This means that under circumstances where the rule of law is poor, obliging investors may have to refer disputes to the courts of a host State and this might risks denial of justice.[147]

Some experts suggest that, a potential solution to this challenge and one which the AfCFTA Investment Protocol can apply is to create a rule of law scoreboard to gauge the rule of law in member States. An African Justice Scoreboard (AJS) is therefore proposed for this purpose. The AJS will be a treaty-based gateway that will determine whether an investor-state dispute must be referred to the courts of a host State, or to another forum. By incorporating the AJS in the AfCFTA investment protocol, the AU will create predictability, and avoid the lack of consensus on investor-state dispute resolution that is evident in the PAIC and that potentially awaits the AfCFTA Investment Protocol.[148]

The Protocol should also give States policy space or regulatory freedom to determine the right kind of FDI, in accordance with their development goals, peculiarities, level of development and historical context. For instance, FDI that supports productive capacity, SME development, infrastructure development, up-stream and down-stream linkages. The Annex 1 of the SADC Finance and Investment Protocol (FIP) provides good guidance in this respect.

The Protocol could also include legal obligations demanding responsible business conduct. The COMESA Investment Agreement, SADC Model BIT and PAIC may be helpful in this regard. They require investors to promote sustainable development, comply with corporate social responsibility, protect, manage and improve the environment, and respect human rights in the host States. The COMESA Investment Agreement and PAIC even allow host governments to sue investors for breaching such treaty obligations. Investor obligations would be necessary for the AfCFTA Investment Protocol to ensure that foreign investors act responsibly and contribute to the development of the African countries.[149]

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[146] Economic Commission for Africa (2016), Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration

[147] Ibid

[148] http://www.afronomicslaw.org/2019/01/11/the-relevance-of-the-draft-pan-african-investment-code-paic-in-light-of-the-formation-of-the-african-continental-free-trade-area/ (accessed 28/05/19)

[149] https://www.tralac.org/blog/article/14065-how-can-the-afcfta-investment-protocol-advance-the-realisation-of-the-afcfta-objectives.html (accessed 10/08/2019)

Some of the opinions are that, although the AfCFTA Investment Protocol will cover intra-Africa FDI/investment, some of the provisions such as the MFN may well be beneficial for investment from outside the continent. FDI will not increase by the mere existence of the AfCFTA Investment Protocol. Economic conditions like access to markets or natural resources of the host economy are important determinants of investment location decisions. Similar to other investment treaties, the Protocol will strive to reduce perceived risks, guarantee legal protection and boost investor confidence and may increase FDI flows through creating an investor-friendly environment and removing barriers to cross-border movements of capital or investments.[150]

As earlier mentioned, the flow of investment in Africa in most cases is being hindered by issues concerning bureaucracy; lack of transparency and disclosure of investment-related information; inefficiency and corruption; lack of harmonisation of investment laws, regulations or policies at national and regional levels; and lack of coordination and cooperation of relevant institutions or authorities. The AfCFTA Investment Protocol could therefore tackle these barriers to FDI-entry by including investment facilitation provisions and the required governance structures. Such provisions should focus on cutting red tape, simplifying personnel entry, easing investment permits and enhancing institutional cooperation and coordination, among others.[151]

Implementation of investment facilitation measures, however, can be complex and costly. AU member States could opt for non-binding commitments on investment facilitation, but such commitments may be problematic with respect to compliance, enforceability and implementation. Another option could then be opting for binding yet flexible approach to investment facilitation. The AfCFTA Investment Protocol should thus adopt binding yet flexible commitments on investment facilitation. Binding commitments could enhance rules-based investment governance and promote certainty and predictability. Special and differential treatment (SDT) may be needed considering African countries different levels of development.[152]

The SDT approach should allow members to self-assess and determine their capacity and time to implement investment facilitation commitments. Technical and financial assistance would also be needed to help States implement investment facilitation measures. The WTO Trade Facilitation Agreement may provide guidance in this regard.[153]

Lastly, it would be expected that the Protocol will build on already existing RECs investments initiatives and developments in Africa and clearly define its relationship with these existing RECs investment models.[154] The end goal is for the investments to benefit African countries and local economies. African countries should reap the benefits through

[150] Ibid
[151] Ibid
[152] Supra
[153] Ibid
[154] This is in line with the preservation of the *acquis* principle enshrined in Art. 5 of the AfCFTA

skills transfer, technology transfer, job creation, and infrastructure development. Subsequent investment agreements should also cover the concept of reciprocity of investments between individual African States or through the RECs to allow inward and outward flows of goods and services.

Given these concerns, this common investment Protocol has to be able to attract more investments from within and outside the continent. As already alluded to, the existing investment initiatives such as BITs need to be strengthened to take into account current varying national levels of socioeconomic development. African countries need to critically review BIT texts before signing. There is a need to explore what to frame in negotiating and renegotiating treaties, as well as alternative rules and venues. Certain type of provisions needs to be crafted to curb their potential liability from investment policy changes.

In essence, countries need to look at the wording of the provisions being negotiated with their counterparts to ensure that a balance is struck between protecting the investors and giving government sufficient policy space to achieve development objectives. Hence, provisions containing a narrow-based definition of investment, mandatory exhaustion of local remedies, regional approaches to dispute resolution, pre-approval of investment, and standard of treatment, among other considerations, have to be worded carefully.

The revised investment agreements models earlier mentioned therefore serve as a useful tool and guidelines in this regard. This includes other policy framework guidelines provided by other institutions such the International Institute for Sustainable Development model, and the UN Conference on Trade and Development Investment Policy Framework for Sustainable Development model. Furthermore, given the ambiguity of the impact of BITs on investment in Africa, Africa needs to sketch out a strategy for investment regulation. This strategy needs to restore the balance between investment protection and the legitimate right of a state to act in accord with its development needs and objectives. The policy recommendations include among others the following:[155]

- The wording of new agreements require much attention, so that it does not allow for the crowding out or discriminatory treatment of domestic and regional investors, which often face unfair conditions as a result of the various "layers" of standards of treatment that foreign investors obtain from BITs. Especially as the continent is receiving more intra-African investment, providing for this type of investment is paramount.
- Termination has been resorted to by some countries such as Morocco and South Africa. Termination of existing agreements will therefore not be a totally new phenomenon. Renegotiation or amendment of existing agreements is another possible avenue.

[155] Economic Commission for Africa (2016), Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration

- Arbitration conducted at the ICSID provides a relatively neutral procedure and is a preferred venue for most disputes, but needs not be the only one. Further, recent experience in Africa also reveals a risk of forum shopping for arbitration, where cases were filed under both UNCITRAL and ICSID.[156]
- There have been suggestions of considering setting up the African Court of Justice. Given that a growing number of disputes from intra-African BITs may be expected, the interest in a home-grown solution is increasing, both to standardize how disputes should be handled and from a legal- economy perspective. However, this interest will need to be paired with institution building, legal independence, and enforcement mechanisms to ensure that they are viewed as credible alternatives to ICSID.[157]

[156] Ibid
[157] Ibid

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