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AN AFRICAN PERSPECTIVE ON THE BALANCING OF INVESTOR-HOST STATE DYNAMIC IN INTERNATIONAL INVESTMENT LAW

Chidebe Matthew Nwankwo

1 Introduction

International investment agreements are facing a protracted legitimacy crisis. The current praxis of Investor-state dispute settlement (ISDS) mechanisms is widely perceived as generating an asymmetrical system, which protects 'the interest of investors, and intruding into the space of human and environmental rights'.[1] These asymmetries have become the rallying point for social movements, scholars and policy makers who are reacting to the vagaries of international investment agreements (IIAs) by urging disadvantaged states to resist the signing of new IIAs, support the inclusion of human and environmental rights safeguards, and stricter regulation of extractive projects that are likely to produce severe environmental liabilities.[2]

Several disputes between host states and corporations from capital exporting states riddle national courts and the ISDS mechanisms with matters seeking redress. One such prominent dispute is the *Texaco/Chevron* law suit,[3] which commenced in November 1993 and is still being litigated. The Ecuadorian plaintiffs claim that Texaco's extractive operations between 1964 and 1992 have had a devastating effect on the environment and on the development prospects and health of the Amazonian people of Ecuador and nearby communities. A tortuous and lengthy judicial

1 L Pellegrini et al 'International investment agreement, human rights and environmental justice: The *Texaco/Chevron* case from the Ecuadorian Amazon' (2020) *Journal of International Economic Law* 1.

2 As above.

3 United States Court of Appeals, Second Circuit, *Aguinda 'B' 'C' 'D' v Texaco Inc* 16 August 2002. The plaintiffs argued that due to its operations during this period, Texaco had cause massive environmental impacts ultimately leading to several adverse effects on the Amazonian region in Ecuador, including higher than normal morbidity and mortality rates. The Southern District of New York Court refused to admit the case and it was eventually instituted in a provincial court in Ecuador resulting in a decision in 2013 that awarded a payment of US $9 500 million against Chevron (which had succeeded Texaco in an acquisition),

process was followed by an arbitral proceeding[4] in 2018 deriving from the Ecuador-United States Bilateral Investment Treaty.[5] An arbitral tribunal constituted under the Permanent Court of Arbitration (PCA) in The Hague decided that Ecuador had to render the 2013 judgment of the Ecuadorian court that condemned Chevron unenforceable as it found that the company had not been given a fair trial. As the time of writing the case has been litigated for 27 years in various fora, including the USA, Ecuador, Argentina, Canada and international courts, and demonstrates how protracted law fare makes it difficult for states to hold multinational companies accountable for their often environmentally and economically devastating actions.[6]

Despite these disputes and the perceived power asymmetries between host states and investor, the number of IIAs continue to rise. As at August 2022 there are 2 872 bilateral investment treaties (BITs) negotiated by states, with 2 231 in force. Furthermore, of the 430 treaties with investment provisions (TIPs) 336 are in force.[7] This underscores the continued relevance of IIAs as a major means of trade and economic development particularly for developing countries. Foreign direct investment (FDI) continues to play an important role in the process of capital importation by providing the financing that, for many developing countries, is otherwise unavailable.[8] This chapter examines the ongoing crisis in international investment law from an African perspective. It undertakes an analysis of the pattern of IIAs entered into by African states and weighs its potential in attaining key national and continental agenda for sustainable development. The first part takes a brief look at the value which IIAs hold for developing countries. The second part examines the importance of IIAs and the quest for sustainable development in Africa. The current *zeitgeist* of regional integration in Africa – sustainable development its relationship with IIAs. The third part undertakes textual analysis of intra-African and extra-African investment agreements. The fourth part explores the pathways available to resolving the challenges plaguing IIAs in Africa. The fifth part is the conclusion.

4 *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador* UNCITRAL, PCA Case 2009–23 (2019), https://www.italaw.com/cases/257 (accessed 26 July 2020).

5 Pellegrini et al (n1) 2.

6 S Joseph 'Protracted lawfare: The tale of Chevron Texaco in the Amazon' (2012) 3 *Journal of Human Rights and the Environment* 70.

7 UNCTAD International investment agreements database, https://investmentpolicy.unctad.org/international-investment-agreements (accessed 26 July 2020).

8 AH de Wet & R van Eyden 'Capital mobility in sub-Saharan Africa: A panel data approach' (2005) 73 *South African Journal of Economics* 22.

2 International investment for host states: To what benefit?

The question remains whether international treaty law holds any advantages for host states. Therefore, it is therefore important to briefly highlight the historical context under which these agreements have been negotiated and implemented. It has been argued that contemporary international investment law is historically rooted in a system designed to protect the interests of foreigners abroad. This was to ensure that foreign citizens or corporations from capital exporting countries benefited from governance as good as they got at home in their host states.[9] Root's seminal speech articulates the ideology behind modern international investment law thus:[10]

> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.

This statement reflected the core minimum standard that was advocated by capital-exporting states as a fundamental tenet of international investment law. It referred to a set of norms encapsulating foreign subjects' entitlement to be treated according to good governance precepts obtainable in 'civilised nations'.[11] The primary function of the customary minimum standard was primarily to protect aliens from the failures of governance in host states, such as a denial of justice and uncompensated takings of property.[12]

It has been stated that despite the portrayal of the international minimum standard as an embodiment of the good governance benchmarks

9 M Sattorova *The impact of investment treaty law on host states: Enabling good governance*? (2018) 1.

10 E Root 'The basis of protection to citizens residing abroad' (1910) 4 *American Journal of International Law* 517 521.

11 See AH Roth *The minimum standard of international law applied to aliens* (1949) cited in Sattorova (n 9) 2.

12 Roth (n 11) 2.

endorsed by civilised nations supposed to be advantageous to a wider world community, it was designed to protect foreigners at the exclusion of nationals in reality.[13] For this reason, it was strongly opposed by developing countries. A remarkable example of the refusal of developing countries to endorse the international minimum standard was the national standard advocated by Latin American states. The national standard required that foreigners and their property be accorded treatment no more favourable than that accorded to the nationals of the host state. This standard is most prominently embodied in the Calvo doctrine or 'national standard', a principal tenet of which is the notion that when entering the territory of a host state a foreigner 'submits to local conditions with benefits and burdens' and that to grant a foreigner special treatment 'would be contrary to the principles of territorial jurisdiction and equality'.[14]

The idea of the core minimum standard and the requirement for compensation for expropriation projected by capital importing states also faced opposition from a coalition of newly-independent developing countries that questioned the fairness of these rules, and re-asserted the primacy of national treatment with regard to foreigners' entitlement for expropriated property. This position of the newly-independent countries found expression in the 1974 UN Charter of Economic Rights and Duties of States,[15] which provided that each state had the right to nationalise, expropriate or transfer ownership of foreign property, and that it was for the state to determine appropriate compensation, taking into account relevant national laws and regulations and all circumstances that it considered pertinent.[16]

Notwithstanding the resistance the international minimum standard had faced in the past, the ideas of special treatment or 'better governance' for foreign investors eventually found its way into the corpus of international investment law through treaties. The resolve of capital importing states, particularly the independent states in Africa, to jealously protect the sovereignty of their nascent states waned at the realisation that 'foreign investment is critical for the purposes of injecting finances into faltering economies, expanding trade opportunities and strengthening infrastructure, which result in growth and development'.[17] Thus, the

13 I Brownlie *Principles of public international law* (2003) 501-502.

14 Brownlie (n 13) 502.

15 A/RES/39/163.

16 See BH Weston 'The charter of economic rights and duties of states and the deprivation of foreign-owned wealth' (1981) 75 *American Journal of International Law* 437.

17 W Nabalende 'Protecting foreign investment using Calvo Doctrine' (2020) 1 *Finance Development* 167.

international minimum standard became incorporated into bilateral and multilateral agreements on the promotion and protection of investment following the wave of economic liberalisation that swept across the globe in the 1980s and 1990s. Capital-exporting states often negotiated BITs with developing countries by designing treaties not just to protect investments into developing countries but also, importantly, to 'treatify' the Hull rule of compensation for expropriation of property by host states.[18]

This codification process resulted in a hitherto unprecedented number of BITs whereby each contracting state committed to implement a range of standards of treatment, including notably the guarantee against uncompensated expropriation, fair and equitable treatment, and non-discrimination.[19]

With this regime of international investment agreements, foreign investors were granted access to arbitration and the right to bring action directly against the host government. By participating in bilateral arrangements on investment protection, developing countries were hailed as 'sending a strong signal of their commitment to provide a predictable, stable and reliable legal environment for foreign direct investors, to stimulate investors' confidence and boost FDI flows'.[20] Advocates of the investment treaty regime advanced the view that one of the principal functions of investment treaty law was to ensure that foreign investors are treated in accordance with stronger, internationally-recognised, good governance standards.[21]

Subsequently, the international investment landscape became marked by investors actively using the investor-state dispute settlement (ISDS) system to challenge various host state actions. This led to a shift in the perception of international investment treaty regime from an attempt to ensure the application of good governance to foreign investment to a system that conferred undue privileges to foreign investors to the detriment of host states. First, investment treaties grant investors direct standing and a right of action for damages against host states, and also allow investors in doing so to avoid national remedies and to enforce awards against state assets located in foreign jurisdictions.[22] This is evident in the weight of financial penalties of investment arbitration for respondent states.

18 KJ Vandevelde *U.S international investment agreements* (2009) 25-26.

19 Sattorova (n 9) 3.

20 As above.

21 Sattorova (n 9) 3.

22 G van Harten and M Loughlin ' Investment treaty arbitration as a species of global administrative law ' (2006) 17 *European Journal of International Law* 332.

Developing countries in particular have found themselves vulnerable due to the detrimental financial impact of the awards on their budget.[23]

Second, the power asymmetry in the investor-state relations is most present in the fact that investors are granted extensive substantive and procedural rights but not obligations. States, on the other hand, are subjected to an array of obligations unaccompanied by rights. These rights enjoyed by foreign investors, being products of treaty law, remain operational in spite of activities of corporations that grossly impede sustainable development in the host state. Consequently, these obligations imposed on states, some argue, 'unduly limit the regulatory powers of host states to implement environmental, labour and social policies by obliging host states to compensate foreign investors for damages caused by such measures'.[24]

As host state measures to implement sustainability policies have frequently been the target of investment arbitration, critics argue that IIAs impede rather than encourage sustainable foreign investment.[25] The critique of IIAs led to the conclusion that there is an IIA crisis. In recent time, discussions have commenced to strengthen the regulatory sovereignty of host states to ensure that foreign direct investment do not impede the sustainable development plans of host states.[26] In addition, ISDS reform debates in the United Nations Commission on International Trade Law (UNCITRAL) Working Group III aim at the reform of the ISDS standards to address the legitimacy concerns over the system and

23 In most cases, to 'expedite payment of the awards, funds may be diverted from important development objectives, such as investment in infrastructure, education, health or other public goods'. See UNCTAD *Best practices in investment for development. How to prevent and manage investor-state disputes: Lessons from Peru* (2011) 7.

24 GM Zagel 'International investment agreements (IIAs) and sustainable development: Are African reform approaches a possible way out of the global IIA crisis' (2020) 17 *Manchester Journal of International Economic Law* 27. See also H Mann 'Reconceptualising international investment law: Its role in sustainable development' (2013) 17 *Lewis and Clark Law Review* 532.

25 Zagel (n 24) 27. See also T Fritz *International investment agreements under scrutiny: Bilateral investment treaties, EU investment policy and international development* (2015); 'Rights for people, rules for corporations – Stop ISDS', https://stopisds.org/ (accessed 10 March 2022).

26 UNCTAD has played a leading role in these reforms by which pursuing a wide-ranging concept of investment policy reform to facilitate sustainable foreign investment. Through its 'Roadmap for IIA Reform' presented in 2015, the organisation supports and systematically surveys national IIA reform processes. See UNCTAD report 'UNCTAD's reform package for the international investment regime', (2018) (UNCTAD 2018), https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_ Reform_Package_2018.pdf (accessed 28 August 2022); UNCTAD, *World Investment Report* (Geneva: UNTAD, 2015).

prevent adverse effects on sustainable development.[27] However, despite attempts by states to reform their respective IIA regimes accordingly, worldwide scepticism remains, as the controversies on the Trans-Pacific Partnership (TPP), North American Free Trade Agreement (NAFTA) and the EU-Canada Comprehensive Economic and Trade Agreement (CETA) recently demonstrate.[28] For this reason, African states have moved to introduce reforms at national, sub-regional and regional levels to ensure that IIAs do not impede on efforts to address climate change and the environment.[29]

3 IIAs and sustainable development in Africa

The case of African states is not any different from other developing countries that view foreign investments as the motor for economic development. Thus, African states have concluded numerous IIAs and continue to explore these as a pathway to economic development. Of the few thousand IIAs in operation around the world, around 900 involve African countries.[30] Originally, African states entered into IIAs as a north-south strategy to promote and protect investments from capital-exporting Western countries into the newly-decolonised countries. From the 1990s onwards African IIAs moved increasingly towards south-south treaties with states within and outside Africa.[31]

27 UNCTAD 2018 (n 26). 8.

28 Among the most obvious challenges facing these trade agreements are President's Trump decision to pull out from the TPP on his first day in office in 2015; the stalemate between the US and her North American counterparts Mexico and Canada over renegotiation of the NAFTA. Regarding the TPP, another 11 member states have proceeded without the US. See O Hoskin & LLP Harcourt 'NAFTA, CETA and the TPP – Significant challenges and opportunities' https://www.lexology.com/library/detail.aspx?g=d2cc84f5-b00a-4aef-8c7a-4efe96fc3bb9 (accessed 15 January 2021); J McBride, A Chatzky & A Siripurapu 'What is the Trans-Pacific Partnership?' Council on Foreign Relations, 1 December 2020, https://www.cfr.org/backgrounder/what-trans-pacific-partnership-tpp (accessed 15 January 2021).

29 See generally CM Nwankwo 'Balancing international investment law and climate change in africa: Assessing vertical and horizontal norms' (2020) 17 *MJIEL* 48-63.

30 For an overview, see UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements (accessed 29 August 2020).

31 Zagel (n 24) 27-28. For a systemic overview of the pattern of IIAs in Africa, see MM Mbengue & S Schacherer 'Evolution of international investment law agreements in africa: Features and challenges of investment law "Africanisation"' in J Chaisse, L Choukroune & S Jusoh *Handbook of international investment law and policy* (2021).

The benefit of these IIAs and the ISDS to African states has been mixed. African states, termed 'reverse contributors',[32] have contributed considerably to the development of ICSID arbitration from post-independence.[33] However, the percentage of disputes involving African states at ICSID sharply contrast with the share of foreign direct investment coming into Africa.[34] Zagel aptly articulates the cost-benefit dynamic of IIAs and the ISDS in Africa over the years thus:[35]

> Up to the mid-nineties, the majority of the ICSID disputes involved African states. While initially most cases were decided in favour of the investor, the outcome of investment awards has been more balanced in recent years. In case of a loss, the damages awarded frequently pose an enormous challenge to the tight budgets of African states. But even if a host state wins the case, the costs for the proceedings and legal services may be huge. Moreover, a publicly known investment dispute always affects the investment climate and reputation of a host state, irrespective of the outcome of the case.

African states are aware that rapid and extensive industrialisation is imperative to compete in the global market. However, industrialisation ought to be pursued in a manner that balances economic development derivable from international investments with its social and environmental impact. In recognition of this need for sustainable development, the continental blueprint under the auspices of the African Union (AU) for the socio-economic advancement of the African continent in the coming years, the Agenda 2063[36] aspires to, by 2063, achieve 'a prosperous Africa based on inclusive growth and sustainable development'.[37] The Agenda 2063 alludes to the fact that 'while Africa at present contributes less than

32 See OD Akinkugbe 'Reverse contributors? African states parties, ICSID and the development of international investment law' (2019) 34 *ICSID Review – Foreign Investment Law Journal* 434.

33 AA Agyemang 'African states and ICSID arbitration' (1988) 21 *Comparative and International Law Journal of Southern Africa* 177.

34 As at the time of writing over 25% of all investment disputes brought before ICSID involve African states while a meagre 2,9% of global FDI make it to the region. See UNCTAD World Investment Report 2020, https://unctad.org/system/files/official-document/wir2020_overview_en.pdf (accessed 30 January 2021); ICSID Caseload Statistics, January 2021, https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf (accessed 30 January 2021).

35 Zagel (n 24) 30.

36 African Union 'Agenda 2063: The Africa we want' https://au.int/en/agenda2063/overview (accessed 30 August 2020).

37 As above.

5% of global carbon emissions, it bears the brunt of the impact of climate change'.[38]

While the Agenda 2063 anticipates that foreign investment can play a fundamental role in implementing the region's sustainable development targets,[39] corporations continue to impede the sustainability measures of their host states either through their operations or by manipulating the ISDS mechanisms. One case that demonstrates the challenge that traditional IIAs pose to the regulatory sovereignty of African states, particularly as it affects sustainable development, is *Biwater Gauff v Tanzania*.[40] In this case Tanzania commissioned its water and sewerage infrastructure and services to Biwater Gauff, a company under the control of British and German investors. The company's mandate was to restore and operate the water and sewerage system of Dar-es-Salaam, a major commercial port and largest city in the country. The company failed to provide satisfactory services, as their cost calculation to acquire the bid could not generate the income required to fund the investment and maintenance costs.[41] Biwater requested a renegotiation of the contract only 18 months after it was awarded. Determined to ensure functioning water supply and sewage services for residents of the city, Tanzania terminated the contract after several unsuccessful negotiation rounds. Biwater instituted a case before an ICSID tribunal claiming that Tanzania's conduct constituted an expropriation and violated the fair and equitable treatment (FET) standard guaranteed in the Tanzania-United Kingdom BIT (1994).[42]

The Tribunal established an expropriation[43] and rejected Tanzania's argument that the conduct was necessary to grant freshwater supply to the population of Dar-es-Salaam[44] which itself was a breach of the FET standard.[45] The tribunal, however, did not award any damages, as Biwater could not prove any losses and had violated its contractual obligations.[46] In spite of this, Tanzania had to bear the costs of the arbitration and its

38 As above.

39 See AU Agenda 2063 (n 36) AU 2063, aspirations 1 & 2 and para 72.

40 *Biwater Gauff v Tanzania* ICSID Case ARB/05/22, award of 24 July 2008.

41 *Biwater Gauff* (n 40) paras 486 and 789.

42 *Biwater Gauff* (n 40) para 354; see also Tanzania-United Kingdom BIT (1994) arts 2(2) & 5.

43 *Biwater Gauff* (n 40) paras 451-519.

44 *Biwater Gauff* (n 40) paras 514-515.

45 *Biwater Gauff* (n 40) paras 622-628.

46 *Biwater Gauff* (n 40) paras 788-808.

legal fees[47] which could have been made available for water and sewerage systems in Dar-es-Salaam.

The sustainable development policy of the Tanzanian government was adversely affected even if the Tribunal did not award any damages in favour of the company. The reason behind Tanzania's decision to terminate the contract was to secure the services of a more competent company to provide a safe and affordable water and sewerage system for Dar-es-Salaam,[48] which is an essential infrastructure to improving the health and nutrition of the Dar-es-Salaam population. However, between Biwater's failure to provide the services and the institution of the arbitral proceeding, Tanzania's water policy not was only at a standstill but stood the risk of being totally reversed. Yet, Tanzania had to bear costs for the ISDS proceedings initiated by Biwater, although it won the case.[49] Furthermore, the case itself affects Tanzania's reputation as a reliable host state, which may ward off investment flows to the country in future. In addition, the effect of the dispute may cause the Tanzanian government to become reluctant to implement sustainable development policies of this magnitude, an effect called the 'regulatory chill effect' of IIAs.[50]

The *Biwater* case further underscores the general weaknesses of traditional IIAs regarding implementation of the sustainable development policies of host states. First, the weak rules on expropriation and FET hands arbitral tribunals extreme flexibility to apply and interpret these provisions, which blindsides states' ability to predict the obligations resulting from these standards and thus the outcome of investment disputes. For instance, in the case of Biwater, the tribunal considered the termination of the contract by Tanzania an expropriation despite the investor's breach of its contractual obligations. Second, while traditional IIAs grant the protection of foreign investors, they do not require arbitral tribunals to take into account the need of host states to pursue measures in the public interest – such as the implementation of sustainable development policies or the conduct of foreign investors.[51] Third, IIAs typically do not provide for procedural guidance concerning the admissibility of frivolous claims, counterclaims, or the calculation of damages, elements that save resources through limiting the duration and costs of investment disputes.[52]

47 *Biwater Gauff* (n 40) paras 812-813.

48 *Biwater Gauff* (n 40) paras 428-436.

49 *Biwater Gauff* (n 40) para 813.

50 See *Clayton and Bilcon of Delaware Inc v Government of Canada* PCA Case 2009-04, Dissenting Opinion of Donald McRae, para 48.

51 Zagel (n 24) 32.

52 As above.

4 African states attempt to address the IIA crisis

International investment law in Africa is best characterised as a cross-cutting or fragmented regime operating at various levels. There are at least three levels of regulation, namely, national investment legislation, BITs and regional investment agreements. This proves that Africa currently is one of the most active regions in the world when it comes to finding new approaches in shaping IIAs. Over the past 10 years African states, at all levels, have adopted highly-innovative investment instruments in their quest to reshape international investment law. This process of renegotiating the norms guiding IIAs has been described as 'Africanisation' of international investment law.[53] The Africanisation of international investment law by African states through the regulation of international investment according to their policy and development priorities has been described as an 'evident contemporary phenomenon'.

In furtherance of the sustainable development goals agenda of the AU, African states appear to mostly design IIAs to ensure the prioritisation of sustainable development with varying degrees of success. Most of the clauses requiring investors to ensure sustainable development are mostly found in intra-African IIAs (agreements between African states) while extra-African IIAs (between states outside the region) have seen little development in terms of reforming the overly advantageous nature of IIAs for foreign investors and their home economies.[54]

4.1 The Pan-African Investment Code as the regional guide for international investment agreements

In 2008 African ministers responsible for continental integration decided to initiate the work on a comprehensive investment code for Africa. Thus, the elaboration of the Pan-African Investment Code (PAIC)[55] started. From the beginning, the AU and its member states intended to create a text that would address Africa-specific needs. After several years of drafting the text the PAIC was approved in March 2016 and subsequently adopted as non-binding model investment guideline. Notwithstanding its status as

53 MM Mbengue 'The "Africanisation" of international investment law: The Pan-African Investment Code and the reform of the international investment regime' (2017) 18 *Journal of World Investment and Trade* 414-48.

54 Mbengue (n 31) 2.

55 Draft Pan-African Investment Code, December 2016, https://au.int/sites/default/files/documents/32844-doc-draft_pan (accessed 24 April 2020).

a normative guideline, the PAIC introduces very important model clauses that will guide IIAs in the region in the coming years.

In terms of the content, the PAIC introduces several innovative clauses. Article 1 provides that the objective of the PAIC is to promote, facilitate and protect investments that foster the sustainable development of each member state and, in particular, the member state where the investment is located. It also includes provisions on due diligence and obligations for investors in relation to human rights, corporate social responsibility, use of natural resources and land grabbing.[56] The PAIC also omits certain investment standards that have been disadvantageous to African states. For instance, the instrument completely leaves out the controversial FET standard.

The PAIC precisely places strong emphasis on safeguarding the right of host states to regulate admitted investments and to adopt measures concerning preserving the environment,[57] international peace and security, and national security interests and promoting national development. In addition, the instrument limits the application of most-favoured-nation treatment (MFN) and national treatment (NT) obligations to investments 'in like circumstances'[58] and grant host states the right to derogate from these obligations to preserve public interests (that is, environment, security).[59] Article 22(3) obliges the investor to contribute to the economic, social and environmental progress to achieve sustainable development of host states.

The PAIC has been hailed as one of the 'boldest investment instruments adopted so far'[60] for imposing of certain obligations on investors. These obligations range from compliance with host states' corporate governance standards, adherence to socio-political obligations, to adherence to corporate social responsibility standards, responsible use of natural resources, and compliance with business ethics and human rights.[61] In addition, the PAIC attempts to create symmetry in the relationship between investors and host governments by introducing horizontal obligations that

56 Draft PAIC (n 55) 18.

57 Art 37(1) provides that the member states shall not encourage investment by relaxing or waiving compliance with domestic environmental legislation.

58 PAIC arts 7(3) & 9(3).

59 PAIC arts 8 & 10.

60 Mbengue (n 53).

61 See, eg, art 24 of the PAIC. See also E de Brabandere 'Human rights and international investment law' in M Krajewski & RT Hoddmann (eds) *Research handbook on foreign direct investment* (2019) 619–645; Nwankwo (n 29) 53-57.

are addressed to both the host states and the investors. These provisions refer to basic principles as to how state contracts as well as public-private partnerships should be designed; how African states should adapt their labour policies and resource development; and how investors can help to promote technology transfer, clean technologies, and environmental protection.[62]

4.2 Sub-regional model treaties

Most of the regional economic communities (RECs)[63] in Africa have in the past adopted legal instruments that regulate foreign investment. Various treaties were concluded from the 1970s to the 1990s, to enhance cooperation and harmonisation in the area of investment, such as the 1965 Economic and Monetary Community of Central Africa (CEMAC) Investment Agreement; the 1984 ECOWAS Protocol on Community Enterprises; and the 1979 ECOWAS Protocol on Movement of Persons and Establishment. In 2007 the Common Market for Eastern and Southern Africa (COMESA) developed a modern investment agreement, which was to establish a COMESA Common Investment Area. However, negotiations are still ongoing regarding its content. The 2006 SADC Protocol on Finance and Investment is another important instrument adopted by an REC. For its part, the EAC adopted a model investment agreement in 2006 (which was revised in 2015).[64] The provisions of these sub-regional intra-African investment treaties and model instruments reflect the innovative wording of the PAIC. The following parts briefly highlight key provisions of selected instruments at the sub-regional level.

62 Mbengue (n 53).

63 There currently are eight recognised RECs that form the building block for the African Economic Community under the 1991 Abuja Treaty. These include the Economic and Monetary Community of Central Africa (CEMAC); the Community of Sahel-Saharan States (CEN-SAD); the Common Market for Eastern and Southern Africa (COMESA); the East African Community (EAC); the Economic Community of East African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority for Development (IGAD); and the Southern African Development Community (SADC).

64 M Mbengue 'The quest for a pan-African investment code to promote sustainable development' (2016) *Bridges Africa*, www.ictsd.org/bridges-news/bridges-africa/news/the-quest-for-a-pan-african-investment-code-to-promote-sustainable (accessed 22 March 2020).

4.2.1 The SADC Model Bilateral Investment Template

In 2012 the SADC adopted its Model Bilateral Investment Template[65] as a non-binding guideline under its 2006 Protocol on Finance and Investment. The main objective of the agreement 'is to encourage and increase investments … that support the sustainable development of each party and in particular the host state where an investment is to be located'.[66] This orientation is maintained throughout the text and was used as a benchmark when examining other draft provisions for the text. It is worth noting that the SADC Model BIT is merely a draft guideline for SADC member states as the required number of ratification is yet to be achieved. However, its provisions are of value as it shapes the content of individual BITs entered into by member states. The instrument places an obligation on investors to comply with environmental and social impact assessment according to the laws of the host state or the International Finance Corporation (IFC) performance standards.[67] In similar manner as the PAIC, the SADC Model BIT prohibits investors from managing or operating investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the host state or the home state, whichever obligations are higher.[68]

4.2.2 The investment agreement for the COMESA Common Investment Area

The COMESA Common Investment Area (CCIA)[69] was adopted by the heads of state of COMESA member states in May 2007. The CCIA agreement is considered 'a precious investment tool established to create a stable region and good investment environment, promote cross border investments, and thus enhance COMESA's attractiveness and competitiveness … as a destination for Foreign Direct Investment (FDI), and in which domestic investments are encouraged.'[70] Article 5(e) of the CCIA obliges member states not to 'waive or otherwise derogate from or

65 See 'SADC Model Bilateral Investment Treaty Template with Commentary' July 2012, www.iisd.org/itn/wp-content/uploads/2012/10/SADC-ModelBIT-Template-Final.pdf (accessed 22 March 2020).

66 Art 1 SADC Model Bilateral Investment Treaty Template.

67 Art 13(1) SADC Model Bilateral Investment Treaty Template.

68 Art 15 SADC Model Bilateral Investment Treaty Template.

69 Investment Agreement for the COMESA Common Investment Area adopted 23 May 2007, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3092/download (accessed 22 March 2022).

70 P Muchlinski 'The COMESA Common Investment Area: Substantive standards and procedural problems in dispute settlement' in C Lim (ed) *Alternative visions of international law on foreign investment* (2016) 156.

offer to waive or otherwise derogate from measures concerning labour, public health, safety or the environment as an encouragement for the establishment, expansion or retention of investments'.

The new CCIA is remarkable for further narrowing down the wide scope of investment protection standards. For instance, the FET standard has been reduced to fair judicial and administrative treatment. Lastly, in terms of dispute settlement between host state and investor, the CCIA foresees the exhaustion of local remedies. In addition to this requirement, the instrument also encourages the referral of disputes to the COMESA Court of Justice or to an arbitral tribunal constituted under the COMESA Court of Justice.[71]

4.3 The Morocco-Nigeria BIT as a potential model

In December 2016 Morocco and Nigeria signed a BIT[72] that attempts to address the unbalanced content of IIAs, restrictions on regulatory powers and the inadequacies of investment arbitration.[73] The Morocco-Nigeria BIT centres the agreement on sustainable development by making it the overarching objective of the treaty. In the Preamble to the treaty, up to four references are made to the sustainable development. With regard to the substantive provisions of the BIT, the treaty establishes a balance between the investors' rights and obligations. The investors' rights mimic those that are traditionally contained in IIAs. However, the scope of protection is limited to investments that fulfil the criteria of the treaty's investment definition. This definition requires that an investment has to contribute to the sustainable development of host states.[74]

71 Arts 26 & 27 CCIA.

72 Reciprocal investment promotion and protection agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 3 December 2016, not yet in force) https://investmentpolicyhubold.unctad.org/Download/TreatyFile/5409 (accessed 20 June 2019).

73 Dissatisfaction with traditional BITs has generated four main types of reaction: (a) reluctance to ratify BITs; (b) conclusion of facilitation agreements, which radically downgrade the substantive protection of foreign investment and do not provide for arbitration; (c) termination of BITs and adoption of investment legislation; and (d) upgrading of BITs with a view to striking a better balance between the private and public interests at stake which the Morocco-Nigeria BITrepresents. See T Gazzini 'Nigeria and Morocco move towards a "new generation" of bilateral investment treaties' *EJIL Blog* 8 May 2017, www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/ (accessed 12 February 2020).

74 Art 1(3) Morocco-Nigeria BIT. Under art 24(1), investors 'should strive to make the maximum feasible contributions to the sustainable development of the host state and the local community'.

The treaty also requires investors to comply with environmental assessment screening and assessment processes in accordance with the most rigorous between the laws of the home states, as well as social impact assessment based on standards agreed with its Joint Committee.[75]

The Morroco-Nigeria BIT also obliges investors to apply the precautionary principle;[76] maintain an environmental management system and uphold human rights in accordance with core labour and environmental standards as well as labour and human rights obligations of the host state;[77] operate through high levels of socially-responsible practices and apply the International Labour Organisation (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.[78] The treaty also addresses the perceived restrictions imposed by some investment treaties upon the regulatory power of host states by recognising the parties' right to exercise discretion 'with respect to regulatory, compliance, investigatory, and prosecutorial matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities'.[79]

Lastly, the BIT introduces a novel provision that subjects investors 'to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state'.[80]

75 Art 18 Morocco-Nigeria BIT.The treaty establishes a Joint Committee composed of representatives of both contracting states. Its responsibilities include to monitor the implementation and execution of the treaty; to debate and share opportunities for the expansion of mutual investment; to promote the participation of the private sector and civil society; and to resolve any issues or dispute concerning parties' investment amicably.

76 Art 14(3) Morocco-Nigeria BIT.

77 Art 18 Morocco-Nigeria BIT.

78 Art 24 Morocco-Nigeria BIT.

79 Art 13(2) Morocco-Nigeria BIT. Art 13(4) provides that nothing in the treaty prevents state parties from adopting, maintaining, or enforcing, in a non-discriminatory manner, any measure otherwise consistent with the treaty that they consider appropriate to ensure that investment activity in their territory is undertaken in a manner sensitive to environmental and social concerns.

80 Art 20 Morocco-Nigeria BIT: 'Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.'

4.4 Extra-African international investment agreements

The majority of the agreements concluded with non-African countries was concluded with European countries.[81] Switzerland and Germany have signed most of the agreements with African countries.[82] European countries were also the first to commence bilateral relations with African countries in order to establish international rules on investment protection. Egypt is the country that has concluded the highest number of BITs with European countries, followed by Morocco, Tunisia, Algeria and Mauritius.[83]

Mbengue states that the early initiative of the conclusions of BITs between African and European countries was driven mainly by colonial links and heritage.[84] As such, they were primarily intended to protect the vested interests of European countries already present in Africa, particularly in the extractive industry.[85] The content of the majority of these agreements follows the traditional approaches of treaties elaborated by capital-exporting countries.[86] The main provisions found in these BITs impose traditional obligations on host states.[87]

At the moment, China appears to be making the most inroads into African states on the back of its Belt and Road Initiative. Currently, there are 33 BITs between China and African countries, all of which are into force. However, despite the possibility for south-south cooperation between China and Africa, most of the BITs follow the traditional pattern, as regards their content, of capital-exporting countries. In sum, the BIT network between China and Africa does not reflect much of the current Africanisation of international investment law. It has even been referred

81 L Cotula et al 'China-Africa investment treaties: Do they work?'26, https://pubs.iied.org/pdfs/17588IIED.pdf (accessed 14 March 2022).

82 Germany (52) and Switzerland (46). They are followed by China (33); Belgium-Luxemburg Economic Union (32); Italy (32); The Netherlands (30); Turkey (30); France (25); United Kingdom (24); Portugal (21); and Spain (19).

83 United Nations Economic Commission for Africa (UNECA) (ed) *Investment policies and bilateral investment treaties in Africa: Implications for regional integration* (2016) 4.

84 Mbengue (n 53) 4.

85 Cotula et al (n 81) 7.

86 OECD (1967) Draft Convention on the Protection of Foreign Property.

87 These include, as highlighted above, National treatment; Most-Favoured Nation (MFN) treatment; Fair and Equitable treatment (FET); Full Protection and Security (FPS); the prohibition of 'arbitrary', 'unreasonable' or 'discriminatory' impairment of the foreign investment; and the duty to pay compensation in case the foreign investment is, directly or indirectly, expropriated.

to as 'sporadic, outdated, uninformed by recent developments, incoherent, and even purposeless'.[88]

5 The way forward

African states have contributed substantially to the development of international investment law. This has earned them the title of 'reverse contributors',[89] particularly through their role in the generation of the jurisprudence of ICSID case law.[90] While this may be perceived as confidence in the 'transformative potential of the ICSID system for the economic development of their economies', it perhaps is more attributable to the power asymmetries of IIAs as well as the ISDS system. The perception of African countries as investment rule consumers is mainly attributable to the heavy reliance of African countries on private capital commitment which drives the acceptance of pre-drafted BIT models of capital-exporting countries.

Therefore, it is not surprising that African states constantly explore ways of reforming the system although they have only been able to relatively achieve this on the continent. However, by at least producing model investment instruments at continental, sub-regional and national levels as exemplified by the PAIC, the SADC model BIT and the Morocco-Nigeria BIT respectively, African states are becoming producers.

However, African states are still a long way from attaining the required balance in the system. First, while it may not be easy to overcome the power asymmetries that underlie IIAs with third states, African countries must be brave enough to incorporate the highly-innovative regional approaches into agreements negotiated with extra-African countries. Direct transfixing of content of the PAIC, the SADC Model and the Morocco-Nigeria BIT may not be achievable in the immediate future, but negotiations can be based on the terms of these agreements.

88 W Kidane 'China's bilateral investment treaties with African states in a comparative context' (2016) 49 *Cornell International Law Journa*l 175-176.

89 Some scholars have also argued that African states have not only contributed to the ISDS system but may even have developed a regional *lex mercatoria*. See C Onyejekwe & E Ekhator 'AfCFTA and *lex mercatoria*: Reconceptualising international trade law in Africa' (2020) 47 *Commonwealth Law Bulletin* (2021) 93.

90 Between 1972 and 2017, African states have been a party to at least 144 investor-state ICSID cases. Furthermore, 19% of the disputes registered in 2018 under the ICSID Convention and additional facility rules by region involved sub-Saharan African states. See Akinkugbe (n 32) 435.

Second, African states must seek to establish consistent policy approaches for intra-African investment negotiations. The essence of this is to ensure uniformity and predictability in intra-African BITs so that the region can benefit collectively from the normative transformation of IIAs within, before it can possibly be exported to other regions.[91]

Lastly, African states must do well to avoid overlap in the 'spaghetti bowl'[92] dynamic of instruments regulating foreign investment in the region. The international investment law landscape in an Africa country in most cases comprises national investment law, regional investment instruments, as well as a BIT. These different levels of legal commitments raise many issues, particularly the fragmentation of legal norms. This unpredictability of prevailing rules could potentially deter investment in Africa. To solve these issues African states should work toward harmonising the inconsistencies between their national, regional, and international commitments.

6 Conclusion

As debates over the need to reform and rebalance international investment law continue, African states must be commended for attempting to achieve the much-needed change from within the continent. The move to align IIAs within the continent with the sustainable development agenda is an indication of the awareness that foreign investment must be aligned with critical values.

The dichotomy of approaches between north and south remain over the benefit of international investment law to host states, while some scholars argue that, in spite of the perceived power asymmetries hampering economic development as envisaged under international investment law, IIAs may serve as vessels for good governance in the host state.[93] A counter argument that has been made is that the cost of

91 Eg, the Morocco and Congo (Brazzaville) BIT which was signed in 2018 varies markedly from the Morocco-Nigeria BIT. The former reflects the features of traditional BITs. Investor obligations, which are central aspect of the PAIC, are not included; not least does the treaty contain references to voluntary corporate social responsibility standards. In addition, the Congo-Morocco BIT does not contain appreciable safeguards for the host state's right to regulate for sustainable development purposes as provided for under the Morocco-Nigeria BIT.

92 The term was coined by Jagdish Bhagwati to describe the proliferation of US free trade agreements. See 'US trade policy: The infatuation with free trade agreements' in J Bhagwati & A Krueger *The dangerous drift to preferential trade agreements* (1995).

93 See, eg, Vandeverde who states that that investment treaties 'embody norms that all countries committed to the rule of law should follow' and can therefore 'contribute greatly to institutional quality in host countries'. KJ Vandevelde 'Model bilateral

the disputes arising from these traditional IIAs, obscures the benefits of the IIA system as originally conceived.[94] While African states must take action to balance IIAs IIL with a view to remedying the often devastating consequences of the activities of investors, they must also match norm-generation with adroit implementation.

investment treaties: The way forward' (2012)18 *Southwestern Journal International Law* 313.

94 See, eg, Tienhaara arguing that '[m]any African countries that have ratified numerous BITs have remained marginalised in terms of global investment flows'. K Tienhaara *The expropriation of environmental governance: Protecting foreign investors at the expense of public policy* (2009) 59.