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## The Right to Regulate in Africa's International Investment Law Regime

Introduction.....	437
I. Global Investment Law for Africa .....	440
II. Africa's Continental Investment Law .....	443
III. African Regional Investment Law .....	449
IV. SADC FIP .....	451
A. COMESA Common Investment Agreement .....	454
B. ECOWAS Supplementary Act .....	456
C. EAC Model Investment Code.....	459
V. African Investment Regulation at the Bilateral Level.....	460
Conclusion .....	466

### INTRODUCTION

Africa's international investment law regime is shaped by a complex, fragmented, and heterogeneous network of bilateral, regional, and international legal instruments. More precisely, the regime comprises customary international law rules, bilateral, regional, and plurilateral investment treaties, and free trade agreements (FTAs) with investment provisions or chapters.<sup>1</sup> Almost every African country has currently concluded at least one investment treaty with countries inside or outside Africa.<sup>2</sup> The treaties generally enshrine investment

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<sup>1</sup> See generally Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration, UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA (Feb. 2016), [https://www.uneca.org/sites/default/files/PublicationFiles/eng\\_investment\\_landscaping\\_study.pdf](https://www.uneca.org/sites/default/files/PublicationFiles/eng_investment_landscaping_study.pdf) [hereinafter UNECA (2016)].

<sup>2</sup> UNECA (2016), *supra* note 1, at 16; see *International Investments Agreement Navigator*, UNCTAD INVESTMENT POLICY HUB, <http://investmentpolicyhub.unctad.org/>

promotion and protection standards, although they may differ in nature, scope, and interpretation. Most of the international investment agreements (IIAs) signed and ratified by African countries were signed in the 1960s with advanced European economies and the United States because they were main sources of foreign direct investment (FDI) to Africa.<sup>3</sup> These IIAs became commonly known as North-South Bilateral Investment Treaties (BITs). Nowadays, developing economies like China, India, Brazil, and Indonesia are increasingly becoming top FDI sources for Africa and, as a consequence, more and more IIAs are concluded between African countries and such economies, the so-called South-South IIAs.

Overall, IIAs were concluded for various reasons including social, economic, and political motivations. African countries signed IIAs as tools to attract FDI from developed nations, to deepen regional integration,<sup>4</sup> and to cultivate economic and diplomatic relations with industrialized countries.<sup>5</sup> FDI has been and is still considered by many as an incentive for enhancing economic growth and development, injecting capital in local industries, creating jobs, and alleviating poverty.<sup>6</sup> There is an extensive debate as to whether IIAs attract FDI,<sup>7</sup> or whether FDI fosters economic development, job creation, and poverty alleviation.<sup>8</sup> The role of FDI in Africa's development has been

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IIA (last visited Mar. 18, 2019). The UNCTAD International Investment Agreements Database is the most comprehensive database for international investment agreements combined by UNCTAD.

<sup>3</sup> See generally Makane Moïse Mbengue & Stefanie Schacherer, *The "Africanisation" of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime*, 18 J. WORLD INV. & TRADE 414, 414 (2017).

<sup>4</sup> UNECA (2016), *supra* note 1, at 21. See also Yao Graham, *BITs a Challenge to Regional Integration in Africa*, 290/291 THIRD WORLD RESURGENCE 5, 5–7 (2014), <http://www.twn.my/title2/resurgence/2014/290-291/econ1.htm>.

<sup>5</sup> See generally FOREIGN DIRECT INVESTMENT AND HUMAN DEVELOPMENT: THE LAW AND ECONOMICS OF INTERNATIONAL INVESTMENT AGREEMENTS (Olivier de Schutter et al. eds., 2013).

<sup>6</sup> See, e.g., Genevieve Fox, *A Future for International Investment? Modifying BITs to Drive Economic Development*, 46 GEO. J. INT'L L. 229, 229 (2014).

<sup>7</sup> See generally THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (Karl P. Sauvant & Lisa E. Sachs eds., 2009); Jeswald W. Salacuse & Nicolas P. Sullivan, *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 72 (2005); Matthias Busse, Jens Königer & Peter Nunnenkamp, *FDI Promotion Through Bilateral Investment Treaties: More Than a Bit?*, 146 REV. WORLD ECON. 147 (2010); Kevin P. Gallagher & Melissa B.L. Birch, *Do Investment Agreements Attract Investment-Evidence from Latin America?*, 7 J. WORLD INV. & TRADE 91 (2006).

<sup>8</sup> See generally Schutter et al., *supra* note 5.

a debatable topic in Africa. Over the years, Africa has attracted voluminous FDI flows from western countries, yet underdevelopment, abject poverty, and high unemployment remain common on the continent.<sup>9</sup>

Immediately after independence in the 1960s, most African countries were facing stagnant economic growth, so they were prompted to conclude BITs with advanced economies to promote more inward FDI and boost economic growth. Consequently, African countries began to adopt economic policies or plans that carved out regulatory autonomy or space of host states in favor of investment promotion and protection standards.<sup>10</sup> Developed nations (the European Union countries, Canada, and the United States), on the other hand, were keen on concluding BITs with African countries to protect their citizens investing in Africa.<sup>11</sup> As such, BITs were designed by capital-exporting countries with a view of providing investors with core investment protections such as free movement of capital, access to international arbitration, and protection against government expropriation.

This Article seeks to examine the contemporary international investment law framework of Africa to determine whether such framework preserves host states' right to regulate investment in public interest. It particularly explores and analyses the IIAs concluded by African countries at global, regional, and bilateral levels. The Article is divided into four parts: global investment law for Africa, African continental investment law, regional investment law, and lastly, Africa's investment law regime at bilateral levels.

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<sup>9</sup> See generally Emmanuel A. Cleeve, Yaw Debrah & Zelealem Yiheyis, *Human Capital and FDI Inflows: An Assessment of the African Case*, 74 *WORLD DEV.* 1, 1–14 (2015).

<sup>10</sup> FOLA ADELEKE, *INTERNATIONAL INVESTMENT LAW AND POLICY IN AFRICA: EXPLORING A HUMAN RIGHTS-BASED APPROACH TO INVESTMENT REGULATION AND DISPUTE SETTLEMENT* 7 (2018).

<sup>11</sup> See Magalie Masamba, *Africa and Bilateral Investment Treaties: To BIT or Not?*, *POLITY* (Jul. 23, 2014), <http://www.polity.org.za/article/africa-and-bilateral-investment-treaties-to-bit-or-not-2014-07-23>. This source indicates that developed countries executed BITs in order to set up their business operations in developing countries, which offered lower labor costs and cheaper raw materials.

**I**  
**GLOBAL INVESTMENT LAW FOR AFRICA**

African countries have signed and ratified multilateral or plurilateral agreements pertinent to international investment regulation. Notably, the World Trade Organization (WTO) Agreement on Trade-Related Investment Measures (TRIMs);<sup>12</sup> the WTO General Agreement on Trade in Services (GATS);<sup>13</sup> the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention);<sup>14</sup> the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention);<sup>15</sup> and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>16</sup> As parties to these treaties, African states have agreed to be bound by the terms and to take all political, legal, and administrative steps necessary to implement the core imperatives of the treaties as encapsulated in their provisions.

TRIMs regulate investment measures with trade-restrictive and distorting effects, while GATS regulate trade in services and contain rules relevant to investment (particularly Mode 3 of supplying services).<sup>17</sup> Mode 3—also known as commercial presence—implies that a service supplier of one member establishes a territorial presence, through methods including ownership or lease of premises in another member’s territory to provide a service.<sup>18</sup> That is FDI. Today, there are thirty-nine African countries that are members of the WTO.<sup>19</sup> As WTO members, these African countries are legally bound by the investment provisions of the TRIMs and GATS.

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<sup>12</sup> Agreement on Trade-Related Investment Measures, Annex 1A, Apr. 15, 1994, 1868 U.N.T.S. 186.

<sup>13</sup> General Agreement on Trade in Services, Annex 1B, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167.

<sup>14</sup> Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, 1508 U.N.T.S. 99. The MIGA Convention was signed in 1985 and came into operation in 1988.

<sup>15</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966, 575 U.N.T.S. 159 [hereinafter Convention on the Settlement].

<sup>16</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, May 20, 1958, 330 U.N.T.S. 38.

<sup>17</sup> General Agreement on Trade in Services, *supra* note 13, art. I(2).

<sup>18</sup> *Id.* art. I(2)(c).

<sup>19</sup> The current WTO membership can be found on the WTO website. *Members and Observers*, WTO.ORG, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Sept. 6, 2018).

The MIGA Convention provides risk insurance to foreign investors against political risks such as expropriation, transfer restriction, breach of contract, non-honoring of financial obligations, as well as war, terrorism, and civil disturbance. The Convention also provides investment dispute resolution on a case-by-case basis. Fifty-three African countries are currently members of the MIGA Convention.<sup>20</sup>

The ICSID Convention creates the International Centre for Settlement of Investment Disputes (ICSID) and provides for the resolution of investor-state disputes and interstate disputes. ICSID provides several services including:

- Arbitrations under the ICSID Convention
- Arbitrations under the Additional Facility
- Conciliations under the ICSID Convention
- Conciliations under the Additional Facility
- Fact-finding proceedings; non-ICSID investor-state arbitrations (for example, under the UNCITRAL Arbitration Rules); non-ICSID state-to-state disputes (for example, under free trade agreements); mediations; and other alternative dispute resolution cases.<sup>21</sup> Forty-seven of the African countries are signatory and contracting states and legally bound by the ICSID Convention.<sup>22</sup>

The New York Convention regulates the recognition and enforcement of foreign arbitral awards.<sup>23</sup> The New York Convention requires domestic courts of contracting states to recognize and enforce arbitration awards made in other contracting states. The Convention is the principal international instrument on the recognition and enforcement of foreign arbitral awards—arbitral awards made in the territory of another state other than where recognition and arbitration is sought.<sup>24</sup> The Convention requires each contracting state to “recognize arbitral awards as binding and enforce them in accordance with the

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<sup>20</sup> *Member Countries*, WORLD BANK GROUP, <https://www.miga.org/member-countries> (last visited Mar. 18, 2019). A list of MIGA Convention member countries can be found on MIGA's website.

<sup>21</sup> See ICSID Services Overview, WORLD BANK, <https://icsid.worldbank.org/en/Pages/services/default.aspx> (last visited Sept. 6, 2018).

<sup>22</sup> *Database of ICSID Member States*, INT'L CTR. FOR SETTLEMENT OF INV. DISP., <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> (last visited Mar. 18, 2019). A database of ICSID's Membership can be found on the ICSID website.

<sup>23</sup> See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 16.

<sup>24</sup> Convention on the Settlement, *supra* note 15, art. 1(1).

rules of procedure of the territory where the award is relied upon.”<sup>25</sup> South Africa and Zimbabwe, among other African countries, have incorporated or domesticated the New York Convention.<sup>26</sup> This means the Convention has become part of South Africa and Zimbabwe’s municipal laws.<sup>27</sup>

The aforementioned treaties do not contain substantive provisions on the right to regulate for states. The text and content of the treaties were heavily influenced by the Western capital-exporting economies who were keen on maintaining international rules favorable to their social and economic interests.<sup>28</sup> Emphasis was placed on concluding investment treaties as instruments for investor protection and promotion. The treaties incorporate suggestions to regulatory space which are viewed as an impediment to the principal purpose of the treaties. Developing countries (including Africa) were merely investment rule consumers in the North-South BITs.<sup>29</sup> They lacked sufficient capacity to negotiate public policy and development issues into these IIAs, or to analyze the practical legal and policy consequences of negotiating such agreements.<sup>30</sup>

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<sup>25</sup> Convention on the Settlement, *supra* note 15, art. 3.

<sup>26</sup> See International Arbitration Act 15 of 2017 (S. Afr.); Arbitration Act, Chapter 7:15, 1996, Zimbabwe.

<sup>27</sup> For more information and a discussion on domestication of international treaties, see *Gov’t of the Rep. of Zimbabwe v. Fick*, 2012 ZASCA 122 (Sept. 20, 2012); see also *Glenister v. President of the Rep. of S. Africa* (2011), (6) All SA 2 (CC) (S. Afr.); see generally G. Ferreira & A. Ferreira-Snyman, *The Incorporation of Public International Law into Municipal Law and Regional Law Against the Background of the Dichotomy Between Monism and Dualism*, 17 PER: POTCHEFSTROOMSE ELEKTRONIESE REGSBLAD 1471 (2014); see generally David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129 (1999).

<sup>28</sup> See Emmanuel Tetteh Layrea & Franziska Sucker, *The Importance of an African Voice in, and Understanding and Use of, International Economic Law*, in INTERNATIONAL ECONOMIC LAW: VOICES OF AFRICA, 10 (Emmanuel Tetteh Layrea et al. eds., 2012) [hereinafter Layrea & Sucker]. See also Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 13–35 (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

<sup>29</sup> See Wolfgang Alschner & Dmitriy Skougarevskiy, *Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice* (June 7, 2016), TOM Special Issue on Int’l Arbitration Involving Commercial and Investment Disputes in Africa (forthcoming), [https://snis.ch/wp-content/uploads/2018/03/wp-alschner\\_skougarevskiy\\_africa\\_tdm\\_20may2016-final.pdf](https://snis.ch/wp-content/uploads/2018/03/wp-alschner_skougarevskiy_africa_tdm_20may2016-final.pdf).

<sup>30</sup> ADELEKE, *supra* note 10, at 156.

## II

## AFRICA'S CONTINENTAL INVESTMENT LAW

Africa has no legally binding and continent-wide instrument on investment regulation. The international investment regulatory framework is fragmented, consisting of BITs, regional investment agreements, and free trade agreements with investment provisions. Nonetheless, African countries, under the auspices of the African Union (A.U.), have developed and adopted a nonbinding continent-wide investment code, the Pan-African Investment Code (PAIC).<sup>31</sup> The PAIC aims to create a balanced investment regime that promotes and protects investments while conserving the policy space for host states.<sup>32</sup> It contains many references and inferences to the right to regulate of host states. The preamble of the PAIC, for instance, expressly refers to the right of A.U. member states to regulate all investment-related aspects within their territories to promote sustainable development objectives.<sup>33</sup> In principle, preambles do not necessarily constitute normative standards that are legally enforceable, but they have an important role as to how IIAs will be interpreted in the event of a dispute between state parties or between investors and host states.<sup>34</sup> History has, however, shown that international investment arbitral tribunals do not depend on the preamble to influence interpretation of the treaty's text.<sup>35</sup>

In addition, the PAIC consists of numerous substantive provisions, including the right of host governments to regulate admitted investments in accordance with their laws and regulations,<sup>36</sup> and the right to adopt measures concerning environmental preservation, international peace and security, national security interests,<sup>37</sup> and promoting national development (including through performance

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<sup>31</sup> African Union Commission [AUC], Draft Pan-African Investment Code (Dec. 2016), [https://au.int/sites/default/files/documents/32844-doc-draft\\_pan-african\\_investment\\_code\\_december\\_2016\\_en.pdf](https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf) [hereinafter Draft Pan-African Investment Code].

<sup>32</sup> ADELEKE, *supra* note 10, at 131.

<sup>33</sup> Draft Pan-African Investment Code, *supra* note 31, pmbl. at 3.

<sup>34</sup> RUDOLPH DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 20 (1995). *See also* Max H. Hulme, *Preambles in Treaty Interpretation*, 164 U. PA. L. REV. 1281, 1296–97 (2016).

<sup>35</sup> Christina L. Beharry & Melinda E. Kuritzky, *Going Green: Managing the Environment Through International Investment Arbitration* 30 AM. U. INT'L L. REV. 391 (2015).

<sup>36</sup> Draft Pan-African Investment Code, *supra* note 31, art. 5.

<sup>37</sup> *Id.* art. 14.

requirements and local content).<sup>38</sup> Performance requirements are significant because they can serve as a tool for economic development policies.<sup>39</sup> For instance, requirements for technology transfers or the employment of local workers can help materialize beneficial spillover effects for the host state.<sup>40</sup>

Moreover, the PAIC includes a list of exceptions to the application of most-favored-nation treatment (MFN) and national treatment obligations to investors and investments in order to preserve public interests. For instance, Article 8(2) provides that a state does not violate the MFN clause if it adopts measures that are “designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment.”<sup>41</sup> Closely related, Article 8(5) provides that the MFN principle “does not oblige a member state to extend to the investors of any other country the benefit of any treatment contained in an existing or future customs union, free trade area or international agreement to which the investor’s home state is not a party, or any international agreement or domestic legislation relating to taxation.”<sup>42</sup>

With reference to national treatment, Article 10(3) of the PAIC permits states to grant investments and investors preferential treatment in accordance with their respective domestic legislations.<sup>43</sup> Article 10(4) preserves the right of states to deny an investor the benefits of the PAIC and “to grant special and differential treatment to any investor and investment in such cases, though not limited to instances where: the investor does not have substantial business activities in the Member State; or the investor is engaged in activities inimical to the economic interest of Member States.”<sup>44</sup> Article 10(6) of the PAIC further prescribes that national treatment does not apply “to subsidies or grants provided to a government or a State enterprise, including government-supported loans, guarantees and insurance; or to taxation measures aimed at ensuring the effective collection of taxes, except where this

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<sup>38</sup> *Id.* arts. 17, 15.

<sup>39</sup> Mbengue & Schacherer, *supra* note 3, at 433.

<sup>40</sup> United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development*, 99, U.N. Doc. UNCTAD/DIAE/PCB/2015/5 (2015).

<sup>41</sup> Draft Pan-African Investment Code, *supra* note 31, art. 8(2).

<sup>42</sup> *Id.* art. 8(5).

<sup>43</sup> *Id.* art. 10(3).

<sup>44</sup> *Id.* ch. 2, art. 10(3).

results in arbitrary discrimination.”<sup>45</sup> It is worth mentioning that the implementation of these exceptions does not entitle an investor to compensation for any competitive disadvantages.<sup>46</sup>

More importantly, the PAIC contains an entire chapter on investors' obligations,<sup>47</sup> which is rare in traditional BITs.<sup>48</sup> The PAIC allows host governments to impose certain obligations on investors, including to comply with corporate governance standards,<sup>49</sup> to adhere to sociopolitical obligations,<sup>50</sup> to refrain from bribery,<sup>51</sup> to adhere to corporate social responsibility standards,<sup>52</sup> to use natural resources in a responsible manner,<sup>53</sup> and to comply with business ethics and human rights.<sup>54</sup> The PAIC also comprises provisions regulating state contracts,<sup>55</sup> public-private partnerships,<sup>56</sup> labor issues,<sup>57</sup> human resources development,<sup>58</sup> and the promotion of technology transfer and clean technologies,<sup>59</sup> and environmental and consumer protection.<sup>60</sup>

With regard to dispute resolution, the PAIC gives host governments the discretion to implement investor-state dispute settlement (ISDS), thereby offering a middle-ground solution to African states that are either pro-ISDS or anti-ISDS.<sup>61</sup> The PAIC's ISDS provisions articulate

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<sup>45</sup> *Id.* art. 10(6).

<sup>46</sup> *Id.* ch. 2, art. 10(8).

<sup>47</sup> *Id.* ch. 4.

<sup>48</sup> *See, e.g.*, Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶ 871 (Dec. 7, 2011), where the ICSID Tribunal conceded that “the BIT imposes no obligations on investors, only on contracting states.”

<sup>49</sup> Draft Pan-African Investment Code, *supra* note 31, art. 9. Investors are obliged to comply with national and international standards of corporate governance for the sector concerned.

<sup>50</sup> *Id.* ch. 4, art. 20. Investors are required to adhere to the principle of noninterference in internal political affairs as well as the noninterference in intergovernmental relations, including for instance the respect for cultural values.

<sup>51</sup> *Id.* ch. 4, art. 21.

<sup>52</sup> *Id.* ch. 4, art. 22.

<sup>53</sup> *Id.* ch. 4, art. 23. Investors are not to exploit or use them to the detriment of the rights and interests of the host state and to respect the rights of the local population as well as to avoid land grabbing practices vis-à-vis local communities.

<sup>54</sup> *Id.* ch. 4, art. 24.

<sup>55</sup> *Id.* ch. 5, art. 26.

<sup>56</sup> *Id.* ch. 5, art. 27.

<sup>57</sup> *Id.* ch. 5, art. 34.

<sup>58</sup> *Id.* ch. 5, art. 36.

<sup>59</sup> Draft Pan-African Investment Code, *supra* note 31, ch. 5, art. 29; *id.* at ch. 5, art. 30.

<sup>60</sup> *Id.* at ch. 5, art. 37; *id.* at ch. 5, art. 40.

<sup>61</sup> *Id.* at ch. 6.

the possibility for a state to file a counterclaim against an investor in an investor-state arbitration.<sup>62</sup> This mechanism is nonexistent in traditional investment treaty practice. The counterclaim provision will make it possible to legally enforce the investor obligations contained in a specific investment treaty. As a result, for instance, a state can invoke any violation of any relevant international treaty protecting the environment, human rights, and labor standards under the PAIC's provision on counterclaims. The breadth of potential legal bases of a state's counterclaim is thus very large. The PAIC's dispute settlement provisions seek to establish a better balance between the rights and obligations of investors and host states. Furthermore, the PAIC exempts dispute settlement procedures from the scope of the MFN clause.<sup>63</sup>

The investment regime espoused in the PAIC is consistent with the current global initiatives<sup>64</sup> and new generation IIAs<sup>65</sup> aimed at balancing rights and obligations of host states and investors. In contrast, the majority of Africa's investment treaties do not impose direct obligations on foreign investors, which potentially leads to unregulated investments.<sup>66</sup> However, imposing direct obligations on a foreign investor has not yet gained real recognition or traction in conventional investment treaty practice,<sup>67</sup> yet it is a viable mechanism

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<sup>62</sup> *Id.* at ch. 6, art. 43.

<sup>63</sup> Mouhamadou Madana Kane, *The Pan-African Investment Code: A Good First Step, But More Is Needed*, in COLUMBIA FDI PERSPECTIVES, NO. 217, 2 (Mar. 21, 2018).

<sup>64</sup> *E.g.*, UNCTAD *Investment Policy Framework for Sustainable Development* (2015) and International Institute for Sustainable Development (IISD), *Model International Agreement on Investment for Sustainable Development*, (Apr. 2005), [https://www.iisd.org/pdf/2005/investment\\_model\\_int\\_agreement.pdf](https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf).

<sup>65</sup> *See, e.g.*, Australia-Japan Economic Partnership Agreement, Austl.-Japan, Jan. 15, 2014, <https://dfat.gov.au/trade/agreements/in-force/jaepa/full-text/Pages/full-text-of-jaepa.aspx>; Austria-Republic of Korea Free Trade Agreement, Austria-Republic of Korea, Aug. 4, 2014; Canada-Cameroon Bilateral Investment Treaty, Can.-Cameroon, Mar. 3, 2014; Canada-Côte d'Ivoire Bilateral Investment Treaty, Can.-Côte d'Ivoire, Nov. 30, 2014; Canada-Mali Bilateral Investment Treaty, Can.-Mali, June 8, 2014; Canada-Nigeria Bilateral Investment Treaty, Can.-Nigeria, May 6, 2014; Canada-Serbia Bilateral Investment Treaty, Can.-Serbia, Sept. 1, 2014.

<sup>66</sup> ADELEKE, *supra* note 10, at 15; *see also* K. Nowrot, *Obligations of Investors*, in INTERNATIONAL INVESTMENT LAW: A HANDBOOK 1155 (Marc Bungenberg et al. eds., 2015).

<sup>67</sup> Nonetheless, some early treaties included investor obligations. *See, e.g.*, Community Investment Code of the Economic Community of the Great Lakes Countries, art. 19, ECONOMIC COMMUNITY OF THE GREAT LAKES COUNTRIES, Jan. 31, 1982, <https://investmentpolicyhub.unctad.org/Download/TreatyFile/2400>; Charter on a Regime of Multinational Industrial Enterprises of Eastern and Southern African States, art. 17, Nov. 23, 1990, 30 I.L.M. 696.

for striking an appropriate balance between investment protection and corporate responsibility in host states.<sup>68</sup> Nonetheless, a vast majority of modern investment treaties are increasingly integrating, such as the obligation of foreign investors to comply with all applicable domestic law and measures of the host state.<sup>69</sup> Mbengue and Schacherer emphasize the need to enforce direct obligations for investors, such as “the denial of treaty protection for the investor or the possibility of a state to file counterclaims in an arbitral proceeding.”<sup>70</sup>

As alluded earlier, the PAIC is not legally binding on member states, nor investors, nor their investments,<sup>71</sup> although the original goal was to have a binding instrument replacing the existing intra-African investment agreements.<sup>72</sup> This does not mean, however, that the PAIC is not important in Africa's investment regulation. The PAIC forms part of a broader continental framework, namely Agenda 2063,<sup>73</sup> based on a “coherent strategic framework for development whose foundation is the promotion of a more inclusive and sustainable growth, the engine of structural transformation on the continent.”<sup>74</sup> The PAIC was developed “based on the idea that national, regional, and continental dimensions must be taken into consideration in order to propose a conducive legal environment to promote the flow of investments in

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<sup>68</sup> Mbengue & Schacherer, *supra* note 3, at 435. See also Nowrot, *supra* note 66, at 1162.

<sup>69</sup> See, e.g., COMESA, Revised COMESA Common Investment Agreement Tabled Before Legal Affairs Committee, art. 25, <http://www.comesa.int/revised-comesa-common-investment-agreement-tabled-before-legal-affairs-committee/> (last visited Sept. 29, 2018). [hereinafter Revised COMESA Common Investment Agreement]; SADC Protocol on Finance and Investment, Annex 1, art. 10 [hereinafter SADC FIP].

<sup>70</sup> Mbengue & Schacherer, *supra* note 3, at 437.

<sup>71</sup> Draft Pan-African Investment Code, *supra* note 31, ch. 1, art. 2(1) (The PAIC is a “guiding instrument.”).

<sup>72</sup> The legal nature of the PAIC stimulated a hot debate. See Dr. Amr Hedar, *The Legal Nature of the Draft Pan-African Investment Code and Its Relationship with International Investment Agreements*, SOUTH CENTRE (Jul. 2017), [https://www.southcentre.int/wp-content/uploads/2017/07/IPB9\\_The-Legal-Nature-of-the-Draft-Pan-African-Investment-Code-and-its-Relationship-with-International-Investment-Agreements\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2017/07/IPB9_The-Legal-Nature-of-the-Draft-Pan-African-Investment-Code-and-its-Relationship-with-International-Investment-Agreements_EN.pdf).

<sup>73</sup> Agenda 2063 is a strategic framework of the African Union for the socioeconomic transformation of the continent over the next fifty years. It builds on and seeks to accelerate implementation of past and existing continental initiatives for growth and sustainable development. More information about Agenda 2063 is available at *What is Agenda 2063?*, AFRICAN UNION AGENDA 2063 (2017), available at <https://au.int/en/agenda2063>.

<sup>74</sup> 2017 AU-ECA Conference of Ministers: Committee of Experts' Meeting, AFRICAN UNION (2017), <https://www.tralac.org/news/article/11444-2017-au-eca-conference-of-ministers-committee-of-experts-meeting.html> [hereinafter A.U. (2017)].

Africa, facilitate intra-African trade and promote cross-border investment.”<sup>75</sup>

The development of the PAIC was Africa’s attempt to shape international investment treaty in accordance with its own developmental priorities, the so-called Africanization of international law.<sup>76</sup> This was a reaction to the earlier models of investment regulation that have been presumably unfavorable to Africa’s developmental interests.<sup>77</sup> As UNECA has noted, the PAIC purports to develop “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 context.”<sup>78</sup> The PAIC is therefore a guiding instrument for African countries in investment policy-making at the continental, regional, and bilateral level.

The PAIC can be a useful instrument for the investment protocol for the African Continental Free Trade Agreement (AfCFTA)<sup>79</sup> as well as the investment chapters envisaged in the Tripartite Free Trade Agreement (TFTA).<sup>80</sup> Both the AfCFTA Agreement and TFTA

<sup>75</sup> *Id.*

<sup>76</sup> See generally Mbengue & Schacherer, *supra* note 3, at 414–48. See also M.M. Mbengue, *The Quest for a Pan-African Investment Code to Promote Sustainable Development* (June 21, 2016), available at <https://www.ictsd.org/bridges-news/bridges-africa/news/the-quest-for-a-pan-african-investment-code-to-promote-sustainable>.

<sup>77</sup> ADELEKE, *supra* note 10, at 8.

<sup>78</sup> UNECA (2016), *supra* note 1, at 36.

<sup>79</sup> The AfCFTA is a free trade agreement between fifty member states of the African Union, whose primary objective is to establish a single continental market for goods, services, and investments. See *CFTA—Continental Free Trade Area*, AFRICAN UNION, <https://au.int/en/ti/cfta/about> (last accessed Apr. 15, 2019). Article 8(2) of the AfCFTA Agreement provides that the agreement will contain a Protocol on Investment (to be negotiated in Phase II Negotiations), which will form an integral part of the Agreement. See Agreement Establishing the African Continental Free Trade Agreement, AFRICAN UNION, art. 8(2) (Mar. 21, 2018), [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf). Additionally, Article 23 of the AfCFTA Agreement prescribes that the Agreement will enter into force once ratified by twenty-two member states. See *id.*

<sup>80</sup> The TFTA Agreement is a free trade agreement between three regional economic communities: the East African Community, the Southern African Development Community, and the Common Market for Eastern and Southern Africa. The TFTA Agreement is essentially a trade in goods agreement but contains *rendezvous* clauses expressing the intention of the parties to enter discussion (in Phase II Negotiation) on investment (trade in services; competition policy, trade and development, and intellectual property rights). See Article 45(1) of the TFTA Agreement. The TFTA Agreement is not yet legally binding; it will enter into force once ratified by fourteen member states. See Agreement Establishing a Tripartite Free Trade Area Among the Common Market for Eastern and Southern Africa, the East African Community, and the Southern African Development Community, art. 39, (June 10, 2015), <https://www.tralac.org/news/article/7646-signed-agreement-establishing->

Agreement are intended to be binding instruments.<sup>81</sup> A binding instrument at the continental level guarantees that right to regulate provisions are preserved in new bilateral investment treaties negotiated by African countries. Additionally, a Pan-African wide, binding instrument that allows African countries to speak with a single voice on investment creates leverage when negotiating investment deals with other non-African states and the international business community.

### III AFRICAN REGIONAL INVESTMENT LAW

Africa's Regional Economic Communities (RECs) have adopted regional agreements of relevance to investment called intra-African Regional Investment Agreements (RIAs). For example, the Common Market for Eastern and Southern Africa (COMESA) adopted the Investment Agreement for the COMESA Common Investment Area (COMESA Common Investment Agreement),<sup>82</sup> the Southern African Development Community (SADC) adopted the Finance and Investment Protocol (SADC FIP)<sup>83</sup> and the SADC Model BIT,<sup>84</sup> the Economic Community of West African States (ECOWAS) adopted the Supplementary Act adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS (ECOWAS Supplementary Act)<sup>85</sup> and the ECOWAS Energy Charter,<sup>86</sup> and the East African Community (EAC) has adopted the Model Investment

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a-tripartite-free-trade-area-among-comesa-the-eac-and-sadc.html [hereinafter TFTA Agreement].

<sup>81</sup> See AfCFTA, art. 23; TFTA Agreement, *supra* note 80, art. 39.

<sup>82</sup> See Investment Agreement for the COMESA Common Investment Area, UNCTAD (May 23, 2007), <https://investmentpolicy.unctad.org/international-investment-agreement/treatyfiles/3092/download> [hereinafter COMESA Investment Agreement].

<sup>83</sup> SADC FIP was adopted and signed in 2006 and entered into force on Apr. 16, 2010. See Talkmore Chidede, *Investment Dispute Resolution Under the Amended Annex 1 of the SADC FIP* (2018), <https://www.tralac.org/blog/article/13526-investment-dispute-resolution-under-the-amended-annex-1-of-the-sadc-fip.html> (last visited Jan. 15, 2019).

<sup>84</sup> SADC Model Bilateral Investment Treaty Template, SADC (Jul. 2012), <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>.

<sup>85</sup> Supplementary Act Adopting Community Rules on Investment and the Modalities for Their Implementation with ECOWAS was adopted and signed in December 2008. Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, ECONOMIC COMMUNITY OF WEST AFR. STATES, Dec. 19, 2008, <https://investmentpolicyhub.unctad.org/Download/TreatyFile/3266> [hereinafter ECOWAS Supplementary Act].

<sup>86</sup> ECOWAS Energy Protocol was adopted and signed on Jan. 31, 2003.

Code (EAC Model Investment Code).<sup>87</sup> In addition, other African regional blocs whose constituency spreads beyond the continent have also adopted a comprehensive “and less systematic compilation of substantive and procedural provisions on investment.”<sup>88</sup> Similarly, African countries have negotiated or are negotiating Economic Partnership Agreements (EPAs) with the European Union as part of their central, eastern, western, and southern African regional blocs.<sup>89</sup> EPAs essentially concern trade and development but also include provisions related to the promotion and protection of foreign investment as well as *rendezvous* clauses for future negotiations in areas of investment, trade in services, public procurement, and competition.<sup>90</sup> Furthermore, the United States has executed Trade and

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<sup>87</sup> EAC Model Investment Code, 2006.

<sup>88</sup> Erik Denters & Tarcisco Gazzini, *The Role of African Regional Organisations in the Promotion and Protection of Foreign Investment*, 18 J. WORLD INV. & TRADE 451, 457 (2017). For example, the Community Investment Code of the ECGLC, which was adopted on Jan. 31, 1982, (available at <https://investmentpolicyhub.unctad.org/Download/TreatyFile/2400>) and entered into force on Oct. 4, 1987; the Arab Maghreb Union Investment Agreement, which was adopted on Jul. 23, 1990, and is not yet in force (available at <https://investmentpolicyhub.unctad.org/Download/TreatyFile/2405>); the Common Convention in Investments in the States of the Customs and Economic Union of Central Africa, adopted on Dec. 14, 1965, and entered into force Apr. 1, 1966 (available at <https://investmentpolicyhub.unctad.org/Download/TreatyFile/2388>); the Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organization of the Islamic Conference, adopted on June 5, 1981, entered into force on Sept. 23, 1986 (available at <https://investmentpolicyhub.unctad.org/Download/TreatyFile/2399>); the Agreement on Investment and Free Movement of Arab Capital Among Arab Countries, signed and entered into force on Aug. 29, 1970 (available at <https://investmentpolicyhub.unctad.org/Download/TreatyFile/2390>).

<sup>89</sup> These EPAs are available at the European Commission website: <http://trade.ec.europa.eu/tradehelp/economic-partnership-agreements-epas>.

<sup>90</sup> See, e.g., Article 53 of the EPA between the European Union and the Eastern and Southern Africa States, 2007; Chapter IX of the EPA between the European Union and SADC EPA States, 2016; Article 3 of the EPA between the European Union and EAC, 2014; Article 106 of the EPA between the European Union and the West African states, 2014; and Title V of the EPA between the European Union and Central Africa, 2009.

Investment Framework Agreements (TIFAs) with EAC,<sup>91</sup> COMESA,<sup>92</sup> SACU,<sup>93</sup> and ECOWAS.<sup>94</sup>

Intra-African RIAs reflect a remarkable attempt to incorporate host states' right to regulate. As Denters and Gazzini concede:

The content of African regional treaties must be appreciated also from the standpoint of the second concern mentioned above, namely risk that investment agreements could unduly limit the sovereignty of host states, curtail their regulatory powers and ultimately undermine their capacity to develop efficient policies, in particular in the field of the protection of the environment and public health.<sup>95</sup>

In the next Part, I will analyze whether intra-African RIAs effectively preserve the regulatory autonomy of host states.

#### IV SADC FIP

SADC FIP is legally binding on state parties.<sup>96</sup> The SADC FIP was adopted to promote the harmonization of financial and investment policies of the state parties through alignment with the SADC objectives.<sup>97</sup> Annex 1 to the SADC FIP was amended in 2016 by the Agreement Amending Annex 1 of the SADC Finance and Investment

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<sup>91</sup> Trade and Investment Framework Agreement between the United States and EAC, which was signed on Jul. 16, 2008, and entered into force on Jul. 16, 2008.

<sup>92</sup> Agreement Between COMESA and the United States Concerning the Development of Trade and Investment Relations, which was signed on Oct. 29, 2001, and entered into force on Oct. 29, 2001. Common Market for Eastern and Southern Afr.-U.S., Oct. 29, 2001, Hein's No. KAV 8971.

<sup>93</sup> Cooperative Agreement Between the United States and the SACU to Foster Trade, Investment and Development, signed on Jul. 16, 2008, and entered into force on Jul. 16, 2008. Cooperative Agreement Between the United States of America and the Southern African Customs Union to Foster Trade, Investment, and Development, Southern African Customs Union-U.S., Jul. 16, 2008, T.I.A.S No. 08-716-2.

<sup>94</sup> Trade and Investment Framework Agreement Between the Government of the United States of America and the Economic Community of West African States, Economic Community of West African States-U.S., Aug. 5, 2014, available at <https://investmentpolicyhub.unctad.org/Download/TreatyFile/5102>.

<sup>95</sup> Denters & Gazzini, *supra* note 88, at 481.

<sup>96</sup> Talkmore Chidede, *Amendment of Annex 1 to the SADC Finance and Investment Protocol: Are They in Force Yet?*, TRALAC (Jul. 13, 2017), <https://www.tralac.org/discussions/article/11875-amendments-of-annex-1-to-the-sadc-finance-and-investment-protocol-are-they-in-force-yet.html>.

<sup>97</sup> See SADC FIP, *supra* note 69, art. 2(1). The objectives of SADC are outlined in Article 5 of the SADC Treaty (2002).

Protocol (Amended Annex).<sup>98</sup> The Amended Annex entered into force in August 2017, upon adoption by three-quarters of all state parties, and it subsequently replaced or modified most of the investment protection standards provided under the original Annex.<sup>99</sup> For example, the Amended Annex elaborates more comprehensively than the original Annex on provisions regarding each host state's right to regulate with respect to domestic health, safety, and environmental protection.<sup>100</sup> Article 11 of the Amended Annex stipulates:

State parties recognise that it is inappropriate to encourage investment by relaxing domestic health, safety and environmental measures and agree not to waive or otherwise derogate from, international treaties they have ratified, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in their territories, of an investment.<sup>101</sup>

This provision reiterates state parties' international obligations on the protection of health, safety, and environmental standards. The right for a host state to adopt environmental measures has increasingly become part of modern IIA practice, and most treaties contain provisions specifically addressing the relationship between investment and the environment.<sup>102</sup> The non-lowering standards<sup>103</sup> are inserted to prevent race-to-the-bottom actions by host states in a bid to lure investments.<sup>104</sup> Measures directed at environmental protection in IIAs

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<sup>98</sup> Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment, Aug. 31, 2016, available at <https://investmentpolicyhub.unctad.org/Download/TreatyFile/5527>.

<sup>99</sup> See *Summary of the Key Amendments to Annex 1 of the SADC Finance and Investment Protocol*, PARLIAMENTARY MONITORING GROUP, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150922summary.pdf> (last visited Jan. 15, 2019).

<sup>100</sup> See SADC FIP, *supra* note 69, Annex 1, art. 13 and 14. These articles discuss environmental protection and right to regulate, respectively.

<sup>101</sup> Agreement Amending Annex 1, *supra* note 98, art. 11.

<sup>102</sup> Lise Johnson & Lisa Sachs, *International Investment Agreements, 2011–2012: A Review of Trends and New Approaches*, in Y.B. INT'L INVESTMENT LAW & POL. 2012–2013 219, 234 (Andrea K. Bjorklund ed., 2014); See JORGE E. VIÑUALES, *FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW* (2012).

<sup>103</sup> Non-lowering standards are rules prohibiting states from lowering their labor, human rights, or environmental protection standards in order to lure foreign investments. See, e.g., 2012 U.S. Model Bilateral Investment Treaty, art. 12.

<sup>104</sup> A good example of race-to-the-bottom actions in southern Africa is illustrated by the relocation of Ramatex Company from South Africa to Namibia in the early 2000s. See Herbert Jach, *Africa's Clothing and Textile Industry: The Case of Ramatex in Namibia*, in *THE FUTURE OF THE TEXTILE AND CLOTHING INDUSTRY IN SUB-SAHARAN AFRICA*, 212–25 (Herbert Jach & Rudolf Traub-Merz eds., 2006).

guarantee the host states' right to regulate in the field of environment.<sup>105</sup>

In addition, the Amended Annex preserves the right of host states to take regulatory measures to ensure that development in their territory is consistent with the sustainable development and legitimate social and economic policy objectives. In particular, article 12 provides:

- (1) In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic objectives.
- (2) Except where the rights of a Host State are expressly stated as an exception to the obligations of this Annex, as Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of investors and investments and host states, as set out in this Annex.
- (3) Non-discriminatory measures taken by a state party to comply with its international obligations under other treaties shall constitute a breach of this Annex.<sup>106</sup>

A reading of the above provisions shows that under the Amended Annex, SADC host states preserve a right to regulate investments in accordance with their development goals and in line with customary international law and other general principles of international law. This is contrary to the original Annex, which merely provided that a state party is allowed to "exercise[e] its right to regulate in the public interest and to adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns."<sup>107</sup> These kind of provisions establish vague standards and can be broadly interpreted. article 12 of the Amended Annex further requires host states to balance their regulatory autonomy with the rights and obligations on investments provided under the SADC FIP.<sup>108</sup>

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<sup>105</sup> See generally ÅSA ROMSON, ENVIRONMENTAL POLICY SPACE AND INTERNATIONAL INVESTMENT LAW (2012).

<sup>106</sup> Agreement Amending Annex 1, *supra* note 98, art. 12.

<sup>107</sup> SADC FIP, *supra* note 69, Annex 1, art. 14.

<sup>108</sup> Agreement Amending Annex 1, *supra* note 98, art. 12(2).

### *A. COMESA Common Investment Agreement*

The COMESA Common Investment Agreement was adopted in 2007 and revised in 2017<sup>109</sup> with the objective of promoting investments that will foster sustainable development in COMESA member states and designating COMESA as an attractive investment region to investors from within and outside COMESA.<sup>110</sup> As such, member states are required to gradually eliminate “investment restrictions and conditions, which may impede investment flows and the operation of investment projects in COMESA and promote a more transparent investment environment.”<sup>111</sup> The agreement is not in force yet; it will enter into force once ratified by at least two-thirds of the member states.<sup>112</sup> The Revised COMESA Common Investment Agreement reveals some concerted efforts to integrate the regulatory autonomy of host states.

The agreement permits member states to adopt measures aimed at redressing historically based economic inequalities “suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups.”<sup>113</sup> This is justified in the context of preserving the regulatory autonomy of the host states to support the economic development and equality of their citizens. This provision is applied as a specific exception to national treatment and most-favored-nation treatment standards embedded in articles 17 and 18 of the Revised COMESA Common Investment Agreement. South Africa and Zimbabwe are among the African countries that have adopted robust policies aimed at redressing historically based economic disparities.<sup>114</sup>

In addition, the Revised COMESA Common Investment Agreement allows member states to adopt or enforce measures designed to protect national security, public morals, human, animal and plant life or health, and the environment.<sup>115</sup> COMESA member states are permitted to adopt and enforce such measures, provided they are not arbitrary or

<sup>109</sup> Revised COMESA Common Investment Agreement, *supra* note 69.

<sup>110</sup> *Id.* arts. 2(a), 2(e).

<sup>111</sup> *Id.* art. 2(b).

<sup>112</sup> *See id.* art. 42(1).

<sup>113</sup> *Id.* art. 19(2).

<sup>114</sup> *See* South Africa’s Black Economic Empowerment Policy; *see also* Zimbabwe’s Indigenisation and Economic Empowerment Policies, which are regulated through the Broad-Based Black Economic Empowerment Act 53 of 2003 (as amended) and the Indigenization and Economic Empowerment Act, Chapter 14:33 2007 (as amended).

<sup>115</sup> Revised COMESA Common Investment Agreement, *supra* note 69, art. 22(1).

unjustifiably discriminatory between investors or restrict investment flows.<sup>116</sup> Furthermore, the Revised COMESA Common Investment Agreement explicitly provides for the member states' "right to deny an investor the benefits" provided under the agreement "and to grant special and differential treatment to any investor and investment in such cases, where the investor is engaged in activities inimical to the economic and security interest of the Member State."<sup>117</sup>

The Revised COMESA Common Investment Agreement also provides for the imposition of safeguard measures.<sup>118</sup> The tradition of imposing safeguard measures is common in international trade law but rare or nonexistent in international investment treaty practice.<sup>119</sup> In the context of international trade, a safeguard is a provisional safety valve providing countries flexibility to legally escape their liberalization commitments in order to assist the endangered domestic industry.<sup>120</sup> COMESA states are allowed to impose safeguard measures if, as a result of opening up economic activities pursuant to the agreement, the member state is suffering or is threatened with any serious balance of payment or external financial difficulties.<sup>121</sup> COMESA member states are permitted to adopt such safeguard measures provided they are temporary and to be progressively eliminated, nondiscriminatory among member states, compatible with article VIII of the agreement of the International Fund, and not detrimental to other members' commercial, economic, and financial interests.<sup>122</sup>

Nevertheless, the Revised COMESA Common Investment Agreement dedicates a whole chapter to investor and investment obligations.<sup>123</sup> Article 25 of the Revised COMESA Common Investment Agreement requires investors and their investments to comply with all applicable domestic measures of the member state where their investments are made or constituted.<sup>124</sup> COMESA investors

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* art. 22(3).

<sup>118</sup> *Id.* art. 24.

<sup>119</sup> See Simon Lester & Bryan Mercurio, *Safeguarding Policy Space in Investment Agreements*, INST. OF INT'L ECONOMIC LAW (Dec. 2017), <https://object.cato.org/sites/cato.org/files/articles/lester-mercurio-iiel-issue-brief-december-2017.pdf>.

<sup>120</sup> Alan O. Sykes, *Protectionism As a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255, 255–56 (1991).

<sup>121</sup> Revised COMESA Common Investment Agreement, *supra* note 69, art. 24(1).

<sup>122</sup> *Id.* art. 24(3).

<sup>123</sup> *Id.* pt. 4.

<sup>124</sup> *Id.* art. 25.

and investments are also required to comply with national and internationally accepted standards of corporate governance;<sup>125</sup> adhere to sociopolitical obligations;<sup>126</sup> refrain from bribery and corruption;<sup>127</sup> observe the United Nations Guiding Principles on Business and Human Rights with modifications necessary for local circumstances;<sup>128</sup> comply with their corporate social responsibility;<sup>129</sup> and protect, manage, and improve the environment.<sup>130</sup> Although quite unusual in investment treaty practice, article 33 of the Revised COMESA Common Investment Agreement permits the host state to initiate proceedings against a COMESA investor or investment in its domestic courts for breaching obligations under the Agreement.<sup>131</sup> This is an innovative provision that gives the host states the right to file a claim against investors and investments for breaching their social, economic, or political obligations in the territory of the host state. Such provisions are not found in traditional BITs. Equally, article 36(7) of the Revised COMESA Common Investment Agreement provides for counter claims by member states.<sup>132</sup> The counter claim provision will allow a COMESA member state complained against to

assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages.<sup>133</sup>

### ***B. ECOWAS Supplementary Act***

The ECOWAS Supplementary Act is legally binding on ECOWAS member states, investors, and investments.<sup>134</sup> The Act is one of the most advanced investment treaties that is conscious of the distinctive “context of African countries and adopts rights-based approach to development.”<sup>135</sup> Its declared objective is to stimulate investment that

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<sup>125</sup> *Id.* art. 26.

<sup>126</sup> *Id.* art. 27.

<sup>127</sup> *Id.* art. 28.

<sup>128</sup> *Id.* art. 29.

<sup>129</sup> *Id.* art. 30.

<sup>130</sup> *Id.* arts. 31, 32.

<sup>131</sup> *Id.* art. 33.

<sup>132</sup> *Id.* art. 36(7).

<sup>133</sup> *Id.* art. 28(9).

<sup>134</sup> See generally ECOWAS Supplementary Act, *supra* note 85, art. 4.

<sup>135</sup> ADELEKE, *supra* note 10, at 144.

can promote sustainable development within the ECOWAS.<sup>136</sup> Article 20 prohibits member states from relaxing their labor, public health, safety, or environmental standards to lure investment into their territories.<sup>137</sup> In terms of article 24(2) host states can

impose performance requirements to promote domestic development benefits from investments. Measures adopted prior to the completion of the host State measures prescribing the formalities for establishing an investment shall be deemed to be in compliance with this Supplementary Act. If such measures are taken after the completion of the host State measures prescribing the formalities for establishing an investment, they shall be subject to the provisions of this Supplementary Act.<sup>138</sup>

Article 24(3) of the ECOWAS Supplementary Act provides for examples of the performance requirements covered in article 24(2) to include the following:

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced or services provided in its territory;
- (d) to purchase goods or services from persons in its territory;
- (e) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange flows associated with such investment;
- (f) to restrict sales of goods or services in its territory that such investment produces by relating such sales to the volume or value of its exports or foreign exchange earnings; and
- (g) similar measures intended to promote domestic development.<sup>139</sup>

Additionally, a host state can apply measures that it considers necessary for the fulfilment of its obligations under the United Nations Charter:<sup>140</sup> “[W]ith respect to the maintenance or restoration of international peace or security, or for the protection of its own essential security interests.”<sup>141</sup> The ECOWAS Supplementary Act does not prohibit host states from adopting or applying any measures aimed at

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<sup>136</sup> ECOWAS Supplementary Act, *supra* note 85, art. 3.

<sup>137</sup> *Id.* art. 20.

<sup>138</sup> *Id.* art. 24(2).

<sup>139</sup> *Id.* art. 24(3).

<sup>140</sup> United Nations Charter, Oct. 24, 1945, 1 U.N.T.S. XVI.

<sup>141</sup> ECOWAS Supplementary Act, *supra* note 85, art. 37.

promoting the “achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by long-term historic discrimination in its territory.”<sup>142</sup>

Moreover, the ECOWAS Supplementary Act provides for ISDS and interstate dispute settlement through the use of good offices, conciliation, mediation, or any other dispute resolution process as agreed upon.<sup>143</sup> Article 33(5) of the Act provides that “[m]ember states may also establish national mediation centers to facilitate the resolution of disputes between parties and investors or investments, taking into account regional rules, customs and traditions on investment.”<sup>144</sup> If a dispute between an investor and a member state is not settled through good offices, conciliation, or mediation, it may be submitted to arbitration under a domestic court; “any national machinery for settling investment disputes;”<sup>145</sup> “the relevant national court of the member states;”<sup>146</sup> or referred to the ECOWAS Court of Justice.<sup>147</sup>

Chapter III of the ECOWAS Supplementary Act is dedicated to obligations and duties of investors. The chapter contains investors’ obligations and duties including, among others, complying with environmental and sociocultural standards,<sup>148</sup> labor standards,<sup>149</sup> anti-corruption practices,<sup>150</sup> hygiene, security, health, social welfare rules, and human rights.<sup>151</sup> Investors are also required to comply with corporate governance and corporate social responsibility practices,<sup>152</sup> and they are liable for any civil actions leading to significant damage, personal injuries, or loss in the host state.<sup>153</sup>

Quite uniquely, the ECOWAS Supplementary Act contains rights and obligations for home states.<sup>154</sup> The Act enjoins home states to assist and facilitate cross-border investments and provide information necessary for the host state to meet its obligations, and perform its

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<sup>142</sup> *Id.* art. 38(1).

<sup>143</sup> *Id.* art. 33.

<sup>144</sup> *Id.* art. 33(5).

<sup>145</sup> *Id.* art. 33(6)(b).

<sup>146</sup> *Id.* art. 33(6).

<sup>147</sup> *Id.* art. 33(7).

<sup>148</sup> *Id.* art. 12.

<sup>149</sup> *Id.* art. 14(2).

<sup>150</sup> *Id.* art. 13.

<sup>151</sup> *Id.* art. 14.

<sup>152</sup> *Id.* art. 17.

<sup>153</sup> *Id.* art. 17.

<sup>154</sup> *Id.* at ch. 6.

duties in relation to investors and investments. It also requires a home state to provide “information relevant to the home state standards that might apply under like circumstances to the investment proposed by its investor, including but not limited to the home state’s environmental and social public health impact assessment process.”<sup>155</sup> Article 29 require member states to

ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of investors for damages resulting from alleged acts or decisions made by investors in relation to their investments in the territory of other member states.<sup>156</sup>

In addition, the Act requires home states to provide “information that might assist a dispute settlement tribunal under this Supplementary Act in determining whether there has been a breach of an anti-corruption obligation.”<sup>157</sup>

### *C. EAC Model Investment Code*

The EAC Model Investment Code is not a binding legal instrument but a guiding instrument whose features may be incorporated by the EAC member states into their national laws.<sup>158</sup> The Code was adopted with the overall aim of improving the business climate within the region and harmonizing investment laws and policies of member states. It seeks to facilitate the adoption of transparent, predictable regulations and laws for investors, especially in matters relating to compensation for loss of investment and dispute settlement mechanisms. The EAC Model Investment Code provides for national treatment and nondiscrimination of foreign investors,<sup>159</sup> prohibits expropriation except in public interest in accordance to the due process of the law and on payment of fair and adequate compensation within a reasonable time,<sup>160</sup> allows for free transfer of assets and capital,<sup>161</sup> and permits investors to submit investment disputes to international arbitration

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<sup>155</sup> *Id.* art. 28(2).

<sup>156</sup> *Id.* art. 29.

<sup>157</sup> *Id.* art. 30(3).

<sup>158</sup> East African Community Secretariat [EAC], *East African Model Investment Code*, arts. 5, 3(1) (Jul. 2006), <https://www.tralac.org/documents/resources/eac/1378-eac-model-investment-code-july-2006/file.html>.

<sup>159</sup> *Id.* art. 5.

<sup>160</sup> *Id.* art. 14.

<sup>161</sup> *Id.* art. 13.

under ICSID rules.<sup>162</sup> More importantly, the EAC Model Investment Code incorporates provisions on special economic zones, covering fiscal and non-fiscal incentives as well as ceilings or limits to them.<sup>163</sup> Similar provisions are quite rare in regional investment treaties, regulations, laws, or policies in Africa and beyond.

The EAC Model Investment Code is a step in the right direction toward developing a regional approach to investment. Then again, history has shown that African states generally make no use of their own Model BITs, and when negotiating and signing BITs with third parties, Model BITs of the European or North-American states are followed.<sup>164</sup>

## V

### AFRICAN INVESTMENT REGULATION AT THE BILATERAL LEVEL

Despite the extensive legislative infrastructure at the disposal of the international investment community for the promotion and protection of investors, BITs have emerged as the main legal instruments to protect investors, provide them with rights and benefits, and deal with investment disputes. Traditionally, BITs have been concluded between developing and developed countries (North-South BITs), but the trend has changed in recent decades as BITs are also being concluded among developing countries from Africa, Asia, and Latin America (South-South BITs).<sup>165</sup> Alschner and Skougarevskiy have detected that the South-South BITs contain more public interest and host state regulatory autonomy elements than North-South BITs.<sup>166</sup>

African countries have signed 881 BITs, 722 of which are signed with non-African countries and 159 of which are signed between African countries (intra-African BITs).<sup>167</sup> The greater part of these

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<sup>162</sup> *Id.* art. 15(3).

<sup>163</sup> EAC, *supra* note 158, pt. 4.

<sup>164</sup> Eric De Brabandere, *Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties: Between Generality and Contextual Specificity*, 18 J. WORLD INV. & TRADE 530, 531 (2017).

<sup>165</sup> See generally Lauge Skovgaard Poulsen, *The Politics of South-South Bilateral Investment Treaties*, in THE POLITICS OF INTERNATIONAL ECONOMIC LAW 186 (Tomer Broude et al. eds., 2011). See also Stephan W. Schill, *Special Issue: Dawn of an Asian Century in International Investment Law*, 16 J. WORLD INV. & TRADE 765, 765 (2015).

<sup>166</sup> Alschner & Skougarevskiy, *supra* note 29, at 10.

<sup>167</sup> Mbengue & Schacherer, *supra* note 3, at 416. See *International Investment Agreement Database*, UNCTAD, <https://investmentpolicyhub.unctad.org/IIA> (last visited Mar. 18, 2019).

treaties were concluded in the late 1990s and early 2000s.<sup>168</sup> The content of these BITs have been largely dictated by developed countries, particularly countries from Western Europe and North America.<sup>169</sup> African countries were presented with “take-it-or-leave-it” offers by developed countries in the negotiation of investment treaties.<sup>170</sup> The existing network of traditional BITs entered into by African countries with their western trade and investment partners are biased in favor of foreign investors—who seem to enjoy greater privileges than their African or domestic counterparts when investing in Africa.<sup>171</sup> As UNECA opines, “[T]his generally comes at the expense of countries’ ability to formulate and pursue autonomous development policies, and has not proven to attract more investment into the continent.”<sup>172</sup>

Furthermore, the BITs signed by African countries are weak in leveraging and imposing obligations on investors, and the BITs tend to favor foreign investors without addressing questions of economic sustainability for the continent.<sup>173</sup> For instance, BITs have established a situation in which foreign investors can bypass local courts of the host states and submit their investment claims directly to international arbitral tribunals mostly based overseas.<sup>174</sup> UNECA has observed that African countries find themselves exposed to the risk of legal disputes and hefty fines “which put a further strain on scant government resources and narrow the policy space when designing policies which touch on investment.”<sup>175</sup>

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<sup>168</sup> *Id.*; see also Mbengue & Schacherer, *supra* note 3, at 416.

<sup>169</sup> Layrea & Sucker, *supra* note 28, at 10.

<sup>170</sup> Gus Van Harten, *A Critique of Investment Treaties*, in *RETHINKING BILATERAL INVESTMENT TREATIES: CRITICAL ISSUES AND POLICY CHOICES* 41, 50 (Kavaljit Singh & Burghard Ilge eds., 2016).

<sup>171</sup> Masamba, *supra* note 11.

<sup>172</sup> *The Pan African Investment Code and the Investment Chapter of the CFTA: Opportunities for Rationalising Investment Regulation in Africa, Concept Note for the High-Level International Investment Agreements Conference 2017*, UNECA, <http://investmentpolicyhub.unctad.org/Upload/Documents/UNECA%20Final%20Side%20event%20Agenda.pdf> (last visited Aug. 16, 2018) [hereinafter UNECA (2017)].

<sup>173</sup> UNECA (2016), *supra* note 1, at 39.

<sup>174</sup> See, e.g., ICSID, UNCITRAL, the International Chamber of Commerce, the International Court of Arbitration, the Permanent Court of Arbitration, the International Court of Justice, the Arbitration Institute of the Stockholm Chamber of Commerce, and the London Court of International Arbitration.

<sup>175</sup> UNECA (2017), *supra* note 172.

A growing number of these cases have been brought by foreign investors against African countries. Since 1972, 111 treaty-based ISDS cases involving African countries have been recorded, sixty-eight of which ended up in awards, settlements, or were discontinued, while forty-four are pending.<sup>176</sup> The ICSID has been responsible for 107 cases, while the UNCITRAL tribunals have handled three cases.<sup>177</sup> Signing and ratifying BITs comes with great risk of investment dispute proceedings. It appears that an increase in BITs worldwide correlates with an increase in investment dispute proceedings. The more BITs African countries enter into, the more they will be parties in dispute settlement proceedings. Egypt is the African country with the highest number of BITs, having entered 100 BITs,<sup>178</sup> and is also the African country with the highest number of ISDS cases: Egypt is a respondent in twenty-nine cases.<sup>179</sup>

There has been strong opposition to ISDS international arbitration among African countries.<sup>180</sup> Overall, this antipathy has exceedingly surfaced across the world, even with traditional capital-exporting countries such as the United States,<sup>181</sup> the E.U. countries, Australia, and Canada sharing the same view.<sup>182</sup> ISDS international arbitration opponents have raised concerns about the international arbitral tribunals' legitimacy and ability to assess government actions as well as their lack of transparency, independence, impartiality, and inconsistent application and interpretation of investment treaty

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<sup>176</sup> See *Investment Dispute Settlement Database*, UNCTAD INVESTMENT POLICY HUB, <http://investmentpolicyhub.unctad.org/ISDS> (last visited Mar. 10, 2019).

<sup>177</sup> See *id.*

<sup>178</sup> See *id.*

<sup>179</sup> See *id.*

<sup>180</sup> See Kidane (2018); Kinda Mohamadieh & Daniel Uribe, *The Rise of Investor-State Dispute Settlement in the Extractive Sectors: Challenges and Considerations for African Countries* (2016), [https://www.southcentre.int/wp-content/uploads/2016/02/RP65\\_Rise-of-investor-state-dispute-settlement-in-extractive-sectors\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2016/02/RP65_Rise-of-investor-state-dispute-settlement-in-extractive-sectors_EN.pdf).

<sup>181</sup> The North American Free Trade Agreement (NAFTA) has been amended by the United States-Mexico-Canada Agreement, 2018 [hereinafter USMCA]. The USMCA, among other things, amended the ISDS mechanism in NAFTA. See Chapter 14 of the USMCA. For discussions, see, e.g., Matti Lemmens & Tiffany Bennett, *The Impact of USMCA on Investor-State Disputes and the Energy Industry* (Jan. 10, 2019), <https://www.lexology.com/library/detail.aspx?g=28553ff1-c132-477d-932e-ccb502764939>; Nathalie Bernasconi-Osterwalder, *USMCA Curbs How Much Investors Can Sue Countries—Sort Of* (Oct. 2, 2018), <https://www.iisd.org/library/usmca-investors>.

<sup>182</sup> See Kenneth Vandeveld, *A Comparison of the 2004 and 1994 US Model Bits: Rebalancing Investor and Host Country Interests*, in 1 Y.B. ON INT'L INVESTMENT L. AND POL'Y. 283 (Karl P. Sauvant ed., 2009).

provisions.<sup>183</sup> ISDS arbitration has caused many African governments to pay substantial fines to foreign companies. For example, in *Al-Kharafi v. Libya*,<sup>184</sup> an international tribunal held the government of Libya liable for more than \$900 million U.S. dollars for a canceled investment project where the investor had invested only \$130,000 U.S. dollars in service fees in Libya.

ISDS arbitration has also discouraged African governments from adopting regulations for public interests, resulting in a regulatory chill effect or undermining of state sovereignty.<sup>185</sup> In *Foresti v. South Africa*,<sup>186</sup> foreign investors challenged South Africa's set of black economic empowerment policies, claiming that they violated South Africa's investor protection obligations of no expropriation without compensation, fair and equitable treatments, as well as national treatment standards enshrined in BITs signed by South Africa with Italy and Luxembourg.<sup>187</sup> It is against this background that the government of South Africa decided to review and unilaterally terminate its BITs with several E.U. countries and Switzerland in 2013.<sup>188</sup> The South African government expressed its desire to protect policy space, discontentment with ISDS international arbitration in relation to arbitrary and inconsistent awards, and a dearth of sufficient evidence that the BITs promote FDI in South Africa.<sup>189</sup> Members of the South African government argued that the BITs signed by the country immediately after independence in 1994, *inter alia*, provided more protection to foreign investors than to domestic investors and allowed

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<sup>183</sup> JOHAN BILLIET, INTERNATIONAL INVESTMENT ARBITRATION: A PRACTICAL HANDBOOK 84–85 (2016).

<sup>184</sup> Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya, Arbitration Award 386, 181 (2013), <https://www.italaw.com/sites/default/files/case-documents/italaw1554.pdf>.

<sup>185</sup> See generally Trisha Menon & Gladwin Issac, *Developing Country Opposition to An Investment Court: Could State-State Dispute Settlement Be an Alternative?* (Feb. 17, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/>.

<sup>186</sup> Piero Foresti et al. v. Rep. of S. Afr., ICSID Case No. ARB(AF)/07/01, Award (Aug. 2010).

<sup>187</sup> *Id.* ¶¶ 58, 70.

<sup>188</sup> See Engela C. Schlemmer, *An Overview of South Africa's Bilateral Investment Treaties and Investment Policy*, 31 ICSID R. FOREIGN INV. L.J. 167, 167 (2016).

<sup>189</sup> See generally Jonathan Klaaren & David Schneiderman, *Investor-State Arbitration and SA's Bilateral Investment Treaty Policy Framework Review*, WIREDSPACE.COM (Aug. 10, 2009), <http://wiredspace.wits.ac.za/jspui/bitstream/10539/9205/1/SABITPolicyReviewCommentsKlaarenandSchneiderman10Aug2.pdf>.

foreign investors to challenge the public policy measures of the government before international arbitral tribunals.<sup>190</sup>

Accordingly, South Africa enacted the Protection of Investment Act in 2015 to protect (domestic and foreign) investment in accordance with and subject to the constitution,<sup>191</sup> and in a manner which balances the public interest and rights and obligations of investors.<sup>192</sup> Section 12(1) of the Protection of Investment Act further allows the government to take necessary measures for the fulfilment of its obligations in regard to the maintenance, compliance, or restoration of international peace and security, or the protection of the security interests, including the financial stability of the country. Adeleke has supported these provisions, stating that they ensure the protection of investment in South African and do not hamper the government's legitimate obligation to protect public interests.<sup>193</sup>

Notwithstanding the foregoing arguments, it must be acknowledged that African countries have recently executed investment treaties that attempt to preserve policy space. For example, the investment treaties make reference to right to regulate (regulatory autonomy, policy space, flexibility to introduce new regulations), sustainable development, social investment aspects (human rights, labor, health, corporate social responsibility, poverty reduction), or environmental issues (plant or animal life, biodiversity, or climate change). Most of these BITs were concluded in the twenty-first century and refer to the right to regulate, sustainable development, social investment, and environmental aspects in their preambles.<sup>194</sup> Giannakopoulos opines:

By incorporating this and similar language to the preambles of their IIAs, States indicate that they have multiple goals in mind when signing such agreements. They send a clear message to arbitral

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<sup>190</sup> See also Xavier Carim, *International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa*, 4 S. CTR. INV. POL'Y BRIEF (2015), [https://www.southcentre.int/wp-content/uploads/2015/08/IPB4\\_IIAs-and-Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa\\_EN.pdf](https://www.southcentre.int/wp-content/uploads/2015/08/IPB4_IIAs-and-Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf).

<sup>191</sup> S. AFR. CONST., 1996.

<sup>192</sup> Protection of Investment Act 22 of 2015 § 4.

<sup>193</sup> ADELEKE, *supra* note 10, at 135.

<sup>194</sup> See, e.g., For the Promotion and Reciprocal Protection of Investments, S. Afr.-Eth., Mar. 18, 2008; Reciprocal Investment Promotion and Protection Agreement, Morocco-Nigeria, Dec. 3, 2016; Agreement for the Promotion and Protection of Investment, Austria-Nigeria, Apr. 8, 2013; Acordo de Cooperação e Facilitação de Investimentos [Agreement For Cooperation and Facilitation of Investments], Braz.-Angl., Apr. 1, 2015; Investment Cooperation and Facilitation Agreement, Braz.-Malawi, June 26, 2015; Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, Can-Benin, Sept. 1, 2013.

tribunals that investment protection is not the sole or even the primary goal of the treaty, but rather that investment policy objectives ought to be achieved in a manner that is compatible with other public policy objectives.<sup>195</sup>

Some connotations of the right to regulate are contained in the general exception provisions in BITs; for example, for the protection of human, animal, or plant life or health, or the conservation of natural resources.<sup>196</sup> It may be submitted that these exclusions somehow enhance the protection of aspects of legitimate public welfare such as public health, safety, and the environment.

The inclusion of these public policy considerations in BITs with African countries has been because of change in treaty policy by countries such as Canada.<sup>197</sup> However, these provisions—specifically the preambles—are weak when it comes to the enforcement of the right to regulate in public interest and sustainable development. Under international law, preambles are crucial in the interpretation of treaties. Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT)<sup>198</sup> stipulates that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>199</sup> Article 31(2) of the VCLT further provides that a context of a treaty is to be interpreted using the agreement’s text, preamble, and annexes. Furthermore, article 31(2) states that the context of a treaty can be interpreted using any related agreements made between parties connected to the treaty and any instrument made by a party connected to the treaty that has been accepted by the other parties as an instrument related to the treaty. Thus “the meaning must merge in the context of the treaty as a whole (including the text, its preamble and annexes, and

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<sup>195</sup> Charalampos Giannakopoulos, *The Right to Regulate in International Investment Law and the Law of State Responsibility: A Hohfeldian Approach*, 11–12 (2017), <https://ssrn.com/abstract=2962686>.

<sup>196</sup> *E.g.*, Pour la Promotion et la Protection Reciproque des Investissements (Agreement for the Promotion and Reciprocal Protection of Investments) art. 3, Madag.-S. Afr., Dec. 13, 2006; Investment Promotion and Protection Agreement art. 14, Eri.-Uganda, June 30, 2001; Accord Concernant la Promotion et la Protection Reciproques des Investissements (Agreement on Promotion and Reciprocal Protection of Investments), Burundi-Comoros, May 18, 2001; and Botswana-Egypt BIT Jul. 2, 2003.

<sup>197</sup> See Canada’s BITs with Tanzania, Cameroon, Burkina Faso, Mali, Rwanda, Benin, Ivory Coast, Nigeria, Senegal, and Mozambique.

<sup>198</sup> Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

<sup>199</sup> *Id.* art. 31(1).

any agreement or instrument related to the treaty and drawn up in connection with its conclusion) and in the light of its object and purpose.”<sup>200</sup> The preamble gives arbitrators the object and purpose of the treaty.<sup>201</sup> The right to regulate in a treaty’s preamble should give the arbitrators a principled interpretive stance in determining the legal rights and obligations of the disputing parties.<sup>202</sup> That notwithstanding, international arbitral tribunals, in practice, do not rely on preambular language to influence the interpretation of BITs.<sup>203</sup> In effect, preambles do not create binding substantive obligations, but merely offer interpretive guidance to decision makers. That said, negotiating substantive treaty provisions that are legally binding and enforceable is of paramount importance, particularly when preserving the right to regulate in public interest. Such strategic considerations will avoid the potential exploitation of BIT rules by foreign investors and arbitral tribunals.

### CONCLUSION

This Article has attempted to provide a detailed overview of the IIAs concluded by African countries at multilateral, continental and regional, and bilateral levels to determine whether the agreements maintain policy space for African countries to pursue their public policy goals. This Article has revealed several issues that need to be considered to ensure that Africa’s efforts preserve the regulatory space of host states and ensure that their national development goals are not undermined at the expense of attracting and protecting foreign investments.

African countries have signed IIAs as incentives for attracting FDI from developed countries.<sup>204</sup> Developed countries, on the other hand, have concluded IIAs to protect their investors and investments from

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<sup>200</sup> JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 381 (8th ed. 2012).

<sup>201</sup> *See, e.g.*, The Gabčíkovo-Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. 15 (Sept. 25); Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213, ¶¶ 68, 79 (Jul. 13). In the investment context, see, Société Générale de Surveillance S.A. v. Republic of the Phil., ICSID Case No. ARB/02/6, Decision on Jurisdiction, ¶ 116 (Jan. 29, 2004).

<sup>202</sup> *See, e.g.*, Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶¶ 272–273 (Jan. 14, 2010).

<sup>203</sup> *See* Beharry & Kuritzky, *supra* note 35, at 391.

<sup>204</sup> Mbengue & Schacherer, *supra* note 3, at 416.

expropriation or nationalization by African governments.<sup>205</sup> Developed countries were investment-rule makers<sup>206</sup> and, accordingly, designed investment treaties that were pro-investor and do not contain substantial provisions on the host state's right to regulate. African countries, as investment-rule consumers, signed these treaties without careful consideration of their nature and content.<sup>207</sup> This historical account explains the exclusion of policy space in most IIAs executed by African countries with developed countries.

Secondly, this Article reviewed the fact that there is not yet an Africa-wide binding instrument on investment. Nonetheless, African states have, under the auspices of the African Union, adopted the PAIC, an Africa-wide nonbinding instrument shaped in the form of a model investment treaty to serve as a guide for African Union members in negotiating investment treaties. An appraisal of the PAIC shows that it was designed with an African perspective and in line with the international initiatives to craft investment treaties that promote responsible investments and sustainable development. The PAIC contains several Africa-specific and innovative features that presumably make it a unique model investment treaty. The PAIC contains several important novelties meant to rebalance the rights and obligations of the various stakeholders and to safeguard host state policy space. The PAIC includes substantive provisions on the host country's right to regulate sustainable development, social investment, and environmental aspects, as well as investors' obligations. However, African countries rarely use their model investment treaties when negotiating investment agreements.<sup>208</sup>

At the regional level, only a handful of RECs have regional investment regulations that allow them "to determine appropriate investment policies that address their economic interests and protect the state right to regulate in public interest while, at the same time, defining applicable rules for investment by being rule providers rather than rule takers."<sup>209</sup> Intra-African RIAs enshrine investment-related rules that protect the needs of African countries, including regulatory freedom, the use of domestic courts in resolving investment disputes,

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<sup>205</sup> Masamba, *supra* note 11.

<sup>206</sup> See Layrea & Sucker, *supra* note 28, at 10.

<sup>207</sup> See Alschner & Skougarevskiy, *supra* note 29, at 4.

<sup>208</sup> De Brabandere, *supra* note 164, at 531.

<sup>209</sup> ADELEKE, *supra* note 10, at 158.

and the imposition of direct obligations on foreign investors.<sup>210</sup> Further, the intra-African RIAs provide a robust platform to designate investment regulatory frameworks that preserve policy space and foster sustainable development in Africa.<sup>211</sup>

The bulk of old-generation BITs executed by African countries are weak in leveraging and imposing obligations on investors and tend to favor foreign investors without addressing questions of economic sustainability for the continent.<sup>212</sup> These BITs replicate the agenda of developed countries and have not featured public policy provisions.<sup>213</sup> They contain ambiguous provisions which on many occasions have resulted in broad and inconsistent interpretation of treaty rights and obligations by tribunals. The lack of clarity and precision in the investment treaties maximizes the protection of investors by effectively expanding the scope of the treaty, and it can also make host states more prone to claims arising out of legitimate state measures for the protection of public policy. Countries signed BITs without careful consideration for the provisions and traded their regulatory space for investment commitments. In the absence of a binding multilateral treaty on investment, BITs remain the primary source of investment protection in Africa and across the world. This means that BITs form an integral part of Africa's international investment law regime. Overall, Africa is lagging behind other developing and developed regions when it comes to integrating more policy space into investment treaties. Therefore, incorporating the right to regulate, sustainable development, social investment, and environmental aspects in such instruments has the potential to cement the policy space of African countries in their international investment law.

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<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 163.

<sup>212</sup> UNECA (2016), *supra* note 1, at 39.

<sup>213</sup> ADELEKE, *supra* note 10, at 156.