*Tomasz Milej**

Reclaiming African Agency: The right to regulate, the Investor-State Dispute Settlement and the "Africanisation" of international investment law

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* Professor, School of Law, Kenyatta University, Nairobi, Kenya. The author is very thankful to Caroline Saroni, Tsotang Tsietsi and the volume editors for their feedback on earlier drafts.

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I. Introduction

The right to regulate has been discussed as a reaction to the application of International Investment Agreements (IIAs) by international arbitral tribunals which have been accused of excessively limiting the policy space of developing countries.[1] It can be understood broadly, as a right of the host state to take measures in pursuance of different social and economic policy objectives; those objectives can be linked to the protection of human rights, protection of environment or, more generally, to the pursuance of Sustainable Development Goals (SDGs).[2] The term Africanisation has been used descriptively as synonymous with the approaches taken by the African States towards international investment law and their contributions or innovation to it.[3] For Mbegue and Schacherer, "Africanisation" also means that the African States do not act merely as "rule consumers", but also as "rule producers".[4] As the debate about the legitimacy and the future of the International Investment Law is ongoing, a number of claims made and the reforms actually pursued or even pioneered in the name of "Africanisation" might coincide with criticism towards international investment law made in other contexts. Yet, they contribute to "Africanisation" since they still – to borrow

[1] Surya Deva, Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises et al., *Letter transmitted to all Members of the Working Group III and a copy of it to the secretariat of the UNCITRAL, REFERENCE: OL ARM 1/2019, (2019*), available at https://www.ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf; Barnali Choudhury, 'International Investment Law and Noneconomic Issues', 53 *Vanderbilt Journal of Transnational Law (Vand J Transnat'l L)* (2020) 1, at 63; Julie Kim, 'Balancing Regulatory Interests through and Exceptions Framework under the Right to Regulate Provisions in International Investment Agreements', 50 *George Washington International Law Review (Geo. Wash. Int'l L. Rev.)* (2018) 289, at 292.

[2] International Institute for Sustainable Development (IISD), *Model International Agreement on Investment for Sustainable Development (2006)*, available at https://www.iisd.org/system/files/publications/investment_model_int_handbook.pdf

[3] Paolo Vargiu and Francesco Seatzu, 'Africanizing Bilateral Investment Treaties (BITs): Some Case Studies and Future Prospects of a Pro-Active African Approach to International Investment', 30 *Connecticut Journal of International Law (Conn J Int'l L)* (2015) 143, at 146-147; Makane Moïse Mbengue and Stefanie Schacherer, 'The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime', 18 *Journal of World Investment and Trade* (2017) 414, at 446; Olabisi D. Akinkugbe, 'Africanization and the Reform of International Investment Law', 53 *Case Western Reserve Journal of International Law (Case W. Res. J. Int'l L.)* (2021), forthcoming, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3766357

[4] Makane Moïse Mbengue and Stefanie Schacherer, 'Evolution of International Investment Agreements in Africa: Features and Challenges of Investment Law "Africanization"', in Julien Chaisse, Leïla Choukroune, and Sufian Jusoh (eds.), *Handbook of International Investment Law and Policy* (2019), at 20.

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from Akinkugbe - “center the interests of African States and seek to address their subordinate position in the global economic hierarchy”.[5]

Based on this, the present chapter attempts to explore the defining markers of “Africanisation” by a looking at its three dimensions: the content of the IIAs, in particular the entrenchment of right to regulate in recent African legal instruments, the interpretation of the IIAs, most notably the elimination (at least a partial one) of the Investor-State-Dispute-Settlement (ISDS) and, more generally, the restoration African agency in the international investment law. To this end, the chapter, firstly, gives a brief overview of the innovations in the recent practice of the African States with regard to IIAs, of which the right to regulate is a major component. Secondly, it compares those innovations with the current global trends in international investment law. And thirdly, it addresses the imbalances in the IIAs – the main reason why the right to regulate and the backlash against the ISDS are an element of the recent African practice.

II. Recent Practice of African States with regard to IIAs

A. The four instruments: PAIC, ECOWIC, SADC FIP and the Morocco-Nigeria BIT

The discussion will focus on four instruments which may be seen as exemplifying recent African practice:[6] The Pan-African Investment Code (PAIC), elaborated under the auspices of the African Union (AU) and adopted as a non-binding model investment treaty by the government representatives of the African States in 2016;[7] the Economic Community of West African States (ECOWAS) Common Investment Code of 2018 (ECOWIC), intended to be a binding instrument applicable to investments in an ECOWAS Member State made by an

[5] Akinkugbe, *supra* note 3, at 3.
[6] For a comprehensive overview of the various instruments, both binding and non-binding, adopted in Africa see Talkmore Chidede, ‘The Right to Regulate in Africa’s International Law Regime’, 20 *Oregon Review of International Law (Or. Rev. Int'l L.)* (2019) 437; Mbengue and Schacharer, *supra* note 4.
[7] Pan-African Investment Code (PAIC), 2016, available at https://au.int/en/documents/20161231/pan-african-investment-code-paic

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investor from another ECOWAS Member State,[8] the Southern African Development Community (SADC) Protocol on Finance and Investment (SADC FIP) Annex 1[9] of 2006, as amended in 2016, which is an international treaty aiming at harmonization of investment policies of the Protocol's State Parties; and the Morocco-Nigeria Bilateral Investment Treaty (BIT) of 2016,[10] described by Mbegue and Schacherer as a "wind of change".[11]

ECOWAS and SADC are two of the eight African Regional Economic Communities (RECs) recognized as building blocks of the African Economic Community (AEC). Pursuant to the Treaty of Abuja of 1991,[12] a blueprint for the regional integration in Africa, the RECs are to be gradually merged into the AEC; this should happen in six stages not exceeding thirty-four years.[13]

It is the SADC FIP after the 2016 amendment that postulates and sets the scene for a radical departure from the generation of BITs concluded in the 1990s. The main reason for the amendment was the perceived lack of sufficient policy space for the host states. The Protocol is also a follow-up to the SADC Model BIT of 2012 that was already a new generation instrument emphasising the right of the host state to pursue development goals.[14] All four instruments, negotiated at a similar time, have influenced each other and all of them were

[8] ECOWAS Common Investment Code, 2018, available at https://wacomp.projects.ecowas.int/wp-content/uploads/2020/03/ECOWAS-COMMON-INVESTMENT-CODEENGLISH.pdf. ECOWIC is not yet in force.

[9] SADC Protocol on Finance and Investment (SADC FIP) Annex 1, 2006 (amended in 2016), available at https://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance__Investment2006.pdf, the Amendment Agreement available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5527/download. The scope of regulation in the SADC FIP goes beyond the rules on international investments. Those rules is what Annex 1 specifically addresses.

[10] Reciprocal Investment Promotion and Protection Agreement Between The Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, 2016, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3711/morocco–-nigeria-bit-2016-. This instrument is also not yet in force.

[11] Mbengue and Schacharer, *supra* note 4, at 9.

[12] Treaty Establishing the African Economic Community (Abuja Treaty), 1991, available at https://au.int/en/treaties/treaty-establishing-african-economic-community.

[13] See in particular Article 6 of the Abuja Treaty.

[14] Tinashe Kondo, 'A Comparison with Analysis of the SADC FIP before and after Its Amendment', 20 *Potchefstroom Electronic Law Journal (PELJ)* (2017), at 4. See also Vargiu and Seatzu, *supra* note 3, at 155.

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inspired by the global "systemic criticism of the IIAs".[15] Currently under the negotiations is the Investment Protocol for the African Continental Free Trade Area (AfCFTA).[16]

B. The role of the right to regulate

The right to regulate is a foundation stone. The Nigeria-Morocco BIT, SADC FIP and ECOWIC provide for it in a general clause[17] which, broadly speaking, establishes the right of the host states to pursue developmental goals – the Nigeria-Morocco BIT and SADC FIP refer explicitly to the "goals and principles of sustainable development" – and other legitimate policy objectives and priorities. PAIC does not contain such a clause, but recognizes the right to regulate in the preamble and implements it in a number of provisions. Some of them involve regulations tailored to specific investors guarantees. For example, Article 10 (2) of the PAIC provides that a "regulatory measure taken by a Member State that is designed and applied to protect or enhance legitimate public welfare objectives, such as national interests, public health, safety and the environment, does not constitute a breach of the National Treatment principle" (NT). According to Article 10 (1) of the PAIC such measures must not be "arbitrary". A similar regulation is made with regard the Most-Favoured-Nation Treatment principle (MFN); here, however, the state does not have to prove that the measure was not "arbitrary".[18] The regulation in the ECOWIC with regard to the NT principle is structured in the same way as the one in the PAIC,[19] there is, however, no specific provision on exceptions to the MFN principle. Measures taken in public interest derogating from the MFN principle would fall under the general exceptions provision such as Article 14 (1) of the PAIC.

Article 14 (1) of the PAIC allows for exceptions to all provisions of the Code. The relevant measures must be taken in pursuance of specific enumerated policy objectives. The provision is modelled after Article XX of the General Agreement on Tariffs and Trade (GATT), but gives

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[15] Mbengue and Schacherer, *supra* note 3, at 447; Nicollo Zugliani, 'Human Rights in International Investment Law: The 2016 Morocco-Nigeria Bilateral Investment Treaty', 68 *International and Comparative Law Quarterly (ICLQ)* (2019) 761, at 762.

[16] Mchandazo Ngweya, *The Africa Continental Free Trade Area Protocol on Investment: A prickly pear for SADC and other regional economic communities* (2020), available at https://www.howwemadeitinafrica.com/the-africa-continental-free-trade-area-protocol-on-investment-a-prickly-pear-for-sadc-and-other-regional-economic-communities/67153/.

[17] Article 23 of the Nigeria-Morocco BIT, Article 12 of the SADC FIP Annex 1 and Article 31 of the ECOWIC.

[18] Article 8 of the PAIC.

[19] Article 7 of the ECOWIC.

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the state more policy latitude: while, e.g. Article XX of the GATT allows for measures which are "necessary" to protect human, animal or plant life or health, the PAIC speaks of measures which are "relating to" the protection of the same. The "chapeau clause" remains very similar, though. The measures taken under Article 14 (1) PAIC must pass the arbitrariness and discrimination test. A comparable GATT-styled provision can be found in the ECOWIC, where the necessity test is replaced by the term "measures taken in good faith and designed and applied to".[20] The SADC FIP Annex 1 and the Nigeria-Morocco BIT provide explicitly for a balancing test, declaring the right to regulate as "embodied within a balance of the rights and obligations of investors and investments and Host States".[21] However, with regard to the principle of non-discrimination,[22] the SADC FIP Annex 1 states that "notwithstanding" the principle "State Parties may, in accordance with their respective domestic legislation, grant preferential treatment to domestic investments and investors in order to achieve national development objectives."[23] It is not entirely clear, whether a balancing test is required here, or the preferential treatment is entirely at the discretion of the host state.

While Article 6 (5) of the Nigeria-Morocco BIT includes a more traditional "national security, public security or public order" exception, the PAIC and the ECOWIC implement the right to regulate using "self-judging" norms that leave the decision on the adoption of exception measures at the discretion of the host state.[24] Such is the case of the exceptions to the MFN and NT standards discussed above (save for the "arbitrariness" requirement in the PAIC with regard to the NT). And as said, in the provision providing for general exceptions, the level of scrutiny or justiciability of the host state decisions to apply regulatory measures is significantly lower as compared to GATT. The discretion of the host states is further emboldened by the option to exclude specific sectors from the operation of NT and MFN principles. While ECOWIC seems to require that the list of excluded sectors (attached as a schedule) be covered by the consent of all State Parties,[25] according to the PAIC, each and every state may decide on such

[20] Article 9 of the ECOWIC.
[21] Article 23(2) of the Nigeria-Morocco BIT, Article 12(2) of the SADC FIP Annex 1.
[22] The principle is a replacement for NT and MFN principles (see below).
[23] SADC FIP Article 6(3).
[24] See Choudhury, *supra* note 1, at 52.
[25] The consent is not explicitly provided for, but can be deducted from the definition in Article 1 (a) of the ECOWIC.

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a list unilaterally.[26] In sum, while the Nigeria-Morocco BIT and the SADC FIP Annex 1 take a balancing approach, the exceptions stipulated in the PAIC and ECOWIC tend to hollow out the substantive standards of investment protection, most notably the MFN and NT standards.[27]

In all four instruments, the right to regulate comes as part of a package of solutions aiming at reinforcement of the position of the host states vis-à-vis the investors. This package also includes a set of obligations for investors and obligations applicable both to the host States and to the investors – for this reason referred as "horizontal" obligations.[28] Those obligations concern important social-economic issues, e.g. the duty not to engage in acts of bribery or the duty to contribute to sustainable development.[29] As will be shown, the latter term plays quite a central role and, while taking up one of the *Salini* criteria,[30] has an impact also on the definition of the investment.[31] PAIC reinforces those obligations by explicitly allowing host states' counterclaims based on the investors' obligations.[32]

C. The Fair and Equitable Treatment Standard

Noteworthy is the approach to the Fair and Equitable Treatment Standard (FET). The standard was omitted in PAIC, ECOWIC and SADC FIP Annex 1, while the Morocco-Nigeria BIT clarifies that it is equivalent to the minimum standard for the treatment for aliens under customary international law.[33] The literature quotes three reasons for this: First, FET standard would create uncertainty, second, it has been the basis for the majority of successful claims, and third, it would have a potential to unduly limit the regulatory freedom of the host states

[26] Article 18 of the PAIC.
[27] For elaborate critique see Won Kidane, 'Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Code', 50 *George Washington International Law Review (Geo. Wash. Int'l L. Rev.)* (2018) 523, at 565.
[28] See Article 19 et seq. of the PAIC, Article 27 et seq. of the ECOWIC, Article 17 et seq. of the Nigeria-Morocco BIT and Article 8 of the SADC FIP Annex 1.
[29] Article 24 of the Nigeria-Morocco BIT.
[30] ICSID, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, Decision on Jurisdiction, 23 July 2010, ICSID Case No. ARB/00/4, at 52 ("the contribution to the economic development of the host State of the investment").
[31] According to Article 3 (4) of the PAIC "In order to qualify as an investment under this Code, the investment must have the following characteristics: (…) and a significant contribution to the host State's economic development." See also Mbengue and Schacherer, *supra* note 3, at 424.
[32] Article 43 of the PAIC.
[33] Article 7 (2) of the Morocco-Nigeria BIT.

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favouring the investors disproportionally.[34] However, as will be discussed, a more promising way to enhance the predictability of the substantive standards of investment protection, is not to curtail them, but to entrench them within the national constitutional and regional integration treaty framework.

D. Compensation for expropriation

The instruments differ with regard to the compensation for expropriation. While ECOWIC and the Morocco-Nigeria BIT adopt the Hull-formula, PAIC and SADC FIP Annex 1 do not. Article 5(2) of the SADC FIP provides as a matter of principle for a "fair and equitable" compensation reflecting the fair market value of the property, allowing, however, to base the compensation on an "equitable balance between the public interest and interest of those affected". The provision outlines several factors that should be taken into account while striking this balance, e.g. the history of the acquisition of the property, its past and current use etc. The regulation in PAIC adopts the same approach.[35]

E. Backlash against ISDS

All four instruments move away from the traditional regulation regarding the ISDS, understood here in a narrow sense, as involving the right of a foreign investor to bring a dispute against the host state before an international arbitral tribunal. The most radical solution is advanced by the SADC FIP Annex 1, which does away with the ISDS altogether; all investors are to seek remedies in the domestic courts.[36] Such a solution was controversially discussed during the negotiations on PAIC, but was eventually not adopted; the majority regarded ISDS as essential to attracting foreign investment; it was felt that investors have little trust in the judicial systems of African States.[37] ISDS was thus retained, but only if a mutual agreement between the host State and the aggrieved investor or the laws of the host state provides for it. Also, the recourse to ISDS was made possible only after exhaustion of domestic

[34] See Mbengue and Schacherer, *supra* note 3, at 429-430; Kondo, *supra* note 14, at 19. The SADC Model BIT of 2012 was less radical, replacing the FET standard by a FAT – Fair Administrative Treatment – Standard, which is not applicable to regulatory measures.
[35] Article 12 (2) of the PAIC.
[36] Article 25 of the SADC FIP Annex 1.
[37] Mbengue and Schacherer, *supra* note 3, at 441.

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remedies.[38] ECOWIC and Morocco-Nigeria BIT, too, retain the ISDS but do not require any special agreement. What they however also require is the exhaustion of domestic remedies. In the case of ECOWIC, those remedies include the Court of Justice of ECOWAS; the parties are further "encouraged" to use "regional and national alternatives dispute settlement institutions".[39] In addition, the Morocco-Nigeria BIT provides for a Joint Committee before which the parties should seek an amicable solution before resorting to other means of dispute settlement.[40]

Those regulations are not unproblematic. If the low trust in the African judiciaries is the reason for the retention of ISDS,[41] then domestic investors are put at disadvantage, for they still have to deal with the national judiciaries that are allegedly not trustworthy. PAIC also has a problem with different treatment of the African investors and the investors from outside of the continent. If intra-African investments are to be governed by the PAIC, African investors will have to put up with the guarantees eroded by self-judging derogations for which the Code provides, while the investors from the outside of the continent might benefit from the "classical" BITs.[42] A number of such BITs are still in force and some new ones have been concluded with non-African States even very recently.[43] These two problems are avoided by

[38] See Article 42 of the PAIC.

[39] Article 54 of the ECOWIC.

[40] Article 26 of the Morocco-Nigeria BIT.

[41] The historical origins of the ISDS explored further below suggest that its original objective (or original sin) was to safeguard privilege for the investors of the former colonial masters. Today, the lack of trust in the domestic judiciaries in the domestic judiciaries seems also to play an important role. According to a paper written by the European Federation for Investment Law and Arbitration (EFILA), "it may be difficult in some countries to ensure that the rule of law is applied by domestic courts or their executive branches in an impartial and independent way which results in a final decision consistent with fundamental principles of public law." See EFILA, *A response to the criticism against ISDS* (2015), at 31, available at https://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_final_draft.pdf. Interestingly, the paper goes on to state on the same page "that investment arbitration should not be seen as simply the viable route in the face of 'untrustworthy' domestic courts". The other reason which the paper cites is the lack of domestic enforceability of the BITs in the domestic courts (ibid.). This may be true for some common law jurisdictions, which however, do provide for the major investor guarantees in their investment protection legislation. Otherwise, in the African context, one cannot also claim that investors are "unfamiliar" with the domestic law of the host states. Most of those legal system are still to a large extent influenced by their colonial legacy. And those investors that can afford the ISDS (see further below) will also be in a position to afford competent legal advice on the law of the host state.

[42] Kidane, *supra* note 27, at 566, 572 and 578.

[43] For examples see Mbengue and Schacharer, *supra* note 4, at 20-21. A very recent example is the agreement between the Kingdom of Morocco and Japan for the promotion and protection of investment concluded in January 2020, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5908/download. Its preamble highlights the existence of the "inherent" right to regulate and the recognizes that the Treaty objectives "can be achieved without relaxing health, safety and environmental measures of

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the SADC FIP Annex 1. Save for the FET standard, the Protocol's approach is not to cut down on the substance of the guarantees, but to ensure equal treatment of domestic and foreign investors, and in so doing, to radically transform the dispute settlement system. Accordingly, the Protocol establishes for all investors, irrespective of their origin and the size of the company the same regime of remedies limited to the domestic courts. This aspect will be explored further below. As the Protocol (SADC FIP) is meant to harmonise the investment law of SADC states, it is to be expected that future BITs concluded between with SADC and non-SADC member States[44] will also reflect the provisions of the SADC FIP Annex 1 and leave out the ISDS. The policy against ISDS is based on the Calvo-doctrine, according to which the foreign investor should not be entitled to any rights not accorded to the domestic investor.[45] It has been consequently pursued by the Republic of South Africa[46] which actually terminated quite a number of BITs providing for ISDS.[47]

F. Alternatives to ISDS

Worth mentioning are, finally, regulations pertaining to regional dispute resolution mechanisms, which could be an alternative to ISDS as currently practiced. Nowadays, there is a number of arbitration centers based in Africa[48], and investors can also resort to the international courts of the African RECs. The ECOWAS Court of Justice is explicitly mentioned in ECOWIC, and its jurisdiction allows for examination of state measures affecting

general application". There are also some modest attempts to define the FET standard (Article 4). Otherwise, the document is very similar to classical BITs. The GATT-styled exception clause (Article 21) provides for a necessity test; it is therefore neither self-judging nor does it impose on the arbitral tribunal any heightened levels of deference to the host state. The ISDS provision (Article 16) is by no mean innovative; in particular, no exhaustion of domestic remedies is required.

[44] See Article 24 of the SADC FIP Annex 1.

[45] M. Sornarajah, *Resistance and change in the international law on foreign investment* (2015), at 33.

[46] See Article 4 (c) of the South African Protection of Investment Act, 15 December 2015, Government Gazette Vol 606, No. 39514, available at https://www.gov.za/sites/default/files/gcis_document/201512/39514act22of2015protectionofinvestmentact.pdf; see also Dennis M. Davis, 'Bilateral investment treaties: Has South Africa chartered a new course?', *Acta Juridica* (2018) 1, at 11.

[47] Davis, *supra* note 46, at 14; Mmiselo Freedom Qumba, 'South Africa's move away from international investor-state dispute: a breakthrough or bad omen for investment in the developing world?' *De jure Law Journal* (2019) 358, at 360. The terminated BITs are those with Spain, Belgium-Luxemburg Economic Union, Argentina, Italy, Austria, Denmark, France, Germany, Switzerland, Netherlands and the United Kingdom, see https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa.

[48] E.g. the Nairobi Centre for International Arbitration (https://www.ncia.or.ke).

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investments.[49] Similarly, the East African Court of Justice could also be an organ suitable for investment disputes due to its broad jurisdiction and good accessibility[50] as well as a special Protocol concluded in 2015.[51] Recourse to a regional court might at least to some extent mitigate the possible distrust towards handling of investment disputes by national judiciaries only.

III. Global trends

A move towards a new generation of IIAs which "pay due regard to sustainable development" featured prominently in the UNCTAD World Investment Report of 2012.[52] In 2018, UNCTAD came up with a reform package document, outlining five reform areas: safeguarding the right to regulate while providing protection to investors, reforming investment dispute settlement, promoting and facilitating investment, ensuring responsible investment, and enhancing systemic consistency. For each of those areas, the document proposed a number of policy options. For example, with regard to FET, the proposed policy options aiming at safeguarding the right to regulate range from the omission of FET (which is the case of PAIC and SADC FIP) to a clarification of the standard through closed lists of specific obligations.[53] Relaxing the requirements of the Hull-formula, as PAIC and SADC FIP do, is also mentioned as a policy option.[54] However, one must see that the UNCTAD reform package of 2018 is not designed as a caption of trends, but rather as a policy document intended to trigger changes that would help to bring the IIAs in line with the sustainable development paradigm.[55]

[49] Mathew Happold, 'Investor–State Dispute Settlement using the ECOWAS Court of Justice: An Analysis and Some Proposals', 34 *ICSID Review - Foreign Investment Law Journal* (2019) 496.
[50] Tomasz Milej, 'Human Rights protection by International Courts – What Role for the East African Court of Justice?', 26 *African Journal of International and Comparative Law (AJICL)* (2018) 108, at 129.
[51] The Protocol was signed, but is not yet in force. See East African Community, *Communiqué of the 16th Ordinary Summit of the East African Community Heads of State (*2015), available at http://repository.eac.int/bitstream/handle/11671/547/COMMUNIQUE%2016TH%20ORDINARY%20EAC%20HEADS%20OF%20STATE%20SUMMIT%2018TH%20FEB%202015-1.pdf?sequence=1&isAllowed=y
[52] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2012*, available at https://unctad.org/system/files/official-document/wir2012_embargoed_en.pdf, at p. 89.
[53] United Nations Conference on Trade and Development (UNCTAD), *UNCTAD's Reform Package for the International Investment Regime* (2018), at 36.
[54] *Ibid*., at 46.
[55] *Ibid*., at 15.

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According to the World Investment Reports of 2019 and 2020, nearly all of the newly concluded IIAs contain reform-oriented clauses.[56] Despite this, it is quite striking that in recent years, more IIAs have been terminated than concluded.[57] ISDS is mostly retained, but in limited or improved form, to use the UNCTAD terminology.[58] Interestingly, ISDS by special mutual agreement as contemplated by PAIC is classified by UNCTAD as "no ISDS" policy option.[59] On balance, one may speak about a political consensus that the policy space of the host states should be expanded and the IIAs should move away from the pro-investor bias.[60] As pointed out by Rolland and Trubek, this view is shared by many "developed and developing states alike".[61] For example, the EU negotiating position with regard to the Transatlantic Trade and Investment Partnership (TTIP)[62] provided for a closed list of FET violations and a replacement of the ISDS with an Investment Court System (first instance and appeal).[63] ISDS was entirely removed from the US-Mexico-Canada Agreement (USMCA) with respect to Canada and restricted with respect to Mexico and the US;[64] also Brazil has a general policy against ISDS.[65] On the other hand, the Brazil-Malawi BIT provides for the office of an "Ombudsman" to assist investors;[66] the "Ombudsman" also has a role to play in the prevention of disputes alongside a Joint Committee established by the Parties.[67] There are

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[56] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2019*, available at https://unctad.org/webflyer/world-investment-report-2019, at 10; United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2020*, available at https://unctad.org/webflyer/world-investment-report-2020, at 112.

[57] UNCTAD 2020, *supra* note 56, at 124.

[58] UNCTAD 2019, *supra* note 56, at 106; UNCTAD 2020, *supra* note 56, at p. 113.

[59] UNCTAD 2020, *supra* note 56, at 113.

[60] Sonia E. Rolland and David M. Trubek, 'Legal Innovation in Investment Law: Rhetoric and Practice in Emerging Countries', 39 *University of Pennsylvania Journal of International Law (U. PA. J. INT'l L.)* (2017) 355, at 428 and 432-433.

[61] *Ibid.*, at 428, see also Kidane, *supra* note 27, at 549.

[62] See the analysis by Kidane, *supra* note 27, at 547 et seq.

[63] This approach was eventually implemented in the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada (2016), available at https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/. See Article 8.11 for FET (closed list) and Chapter 11 F for the Investment Claims Tribunal.

[64] See USMCA Chapter 14 with the relevant Annexes, available at https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf.

[65] Analysed by Choudhury, *supra* note 1, at 61. For a most recent example see the Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India (2020), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/download (Brazil-India BIT).

[66] Article 4 of the Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi (2015), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4715/download (Brazil-Malawi BIT). A similar provision (Article 14) is contained also in the 2020 Brazil-India BIT.

[67] Article 13 of the Brazil-Malawi BIT.

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other cases of states which embarked on a review of their BITs resulting in terminations thereof.[68]

Writing about PAIC, Mbegue and Schacharer contend that the Code's objective is not a fundamental contestation to the system of IIAs, but rather an "African tuning" and "recalibration".[69] Indeed, the PAIC limiting the substantive guarantees, relaxing the Hull formula and allowing ISDS only if based on a case-specific agreement or national legislation may be more on a radical side, but still within the current trends. ECOWIC and even more so the Morocco-Nigeria BIT might be classified as moderate reforms. But is "African tuning" enough for "Africanisation"? In the remaining sections, the present chapter suggests that an "Africanisation" would require more than add-ons to the ongoing global reform processes. And it is the SADC FIP Annex 1 which comes to it closest, especially by ensuring equal treatment of domestic and foreign investors.

While discussing the "African tuning", one must be mindful of the historical context. The current "trends" are at least partly reflective of claims which African and other developing States have been making for decades; they date back to the struggle for New International Economic Order (NIEO), if not further.[70] And most likely, it would not have been possible to achieve a consensus about the need for reform, if the patterns of investments had not changed. It is because a clear distinction between capital exporting and capital importing states is not any longer visible, the pro-investor bias of IIAs started also working against those states which were traditionally considered as capital exporting.[71] As poignantly put by Mbori, serious reforms are on the table, because the system has proven burdensome also for the Global North.[72] This aspect, too, will be discussed in further sections.

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[68] Kidane cites the examples of Canada, Australia, India, Brazil and Indonesia, Kidane, *supra* note 27, at 558. See also Dominic Npoanlari Dagbanja, Hegemony in Investor State Dispute Settlement: How African States Need to Approach Reforms – A Response (2020), available at https://www.afronomicslaw.org/2020/09/08/hegemony-in-investor-state-dispute-settlement-how-african-states-need-to-approach-reforms-a-response/.

[69] Mbengue and Schacherer, *supra* note 3, at 447.

[70] See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004), at 211 focussing on the doctrine of the Permanent Sovereignty over Natural Resources; Mohammed Bedjaoui, *Towards a new international economic order* (1979), at 70-79; Kidane, *supra* note 27, at 548; M. Sornarajah, *supra* note 45, at 57.

[71] Vargiu and Seatzu, *supra* note 3, at 163, Kim, *supra* note 1, at 299.

[72] Harrison O. Mbori, *Exit is the Only Way Out: A Polemic Response to John Nyanje's "Hegemony in Investor State Dispute Settlement: How African states need to Approach Reforms"* (2020), available

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IV. Why Right to Regulate?

In the African context, IIAs reveal a pro-investor bias not only in the imbalance of the treaty contents but also in the imbalance of power between the host states on the one hand and big corporate investors and their home States on the other. An important aspect of those imbalances is the regulatory chill, a situation, in which the host States are deterred from taking measures aiming at the promotion of human rights, protection of environment or pursuance of the SDGs by fear of being sued before an international arbitral tribunal and compelled to pay high compensations after costly proceedings. This section makes four points: first, that IIA favour the interests of investors at the expense of genuine public policy concerns of the host states (A.); second, that IIA generate regulatory chill which undermines their right to regulate (B.); third, that in making a decision to enter into IIA, the African States had only limited political autonomy; and fourth, that IIAs focus on protecting big investors while neglecting the Small and Medium enterprises (SMEs), which is eventually to the detriment of the host States.

A. Imbalance of content

Originally, IIAs concluded in the form of BITs aimed at ensuring legal protection of foreign investments; since the 1990s, they have also covered market liberalization,[73] but only a minority of them would include provisions on investment promotion.[74] The developing countries were concluding the BITs in the hope of attracting investments that would contribute to their economic development.[75] Today, the positive externalities of foreign investments are linked to the pursuance of the UN Sustainable Development Goals (SDGs).[76] Obviously, an investment may contribute to the achievement of the SDGs by spurring

at https://www.afronomicslaw.org/2020/09/10/exit-is-the-only-way-out-a-polemic-response-to-john-nyanjes-hegemony-in-investor-state-dispute-settlement-how-african-states-need-to-approach-reforms/.

[73] Kim, *supra* note 1, at 297-298.

[74] UNCTAD*, Investment Promotion Provisions in International Investment Agreements* (2008), available at https://unctad.org/system/files/official-document/iteiit20077_en.pdf with examples of various investment promotion provisions that could be included in IIAs.

[75] Choudhury, *supra* note 1, at 7, Kim, *supra* note 1, at 298.

[76] Most notably, Article 1 of the IISD Model International Agreement (*supra* note 2) proclaims in Article 1 that “The objective of this Agreement is to promote foreign investment that supports sustainable development, in particular in developing and least-developed countries”.

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economic growth, creating jobs, through the transfer of technology, skills etc.[77] However, the SDGs may, on the other hand, be undermined by violations of human and labour rights by investors, diluting the rule of law through bribery, encroaching on the rights of indigenous communities or pollution of the environment. It is in the interest of the host state that positive externalities are maximized and the negative ones contained. This does not happen automatically but requires regulations that are at risk of being reviewed by ill-fitted IIA standards. For example, as observed by Sornarajah, the expropriation standards came into existence as a reaction to takings of property by capricious dictators and nationalisations, while now, they are confronted with legitimate public interest concerns.[78]

Those concerns do not have to be linked directly with maximising of positive externalities of foreign investments and eliminating the negative ones. They may involve policies aiming at reversing the injustices of the past. This is quite important in the African context. Davis gives a recent example of a law requiring mining companies in South Africa to achieve an ownership level of 26 per cent by historically disadvantaged Africans.[79] The author refers to the *Foresti Case* in which a foreign company brought a case against South Africa, claiming compensation for an expropriation based on this law. The case was settled amicably, but the cost order obtained by South Africa against the claimants "was far less than the amounts incurred by the government to defend the claim".[80] According to Davis, the case demonstrated how IIAs can be used to block legitimate legislative change in South Africa and undermine policies mandated by the Constitution.[81] In the upshot, the IIAs concluded in the past aiming only at the protection of foreign investments and market liberalization, but failing to address the maximization of positive externalities, elimination of the negative ones and other legitimate policy concerns as their objectives may not be considered as balanced. Therefore, there is a need to rebalance them and provide for appropriate balancing tools.[82]

[77] Mbengue and Schacherer, *supra* note 3, at 421.
[78] M. Sornarajah, *supra* note 45, at 213.
[79] Davis, *supra* note 46, at 6 et seq.
[80] Davis, *supra* note 46, at 7.
[81] Davis, *supra* note 46, at 6 and 8.
[82] Kim, *supra* note 1, at 303.

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The South African case shows that what is at stake is not only the right to regulate but also a duty to regulate. It may be imposed upon the host State by its constitution, but also by international treaties that it has ratified. In the spirit of "systemic integration"[83] of public international law, IIAs must not make it impossible for the host State to fulfil its international obligations in the areas other than investment law, eg. in international human rights or environmental law.[84]

The African instruments discussed here respond to the need for systemic integration by prohibiting "a race to the bottom" with regard to international standards. According to Article 11 of the SADC FIP Annex 1, the State Parties may not encourage investments by relaxing health, safety or environmental measures or derogating from Treaties that they have ratified. Article 34 of the PAIC does not only prohibit relaxation of labour protection standards by the host State but also imposes upon investors an obligation to respect international conventions and existing labour policies. Both aspects, that is a creation of avenues for systemic integration of investment treaties with other international law obligations and the inclusion of obligations for investors in IIAs,[85] should be seen as an effort to create a more balanced international investment law regime.

Such avenues are necessary, given the practice of international arbitral tribunals which has not been attaching enough weight to the pursuance of developmental objectives. This is the conclusion of the study by Choudhury, which analysed 56 arbitral awards involving human rights and environmental issues and handed down between 1992 and 2018.[86] Despite some positive examples such as *Methanex v. USA*[87] and *Philipp Morris v. Uruguay*[88], the prevailing

[83] See Article 31(3)(c) of the Vienna Convention of the Law of Treaties (VCLT). On systemic integration see Matti Koskenniemi, Fragmentation of international law: difficulties arising from the diversification and expansion of international law. Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682, 13 April 2006, at paras 410 et seq.
[84] In S.D. Myers v. Canada, while responding addressing the host State's obligations with regard to the protection of environment, the arbitral tribunal held that the State must choose those measures which are most consistent with open trade, UNCITRAL Arbitration, S.D. Myers, Inc. v. Government of Canada, Partial Award, 13 November 2000, at para. 221. See Choudhury, *supra* note 1, at 29.
[85] According to the preamble to the 2006 IISD Model International Agreement (*supra* note 1), what the agreement seeks, is "an overall balance of rights and obligations in international investment between investors, host countries and home countries".
[86] Choudhury, *supra* note 1, at 56.
[87] UNCITRAL Arbitration, Methanex Corporation v. United States of America, Final Award, 3 August 2005.
[88] ICSID, Philip Morris v. Uruguay, Final Award, 8 July 2016, ICSID Case No. ARB/10/7.

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attitude of the arbitral tribunals was disregarding and sidestepping of non-economic issues; only one of every five tribunals engaged with them.[89] In 2019, a group of UN-appointed Special Rapporteurs and Independent Experts wrote the letter to the Working Group III of the UNCITRAL whose task is to come up with an ISDS reform.[90] The authors invoked Principle 9 of the UNGPs[91] reminding the States to "maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives". The letter specifically addresses the issue of ISDS:[92]

> "The inherently asymmetric nature of the ISDS system, lack of investors' human rights obligations, exorbitant costs associated with the ISDS proceedings and extremely high sums of damages awarded in the arbitral awards are some of the elements that lead to undue restrictions of States' fiscal space and undermine their ability to regulate. The ISDS system can also negatively impact affected communities' right to seek effective remedies against investors for project-related human rights abuses. In a number of cases, the ISDS mechanism, or a mere threat of using the ISDS mechanism, has caused regulatory chill and discouraged States from undertaking measures aimed at protection."

B. Regulatory chill

The regulatory chill is a valid reason to entrench the right to regulate in African IIAs. It is, however, questionable whether the right to regulate alone would reduce it.

1. Threatening the host State

There is a number of documented cases, in which governments actually backtracked on certain regulations under a direct threat of litigation. Such cases are difficult to prove since foreign investors would hardly ever use open channels to put pressure on the governments of the host States. The case cited quite often is *Ethyl Corporation v. Canada*, where the government refrained from a health protective measure in view of litigation and after losing

[89] Choudhury, *supra* note 1, at 16.
[90] Deva et al., supra note 1.
[91] Office of the High Commissioner for Human Rights (OHCHR), Guiding Principles for Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011), available at: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
[92] Deva et al., *supra* note 1, at 2.

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at the jurisdictional stage.[93] Another example is Indonesia's reversal of a ban on open pit mining under the threat of arbitration.[94] But there are also cases of intimidation in Africa. Big tobacco companies were pressurising Namibia, Gabon, Togo, and Uganda to shelve their anti-smoking legislation.[95] Some evidence suggests that foreign companies made threats of international investment arbitration to compel the government of Ghana to allow mining in forest reserves.[96]

2. The costs of ISDS

The mechanism of regulatory chill is, however, often more subtle than outright threats. The chill is triggered by the uncertainty regarding the outcome of the dispute combined with the high costs of the same.[97] Damages awarded are sometimes exorbitant,[98] and the costs of arbitral proceedings are very high too.[99] Scarce resources of the developing States are thus channelled towards a small wealthy elite. As aptly summarized by Krivoi:[100]

> "Elite western law firms dominate the field of investment arbitration because of their expertise – according to one estimate, all top 30 law firms representing investors and states in arbitration were headquartered in the United States or the United Kingdom. A charge of

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[93] Choudhury, *supra* note 1, at 25, Deva et al., supra note 1; Kara Dougherty, 'Methanex v. United States: The Realignment of NAFTA Chapter 11 with Environmental Regulation', 27 *Northwestern Journal of International Law & Business* (2007) 735, at 753

[94] Yarik Kryvoi, *Three Dimensions of Inequality in International Investment Law* (2020), available at https://www.biicl.org/publications/three-dimensions-of-inequality-in-international-investment-law, at 14.

[95] Sabrina Tavernise, *Tobacco Firms' Strategy Limits Poorer Nations' Smoking Laws* (2013), available at https://nyti.ms/1dvsmav. It remains to be seen, if the 2016 award in Philipp Morris v. Uruguay will durably foreclose such practices.

[96] Kyla Tienhaara,'Mineral investment and the regulation of the environment in developing countries: lessons from Ghana', 6 *International Environmental Agreements: Politics, Law and Economics* (2006) 371, at 387-388.

[97] Kim, *supra* note 1, at 295.

[98] An average award in cases won by investors is about USD 500 million and in median about USD 20 million, UNCTAD, *Investor-State Dispute Settlement: Review of Developments in 2017* (2018), available at https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf, at 5, The same figure is quoted by Luke Nottage and Ana Ubilava, *The University of Sydeny Law School Legal Studies Research Paper No. 18/46. Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry* (2018), available at http://ssrn.com/abstract=3227401, at 10.

[99] Jonathan Bonnitcha, *Assessing the Impacts of Investment Treaties: Overview of the evidence* (2017), available at https://www.iisd.org/system/files/publications/assessing-impacts-investment-treaties.pdf. at 14 gives the figure of over USD 4 million per dispute per party. The OECD study from 2012 cites the same figure (USD 8 million for both parties), albeit pointing out that the costs exceeded USD 30 million in some cases, Organisation for Economic Co-operation and Development (OECD), *Investor-State Dispute Settlement Public Consultation: 16 May - 9 July 2012* (2012), available at http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf, at p. 18.

[100] Kryvoi, *supra* note 94, at 11.

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£1,000 per hour is not unusual for a partner of such a law firm, while, for example, the average salary in Kyrgyzstan, which is currently involved in at least four investor-state disputes, is less than £200 per month."

Those costs only add to the reputational costs which the host state incurs irrespective of the outcome of the dispute. There is a perception that host state's reputation as "investor friendly" might be rampaged, and that the state might consequently suffer a handicap in the international competition to attract investments.[101] Moreover, even if the host state "wins" the case, such a "win" means only that it would not have to pay high sums in damages, but the costs awarded to the state would sometimes still not cover the entirety of spending related to the ISDS litigation.[102] Therefore, to avoid the costs and the damages, the host States could be willing to adjust the regulatory framework to the benefit of the investor,[103] and in so doing, frustrate their own right to regulate, or even – as was the case of South Africa – the policies mandated by the Constitution.[104]

3. The uncertainties

The uncertainty of the outcome of potential disputes – the trigger for the regulatory chill – has two aspects: an open-ended wording of the IIAs and the very structure of investment arbitration.

a) Ambiguity of substantive standards

Problematic is not only the wording of the guarantees for investors, such as the FET standard discussed above but also the language of exceptions meant to secure the right to regulate. According to the South Africa Government Position Paper on BITs, those exceptions might create "interpretational difficulties"; they are modelled after Article XX of the GATT, and the transposition from trade to investment law is not straightforward.[105] The same applies to the

[101] Tienhaara, supra note 96, at 373 and 379. The point of "reputational harm" is also made by Kryvoi, *supra* note 94, at 11.
[102] Choudhury, *supra* note 1, at 37. Davis cites the cost order obtained by South Africa in the *Foresti* case, where "the quantum […] was far less than the amounts incurred by the government to defend the claim". Davis, *supra* note 46, at 7.
[103] Choudhury, *supra* note 1, at 37, Dougherty, *supra* note 93, at 753.
[104] Davis, *supra* note 46, at 8.
[105] Republic of South Africa*, Bilateral Investment Treaty Policy Framework Review. Government Position Paper* (2009), available at https://pmg.org.za/policy-document/161/, at 47-48. See also Vargiu and Seatzu, *supra* note 3, at 160-161

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public order carve-out, which has been interpreted by arbitral tribunals as encompassing the strict necessity test of the law of state responsibility, making it difficult to invoke for the host state.[106] Moreover, as pointed out by Sornarajah, such exceptions, when raised as a defence by the host state, prompt the tribunal to perform a balancing test,[107] weighing the guarantee for the investors against the host state's public policy concerns. Such a balancing act allows for a considerable degree of latitude of the adjudicator and is in itself a source of uncertainty.[108] There is also uncertainty as to which necessity test will be applied.[109] Therefore, according to Sornarajah, while hijacking human rights methodology to protect the rights of investors,[110] the balancing test is an attempt to preserve ISDS under the guise of taking the right to regulate into account.[111] It does not substantially reduce the uncertainty about the outcome of the dispute, and hence, it also does not reduce the regulatory chill.

An alternative approach would be to adopt higher levels of deference towards the host state's policy choices. This can be achieved by framing exceptions in IIAs in a certain language. Rather than using the "necessity" test as it is used in international trade law, in human rights law, or its most strict version from the law of state responsibility, IIAs could follow the example of PAIC and link the adoption of regulatory measures with legitimate policy objectives using the

[106] See generally Kim, *supra* note 1, at 319 referring to a number cases decided against Argentina and Jürgen T. Kurtz, 'ICSID Annulment Committee Rules on the Relationship between Customary and Treaty Exceptions on Necessity in Situations of Financial Crisis', 11 ASIL Insights (2007), available at https://www.asil.org/insights/volume/11/issue/30/icsid-annulment-committee-rules-relationship-between-customary-and#_edn1. In 2007, the ICSID ad hoc annulment committee held that applying the necessity test as provided for in the ILC Draft Articles on State Responsibility, as the Arbitral Tribunal did in CMS v. Argentina amounted a "manifest error of law", see CMS Gas Transmission Company v. Argentine Republic, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, at para. 130. However, the Committee did not reverse the erroneous findings citing jurisdiction limitations (ibid., at para 158). Prior to the ad hoc Committee decision, the same test was used in Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, Award, 22 May 2007, at para 344 and Sempra Energy v. Argentine Republic, Award, 28 September 2007, at para. 347 decided at around the same time. In the Continental Casualty case decided one year later, the Arbitral Tribunal distanced itself from the approach applied in Enron and CMS, however, without any reference to the decision on annulment in CMS v. Argentina. The Continental Casualty Tribunal held that the necessity test should be performed using the criteria developed by the WTO Dispute Settlement Body with regard to Article XX GATT. See Continental Casualty Company v. The Argentine Republic, Award, 5 September 2008, para 192.

[107] Sornarajah, *supra* note 45, at 380.

[108] See also Choudhury, *supra* note 1, at 44, according to whom, the generally framed exceptions clauses in the IIAs are "typically muted since they neither create any legally enforceable rights or obligations nor create regulatory space".

[109] Kurtz, *supra* note 106 and the comments there.

[110] Sornarajah, *supra* note 45, at 375.

[111] Sornarajah *supra* note 45, at 380.

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term “relating to”. The self-judging exceptions, as also used in the PAIC, could be an option too. However, as explained above, those techniques cut very deep into the substance of investment protection standards. One may also think about entrenching the *in dubio mitius* rule in the IIAs compelling the arbitration tribunals to adopt an interpretation that is least restrictive to the right to regulate.[112] Other techniques, already discussed and applied in IIAs include an enumeration of specific criteria for assessing a violation of the FET standards or an exclusion of regulatory measures from its ambit. On balance, however, trying to reduce the regulatory chill by adjustment in the substance of standards seems to be an uphill task. There is the risk of hollowing them out by rules of deference and the risk of increasing the uncertainty by balancing tests. This is why removing ISDS, as the SADC FIP Annex 1 does, looks like a more promising alternative.

b) Structural flaws of ISDS

The ISDS contributes to the regulatory chill in two ways. Firstly, it generates costs for the host states – this issue has already been discussed. But secondly, due to its characteristics, it is intrinsically incapable of developing international law. Consequently, the system – or rather lack thereof – exacerbates the uncertainties linked to the scope of substantive guarantees for the investors, rather than reducing them.

Generally speaking, international adjudication may contribute and actually does contribute to the development of international law. By deciding cases, it provides “focal points” which assist the states in realising what actions violate international law and what actions are in conformity with it.[113] Consequently, the States can better choose their course of actions which is a gain for the certainty of law. International adjudication tests the open-ended norms of international law (such as FET standard) in a variety of factual settings.[114] Sometimes, those settings require the application of norms belonging to different subsystems of international

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[112] The *in dubio mitius* interpretation was applied by the WTO Appellate Body in *EC - Measures Concerning Meat and Meat Products*, 16 January 1998, WT/DS26/AB/R, at para 165. See also Dirk Pulkowski, ‘Structural Paradigms of International Law’, in Tomer Broude and Yuval Shany (eds.), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (2008) 51, at 66.

[113] Tom Ginsburg, ‘Bounded Discretion in International Judicial Law Making’, 45 *Virginia Journal of International Law* (2005) 631, at 645.

[114] Ginsburg, *supra* note 113, at 655.

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law, such as investment law, environmental law, or human rights law. The "focal points" arising out of such cases may help to overcome the fragmentation of international law.[115]

However, for those positive impulses for the development of international law, certain conditions must be met. This first condition is consistency.[116] Inconsistent "focal points" do not clarify meanings and do not resolve clashes of principles, but add to the confusion. In the context of international investment law, the development of the law is not the main concern of *ad hoc* arbitral tribunals.[117] It is rather the settlement of a dispute at hand. This is why ensuring consistency of the case law is one of the central concerns in the ongoing UNCITRAL Working Group III ISDS reform process.[118]

Historically, the function of the development of international law has been associated with a permanent judicial body. It is thus not surprising that the establishment of such a permanent organ is one of the major reform options.[119] As the second Hague Peace Conference of 1907 was making plans for the establishment of a permanent international court ("Court of Arbitral Justice"), it was underscored that "continuity of jurisprudence in arbitration", is a "natural consequence" of the permanent character of the judicial organ and its institutional culture (*esprit de corps*).[120] This was one of the main reasons why *ad hoc* arbitration was to be replaced by a permanent court.[121]

Exercising of the law development function requires at least a *de facto erga omnes* binding force of the "focal points", which in turn presupposes the court's legitimacy.[122] The states that

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[115] Karin Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction', 5 *Max Planck Yearbook of United Nations Law* (2001) 67, at 71; Tomasz Milej, Entwicklung des Völkerrechts. Der Beitrag Internationaler Gerichte und Sachverständigengremien (2014), at 341-342.

[116] Mohamed Shahabuddeen, *Precedent in the World Court* (1996), at 130.

[117] This might be the reason why the 2012 OECD report noted that the ISDS system in the current form has a potential to generate inconsistencies (OECD, *supra* note 99).

[118] United Nations Commission on International Trade Law Working Group III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its resumed thirty-eighth session, UN Doc. A/CN.9/1004/Add.1, 28 January 2020, available at: http://undocs.org/en/A/CN.9/1004/Add.1.

[119] Ibid.

[120] James Brown Scott, 'The Proposed Court of Arbitral Justice', 2 *The American Journal of International Law* (1908) 772, at 789.

[121] Scott, *supra* note 120, at 775.

[122] Allison Marston Danner, 'When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War', 59 *Vanderbildt Law Review* (2006) 1, at 49, Milej, *supra* note 115, at 615.

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are to be bound by the court's jurisprudence must "own" it. The sense of ownership is created by the participation in the election of judges and by the diversity of the bench.[123] Consequently, international courts are constructed not as an organ of the parties to the particular dispute, but as an organ of the international community (on a global or a regional scale).[124] It is the authority of the international community which legitimizes the judicial development of the law. Finally, the law development by international adjudication must conform to a certain entrenched type of judicial decision making, which presupposes judicial independence as well as a type of procedure which contributes to the acceptance of judicial decisions, e.g. due to individualized hearings, accessibility, due process guarantees and the public character of the procedure.[125]

It nearly goes without saying that ISDS in its current form does not even come close to this model. The arbitral tribunals are not organs of the international community, but of the parties to a particular dispute. The body of arbitrators lacks diversity.[126] According to data presented by *Nottage* and *Ubilava*, 38% of concluded ISDS cases are not public, but confidential,[127] while the access to tribunals is an exclusive right of investors privileged in the IIAs and even within this group only few can afford the high costs of dispute settlement. Kidane goes as far as to say that the problem might not be the substantive principles, which, e.g. the PAIC "gets rid of", but "the system of international arbitration run amok without checks and balances".[128]

The advantage of the rejection of ISDS by SADC FIP Annex 1 is that it places the investment protection rules under the stewardship of the political community of the host state. The domestic courts of the host state are in a position to develop the substantive standards of investment law in the context of the public standards of the host state's society, ensuring both the consistency in the jurisprudence (in the context of that particular state) and the fidelity to

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[123] Milej, *supra* note 115, at 570; Scott, *supra* note 120, at 789.
[124] Georges Abi-Saab, 'The International Court as a world court', in: Vaughan Lowe and Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice. Essays in honour of Sir Robert Jennings* (1996) 3, at 7, Milej, *supra* note 115, at 104 and 109, Scott, *supra* note 120, at 775.
[125] Ginsburg, *supra* note 113, at 655; Milej, *supra* note 115, at 503.
[126] Choudhury, *supra* note 1, at 60, although suggesting that the background of the arbitrator does not necessarily affect the outcome of the dispute.
[127] Nottage and Ubilava, *supra* note 98, at 11.
[128] Kidane, *supra* note 27, at 575.

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the fundamental principles of the given society.[129] For the South African example of the *Foresti* case, it would mean that the substantive protections in the IIAs would be interpreted in light of the nation's commitment to erase the injustices caused and perpetuated by the crime of apartheid, a commitment which is entrenched in the constitution. The protection of investments would be embedded in the general body of South African law.[130]

C. Imbalance of power

The push towards the right to regulate in Africa may be finally looked at as a reaction to the genealogy of the international investment law which is rooted in the system of colonial oppression. In the colonial period, the imperial powers were collecting a vast amount of resources from the territories of colonial nations, thus preventing their industrialization.[131] Those policies are exemplified by the "Euroafrica" project envisaged at the inception of the European integration. Central to "Eurafrica" was an idea of a relationship between the newly funded EEC and the colonies which would focus on the acquisition in Africa of affordable primary commodities necessary for the development of European industries.[132] Such a position of raw materials supplier was and is detrimental to African economies. It hinders industrialization and makes it difficult for them to move upward along the value chains towards more profitable industrial processing and realise the potential to create jobs and welfare.[133]

In the colonial period, European investors were in a privileged position. The imperial legal systems shielded them from risks otherwise considered ordinary in the place, where

[129] Ronald Dworkin, *Law's Empire* (1986), at 219.
[130] Davis, *supra* note 46, at 10.
[131] Anghie, *supra* note 70, at 208.
[132] Peo Hansen and Stefan Jonsson, *Eurafrica: History of European Integration, "Compromise" of Decolonization* (2018), available at https://www.europenowjournal.org/2018/02/28/eurafrica-history-of-european-integration-compromise-of-decolonization/.
[133] Sendra Chichaka, *COVID-19: Africa's Chance to take Advantage of Regional Production* (2020), available at https://www.afronomicslaw.org/2020/05/07/covid-19-africas-chance-to-take-advantage-of-regional-production/; Ian Taylor, 'Dependency redux: Why is Africa not rising', 43 *Review of African Political Economy* (2016) 8, at 13.

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investment is made.[134] This line of thought underpins the BITs concluded with the newly independent African States. After years of oppression, they found themselves in urgent need for capital necessary to boost the development.[135] Consequently, competition for foreign direct investments set in.[136] But the capital was available in the so called "Global North" which included the former colonial masters keen to safeguard the past privileges and entrench them in international treaties.[137]

The capital exporting States set up an opt-in system[138] modelled after the Treaties of Friendship Commerce and Navigation.[139] African States were presented with treaty templates incorporating a set of norms in whose creation they had not participated and which then became the BIT standards.[140] While attempting to challenge those norms and establish a New International Economic Order (NIEO), the African States emerged victorious on the UN fora, but not in practice.[141] Concluding the BITs, or rather adhering to the BIT templates, they bowed to political pressure and to what they perceived as economic necessities.[142] At the same time, the sovereignty of the newly independent States was further undermined by the idea of so called "internationalized contracts" excluding the contracts concluded between the host States and investors from the realm of domestic jurisdiction, and subjecting them to "international law" via stabilisation clauses,[143] the umbrella clauses in the BITs and even FET provisions.[144] Therefore, the language of "voluntary" limitations of sovereignty by conclusion of treaties often associated with PCIJ's *Wimbledon* case only obscures the real state of affairs,

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[134] Kidane, *supra* note 27, at 530. The author cites the quote by a former British governor of today's Ghana according to whom the English "capitalists" in Ghana relied on the protection of English "troops and guns".
[135] Choudhury, *supra* note 1, at 5
[136] Anghie, *supra* note 70, at 210-213.
[137] Uncertainties about the actual state of customary law also played a role. See Rukia Buruti, 'Investment Facilitation in Regional Economic Integration in Africa: The Cases of COMESA, EAC and SADC', 18 *Journal of World Investment and Trade* (2017) 493, at 495 and Sornarajah *supra* note 45, at 33 et seq.
[138] Vargiu and Seatzu, *supra* note 3, at 163. Accordingly, as pointed out by Kidane, the BITs were made not with Africa, but "for Africa", Kidane, *supra* note 27, at 526.
[139] Vargiu and Seatzu, *supra* note 3, at 163.
[140] *Ibid.*
[141] Anghie, *supra* note 70, at 216 et seq.
[142] Anghie, *supra* note 70, at 216, Kidane, *supra* note 27, at 533.
[143] The leading case is the 1977 arbitral award in Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, 19 January 1977, ILM 1978, 1. See generally Jean Ho, 'Internationalisation and State contracts: are State contracts the future or the past?', in: C. L. Lim (ed.), *Alternative Visions of the International Law on Foreign Investment. Essays in Honour of Muthucumaraswamy Sornarajah* (2016) 377, at 397. According to Anghie, while the state was degraded to a private party and the multinational company was elevated to a sovereign actor, Anghie, *supra* note 70, at 234.
[144] Ho, *supra* note 143, at 391.

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in which the newly independent African States were denied the opportunity to shape international law and forced to validate the effects of colonial subjugation. Due to the power imbalance,[145] the "colonial DNA"[146] or "original sin" of international investment law,[147] the interests which were protected by the imperial system before independence, continued being protected by the BITs,[148] turning the international law to an instrument of privilege entrenchment.[149] But perhaps even more painfully, the concept of exchanging deep erosions of sovereignty against capital inflow and development has not worked in the real world. No correlation has been proved between the conclusion of the BITs and the inflow of investments.[150] In South Africa, there has been even a surge of investment after denunciations of some of the BITs.[151]

D. Bias towards big investors

The ISDS is quite rightly considered to be an instrument of the powerful.[152] The SMEs can barely afford it. As data shows, most of the successful claims are brought by large companies and only 22% of the claims by smaller investors.[153] At the same time, it is the SMEs that experience most difficulties on the markets of host States, such as to permit requirements and costs or red tape.[154] It is also the SMEs which might suffer most under the erosion of substantive standards of investors' protection. And yet, positive externalities of foreign

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[145] Kim, *supra* note 1, at 299
[146] Mbori, *supra* note 72.
[147] Kidane, *supra* note 27, at 537
[148] According to Anghie, the BITs were meant to ensure that the property interests before independence are safeguarded after independence and things generally stay the same. Anghie, *supra* note 70, at 208. This is an exemplification of a flawed idea that property rights always exist independently of a political and legal system in which they were created and safeguarded, and remain untouched even after the system breaks down or even falls into disgrace. Joachim Lege, 'Gleichheit im Unrecht für Alteigentümer?', 58 *Neue Justiz* (2004) 385, at 386-387, makes this point in the German literature in the context of a certain category of expropriations in East Germany. Similarly, the validity of the property rights created in and safeguarded by the system of colonial oppression cannot be seen as unaffected by the lack of legitimacy and eventual fall of that system.
[149] Dagbanja, *supra* note 68.
[150] See generally Bonnitcha, *supra* note 99, at 4; Choudhury, *supra* note 1, at 3. For Ghana, Dagbanja *supra* note 68.
[151] Choudhury, *supra* note 1, at 61.
[152] Kryvoi, *supra* note 94, at 11 with further references.
[153] Bonnitcha, *supra* note 99, at 14; OECD, *supra* note 99, at 16.
[154] Tomasz Milej, 'Striking the right balance between the interests of the foreign investors and the host state – a case study of the Tanzania-Germany BIT 50 years after its conclusion', 25 *African Journal of International and Comparative Law (AJICL)* (2017) 1, at 8.

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investment can be associated more with SMEs than with large multinationals.[155] In the case of negative externalities, the opposite is likely to be the truth. One is inclined to hypothesise that SMEs would often not have enough economic power to engage in abusive practices or gross corruption; their investment by virtue of scale would be less likely to cause environmental pollution, they would have to rely on the cooperation with local partners and while cooperating contribute to transfer of technology and skills. They would also be less likely to pose a threat to local players on the domestic market of the host state. Therefore, ironically, the system in place penalises those investors (SMEs) that would be most beneficial for the development of the host states and privileges the most powerful players who are associated with the negative externalities of foreign investment. As demonstrated by Taylor, the current foreign investment in Africa is focused on capital-intensive extraction of natural resources; it reveals little positive externalities in terms of jobs creation or technology transfer, as it is in the manufacturing, where most of technological learning takes place.[156] The right to regulate might be thus used to change this pattern and offer protection to those who really need it and who produce positive externalities, that is to the SMEs.

IV. Conclusions

In view of the foregoing, international investment law may be considered "Africanised" if it addresses three closely interlinked problems: the problem of content, the problem of interpretation and the problem of agency. Those appear to be the three pillars of Africanisation. The problem of content is resolved in the analysed documents by a number of substantive provisions which constitute exceptions to the standards of protection for foreign investments and the introduction of obligations for investors. The problem of interpretation

[155] UNCTAD, *Handbook on foreign direct investment by small and medium-sized enterprises: lessons from Asia* (1998); Mazdak Rafaty, 'Small and Medium Sized Enterprises as Sustainable Foreign Direct Investors', The African Business Review (2013), available at https://www.researchgate.net/publication/256005683_Small_and_Medium_Sized_Enterprises_as_Sustainable_Foreign_Direct_Investors. More generally on the positive contribution of SMEs to sustainable development, see David Wood, 'Investing in the Backbone of Emerging Markets. A Working Paper from Boston College Center for Corporate Citizenship's Institute for Responsible Investment', available at https://iri.hks.harvard.edu/files/iri/files/iri_-_sustainable_sme_investment_-_investing_in_the_backbone_of_emerging_markets.pdf.

[156] Taylor, *supra* note 133, at 11. See also Ian Taylor, 'Sixty Years Later: Africa's Stalled Decolonization', 20 *Vestnik RUDN. International Relations* (2020) 39, at 41.

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can be addressed by the abolishment of ISDS, which is the SADC FIP Annex 1 approach or having ISDS only on a "case by case" basis, which is the solution of the PAIC. However, without clear common African policy against ISDS, the investors and home state may still use their political and economic power to pressurise the host States into accepting ISDS clauses in the state contracts.[157] Given the situation of competition for FDIs, also BITs with traditional ISDS clause can still be concluded and, as said, are actually being concluded. A joint stance on IIAs requires thus a commitment to regional integration. Otherwise, the competition for FDIs might generate a pull towards conclusion of BITs with ISDS.

Domestic courts, Africa-based mediation and arbitration centers and regional courts, such as EACJ and the ECOWAC Court of justice may be a viable alternative to ISDS offering remedies to investors, domestic and foreign, big and small alike. Of course, not every African country inspires as much confidence in its judiciary as South Africa does. And indeed, if judicial independence is compromised and regional courts are weakened, a decreased FDI inflow might be one of the negative consequences. However, those are policy choices to be made by the African nations subject to global and regional human rights protection mechanisms. To replace them with a privilege for big foreign investors, such as ISDS, disrespects African agency. It exploits the imbalance of power and abuses the quest of African States for capital to finance their development needs.

Addressing African agency is the third, and perhaps the most significant pillar of investment law's "Africanisation". It is particularly significant, as it is not only about practical, pragmatic or utilitarian concerns about how to balance FDI inflows, development needs and public policy objectives. Affirming African agency is also a deontological issue, a choice of what a morally right thing to do is. And given that there is international consensus that colonial oppression was a wrong thing, then doing the right thing means doing away with its relics. The IIAs in their current shape, created with only symbolic African participation, full of rules detrimental to Africa, enrooted in colonialism, preserved due to power imbalance which colonialism created

[157] See Ohio Omiunu and Oludara Akanmidu, *Lessons from Nigeria and Process & Industrial Developments Limited (P&ID)* (2020), available at https://www.afronomicslaw.org/2020/10/12/lessons-from-nigeria-and-process-industrial-developments-limited-pid/. In 2017, the P&ID was awarded damages from Nigeria amounting to USD 6.6 billion by an arbitral tribunal in London, but the dispute is still ongoing due to allegations of corruption. The jurisdiction of the tribunal was established in a state contract.

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and despite the opposition of African States in the post-colonial period is one of such relics. What is needed is a new beginning based on African ownership and setting the African States free from the dependency on a path which started with colonialism.[158]

It is doubtful, whether giving international investment law an "African tuning" and "recalibrating" it as envisaged by the PAIC, might be considered as "Africanisation" in the sense proposed here. The SADC FIP Annex 1 comes closest to the realisation of all three pillars. The Protocol's approach of coordinating investment policies of the SADC States avoids the discrimination of investors from within and from outside of the community. It also reduces the power imbalances between investors: domestic and foreign, the smaller and the larger ones. And while retaining a reformed set of standards, rejecting ISDS and placing the investment protection under the authority of national constitutions, the document powerfully reclaims African agency.

[158] Kidane, *supra* note 27, at 471.

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