AFRICANISATION AND REFORMATION OF THE AFRICAN INTERNATIONAL INVESTMENT LANDSCAPE: TOWARDS A NEW CONTINENTAL INVESTMENT AGREEMENT

by

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PUBLICATIONS BY THE CANDIDATE THAT ARE RELEVANT TO THE STUDY

1. Mhlongo Lindelwa, 'Clash of laws? Testing the effectiveness of the national treatment principle against black economic empowerment laws in South Africa' (2021) 35:2 *Speculum Juris* 70-85

2. Dube Angelo and Mhlongo Lindelwa, 'The forgotten continent? A South African perspective on the development of African international legal thought' in Lesaffer Randall, *Politics and the Histories of International Law*: *The Quest for Knowledge and Justice* (Brill Nilhoff 2021) 270-297

3. Mhlongo Lindelwa, 'A critical analysis of the Protection and Investment Act in South Africa' (2019) 34:1 *Southern African Public Law Journal* 1-22

4. Mhlongo Lindelwa 'Of politics and law: Analysing the implications of the US-China trade war on international law and international trade law' (2019) 44:1 *South African Yearbook of International Law* 1-26

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ACADEMIC HONESTY DECLARATION

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Thesis title: **'Africanisation and Reformation of the African International Investment Landscape: Towards a new Continental Investment Agreement'.**

I declare that the above thesis is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the thesis to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

_____ _12 November 2021_____

SIGNATURE DATE

ABBREVIATIONS AND ACRONYMS

AEC	Africa Economic Community
AfCFTA	African Continental Free Trade Area Agreement
AMU	Arab Maghreb Union
ASEAN	Association of South-East Asian Nations
AU	African Union
AUC	African Union Commission
AUCIL	Forum of the AU Commission on International Law
B-BBEE	Broad-Based Black Economic Empowerment
BIT	Bilateral Investment Treaty
CENSAD	Community of Sahel-Saharan States
COMESA	Common Market for East and Southern Africa
CSID	Conference for the Settlement of Investment Dispute
DIRCO	Department of International Relations and Cooperation (South Africa)
DRC	Democratic Republic of Congo
EAC	East African Community
ECA	Economic Commission in Africa
ECCAS	Economic Community on East African States
ECOWAS	Economic Community of West African States
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment

FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Production
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID	International Centre for the Settlement of Investment Dispute
IGAD	Intergovernmental Authority on Development
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
ILC	International Law Commission
ILO	International Labour Organisation
IMF	International Monitory Fund
IMST	International Minimum Standard of Treatment
LPA	Lagos Plan of Action
MFN	Most Favoured Nation
MIT	Multilateral Investment Treaties
NAFTA	North American Free Trade Area Agreement
NEPAD	New Partnership for Africa's Development
OAU	Organisation of African Unity

OECD	Organisation on Economic Cooperation and Development
PAC	Pan African Congress
PAIC	Pan African Investment Code
PCIJ	Permanent Court of International Justice
PER	*Potchefstroomse Elektroniese Regsblad*
RECs	Regional Economic Communities
RTIA	Regional Trade and Investment Agreements
SACU	South African Customs Union
SADC FIP	Southern African Development Community Finance and Investment
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SAIIA	South African Institute of International Affairs
TRALAC	Trace Law Centre
TWAIL	Third World Approaches to International Law
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
UNESCO	United Nations Educational, Scientific, and Cultural Organisation
USA	United States of America

KEY TERMS

Africanisation; Reformation; Africa; African Union; Sustainable economic development and relations; Decolonisation; Foreign direct investment; Regional economic development; Continental economic development; African Union Investment Agreement

NKOMISO

Matiko yo tala eAfrika se mani ntshuxeko wa rihanyo. Kambe ntshuxeko wa ikhonomi kumbe swa timali na vuxaka exikarhi ka matiko ya Afrika awu se fikeleriwa. Mihlangano ya ma tiko ya Afrika yi kumeka eAfrican Union (AU). Swinwana swa xikongomelo swa mihlangano leyi I ku fikelela ntwanano, ku khomanana ni ntshuxeko eka swa timali. Afrkia yi kotile ku fikelela swinwana swa swikongomelo leswi, kambe ya ha tikeriwa hi ku fikelela ntshuxeko wa swa timali kumbe ikhonomi. AU yile kuringeteni hi matimba ku fikelela ntshuxeko lowu hiku veka swiyenge swo hambana-hambana. Kambe xiphiqo-nkulu a ku na xiphemu lexi xi nga tiyimela xi ri xoxe lexi xi nga langutana na timhaka ta vuvekisi eAfrika. Vuvekisi bya le matikweni mambe eAfrika byi voniwa ehansi ka mpfumelelano wa African Continental Free Trade Agreement (AfCFTA Agreement). Matiko lawa yanga le hansi ka Africa ma karhi male ku burisaneni leswaku ku vekiwa mpfumelelano lowu wu ngatava ehansi ka AfCFTA Agreement. Mpfumelelano/ntwanano lowu wu ta vitaniwa AfCFTA Agreement Investment Protocol. Na kambe AU yivekile xiboho xa Pan African Investment Code of 2016 (PAIC) ku yi kombisa vuleteri bya timhaka ta vuvekisi eAfrika.

Kuya hi leswi swinga tsariwa laha e henhla, xivutiso-nkulu hi lexi: Xana mintwanano ya AfCFTA Agreement na PAIC yita swi ta kota ku fikelela ntshuxeko wa swa timali na vuxaka kuya kuyile eAfrica? Vulavisisi-nkulu na xikongomelo swa dyondzo leyi i ku kuma ndlela yo pfala vangwa leri ri nga kona eAfrika. Leswi swi ta endliwa hi ku mpfampfarhuta no tsala mpfumelelano lowu wungata tsariwa hi tlhelo ra Afrika ra AU Investment Agreement. Mpfampfarhuto lowu wu ta tekela e nhlokweni ni ku tlhela wu veka matiko ya Afrika emahlweni loko swita e ka timhaka ta swa timali, ikhonomi na vuxaka.

Xivumbeko xa dyondzo leyi xa landzelerisa, na kona xi fambisa xi leswi: Xisungula hiku humesa e ri valeni xiphiqo, xivutiso-nkulu na swikongomelo leswi swinga khoma dyodzo leyi. Loko yi heta sweswo, dyondzo leyi yita nika matimu hi vu enti e ka swa vuvekisi emisaveni hinkwayo. Loko yi heta sweswo, yita nika xiga lexi ngata komba ku i khale Africa yi ngenelela timhaka ta vuvekisi na swa timali; naku a swi sungulanga loko valungu va fika eAfrika. Ndzhaku ka sweswo, dyondzo leyi yita languta laha Afrika yinga kona e ka nkarhi wa sweswi kuya hi swiyimo swa timali, ikhonomi na vuvekisi. Dyondzo leyi yi endla leswi hi xikongomelo xo komba vangwa na swiphiqo leswi swi

pfalaka ku humelela ka Afrika. Loko yi heta leswi, yita fananisa mipfumelelano ya Southern African Development Community Protocol on Finance and Investment of 2016 na PAIC. Leswi swi ta endliwa hi xikongomelo xo tsala mpfumelelano wa AU Investment Agreement lowu wu ngata pfala swiphiqo wa swa timali, ikhonomi na vuvekisi eAfrika.

SUMMARY

Many African states have now regained their independence, however, sustainable economic development and relations remain a dream. The African powerhouse is hosted at the African Union (AU) and it is aimed at achieving unity, cohesion, solidarity and economic freedom. To achieve this, it has put in place several international agreements. However, even though one of the main aims of the AU is to achieve economic independence, it still does not have a stand-alone binding AU Investment Agreement. Foreign investment at the AU level is currently regulated under the African Continental Free Trade Area Agreement (AfCFTA Agreement). The AU is currently negotiating the AfCFTA Agreement Investment Protocol. Furthermore, the AU has put in place the Pan-African Investment Code of 2016 (PAIC) which aims to provide a model and guidelines for regulating investment in Africa.

In light of the above, the question that begs for an answer is: Are the above reforms adequate to achieve sustainable economic development and relations in Africa? The study is centred around interrogating the gaps in the current African foreign investment framework with a purpose of charting the new reformed and Africanised AU Investment Agreement. To this end, the study encompasses a reformed, decolonised and Africanised approach which places African countries at the centre of its policy making and implementation.

The study is structured sequentially in that it identifies problem statement, legal questions, aims and objectives which are pillars of the whole thesis. The study then moves to provide a historically overview of foreign investment in Africa from the Global perspective. The study then moves to provide historical events which are aimed at debunking some of the prevailing notions regarding the emergence and evolution of foreign investment in Africa. Once Africa's history and its contribution to the development of foreign investment as a field of law has been put to the fore, the study shifts to the current foreign investment landscape. It does this in order to assess Africa's efforts and challenges that stand in its way of achieving sustainable economic development and relations. The study then compares the Southern African Development Community Protocol on Finance and Investment of 2016 and the PAIC with a purpose of charting the proposed Africanised and reformed AU Investment Agreement in order to deal with the challenges highlighted throughout the study.

CHAPTER 1

GENERAL INTRODUCTION

1.1 Background of the study

The number of international investment agreements (IIAs) concluded in the past decade has increased.[1] As a result, IIAs have been a subject of legal regulation by means of bilateral and multilateral agreements at regional, continental and global levels.[2] Since all African states are still developing, the conclusion of IIAs is encouraged on the African continent. African states thus have a duty to collectively contribute to the greater good of the continent. This Afro-centred approach arose after African states endured economic uncertainty and segregation for many decades.[3]

This economic uncertainty led African states to embark on investment liberalisation, market integration and harmonisation of their respective investment laws at the domestic, regional and continental levels through IIAs.[4] The move towards harmonisation of African investment was also motivated by cultural and historical ties or political preferences of African states.[5] In turn, intra-regional investments increased as a result of lifting investment restrictions such as the liberalisation of investment in particular industries, and the old model of investment that were linked to former colonial masters.[6]

Cooperation between states led to the creation and diversion of investment through restructuring within integrated groups.[7] These groups created investment mechanisms that were aimed at increasing investment flow in and outside the African continent. These include (1) Pan-regional projects aimed at increasing investment opportunities

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1 The number of international agreements concluded in recent past has increased rapidly see the Investment Policy Hub 'Global policy data' https://investmentpolicy.unctad.org/ (accessed 28 August 2019).

2 Asteriti Alessandra, 'Conflicts sources in international investment agreements' (2016) *A Working Paper: Research Gate* 2.

3 SAHO, 'African achievement and potential' http://www.sahistory.org.za/article/african-achievements-and-potential (accessed 18 June 2018).

4 Chidede Talkmore, 'The Right to Regulate in Africa's International Investment Law Regime' (2019) 20 Oregon Review of International Law 437.

5 Denters Erik and Gazzini Tarcisio, 'The role of African regional organisations in the promotion and protection of foreign investment' (2017) 18 *Journal of World Investment and Trade* 8468.

6 United Nations (UN), 'United Nations Conference on Trade and Development: Regional integration and foreign direct investment in developing and transition economies' (2012) 4.

7 *Ibid* 3.

and (2) the policy harmonisation, which encourages investment through the reduction of transaction costs, perceived risk and investment liberalisation provisions in IIAs.[8] To realise this new investment phenomenon, African states have attempted to reduce regulatory barriers applicable to foreign investment. They did this by concluding bilateral, tripartite and multilateral agreements.

However, the IIAs concluded by Africans have been criticised for being Eurocentric and failing to cater for the unique needs of the African continent.[9] This is because the current IIA regime is a product of negotiations which were aimed at advancing the Western powers.[10] For this reason, there is a need to introduce a new generation of IIAs which will Africanise economy on the African continent.

1.2 Problem statement

The challenge of multiple memberships in various economic blocs at the regional and continental levels has been the subject of debate in the past few years. Furthermore, there is an ongoing debate on how to structure the foreign investment landscape in a way that fully embodies African realities in achieving sustainable economic development *and relations*.

The historical signing of the African Continental Free Trade Area Agreement[11] (AfCFTA Agreement) on 21 March 2018 marked a momentous milestone for regulating trade and investment in Africa.[12] In implementing the AfCFTA Agreement, Africa is taking the previously trampled path of market integration from which it has achieved little success.[13] Articles 7 and 8 of the AfCFTA Agreement make provision for adopting a protocol that will deal with investment in Africa.[14] This is definitely a step in the right

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8 *Ibid* 4.

9 Laryea Emmanuel and Fabusuy Oladapo, 'African Countries and International Investment Law: Right to Regulate or Appropriate Regulation or Both?' (2019) 27 *Australasian Review of African Studies* 27.

10 *Ibid.*

11 African Continental Free Trade Area Agreement of 2019.

12 UN: Economic Commission for Africa, *Next Steps for the African Continental Free Trade Area: Assessing Regional Integration in Africa* (United Nations Conference on Trade and Development: Aria 9) 11.

13 De Melo Jaime, 'Regional trade agreements in Africa: Success or failure?' https://www.theigc.org/blog/regional-trade-agreements-in-africa-success-or-failure/ (accessed 02 July 2020).

14 The negotiations of the AfCFTA Agreement Investment Protocol have been delayed by the COVID-19 pandemic.

direction, however, if Africa is to accelerate its economic freedom, there should be a standalone African Union (AU) Investment Agreement.

Including an investment protocol in the AfCFTA Agreement may undermine the very same economic goals that Africa aims to achieve. The study argues that the regulation of investment in Africa should not be presented as an ancillary issue to trade. As one of the primary drivers of economy, investment in Africa should be regulated under a main instrument that specifically deals with issues of investment.

Furthermore, African states have opted to conclude IIAs at different levels. This has rendered the relationship between host states and various economic blocs a delicate one. They must balance their roles as regional, a continental and global economic player. While doing this, they must ensure that the continental investment integration agenda is development-focused and relevant at the global level while trying to uphold their national obligations. This can indeed be a difficult path for host states that are still developing.

The challenge of honouring multiple memberships is a major concern as conflicting interests and varying commitments may lead to many uncertainties in the implementation of IIAs.[15] These uncertainties may also lead to varying interpretations by dispute resolution bodies at different levels, especially in the absence of a clear choice of law or forum as per the investment agreement. In the end, the relationship between states may be strained. It is for this reason that the study emphases the need to not only focus on achieving sustainable economic development, but also achieving sustainable economic relations among African states.

Moreover, the multiple membership with various economic blocs directly affects host state's right to regulate in the public interest at the national level. Most IIAs focus on the right of foreign investors to be protected, and not on the impact of concluding

[15] For example, South Africa is a party to the Southern African Development Community Finance and Investment Protocol of 2016 (SADC) and the 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 of 2015 (COMESA-EAC-SADC Tripartite Agreement).

various IIAs with different obligations at various levels.[16] In this regard, Kapuya Tinashe was quoted saying that:

> We go on to sign these agreements at the regional and continental level[s] but the bottom basics have not been resolved. Many African countries sign these agreements without fully assessing the impact they will have on their commitments, which results in misalignment with their national policies.[17]

In the past few years, states have been reluctant to ratify new IIAs and some countries have denounced several existing IIAs.[18] An example of such reluctance can be found in the recently signed AfCFTA Agreement.[19] Nigeria and South Africa, the two economic giants on the African continent were initially reluctant from signing this instrument when it was launched in Kigali, Rwanda.[20] South Africa indicated that although it is committed to becoming a party to the treaty, legal requirements meant that there should be a review and consideration of the agreement in light of the South African Constitution[21] which requires that international agreements be considered first at the national level.[22] Nigeria averred that it wanted to protect local industries from cheap imports being dumped in that country by ensuring that it undertakes an extensive consultation process with stakeholders including states, local governments and trade unions and therefore could not sign until that process was concluded.[23] South Africa subsequently ratified the AfCFTA Agreement on 10 February 2019 while Nigeria only ratified it on 5 December 2020.[24]

The above-mentioned fears are not unfounded. While the continent as a whole may economically win, there will be countries, companies and individuals who may be negatively affected by IIAs. In recent past, host states have found themselves in

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16 It is important to note that the scope and limitation of the application of the right to regulate ultimately depends on the wording and objectives of the IIAs.

17 Tshwane Tebogo, 'African trade far from free' https://mg.co.za/article/2018-07-13-00-african-trade-far-from-free/ (accessed 03 March 2020).

18 On 16 August 2021, the AfCFTA Agreement was signed by 54 member states and ratifies by 31 member states.

19 The African Continental Free Trade Area agreement of 2015. The AfCFTA Agreement provides for an investment protocol, which will be finalised by 2020.

20 *Ibid.*

21 The Constitution of South Africa, 1996 (the South African Constitution).

22 This stems from section 231 of the South African Constitution.

23 Pan African Chamber of Commerce and Industry, 'Finally, Nigeria to ratify the AfCFTA Agreement' https://www.pacci.org/finally-nigeria-to-ratify-the-afcfta-agreement/ (accessed 03 March 2020).

24 TRALAC, 'AfCFTA Ratification Barometer' https://www.tralac.org/documents/resources/infographics/2605-status-of-afcfta-ratification/file.html (accessed 16 August 2021).

international investment disputes where foreign investors were challenging their right to regulate in the public interest, and arguing that their rights have been infringed.[25] African countries are the highest recipient of claims at the International Centre for Settlement of Investment Disputes (ICSID).[26] With 64 cases instituted against Argentina, it is the highest recipient of claims at the ICSID.[27] This is because the current IIAs regime leaves a little room for host states to regulate in the public interest. Another example can be found in the *Piero Foresti, Laura De Carli v Republic of South Africa* case (*Piero Foresti* case).[28] The *Piero Foresti* case illustrates the challenges faced by South Africa when it attempted to regulate in the national interest against the concluded IIAs.[29]

The study aims to ultimately interrogate the African international investment landscape in an attempt to find a balance in the IIAs that will serve both the host states and foreign investors. It purposes to do this by identifying gaps in the current regime, and debunking Eurocentric notions which adversely affect Africa's progress towards sustainable economic development *and relations* through an AU Investment Agreement. The study employs a decolonised and Africanised approach to balancing and regulating foreign investment in Africa.

1.3 Central research questions

25 To read more on this, see Mhlongo Lindelwa, 'Clash of laws? Testing the effectiveness of the national treatment principle against black economic empowerment laws in South Africa' (2021) 3:2 *Speculum Juris* 73.

26 Investment Policy Hub, 'Investment dispute settlement navigator: Countries' https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed 09 August 2021).

27 Investment Policy Hub, 'Investment dispute settlement navigator: Argentina' https://investmentpolicy.unctad.org/investment-dispute-settlement/country/8/argentina (accessed 09 August 2021).

28 The *Piero Foresti, Laura De Carli v Republic of South Africa* ICSID case No ARB (AF) /07/1.

29 This case dealt with the mining interests owned by a group of European investors namely, Foresti Piero and de Carli Laura who had investments in South Africa. South Africa found itself entangled with a challenge of balancing its sovereign right to regulate, and the need to avoid investment protectionism. Section 25 of the Constitution of South Africa guarantees a right to property, and the Government has an obligation to protect this right. It is undeniable that the right to regulate is moving towards the centre of the legal framework for foreign investment with a purpose of reducing negatives aspects while fostering the positive social, economic and environmental implications while protecting foreign investment.

Africa needs to revisit and revise principles that are related to foreign investment in order to assess the extent to which they align with Africa's sustainable economic development and relations.

The main research question of the study is:

(a) How can the AU structure and align foreign investment in order achieve its sustainable economic development and relations goals?

In order to answer the main research question, the following ancillary questions are posed:

i) What are the African epistemologies and historiographies that shaped and contributed to the development of international investment law?
iii) What are the challenges that Africa is facing in realising its sustainable economic development and relations as well as balancing the rights of foreign investors and host states?
iv) How can Africa Africanise, decolonise and reform its foreign investment landscape?
v) Is Africa ready for a continentally, binding and primary investment instrument, and if yes, how can such instrument be structured?

1.4 Aims and objectives of the study

The study aims to:

i) Problematise the prevailing Eurocentric approach to developing intra-African IIAs.
ii) Provide a de-colonial perspective of the historical events that shaped the international investment landscape in Africa.
iii) Interrogate the extent of the AU's and RECs' attempts to achieving economic freedom in Africa.
iv) To underscore the challenges caused by lack of a stand-alone and binding AU Investment Agreement.

v) Compare the SADC Financial and Investment Protocol of 2016 (SADC FIP) and the Pan African Investment Code of 2016 (PAIC) with a purpose of charting the proposed AU Investment Agreement.
vi) Reach a conclusion and make recommendations.

1.5 Literature review

Africa is a very diverse and homogenous continent with 55 countries and eight regional economic blocs.[30] These economic blocs have as one of their objectives, the regulation of foreign investment at different levels. Many African states are simultaneously members of two or more Regional Economic Communities (RECs).[31] These initiatives are good for the economic growth of the whole continent. It is generally accepted that IIAs can complement domestic investment protection and facilitate policies by ensuring a stable and predictable investment climate.[32]

International investment law is centred on a network of BITs and MITs at the global, continental and regional levels.[33] It is presumed that IIAs are for promoting growth and development with distinct rights and obligations. Denters Erik and Gazzini Tarcisio posit that the regional investment agreements among African states are more heterogeneous in terms of structure, purpose and content, as compared to the regional investment agreements with non-African states.[34] In this regard, they argue that the IIAs that African states conclude with non-African states are more balanced and sophisticated.[35]

Notwithstanding the above advantages of IIAs, several criticisms have generally been levelled against the traditional investment regime, namely: (1) That the current IIAs have been dominated and exploited through the mobilisation of Western powers, which

30 Africa is made up of the following RECs: SADC, EAC, COMESA, Arab Maghreb Union (AMU), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD), Economic Community on East African States (ECCAS) and Community of Sahel-Saharan States (CENSAD).

31 For example, the Republic of Tanzania and the Democratic Republic of Congo (DRC) members of the Southern African Development Community (SADC) and East African Community (EAC).

32 Zhan James, *Investment Policies for Sustainable Development: Addressing Policy Challenges in a New Investment Landscape* (Cambridge University Press 2013) 21.

33 This is achieved by the host state agreeing to provide certain guarantees and standards of protection to the foreign investors and their investments.

34 Denters Erik and Gazzini Tarcisio, 'The role of African regional organisations in the promotion and protection of foreign investment' (2017) 18 *Journal of World Investment and Trade* 452.

35 *Ibid.*

privileges the usurpation of economic resources on the African continent;[36] (2) that it relatively does not echo voices from the Global South;[37] (3) that it entrenches the imperial and capitalist interests of multinational corporations to the detriment of host states; and (4) that principles and obligations within IIAs generally overlap and conflict which makes it hard to implement.[38]

According to Carim Xavier, the anticipated implications of IIAs are *inter alia* that governments should attract foreign direct Investment (FDI) by providing strong protection to foreign investors, liberalise investment regimes, reduce and limit regulations and conditions, which will as a result realise the benefit of FDI.[39] However, the problem with this is that IIAs should not only benefit one party, but they are supposed to balance the rights and obligations of both parties. Therefore, it is important to balance the economic requirements of investors with the need for positively contribute to sustainable development in the host state.[40] The normative conflicts between the IIAs at different levels defuse their potential to positively contribute to sustainable development.

Brower Charles and Schill Stephan addressed and responded to a few criticisms related to legitimacy that affect decision-makers in their respective sovereign states. They first noted that various IIAs may lead to unpredictability and inconsistency which will in turn affect the application and interpretation of these IIAs.[41] They also noted that IIAs establish an asymmetrical legal regime that is detrimental to sovereignty of states.[42] However, they counter-argue that international investment law is much more

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36 Olabisi Akinkugbe, 'Africanisation and the reform of international investment law' (2021) 53:1 *Case Western Reserve Journal of International Law* 13.

37 *Ibid.*

38 See Linarelli John *et al, The Misery of International Law: Confrontations with Injustice in the Global Economy* (Oxford University Press 2018) 5; Schneiderman David, *Resisting Economic Globalisation: Critical theory and international investment law* (Palgrave Macmillan 2013) 1-2; see generally Sornarajah Muthucumaraswamy, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015).

39 Carim Xavier, 'International investment agreements and Africa's structural transformation: A perspective from South Africa' (2015) *South Centre Investment Policy Brief*' https://www.southcentre.int/wp-content/uploads/2015/08/IPB4_IIAs-and-Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf (accessed 21 March 2019).

40 *Ibid.*

41 Brower Charles and Schill Stephan, 'Is arbitration a threat or a boon to the legitimacy of international investment law?' (2009) 9:2 *Chicago Journal of International Law* 474.

42 *Ibid.*

nuanced and balanced, both with regard to its substance and its procedural implementation.[43]

Generally, foreign investment reformation foreground innovative aspects of IIAs in contrast to the traditional foreign investment law regime.[44] From an African context, scholars agree that the current foreign investment regime in Africa does not take into account the unique issues of African states, and thus is in need of reformation. However, the fundamentals and methods of achieving economic freedom in Africa is a subject of debate. In this regard, there are two prominent approaches regarding the reformation of investment on the African continent; namely, radical Africanisation and moderate Africanisation of IIAs.[45]

Radical Africanisation of IIAs entails an ambitious reformation agenda 'where the regime is less substantively captured by Western or transnational capital interests'.[46] This type of Africanisation inhibits the spread of Western domination, and an overreach of FDI that constrains the legislative space in host states.[47] A tenacious pursuit of an agenda for radical Africanisation of IIAs would usher in a new international economic order that integrates Africa's and the Global South's interests on their own terms.[48] However, this approach does not take into account the positive efforts that are already in place. It advocates for a complete overhaul of IIAs on the African continent, whether good or bad.

Moderate Africanisation of IIA entails expunging those principles that do not align with Africa's sustainable economic development and relations.[49] If well structured, moderate reformation of IIAs can eliminate the neoliberal model, and as such ensures that African countries have economic and policy control of their respective state. A moderate pursuit of Africanisation of IIAs will bring about new international economic order by changing the adverse Western principles of IIAs. Practically speaking, this

43 *Ibid*.
44 Olabisi Akinkugbe, 'Africanisation and the reform of international investment law' (2021) 53:1 *Case Western Reserve Journal of International Law* 7.
45 *Ibid* 13.
46 *Ibid.*
47 *Ibid* 12.
48 *Ibid.*
49 *Ibid.*

approach is easier to implement, as only those principles that do not work will be done away with. For this reason, the study is in favour of the moderate Africanisation of IIAs.

Jiboku Peace argues that it is critical to be aware of the complexity involved in the ideological dynamics and political economics of African regionalism. He suggests the theories of functionalism, neo-functionalism, and neo-realism as instruments for analysing significant economic and political concerns in Africa.[50] The functionalist theory is an approach against power-politics and state-centeredness in international relations.[51] These dynamics, it claims, lead to conflicts and wars in the international system, as states fight to accomplish their diverse and competing national interests while also defending and maintaining their sovereignty.[52] According to him, the first theory is functionalism, which advocates for conditions that promote peace and prevent state disharmony.[53]

Neo-functionalism, which evolved from functionalism is the second theory. It embraces the functionalist notion that national government authority erodes over time as people shift their allegiances to supranational authorities.[54] It is not, however, limited to enhancing policy collaboration in specific economic or technological functional areas.[55] It employs a political approach by pointing out that in the process of integration, concerns of sovereignty and frequent confrontations among nations are inescapable.[56] When there are national interests at odds, long-term cooperation is certain to fail.[57]

The neo-realism theory is the final one. States are the primary participants in the international system, according to this viewpoint.[58] As a result, national interests are essentially the determinants of foreign policy objectives that states pursue competitively in the international system.[59]

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50 Jiboku Peace, 'The challenge of regional economic integration in Africa: Theory and reality' (2015) *Africa's Public Service delivery and Performance Review* 10.
51 *Ibid.*
52 *Ibid.*
53 *Ibid.*
54 *Ibid* 12.
55 *Ibid.*
56 *Ibid.*
57 *Ibid.*
58 *Ibid* 15.
59 *Ibid.*

Looking at these theories, one can argue that states are inclined to participate at the international level if such participation will benefit them.[60] The truth is that Africa is yet to fully benefit from FDI initiatives that have been concluded thus far. Thus moderate Africanisation would achieve sustainable economic development and relations by building institutional strength to effectively negotiate and implement intra-African IIAs.

1.6 Justification and limitation of the study

1.6.1 Justification and significance of the study

The subject of Africanising and decolonising international investment law, and in contrast, the lively discussions on IIAs and policies in Africa on changing the African investment landscape is limited. At best the current debates focus on the currently negotiated AfCFTA Agreement Investment Protocol. However, as said above, the study argues for an AU investment instrument that is not ancillary to a trade instrument. Furthermore, the interrogation of multiple investment agreements at different levels from an African perspective remains relatively low. Much of what has been written focuses on the protection of investment and the role or benefits of IIAs in general without linking them to the unique structure of African states.[61] There is a need to review the content of IIAs so that they comprehensively address the IIA regime's challenges in a holistic manner.

Therefore, the study is primarily motivated by the lack of a centralised investment Agreement in Africa. The study argues for inclusiveness of various role players such as the negotiation and implementation of intra-African investment agreement. This is because when redeveloping and restructuring economic programmes and strategies to effect transformation, public participation should be at the centre of intra-African investment. The study is particularly relevant to the whole continent, and the findings

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60 From the South African context, Saurombe Amos argues that the regional obligations have the power to 'brain drain' South Africa. As a result, South Africa has suffered at the hands of other attractive destinations like Europe, Australia, New Zealand, Canada and USA. South Africa has lost 25% of its graduates to the USA alone.

61 See Segal Ilya and Whinston Michael, 'Exclusive contracts and protection of investments' (2002) 31:4 *RAND Journal of Economics* 603-633; See also Diaz-Bonilla Eugenio, 'Thinking inside the boxes: protection and investments in the development and food security boxes' (2003) *Conference Paper presented at the International Conference Agricultural policy reform and the WTO: Where are we heading?* 1-39; See further Akinsany Adeoye, 'International protection of direct foreign investments in the third world' (1989) 36:1 *International and Comparative Law Quarterly* 58-75.

are likely to attract the interest of states, investment policymakers, foreign investors in Africa and African people as a whole.

From a non-African perspective, the study will ensure that states and foreign investors from the global South understand where Africa is heading in terms of regulating foreign investors. This will ensure that when considering entering into an investment agreement or investing in Africa, every stakeholder understands the direction that Africa is heading and what that means for the concluded agreement or investment.

1.6.2 Limitation of the study

The study is undertaken from an African perspective. As such it interrogates how a stand-alone and a binding investment agreement may benefit the African continent. It is by design all-encompassing as it looks at various foreign investments at regional and continental levels. This will highlight the challenge of multiple and conflicting obligations that African states face when trying to regulate in the public interest. In this regard, the study uses as well as compares the SADC FIP and the PAIC as main instruments for charting the proposed AU Investment Agreement.

Since this study is undertaken from an African perspective, IIAs at the global will only be discussed to bring to the fore historical events which shaped and influenced international investment law as we have come to know it today. This is to highlight how Africa ended in this difficult situation of needing to reform its international investment landscape. In this regard, the study will draw from relevant readily available and accessible literature.

The limitation of the scope of this study is further necessitated by the research question and objectives of the study. The study only focuses on the substantive side of international investment law, and for this reason, investment dispute resolution mechanisms will not be covered in this study. The study will also not look at particular domestic investment laws of any AU member states, as this needs a separate detailed study, and will unreasonably broaden the scope of this study, which fall outside the problem statement and research questions identified.

1.7 Overview of chapters

Chapter 1 provides a background and overview of the study. It contains the problem statement, research question and the objectives of the study. It also contains a road map of the entire thesis.

Chapter 2 contextualises the analysis of international investment law by looking at the global foreign investment landscape. It does this by discussing various historical events that shape what we know as international investment law today.

Chapter 3 sets out the historical development of foreign investment law in Africa from the pre-colonial era until the demise of the OAU.[62] This chapter deals with regional and continental attempts to regulate foreign investment in Africa during the pre-colonial era, colonial era and post-colonial era (which in terms of this study, ended with the dissolution of the OAU in 1999).

Chapter 4 introduces the new era in the African international investment landscape which came through the AU in 1999. It outlines various legal instruments and projects that have been put in place to advance economic development under the AU. This chapter also looks at various challenges that hinder Africa's progress to sustainable economic development and relations.

Chapter 5 compares the provisions of the SADC FIP and the PAIC in order to chart the proposed recommended AU Investment Agreement. The reason why these two legal instruments are used in this study is that they are considered to be the most innovative multilateral investment agreement by far in Africa. While comparing the two instruments, this chapter further recommends if provisions of the two instruments are in line with where Africa is headed economically. Where the study disagrees with either of the instruments, it proposes new provisions which can be included in the proposed AU Investment Agreement.

Chapter 6 is the penultimate chapter and continues with the recommendation of provisions that can be included in the proposed AU Investment Agreement. However, unlike chapter 5, this chapter includes provisions which are not in the SADC FIP or the PAIC.

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62 The OAU Charter was adopted in 1963.

On the premise of the issues identified throughout the study, chapter 7 concludes with summary of chapters and a set of recommendations.

1.8 Research methodology

The methodology applied in this study is qualitative in nature. This is a desktop study. The study will to a certain extent, employ a historical and comparative research. Drawing primarily on existing literature, the study will utilise a holistic body of data comprising mainly of primary sources such as investment treaties, case law and legislation.

The study will refer to both old and contemporary textbooks and journal articles in the fields of international investment law as well as international economic law. It will also rely on policy documents and declarations. The secondary sources to be used in the study include theoretical literature, critiques and discussion papers, and where applicable, media reports. Literature and source information such as electronic journals, and websites of international and regional organisations will also be consulted in this study.

The study follows a sequential approach in analysis the literature dealing with international economic law issues from the precolonial era until the current era. Chapters 1 to 4 of the study employ an analytical, descriptive and conceptual research methodology. Chapter 5 focuses on evaluative, comparative and prescriptive research methodology. Chapters 6 and 7 adopt a prescriptive research methodology. Each chapter of the study takes an explanatory approach to analysing the literature before concluding the chapter.

1.9 Ethical issues

The study is largely desktop based, and the researcher has obtained ethical clearance required for a desktop academic research.

CHAPTER 2

PREVAILING NOTIONS ON THE EVOLUTION OF INTERNATIONAL ECONOMIC LAW: A EUROCENTRIC APPROACH

2.1 Introduction

Understanding the evolution of foreign investment law as a field of law requires an understanding of historical events. This is due to the fact that present foreign investment law is the result of a long-term organic historical process.[1] Changes in investment policy patterns are likely to affect the contemporary foreign investment landscape throughout the globe. This chapter aims to underscore the importance of developing foreign investment rules in such a way that they are flexible enough to accommodate the varying level of development of African states and their changing economic space at all levels.

This chapter lays a background and contextualises the study by providing definitions of key terms in foreign investment law.[2] It also narrates the historical events that shaped this field of law. Thereafter, the chapter looks at the principles of and theories that lie at the foundation of foreign investment law. Finally, the chapter discusses the international minimum standard of treatment. It is undeniable that the historical events related to the foreign investment law have shaped the content and scope of modern IIAs. Due to the role played by customary international law, a discussion of the effectiveness of IIAs in Africa should commence with a review of the global investment legal regime.

2.2 Economic theories on foreign investment

Over the past few years, scholars and writers have been debating the role of foreign investment in the host state. There are varying and opposing schools of thought on the role that foreign investment plays in host states, and whether they have a potential to tremendously boost their economies. These schools of thought have shaped the legal attitude towards foreign investment. Policy makers in the field of foreign investment law are now questioning the role of foreign investment when negotiating IIAs. One may

1 Subedi Surya, *The Law of Investment Treaties* (Oxford International Law Library 2010) 79.
2 These legal terms generally form part of many IIAs that have been concluded.

therefore ask if from an African perspective, it is worth it to admit foreign investment into the host state taking into account the amount of sacrifices developing countries have to make for foreign investors and their investments.

There are varying answers to this question. The first one is that there is nothing wrong with protecting foreign investment since host states derive benefit from these investments, and therefore, the current investment legal framework should not be changed. The second one is that even though foreign investment is beneficial to host states, the current investment legal framework is imbalance against host states, and should therefore be reformed while keeping some of its positive features.

The study focuses on three economic theories of investment, namely, the classical theory and the dependence theory as well as the contemporary 'hybrid theory'.[3] The classical theory advocates that foreign investment is beneficial to the host state, and as such foreign investors should have high protection of their rights;[4] while the dependence theory is premised on the notion that if states are to achieve economic freedom they should not wholly depend on foreign investment. The 'hybrid theory' advocates for a balance between the rights of foreign investors and those of host states. The study advocates for the 'hybrid theory'. In this regard, it argues that if there is a substantial balance between the rights of host states and those of foreign investors, then both stakeholders may benefit from foreign investment. At this juncture, it is important to note that the below theories have been developed from the Marxist theory by Karl Marx which puts primacy of economic distinctions and class struggle as part of the course of human events.[5]

2.2.1 The classical Marxist theory in international investment law

The argument in terms of the classical Marxist theory in international investment law is that foreign capital brought into the host state ensures that there are resources that

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3 Sornarajah in his book titled *International Law on Foreign investment* terms the hybrid theory 'middle path'. However, this study maintains the term hybrid theory.

4 Subedi Surya, *The Law of Investment Treaties* (2010) 60-61.

5 To read more on the Classic Marxist theory see Milios John, 'Social Classes in Classical and Marxist Political Economy' 59:2 *The American Journal of Economics and Sociology* 283-302. See also Choonara Joseph, 'Class and Classical Marxist Tradition' in *Considering Class: Theory, Culture and the Media in the 21st Century (*Brill: Studies in Critical Social Sciences 2017) 13-30.

can be used for public benefit.[6] This view has to a certain extent influenced policy makers in the field of foreign investment and as a result many IIAs are imbalanced since the view is that foreign investors should be fully protected as they contribute immensely to the economy of host states. The problem with this is that the IIAs tend to be skewed against host states in a bid to attract foreign investment. This is one of the reasons why the promotion and protection of foreign investment has found itself in the majority of modern IIAs.

An example can be found in Article 3 of the South Africa-Zimbabwe BIT of 2009.[7] This provision espouses that host states should accord foreign investors of member states a treatment not less favourable than that which it accords to its own investors or to investors of any third-party state. Another example can be found in the *Amco v Indonesia*[8] case where the tribunal asserted that 'to protect investment is to protect the general interests of development and developing countries'.[9] Even though this case is more than three decades old, some modern scholars still hold this view. According to Brower Charles and Schill Stephan, what should not be forgotten in this argument is that countries benefit from increasing foreign investment flows.[10]

Other scholars have taken the debate further and argued that only developing countries may benefit from foreign investment. Hyde James posits that IIAs in developing countries promote economic development as opposed to IIAs in developed states.[11] These sentiments insinuate that foreign investors should be treated with seniority since they contribute to the economic development of host states. This view cannot hold water since a balance is needed because the rights of host states cannot be ignored. This undermines the very same objectives that foreign investment law seeks to achieve. In truth every country needs foreign investment to achieve some of its economic development goals.

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6 *Ibid*.

7 Article 3 of the South Africa-Zimbabwe BIT of 2009 focuses on treatment of foreign investors. It contains, the national treatment, FET, MFN standards.

8 *Amco v Indonesia* 1984 ICSID Case No ARB/81/1.

9 *Ibid* para 23.

10 Brower Charles and Schill Stephan, 'Is arbitration a threat to or a boom to the legitimacy of foreign investment law?' (2009) 9:2 *Chicago Journal of International Law* 496. See also Yira Ayala, 'Restoring the balance in bilateral investment treaties: Incorporating human rights clauses' (2009) 32 *Revista De Derecho, Universidad Del Norte* 139-161.

11 Hyde James, *Economic Development Agreements* (Hague Recueil 1962) 105. See further *Revere Cooper and Brass Inc v OPIC* (1978) 56 ILR para 258.

The UNCTAD in its 2004 Key Issue Series,[12] while appreciating the need to align IIAs with national laws, polices and measures, maintained that foreign investment is still the main economic driver. In this regard, it averred that foreign investment liberalisation:

> Involves the gradual decrease or elimination of measures and restrictions on the entry and operations of firms, especially foreign ones; the application of positive standards of treatment with a view to the elimination of discrimination against foreign enterprises; and the implementation of measures and policies seeking to promote the proper operation of markets.[13]

The classical Marxist theory has influenced the development of many principles of foreign investment law which are geared towards promoting and protecting foreign investment.[14] As a result, this idea has shaped the perception of foreign investment as a tool for serving sectional global interests as evidenced by the history of this field of law.[15] Fair and equitable treatment (FET) and national treatment are two examples of such ideas. These principles are intended to protect foreign investors' rights in host countries. They are commonly found and embraced in various IIAs at different levels.[16] It further allows a foreign investor to lay a claim directly against the host state should the latter infringe the foreign investor's rights.

The classical Marxist theory evolved into foreign investment law, which is aimed at regulating economic relations between states and protect foreign investment. However, since this theory is aimed at largely protecting foreign investment, this has created an imbalance between the right of states to regulate and those of foreign investors to be protected. When this theory is applied, foreign investors have many rights which are not accompanied by obligations, while host states have endless obligations towards foreign investors. Some of these rights of foreign investors commence even before an investment is established in the host state. Lately, many policy makers, scholars and other stakeholders have been calling for a departure from this theory.

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12 UNCTAD, 'International investment agreements: Key issues' UNCTAD/ITE/IIT/2004/10 (UNCTAD: International investment agreements: Key issues) 1.

13 *Ibid.*

14 Chimni Bhupinder, 'Marxism and international law: A contemporary analysis' (1999) 34:6 *Economic and Political Weekly* 337-338.

15 *Ibid.*

16 Refer to heading 2.6 below in this chapter.

2.2.2 The dependence theory

Unlike the classical theory, the dependence theory maintains that a state should not depend fully on foreign investment if it wants to achieve economic development.[17] The basis of this theory is that the majority of foreign investment is made by multinational corporations which have their headquarters in developed countries, and operate through subsidiaries in developing states.[18] The argument is that, despite operating on territories of host countries, they are there to serve the interests of foreign investors and their developed home countries, where their headquarters are located.[19]

The hegemonic view of the dependence theory is that foreign investment is dominated by developed states who impose their power on weaker developing states.[20] As a result, development through foreign investment becomes impossible unless host states can break out of the situation which ties them to the peripheral economies.[21] If they fail to break out, this may keep the developing host state in a permanent position of dependency.[22] During the colonial years, the colonisers created rules which at first appeared to be favourable for everyone involved, however, further analysis of these rules revealed that they actually benefited developed states more than developing states.[23] This was mainly due to the fact that the needs of a developing state and those of a developed state differ fundamentally in substance.

In addition to the principles under the international minimum standards of treatment (IMST), the dependence theory has over the years influenced, *inter alia*, the development of the following principles at the international level: Sovereignty, autonomy, environmental protection and the right of states to regulate.[24] Countries have sustainable economic development and relations goals. Since the argument is

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17 Peet Richard and Hardwick Elaine, *Theories of development: Contentious, Arguments, Alternatives* (Guilford 2009) 188-194; See Amin Samir *Unequal Development: An Essay on the Social Formation of Peripheral Capitalism* (Harvester Press 1976); See further Amin Samir, *Obsolescent Capitalism: Contemporary Politics and Global Disorder* (ZED Books 2003).

18 Sornarajah Muthucumaraswamy, *International Law on Foreign investment* (Cambridge University Press 2017) 67.

19 *Ibid*.

20 Brower Charles and Schill Stephan, 'Is arbitration a threat to or a boom to the legitimacy of foreign investment law?' (2009) *Chicago Journal of International Law* 473.

21 *Ibid.*

22 *Ibid.*

23 This topic is discussed in chapter 2 below.

24 These principles are discussed in detail throughout the study.

that the host state does not derive economic development exclusively from foreign investment, the dependence theory embraces these principles as they are aimed at protecting the host states.

Furthermore, African states have been and continue to be recipients of foreign assistance since they *regained* their independence.[25] To leave this state of dependency, Africa needs to Africanise and reform its economic policies. This Africanisation and reformation of economic policies in general and investment in particular will strengthen and assist in achieving sustainable economic development and relations.

2.2.3 The hybrid theory

The common thread between the two preceding theories is that they are both intended to boost economic development. However, the basis and method for achieving this goal differs tremendously. It is undeniable that the development of foreign investment law was influenced and guided by how IIAs were interpreted and applied.[26] This means that if the interpreter believed that the aim of a treaty was to protect foreign investment, then an interpretation leaning towards this view would be preferred. Similarly, if the interpreter believed that the objective of a treaty was to promote economic development, the interpretation process would gravitate towards that direction.

The hybrid theory balances the classical and dependence theories in that both the foreign investor and the host states have rights and obligations. Host states have duty to regulate[27] in the public interest within their territories while protecting and promoting foreign investment.[28] Foreign investors also have obligations which include *inter alia* to respect the national laws of the host state, and to ensure that host states also benefits from an investment.[29] Policy makers in the foreign investment space have now

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25 Kwemo Angelle, 'Making Africa great again: Reducing aid dependency' https://www.brookings.edu/blog/africa-in-focus/2017/04/20/making-africa-great-again-reducing-aid-dependency/ (accessed 04 March 2020).

26 Sornarajah Muthucumaraswamy, *International Law on Foreign investment* (2017) 60-61.

27 In so regulating, the host state's actions are geared towards development of domestic economic climate.

28 Reinisch August, *Standards of Treatment Protection* (Oxford University Press 2008) 155.

29 *Ibid.*

realised that it is not realistic for foreign investors to not have obligations.[30] This is a new phenomenon, however, it is likely to gain popularity among modern policy makers.

The elements of the hybrid theory are well suited to tackle the ever changing economic conditions of the host state. In essence, this theory is flexible enough to allow foreign investment to strive in the host state, while narrow enough to ensure that the host state does not lose its power to regulate in accordance with the needs of its society. In this way, the role of other stakeholders is recognised. The hybrid theory embraces the protection of both the foreign investor and the host state which makes it the preferred method of regulating foreign investment.

2.3 The hierarchy of international investment agreements and how they affect implementation thereof

A treaty is one of the legal vehicles that regulates foreign investment law.[31] It establishes the parameters for interpreting and applying international law instruments. Treaties may be broadly divided into three categories, namely, contractual, legislative and constitutional.[32] A contractual treaty is an agreement between two or more countries that governs matters such as trade, investment, extradition, airspace, landing rights, and mutual defence. This type of treaty's goal is to establish a specific legal relationship between contracting parties.[33] A legislative treaty, unlike a contractual treaty, codifies existing norms of customary international law or establishes new rules of law that are binding on contracting nations.[34] Constitutive treaties establishes international legal bodies.[35]

International organisations like the United Nations (UN) are created by multilateral treaties such as the UN Charter which serves as a constitution of the UN.[36] From an African perspective, the AU Constitutive Act is an example of a constitutive treaty. A

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30 For an example of an IIA that incorporated the foreign investor's obligations, refer to the Preamble of the Nigeria-Morocco BIT.

31 Article 2(1)(a) of the Vienna Convention on the Law of Treaties of 1969 (VCLT) defines a treaty as 'an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

32 Dugard John *et al, Dugard's International Law: A South African Perspective* (Juta 2018) 29-30.

33 *Ibid.*

34 *Ibid.*

35 Strydom Hennie (ed), *International Law* (Oxford University Press 2020) 76-77.

36 *Ibid*.

treaty is founded on consent of the parties and binding only on states which are party to it.[37] For a state to become a party to a treaty, it must demonstrate its willingness to undertake the legal rights and obligations contained in a treaty.[38] Such state must express, through a concrete act, its consent to be bound by a particular treaty.[39] In the case of *S.S Lotus* (*France v Turkey*)[40] the Permanent Court of International Justice (PCIJ) emphasised consent as the basis of international law and international relationship.[41] The PCIJ held that the rules of law binding upon states emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.[42]

The issue relating to hierarchy of treaties has been the subject of debate in recent years. The Vienna Convention on the Law of Treaties of 1969 (VCLT) does not contain a formal hierarchy of treaties save for the UN Charter which trumps all other treaties.[43] The VCLT has codified rules relating to resolving conflicts of treaties in Article 30. This provision deals with conflicts of treaties relating to the same subject-matter. The following guidelines have been provided by the VCLT: (1) When a treaty states that it is subject to, or that it is not to be regarded as incompatible with, an earlier or later treaty, the provisions of that other treaty will take precedence.[44] (2) When all the parties to the earlier treaty are also parties to the later treaty but the older treaty is not terminated or suspended in operation under Article 59 of the VCLT, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.[45] (3) The treaty to which both states are party determines their mutual rights and duties when the parties to the later treaty do not include all of the parties to the older treaty.[46]

However, the normative framework of Article 30 of the VCLT applies only in defined instances with the same subject matter. The VCLT sets forth cannons of treaty

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37 *Ibid.*
38 UN, *Final Clauses of Multilateral Treaties Handbook* (United Nations Publication 2003) 34.
39 See Articles 11-15 of the VCLT for different way of consenting to a treaty.
40 The *S.S Lotus (France v Turkey) PCIJ Series A,* No.10 (1927).
41 PCIJ is the predecessor of the International Court of Justice (ICJ) and was provided for in the Covenant of the League of Nations. It held its inaugural sitting in 1922 and was dissolved in 1946.
42 The *Lotus (France v Turkey* case) para 18.
43 See Article 30 of the VCLT; See further Article 103 of the UN Charter.
44 *Ibid* Article 30(2)).
45 *Ibid* Article 30(3).
46 *Ibid* Article 30(4).

interpretation, general rules of treaty operations as well as means of avoiding and resolving potential disputes.[47] Its application is based on the hierarchy of treaties and how global, regional and domestic laws organically relate with each other. The question that begs for an answer is: If the VCLT makes provision to deal with hierarchy of treaties, why do states still struggle with the issue of overlapping treaties?

The issue of hierarchy of treaties in general and IIAs in particular directly affects how they may be successfully implemented. Since the previous generations of IIAs were largely one sided, host states generally struggled to have sufficient economic control within their respective states, and the hierarchy of treaties brings another challenge to the fore. If a state has concluded an IIA (most specially the previous generations of BITs) which do not cater for its unique needs, but such IIA is higher in the hierarchy of treaties, host state may struggle to sufficiently benefit from IIAs.

In addition, foreign investment operates within the parameters as contained in a particular IIA. The law and IIAs have been developed in the context of protecting and promoting foreign investment.[48] The idea that formed the basis for the genesis of international investment law was that if a host state failed to treat a 'alien' in accordance with a minimum standard of treatment, the host state would be held liable.[49] This standard of treatment was also extended to the foreign investor's physical property. However, the law only protected the tangible assets of the foreign investor from governmental interference by the host state.[50] This meant that the application of this rule was relatively narrow as only physical dispassion was necessary.

One can argue that the VCLT focuses on the conflicting subject matter, and not conflict with regard to international agreements. The practice in the past years has been that states put in place international blocs and these organisations have powers to conclude treaties. In the foreign investment law context, the majority of IIAs are currently concluded by international economic blocs. The truth is that the VCLT was drafted before the modern development of the modern IIA regime; and its flaws make

47 Borgen Christopher, 'Resolving treaty conflicts' (2005) 37 *George Washington International Law Review* 576.
48 *Ibid.*
49 Subedi Surya, *International Investment Law: Reconciling Policy and Principle* (2012) 78.
50 *Ibid.*

it difficult to meet the needs and nuances of state practices. It is for this reason that this study was undertaken.

Furthermore, in addition to the issue of hierarchy of treaties, is the definition of an investment which adds another challenge that affects the implementation of IIAs. At the global level, the Uruguay Round introduced an 'investment' dimension to multilateral trade regulations.[51] Over the years, the definition of investment has progressed to two approaches, namely, the open-asset based[52] and the close-asset based[53] schools of thought. The open-asset based school of thought includes many assets, such as enterprises, shares, debentures, mergers and acquisitions by an enterprise, and movable as well as immovable property.[54]

The open-asset-based definition of investment is wider and inclusive in nature.[55] This approach implies that a treaty that includes all types of assets in the definition of an investment may at times be incompatible with a state's development policy while the IIA is in effect.[56] The closed-asset based school of thought contains a closed list of covered assets, and further requires that the investment must be in accordance with the laws of the host state.[57] This type of an investment is narrow in nature, more controlled, enterprise-based and physical presence of the asset in the host state is a

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51 OECD, 'Directorate for financial and enterprise affairs' (2004) *Working papers on foreign investment Number'* 1.

52 For an open-asset based definition of an investment, see Article 1 of Cameroon-Mauritius BIT of 2001.

53 For a closed-asset based definition of investment refer to the Morocco-Nigeria BIT of 2016.

54 See Article 1 of the South Africa-Zimbabwe BIT of 2009.

55 Strik Philip, *Shaping the Single European Market in the Field of Foreign Direct investment* (Hart Publishing 2014) 140-141; Article 1(a) of the Ecuador-United Kingdom BIT of 1994 contains a broad definition of investment**.** In terms of this provision, investment means every kind of asset and in particular, though not exclusively, includes:
(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
(ii) shares, stock and debentures of companies or interests in the property of such companies;
(iii) claims to money or to any performance under contract having a financial value;
(iv) intellectual property rights and goodwill; and
(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

56 UNCTAD Series: International investment agreements: Flexibility for development 70.

57 For the close-asset-based definition of investment, see Article 1 of the Ethiopia-South Africa BIT 2008.

requirement.[58] The approach in relation to the definition of investment that one chooses generally depends on the intended goals by member states.

The objective of definitions in IIAs is to establish the object and scope of the rules that apply to a particular instrument.[59] Thus, they are included in the instrument's normative content.[60] The scope of an IIA's application is determined by the definition of specific terms, most notably an 'investment'.[61] This definition establishes which investments are covered by the provisions of the agreement and those that are not.[62]

It is notable that without the definition of investment, the objectives of the IIAs in relation to coverage of investment issues would be defective. The IIAs define investment in order to provide the types of investments that are protected through their provisions. For this reason, definitions of an investment differ according to the purpose for which they are intended to be used. IIAs may contain a broad or narrow definition of an investment. As a result, states differ with regard to the definition of an investment, and ultimately such definition depends on the intention of the parties, and the purpose of the particular IIA.

The drafters of the ICSID Convention did not define investment. There have been attempts to test the scope and reach of the definition of an investment.[63] The first case to test the scope and limits of the definition of an investment was *Fedax NV v The Republic of Venezuela*.[64] However, the *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* (*Salini* case)[65] took the assessment further. The Tribunal laid down four elements (the *Salini* test) for the definition of investment: (1) A contribution

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58 Article 1(a) of the Germany-Israel BIT of 1976 contains a narrow definition of investment. It provides that **t**he term investment means, as the context may require, either investment in an enterprise involving active participation therein and the acquisition of assets ancillary thereto.

59 UNCTAD, 'International investment agreements: Flexibility for development' UNCTAD Series /ITE/IIT/18 2000 (UNCTAD Series: International investment agreements: Flexibility for development) 70.

60 *Ibid.*

61 UNCTAD, 'Key terms and concepts in IIAs: A glossary' (2004) *UNCTAD Issues Paper Series)* 94.

62 UNCTAD Series: International investment agreements: Flexibility for development) 70.

63 Grabowski Alex, 'The definition of investment under the ICSID Convention: A defence of *Salini'* (2014) 15:1 *Chicago Journal of International Law* 287-309.

64 *Fedax NV v The Republic of Venezuela* ICSID Case No ARB/96/3 para 29.

65 *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID case No ARB/00/4 (*Salini* case).

of money or assets; (2) adequate duration; (3) an element of risk; and (4) a contribution to the economic development of the host state.[66]

The Tribunal in the *Phoenix Action Ltd v Czech Republic*[67] noted that there were divergent views on the last requirement in the *Salini* test.[68] To this end, the Tribunal found that it is hard to determine the contribution of an international investment to the growth of the host state, especially when there are widely divergent views on what constitutes development.[69] The Tribunal decided to lay down its own criteria for investment that would be protected under the ICSID Convention. These are the criteria: (1) A monetary contribution or other assets contribution; (2) a specified period of time; (3) a risk element; (4) an operation that grows and develop an economic activity in the host state; (5) assets invested in compliance with the laws of the host state; and (6) assets invested in good faith.[70] The Tribunal in the case of *Quiborax v Bolivia,*[71] held that even though the ICSID Convention aspires to promote economic development through foreign investment, such development is not a requirement that should be included in a definition of an investment.[72]

The study argues that the 'contribution to the economic development of the host state' should be maintained when assessing if there exist a foreign investment in the host state. To a certain extent, foreign investment limits a host states control over its economy. Therefore, this requirement ensures that foreign investors do not establish investments which do not positively contribute to the economic development of host states, but instead exposes host states to liability. This will further ensure that foreign investors do not set up investments in host states with a sole purpose of controlling the economy of the host state as seen in the classical Marxist theory of foreign investment above.

In fact, contribution to the development of host states should be included in the obligations of foreign investors towards host states under IIAs. The enduring hierarchy of treaties has allowed the selective and creative use of IIAs for the benefit of those

66 *Salini* case para 83.
67 *Phoenix Action Ltd v Czech Republic* ICSID Case No ARB/06/5 *(Phoenix* case*).*
68 *Ibid* para 84.
69 *Ibid* para 85.
70 *Ibid* para 114.
71 *Quiborax v Bolivia* ICSID Case No ARB/06/2 (*Quiborax v Bolivia* case).
72 *Ibid* paras 106 and 129.

who are at the top of economic ladder to the detriment of those on the lower end. Previous generations of BITs were used as a replacement for colonial rules for the protection of capital.[73] Consequently, African states are now gearing up to change the status quo of foreign investment.

2.4 An African perspective of Western historical events that contributed to the development of the modern foreign investment law

Modern foreign investment law as we have come to know it today is a product of a historical process that has passed through different phases of development. In order to understand the challenges, the gaps and prospects in this field of law, it is therefore imperative to go back in time and deal with how it came about. From the Western perspective, the epochs of foreign investment can be divided into three major historical phases. These phases are: Firstly, the colonial era which evidences the first generation of IIAs; secondly, the post-colonial era which introduced the second generation of IIAs and lastly, the global era which saw a rise to the conclusion of modern IIAs. This part of the chapter looks at those ground-breaking events that shaped the IIAs. Since this study is written from an African perspective, a detailed look at African events that contributed to the development of the field of international economic law is dealt with in a separate chapter below.

2.4.1 The colonial era

The colonial era is found between the periods 1790s and 1914.[74] During these years, a new dimension of international financial mobility led to an enormous growth in international trade.[75] The change was accomplished through domestic laws, which opened up economic borders in the absence of IIAs.[76] Prior to the Second World War, states did not concern themselves with the protection of foreign investors through

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73 Kidane Won, 'Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code' (2018) 50:3 *George Washington International Law Review* 526.

74 Baldwin Richard and Martin Philippe in Siebert H (ed), 'Two waves of Globalisation: Superficial similarities, fundamental differences' (1999) *Globalisation and Labour: Working Paper 6904* 3.

75 *Ibid.*

76 Dolzer Rudolph and Schreuer Christoph, *Principles of Foreign Investment Law* (Oxford University Press 2008) 12.

IIAs.[77] During this period, most agreements established trade relations, though they at times included some provisions on the protection of property of nationals of other states.[78]

The Eurocentric view is that international relations can be traced back as early as 1796[79] when Adams John, Franklin Benjamin and Jefferson Thomas negotiated the US-France first treaty on Friendship, Commerce and Navigation (FCN).[80] This treaty highlighted the protection of property of 'aliens' by the rules of international law, and states that:

> There is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of another country in friendship with their own to the protection of its sovereign by all efforts in his power.[81]

In 1868, the Argentinian diplomat Calvo Carlos rejected the idea that there should be an international law that regulates foreign private property.[82] Calvo Carlos thus advocated through what is known today as the 'Calvo Doctrine' the idea that private property should be regulated by domestic law.[83] Using today's language, his argument was that the host state should exercise jurisdiction in foreign investment disputes. He thus rejected the idea of international arbitration for foreign investors.

When the 'Calvo Doctrine' was challenged by the Mexican Government in the 1930s, the demand of full compensation for expropriation was clearly emphasised.[84] Mexico had expropriated various properties of USA nationals in its territory between 1915 and 1940.[85] The USA then sought compensation for its nationals who had been affected by the expropriation. In reaction to Mexico's seizure, USA Secretary of State Cordell Hull

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77 Vandevelde Kenneth, 'A brief history of foreign investment agreements' (2005) 12:157 *UC Davis Journal of International* 158.

78 *Ibid.*

79 However, not all IIAs were titled 'Treaty of friendship and navigation'.

80 Dolzer Rudolph and Schreuer Christoph, *Principles of Foreign Investment Law* (2008) 11.

81 *Ibid.*

82 The Law dictionary, 'The Calvo Doctrine' https://thelawdictionary.org/calvo-doctrine/ (accessed 13 September 2019).

83 Dolzer Rudolph and Schreuer Christoph, *Principles of Foreign Investment Law* (2008) 13; See further Guzmann Andrew 'Why do LDC sign treaties that hurt them?' (1998) 38:4 *Virginia Journal of International Law* 639-688.

84 Haywood Green, *Digest of International Law* (Digital Library of India 1942) 658.

85 Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (Hotei Publishing 2017) 12-15.

proposed the 'Hull formula', which has since been the primary version of the full compensation requirement.[86] In this regard, he posited that:

> We cannot question the right of a foreign government to treat its own nationals in this fashion if it so desires. This is a matter of domestic concern. But we cannot admit that a foreign government may take the property of American nationals in disregard of the rule of compensation under international law.[87]

Cordell Hull totally opposed the 'Calvo Doctrine', and asserted that expropriation should be accompanied by 'prompt, adequate and effective compensation'.[88] This led to states reaching consensus on the appropriate level of protection for foreign investment. Foreign investors were thought to be entitled to have their property safeguarded by international law, and that a host state's seizure of a foreign investor's property required 'prompt, appropriate, and effective' compensation.[89] The 'prompt, adequate and effective' standard was regarded as a rule of customary international law.[90] The 'Hull Formula' thus advocated the invention of what is known today as minimum standard of treatment of foreign investors.[91] This first modern period of internationalised economic relations was halted in 1914 by the World War I, and the subsequent troubled economic relations which led to World War II in the 1930s.

2.4.2 The post-colonial era

The second modern period of internationalised economic relations and integration began after the World War II in 1945 when the UN was created.[92] During this period, states appreciated the severe economic depression triggered by the previous world wars and began to negotiate IIAs aimed at liberalising trade and investment. The period between the 1940s and 1990s saw major confrontations between the growing number

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86 Herdegen Matthias, *Principles of International Economic law* (Oxford University Press 2013) 366.

87 Lowenfeld Andreas, *International Economic Law* (Oxford University Press 2008), (quoting letter from USA Secretary of State Cordell Hull to Mexican Minister of Foreign Affairs dated July 21, 1938).

88 The Jean Monnet Centre for International and Regional Economic Law and Justice 'the Hull rule' https://jeanmonnetprogram.org/archive/papers/97/97-12-III.html (accessed 13 September 2019).

89 Roth Andreas, *The Minimum Standard of Treatment Law Applied to Aliens* (Leiden: A W Sijthoff 1949) 185-186.

90 Herdegen Matthias, *Principles of International Economic law* (2013) 366.

91 Even though the 'Hull Formula' gained a status of customary international law, it ceased to exist around mid-1970s; See Verwey Wil and Schrijver Nico, 'Taking of Foreign Property under International Law: A New Legal Perspective' (1984) 15 *Netherlands Yearbook of International Law* 3.

92 The UN was created through the UN Charter of 1945.

of newly independent developing but underdeveloped states on one hand, and the developed capital exporting states on the other hand. As a result, states faced the multilateralism battle.[93]

The main concern was to formulate a multilateral rule aimed at regulating foreign investment. This led to the adoption of the Havana Charter of 1948 (the Havana Charter), and the inclusion of investment clauses in Article 11 thereof titled 'means of promoting economic development and reconstruction'; and Article 12 titled 'foreign investment for economic development and reconstruction' in the Havana Charter.[94] The inclusion of these provisions in the Havana Charter was the first attempt at codifying foreign investment rules. There was however no separation between trade and investment, and as a result investment was not comprehensively regulated in the Havana Charter. The Havana Charter never entered into force, however, it created the spirit of grand economic building with heavy regulatory content.[95]

Foreign investment law in the post-World War II era was rife with flaws. Firstly, it featured a scattered treaty obligations, disputed customs, and dubious general principles of law.[96] Secondly, it failed to provide an investor with the ability to transfer funds from one state to another.[97] Thirdly, the principles in place at the time were hazy and open to a variety of interpretations,[98] posing a dilemma that persists today. Finally, it did not provide an effective method for a foreign investor to pursue a claim against the host state when the host state failed to meet its contractual duties, resulting in a foreign investor's grievance.[99] This meant that the host state could unilaterally amend contracts, and this could result in the expropriation of the property of the foreign investor or force him to renegotiate an agreement.

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93 Multilateralism is a diplomatic term that refers to cooperation among several nations.

94 The Havana Charter was established in terms of the International Trade Organisation (ITO), however, it never eventuated due to objection by business stakeholder and the refusal of the United States to participate in the establishment process.

95 Drabek Zdenek and Mavroidid Petros, *Regulation of Foreign investment: Challenges to International Harmonisation* (World Scientific in International Economics 2012) 13.

96 Salacuse Jeswald, 'The treatification of foreign investment law' (2007) 13:1 *Law and Business Review of America* 155

97 *Ibid.*

98 Miles Kate, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) 24; See further Vandevelde Kenneth, 'A brief history of foreign investment agreements' (2005) 12:1 *UC Davis Journal of International* 157.

99 *Ibid.*

States realised the need to conclude treaties that would provide procedural and substantive protection while promoting foreign investment.[100] To overcome this challenge, they began a process of foreign investment treaty negotiations that would be complete, clear, specific and enforceable.[101] When the Federal Republic of Germany and Pakistan signed the first generation BIT in 1959, it marked the beginning of modern BIT agreements.[102] The BIT between Germany and Pakistan defined the scope of protection by defining protected investments and enabled state-to-state dispute settlement before the ICJ[103] or an arbitration tribunal.[104] This provision can still be found in the previous generations of BITs.[105]

The politicised clash between developed and developing states which had regained independence gave rise to the need for agreements which protected foreign investments.[106] Developing states were very protective of their regained independence after colonialism. Their intention was to protect their sovereignty which was taken away during the colonial era.[107] At the end, even though many developing states opposed property rights commitments at a multilateral level, they were pressured into concluding IIAs by competition for foreign capital.[108] Developing states believed that entering into IIAs would induce foreign investors to invest in host states.

During the 1960s, European countries led by Germany negotiated agreements on a bilateral basis that dealt exclusively with FDI, and that were aimed at creating a basic legal framework that governs investments by nationals of one country in the territory

100 *Ibid.*

101 Subedi Suyra, *International Investment Law: Reconciling Policy and Principle* (2012).

102 Schefer Krista, *Foreign Investment Law: Texts, Cases and Materials* (Edward Elgar Pub 2013) 1.

103 The ICJ is the main judicial organ of the UN. The Court's role is to settle, in accordance with international law, legal disputes submitted to it by states. See Article 1 of the ICJ Statute.

104 Mestral Armand De and Lĕvesque Céline (eds), *Improving Foreign Investment Agreements* (Routledge 2013) 16.

105 The Germany-Pakistan BIT did not provide for a dispute resolution mechanism between the foreign investor and the host state, however, dispute resolution does not form part of the study. The Chad-Italy BIT of 1969 was the first treaty to introduce a dispute resolution mechanism between an investor and a host state.

106 The study uses the term 'regained' because it argues that in the context of Africa, states were independent prior to colonisation.

107 This issue is dealt with in detail under chapter 3 below where the development of international economic law from an African perspective is dealt with.

108 Strik Philip, *Shaping the Single European Market in the Field of Foreign Direct Investment* (2014) 139.

of another country.[109] Switzerland, Italy, France, the United Kingdom, the Netherlands, and Belgium signed first-generation BITs with certain developing countries not long after this.[110] The goal of these BITs was to ensure that host states adhered to international legal standards and that foreign investors may file a claim in international arbitration against host states who violated the BITs' obligations.[111] This was another capitalist move aimed at gaining advantage over developing states.

In the late1960s, the Organisation on Economic Cooperation and Development (OECD) adopted rules on how to treat, protect and promote foreign investment as well as rules relating to arbitration at the international level. The OECD Draft Convention on the Protection of Foreign Property of 1967 (OECD Draft Convention)[112] never came into force; however, it provided general guidelines to assist policy makers for when negotiating BITs provisions for the treatment of foreign investors post-establishment.[113]

Before the development of modern BITs, bilateral economic agreements such as the Treaties of Friendship, Treaties of Commerce and Treaties of Navigation regulated foreign investments.[114] These treaties dealt with the granting of reciprocal commercial privileges between the parties and their nationals.[115] Individuals were afforded property protection, freedom of movement, and the right to trade and engage in commercial business as a result of these laws.[116] In addition, they contained the most favoured nation (MFN) and the national treatment principles.[117] These treaty agreements, on the other hand, were unclear and left many questions about investor protection and promotion unanswered.[118] Nonetheless, these BITs introduced the second generation

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109 Mestral Armand De and Lĕvesque Céline (eds), *Improving Foreign Investment Agreements* (2013) 16.

110 The International Institute for Sustainable Development, 'Investment Treaties and the Search for Market Access in China' https://www.iisd.org/itn/2013/06/26/investment-treaties-and-the-search-for-market-access-in-china/ (accessed 13 September 2019).

111 Salacuse Jeswald, 'The treatification of foreign investment law' (2007) *Law and Business Review of America* 156.

112 The OECD Draft Convention on the Protection of Foreign Property of 1967.

113 Strik Philip, *Shaping the Single European Market in the Field of Foreign Direct Investment* (2014) 141.

114 Herdegen Matthias, *Principles of International Economic law* (2013) 380.

115 Miles Kate, *The Origins of Foreign Investment Law: Empire, Environment and the Safeguarding of Capital* (2013) 24.

116 *Ibid.*

117 *Ibid.*

118 Salacuse Jeswald, 'The treatification of foreign investment law' (2007) 13:1 *Law and Business Review of America* 155.

of BITs.[119] In 1974, the UN through the working group of governmental representatives introduced the UN Charter on the Economic Rights and Duties of States.[120] This Charter is aimed at promoting the establishment of a new international economic order.[121] This Resolution did not, however, require expropriating states to pay compensation.

2.4.3 The global era

The 1990s ushered in a new dimension in the field of foreign investment law, and saw a rise of IIAs. This era is characterised by profound changes in the context and scope of IIAs.[122] States saw a need to separate trade from investment, and as a result, the fields of trade and investment were no longer intertwined.[123] The WTO was introduced after the Uruguay Round with the aim of centralising trade issues through the GATT and related agreements. This allowed states to enter into an agreement where it offered concessions on foreign investment in exchange of market access to goods.[124]

Furthermore, states began to test a new phenomenon of market ideology. As a result of the economic hostility of the post-colonial era, developing states openly pursued ways to attract foreign investment in their territories.[125] The new international economic order's ideology of the post-colonial era of expropriation without compensation was disbarred.[126] The 'Calvo Doctrine' was discontinued and the 'Hull Formula' became popular with the inclusion of international minimum standards of treatment of foreign investors.[127] The content of IIAs concluded during the globalisation era were similar to the ones concluded during the post-colonial era in that they were both mainly aimed at attracting and protecting foreign investment.[128] This has led modern IIAs policy makers to still focus on the protection and promotion of foreign investment when negotiating

119 In 1963, Broches Aaron rejected the OECD's substantive law, and proposed a treaty to resolve investment disputes without substantive law through the ICSID Convention of 1966. He argued that the ICSID Convention would attract foreign investment in the host state.
120 UN Charter on the Economic Rights and Duties of States 32/81 of 1974.
121 The Preamble of the UN Charter on the Economic Rights and Duties of States 32/81 of 1974.
122 Vandevelde Kenneth, 'Model bilateral investment treaty: The way forward' (2011) *South-Western Journal of International Law* 175.
123 *Ibid* 176.
124 *Ibid* 181.
125 *Ibid.*
126 Guzmann Andrew, 'Why do LDC sign treaties that hurt them' (1998) *Virginia Journal of International Law* 645-646.
127 *Ibid.*
128 *Ibid.*

the modern day IIAs. At the end, IIAs were not balanced since foreign investors only had rights without obligations in the host states.[129]

States attempted to deepen economic integration at the regional and global levels by concluding IIAs on bilateral or multilateral basis,[130] however, the BITs or IIAs between developed and developing states did not take contradictory economic circumstances of each party into account.[131] The global era also saw a rise in the need to reduce trade and investment barriers. Since states only focused on protection and promotion of foreign investment, the IIAs during this period did not offer much protection to host states. This led to a rise in foreign investment disputes.[132]

The foreign investment law dilemmas thus have their own history, and these dilemmas persists in contemporary IIAs.[133] In an attempt to close the gaps identified in the third generation of IIAs, investment policy makers are currently looking at ways to balance the rights and duties of both foreign investors as well as host states.[134] As a result, many states are reviewing their international economic commitments and some states have terminated some of the third generation of BITs.[135] An example of such state is South Africa, which has terminated most of its BITs with many European countries.[136]

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129 This is dealt with in chapter 4 below.

130 Brower Charles and Schill Stephan, 'Is arbitration a threat to or a boom to the legitimacy of foreign investment law?' (2009) 9:2 *Chicago Journal of International Law* 474; See further United Nations Legislative *Series:* Review of the multilateral treaty-making process of 1985.

131 *Ibid.*

132 On 31 July 2019 more than 980 disputes have been filed with the ICSID. See ICSID's website https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx (accessed 04 March 2020).

133 Kidane Won, 'Contemporary international investment law trends and Africa's dilemmas in the Draft Pan-African Investment Code' (2018) 50:3 *George Washington International Law Review* 526.

134 Lall Sanjaya and Narula Rajneesh, 'Foreign direct investment and its role in economic development: Do we need a new agenda?' (2004) 16:3 *The European Journal of Development Research* 15; The Centre For International Environmental Law Issue Brief, 'International law on investment: The Minimum Standard of Treatment' http://www.ejiltalk.org/international-minimum-standard/ (accessed 23 March 2016).

135 So far South Africa, Bolivia, Indonesia, Ecuador and India have review and terminated some of their BITs. This information is available on https://investmentpolicy.unctad.org/ (accessed 06 March 2020).

136 Mhlongo Lindelwa, *The impact and effect of national and international law on foreign investment in South Africa* (unpublished LLM dissertation, University of South Africa 2017) 15-16.

2.5 Principles of foreign investment law

2.5.1 The pacta sunt servanda principle

On a global scale, the rules and norms of foreign investment provide foreign investors with more protection than domestic law. This is due to the principles of international law, such as *pacta sunt servanda* and the autonomy that provide protection for foreign investors.[137] In terms of the *pacta sunt servanda* principle, contracting parties of an agreement must uphold and fulfil the obligations therein.[138]

The VCLT codified the *pacta sunt servanda* principle in Article 26. This provision provides that every treaty in force binds the parties to it and must be performed in good faith. In terms of Article 27 of the VCLT, obligations originating from international law principles cannot be avoided by resorting to national legislation.[139] Article 3 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts[140] states that 'the characteri[s]ation of an act of a state as internationally wrongful is governed by international law. Such characterisation is not affected by the characterisation of the same act as lawful by internal law'.

It is worth noting that as a matter of principle, a host state's constitution trumps treaties, however, this does not apply to other sources of law.[141] However, neither a constitutional mandate nor the enactment of a statute, according to international law, provides an explanation for a treaty infringement.[142] Thus an act wrongful under international law remains so even if a country's domestic law deems otherwise.[143] In the case of *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in Danzig Territory,*[144] the Tribunal held that 'a state cannot adduce as against another

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137 Booysen Hercules, *The Principles of International Trade Law as a Monistic System* (Interlegal 2004) 506-507.

138 *Ibid* 292-293.

139 Article 27 of the VCLT; See further Subedi Surya, *Foreign Investment Law: Reconciling Policy and Principle* (2012) 8.

140 ILC Articles on Responsibility of States for Internationally Wrongful Act of 2001.

141 Park William and Yanos Alexander, 'Treaty obligations and national law: Emerging conflicts in international arbitration' (2006) 58:1 *Hasting Law Journal* 252.

142 *Ibid.*

143 *Ibid.*

144 *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in Danzig Territory*, Advisory Opinion, 1932 PCIJ A/B) No 44.

state its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force'.[145]

The key challenge for host states is providing a balance and effective regulatory framework that protects and upholds the right of states to regulate in their territories, while protecting foreign investment.[146] For this reason, it may at times be challenging for host states to honour their obligations towards all the diverse stakeholders in the domestic and international arena. There is therefore a need to reform the current foreign investment regimes so that there are less conflicts and overlaps in IIAs.

It is unclear if the *pacta sunt servanda* principle has gained the status of customary international law; however, it has been embraced in many provisions of IIAs. Hernández Gleider argues that this principle is one of the oldest principles of international law.[147] He posits that it underscores every single international agreement, raising expectations that states will fulfil the obligations to which they have consented to.[148]

It is not helpful, according to Yackee Jason, to evaluate whether the principle of *pacta sunt servanda* is part of customary international law in isolation from the circumstances of specific cases. What counts, he argues, is whether unbiased, authoritative decision makers declare and act as if state guarantees to investors are legally enforceable in actual circumstances.[149] This view cannot be correct as it is important to ascertain if a concept has crystallised into customary international law. In a case where the right of foreign investors is violated, such foreign investor may rely on the *pacta sunt servanda* as the rule of customary international law. Furthermore, the Preamble of the VCLT states that the *pacta sunt servanda* among other principles of international law are

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145 *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in Danzig Territory*, Advisory Opinion, 1932 PCIJ A/B) No 4 para 24; See also to *Occidental Petroleum Corp and Occidental Exploration and Production Co v Republic of Ecuador*, ICSID Case No ARB/06/11 (*Occidental Petroleum Corporation v Ecuador* case).

146 Zhan James, *Investment Policies for Sustainable Development: Addressing Policy Challenges in a New Investment Landscape* (Cambridge University Press 2013) 13; See further Brower Charles and Schill Stephan 'Is arbitration a threat to or a boom to the legitimacy of foreign investment law?' (2009) 9:2 *Chicago Journal of International Law* 474.

147 Hernández Gleider, *International Law* (Oxford University Press 2019) 164.

148 *Ibid* 164.

149 Yackee Jason, '*Pacta sunt servanda* and state promises to foreign investors before bilateral investment treaties: Myth and reality' **(**2009) 32:5 *Fordham International Law Journal* 1553.

universally recognised by member states. Thus, one can accept that this principle has gained the status of customary international law.

2.5.2 The sovereignty principle

During the early years, states would invade territories of other states illegally with the intention of gaining economic advantage over such territories. As part of the post-colonial struggle for economic emancipation, discussions and negotiations within the UN Conference on Trade and Development (UNCTAD) started.[150] This led to the UN Resolution of 1974[151] calling for a new international economic order.[152] This Resolution proclaimed that every state enjoys full permanent sovereignty over its natural resources and economic activities, and that each state has a right to nationalise foreign property found within its territory.[153]

Sovereignty is one of the key principles of international law and has been codified in Article 2 of the UN Charter. From an economic perspective, the sovereignty principle can be found in the UN Charter of Economic Rights and Duties of 1974 (Charter of Economic Rights and Duties). In terms of Article 2(1) of the Charter of Economic Rights and Duties, '[e]very state has and shall freely exercise full permanent sovereignty, including possessions, use and disposal, over all its wealth, natural resources and economic activities'.

No state is obligated to admit foreign investment in its territory under the principles of customary international law and international investment law. This obligation only comes after a conclusion of an IIA. States are generally at liberty to form, maintain or terminate relations with other states.[154] This prerogative is derived from Article 2 of the UN Charter, which contains sovereignty and equality as principles recognised by the Charter. Article 4 of the Constitutive Act of the AU also recognises, *inter alia,* sovereign equality of states and non-interference by member states in the internal affairs of another as its founding principles. The UN Charter of Economic Rights and Duties of

150 United Nations Conference on Trade and Development is an economic wing for the UN. It was established by the UN General Assembly as a permanent intergovernmental body in 1964.
151 UN General Assembly Resolution 3201: Declaration on the Establishment of a New International Economic Order of 197.
152 See the Preamble of the UN General Assembly Resolution 3201.
153 Article 1 of the UN General Assembly Resolution 3201.
154 Herdegen Matthias, *Principles of International Law* (2013) 53.

States[155] provides for unfettered sovereignty of every state over its resources and economic life.[156]

Article 2 of the Draft Declaration of the Rights and Duties of States of 1945 recognises sovereignty by asserting that every state has a right to exercise jurisdiction in its territory, which includes jurisdiction over persons and things. Therefore, a state is not bound to continue with trade and investment relations in the absence of treaty obligation or other specified legal obligations. The sovereignty principle also found its way into the General Assembly's Friendly Relations Resolution 2526 of 1970. In terms of this provision every state enjoys sovereign equality. Regardless of economic, social, political, or other distinctions, they have equal rights and obligations and are equal members of the international community.[157]

In modern day society, states are masters of their own territories. In legal terms, this means that states have jurisdiction over any act, conduct or persons in their territories.[158] They enjoy broad powers to pursue and enforce regulatory economic interests.[159] Equal sovereignty of states includes the following elements:

- Judicial equality;
- Enjoyment of rights inherent in full sovereignty;
- Duty to respect the personality of other States;
- Territorial integrity and political independence;
- Right to freely choose and develop political, social, economic and cultural systems; and
- Duty to comply fully and in good faith international obligations.[160]

In the case of *Nicaragua v United States of America,*[161] the court held that states may freely determine economic relations with each other.[162] As a result, states contract with each other to establish a particular legal relationship.[163] Today many domestic laws, IIAs at the regional, continental and global levels embrace the sovereign equality

155 UN Charter of Economic Rights and Duties of States A/RES/29/3281.
156 Article 2 of the Charter of Economic Rights and Duties.
157 Article 25 of the General Assembly's Friendly Relations Resolution 2526 of 1970.
158 Dube Angelo, 'Of neighbours and shared upper airspaces: The role of South Africa in the management of upper airspaces of the Kingdoms of Lesotho and Swaziland' (2015) 48:2 *Comparative and International Law Journal of Southern Africa* 224.
159 *Ibid.*
160 Herdegen Matthias*, Principles of International Economic Law* (2013) 66.
161 *Nicaragua v USA* (Merits) 1986 ICJ (*Nicaragua* case).
162 *Ibid* para 275.
163 Dugard John, *Dugard's International Law: A South African Perspective* (Juta 2018) 29.

principles.[164] In spite of this freedom, states have opted to limit it for the realisation of economic liberalisation at the domestic, continental and global levels through *inter alia* the conclusion of IIAs.

The sovereignty of states may, however, be limited by international law in general, customary rules of international law and international agreements. The Declaration of the Rights and Duties of States limits the right of states to sovereignty by declaring that every state has a duty to refrain from threat or use of force against another state or in a manner that is inconstant with international law.[165] A similar provision is found in Article 2(4) of the UN Charter. Article 14 of the Draft Declaration of the Rights and Duties of States clearly states that the right to sovereignty is limited by the supremacy of international law.

There has been a shift of emphasis towards local control of natural resources that was ushered in by the UN General Assembly Resolution 1803 of 1962 on Permanent Sovereignty over Natural Resources. Tension was high between national governments with their underdeveloped economies on the one hand and foreign investors enjoying legal protection from their home governments on the other hand. The increasing incidents of nationalisation of foreign investments by governments of developing countries and consequent admixture of legal and political conflicts between the host governments and home states of the investors mounted. Often times there were allegations, with good reasons, that western governments plotted *coups d'etat* against governments which pursued policies of nationalisation of foreign investments. Numerous bilateral and investment agreements were concluded, and their implementation, if any, was haphazard and geared primarily at the short-term interest of investors who were using developing countries as warehouses.

2.5.3 The autonomy principle

On the basis of such cognition and decision, the autonomy principle refers to one's ability to think, decide, and act freely and autonomously.[166] This principle is directly linked to the sovereignty principle in that states are at liberty to freely regulate within

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164 For example, in the African context see Article 3 and 4 of the AU Constitutive Act.

165 Article 9 of the Draft Declaration of the Rights and Duties of States.

166 Booysen Hercules, *The Principles of International Trade Law as a Monistic System* (2004) 506-507.

their territories as they deem fit. In terms of the autonomy principle, the parties on the global scale have broad discretion over many aspects of concluded agreements, which influence the regulatory powers within their respective territories.[167] For example, they have a discretion to determine the law that will apply to their agreements, the competent body that will resolve disputes originating from such agreements, and how to treat such agreements if one of the parties' laws changes or if there is no stabilisation provision. This is also known as the principle of contractual autonomy on the choice of law.[168] A stabilisation clause assures that future changes in one of the parties' laws do not affect the agreement's terms.[169] In other words, a stabilisation clause freezes the law that is applicable at the time of the conclusion of an agreement.[170] However, states should not abuse their right to autonomy in order to evade responsibilities and obligations.

2.5.4 Good faith

The principle of good faith has always been in existence, however, it took a moral rather than a legal form. In other words, what we currently refer as good faith previously encompassed a moral standard before it gained a legal status. The principle of good faith at the international level was first proposed by the League of Nations in 1919,[171] before this body's dissolution in 1946. Nonetheless, its successor, the UN, went on to embrace, recognise and maintain this principle.[172] The idea was that lack of formal and legalistic obedience towards international obligations in the post-world war order might obstruct the realisation of the purpose and principles of the UN.[173] Article 2(2) of the UN Charter requires member states to fulfil their obligations under the Charter in good faith for the adequate realisation of international community's objectives through mutual undertakings and responsibilities.

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167 *Ibid.*

168 Woodward William, 'The contractual choice of law: Legislative choice in an era of party autonomy' 2001 54:2 *Southern Methodist University Law Review* 711.

169 Sornarajah Muthucumaraswamy, *The International Law on Foreign Investment* (2017) 407.

170 *Ibid.*

171 Article 13 of the League of Nations Covenant provides that: The members of the League agree that they will carry out in full good faith any award that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto.

172 See Article 2(2) of the UN Charter.

173 *Ibid.*

In 1966, the International Law Commission's (ILC) Articles and Commentaries on the Law of Treaties referred to good faith as a fundamental legal principle of the law of treaties which forms part of the *pacta sunt servanda* principle.[174] Article 26 of the VCLT requires states to honour and perform their treaty obligations in good faith once a treaty is in place. The Tribunal in the *Phoenix Action Ltd v Czech Republic*[175] case used the criteria that it laid down for the definition of investment when dealing with the protection of investment. The Tribunal held that for an investment to be protected under the ICSID Convention, such investment must have been made without violating the laws of the host state and in good faith.[176]

To the date, the principle of good faith has formed the basis for achieving sustainable economic development and relations. In the context of Africa, the principle of good faith will ensure that the Africanisation and reformation of international economic law is done in line with the rules and objectives of African states as a whole. This is because this principle is not a self-standing rule,[177] it is augmented by the unique needs and circumstances of every stakeholder.

2.5.5 Sustainable development

Because rapid industrialisation has resulted in severe environmental degradation, the Brundtland Commission Report defines sustainable development as development that meets the requirements of the present generation without jeopardising future generations' ability to meet their own needs.[178] It calls for the integration of environmental, social, and economic concerns.[179] The Rio Declaration on Environment and Development of 1992 (The Rio Declaration)[180] provides that:

> The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.[181]

174 Article 23 of the ILC Articles and Commentaries on the Law of Treaties of 1966.
175 *Phoenix Action Ltd v Czech Republic* ICSID Case No ARB/06/5.
176 *Phoenix Action Ltd v Czech Republic* para 100.
177 *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 82.
178 UN Sustainable Goals Knowledge Platform, 'Report of World Commission on Environment and Development: Our Common Future' https://sustainabledevelopment.un.org/milestones/wced (accessed 27 February 2020).
179 *Ibid.*
180 Principle 3 of the Rio Declaration on Environment and Development of 1992.
181 Principles 4 the Rio Declaration.

Even though the Rio Declaration is non-binding, it remains persuasive to states, and represents a collective intent by them to ensure and protect sustainable development. It is noteworthy that the level of responsibility of states towards sustainable development differs from region to region. Whether a state is developed or developing plays an important role in assigning sustainable development responsibilities to states. In this regard, the Rio Declaration espouses that:

> In view of the different contributions to global environment degradation, states have common but different responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressure their societies place on the global environment and of the technologies and financial resources they command.[182]

The International Institute for Sustainable Development (IISD) requires both host states and foreign investors to actively take part in protecting the development objectives of a host state.[183] In terms of Article 25 of the IISD Model International Agreement on Investment for Sustainable Development of 2005 (IISD Model Agreement), host states have the right to take regulatory measures to ensure that development in their territories is consistent with the goals and principles of sustainable development.

Sustainable development is not a new phenomenon in the international arena. The contemporary framework of international economic law has started to take into account environmental concerns, and environmental protection has become of paramount importance. The environmental protection agenda reflects not only a state's sensitivity to environmental problems, but also its risk aversion.[184] This may to a certain extent influence ones' choice of where to invest.[185] It is currently a soft law, and has not achieved the status of a strict principle of international law.[186] It has found its way into many treaties in general and IIAs in particular.

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182 Principle 7 of the Rio Declaration.

183 Articles 11, 20 and 21 of the IISD Model International Agreement on Investment for Sustainable Development.

184 *Ibid* 118.

185 *Ibid.*

186 Herdegen Matthias, *Principles of International Economic Law* (2013) 62.

2.6 Investment protection through International minimum standard of treatment

The concept of international minimum standard of treatment (IMST) is a complex one. The origin of the IMST concept deals with the status of foreigners in general. It covers a wide range of procedural rights in criminal law, including rights before tribunals, civil law rights, and foreigners' private property rights.[187] The IMST was first highlighted by tribunals in the *LFH Neer and Pauline Neer v United Mexican States* case.[188] This case dealt with the duty of Mexico as a host state to investigate the circumstances of the death of a US national.[189] A claim for compensation was brought by the widow of a USA national before a Mixed Claims Commission.[190] The Mixed Claims Commission held that:

> The treatment of an alien, in order to, constitute an international delinquency, should amount an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily, recogni[s]e its insufficiency.[191]

Even though this statement was not related to the treatment of foreign investor, since these matters were not a priority on the international agenda, it recognised the concept of IMST of a foreign national. The IMST is defined as:

> A norm of customary international law, which governs the treatment of aliens, by providing for a minimum set of principles which [s]tates, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property.[192]

Generally, states have a discretion to have the IMST included in their IIAs or domestic legislation.[193] The IMST's major goal is to protect foreign investment in the host states, and it promotes for host states not to discriminate between domestic and foreign investors.[194] The modern IMST grants foreign investors a number of pre and post-establishment rights.[195]

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187 Dolzer Rudolph and Schreuer Christoph, *Principles of Foreign Investment Law* (2008) 14.
188 *LFH Neer and Pauline Neer v United Mexican States* 4 RIAA (1926).
189 *Ibid* para 61-62.
190 *Ibid.*
191 *Ibid.*
192 The OECD, 'The international minimum standard of treatment' https://asadip.files.wordpress.com/2008/09/mst.pdf (accessed 14 October 2019).
193 Mhlongo Lindelwa, *The impact and effect of national and international law on foreign investment in South Africa (*unpublished LLM dissertation, University of South Africa 2017) 34.
194 Article 4 (Commentary) of the SADC BIT Model Template of 2012.
195 Woolfrey Sean, 'The SADC Model Bilateral Investment Treaty Template: Towards a new standard of investor protection in southern Africa' https://www.tralac.org/images/docs/6771/d14tb032014-woolfrey-sadc-model-bit-20141210-

2.6.1 The national treatment standard

The national treatment standard generally forbids discrimination based on a foreign investor's nationality. National treatment is a contingent standard based on how other investors are treated.[196] It underscores the principle of non-discrimination which is applied between contracting parties of a particular IIA. It prohibits the contracting states to an IIA from discriminating against the foreign investors of each other.[197] It provides protection of foreign investment at the pre-entry and post-entry stages. It creates a right of entry into the host state as well as a right of business establishment at the pre-entry stage;[198] while affording a foreign investor a right to be treated equally with domestic investors and to do business at the post-entry stage.[199]

A national treatment principle can be found in many treaties dating back to earlier centuries. It creates an obligation for the host state not to discriminate against foreign investors.[200] However, the scope of the obligation may vary from treaty to treaty, and may apply to various activities of the host state. It is not clear if the national treatment forms part of customary international law, however, it has been widely embraced in many IIAs.[201] Such embracement may thus meet the requirements for customary international law.

On a practical level, the national treatment standard seeks to provide foreign investors with treatment comparable to that provided to domestic investors in the host state who are 'in like circumstances'.[202] In general, the host state bears no inherent responsibility to provide a foreign investor with comparable protection to that afforded to its nationals.[203] This is only applicable if the contracting states have entered into a BIT

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fin.pdf (accessed August 2019). The challenge of affording foreign investors pre-establishment rights is fully discussed in chapter 4 below.

196 The UNCTAD, 'National treatment' UNCTAD Series /ITE/IIT/11, Vol IV (UNCTAD Series: National treatment) 7.

197 Reinisch August, *Standards of Investment Protection* (2008) *32.*

198 The UNCTAD*, 'National treatment'* UNCTAD Series /ITE/IIT/11 Vol IV (UNCTAD Series National Treatment) 4.

199 *Ibid.*

200 Sadiq Lawal, 'Variability of fair and equitable treatment standard according to the level of development, governance capacity and resources of host countries' (2014) 9:4 *Journal of International Commercial Law and Technology* 229.

201 *Ibid.*

202 Subedi Surya, *Foreign Investment Law: Reconciling Policy and Standard* (2012) 57.

203 Salacuse Jeswald, *The Law of Investment Treaties* (2010) 47.

and included the national treatment clause. Once an IIA is in place, host countries must be mindful of the investor's rights and interests.[204]

The national treatment standard is a relative standard in that the violation of the foreign investor's right is determined by how the host state treats its domestic investors 'in like circumstances'.[205] Unlike the fair and equitable treatment (FET), the national treatment standard defines the required treatment by reference to the treatment accorded to other investors in 'in like circumstances'.[206] The 'in like circumstances' component necessitates a comparison of the circumstances of foreign and domestic investors.[207] The criteria used to determine the 'in like circumstances' is subjective, and it is generally limited to commercial considerations in various economic sectors.[208]

Notwithstanding the fact that the national treatment principle has influenced the foreign investment framework, it is still one of the most controversial principles in international economic law. The main argument against it is that the responsibility of legislators and other policy makers to shape the domestic regulatory framework or tax measures in a manner which is favourable to growth domestic product (GDP) is a reality for any host state; and this principle may at times affect a large number of internal regulations and government measures in the host state.[209] It may also affect the right of the host states' sovereignty[210] and national sensitivities, ranging from the way a country governs and protect its, consumer protection, food and drug measures, safety measures and tax.[211]

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204 *The UNCTAD, 'National treatment'* UNCTAD Series /ITE/IIT/11 Vol IV (UNCTAD Series National Treatment) 4; See further Sornarajah Muthucumaraswamy, *The International Law on Foreign Investment* (2017) 320.

205 Segger Marie-Claire *et al* (eds), *The Global Trade Law Series: Sustainable Development in World Trade Investment Law* (2011) 268.

206 Sadiq Lawal, 'Variability of fair and equitable treatment standard according to the level of development, governance capacity and resources of host countries' (2014*) Journal of International Commercial Law and Technology* 229.

207 *The* UNCTAD, 'National treatment' UNCTAD Series /ITE/IIT/11, Vol IV (UNCTAD Series: National Treatment) 5.

208 *Ibid* 269-270. Article 2(2)(c) of the Charter of Economic Rights and Duties of States: General Assembly resolution 3281 provides for the national treatment standard.

209 Jackson John, 'National treatment obligations and non-tariff barriers' (1989) 10:1 *Michigan Journal of International Law* 208.

210 Sovereignty refers to the right of state to exercise jurisdiction over persons, including legal entities and other things within its territory.

211 Jackson John, 'National treatment obligations and non-tariff barriers' (1989) *Michigan Journal of International Law* 208.

The responsibility of a host state to treat domestic and foreign investors equally means that host states will struggle to successfully regulate in the public interest.[212] The major argument in this study against the national treatment principle is that practically this principle does not work. The 'in like circumstances' requirement is impractical as foreign investors will not be able to be in the same material position as domestic investors. For example, in South Africa a black domestic investor and a foreign investor who both invested in the same industry, which in theory meets the 'in like circumstances' requirement, do not have equal or similar rights. The reason for this is that certain benefits are only available to black domestic investors because they are part of the categories of legal persons who are entitled to certain benefits, even though both domestic and foreign investors are investing in the same market.

In the South African context, this argument stems from the fact that the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act) will always come into play whenever the right of citizens is tested against the right of foreign investors. In the event of a conflict between the B-BBEE Act and any other law in force on the date of commencement, the B-BBEE Act takes precedence if the conflict specifically relates to a matter dealt with under this Act.[213] This self-proclaims supremacy over other pieces of legislation, and since the B-BBEE Act came into operation before the Protection of Investment Act 22 of 2015, it therefore prevails.

The 'in like circumstances' concept appears to be a good one in theory, but it is problematic in practice because a foreign investor will never be in 'like circumstances' with domestic investors, limiting the prospect of fully realising the effectiveness of the national treatment principle. This issue is further dealt with in chapter 5 when comparing the provision of the Southern African Development and Community Finance and Investment Protocol of 2016 (SADC FIP) and the Pan African Investment Code of 2015 (PAIC).

212 Sornarajah Muthucumaraswamy, *The International Law on Foreign Investment* (2017) 233.
213 Section 3(2) of the B-BBEE Act.

2.6.2 The fair and equitable treatment standard

The origin of the FET standard can be traced back to early customary international law just after the World War II.[214] However, there is no precise definition of this standard because writers, arbitrators, scholars, and judges cannot agree on what exactly constitutes fair and equitable.[215] This concept has thus not been precisely defined in the fields of international investment law and international economic law.[216] Despite its lack of precision, the FET standard has been used in international arbitration to assess the appropriateness of a government's behaviour that does not easily qualify as expropriation.[217]

The Havana Charter was the first instrument to contain a reference to the 'equitable' treatment accorded to foreign investors.[218] Article 11(2) of the Havana Charter empowers member states to make recommendations and promote bilateral or multilateral agreements on measures to ensure the just and equitable treatment of enterprise, skills, capital, arts, and technology transferred from one member state to another.[219] The United Nations Conference on Trade and Development (UNCTAD) developed two approaches to be taken into account when interpreting the FET standard, namely, the plain meaning approach where a foreign investor is assured to receive a treatment that is 'fair' and 'equitable'[220] and the contextual approach which equates fair and equitable treatment with the IMST taking into account relevant and applicable circumstances.[221]

The FET standard incorporates the element of fairness and equity elements derived from customary international law.[222] It contains four elements, namely, fair procedure,

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214 The UNCTAD 'Fair and Equitable Treatment' UNCTAD Series /ITE/IIT/11, Vol III 1999 (UNCTAD Series: Fair and Equitable Treatment) 7.

215 *Ibid.*

216 The UNCTAD: FET Series 10; See further Segger Marie-Claire *et al* (eds) *The Global Trade Law Series: Sustainable Development in World Trade Investment Law* (Wolter Kluwer 2011) 238.

217 The *UNCTAD*: FET Series 10.

218 Article 11(2) of the Havana Charter for the International Trade Organisation.

219 The Havana Charter never came into force; however, its provision that dealt with the protection of foreign investment was later incorporated into investments agreements.

220 The UNCTAD: FET Series 10.

221 *Ibid.*

222 Subedi Surya, *Foreign Investment Law: Reconciling Policy and Standard* (2012) 57.

non-discrimination, legitimate expectation, transparency and proportionality.[223] Fair procedure refers to the notion of due process, denial of justice, and the necessary judicial and/or administrative proceedings for the protection of foreign investors' rights and interests.[224]

A host state's discriminatory intent may contribute to the finding of a violation of the FET standard by a tribunal or court.[225] However, the host state may justify the existence of discriminatory behaviour by demonstrating the existence of reasonable grounds for such discrimination.[226] Foreign investors have a right to have their legitimate expectations protected by the wording of an IIA, as well as by stability and consistency in the host state's overall legal framework.[227]

In the *Parkerings-Compagniet AS v Republic of Lithuania*[228] case, the Tribunal held that a foreign investor's expectations are generally only legitimate and protectable under international law if they are based on either the host state's explicit promises or implicit assurances that the investor considered when making an investment.[229] The legal regime of the host state must also be open and clear. This means that foreign investors must have easy access to all relevant legal requirements for initiating, completing, and successfully managing their investments in the host state.[230] The proportionality requirement prevents the host country from putting unreasonable or unnecessary strain on foreign investment.[231] In other words, the host state may only limit a foreign investor's rights and interests if such limitation is reasonable and necessary.

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223 Segger Marie-Claire *et al* (eds), *The Global Trade Law Series: Sustainable Development in World Trade Investment Law* (2011) 247-249; See Drabek Zdenek and Mavroidid Petros, *Regulation of Foreign investment: Challenges to International Harmonisation* (2012) 248-250.

224 Segger Marie-Claire et al (eds), *The Global Trade Law Series: Sustainable Development in World Trade Investment Law* (2011) 247-249.

225 *Ibid* 247.

226 The UNCTAD: FET Series 24.

227 *Ibid.*

228 *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8 (*Parkerings-Compagniet AS* case).

229 *Ibid* para 331.

230 Article 2(5) of the United States Model BIT of 1994.

231 Segger Marie-Claire *et al* (eds), *The Global Trade Law Series: Sustainable Development in World Trade Investment Law* (2011) 249.

The FET standard also prohibits the host state from abusing its authority. The host state may not unreasonably refuse to meet its contractual obligations, or use its powers to evade agreements with investors, and/or act in bad faith during contractual obligations execution.[232] It is unclear whether the FET standard is higher than the general IMST standard. However, the North American Free Trade Agreement (NAFTA) of 1989 issued an interpretative statement indicating that the FET as used in NAFTA does not contemplate a higher standard than the IMST in customary foreign investment law. The FET standard is often said to be able to adapt because its content and application can be adjusted to meet the evolving demands of each stakeholder involved.[233] For this reason, it is believed to have been the most invoked treaty standard in investor-state arbitration, and it is generally present in claims brought by foreign investors against host states.[234]

2.6.3 The full protection and security standard

Most IIAs contain provisions which grant foreign investors full protection and security for their investment.[235] The full protection and security standard is not as popular as the other IMSTs. For this reason, it is not applied regularly during investment dispute resolutions.[236] There is also a paucity of cases dealing with this standard, and where it was raised, the tribunals simply held that there was no breach of this standard without testing the scope of its application.[237] In a broad sense, the standard of full protection and security refers to the protection of investment or property rights.[238] It prohibits

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232 Martin Anne, 'Proportionality: An addition to the International Centre for the Settlement of Investment Disputes' fair and equitable treatment standard' (2014) 37:3 *Boston College International and Comparative Law Review* 62.

233 Sadiq Lawal, 'Variability of fair and equitable treatment standard according to the level of development, governance capacity and resources of host countries' (2014) 9:4 *Journal of International Commercial Law and Technology* 229.

234 Subedi Surya, *Foreign Investment Law: Reconciling Policy and Standard* (2012) 62. See further Drabek Zdenek and Mavroidid Petros, *Regulation of Foreign investment: Challenges to International Harmonisation* (2012) 247-248.

235 See for example, the Article 1105(1) NAFTA Agreement and Article 10(3) of the Energy Charter Treaty of 1994.

236 Reinisch August, *Standards of Treatment Protection* (2008) 131.

237 For cases where the full protection and security was raised as a point of departure by the claimants refer to the *Parkerings-Compagniet AS v Republic of Lithuania* Case; *SGS Société Générale de Surveillance SA v Republic of the Philippines,* ICSID Case No ARB/02/6 and *Tecnicas Medioambientales Tecmed SA v United Mexican States,* ICSID Case No ARB(AF)/00/2.

238 cf Vandevelde Kenneth, 'Model bilateral investment treaty: The way forward' (2015) *South-Western Journal of International Law* 167.

contracting states from using force or violent means against foreign investors and their investments.[239]

The full protection and security standard further prohibits the host state from unreasonably impairing the foreign investment.[240] In this regard, it requires the host state to refrain from using unreasonable violence or force against the property of the foreign investor, if such violence or force can be avoided.[241] In other words, the host state's obligation is not to refrain from causing damage, but to exercise due diligence, or to take reasonable steps to prevent damage to a foreign investor's property.[242] For liability to arise, there must be a causal link between the action of the host state and the prejudice suffered by an investment.[243]

The application of the full protection and security standard may overlap with the FET standard. Similarities between the FET and the full protection and security standards:

(a) Just like the FET standard, the full protection and security standard may be breached, even if there is no physical impairment of the investors' investment;[244]
(b) In the case of *Occidental Petroleum Corporation v Ecuador*, the tribunal held that if it is established that there has been a violation of the FET standard, it becomes moot to enquire whether there had, in addition been a violation of the full protection and security standard.[245] This is because treatment that is not fair and equitable automatically entails an absence of full protection and security.[246]

The violations of this standard can be used only as a last resort, and a foreign investor is entitled to compensation. This provision, like most IMSTs, is only in effect because the IIA provides for it and therefore not inherent. The full protection and security standard is not clear whether it is a subjective or objective standard. However, the host state's due diligence obligation means that the host state is required to take all

239 Schreuer Christoph, 'Full protection and security' (2010) 1:2 *Journal of International Dispute Settlement* 353. See also Nartnirun Junngam, 'The full protection and security standard in international investment law: What and who is investment fully? Protected and secured from?' (2018) 7:1 *American University Business Law Review* 1.
240 *Ibid.*
241 *Ibid.*
242 Reinisch August, *Standards of Treatment Protection* (2008) 138.
243 *Ibid.*
244 *Ibid* 140.
245 *Occidental Petroleum Corporation v Ecuador* case para 183.
246 *Ibid* para 187.

reasonable preventive measures that a host state in similar circumstances is expected to take.

2.6.4 The most favoured nation standard

If there is no standard of protection from an IIA, the foreign investor may still be protected by virtue of the most favoured nation standard (MFN).[247] The MFN standard originates from old treaties of FCN.[248] These FCN treaties included a provision granting signatory companies the right to hire executive personnel or employees of their choice in their overseas operations.[249] This standard is contained in both old and contemporary IIAs, however, at the global level, the definition of the MFN standard is contained in Article 4 of the ILC Articles on Most Favoured Nation Clause of 1978. According to this provision, a most-favoured-nation clause is a treaty provision in which a state undertakes an obligation to another state to accord most-favoured-nation treatment in an agreed sphere of relations.[250] In other words, the MFN clause requires a state to extend to all other member states any concessions, privileges, or immunities granted to one nation in a trade or investment agreement.[251] Although its name implies favouritism toward another nation, the MFN standard denotes the equal treatment of all countries.[252]

The MFN standard, like the national treatment standard, is relative in that it defines the required treatment by reference to the treatment accorded to other investments in similar circumstances.[253] It enables foreign investors of contracting parties to benefit from a favourable treatment that was afforded to nationals of a third state by either

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247 Salacuse Jeswald, *The Law of Investment Treaties* (2010) 252.

248 UNCTAD, 'Most-Favoured-Nation' *UNCTAD Series on Issues in International Investment Agreements II 201*9. For an example of FCN treaty see Article Treaty of Amity and Commerce between the United States and France of 1778.

249 Silver Gerald, 'Friendship, commerce and navigation treaties and United States discrimination law: The right of branches of foreign companies to hire executives of their choice' (1989) 57:5 *Fordham Law Review* 765.

250 Article 1 of the GATT for another example of the MFN provision.

251 UNCTAD 'Most-Favoured-Nation' *UNCTAD Series on Issues in International Investment Agreements II 2010* 9.

252 *Ibid* 14.

253 Sadiq Lawal, 'Variability of fair and equitable treatment standard according to the level of development, governance capacity and resources of host countries' (2014) *Journal of International Commercial Law and Technology* 229.

contracting state.[254] The purpose of the MFN standard is to provide a foreign investor from one of the contracting parties to an IIA with favourable trade and investment conditions in the host state.[255] Another primary objective of the MFN standard is to ensure that foreign investors from one contracting state receive preferential treatment in the territory of the other, in cases where the host state grants favourable treatment to nationals or companies from a third country.[256]

Furthermore, the MFN standard can be used to grant equality in trading and investment conditions and not to grant superiority, or to guarantee the combination of advantageous rules and standards in IIAs.[257] Furthermore, if the host state grants a foreign investor from a third state a favourable treatment, an obligation arises for such host state to grant foreign investors of the contracting states, at least the equivalent treatment to that afforded to a third party.[258]

The MFN standard requires non-discrimination between foreign investors by the host state.[259] The principle of non-discrimination is a central feature of IIAs, which typically provide for MFN.[260] The host state is under an obligation to extend a favourable treatment to foreign investors from the moment it grants such treatment to an investor from a third country.[261] This could come at a high cost to the host state. The 'right to claim' approach, on the other hand, limits the host state's responsibility to extend favourable investment conditions to a foreign investor only when the claimant makes such a claim.[262] The MFN standard affords foreign investors more favourable treatment than available under customary international law.[263]

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254 The UNCTAD, 'Most favoured nation' UNCTAD/ITE/IIT/10, Vol III,1999 (UNCTAD Series Most favoured-Nation) 7.

255 Thulasidhass P R, 'Most-favoured-nation treatment in foreign investment law: Ascertaining the limits through Interpretative standards' (2015) 7:1 *The Amsterdam Law* 4.

256 UNCTAD, 'Most favoured nation' UNCTAD Series on Issues in International Investment Agreements II 2010 13-14.

257 *Ibid.*

258 Cole Tony, *The Structure of Investment Arbitration* (Routledge Taylor and Francis Group 2013) 81.

259 Article 4 (Commentary) of the SADC Model Bilateral Investment Treaty Template, 2012.

260 Woolfrey Sean, 'The SADC Model Bilateral Investment Treaty Template: Towards a new standard of investor protection in southern Africa' https://www.tralac.org/images/docs/6771/d14tb032014-woolfrey-sadc-model-bit-20141210-fin.pdf (accessed 26 August 2019).

261 Thulasidhass P R, 'Most-favoured-nation treatment in foreign investment law: Ascertaining the limits through interpretative standards' (2015) *The Amsterdam Law* 8.

262 *Ibid.*

263 Subedi Surya, *Foreign Investment Law: Reconciling Policy and Standard* (2012) 57.

2.7 Should the African Union depart completely from the Western approaches to regulating foreign investment?

The study argues that if Africa needs to achieve sustainable economic development and *relations,* it should not completely divorce itself from the Western approaches to regulating foreign investment. It should do away with the theories and notions that do not align with its economic agenda. The theory which policy makers subscribe to will ultimately influence the scope of application of a particular IIA. The hybrid theory is more relevant to the study since it aims to balance the rights of both foreign investors and the host states.

The role played by foreign investment in the economic development in developing states cannot be ignored. However, this does not mean that states should fully depend on IIAs, as this may lead to admitting foreign investment in host states at all costs. The study therefore argues that the classical Marxist and the dependence theories are orthodox, and as such cannot fully cater for the unique circumstances of Africa. The orthodox approach offers no possibility of reconciling analyses of growth undertaken at the level of the economy or the sector with the technical change at the microeconomic level.[264]

Although in 2004 the UNCTAD initially believed that the classical Marxist theory was correct, by 2009, it had changed its view and was leaning towards the hybrid theory. The 2009 view is correct because the important exercise is to ensure that rights of foreign investors and the host states are balanced. The main goal is not to protect foreign investment, but to ensure economic cooperation between states, which will lead both the foreign investor and the host state to benefit from a particular economic relation.

The UNCTAD in its 2009 Series of Key Issues changed the direction and pointed out that entering into BITs alone will not benefit the host state. In this regard, it identified three elements which play an important role in the success of foreign investment in the

[264] Nelson Richard and Winter Sydney, *An Evolutionary Theory of Economic Order* (Belknap Press of Harvard University Press 1982) 206.

host state, namely, the policy framework for foreign investment, economic determinants and business facilitation.[265] It further opined that being aware of this limited role of IIAs:

> Helps avoid frequent misperceptions about the impact of these treaties. Many developing countries seem to expect that, once they have concluded an IIA with another country, FDI from that country will almost automatically flow in. If this does not happen, disappointment about the role of IIAs may be huge and even result in criticism that these agreements are useless. However, such a critique is based on a wrong assessment of the role of IIAs.[266]

Many developing states conclude BITs without due consideration of their effects on host states. An example of the effects thereof may come to the fore when foreign investors challenge domestic laws. The South African case of the *Piero Foresti, Laura De Carli v Republic of South Africa* (*Piero Foresti* case)[267] is instructive in this regard. In *casu*, foreign investors challenged South Africa's new mining policy which afforded domestic investors who fell under the category of historically disadvantaged persons[268] more mining rights as compared to foreign investors.[269]

From the hybrid theory's point of view, the protection of foreign investment does not outweigh the right of the host state to regulate. Generally, many previously concluded IIAs afforded foreign investors a right to pursue treaty-based claims. In doing so, they relied on the principles of international law of arbitration in the host state without having to take into consideration the right of host states to regulate in the public interest. The need to balance the rights of foreign investors and those of the host states has gained popularity in recent years. At the national level, African countries have been modernising their national investment frameworks by adopting new laws and legislation governing FDI (e.g. Egypt introduced new investment laws and policies in

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265 UNCTAD, 'The role of international investment agreements in attracting foreign direct investment to developing countries' (UNCTAD Series 2009) 5.

266 *Ibid.*

267 *Piero Foresti, Laura De Carli v Republic of South Africa* ICSID case No ARB (AF) /07/1.

268 In the South African context, historically disadvantaged persons refer to Africans and women.

269 *Piero Foresti* case para 54.

2017,[270] Algeria in 22016,[271] Namibia in 2016,[272] Tunisia in 2016,[273] Burkina Faso[274] and South Africa in 2015[275] have enacted new domestic investment laws in the past 5 years).

The definition of investment forms the basis of IIAs, and as such plays an important role in the field of international economic law. Preferably, IIAs should have a narrow definition of investment. This will avoid the danger of host states committing themselves to permit, promote or protect forms of investment that they had not contemplated at the time of entering into investment agreements. The issue of overlapping IIAs has been of concern for a while now. The variance in the definition of investment is open to various interpretations which may in turn lead to uncertainty in the international economic law sphere. Unlike other fields of law, international economic law is largely based on treaties of different kinds.

The historical events discussed above show that there is a trend by policy makers, states, and tribunals of focusing on investment protection, which ultimately influenced the modern foreign investment landscape. Most contemporary policy makers still use some of the landmark events as a yard stick when negotiating and drafting IIAs. The current era should not only focus on investment protection but also on cooperation of states. There is currently a call for a new international economic order that focuses on national sovereignty over states resources and sovereign equality of states irrespective of their economic and social choices.

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270 Investment Policy Hub, 'Egypt: Investment laws' https://investmentpolicy.unctad.org/country-navigator/63/egypt (accessed 22 September 2021).

271 Investment Policy Hub 'Algeria: Investment laws' https://investmentpolicy.unctad.org/country-navigator/4/algeria (accessed 22 September 2021).

272 Investment Policy Hub, 'Namibia: Investment laws' https://investmentpolicy.unctad.org/country-navigator/148/namibia (accessed 22 September 2021).

273 Investment Policy Hub, 'Tunisia: Investment laws' https://investmentpolicy.unctad.org/country-navigator/221/tunisia (accessed 22 September 2021).

274 Investment policy Hub, 'Burkina Faso: Investment Laws' https://investmentpolicy.unctad.org/country-navigator/34/burkina-faso (accessed 22 September 2021).

275 Investment Policy Hub, 'South Africa: Investment laws' https://investmentpolicy.unctad.org/country-navigator/221/tunisia (accessed 22 September 2021).

The new economic order emphasises the discretion of states regarding the terms and conditions of admission of foreign investment in the host state.[276] It generally provides better regulating space for developing states. It has lowered the standards for compensation in case of expropriation as it requires 'appropriate' rather than 'adequate' compensation.[277] The concerns of developing states have shaped the new international economic order which is fundamentally influencing the broader scope of international economic law. The concerns relate mostly *inter alia* to the development dimension of IIAs, the balance of rights and obligations of investors and states, and the systemic complexity of the IIA regime.[278] The UN has admitted that many states are dissatisfied with the current foreign investment regime.[279]

It is worth noting that the above-mentioned treaty-based investment rules must be understood and interpreted in the context of the general rules of international law, just like all other treaties. This includes customary international law and general principles of law as defined in Article 38(1) of the 1945 Statute of the International Court of Justice (ICJ Statute). This is because public international law will always act as a yardstick at the international level. Thus, the principles discussed above fall squarely within the general rules of public international law. These principles are important for the study since they all affect the performance requirement of IIAs.

The principles of foreign investment law have undergone much change in the past, and many states have embraced these principles in many global, continental and regional IIAs. However, what is important is to take these old principles, and review them to fit the changing African economic conditions. For example, African principles in the proposed AU Investment Agreement should not only protect matured industries but also accommodate industries that are still in infancy stages so that the whole continent can benefit.[280] This view is not new, developed countries have always maintained a right to nurse their economic environment.[281] They have used it to justify the different

276 Herdegen Matthias, *Principles of International Economic Law* (2013) 16.
277 *Ibid.*
278 *Ibid* 16.
279 UNCTAD, 'Reform of the IIA regime: Four paths of action and a way forward' 2014 IIA Issue Note 1.
280 This is dealt with in dealt in chapter 4, and further included in the proposed AU Investment Agreement in chapter 5 below.
281 Sornarajah Muthucumaraswamy, *The International Law on Foreign Investment* (2017) 403.

treatment accorded to developing states.[282] There are many gaps in the current international legal framework, and with Africa not having its own binding and standalone continental investment instrument, it may be difficult to aggressively seek its economic agenda.

The IMST has evolved over the years. States are beginning to assess their usefulness in achieving the greater goal of sustainable development rather than the mere protection of investment. These IMSTs are intertwined; however, they need not be applied at the same time. Depending on the wording of IIAs, the IMST may at times overlap; and this may lead to 'forum shopping' in investment dispute settlement procedures. Forum shopping may allow foreign investors to initiate multiple procedures on the same question in order to take advantage of the potentially more favourable dispute settlement provisions available in different agreements.[283]

The need for a centralised AU Investment Agreement is accelerated by the issue of overlapping IIAs and domestic laws, which comes into play under IMST. Some of these trends in foreign investment have the potential to hinder the right of states to regulate, and as a result they will not be included in the proposed the proposed AU Investment Agreement.[284] For example, the national treatment serves no purpose in a county like South Africa which has black economic empowerment measures aimed at correcting the injustices of the past. In this instance, South African black investors have preferential treatment over foreign investors. The scope of the FET should be limited so that if affords foreign investment 'appropriate' rather than 'adequate' protection. Furthermore, while the IIAs notably promote these closely related concepts (national treatment, MFN, FET, full protection and security), they also contain legal and/or textual variations, sometimes of a subtle nature.[285] This could result in divergent interpretations of the same general obligation under different agreements.[286]

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282 *Ibid.*

283 For an example of forum shopping, See *CME Czech Republic BV v Czech Republic, UNCITRAL*
Ronald S. Lauder v Czech Republic 2001.

284 This is dealt with in chapters 5 and 6 below.

285 OECD, 'Directorate for financial and enterprise affairs' (2004) *Working papers on foreign investment* 3.

286 *Ibid.* The extent of the inclusion of these provisions is dealt with in chapter 5 below when comparing the SDC FIP and the PAIC.

2.8 Conclusion

This chapter looked at the theories which influenced the legal debates on the importance of foreign investment. It interrogated the historical and current trends in the field of international investment law. It further underscored the gaps in the current global IIAs regime and found that the focus is more on investment protection, rather than economic cooperation of states. As a result, IIAs at the global level do not adequately allow host states to have control over the policy space and to regulate in the public interest. This chapter also looked at the key principles of foreign investment. It also highlighted the role played by the definition of a treaty and investment found in traditional IIAs. It further highlighted the need to develop the IMST provisions such as the national treatment and FET.

This chapter also put into perspective modern foreign investment law by highlighting the historical events which shaped this field of law. The dominant principles and IMST in the field of foreign investment law were highlighted. Even though the study is generally taken from an African perspective, discussion of foreign investment from the Eurocentric view in this chapter is important since it is necessary to underscore the successes and failures of the global investment regulatory framework. The West has to a certain extent influenced the international investment law landscape throughout the world, and Africa is no exception. However, some regimes which were inherited from the West do not serve the best interest of Africans.

The next chapter looks at the historical development of international economic law from an African perspective. It does this with the aim of debunking some of the prevailing notions of Africa's contribution in the development of the field of international law in general and international economic law in particular.

CHAPTER 3

HISTORICAL DEVELOPMENT OF INTERNATIONAL ECONOMIC LAW IN AFRICA - A DECOLONIAL PERSPECTIVE

3.1 Introduction

Geographically, Africa is the second largest continent in the world.[1] The continent is famed for its abundance of natural resources,[2] and for being economically, ethnically, culturally and socially diverse.[3] There are currently 55 states on the continent.[4] Its civilisation went through many changes in history, and as such the historical process that actuate Africa is suggestive of multiple trajectories.[5] People have lived in Africa for centuries, and as such it possesses a rich history.[6]

Taking the uniqueness of Africa into account, this chapter is structured differently from the rest of the chapters. In the previous chapter, the main focus was to bring to the fore the prevailing notions of international economic and legal order which shaped the global international investment regulation landscape. In this chapter, the unique historical events that shaped Africa are analysed to assess where Africa is coming from. This will provide a bigger picture of how it got to where it is currently, and ultimately, where it is supposed to go with regard to the reformation of the investment framework at the continental level. Thus, the ultimate aim of this chapter is to provide a historical overview of pre-colonial Africa, and early economic developments during the post-colonial era. This is done for the purpose of underscoring the importance of

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1 Africa Facts, 'Facts about Africa' https://africa-facts.org/facts-about-africa/ (accessed 16 March 2020). Africa covers about approximately 30,365,000 square km which make up for one-fifth of the total land surface of earth. Africa's total land area is It is bounded on the west by the Atlantic Ocean, on the north by the Mediterranean Sea, on the east by the Red Sea and the Indian Ocean, and on the south by the mingling waters of the Atlantic and Indian oceans.

2 AU, 'Member state profile' https://au.int/memberstates (accessed 16 March 2020).

3 Africa.Com, 'The diversity of African culture and creativity' https://africa.com/diversity-african-culture-creativity/ (accessed 16 March 2020).

4 Worldo Meters, 'Countries in Africa' https://www.worldometers.info/geography/how-many-countries-in-africa/ (accessed 21 October 2020).

5 Falola Toyin and Hoyer Cacee (eds), *Global Africans: Race, Ethnicity and Shifting Identities* (Routledge African Studies 2017) 20.

6 UNESCO, 'General history of Africa' https://en.unesco.org/general-history-africa (accessed 19 October 2020).

incorporating some pre-colonial aspects in the recommended AU Investment Agreement.

There seem to be no consensus on the exact historical periods in Africa. Many leading writers dealing with the history of Africa have divided the historical periods into different sets of years. A close reading of various African history books reveals that some scholars divided the periods in terms of the major events which were considered a game changer for Africa; while for others, it is just a continuation of episodes in the African history.

3.2 Understanding the concepts of Pan-Africanism, Africanisation, reformation, decolonisation and eurocentrism

Pan-Africanism

Pan-Africanism refers to a movement by Africans that is aimed at reclaiming their history, culture and national identity which were diminished by colonisation.[7] Pan-Africanism has been a driving force behind the reformation and Africanisation of foreign investment in Africa. At this juncture, it is important to point out that Pan-Africanism is a wide concept with different meanings, which are dependent on the circumstances and historical period within which it is being discussed.

On a general level, the concept encompasses a number of different ideals, practices and principles.[8] It underscores common interests and a need for Africans to unite wherever they are in the world.[9] Pan-Africanism is premised on the conviction that the destiny of Africans is connected.[10] From both political and decolonisation contexts, Pan-Africanism denotes a drive to reclaim Africa's control over its narrative, policy space and economy.

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7 Clarke John, 'Pan-Africanism: A brief history of an idea in the African world' (1988) 145 *Présence Africaine* 26.

8 M'Baye Babacar, 'Narrowing the gap between the African-centred and the postmodern interpretations of Pan-Africanism in contemporary Black Atlantic Studies' (2006) 21 *UCLA Historical Journal* 80.

9 South African History Online, 'Pan-Africanism' https://www.sahistory.org.za/article/pan-africanism (accessed 24 August 2021); See also M'Baye Babacar, 'Narrowing the gap between the African-centred and the postmodern interpretations of Pan-Africanism in contemporary Black Atlantic Studies' (2006) 21 *UCLA Historical Journal* 80.

10 *Ibid.*

Africanisation:

Africanisation is frequently defined as a renewed focus on Africa and entails reclaiming what has been taken from the continent.[11] The academic debates in recent past have reminded us that there is a relative lack of African voices in the global international investment law agenda. In other words, scholars most especially African scholars are alive to the fact that the research that deals with Africanisation of foreign investment is limited. The concept of Africanisation is rooted in an African agenda that aims to place African states at the centre of all issues concerning them.

In the context of foreign investment law, Africanisation encapsulates the progressive remaking of the foreign investment regulatory landscape substantive and procedural reforms.[12] It is about giving legislative and treaty reforms that prioritise the interests of African states a voice and ownership.[13] Africanisation thus allows African leaders to reclaim their policy space and steer Africa in the direct that suits the current and future generations of African people. This is done with the purpose of achieving not only political and social emancipation, but to also achieve economic emancipation.

Reformation:

The reformation of foreign investment law stems from an argument that the current legal framework entrenches the imperial and capitalist interests of multinational corporations at the detriment of African states.[14] As such, Africa's effort at reforming and remaking foreign investment span across domestic, regional and continental spheres.[15] Reformation of international economic law from an African perspective is a form of post-colonial African international legal knowledge production.[16] As a legal concept it is not an end in itself, a closed set of goals, or a policy prescription, it is an evolving critical legal phenomenon with both procedural and substantive Africanised agendas.

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11 Letsekha Tebello, 'Revisiting the debate on the Africanisation of higher education: An appeal for a conceptual' (2003) 8 *The Independent Journal of Teaching and Learning* 5. It can relate to among others culture, religion and education.

12 Olabisi Akinkugbe, 'Africanisation and the Reform of International Investment Law' (2021) 53:1 *Western Reserve Journal of International Law* 12.

13 *Ibid.*

14 *Ibid* 9.

15 *Ibid* 12.

16 *Ibid* 14.

Decolonisation:

Ngugi wa Thiongo ravages colonialism by arguing that 'Africa has been a victim of forces of colonial exploitation, oppression and human degradation'.[17] When one is colonised, they are removed from history; and to decolonise is to reclaim the power that was antagonistically taken. Decolonisation is thus a counter act which aims to restore and transform that which has been unlawfully or unfairly taken. In essence, decolonisation means the dismantling of relations of power and conceptions of knowledge that foment the reproduction of racial, gender, and geo-political hierarchies that are found in the modern Africa.

Eurocentrism:

Eurocentrism is a dialectical inter-phase that occurred during European colonisation of Africa, where diaspora wrecked psychologically, economically, culturally, politically, legally and otherwise.[18] Eurocentrism is therefore a 'culturalist' expression of the Western model that the only solution to the challenges of the current generation in Africa should come from the Global North. This is very far from the truth because in the context of Africa, Eurocentrism does not take into account the unique needs of Africans. Africa is need of an Africanised content and situation specific to deal with sustainable economic development issues.

3.3 The two schools of thought regarding the contribution of Africa to the development of law at an international level: The myth and the truth

Both the historical and ideological origins of international law are a matter of dispute among scholars.[19] Africa's contribution to the development of international law has also been the subject of debate for a while now. The question whether Africa contributed to the development of international economic law depends on the school of thought of the writer.[20] One may appreciate that what writers and scholars studied may not be Africa's authentic past, but a version transmuted through four centuries of colonialism.

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17 Ngugi wa Thiongo, *Decolonising the Mind: The Politics of Language in African Literature* (East African Publishers 1992) 100.

18 Chukwuokolo Chidozie, 'Afrocentrism or Eurocentrism: The dilemma of African development' (2009) 6 *African Journals Online* 24.

19 Jewsiewicki Bogumil and Mudimbe Valentin, 'Africans' memories and contemporary history of Africa' (1993) 32:4 *History and Theory* 1.

20 *Ibid* 3.

This is evident from the differing in periods of development in Africa. This is also influenced by the school of thought a particular writer or scholar associates with.

It is generally believed that Africans did not contribute to the development of international law let alone international economic law. This reasoning stems from the view that pre-colonial Africans did not have independent states, and thus could not have contributed to the development of any field of law.[21] This is far from the truth as the discussion of evidence of Africa as an active player in the international arena will show below. To that end, this part of the chapter uses common experiences of Africans to provide an analysis of economic related historical events throughout the African continent which dates back to the pre-colonial era. Nonetheless, the whole chapter is written with the contemporary circumstances and challenges facing Africa in mind.

3.3.1 Africa's contribution to the development of international economic law: The myth

The prevailing view in academic circles is that international law emerged in Europe after the conclusion of the Peace of Westphalia Treaty (the Peace of Westphalia) in 1648,[22] which resolved the thirty-year war.[23] Foster John opines that modern states only began to evolve, gained some stability and independence as well as embraced the notion of sovereign equality only after the fall of the Roman empire.[24] Foster also

21 Scholastic, 'Colonial Period 1607-1776' https://www.scholastic.com/teachers/articles/teaching-content/colonial-period-16071776/ (accessed 21 October 2020).

22 The Peace of Westphalia Treaty, which signalled the end of the Thirty-Years' War was concluded between feuding European nations in 1648 in Münster, Germany. Fassbender states that the Peace of Westphalia consisted of two separate treaties that were both signed at Münster, Germany. The first Treaty of Peace was between the Holy Roman Empire and France; whilst the second was between the Holy Roman Empire and Sweden. Both instruments were concluded on 24 October 1648. The treaties are sometimes referred to as the 'Peace of Münster' and the 'Peace of Osnabrück', the towns in which they were negotiated; See Bardo Fassbender, 'Westphalia, Peace of (1648)' https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e739 (accessed 28 November 2020).

23 The so-called 'Thirty-Years' War' is a central feature of European history. It was characterised by a series of wars fought by various European nations between 1618 and 1648. It is worth noting that religion played a huge role in these wars, and that the Peace of Westphalia is hailed as having brought the Thirty-Years' War to an end. See Shaw Malcom, *International Law* (Cambridge University Press 2017). See also Britannica, 'Thirty-Years' War' https://www.britannica.com/event/Thirty-Years-War (accessed 29 January 2020).

24 Foster John, 'The evolution of international law' (1909) 18:3 *Yale Law Journal* 152.

credits Grotius and the Peace of Westphalia with situating international law squarely in its current form and mould.[25]

He proceeds to extol Suarez Francis and Gentili Alberico as some of the luminaries of their time, through whose industry and skill principles of the law of nations were being churned out in Europe.[26] Klabbers Jan emphasises the 17th century as the period in which international law began.[27] However, he makes a disclaimer that this should not be interpreted to mean that 'there were no international rules before that date'.[28] This disclaimer, however, does not necessarily remedy the misconception that Africa and other regions did not contribute to the development of international law,[29] because it does no more than acknowledge that there may be some evidence of Africa's contribution without identifying that evidence.

As far as contribution to the development of law is concerned, it is believed that Africa only contributed to its field of indigenous law. In terms of this school of thought, Africans never contributed to the development of any field of law at the international level. As such, African states are generally classified according to the legal system transplanted during the colonial era.[30] Furthermore, it is not just in the field of international law or international economic law where Africa is regarded as not having contributed, the entire colonial design of the curriculum ensured that Africa's contribution was

25 Dube Angelo and Mhlongo Lindelwa, 'The Forgotten Continent? A South African Perspective on the Development of African International Legal Thought' in Lesaffer Randall, *Politics and the Histories of International Law*: *The Quest for Knowledge and Justice* (Brill Nilhoff 2021) 271-272.

26 Foster John, 'The evolution of international law' (1909) *Yale Law Journal* 152.

27 Klabbers Jan, *International Law* (Cambridge University Press 2013) 4. Klabbers cites the example of treaties regarding prisoners of war amongst the Greek city states and trade regulations amongst the Roman, as well as pre-colonial practices of diplomacy as evidence that international rules existed before the 17th century. Even though these, and more advanced rules existed in Africa way before those periods, Klabbers and other Eurocentric authors do not acknowledge that.

28 Klabbers Jan, *International Law* (2013) 4.

29 Dube Angelo and Mhlongo Lindelwa, 'The Forgotten Continent? A South African Perspective on the Development of African International Legal Thought' (2021) 273.

30 Salvatore Mancuso, 'The new African Law: Beyond the difference between Common Law and Civil Law' (2008) 14:1 *Annual Survey of International and Comparative Law* 45.

disregarded or marginalised.[31] For example, the law of contract,[32] law of delict,[33] and law of evidence[34] extoled European common law.

The only African law taught at most universities was 'African customary law' as a standalone subject, creating the impression that is the only area in which Africans contributed. The consequence brought by classification of system of laws is that any legal system that could not match the criteria of common law, Roman-Dutch law or civil law is relegated into a residual category generically called the 'other legal systems', which is capricious and disorganised.[35]

The only other subject that allowed elements of African customary law principles was the law of persons; here there was reliance on African customary rules of marriage, of property between husband and wife and of determining status of persons.[36] Besides the above, African legal systems and jurisprudence were relegated to a level below the common law or the Romans and the Dutch, and called it simply customary law; whilst calling the coloniser's *own customary law* 'common law'. The study argues that what was imposed on Africans as common law was essentially the customary law of the Dutch, Romans and Europeans. African history was for many historians seen as the history of Europeans in Africa or a part of the historical progress and development of Western Europe and an appendix of the national history of the metropolis.[37] This view stems from an argument that Africa had no history because history begins with writing

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31 Shehla Burney, 'Erasing Eurocentrism: Using the other as the supplement of knowledge' (2012) 417 *Counterpoints: Pedagogy of the Other* 143; See TWAIL 'A Critical Approach to International Legal Education in Africa: Some pivotal considerations' https://twailr.com/a-critical-approach-to-international-legal-education-in-africa-some-pivotal-considerations/ (accessed 02 September 2020).

32 Gardiol van Niekerk, 'The application of South African law in the courts of Botswana' (2004) 37:3 *The Comparative and International Law Journal of Southern Afric*a 312-326.

33 See Christopher Roederer, 'Working the Common Law Pure: Developing the South African law of delict (Torts) in light of the spirit, purport and objects of the South African Constitution's Bill of Rights' (2009) 26:2 *Arizona Journal of International and Comparative Law* 427-503.

34 See Christopher Nyinevi and Maame Addadzi-Koom, 'To admit or not to admit: A comparative constitutional perspective on illegally obtained evidence in Ghana' (2017) 42:4 *Commonwealth Law Bulletin* 538-563.

35 Salvatore Mancuso, 'The New African Law: Beyond the difference between Common Law and Civil Law' (2008) 14:1 *Annual Survey of International and Comparative Law* 42. Common law lawyers and judges tend to believe that the common law system is superior. This opinion is based on the idea that the common law system inherited from the British can provide high standard of protection of individual rights.

36 Ndulo Muna, 'African customary law, customs, and women's rights' (2011) 18:1 *Indiana Journal of Global Legal Studies* 88.

37 Ogot Bethwel, *African Historiography: From colonial historiography to UNESCO's general history of Africa*' (2011) 71 2.

and thus with the arrival of the Europeans.[38] This is far from the truth because the fact that something was not documented, it does not mean that it never happened.

Many authors emphasise the 'newness'[39] of post-colonial African states, and extol their willingness to embrace the Eurocentric version of international law in general and international economic law in particular; motivated by a desire to 'obtain the benefits of rules such as those governing diplomatic relations and the controlled use of force'.[40] July Robert states that 'after seventy-five years of colonial rule African independence in the 1960s was for the most part a new experience'.[41] He further posits that the quest for independence in Africa only began at the beginning of the nineteenth century.[42] This suggests that during the pre-colonial era, Africa did not have states which were sovereign and independent.

Furthermore, it is believed that the only form of trade Africans knew was slave trade.[43] However, slave trade cannot be regarded as a form of trade in international law. Elevating an abominable colonial practice to a form of international trade, obtained through coercion, in violation of the principles of law (even those principles of natural law which was prevalent at the time) and rules of customary law cannot be countenanced.

Iliffe John in his book titled *'Africans: The history of a continent'* argues that the main contribution that Africans made was being the frontiersmen who won against colonialism on behalf of the entire human race.[44] He further argues that the only

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38 *Ibid.*

39 See Anghie Antony, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004).

40 Dube Angelo and Mhlongo Lindelwa, 'The Forgotten Continent? A South African Perspective on the Development of African International Legal Thought' (2021) 278; See Westlake John, *Chapter on the Principles of International Law* (Cambridge University Press 1894). For examples of authors who used this term refer to Shaw Malcom *International Law* (Cambridge University Press 2017); See Crawford Young, *The Post-Colonial State in Africa* (The University of Wisconsin Press 2012); See also Barnett Michael and Sikkink Kathryn, 'From international relations to global society' http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-035?print=pdf (accessed 10 March 2020).

41 July Robert, *An African Voice: The Role of the Humanities in African Impedance* (Duke University Press 1987) *7.*

42 *Ibid.*

43 Settles Joshua, *The Impact of Colonialism on African Economic Development'* (University of Tennessee Honors Thesis Project 1996) 1. For how slave trade was conducted in pre-colonial Africa see Griffiths IEUAN Ll, *The African Inheritance* (Routledge 1995).

44 Iliffe John, *Africans: The History of a Continent* (Cambridge University Press 1995) 1.

'themes of African history' are: '(1) The peopling of the continent, (2) the achievement of human coexistence with nature (3) the building up of enduring societies and (4) their defence against aggression from more favoured regions'.[45] For this reason, he believes that pre-colonial Africa has been a recipient rather than a contributor to the policy development at the international level. It is unfortunate that he omitted any other contributions Africa made such as contributions in international law or international economic law.

The above has led scholars and historians to believe the myth that Africa did not contribute to the development of law at the international level. The focus or theme of many African books depicts Africa as a continent which had no legal foundation or order until the western colonisers occupied Africa and imposed European legal norms. This depiction of knowledge in western pedagogical terms is what led to the country-wide student protests in 2015 - 2016, where South African students demanded decolonised, Africanised or Afro-centred education.[46]

The question that begs for an answer is, how can a continent, which invented iron working tools, and had (and still has) the largest natural resources in the world (as it will be seen below) not have international legal rules? This is so even though there is plenty of evidence that crops, iron tools and natural resources were exported to other African countries and non-African countries.

3.3.2 Africa's contribution to the development of international economic law: The truth

The decolonial view of Africa's contribution to the development international law in general and international economic law in particular is that pre-colonial African states contributed immensely to the global development.[47] This study argues that Africa did not only contribute to the development of indigenous law, but to international law as well.

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45 *Ibid.* These themes will not be dealt with in this study as the focus is on economy.

46 Dube Angelo, 'Teaching law after the #feesmustfall protest - how technology saved the day at University of the Western Cape' in Siddarth Peter de Souza and Maximilian Spohr (eds) *Technology, Innovation and Access to Justice: Dialogues on the Future of Law* (Edinburgh University Press 2021) 282.

47 Igboin Benson, 'Traditional Leadership and Corruption in Pre-colonial Africa: How the Past Affects the Present' (2016) 42:3 *Studia Historiae Ecclesiasticae* 151.

The AU held the 5th Forum of the AU Commission on International Law (AUCIL) under the theme 'the Role of Africa in Developing International Law'.[48] During this proceeding, the AU argued that 'Africa's encounter with international law has shaped it and as argued by some scholars, the continent is largely a creation of international law'.[49] This forum thus endeavoured to analyse Africa's contribution and norm creation in the mostly Eurocentric discourse of international law, with the goal of increasing its active participation.[50]

Africa has a very unique history, and needless to say, the enquiry on how Africa contributed to the fields of international law and international economic law can be answered by drawing from this rich historical record. To dispute the view that Africans were 'settlers' in the wilderness and did not contribute to the development of international economic law, the term sovereignty is used. First and foremost, the term 'settlers' is problematic, as it denotes that Africans were 'settlers' in their own land. Pre-colonial African states were sovereign, and during this period Africans comprehended the fact that they should coexist, and thus formally agreed to surrender their private rights to a superior ruler.[51] Therefore, pre-colonial African systems and principles regulated interstate relations, which far outdated some of the so-called European principles.[52] For example, Africans made pacts/oaths which brought individuals together to form a community/state, or appointed an individual from among the community/state to become their ruler.[53]

These pacts or oaths are similar to contemporary rule of law and the *pacta sunt servanda* (agreements must be honoured). Graham Irwin asserts that amongst the Asante, a huge premium was placed on the *ntam* (oath)[54] as a crucial element of the

48 AU, 'African scholar agree at 5th Forum of the African Union Commission on international law (AUCIL)' https://au.int/sites/default/files/pressreleases/31723-pr-pr_404_-_fifth_forum_aucil.pdf (accessed 11 February 2020).

49 *Ibid*; See also Wilson Alice, *Sovereignty in Exile: Asaharan Liberation Movement of Governs* (University of Pennsylvania Press) 04.

50 *Ibid.*

51 Hobbes Thomas, *The Leviathan* (1651, reprinted in Oxford University Press 1909) 12-15; See Elia Taslim, *Africa and the Development of International Law* (Leiden Oceana Publications 1972); See also Griffiths IEUAN Li, *The African Inheritance* (Routledge 1995).

52 Richard Falk *et al* (eds), *International Law and the Third World* (Routledge 2008) 38.

53 Hobbes Thomas, *The Leviathan* (1651, reprinted in Oxford University Press 1909) 12-15; See Fiona Sheales, 'Sights/sites of spectacle: Anglo/Asante appropriations, diplomacy and displays of power 1816-1820' (unpublished LLD thesis, University of East Anglia 2011).

54 An oath is a promise made before some institutional authority. *Ntam* or oath occurs when the swearer pledges, binds, and commits himself or herself to the apodictic propositions in the oath, and as a result, the assertions mentioned in his oath can be demanded of him; See Kofi

proper conduct of international affairs.[55] Thus, African leaders in the pre-colonial era followed protocols in their dealings with other leaders, society, their own individuals as well as those from other states.[56] As such, these dealings may be classified as belonging to a realm of international relations or law.[57]

The term sovereignty in the African context has developed and changed across time as well as places, but in general it relates to the framework of social relations between governing authorities and the governed persons.[58] Wilson Alice approaches sovereignty from a social relations perspective, and refers to practices which evidence sovereignty as 'projects of sovereignty'.[59] According to her, state power, movement claims, distribution of resources and settlement of disputes are examples of 'projects of sovereignty'.[60] She further argues that the distance between territories does not mean an absence of sovereignty.[61] She then takes the discussion further by contextualising sovereignty through property or a 'thing'. Her view is that sovereignty represents social relations between persons (which includes governing authorities on one hand in relation to property' or 'things' on the other hand, and not necessarily in territorial form.[62] Thus, sovereignty is an evolving process, which cannot be understood solely by narrow focus on the Westphalian conception of sovereignty.[63]

Using Wilson Alice's argument above, the question that begs for an answer is: What was the setup of African states during the pre-colonial era? In answering this question, a further question is posed: Did Africans enjoy sovereignty and state power during the pre-colonial era? In answering these questions, one needs to look at the setup of states in the pre-colonial era. The argument of state power of pre-colonial African states is

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Agyekum, '*Ntam* 'Reminiscential oath' Taboo in Akan' 33:3 (2004) *Language in Society: Cambridge University Press* 317-342.

55 Graham Irwin, 'Precolonial African diplomacy: The example of Asante' (1975) 8:1 *The International Journal of African Historical Studies* 81.

56 Curtis Bradley, *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press 2019) 584.

57 *Ibid.*

58 Wilson Alice, *Sovereignty in Exile: Asaharan Liberation Movement of Governs* (2016) 5.

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

62 *Ibid* 7.

63 Biong Deng, *The Evolving Concept and Institution of Sovereignty: Challenges and Opportunities* (Africa Institute of South Africa Policy Brief Number 28 2010) 2.

based on how states in specific historical circumstances are compatible with contemporary state power.

Biong Deng posits that during this period there were established pre-colonial relations among African states, which covered many aspects of life including the economy and politics.[64] He then argues that even though the bilateral relations or 'pacts' and diplomatic representation were *ad hoc* in nature, they were more sincere than the modern day interactions in the international arena.[65] Smith Robert takes the argument further and starts by defining law as body of rules, whether enacted or customary, which are accepted by a community.[66] According to him, the purpose of international relations is universal in general, the only difference is that the rules must be changed to suit changing circumstances.[67] This is in line with the definition of international law which is understood to be a body of rules, regulations and principles, whether written or not, that regulate the interactions between and the affairs of states and other international law subjects.[68]

The argument in this study is that even though pre-colonial international agreements were made orally, or in the form of a symbol or an oath, they were international agreements, nonetheless. In other words, Africa, with its customary, unwritten laws, still practiced international relations using those same unwritten customary law rules; and that simply because these were customary and unwritten, does not mean that they were not rules of international law. Before the European set foot on the African soil, English was not part of the African languages, this language only came when colonialism started. However, they had taken *ntam* with other states and also had *imvumelwano*[69] (agreement) with other states. These brought them together in agreement, by whatever name it was called.

Furthermore, the argument in this study is that the unwritten nature of history applies not only to the African continent, but to every country. Both African and non-African states did not always have written laws, rules, or norms. What differs is the rate at

64 *Ibid.*
65 *Ibid.*
66 Smith Robert, 'Peace and palaver: International relations in pre-colonial West Africa' (1973) 14:4 *Journal of African History*) 600.
67 *Ibid* 601.
68 *Ibid.*
69 This term is common among the Nguni languages in Southern Africa, and it means agreement.

which various states documented their history and enacted laws and policies. For this reason, focusing solely on the unwritten nature of African law and history is unfounded and incorrect. Not recognising this fact deprives the foreign investment law discipline of an important aspect that shaped the field as we know it today.

3.3.3 *Pacts as a sign of communal commitment and diplomacy: An example of Africa's contribution to the development of International Law*

Peaceful contacts between independent groups have always, since time immemorial, required to a large extent, representational activity which has come to be known as diplomacy.[70] Diplomacy can be defined as the conduct of relations between sovereign states through the medium of officials based in the home country or host country.[71] For over centuries, diplomacy has retained a broadly constant character.[72] The purpose of diplomacy is to provide the best means for preventing international relations from being governed by force alone.[73] It thus serves as a vehicle for preventing war, negotiating policies and for the well-functioning of international institutions.[74] In contemporary times, diplomacy is a central feature of international relations.[75]

There were common patterns of the use of diplomats during the pre-colonial Africa.[76] These practices entailed authorising state officials to engage in foreign affairs. For example, in a letter of 1539 from three Portuguese missionaries at Benin to their king, John III, the missionaries wrote that the *Oba* (king) of Benin had the 'habit of ill-treating and imprisoning all ambassadors of kings who sen[t] messages to him', treatment which he had accorded to the envoys of the two small coastal states of Ardra and Labedde.[77] A report written by the captain of a group of missionaries on the island of St. Thomas to the Sacred Congregation at Rome, states that in 1691 relations between

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70 Geoff Berridge and Alan James, *A Dictionary of Diplomacy* (Basingstoke: Palgrave 2001) preface ix.

71 *Ibid*.

72 *Ibid.*

73 Adegbulu Femi, 'Pre-colonial West African Diplomacy: Its Nature and Impact' (2010) 4:18 *The Journal of International Social Research* 171; See Hoffman John, 'Reconstructing diplomacy' (2003) 5:4 *British Journal of Politics and International Relations* 525-542.

74 Adegbulu Femi*, 'Pre-colonial West African Diplomacy: Its Nature and Impact'* (2010) 4:18 *The Journal of International Social Research* 171.

75 Dube Angelo and Mhlongo Lindelwa, 'The Forgotten Continent? A South African Perspective on the Development of African International Legal Thought' (2021) 282.

76 Spies Yolanda, 'Africa and the idea of international society' (2016) 41:1 *Journal of Contemporary History* 42.

77 Adegbulu Femi, 'Pre-colonial West African diplomacy: Its nature and impact' (2010) *Journal of International Social Research* 171.

Benin and the Itsekiri kingdom of Warri were so strained that 'they were not exchanging ambassadors'.[78] This suggests that in the usual course of events, there was regular diplomatic liaison between the two kingdoms.

The employment of diplomats, ambassadors or messengers to represent and to negotiate on behalf of a state or society is a central feature of international relations. A pre-colonial example of diplomacy in Africa can be found in Bunyoro in East Africa where personal immunity for foreign emissaries travelling through the territory was assured.[79] In the Asante kingdom, history records the reception of diplomatic officials from the coast, and one each from the territories of Dahomey, Salaga and Yendi.[80]

In Sub-Saharan Africa, King Moshoeshoe is a prime example of pre-colonial African diplomacy.[81] Moshoeshoe had expressions relating to peace and negotiations that he used among his people and towards his enemies. For example, he would say that '*Khotso ke ausi oa ka'* (peace is my sister) and *boikakaso bo ke ba aha ntlo kapa motse* (arrogance can never build a home or a village).[82] He thus believed that diplomacy, transparency and justice could resolve war disputes.[83] Even though he was at times ruthless, his people could rely on him for tact and diplomacy.[84] This earned him the title of *monno oa litaba* (the man who knows how to handle public affairs).[85]

Another example of diplomacy in Sub-Saharan Africa is that of King Shaka Zulu. He would often send his agents to go and assess his counterparts, and if they were found to be friendly, Shaka Zulu would then send gifts of cattle and ivory as well as an ambassador to guide them to his capital for negotiations.[86] Once an agreement was reached, regiments of girls would then create an arena and dance as a way of

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78 Smith Robert, 'Peace and Palaver: International relations in Pre-colonial West Africa' (1973) *Journal of African History*) 601.

79 Graham Irwin, 'Precolonial African diplomacy: The example of Asante' (2010) *The International Journal of African Historical Studies* 81.

80 *Ibid.*

81 Pheko Kutloano, 'The birth and the existence of Lesotho: A diplomatic lesson' (unpublished LLM dissertation, University of Malta 2017) 7.

82 *Ibid* 35.

83 *Ibid.*

84 Prozesky Martin, 'Ethical leadership resources in Southern Africa's Sesotho-speaking culture and in King Moshoeshoe' (2016) 12:1 *Journal of Global Ethics* 7.

85 *Ibid.*

86 Gluckman Max, 'The rise of a Zulu Empire' (1960) 202:4 *Scientific American, a Division of Nature America* 157.

celebrating and cementing an agreement.[87] He is generally portrayed as a savage and a vengeful person; however, his purpose was to instil disciple to those that he led.[88]

Closely intertwined with African diplomacy was the oath, the equivalent of modern day *pacta sunt servanda*.[89] Graham Irwin posits that amongst the Asante, a huge premium was placed on the *ntam* (oath) as a crucial element of the proper conduct of international affairs.[90] Even though these practices were not collectively called diplomacy, that does not detract from the fact that they contained all the elements of what modern international law regards as diplomacy.

3.3.4 Dispute resolution as an example of Africa contribution to the development of law at an international level

Long before Africa was colonised, African states had institutional mechanisms as well as cultural sources to uphold the values of peace, tolerance, solidarity and respect for, and of, one another.[91] Pre-colonial African leaders were big on communal approach[92] to settling disputes and conflicts, had particular ways of resolving disputes.[93] Social ties, values, norms, and beliefs, as well as the threat of social excommunication, provided elders with legitimacy and sanctions to ensure their decisions were followed.[94] They always managed to give the parties involved a chance to be heard.[95] The parties would sit under a tree in the compound of a chief or community leader, and talk until the dispute was resolved.[96]

In pre-colonial Africa, the following methods were used to settle dispute: Mediation, adjudication, arbitration and negotiation. Mediators, adjudicators, arbitrators were

87 *Ibid.*
88 *Ibid* 157-158.
89 Dube Angelo and Mhlongo Lindelwa, 'The forgotten continent? A South African perspective on the development of African international legal thought' (2021) 284.
90 Graham Irwin, 'Precolonial African diplomacy: The example of Asante' (1975) *International Journal of African Historical Studies* 81.
91 Waindim Jude, 'Traditional methods of conflict resolution: The Kom experience' https://www.accord.org.za/conflict-trends/traditional-methods-of-conflict-resolution/ (accessed 04 October 2020).
92 African states in the pre-colonial era were organised according to clan, village, tribal or ethnic lines.
93 Abe Oyeniyi, 'Conflict resolution in the extractives: A consideration of traditional conflict resolution Paradigms in Post-Colonial Africa' (2017) 25:1 *Willamette Journal of International Law and Dispute Resolution* 61.
94 Kariuki Francis, 'Conflict resolution by elders in Africa: Successes, challenges and opportunities' (2015) 3:2 *Alternative Dispute Resolution Journal* 2.
95 *Ibid.*
96 *Ibid.*

drawn from the communities or societies, and they consisted of elders who were respected as trustworthy and believed to have accumulated experiences and wisdom to handle a case.[97] These methods were effective in settling disputes in pre-colonial Africa, because they encompassed the socio-political orientation of African people, addressing all the social, political and economic conflicts among people who lived a communal way of life.[98]

The pre-colonial dispute settlement mechanisms have the following principles: (1) Confidence and trust by the parties in the process, and as such they had to submit to the authority before them.[99] (2) Truth and impartiality as the parties had to tell the truth while the mediator or arbitrator had to be impartial when hearing the matter.[100] African elders view truth as an objective confirmation of scientific trust and ethical modesty in the dispute resolution process.[101] The parties were always reminded of the aftermath of their wrath if they didn't tell the truth and that spirits of gods and ancestors would be invoked in such cases.[102] Customs and oral maxims were used to persuade or convince the parties about the implication or otherwise of their behaviour.[103] (3) The parties were not only required to resolve their disputes, they were supposed to forgive each other.[104]

Unlike modern dispute resolution, the pre-colonial methods focused more on reconciliation and restoring peace among the parties as well as the community.[105] As such, damages were generally not awarded, although they could in certain circumstances be granted.[106]

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97 Waindim Jude, 'Traditional methods of conflict resolution: The Kom experience' https://www.accord.org.za/conflict-trends/traditional-methods-of-conflict-resolution/ (accessed 04 October 2020).

98 *Ibid.*

99 Ajayi Adeyinka, 'Methods of conflict resolution in African traditional society' (2014) 8:2 *An International Multidisciplinary Journa*l 142.

100 *Ibid.*

101 Abe Oyeniyi, 'Conflict resolution in the extractives: A consideration of traditional conflict resolution paradigms in Post-Colonial Africa' (2017) 25:1 *Willamette Journal of International Law and Dispute Resolution* 63.

102 Ajayi Adeyinka, 'Methods of conflict resolution in African traditional society' (2014) 8:2 *An International Multidisciplinary Journa*l 142.

103 Bello Paul and Adewale Olutola, 'Indigenous conflict resolution mechanisms in Africa: Lessons drawn for Nigeria' (2016) 13:2 *Bangladesh E-Journal of Sociology* 79.

104 Abe Oyeniyi, 'Conflict resolution in the extractives: A consideration of traditional conflict resolution paradigms in Post-Colonial Africa' (2017) 25:1 *Willamette Journal of International Law and Dispute Resolution* 62.

105 Kariuki Francis, 'Conflict resolution by elders in Africa: Successes, challenges and opportunities' (2015) 3:2 *Alternative Dispute Resolution Journal* 2.

106 *Ibid.*

The pre-colonial disputes settlements process was open and inclusive, and community members participated in the decision-making process. This is different to the western practice of majoritarian, or representative methods. This allowed the members of community to be part of the decision-making as the belief was that actions of the members of the community affected everyone within that community.[107] This ensured that the chair of the disputed resolution process was fair and impartial.

3.4 Africa's pre-colonial international relations that are foundational to trade and investment

As indicated above, pre-colonial African traders employed African customary law when doing business.[108] These traders enjoyed, for example, the protection of law from their unwritten contracts based on oaths and 'medicine', which they made with the community members.[109] The rules of customary law provided a bond between different African states, and a form of international law by which their interstate relations could be regulated.[110]

The formation of states, empires and kingdoms during the pre-colonial era in Africa was characterised by oral tradition and unwritten ancient law.[111] Notably, this oral tradition posed challenges in documenting Africa's pre-colonial history. Many of the historical events that took place during this period have been forgotten or distorted.[112] The rules/laws during this period were transmitted from one generation to the next orally.[113] However, the community's oral tradition[114] incorporated a broad general knowledge of the rules/laws which were expressed through songs, maxims and

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107 Ajayi Adeyinka, 'Methods of conflict resolution in African traditional society' (2014) 8:2 *An International Multidisciplinary Journa*l 142.

108 Walter Rodney, *A History of the Upper Guinea Coast 1545-1800* (Oxford University Press1970) 87-8.

109 *Ibid.*

110 Smith Robert, 'Peace and palaver: International relations in pre-colonial West Africa' (1973) *Journal of African History* 600.

111 This part of the study consulted the writings of anthropologists and ethnologists dealing with African man's existence during the pre-colonial era.

112 Camara Babacar, *Reason in History: Hegel and Social Changes in Africa* (Lexington Books 2011) 65.

113 Himonga Chuma and Diallo Fall, 'Decolonisation and teaching law in Africa with special reference to living customary law' (2017) 20 *PER* 7.

114 Oral tradition can be defined a source of knowledge from the oldest form of relating history. See Nöthling Johan, *Pre-colonial Africa: Her Civilisations and Foreign Contacts* (Southern Book Publishers 1989) 16-17.

idioms.[115] The idea that oral traditions do not deserve our attention, and further that they existed only in the pre-colonial period, is therefore a false and even dangerous misconception.[116]

The setup of the past economic environment in Africa means that there is no direct evidence of international investment relations, as there was no distinction between trade and investment. However, there is plenty of evidence relating to trade. Pre-colonial Africa generally refers to the period before the domination of Africa by European powers, that is before colonialism. Africa in the pre-colonial era was characterised by a degree of diversity of empires or kingdoms founded on the principles of communalism, self-governance, autonomy and territoriality.[117] During this period, African states were heterogeneous in nature and organised, with each state having its own set of rules, leadership procedures and culture.[118] The pre-colonial African leaders and chiefs enjoyed considerable support and popularity across their communities.[119] This support and popularity is what gave legitimacy to their territorial and administrative claims. Thus, the community leaders enjoyed sovereignty in their territory.

During the pre-colonial era, African states had a form of government varying greatly in size and structure.[120] The structure can be divided into centralised and decentralised societies.[121] In centralised societies, states were frequently led by emperors, monarchs, or rulers, and power was concentrated in the hands of an elite that made laws, collected taxes, and so on. These societies tended to form in agricultural or trading areas.[122] The degree of power possessed by the emperor or monarch varied from group

115 UNESDOC Digital Library, 'Oral Tradition and its methodology' https://unesdoc.unesco.org/ark:/48223/pf0000042767 (accessed 18 March 2020).

116 Jewsiewicki Bogumil and Mudimbe Valentin, 'Africans' memories and contemporary history of Africa' (1993) *History and Theory* 1.

117 MiaPkum Longbaam, 'Pre-colonial African international relations: Kanem-Bournu external relations under the Reign of Mia Idris Alooma (1517-1603)' a lecture presented at the M.Sc. International Relations and Strategic Studies at the University of JOS 1.

118 Mbunda Xavier, 'Procedures of dispute settlement: Pre-colonial to post independence Tanzania' (unpublished LLM dissertation, University of Dar es Salaam 1985) 20.

119 Michalopoulos Stelios and Papaioannou Elias, 'Pre-colonial ethnic institutions and contemporary African development' (2013) *Journal of the Econometric Society* 115.

120 Falola Toyin, *Key Events in African History: A Reference Guide* (2002) 125. See also Cappelen Christoffer and Sorens Jason, 'Pre-colonial centralisation, traditional indirect rule, and state capacity in Africa' 2018 56:2 *Commonwealth and Comparative Politics* 197.

121 Michalopoulos Stelios and Papaioannou Elias, 'Pre-colonial ethnic institutions and contemporary African development' (2013) 81:1 *Journal of the Econometric Society* 114-115.

122 *Ibid.*

to group, with some societies bestowing over-riding decision-making responsibilities while other leaders employed a symbolic status.[123] In decentralised civilisations, such as the Igbo of modern day Nigeria, Kikuyu of Kenya, the Nuer in Sudan or the Konkomba in Ghana and Togo, societies were made of group systems.[124] As a result, power was dispersed throughout the entire community with local elders providing leadership but with input from the population at large.[125]

African states during the pre-colonial era were never completely isolated.[126] There were trade arrangements amongst neighbouring states, across regions and outside the continent.[127] This ultimately established a large economic network among African states and non-African states.[128] There were three economic drivers during the pre-colonial era, namely, iron tool working, agricultural civilisation and natural resources.

Firstly, from a geological point of view, pre-colonial Africa was rich in minerals. Minerals of every kind were found and continue to exist throughout the continent.[129] The iron age marked a significant period in African trade relations. During this period, iron tools enhanced weaponry, made farming easier and created transport.[130] Evidence of metal working in Africa can be found in southern Egypt around 400BC.[131] Copper and iron formed the main part of metal working which was used to make pins, piercing instruments, and other articles.[132] At a later stage, smelting of copper ore was used to remove impurities.[133] During the African iron age around 500BC-1400AD, Arab and

123 Holton Robert and Nasson William (eds), *World Civilisations and History of Human Development* (United Nation Encyclopaedia of Life Support System 2009) 126.

124 Michalopoulos Stelios and Papaioannou Elias, 'Pre-colonial ethnic institutions and contemporary African development' (2013) *Journal of the Econometric Society* 114-115.

125 *Ibid.*

126 Falola Toyin and Fleming Tyler, 'African Civilisations: From the pre-colonial to the modern day' *World Civilisations and History of Human Development* 2; See Elias Taslim, *Africa and the Development of International Law* (Martinus Nijhoff 1972).

127 Oxford Research, 'Documenting pre-colonial trade in African' https://oxfordre.com/africanhistory/view/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-68?rskey=WVYJEnandresult=6 (accessed 19 March 2020).

128 *Ibid.*

129 Vogel Joseph (ed), *Ancient African Metallurgy: The Socio-Cultural Context* (2000) 1.

130 Gailey Harry, *History of Africa: From Earliest Times to 1800* (1981) 26-28.

131 Iliffe John, *Africans: The History of a Continent* (1995) 18.

132 Falola Toyin and Fleming Tyler, 'African Civilisations: From the pre-colonial to the modern day' *World Civilisations and History of Human Development* 2.

133 Vogel Joseph (ed), *Ancient African Metallurgy: The Socio-Cultural Context* (Altamira Press 2000) 89.

Bantu speaking communities on the East Coast of Africa had established trade relations with Rome, Arabia and Asia for exporting ivory, oil, gold and craftwork.[134]

Iron tools enabled Africans to thrive in any environment, allowing them to live in larger communities, which resulted in the formation of states and kingdoms. With the establishment of states came the emergence of modern civilisations with shared languages, beliefs and value systems, art, religion, lifestyle, and culture. The invention of tools made of copper and metals coincided with the rise of Africa's great agricultural civilisation.[135] Africans independently developed their own system of production and processing of metal.[136]

Another example of this kind can be found in the Ngwenya mine in the Kingdom of Eswatini,[137] which is one of the oldest mines in the world.[138] Red hematite and sparkling ore were extracted during the Middle Stone Age that flourished in southern Africa for about 100 000 years. Pre-colonial Africans were Agro-pastoralists and had the ability to smelt iron and exchanged the local surpluses for rare foods and goods in and outside the continent.[139]

Furthermore, traditional gold working took place in eastern Cameroon and west of Central African Republic.[140] This enabled the continent to exploit mineral wealth and flourish economically.[141] At first, they traded with neighbouring states, but in 1482, Portugal established Elmina (modern day Ghana) as its first trading export/outpost.[142] In the Sahara Desert and along the Swahili coastline of East Africa, vast trade networks also developed.[143] Southern African states with rich mineral wealth, such as Great

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134 Jaffe Hosea, *A History of Africa* (Zed Books 2017) 10.

135 Falola Toyin, *Key Events in African History: A Reference Guide* (2002) 43.

136 Buttner Thea, 'The economic and social character of pre-colonial states in tropical Africa' (1970) 5:2 *Journal of the Historical Society of Nigeria* 278. 275-289. See also David Phillipson, 'The chronology of the Iron Age in Bantu Africa' (1975) 16:3 *The Journal of African History* 321-342.

137 Dube Angelo, 'Does SADC provide a remedy for human rights violations in weak legal regimes? A case study of iron ore mining in Swaziland' (2013) 3:1 *SADC Law Journal* 259.

138 UNESCO, 'Ngwenya mines: Description' https://whc.unesco.org/en/tentativelists/5421/#:~:text=Ngwenya%20Mine%20is%20situated%20on,the%20world's%20earliest%20mining%20activity (accessed 13 September 2020).

139 *Ibid.*

140 *Ibid.*

141 Falola Toyin, *Key Events in African History: A Reference Guide* (2002) 26.

142 *Ibid.*

143 *Ibid*.

Zimbabwe and Tanzania developed mining capabilities and traded these for manufactured goods from overseas.[144]

Secondly, there is plenty of evidence of agricultural revolution from food gathering to food production during the pre-colonial era.[145] This revolution was characterised by domesticated plants and animals.[146] Furthermore, as the demand for crops and meat increased, the need to use tools/metals also increased. At the end of the 16th century, Africans were trading cattle and small stock for glass beads, iron bars, tobacco and other exotic goods.[147] Agriculture is thus one of the bases for African civilisation.[148]

Idriss Alooma has been named the successful practitioner of international relations in the ancient history of Africa between the years 1517 and 1603.[149] During his time in the Hanem-Bournu Empire, he created trade links between North Africa and West Africa known as the Trans-Sahara Trade.[150] He exported grains in exchange for salt, kola nuts, ivory, animal hides, nitrate, cottons, ostrich feathers and perfumes in these regions.[151] He also designed boats for Lake Chad, cleared roads, introduced standard units for measurements of grains.[152]

Trade passed from Ashanti through Gonja, Dagomba and Borgu to Hausaland.[153] The Hausa and Hausa-speaking officials served as diplomatic and commercial representatives of the trade network to local states.[154] Their functions were comparable with those of the European consuls in Venice in England and the Levant.[155] By the first

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144 Falola Toyin and Fleming Tyler, 'African Civilisations: From the pre-colonial to the modern day' (World Civilisations and History of Human Development) 3.

145 Falola Toyin, *Key Events in African History: A Reference Guide* (2002) 26.

146 Buttner Thea, 'The economic and social character of pre-colonial states in tropical Africa' (1970) *Journal of the Historical Society of Nigeria* 278.

147 Chami Felix *et al, The African Archaeology Network: Reports and Reviews* (Dar es Salaam University Press 2004) 116.

148 For detailed discussion of how agriculture in the pre-colonial era effected civilisation, see Falola Toyin, *Key Events in African History: A Reference Guide* (2002) 30-32.

149 MiaPkum Longbaam, 'Pre-colonial African international relations: Kanem-Bournu external relations under the Reign of Mia Idris Alooma (1517-1603)' a lecture presented at the M.Sc. International Relations and Strategic Studies at the University of Jos, Nigeria 9; See also BG Martin, 'Mai Idris of Bornu and the Ottoman Turks-1576-78' (1972) 3:2 *International Journal of Middle East Studies* 470-490.

150 *Ibid* 16.

151 *Ibid* 17.

152 *Ibid.*

153 Smith Robert, 'Peace and palaver: International relations in pre-colonial West Africa' (1973) *Journal of African History* 603.

154 *Ibid.*

155 *Ibid*.

century of AD, Africa had formed trade relations with China, India and the Middle East.[156]

3.5 The colonial era

The colonial era in Africa is largely characterised by European domination in the form of imposed British, French, German, Italian, Portuguese and Spanish rule.[157] There is no consensus among writers and scholars on the exact year of the start of colonisation. In the late 1880s, very few areas in Africa were colonised. Notably, the Dutch man Jan van Riebeek invaded South Africa in 1652, but for many other parts of Africa, colonialism only took place after 1880.[158] For the purpose of this study, colonisation starts from 1880 until 1959. The reason for this is that many African countries[159] *regained* their independence from colonial powers during the 1960s.

Colonisation has been controversially defined as the influence of civilised people on people of lower civilisation, with the goal of gradually transforming the latter through the development of its natural resources and the improvement of the native people's moral and material condition.[160] Civilised people in the context of this definition does not refer to African people as they were generally seen as the 'other population'. The language in this definition is problematic, as it denotes colonialism was an emissary of light to Africa. It suggests that African people were 'backwards', and it presents itself as a carrier of progress and modernity to the colonised without taking into account the already existing rules and practices.

As highlight above, from 1880 until 1959, the majority of African states faced the very daunting reality of being placed under colonialism.[161] Soon after settling in Africa, European states convened a conference in Berlin between 15 November 1884 and 26 February 1885 (the Berlin Conference)[162] the purpose of which was to allocate to

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156 Felix Chami *et al,* 'East Africa and the Middle East relationship from the first millennium BC to about 1500 AD' (2002) 72:2 *Journal des Africanistes* 29.

157 Griffiths IEUAN LI, *The African Inheritance* (1995) 11.

158 Iliffe John, *Africans: The History of a Continent* (1995) 123-125.

159 At least 35 African countries regained their independence in the 1960s.

160 Domínguez Lara and Luoma Colin, 'Decolonising conservation policy: How colonial land and conservation ideologies persist and perpetuate indigenous injustices at the expense of the environment' file:///C:/Users/mhlonlb/Downloads/land-09-00065-v2.pdf (accessed 06 November 2020).

161 Boahen Adu (ed), *General History of Africa: VII Africa under Colonial Domination 1888-1935* (James Currey Ltd 1990) 1.

162 *Ibid* 465.

themselves different parts of the African continent.[163] For example, the General Act of the Berlin Conference of 1885 disposed of certain territories by passing resolutions dealing with free navigation in the Niger, the Benue and the coastal areas in Africa.[164] Article 34 of the General Act of the Berlin Conference provides that any European nation which takes possession of an African coast or declared a 'protectorate' there, must notify signatories to the Act. This was called the doctrine of 'effective occupation'.[165] European powers gained spheres of influence in Africa between 1885 and 1902. They accomplished this through settlement, exploration, the establishment of commercial posts, missionary settlements, and the occupation of strategic areas, as well as through treaties signed with African leaders.[166]

These treaties were between Europeans *inter se*, and between Europeans and African leaders.[167] The Anglo-Germany Delamination Treaty of 1890, for example, placed Zanzibar and its civilians under British spheres of influence.[168] The Anglo-Portugal Treaty of 1891 was an influencer in Angola and Mozambique.[169] The Europe-Africa treaties general dealt with two issues. Firstly, they dealt with slave trade and commerce, which led to European political interference in Africa.[170] Secondly, they dealt with politics by which African leaders surrendered their sovereignty in return for protection or undertook an obligation not to enter into an agreement with other European states.[171] The Anglo-Congo Free State Treaty of 1894, for example, partitioned the territories of Congo Free State (currently known as the Democratic

163 Bahemuka Judith and Brockington Joseph (eds), *East Africa in Transition: Images, Institutions and Identities* (University of Nairobi Press 2004) 234; See Uzoigwe Godfrey, 'Reflections on the Berlin West Africa Conference, 1884-1885' (1985) 12:2 *Journal of the Historical Society of Nigeria* 9-22.

164 Boahen Adu (ed), *General History of Africa: VII Africa under Colonial Domination 1888-1935* (1990) 15; See Matthew Craven, 'Between law and history: The Berlin Conference of 1884-1885 and the logic of free trade' (2015) 3:1 *London Review of International Law.*

165 World History Chronology, 'Berlin Conference 1884' http://www.thenagain.info/WebChron/Africa/BerlinConf.html (accessed 19 March 2020).

166 Ocran Modibo, 'The clash of legal cultures: The treatment of indigenous law in colonial and post-colonial Africa' (2006) *Akron Law Review* 465.

167 *Ibid.*

168 Article 1 of the Anglo-Germany Delamination Treaty of 1890.

169 Boahen Adu, *Africa under Colonial Domination 1880-1935* (University of California Press 1985) 34.

170 *Ibid.*

171 *Ibid.*

Republic of Congo).[172] At the end, there were only two African countries that were never colonised, namely, Ethiopia and Liberia.[173]

The colonial ruler disrupted the African traditional systems, norms and values.[174] The colonial power justified the colonisation of independent African states even though it was through military conquest, coercion, fraud, or intimidation.[175] From the coloniser's point of view, colonisation was part of European's 'civilisationist' mission, which was 'good' for Africans in any case, and any method deployed in its pursuit was morally and legally just. Brutal force including the most barbaric actions imaginable, was applied by Europeans in the furtherance of colonialism.[176] They promoted their economic and religious values, at the expense of Africans.[177] This is evident in economic exploitation and socio-religious character of the colonial period.[178]

The colonialists did not only establish various institutions and structures for the administration of their colonies, but they also established an economic system for their exploitation of African natural resources. During the late eighteenth century, the Europeans controlled the Atlantic slave trade through economic manipulation.[179] The General Act of Berlin Conference silenced African leaders by subordinating their claims to sovereignty, and in the process, forcefully took over the African continent.

3.6 Africa's resistance against colonialism

A question that begs for an answer is: Did African people and leaders during the colonial period attempt to resist colonisation? The answer is yes. An overwhelming majority of African leaders were vehemently opposed to this change and expressed

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172 *Ibid.*

173 Thought.co, 'Countires in African never colonised' https://www.thoughtco.com/countries-in-africa-considered-never-colonized-43742 (accessed 24 September 2021).

174 Hrbek Ivan, *General History of Africa: III Africa from the Seventh to the Eleventh Century (*UNESCO 1992) 190.

175 *Ibid.*

176 Makau Mutua and Anghie Antony, 'Proceedings of the annual meeting (American Society of International Law)' (2000) 94 *Cambridge University Press on behalf of the American Society of International Law* 33.

177 Igboin Benson, 'Colonialism and African cultural values' https://academicjournals.org/journal/AJHC/article-full-text-pdf/8DCB1CE40953 (accessed 25 March 2020).

178 *Ibid.*

179 The resistance of colonisation in Africa was against European religious ideas, however, the study will only deal with economic resistance.

their determination to maintain the status quo.[180] But above all, they were determined to retain their sovereignty and independence.[181] During the colonial period, African leaders attempted to protect their economic environment.[182] African resistance was the consequence, not of slave trade, but of the collapse of their economies caused by the impact of European capital manipulation.[183]

In 1890, Machemba, the king of the Yao in what is now Tanzania, said to the German commander Hermann von Wissmann that:

> I have listened to your words but can find no reason why I should obey you -- I would rather die first. If it should be friendship that you desire, then I am ready for it, today and always; but to be your subject, that I cannot be. If it should be war you desire, then I am ready, but never to be your subject. I do not fall at your feet, for you are God's creature just as I am. I am Sultan here in my land. You are Sultan there in yours. Yet listen, I do not say to you that you should obey me; for I know that you are a free man. As for me, I will not come to you, and if you are strong enough, then come and fetch me.[184]

In 1891, the then Prempeh I of Asante in the Gold Coast (present day Ghana) rejected the protection offered by the British. His response was:

> The suggestion that Asante in its present state should come and enjoy the protection of Her Majesty the Queen and Empress of India is a matter of very serious consideration. I am happy to say we have arrived at this conclusion, that my Kingdom of Asante will never commit itself to any such policy. Asante must remain as of old, at the same time to remain friendly with all white men. I do not write this in a boastful spirit, but in the clear sense of its meaning. The cause of Asante is progressing and there is no reason for any Asante man to feel alarm at the prospects or to believe for a single instant that our cause has been driven back by the events of past hostilities.[185]

In 1895, Wobogo, the Moro Naba or King of the Mosi (Burkina Faso) told the French Captain Destenave that:

> I know the whites wish to kill me in order to take my country, and yet you claim that they will help me to organi[s]e my country. But I find my country good just as it is. I have my

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180 Smith Robert, 'Peace and palaver: International relations in pre-colonial West Africa' (1973) *Journal of African History* 603.

181 There are many quotations regarding Africa's resistance to the colonial powers. For these quotations see Boahen Adu *African Perspective on European Colonialism* (Diasporic Africa Press 2011); See also Fuller Francis, *A Vanished Dynasty-Ashanti* (Routledge 2012) 172.

182 Griffiths IEUAN Li, *The African Inheritance* (1995) 11.

183 Godfrey Uzoigwe, 'Reflections on the Berlin West Africa Conference, 1884-1885' (1985) 12:3 *Journal of the Historical Society of Nigeria* 14.

184 Griffiths IEUAN Li, *The African Inheritance* (1995) 11.

185 Boahen Adu, *African Perspective on European Colonialism* (Diasporic Africa Press 2011) 24.

> own merchants. Consider yourself fortunate that I do not order your head to be cut off. Go away now, and above all, never come back.[186]

When the Italians launched their campaigns against Ethiopia with the help of Britain and France, Menelik the Emperor issued a mobilisation proclamation in September 1895 where he stated that:

> Enemies have now come upon us to ruin our country and to change our religion. Our enemies have begun the affair by advancing and digging into the country like moles. With the help of God I will not deliver up my country to them. Today, you who are strong, give me of your strength, and you who are weak, help me by prayer.[187]

Makombe Hanga of Mozambique said to a white visitor in 1895:

> I see how you [w]hite men advance more and more in Africa, on all sides of my country companies are at work. My country will also have to take up these reforms and I am quite prepared to open it up. I should like to have good roads and railways, but I will always remain the Makombe my fathers have been.[188]

Even though there were pre-colonial African leaders who readily welcomed the colonial powers,[189] there were others who totally opposed it.[190] These sentiments show that the pre-colonial African leaders even without expressing the word sovereignty they considered their communities and kingdoms to be sovereign. And when faced with the difficult challenge of colonisation, they continued to show their determination to oppose the traditional European life, and to defend their sovereignty, religion and their African traditional way of life.[191] They were confident in the 'magic of their ancestors and certainly their gods or God'.[192]

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186 Quotron 'African Responses to Imperialism' http://academic.brooklyn.cuny.edu/education/progler/readings/quotrons/africanresponses.html (accessed 16 October 2020).

187 Boahen Adu (ed), *General History of Africa: Africa under Colonial Domination 1880-1935* (University of California Press 1985) 4.

188 Quotron, 'African Responses to Imperialism' http://academic.brooklyn.cuny.edu/education/progler/readings/quotrons/africanresponses.html (accessed 16 October 2020).

189 For example, in the 19th century, King Somhlolo of Swaziland said he had a vision in which white men would come bearing two things on their hands. On the one hand they would have *umculu* (the Bible) whilst on the other they would bear *indilinga* (money). The voice in King Somhlolo's vision advised him that the nation should choose *umculu*. Since then, Christianity has enjoyed a favoured position in Swaziland. To read more on this, see Dube Angelo and Nhlabatsi Sibusiso, 'The King can do no wrong: The impact of the Law Society of *Swaziland v Simelane NO and others* on constitutionalism' (2016) 16 African *Human Rights Law Journal* 288.

190 Peil Margret and Onyenye Olatunji, *Consensus, Conflict, and Change: A Social Introduction to African Societies* (East African Publisher 1998) 3.

191 *Ibid*.

192 *Ibid.*

The idea of sovereignty clearly provided the ideology for colonial resistance. The resistance against economic manipulation was led by Chief Nana Olomu of Itsekiri in Niger Delta (currently Nigeria), and by Rumaliza who fought the Belgians and Germans in East Africa.[193] This war was ultimately the decisive event which shook the old partnerships between Africa and Europe. The bloody nature of the subsequent conquest of Africa and the utterly callous manner in which African leaders who contested the occupation of their lands were dealt with by the Europeans showed no trace of humanitarian elements whatsoever.[194]

The economic difficulties and dangers that Africans faced as they embarked on regaining their independence were daunting. However, Africa made remarkable advances since the colonial era, and at the end of the colonial period, rapidly rising post-war revenues and a new ideology of economic 'developmentalism' gave momentum to state expansion that was to endure the African economic challenges.[195]

3.7 The post-colonial period

3.7.1 Historical events leading up to the formation of the OAU

This part of the chapter looks at the contemporary historical economic development in Africa from 1961 until 1999. Notably, the post-colonial period includes the current era, however, for the purpose of this study, the post-colonial era ends in 1999.[196] The reason for this is that the AU (which is discussed in the next chapter) brought with it a new and different economic era.

Colonisation started to destabilise around 1958, and post-colonial regimes started to emerge. A series of Pan-African Congresses (PAC) were convened to discuss the interests of Africans and methods of achieving reunification in Africa.[197] Of importance

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193 For a detailed discussion of the resistance of colonialism by African leaders during the colonial period, see Boahen Adu (ed), *General History of Africa: VII Africa under Colonial Domination 1880-1935* (1990) 33-107; See also Erezene Henchard, 'European Influence in Ijo-Itsekiri Relations in Nigeria' (2016) 10:1 *African Research Review: An International Multidisciplinary Journal* 104-115.

194 Uzoigwe Godfrey, 'Reflections on the Berlin West Africa Conference, 1884-1885' (1985) 12:3 *Journal of the Historical Society of Nigeria* 16.

195 Crawford Young, *The Post-Colonial State in Africa* (2012) 8.

196 Historic development from the AU era will be discussed in the next chapter.

197 The Pan-African Congress has 8 series dealing with various aspects aimed at transforming Africa post-colonialism. See Tajudeen Abdul-Raheem, *Pan-Africanism: Politics, Economy, and Social Change in the Twenty-First Century* (1996) 2-5.

for this study is the PAC's 5th Congress of Manchester where most African states *regained* their independence.[198] The PAC advocated for the African continent's complete independence, as well as a total rejection of colonialism and exploitation in all of its forms.[199] It further called for economic integration through RECs and the adoption of democracy.[200] The PAC also emphasised the importance of economic regeneration to replace colonial economies geared toward resource extraction and exploitation, which has resulted in a phenomenon known as the 'Dutch disease'.[201]

It is believed that the Pan-Africanism[202] movement began just after the World War I, when African states signed the Versailles Peace Treaty.[203] It is further believed that Garvey Marcus, du Bois WEB, and Nkrumah Kwame are the Pan-Africanists who ushered in unity in Africa.[204] This is far from the truth, Africans have always been united even though there was no political term for their unification. Prior to colonisation they were united, dealing with trade in various sectors such as mining and agriculture. During colonialism, African leaders were united in their resistance against colonialism. Post colonialism, they continue to be united in decolonisation and Africanisation projects. The only difference is that now there is a political term to describe the unification.

In 1960, tensions arose between states which had just *regained* their independence, and the initial decision was to split Africa into two economic and political blocs.[205] In 1961, the Casablanca bloc had a dynamic anti-imperialist view, and the Monrovia-

198 *Ibid.*

199 South African History Online 'Organisation of African Unity (OAU)' https://www.sahistory.org.za/article/organisation-african-unity-oau (accessed 18 March 2020).

200 *Ibid.*

201 The Dutch disease is a concept that describes an economic phenomenon where the rapid development of one sector of the economy (particularly natural resources) precipitates a decline in other sectors.

202 Pan-Africanism is the belief that people of African descent have common interests and should be unified. See South African History Online, 'Pan-Africanism' https://www.sahistory.org.za/article/pan-africanism (accessed 18 March 2020).

203 Tajudeen Abdul-Raheem, *Pan-Africanism: Politics, Economy, and Social Change in the Twenty-First Century* (New York University Press 1996) 3-5.

204 Garvey Marcus is believed to have founded the 'Negro Empire' in 1920, which attracted millions of Afro-Americans by using slogans as 'Africa for the Africans' 'Back to Africa' and 'Renaissance of the Black Race'. See Meredith Martin, *The First Dance of Freedom* (1984) 7.

205 Mangwende Edgar, 'The OAU: An analysis of the function, problems and prospects of the organisation' (1984) *African E-Journals Project* 23.

Brazzaville bloc was vocal on issues of decolonisation.[206] In the end, these two blocs compromised and merged to form the OAU.[207]

3.7.2 The Organisation of the African Unity

In 1963, 33 African states created the first post-colonial continental institution, namely, the Organisation of the African Unity (OAU) in Addis Ababa, Ethiopia.[208] Just like the UN, the OAU was not created through a legislative body by the founding members.[209] The OAU Charter was signed despite disagreement between the Casablanca and the Monrovia groups.

The OAU Preamble generally addressed issues of African sovereignty, solidarity, and unity. However, from an economic standpoint, it stated that member states were aware of their responsibility to harness the continent's natural and human resources for the total advancement of its people in all spheres of human endeavour. The OAU's mission was to promote unity and solidarity among African states, to improve the lives of Africans, and to defend sovereignty, territorial integrity, and independence of its members.[210] It intended to do this by coordinating and intensifying cooperation for development.[211] The OAU is believed to have been the contemporary epitome and the vehicle which transported political consciousness in Africa.[212]

The OAU embraced the following principles in Article 3:

(a) The sovereign equality of all member states.[213]
(b) Non-interference in the internal affairs of states.[214]

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206 Shaik Baba *et al,* 'Successes and failures of the organisation of African unity: Lessons for the future of the African Union' (2005) 40:3.2 *Journal of Public Administration* 500; See Elias Taslim, 'The Charter of the Organisation of African Unity' (1965) 59:2 *American Journal of International Law* 243.

207 Murray Rachel, *Human Rights in Africa: From the OAU to the African Union* (Cambridge University Press 2004) 4. At first the name Organisation of African States was considered. However, in the end, African Heads of States thought that it could easily be confused with the Organisation of the American States.

208 AU, 'About the African Union' https://au.int/en/overview (accessed 19 March 2020).

209 Tiyanjana Maluwa, 'International law-making in Post-colonial Africa: The role of the Organisation of African Unity' (2002) *Netherlands International Law Review* 84.

210 *Ibid.*

211 *Ibid.*

212 Mangwende Edgar, 'The OAU: An analysis of the function, problems and prospects of the organisation' (1984) *African E-Journals Project* 21.

213 This principle mirrors Article 2(1) of the UN Charter.

214 *Ibid A*rticle 2(7).

(c) Respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence.[215]

(d) Peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration.[216]

(e) Unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring states or any other states.[217]

(f) Absolute dedication to the total emancipation of the African territories which are still dependent.[218]

(g) Affirmation of a policy of non-alignment with regard to all blocs.[219]

A closer look at the principles endorsed by the OAU shows that these principles were intently focused on protecting sovereignty of states which had just *regained* independence, and to assist dependent states to *regain* their independence, as compared to the development of general principles of international economic law (discussed in chapter two above). The OAU did not *per se* focus on harnessing the material resources of the continent for the advancement of African people.

The OAU adopted twenty-one treaties in the three and half decades or so of its existence.[220] Of these, fifteen are currently in force; including one that has entered into force 'provisionally'.[221] The OAU was a unique African institution, created by African states to serve their Pan-African interests.[222] It attempted to establish a new African economic order through the African Economic Community (AEC) in 1991.[223] The Western world was identified by the OAU as the enemy which had to be extorted in any way possible to compensate for exploiting and manipulating African nations for

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215 This principle is just an extension of the first the two principles.

216 This principle mirrors Article 33(1) of the UN Charter.

217 This principle is not in the UN Charter. However, it may have been motivated by the assassination of President Sylvanus Olympio of Togo in January 1963.

218 This principle mirrors Article1(2) of the UN charter.

219 This principle is not in the UN Charter. However, it may have been motivated by World Wars.

220 AU 'OAU/AU Treaties, Conventions and Protocols and Charters' https://au.int/treaties (accessed 19 March 2020); See also Tiyanjana Maluwa, 'International law-making in post-colonial Africa: The role of the Organisation of African Unity' (2002) *Netherlands International Law Review* 84.

221 For a list of all the treaties that are still in force see AU, 'OAU/AU treaties, conventions and protocols and Charters' https://au.int/treaties (accessed 19 March 2020).

222 Shaik Baba *et al,* 'Successes and failures of the Organisation of African Unity: Lessons for the future of the African Union' (2005) 40:3.2 *Journal of Public Administration* 500.

223 Kufuor Oteng, 'The collapse of the Organisation of the African Unity: Lessons from economic and history' (2005) 49:2 *Journal of African Law* 133.

years.[224] The OAU achieved considerable success in certain areas, such as in developing a closer sense of identity among African states.

3.7.3 The demise of the OAU

Until 1999, the OAU had survived a number of crises that threatened its survival.[225] However, its failure to achieve modest political, economic and social development was used to justify its discontinuance while ensuring that some of its aspirations continued albeit in the form of the AU.[226] In 1999, the Assembly of Heads of State and Government made a decision to dissolve the OAU through the adoption of the Sirte Declaration.[227]

The demise of the OAU had a major impact on the fragile African states. Furthermore, it also had many ambiguities. Firstly, its unrestricted rules of entry and membership led to the tragedy of the regional commons, which degraded it as an organisation of value.[228] Secondly, its failure to meet the cumulative results of, among others, economic freedom affected its relevance.[229] Thirdly, its decision-making process was through consensus instead of voting, and thus lacked the binding commitment since its decisions were in the form of recommendations.[230] Lastly, it had low deference to members' sovereignty and non-interference in members' internal affairs.[231]

The biggest error of the OAU was its failure to put in place mechanisms aimed at monitoring or enforcing members' compliance with resolutions and decisions.[232] The reason for this could have been that African states had just *regained* their independence after conquering colonialism, and thus were unwilling to surrender their

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224 Shaik Baba *et al,* 'Successes and failures of the Organisation of African Unity: Lessons for the future of the African Union' (2005) *Journal of Public Administration* 499.

225 *Ibid* 501.

226 *Ibid.*

227 South African Department of International Relations and Cooperation' Transition from the OAU to the African Union http://www.dirco.gov.za/foreign/Multilateral/profiles/oau-au.htm (accessed 19 March 2020).

228 Kufuor Oteng, 'The collapse of the Organisation of the African Unity: Lessons from economic and history' (2005) *Journal of African Law* 133.

229 *Ibid.*

230 Červenka Zdenek, 'Africa and the new international economic order' (1976) 9:2 *Verfassung und Recht in Übersee* 190.

231 *Ibid.*

232 Kufuor Otengc, 'The collapse of the Organisation of the African Unity: Lessons from economic and history' (2005) *Journal of African Law* 136.

sovereign powers to the newly formed OAU.[233] Oteng Kofuor agrees with this argument, however, he takes it further by arguing that intra-African solidarity as contained in the Preamble of the OAU Charter also played a major role in the failure of the OAU.[234] According to him, 'the common experiences of the colonial rule and the Trans-Atlantic traffic in human beings from Africa to the "new world"' led to the OAU's weak governmental structure.[235]

Another major contributor to the failure of the OAU was the differences between member states over major political issues. Even though African states had common objectives for the continent, they differed significantly on ideological commitment, strategies and structural process.[236] This division led to the emergence of various African regional economic blocs (RECs), which created major rivalry.[237]

During the years of the OAU, RECs which were in direct competition with it started to emerge.[238] An example of such organisation is the 1961 Afro-Malagasy Organisation for Economic Cooperation (AMOEC). The AMOEC was in direct competition with the OAU since its purpose was to strengthen cooperation and solidarity between member states. The OAU, however, survived the AMOEC through the years until the establishment of the Economic Community of the West African States (ECOWAS) in 1975, and the SADC in 1980. These regional economic blocs were economic goals oriented, unlike the OAU. The ECOWAS provided constructive solutions which the OAU had failed to address.[239] For instance, it provided its member states with military security and trade preferences.[240]

The SADC provided its member states incentives for their cooperation in the provision of sub-regional goods.[241] With a large number of member states, and no resources at

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233 Akiyeni B, 'The Organisation of the African Union and the concept of non-interference in the internal affairs of member states' (1972-73) *British Yearbook of International Law* 394.

234 Kufuor Oteng, 'The collapse of the Organisation of the African Unity: Lessons from economic and history' (2005) *Journal of African Law* 136.

235 *Ibid.*

236 *Ibid.*

237 Červenka Zdenek, 'Africa and the new international economic order' (1976) *Verfassung und Recht in Übersee* 190. Since these regional economic blocs form part of the current era, they are discussed in the next chapter.

238 The African regional economic blocs are dealt with in detail in the next chapter.

239 Červenka Zdenek, 'Africa and the new international economic order' (1976) *Verfassung und Recht in Übersee* 138.

240 *Ibid.*

241 *Ibid.*

its disposal, the OAU struggled in practice to provide public goods.[242] Regional organisations were more efficient and this created a direct competition for the OAU.[243] The ECOWAS and the SADC went further to enact regional instruments on trade liberalisation that grant member states preferential treatment to goods and services within their respective economic blocs.

The OAU was more focused on bringing freedom and restoring dignity of African people. It was thus generally not economically oriented, and as such, it failed to emphasise its role as an initiator of political and economic integration in Africa.[244] This is so even though the OAU Charter's Preamble included the responsibility to harness the continent's natural and human resources for the total advancement of African people in all spheres of human endeavour. Article 2(1)(b) of the OAU Charter proclaimed the need for African states to coordinate and intensify 'co-operation efforts to achieve a better life for the peoples of Africa'. Article 20 of the OAU Charter made provision for specialised commissions to accomplish these functions. However, the OAU member states disregarded their responsibilities towards economic development of Africa in the OAU Charter. Therefore, sustainable economic development was not at the centre of implementation of the OAU.

3.8 The transmutation of African indigenous practices into international law?

When it comes to building a strong economy in Africa, the life experiences of Africans in terms of everyday reality, indigenous knowledge, cultural transmission, community engagement and so on should be taken into account. The empirical research on international economic order has mainly focused on the principles of this field of law without investigating whether there are any African practices that have been or may be transmuted to the modern international economic order.[245] As a result, many international economic agreements concluded by African states do not reflect African values or principles. They mainly contain the westernised principles of international

242 *Ibid.*

243 A detailed discussion of these regional economic blocs is done in chapter four below.

244 Shaik Baba *et al,* 'Successes and failures of the Organisation of African Unity: Lessons for the future of the African Union' (2005) 40:3.2 *Journal of Public Administration* 500.

245 Discussion of these practices in this study does not presuppose that all African societies experienced the same events, same language, and same mode of addressing issues. However, there are underlying similarities shared by many African societies which, when compared with other Western cultures, reveal a wide gap of difference.

law. However, African reality comprises of its own values, norms and standards which underscores the behaviour of African people.[246] This part of the chapter investigates African values and practices which could be incorporated into modern IIAs in order to achieve the economic development of African states.[247]

3.8.1 Values, culture and custom

Culture can be defined as that complex whole which includes knowledge, belief, art, morals, law, customs or any other capabilities and habits acquired by people as members of society.[248] Culture, as it is usually understood entails a totality of traits and characters that are peculiar to people to the extent that it marks them out from other people or societies.[249] These peculiar traits include social norms, taboos and values.[250] Culture is generally timeless, and encompasses a unique inheritance of a distinct group of people.[251] Culture is universal and each local or regional manifestation of it is unique.[252] Culture, customs and values are powerful human tool for survival and form the bases of existence of every society.[253]

The demise of a strong cultural society of pre-colonial Africa began when it was regarded as evil, while everything from the Global North was 'considered a mark of a class'. This paved a way for the adoption of an outlook that 'denied any culture or values in Africa'.[254] As a result, whatever practices that were in conflict with the European culture had to be done away with.[255] This was achieved through religion and the creation of social classes under which sophistication, and ultimately social values, meant the abandonment of African values and the embracement of Eurocentric values

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246 Balwin Joseph and Nell Yvonne, 'The African self-consciousness scale: An Afrocentric personality questionnaire' (1985) 9:2 *Western journal of Black Studies* 62.

247 Some of these practices have already been incorporated into the wider provisions of IIAs.

248 Taylor Edward, *Primitive Culture* (Cambridge University Press 1871, reprinted in 1958).

249 Idang Gabriel, 'African culture and values' (2015) 16:2 *Phronimon* 98.

250 *Ibid.*

251 Bahemuka Judith and Brockington Joseph (eds), *East Africa in Transition: Images, Institutions and Identities* (2004) 236.

252 Igboin Benson, 'Traditional leadership and corruption in pre-colonial Africa: How the past affects the Present' (2016) *Studia Historiae Ecclesiasticae* 150.

253 Olaniran Olusola and Arigu Aisha, 'Traditional rulers and conflict resolution: An evaluation of pre- and post-Colonial Nigeria' (2013) 3:21 *Research on Humanities and Social Sciences* 120; See Igboin Benson, 'Colonialism and African cultural values' (2011) 3:6 *African Journal of History and Culture* 96-103.

254 Bahemuka Judith and Brockington Joseph (eds), *East Africa in Transition: Images, Institutions and Identities* (2004) 236.

255 *Ibid.*

instead. Parlo FR in 1902 stated that the Kikuyu culture[256] was 'essentially deplorable, barbarous and inhuman'.[257] A similar view was taken by Virginia Blakeslee of the Africa Inland Mission who wrote that:

> Kikuyu land has been dominated by the prince of darkness for past ages. The flooding of the district with the light of the gospel has revealed the hidden, the character and source of every evil tribal custom.[258]

The view that African culture is evil has influenced many policy makers. As a result, African culture has not been widely embraced in modern IIAs. Apart from the economic exploitative agenda, colonialism expressed 'the ethnocentric belief that the morals and values of the coloniser were superior to those of the colonised'.[259] This is evidenced in Wheaton Henry's assertion in 1866, where he opined that:

> Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civili[s]ed and Christian people of Europe or to those of European origin.[260]

The sentiment by Wheaton was aimed at excluding non-European states from the realm of law. Unfortunately, the distinction between civilised and uncivilised states which featured in the colonial Africa continues to thrive in the contemporary legal order. For example, the creation of the UN system was influenced by these sentiments. Article 38(1) of the International Court of Justice Statute (ICJ Statute)[261] when listing the sources of international law, makes mention of 'civilised nations'. Abi-Saab Georges, when analysing the same provision argued that:

> [T]his source of international law is very important from the point of view of the newly independent states. It is through it that they hope their legal systems will contribute to the development of international law. This would widen its base and increase its

256 The Kikuyu culture is found in in central Kenya and Nairobi. They are believed to have belonged to a long-term movement of Bantu-speakers who migrated from Central Africa or Tanzania in pre-colonial times. See Droz Yvan, 'Gikuyu (Kikuyu) People of Kenya' https://www.oxfordbibliographies.com/view/document/obo-9780199846733/obo-9780199846733-0185.xml (accessed 20 March 2020).

257 Vidler Alexander, *The Church in an Age of Evolution* (Penguin Books 1961) 252.

258 Blaslee Virginia, *Beyond the Kikuyu Curtain* (Moody Press 1994) 37.

259 *Ibid.*

260 Wheaton Henry, *Elements of International Law* (Little, Brown and Co 1866) 15.

261 Article 38(1) of the ICJ Statute provides that the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply international conventions, whether general or, establishing rules expressly recognised by the contesting states; international custom, as evidence of a general practice accepted as law; and the general principles of law recognised by civilised nations.

> material sources. It would also give the newly independent state the satisfaction of participating in the creation of the law they are supposed to observe.[262]

Even though article 38(1) of the ICJ Statute may generally be understood to mean 'all nations', one may argue that in this context, civilised nations means Euro-American states and not African states.[263] Anghie Antony argues that the ICJ has so far made minimal effort to draw upon the African legal and cultural systems in the administration of international justice.[264] This has allowed colonial systems of social, economic and political inequality which were created by colonialism to continue to operate despite the ostensible change of the international legal regime.[265] However, it is important to recognise the concept of African culture as one of historical significance in the international economic and legal order.

3.8.2 Ubuntu as an African value

Values are beliefs that are regarded by the community as right or wrong, and thus hold what is important in such community.[266] They may be ideas that propel one's daily actions.[267] They are thus the moral standards which members of the community adhere to in their personal and communal interaction towards the achievement of their goals.[268] In the African context, values may be regarded as agents of moral implementation.[269] They can be institutional and cherished by individuals and by a group of people. Values can refer to the usefulness of a thing which is a function of choice-making.[270] The concept of choice is preponderant to the greatest aptitude of the

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262 Abi-Saab Georges, 'The newly independent states and the rules of international law: An outline' (1962) 8:2 *Howard Law Journal* 109.

263 Fabián Augusto and Cárdenas Castañeda, 'A call for rethinking the sources of international law: Soft law and the other side of the coin' (2013) 13 *Anuario Mexicano de Derecho Internacional* 371.

264 Anghie Antony, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 111.

265 Gathii James, 'International Law and Eurocentricity' (1998) 9 *European Journal of International Law* 184.

266 *Ibid.*

267 *Ibid.*

268 Onuoha Frank, 'Locating African Values in Twenty-First Century Economics' https://www.africanliberty.org/2015/09/09/onuoha-frank-locating-african-values-in-twenty-first-century-economics/ (accessed 20 March 2020).

269 Generally, the discussion of African values touches on how Western religion replaced the African culture and values. However, for the purpose of this study, this ideology will not be discussed. The main purpose of the discussion of African values in this study is to underscore the fact that there is a need to include African values in the recommended AU Investment Agreement.

270 Idang Gabriel, 'African culture and values' (2015) *Phronimon* 98.

person making the choice.[271] The moral value is directly linked to the cultural values in that African culture has a moral code. An example of such moral code includes the prohibition of doing harm to others.[272]

The concept of *Ubuntu* or humanness has been the subject of discussion among scholars for a while now.[273] It has many definitions depending on the context in which it is used. However, there are common elements in definitions of *Ubuntu*. *Ubuntu* is a *Nguni* term which directly translates into humanness.[274] The concept of *Ubuntu* proceeds on the basis that *umuntu ngu muntu ngabantu,* which directly translates to 'a human being is a human being through other human beings.[275] It has been widely embraced in phrases such as 'I am because you are and since you are, I am'. African communities have always had traditional mechanisms for interacting with each other and handling disputes arising in their communities.[276]

Ubuntu is premised on the belief that 'the welfare of the individual and of the community is inextricably linked - the one cannot exist without the other'.[277] In essence, the philosophy of *ubuntu* advocates that everyone must be treated with common humanity.[278] *Ubuntu* can thus be simply summarised as a process that is active, adjustable and adaptable. It is different from the Eurocentric view, which states that 'I think therefore, I am', which emphases individualism.

Below are the few definitions of Ubuntu:

1. Is the humanistic experience of treating everyone with respect and granting them human dignity;
2. Encompasses values like universal brotherhood [and sisterhood] for Africans, sharing, treating and respecting other people as human beings;

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271 *Ibid.*

272 This is widely accepted as one of the international law principles.

273 Bhengu Mfuniselwa, *Ubuntu: The Essence of Democracy* (Novalis Press 1996) 5.

274 *Ibid.*

275 In Setswana, Sepedi and Sesotho it is translated to *motho ke motho ba batho ba bangwe.*

276 Mokomane Relience, *Restorative Justice as an Alternative Sentencing option in South Africa: A Different Approach to Crime* (unpublished LLM dissertation, University of South Africa 2020) 58. In Yoruba it is referred to as *Omoluabi* (good character).

277 Makgoro Yvonne, 'Ubuntu and the law in South Africa' (1998) 1:1 *PER/PELJ* 2-3.

278 Dube Angelo and Nhlabatsi Sibusiso, 'The King can do no wrong: The impact of the Law Society of *Swaziland v Simelane NO and others* on constitutionalism' (2016) 16 African *Human Rights Law Journal* 275.

3. Is a belief in the centrality, sacredness, and foremost priority of the human being in all our conduct, throughout our lives;
4. Is a way of life that contributes towards sustaining the well-being of people, a community or society.[279]

In the South African case of *S v Makwanyane*[280] the court held that:

> Generally, *ubuntu* translates as 'humaneness'. In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.[281]

3.9 The importance of locating Africa's history

Africa needs to control its own narrative. It is good to conduct research on Africa's contribution to the development of law at an international level, however, the research must not only be sterling, but must have reflection of implications of the findings of the research. Vuyo Mjimba, after a young academic delivered a paper which examined the history of commercially rich, ancient African empires at the 2016 African Young Graduates and Scholars echoed these sentiments and asked the presenter the 'so what' question.[282] In this regard, he went on to argue that:

> It may be heart-warming to hear that Africa played a role in global commerce in ancient times especially for an African - but it does not soothe the pains of the present-day afflictions that have caused the continent to maintain the label of the least developed in virtually all the measures of development. My 'so what' question was related to the lessons that can be drawn from these ancient empires, and their contemporary application in the many poor, disease-ridden and politically mismanaged modern countries of Africa. The presentation was fascinating but so what?[283]

The question that remains open is: How can a continent that is rich in natural resources remain so poor? To understand Africa's failure to develop in comparison with other developed continents in the world, despite its human and natural resource abundance; one needs to locate these challenges by going back to the past with the purpose of

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279 Bhengu Mfuniselwa, *Ubuntu: The Essence of Democracy* (1996) 4.
280 *S v Makwanyane* 1995 (2) SACR 1 (CC).
281 *Ibid* para 308.
282 Bialostocka Olga (ed), *New African Thinkers: Agenda 2063-Culture at the Heart of Sustainable Development* (Human Sciences Research Council Press 2018) 165.
283 *Ibid.*

finding solutions for the modern African society. The purpose of this chapter is to decolonise the existing knowledge and literature in the involvement of Africa in economic issues at an international level. Any analysis of law which fails to take into proper consideration the reality of Africa's contribution would be incomplete.

The discussion above showed that African states were never completely isolated from each other and from the world at large. One may wonder, why include the history of Africa in this study? The truth is, the African past is a factor that transmuted and then transmitted the essential elements of pre-colonial years to the present day.[284] It is thus important to reflect on the place of contemporary problems in the continent's long standing history.[285] The new Africa under the AU still faces many economic challenges (as it will become apparent in the next chapter). To resolve these challenges, one must appreciate the unique past as a connecting link to the present.

The world is at the threshold of the 21st century and the 3rd millennium, and we must fully prepare for the future. To do this, one need to look at where Africa is coming from, where it is and where it should go. The need to explore the past and future possibilities is particularly relevant given the precarious situation in which the African continent finds itself today. The purpose of this chapter is to bring to the fore the precolonial elements which may be infused in contemporary IIAs. There are currently many IIAs that African states concluded either on bilateral or multilateral bases which are awkwardly flawed from an African perspective. Many African states concluded treaties where the main focus was to be seen to be actively participating international affairs, without comprehending the negative effects of these treaties.[286] Africa should not only focus on being part of the international economic community but should also channel its inter-state relations to achieve *inter alia* its unique economic development goals.

Both external and internal factors have contributed to Africa's economic stagnation.[287] The establishment of colonialism fundamentally changed the nature of relationships that had existed between African states. What has also emerged from the preceding

284 Griffiths IEUAN LI, *The African Inheritance* (1995) 21.
285 Iliffe John, *Africans: The History of a Continent* (1995) 1.
286 Frankema Ewout, 'How Africa's colonial history Affects its development' https://www.weforum.org/agenda/2015/07/how-africas-colonial-history-affects-its-development/ (accessed 13 February 2020).
287 Mutharika Peter, 'The role of international law in the Twenty-First Century: An African perspective' (1995) 21:3 *Commonwealth Bulletin* 988.

discussions is that some of the key international law rules currently attributed to events in Europe occurred millennia before the so-called European Renaissance in Africa and other third-world societies.[288] Sanders Boykin argues that the white world:

> Brought an end to one of the long tested principle of African life and survival around the world: *I am because we are, and we are because I am.* That principle, a defining one for the African concept of community in traditional society and a staple for African behaviour, was replaced by individualism, i.e. the right of each person to determine life's courses without threat of group sanctions. As a result, a freedom that once suggested interethnic solidarity now suggested the individuated existence.[289]

Africa has not only suffered sorely from imposed priorities of European colonialism but also from the deleterious effects of the political geography of modern Africa.[290] This is evidenced, for example, from the encouragement of the '*emergence*' rather than *'re-emergence*' of Africa, even though African states have always been in existence. Consequently, this influenced the theory that African states had no international legal order, and the harmfulness of pre-colonial treaties such as the Treaty of Berlin are overlooked, and they continue to be given a fundamental role in the international legal order.

African values and principles are generally goal-oriented because they point to a desired goal, towards which actions are geared and upon which the expectation of every individual and community is hinged.[291] African values may thus be 'taken to mean a set of institutionalised ideals which guide and direct the patterns of the life of Africans'.[292] In the context of IIAs, actions of individual member states are mirrored through the approved values of the IIAs. To achieve its desired economic goals, African states should consider including the values which may enhance the continent's economic legal framework and implementation. Thus, values which are appropriate may be used as a yardstick to measure acceptable and unacceptable foreign culture.

At the national level, the African cultural systems, values and beliefs are part of legislation, however, their IIAs do not reflect this important aspect of democracy.

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288 Dube Angelo and Mhlongo Lindelwa, The Forgotten Continent? A South African Perspective on the Development of African International Legal Thought' (2021) 280-281.

289 Sanders Boykin, *Blowing the Trumpet in Open Court: Prophetic Judgment and Liberation* (Africa World Press 2020) 14.

290 Griffiths IEUAN Ll, *The African Inheritance* (1995) 6.

291 Kanu Ikechukwu *et al, African Cultural Personalities in a World of Change: Monolithic Cultural Purity and the Emergence of New Values* (Author House 2018) 119.

292 *Ibid* 8.

African culture, values and beliefs are closely related, even though they vary slightly from one region to another.[293] Therefore, African states to a large extent, share some dominant traits in their cultural systems and have similar values, making it possible to incorporate cultural values in IIAs concluded by them. However, they have followed the Eurocentric approach which echoes Article 38(1) of the ICJ Statute, by focusing on those values that find resonance in Euro-thought or the Western world outlook on account of their endorsement by 'civilised nation'.

Colonialism divided and constrained development, encouraged neo-colonialism and helped perpetuate Africa's economic and political weakness in global affairs.[294] As a result, when African states *regained* their independence, they focused more on issues which had a potential to strengthen their sovereignty. [295] African values, cultures and beliefs should not be considered to be a normative evil, but rather a product of African history which may be embraced in the contemporary international legal order.

Furthermore, values are directly linked to inherent human dignity, equality, supremacy, continental common goals, respect, and transparency. For Africans, culture and values constitute what we can term an 'African personality', which was evidenced in the precolonial dispute settlement methods. African values and culture need to be revived with fresh vigour, developing and adapting to the exigencies of the modern world.[296] It is one thing to decolonise and Africanise the mind, body and spirit, however, Africa needs to decolonised and Africanised the economy.

3.10 Conclusion

From Cape to Cairo, Mozambique to Madagascar, Somalia to Senegal, the African continent has no doubt been beset with large-scale problems and plummeting economic performance. However, it still holds a very good economic prospect. The indigenous practices in Africa are not static. They are capable of being incorporated into the contemporary international economic framework, and thus infusing a qualitative new ethos. Africa should embrace its past experiences, practices, values and culture in its contemporary legal framework. Africans have a value system that

293 Idang Gabriel, 'African culture and values' (2015) *Phronimon* 98.
294 Griffihs IEUAN Ll, *The African Inheritance* (1995) 3.
295 This is evident from the objectives of the OAU discussed above. See also Meredith Martin, *The First Dance of Freedom* (1984) 173.
296 July Robert, *An African Voice: The Role of the Humanities in African Impedance* (1987) 19.

colonialism, segregation, and apartheid managed to distort and suppress but could never eradicate.[297]

It is without doubt that colonialism stimulated positive and negative changes in Africa, as it did elsewhere.[298] Policy makers in the field of international law (whether African or Western) should embrace both sides of the legal systems. The regaining of independence by African states did not in a literal sense end colonialism, but it transformed it into neo-colonialism.[299] The imposition of colonialism on Africa altered its history, modes of thought, and patterns of cultural development. African practices have been impacted upon by the change in the political structure brought about by colonialism.[300] Thus, African states regained only their political independence but not economic independence, hence the current need to reform its investment regulation landscape. For many years, decisions for Africa were made by non-African, without Africans, however, time has come for Africans to take the lead in issues concerning them. Africa needs to be anchored in its own realities in order to tackle the colonial legacy. Africans should claim their narrative and challenge the superiority of colonisation and prioritisation of European mind set, while 'othering' Africans.

297 Mzamane Mbulelo, 'Culture and social environment in the pre-colonial Era' (2009) 46:1 *Tydskrif Vir Letterkunde* 204.

298 Cobbah Josiah, 'African values and the human rights debate: An African perspective' (1987) *Human Rights Quarterly* 320.

299 Tajudeen Abdul-Raheem, *Pan-Africanism: Politics, Economy, and Social Change in the Twenty-First Century* (1996) 2.

300 Settles Joshua, *The Impact of Colonialism on African Economic Development'* (University of Tennessee Honors Thesis Project 1996) 1.

CHAPTER 4

AFRICA'S APPROACH TO REGULATING FOREIGN INVESTMENT IN THE CURRENT GLOBAL ECONOMIC ERA

4.1 Introduction

Changes at the global, continental, regional, and national levels demonstrate the need to continuously promote intra-African investment in support of continental objectives, policy integration, and structural transformation.[1] These changes are aimed at improving international trade and investment prospects.[2] From this context, the unification of the African market through investment has been a work in progress for some time now.

In light of the above, the question that begs an answer is: What is standing in the way of sustainable economic development and *relations* in Africa? The previous chapters critically analysed the general legal investment landscape from an African historical perspective and how Africa became part of it. Building from the previous chapters, the main purpose of this chapter is to locate Africa's position in the current economic epoch, and to interrogate the contemporary investment policy challenges faced by Africa.

This chapter thus deals with challenges that impede Africa's economy at the continental and regional levels. It does this by first analysing the African economic and investment landscape at the continental level. The chapter continues to interrogate attempts made by the African Economic Community (AEC) to harmonise the regulation of investment at the regional level. Thereafter, the chapter analyses the gaps and challenges which hinder the sustainable economic developments and relations through foreign investment. The chapter then answers the question of whether the AU has outlived its relevance.

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1 UNECA, 'Initiatives promoting coherence in investment regulation and supporting investment for Africa's transformation' https://www.uneca.org/oria/pages/initiatives-promoting-coherence-investment-regulation-and-supporting-investment-africa%E2%80%99s (accessed 28 March 2020).

2 *Ibid.*

Host states usually find themselves in a predicament of having to balance their obligation to regulate in the public interest on one hand and to protect foreign investors on the other hand. This portion of the study thus deals with two distinct issues. The first one is the obligation of host states to regulate in the public interest; whilst the second relates to the privilege of foreign investors to have their investment protected. As a point of departure, the study argues that foreign investors do not necessarily have a right *per se* to be protected, but a privilege to be protected in host states.

The study argues that foreign investors have privileges instead of rights since they must meet certain requirements and conditions before they can access a benefit in the host state. Therefore, the benefit is not a right but a privilege, which can be taken away if the foreign investor fails to meet the required condition. Furthermore, the study argues that even though a 'right' to regulate in the public interest may generally be a right, however, when tested against a state's citizens it becomes a 'responsibility to regulate'.

4.2 Locating Africa's place in the global economic arena

From an economic standpoint, the AU is meant to pursue economic cooperation and growth by increasing trade, investment and commerce. This deep desire for a continental bloc that would align more effectively with the changing global economic needs and realities necessitate the interrogation of investment laws and policies in Africa.[3] The AU thus aspires to build 'a prosperous Africa based on inclusive growth and sustainable development' and to ensure that it develops into 'a strong, united, resilient and influential global player and partner.[4]

In a world where sustainable economic development is at the forefront of many treaties, the foreign investment policy system stands as an obsolete regime which is in urgent need of revision and reformation. With its growing participation, the AU is slowly becoming one of the top economic influencers at the global level. As such, the

3 *Ibid.*

4 Agenda 2063, 'A prosperous Africa based on inclusive growth and sustainable development' https://www.nepad.org/agenda-2063/aspirations/332 (accessed 03 July 2020).

economic spotlight has been trained on Africa for a while now.[5] As a consequence, Africa is emerging as a noteworthy player in the global economy.[6]

Article 3(i) of the AU Constitutive Act (the Constitutive Act) recognises the need to create the conditions for the continent to play its rightful role in the global economy and international negotiations. Nonetheless, despite its rise, Africa is yet to make its 'economic mark' on the global stage. The AU is mandated by its member states to improve the continent's political and socioeconomic integration, as well as to promote sustainable development, relations and unity.[7] In the context of foreign investment, the most important integration endeavours currently undertaken by the AU are the establishment of the AEC and the Continental Free Trade Area (CFTA).[8] These establishments are embraced by the UN as strategies for corroborating the initiatives at AU and UN level, and which can be construed as a revived plan for addressing the economic, political and social difficulties facing Africa.

4.3 African foreign investment landscape under the AU umbrella

The African investment policy landscape is fragmented, marked by more than 850 BITs, of which 512 are in force.[9] Of these BITS, 169 are intra-African (44 in force).[10] In 2019, Africa's economy grew at 3.4 percent,[11] and was expected to grow up to 3.9 percent in 2020 and 4.1 percent in 2021.[12] This will, however, be difficult to achieve since the Covid-19 pandemic affected all economies around the world, and Africa is

5 Okubadejo Dapo, 'Why Africa's investment landscape is on the rise' https://www.weforum.org/agenda/2015/06/why-africas-investment-landscape-is-on-the-rise/ (accessed 29 April 2020).

6 DeGhetto Kaitlyn *et al,* 'The African Union's Agenda 2063: aspirations, challenges, and opportunities for management research' 2:1 *Africa Journal of Management* 93.

7 Article 3(c) of the AU Constitutive Act.

8 Ilmari Soininen, 'The Continental Free Trade Area: What's going on?' https://ictsd.iisd.org/bridges-news/bridges-africa/news/the-continental-free-trade-area-whats-going-on (accessed 11 November 2020).

9 UNCTAD, *UN Economic Commission Integration in Africa Next steps for the African Continental Free Trade Area: Assessing regional* (UN Publication Section) 215.

10 *Ibid.*

11 African Development Bank Group, 'African Economic Outlook 2020: Africa's Economy Forecast to Grow despite external shocks' https://www.afdb.org/en/news-and-events/press-releases/african-economic-outlook-2020-africas-economy-forecast-grow-despite-external-shocks-33839 (accessed 06 May 2020).

12 African Development Bank Group, 'African Economic Outlook 2020' https://www.afdb.org/en/knowledge/publications/african-economic-outlook (accessed 29 April 2020).

definitely going to feel its impact.[13] As highlighted in chapter 3 above, the AU is generally built on the infrastructure of its predecessor, the OAU.

The Sirte Declaration, adopted in 1999, gave the AU new life, and it was based primarily on the realisation that the OAU's original mandate of purging the continent of colonialism had been met to a large extent. In this instance, new institutional arrangements were required for Africa to move its development and integration agenda forward. As a result of these legal and political developments, the OAU was disbanded and the AU was established.[14] With at least 55 member states, it is one of the largest international power houses in the world.[15]

The Preamble of the AU Constitutive Act recognises the role played by the OAU, and the principles which are embraced therein. This regional organisation was created to foster Pan-African consciousness, increase cooperation and integration among African states, and promote economic growth and development.[16] It would thus champion the course for economic development, cooperation, integration as well as good governance on the continent. The need for effective regulation of foreign investment in Africa has been expressed over the years through, *inter alia,* the creation of several legal instruments and institutions to meet economic objectives.

The aims of the AU are generally wide. They range from ensuring that the lives of African people are ameliorated to ensuring a sustainable economic development. The drafters of the AU Constitutive Act recognised the need for unity and solidarity between African states.[17] Influenced by the injustices of the colonial era, the AU Constitutive Act recognises the need to defend sovereignty, territorial integrity and independence of African states.[18] From an economic perspective,[19] the AU aims to: (1) Establish

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13 Trade Law Center, 'Impact of the Coronavirus (COVID 19) on the African Economy' https://www.tralac.org/documents/resources/covid-19/3218-impact-of-the-coronavirus-covid-19-on-the-african-economy-african-union-report-april-2020/file.html (accessed 06 July 2020).

14 UN Economic Commission for Africa, *Next steps for the African Continental Free Trade Area: Assessing Regional Integration in Africa* (UN Economic Commission: Aria 9) 37. Article 2 of the AU Constitutive Act brought the AU into existence.

15 *Ibid;* The EU has 27 member states, the ASEAN bloc has ten member states and the Inter-American Organisation has 35 member states, the Oceania has 14 member states, South America has 14 member states and Australia has 8 member states.

16 The AU Commission, *Agenda 2063: First Ten-Year Implementation Plan* 2014-*2023* (the AU Commission 2015) 137.

17 Article 3 of the Constitutive Act.

18 *Ibid* Article 3(2).

19 Since this a continental powerhouse with many objectives, some of them are not related to the economy *per se.*

necessary conditions, which may enable the continent to play its rightful role in the global economy and international negotiations; (2) promote sustainable development at the economic, social and cultural levels; (3) integrate African economies; (4) coordinate and harmonise policies between existing and future RECs for the gradual attainment of the objectives of the AU;[20] and accelerate political and socio-economic integration, promote and defend African common positions on issues of interest to the continent and its peoples.[21]

4.3.1 Aligning foreign investment policy landscape through Agenda 2063

At the Golden Jubilee anniversary celebration of the OAU/AU, African leaders evaluated Africa's successes and challenges since the inception of the OAU in 1963, and found that even though the continent had made progress, more still needed to be done.[22] To remedy the situation African heads of state launched the Agenda 2063 project in 2013 with a purpose of developing 'right strategies to finance its own development and further reduce aid dependency'.[23] The initial reason behind Agenda 2063 was that many international agreements did not cater for the unique circumstances and needs of the continent.[24]

In this regard, African leaders pledged their rededication to the continent's development, and committed to eight key areas.[25] They further pledged to integrate ideals and goals of their national development plans with those of Agenda 2063.[26] Agenda 2063 is a Pan-African people-centred vision and action plan aimed at positioning African growth for a period of 50 years[27] through incorporating lessons and

20 Article 3(a)-(n) of the Constitutive Act.

21 *Ibid* Articles 3(3) and (4).

22 AU, 'African Union Agenda 2063: A shared strategic framework for inclusive growth and sustainable development' (AU Background Note 2013) 3.

23 *Ibid.*

24 AU Commission, 'Agenda 2063: The Africa we want, aspirations 1 and 7' http://www.un.org/en/africa/osaa/pdf/au/agenda2063-firstIOyearimplementation.pdf (accessed 06 May 2020).

25 These include African identity and renaissance, the struggle against colonialism and the right to self-determination of people still under colonial rule, integration agenda, Agenda for Social and Economic Development, Agenda for Peace and Security, democratic governance, determining Africa's destiny, and Africa's place in the world.

26 AU, 'African Union Agenda 2063: A shared strategic framework for inclusive growth and sustainable development' (AU Background Note 2013) 3.

27 Agenda 2063 has global strategic rolling plan with short (10 years), medium (10-25 years), and long-term (25-50 years) perspectives.

experiences from the past.[28] It therefore echoes the Pan-African call for Africa to unite and realise its renaissance.[29] To this end, Agenda 2063 advocates for the achievement of integrated, prosperous and peaceful Africa. It is driven by its own people as a guiding vision and comprehensive framework formulated for the purpose of achieving an integrated, prosperous and peaceful Africa.[30]

Agenda 2063 is the AU blueprint for transforming the continent into a future global powerhouse.[31] It underscores seven aspirations purported to be a vehicle which transports Africa into the global world. These aspirations are to achieve the following: (1) A prosperous Africa based on inclusive growth and sustainable development; (2) an integrated continent, politically united and based on the ideals of Pan-Africanism and the vision of Africa's renaissance; (3) an Africa of good governance, democracy, respect for human rights, justice and the rule of law; (4) a peaceful and secure Africa; (5) an Africa with a strong cultural identity, common heritage, shared values and ethics; (6) an Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children; and (7) Africa as a strong, united and influential global player and partner.[32] These seven goals are translated into 18 goals, which are then divided into 44 priority areas and expressed in 161 different national-level targets. Thus, Agenda 2063's vision is broad, addressing issues of identity, self-determination, political independence, and socioeconomic development in the context of globalisation.

Agenda 2063 makes provision for a sustainable development. From an African's perspective, sustainable economic development can be understood to mean the total context within which all natural resources, human settlement, transportation as well as infrastructure are constructed to support socio-economic activities.[33] During the

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28 DeGhetto Kaitlyn *et al,* 'The African Union's Agenda 2063: Aspirations, challenges, and opportunities for management research' 2:1 *Africa Journal of Management* 93.

29 Ndizera Vedaste and Muzee Hannah, 'A critical review of agenda 2063: business as usual?' (2018) 12:1 *African Journal of Political Science and International Relations* 143.

30 AU, 'Agenda 2063: The Africa we want' https://au.int/en/agenda2063/overview (accessed 30 April 2020).

31 This aim of repositioning Africa to become a dominant player in the global arena is not new to Africa as it was also embraced in the OAU, see Chapter 3 for a detailed discussion.

32 AU, 'Agenda 2063: The Africa we want' https://au.int/en/agenda2063/overview (accessed 30 April 2020).

33 *Ibid.*

precolonial and colonial era, the notion of sustainable development was absent.[34] This is the reality that African states inherited upon regaining their independence. As a result, African states have fallen behind with many of their sustainable development objectives at the national, regional and continental levels.

Through Agenda 2063, the AU envisions that an integration of the continental economy will enlarge markets for goods and services, enhance customs cooperation, and harmonise and coordinate trade policies.[35] In doing so, it seeks to address the disconnect between multiple and overlapping regional memberships of RECs.[36] Agenda 2063 differs from other international organisations' array of 'one-size-fits-all' programs in that it is more focused on an African plan for realising the right to development, including economic development.[37]

Agenda 2063 is also different from past African continental initiatives in several ways. First and foremost, it was created through a non-bureaucratic, bottom-up approach driven by African people.[38] In this way, it advocates ownership of the processes and outcomes which it embodies.[39] Second, it sets out aspirational targets at national, regional, and continental levels to ensure accountability through a monitoring and evaluating component. Third, in the name of making policies coherent across the continent, it is the first initiative to have brought continental, regional and domestic initiatives under one umbrella. Finally, financing strategies and instruments have been identified through a resource mobilisation strategy, which includes expanding and maximising states-to-states partnerships within the African continent.[40]

It is safe to say that Agenda 2063 is thus one of its kind. However, for this grand master plan to make a difference, the realisation and implementation of sustainable

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34 Kaniaru Donald and Okidi Charles, 'Sustainable development and investment in Africa' (2001) *3 Business Law International* 318.

35 AU, 'Agenda 2063: The Africa we want' https://au.int/en/agenda2063/overview (accessed 30 April 2020).

36 *Ibid.*

37 Stevens Clydenia, 'Reviving the right to development within the multilateral trade framework affecting (African) Countries to actualise Agenda 2063' (2019) 19:1 *African Human Rights Law Journal* 472.

38 *Ibid.*

39 *Ibid.*

40 Trade Law Center, 'African Union Agenda 2063' https://www.tralac.org/resources/our-resources/14352-african-union-agenda-2063.html (accessed 10 November 2020).

development must be an integral component of Agenda 2063.[41] As a result, there is a need to identify and address existing impediments in the multilateral trade and investment system that may jeopardise the Agenda's objectives and future African development prospects. Subsidiarity, accountability and transparency, inclusiveness, and integration must all be key guiding principles in Agenda 2063's overall implementation.[42]

Furthermore, even though Agenda 2063 is generally well drafted on many levels, it still has gaps which may hinder its implementation and overall success. First, its drafters recognised the need for new institutional arrangements in order to effectively move the Agenda toward realising change, development, integration, and transformation.[43] However, the precise nature, structure, and composition of these 'institutional arrangements' remain unclear.[44] As experience elsewhere in developing states shows, it is not enough just to change 'institutional arrangements'.[45] Africa must establish effective institutions capable of balancing and protecting competing interests without resorting to open warfare or conflict, while also avoiding state capture or fragility.[46]

Second, Agenda 2063 must address an important question: How can Africa as a whole and individual AU economies leverage their respective advantages, values, natural and human resources to successfully integrate into the global economic chain? Ordinary citizens and small businesses face a challenge in envisioning a more positive future while reconciling with past wrongdoings and atrocities of colonialism as well as dealing with the harsh realities of the present.[47] The proposed plan of action in Agenda 2063 does not include steps for working with these stakeholders who may need special assistance.

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41 Stevens Clydenia, 'Reviving the right to development within the multilateral trade framework affecting (African) countries to actualise Agenda 2063' (2019) 19:1 *African Human Rights Law Journal* 472.

42 AU Commission, 'Agenda 2063: the Africa we want' aspirations 1 and 7' http://www.un.org/en/africa/osaa/pdf/au/agenda2063-firstl Oyearimple mentation.pdf (accessed 06 May 2020).

43 DeGhetto Kaitlyn *et al,* 'The African Union's Agenda 2063: Aspirations, challenges, and opportunities for management research' 2:1 *Africa Journal of Management* 98.

44 *Ibid.*

45 *Ibid.*

46 Ndizera Vedaste and Muzee Hannah, 'A critical review of agenda 2063: Business as usual?' (2018) 12:8 *African Journal of Political Science and International Relations* 150.

47 This is particularly so for former settler economies such (Zimbabwe, Kenya) and conflict and post conflict states (DRC and the Sudan), in addition to states with long serving regimes (Eritrea, Uganda and Cameroon).

Third, Agenda 2063 seeks to treat Africa as a unified unit of analysis for all types of development. This could be a mistake because Africa is so diverse, and issues and challenges mean different things to different countries at different economic levels. These distinctions are likely to complicate the design, implementation, and even monitoring and evaluation of Agenda 2063's action plan. For example, weak states may be impediments to the development of robust rules because they are incapable of developing, managing, and implementing a comprehensive regional integration agenda.[48]

An integration scheme in which countries at different stages of development benefit disproportionately from integration, and their commitment to implement the agreed-upon strategies may suffer as a result.[49] This is an issue that Agenda 2063's plan of action must address, or it will be the same as its predecessors. This is based on the premise that it is difficult for two or more parties to work toward a common goal if their individual issues have not been resolved.[50] Several economically struggling states could be left behind. There is an implicit assumption that member states have the necessary capacities to receive, comprehend, plan, work, communicate, and effectively implement country-specific Agenda 2063 components.[51]

Finally, the challenge that Agenda 2063 may face stems from the fact that political motivation for regional integration in Africa plays a significant role, particularly in overlapping memberships.[52] Although political commitment appears to be compelling, it does not appear to translate into effective implementation.[53] To reach the goals of Agenda 2063, all AU member states will have to be conscious and deliberate in their

48 Hartzenberg Trudi, 'Regional integration in Africa' (2011) 14 *WTO Staff Working Paper: ERSD* 6.

49 Geda Alemayehu and Kibert Haile, 'Regional economic integration in Africa: A review of problems and prospects with a case study of COMESA' (2008) *Journal of African Economies* 12.

50 Ndizera Vedaste and Muzee Hannah, 'A critical review of Agenda 2063: Business as usual?' (2018) 12:8 *African Journal of Political Science and International Relations* 150; See also Daron Acemoglu and James Robinson, *The Origins of Power, Prosperity and Poverty: Why Nations Fail* (Crown Publishers 2012).

51 DeGhetto Kaitlyn *et al,* 'The African Union's Agenda 2063: Aspirations, Challenges, and Opportunities for Management Research' 2:1 *Africa Journal of Management* 98.

52 Hartzenberg Trudi, 'Regional Integration in Africa' (2011) 14 *WTO Staff Working Paper: ERSD* 6.

53 *Ibid.*

efforts to nurture a transformative leadership that will drive the African agenda and defend Africa's interests.

The first performance report of Agenda 2063 shows that Africa has failed to achieve many of its envisaged goals. The continent only managed to realise 16 per cent of its 2019 economic targets (Aspiration 4 of Agenda 2063) with the majority of African regions failing to achieve at least 50 per cent of each of Agenda 2063 aspirations. [54] From an economic development perspective, the report shows that Southern Africa achieved 9 per cent, East Africa achieved 27 per cent, West Africa achieved 12 per cent, Central Africa achieved 0 per cent and North Africa achieved 7 per cent.[55] Nigeria and South Africa, the two largest economies scored 0 per cent and 33 per cent on economic targets respectively.[56] The report does not state in detail what contributed to the failure of performance of the continent. However, the challenges discussed above may have played a role.

4.3.2 Towards sustainable economic development through the eyes of the African Continental Free Trade Area Agreement?

There are key initiatives with the purpose of regulating trade and investment at the AU level. These efforts are aimed at enhancing and supporting Africa's objectives of boosting structural transformation for sustained economic growth and development. One of these key initiatives is the AfCFTA which is instrumental in creating a single continental market for goods and services in the AEC.[57]

The AfCFTA Agreement was introduced to accelerate growth of intra-African trade,[58] with the hope that this would strengthen Africa's common voice and policy space in

54 Agenda 2063: First Continental Report on the Implementation of Agenda 2063 (NEPAD 2020) 13.

55 *Ibid* 25-29.

56 *Ibid* 77-81.

57 The AfCFTA Agreement was introduced at the 18th Ordinary Session of the Assembly of Heads of State and Government of the AU. To date, 54 countries have signed and 29 have ratified the AfCFTA Agreement.

58 African Union, 'Operational Phase of the African Continental Free Trade Area Launched' https://au.int/en/articles/operational-phase-african-continental-free-trade-area-launched (accessed 12 January 2020). The operational phase of the AfCFTA Agreement was subsequently launched during the 12th Extraordinary Session of the Assembly of the African Union in Niger on 7 July 2019. The AfCFTA Agreement will be governed by five operational instruments, e.g. the rules of origin; the online negotiating forum; the monitoring and elimination of non-tariff barriers; a digital payments system and the African Trade Observatory.

global trade negotiations, since African economies are too small and fragmented to be competitive against bigger economies on the world market.[59] In this context, the AfCFTA Agreement intends to create a single African market which will address the problem of small African economies whose impact is minimal in global trade arena.

The AfCFTA Agreement is a unique instrument, and covers not only trade in goods, but also trade in services, investment as well as intellectual property.[60] This ambitious project by African states forms part of the continent's Agenda 2063.[61] It is envisioned in Agenda 2063 as one of the flagship projects aimed at accelerating Africa's economic growth and development, which have the potential to boost Africa's trading position in the global market.[62]

The AfCFTA Agreement is thus a grand plan spearheaded by the AU,[63] it stands to exert a transformative effect on the continent's sustainable economic development.[64] By liberalising investment and trade regimes, the AfCFTA Agreement intends to unleash this growth potential, allowing access to greater opportunities across the continent.[65] The aim is that the successful implementation of the reforms for the AfCFTA Agreement which include harmonising regulations among regions, improving infrastructure, and tackling governance and political issues may attract foreign investment on the continent.[66] The AfCFTA Agreement attempts to centre the AU member states and recognises RECs initiatives as building blocks for its principles.[67] It also endorses flexibility, transparency, disclosure of information as well as special

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Negotiations to establish the AfCFTA Agreement were first launched in June 2015. On March 21, 2018, following 10 negotiating rounds.

59 Qobo Mzukisi, 'The challenges of regional integration in Africa: in the context of globalisation and the prospects for a United States of Africa' (2007) 145 *Institute for Security Studies: Issue Paper* 3.

60 Article 4 of the AfCFTA Agreement.

61 As of September 2019, the AfCFTA Agreement had been signed by 54 out of Africa's 55 countries, with the exception being Eritrea. Of the 54 countries which signed the AfCFTA Agreement, a total of 29 countries had deposited their instruments of ratification with the Chairman of the African Union Commission.[61]

62 AU, 'Flagship Projects of Agenda 2063' https://au.int/en/agenda2063/flagship-projects (accessed 08 July 2020).

63 Article 3 of the AfCFTA Agreement.

64 Celebican Melisa, 'Non-confidential summary: The rationale for an investment protocol in the AFCFTA: How will it contribute to Africa's sustainable development?' https://www.tradelab.org/single-post/2018/08/22/African-Continental-Free-Trade-Area-Investment-Protocol (accessed 27 March 2020).

65 *Ibid.*

66 *Ibid.*

67 The Preamble of the AfCFTA Agreement.

and differential treatment as its principles.[68] It further asserts its own supremacy, and takes precedence over regional agreements that are in conflict with it.[69]

Article 3 of the AfCFTA Agreement outlines the following objectives: (1) to create a single market for goods and services facilitated by movement of persons in order to deepen African economic integration in accordance with the Pan-African Vision of '[a]n integrated, prosperous, and peaceful Africa' as enshrined in Agenda 2063; and (2) to create a liberalised market for goods and services through successive rounds of negotiations development and food security; (3) to facilitate the movement of capital and natural persons and the movement of investments as building blocks on African initiatives and developments; (4) to lay the groundwork for the later establishment of a Continental Customs Union; (5) to improve the competitiveness of African economies within the continent and the global market; and (6) to promote industrial development through diversification and regional value chain development, agricultural development, and rural development.

What is interesting is that the AfCFTA Agreement contains the MFN principle. However, this principle is structured differently from the traditional MFN principle, in that in the AfCFTA Agreement this principle operates on a reciprocal basis.[70] This is a departure from the WTO system which contains an unconditional MFN principle. In the context of the AfCFTA Agreement, the reciprocity requirement preserves the *acquis* for member states. While the *acquis* will ensure that member states are accountable to each other, the lack of a traditional MFN principle may risk the creation of piecemeal of rights and obligations that differ across each member state.[71] Since the AfCFTA Agreement is an intra-African trade instrument, it will not apply directly to non-African states. Nonetheless, they may still benefit from it through the MFN clause.

Regarding the national treatment principle, the AfCFTA Agreement took the traditional operation of this standard of treatment.[72] However, since the main scope of the

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68 Article 5 of the AfCFTA Agreement.

69 *Ibid* Article 19(1) of the AfCFTA Agreement.

70 Articles 18 and 4 of the AfCFTA Agreement.

71 Signé Landry and Van der Ven Colette, 'Keys to success for the AfCFTA negotiations' (2019) *Africa Growth Initiative* 5.

72 The national treatment principle is contained in article 5 of the AfCFTA Agreement and requires member states accord to products imported from other member states treatment no less favourable than that accorded to like domestic products of national origin, after the imported products have been cleared by customs.

AfCFTA Agreement is trade, the national treatment applies to same products imported from each member state, and not investment. The AfCFTA Agreement does not contain the FET clause; however, it does require member states to be flexible in their dealing with one another.[73] Apart from its traditional objectives, the AfCFTA Agreement also aims to advance Agenda 2063 projects as a strategic framework for Africa's socio-economic transformation.[74] In the same way, the inclusion of an investment protocol in the AfCFTA Agreement is expected to promote the goals of the AU as stated in Agenda 2063.

Whilst the AfCFTA Agreement is an impressive initiative by the AU, the considered view from scholars prior to its implementation point to the need to address certain fundamentals first before implementing an ambitious project like the AfCFTA Agreement. Qobo Mzukisa points out the lack of genuine commitment towards the goal of African development. Instead, African leaders are focused on the wrong priorities, grand gestures and abstract visions.[75] Lee Margaret goes further and states that instead of focusing on market integration, the continent's focus should be on addressing fundamentals such as commitment to the regional agenda, addressing the issue of overlapping memberships and well as moving away from the issue of overlapping memberships of IIAs.[76] This seems to be a direct criticism of previous economic integration initiatives on the continent and also the AfCFTA Agreement.

All factors which may lead to sustainable economic development and relations in Africa are intertwined and should be analysed in that fashion. If the gaps in Agenda 2063, the AfCFTA Agreement and RECs are not addressed, Africa risks creating a vicious cycle of ambitious projects and ideals which do not achieve the necessary outcomes. The OAU focused on *regaining* independence, however, the AU has attempted to shift towards development, be it economic, social, political, scientific as well as cultural.

While the AfCFTA Agreement's ratification is a cause for celebration, some critical parts of this Agreement are still outstanding. For example, there is still no investment

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73 Article 6 of the AfCFTA Agreement.
74 *Ibid* Article 3(a).
75 Qobo Mzukisa, 'The challenges of regional integration in Africa' (2007) *Institute for Security Studies* 1.
76 Lee Margaret, 'Regionalism in Africa: a part of the problem or a part of the solution?' https://pdfs.semanticscholar.org/4673/0b441983da52c41e9c378d6289341dd94d8b.pdf 18 (accessed 13 October 2021).

protocol as contemplated in Articles 7 and 8 of the AfCFTA Agreement. In realising the objectives that are set out in Article 3 of the AfCFTA Agreement, Article 4(c) requires member states to cooperate on investment. As indicated in chapter one, there is currently no comprehensive IIA at the AU level, however, the AfCFTA Agreement intends to include a protocol on investment which is currently negotiated in phase two.[77]

Article 7 of the AfCFTA Agreement states that in phase two negotiations, member states will negotiate in the areas of intellectual property rights, investment, and competition policy. Once the anticipated AfCFTA Investment Protocol is ratified, it will form an integral part of the Agreement.[78] At the time of writing this chapter, it was not clear what the substantive issues of the anticipated AfCFTA Investment Protocol would be, or whether they will adopt binding or non-binding commitments.

Furthermore, the AU envisions that the integration of the continental economy will enlarge markets for goods and services, enhance customs cooperation, and harmonise and coordinate trade policies. In doing so, it seeks to address the disconnect between multiple and overlapping regional memberships in RECs. However, the AfCFTA Agreement does not directly deal with issues of foreign investment as it is aimed at regulating trade. Investment will thus be ancillary in the AfCFTA Agreement. This mistake is similar to the one made in the Havana Charter (as discussed in chapter two above) where there was no distinction between investment and trade. The study does not argue that investment should be treated as the main economic vehicle in Africa, but that both trade and investment should be afforded equal space to operate in Africa for Africa to fully benefit from foreign investment.

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77 Chidede Talkmore, 'How can the AfCFTA Investment Protocol advance the realisation of the AfCFTA objectives?' https://www.tralac.org/blog/article/14065-how-can-the-afcfta-investment-protocol-advance-the-realisation-of-the-afcfta-objectives.html (accessed 27 March 2020). Phase One of the AfCFTA Agreement negotiations for trade in goods and services were launched in June 2015, and significant progress has also been achieved in the SADC Protocol on Trade in Services and SADC Protocol on Trade in Goods.

78 Article 8 of the AfCFTA Agreement.

4.4 Regional Economic Communities through the eyes of the African Economic Community

As a first step toward integration, the then-OAU (now AU) Extraordinary Summit adopted the Lagos Plan of Action (LPA) for Economic Development in 1980.[79] The Preamble of the LPA acknowledged that even though African leaders have made efforts to boost the African economy, Africa remains the least developed continent. The LPA advocated for the division of the continent into RECs with a purpose of laying a foundation for an integrated African economy.[80] The commitments in the LPA were translated into concrete form in June 1991 when the Treaty establishing the AEC (the Abuja Treaty) was signed during the 27th Ordinary Session of the Assembly in Abuja.[81] This marked the start of a new push to improve cooperation across the continent.

The AEC's goal is to promote economic, social, and cultural development, as well as African economic integration, in order to increase self-sufficiency and endogenous development, and to create a framework for development, human resource mobilisation, and material mobilisation.[82] The AEC also aims to promote cooperation and development in all aspects of human activity in order to raise the standard of living in Africa, maintain economic stability, and establish a close and peaceful relationship between member states.[83]

Article 3 of the Abuja Treaty contains principles which member states are to abide by: (1) Equality and inter-dependence of member states; (2) solidarity and collective self-reliance; (3) inter-state co-operation, harmonisation of policies and integration of programmes; (4) promotion of harmonious development of economic activities; (5) observance of the legal system and peaceful settlement of disputes, active cooperation between neighbouring countries and promotion of a peaceful environment as a pre-requisite for economic development and (6) accountability, economic justice and popular participation in development.

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79 OAU LPA for the Economic Development of Africa 1980-2000.

80 De Melo Jaime and Tsikata Yvonne, 'Regional Integration in Africa: Challenges and prospects' (2014) *Wider Working Paper* 4.

81 Article 4(1)(a) of the Abuja Treaty.

82 *Ibid* Article 4(a).

83 *Ibid* Article 4(c).

The AEC is a cross-regional bloc conducted mainly between African states, and recognises eight sub RECs[84] as building blocks that provide an overarching framework for continental economic integration.[85] This overarching framework intends to champion Africa's economic integration into pan-African unity and continental industrialisation by dividing the continent into RECs that would contribute towards a sustainable economic development.[86] Regional integration continues to be an economic and political priority for African leaders and policymakers, as evidenced by the adoption and implementation of numerous programmes at the continental and regional levels.[87] In short, RECs were and continue to be the glue cementing African unity and sustainable economic development and relations.[88]

Regional integration is not a contemporary phenomenon. Regional initiatives existed during the colonial era, when African states attempted to form international blocs with a hope of conquering colonialism.[89] For example, the South African Customs Union (SACU) was established in 1910 and the EAC was established in 1919.[90] However, regional economic integration gained momentum in Africa when many states *regained* their independence in the early 1960s.[91] Unlike in the case of membership at the continental level, the membership in African RECs is based on geographic criteria, and as a result, states are not potentially a member of every REC.[92]

The African economic landscape is undoubtedly changing with regional diversity in terms of international agreements, laws, policies and practices.[93] The founding fathers

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84 These eight Recs are AMU, CEN-SAD, COMESA, EAC, ECCAS, ECOWAS, IGAD and SADC.

85 UN Office of the Special Advisor on Africa, 'The Regional Economic Communities (RECs) of the African Union' https://www.un.org/en/africa/osaa/peace/recs.shtml (accessed 11 May 2020). The Preamble of the AfCFTA Agreement also recognises RECs as building blocks 'towards the establishment of the African Continental Free Trade Area'.

86 *Ibid.*

87 UNECA, *Assessing regional integration in Africa: Next Steps for the African Continental Free Trade Area* (Economic Commission for Africa 2019) 1.

88 De Melo Jaime and Tsikata Yvonne, 'Regional integration in Africa: Challenges and prospects' (2014) *Wider Working Paper* 4.

89 Jiboku Peace, 'The challenge of regional economic integration in Africa: Theory and reality' (2015) *Africa's Public Service Delivery and Performance Review* 18.

90 *Ibid.*

91 Qobo Mzukisi, 'The challenges of Regional Integration in Africa: In the context of globalisation and the prospects for a United States of Africa' (2007) 145 *Institute for Security Studies: Issue Paper* 2.

92 Panke Diana, 'African states in international organisations: A comparative analysis' (2019) 26:1 *South African Journal of International Affairs* 2.

93 DIRCO, 'African Economic Community' http://www.dirco.gov.za/foreign/Multilateral/africa/aec.htm (accessed 11 November 2020).

of regional economic integration expressed their willingness to postpone their own states' individual independence if it meant forging more integrated regional economies with their neighbours in order to regain independence.[94] The motivating factor was that if states were allowed to focus only on their territories, the 'temptations of nationhood' would take over and the goals of economic and political integration would become elusive.[95]

As discussed in the previous chapter, the failed attempt of the OAU to industrialise efficiently using import-substitution after states *regained* their independence gave rise to the notion of regional integration as a means to facilitate structural transformation in Africa.[96] As a result of growing concerns about the legitimacy of international investment law and investor-state arbitration, African states attempted to project a different image of international investment law through regional economic blocs and hard law instruments. [97]

The adoption of the LPA in 1980 signalled the start of a renewed push to strengthen cooperation across the continent. The LPA advocated for the continent's division into RECs, which would lay the groundwork for an integrated African economy.[98] As such, the LPA promoted a regional approach to furthering economic development, and as a consequence, the 1980s and 1990s saw a proliferation of regional economic integration organisations on the African continent.[99] Thus, some African states are members of various international economic blocs. Most of them are actively involved in the realisation of the continent's economic objectives.[100] Among these efforts are

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94 *Ibid.*

95 Kayizzi-Mugerwa Steve *et al,* 'Regional integration in Africa: An introduction' (2014) 26:S1 *African Development Review* 1.

96 *Ibid.*

97 Repousis Odysseas, 'Multilateral Investment Treaties in Africa and the Antagonistic narratives of bilateralism and regionalism' (2017) 52:3 *Texas International Law Journal* 313.

98 De Melo Jaime and Tsikata Yvonne, 'Regional integration in Africa: Challenges and prospects' (2014) *Wider Working Paper* 4.

99 UNCTAD Secretary, 'United Nations Conference on Trade and Development: Regional integration and foreign direct investment in developing and transition economies' https://unctad.org/meetings/en/SessionalDocuments/ciimem4d2_en.pdf (accessed 21 March 2019).

100 These objectives have been codified in the Agenda 2063. The Agenda 2063 is Africa's blueprint and master plan for transforming Africa into the global powerhouse of the future. It is the continent's strategic framework that aims to deliver on its goal for inclusive and sustainable development.

bilateral, tripartite and multi-lateral investments agreements that they have concluded at their respective regional levels.[101]

The AU currently recognises eight RECs, namely:

(1) Arab Maghreb Union (AMU) which is aimed at coordinating, harmonising and rationalising policies and strategies to achieve sustainable development in all sectors of human activities.[102]

(2) The Community of Sahel-Saharan States (CEN-SAD) which has, as its main purpose, the achievement of a comprehensive Economic Union based on a strategy implemented in accordance with a developmental plan that would be integrated in the national development plans of the member states.[103]

(3) Common Market for Eastern and Southern Africa (COMESA) which has, as one of its objectives, the formation of a large economic and trading unit to overcome trade barriers faced by member states.[104]

(4) East African Community (EAC) with the aim of gradually establishing among themselves a Customs Union, a Common Market, a Monetary Union, and ultimately a Political Federation of the East African States.[105]

(5) Economic Community of Central African States (ECCAS) which is aimed at:

> [P]romoting and strengthening a harmonious cooperation in order to realise a balanced and self-sustained economic development, particularly in the fields of industry, transport and communications, energy, agriculture, natural resources, trade, customs, monetary and financial matters, human resources, tourism, education, culture, science and technology and the movement of persons with a view to achieving collective self-reliance, raising the standards of living, maintaining economic stability and fostering peaceful relations between the member [s]tates and contributing to the development of the African continent.[106]

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101 These communities/organisations have ordained various IIAs which have been signed by member states.

102 AU Economic Commission for Africa, 'AMU - Arab Maghreb Union' https://www.uneca.org/oria/pages/amu-arab-maghreb-union (accessed 26 August 2019).

103 AU Economic Commission for Africa, 'CEN-SAD - The Community of Sahel-Saharan States' https://www.uneca.org/oria/pages/cen-sad-community-sahel-saharan-states (accessed 26 August 2019).

104 AU Economic Commission for Africa, 'COMESA - Common Market for Eastern and Southern Africa' https://www.uneca.org/oria/pages/comesa-common-market-eastern-and-southern-africa (accessed 26 August 2019).

105 AU Economic Commission for Africa, 'EAC - East African Community' https://www.uneca.org/oria/pages/eac-%e2%80%93-east-african-community (accessed 26 August 2019).

106 AU Economic Commission for Africa, 'ECCAS-Economic Community of Central African States' https://www.uneca.org/oria/pages/eccas-economic-community-central-african-states (accessed 26 August 2019).

(6) Economic Community of West African States (ECOWAS) which is aimed at:

> The harmonisation and co-ordination of national policies and the promotion of integration programmes, projects and activities, particularly in food, agriculture and natural resources, industry, transport and communications, energy, trade, money and finance, taxation, economic reform policies, human resources, education, information, culture, science, technology, services, health, tourism, legal matters.[107]

(7) Intergovernmental Authority on Development (IGAD) which is aimed at assisting and complementing the efforts of the member states to achieve, through increased cooperation, food security and environmental protection, peace and security, and economic cooperation and integration in the region.[108]

(8) The SADC which has, as one of its objectives to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.[109]

The AfCFTA Agreement, which establishes a continental FTA, builds on from the Abuja Treaty by continuing the same path of market integration as an economic development strategy. The launch of the operational phase of the AfCFTA Agreement has reignited excitement about integration of Africa. The ratification of the AfCFTA Agreement strongly indicates a commitment by policy makers and African leaders to regional integration.[110] However, African states must still address the crisis of implementation at the continental and regional levels. These include *inter alia* the inclusion a separate binding instrument aimed at regulating foreign investment in Africa. The implementation of the AfCFTA Agreement goes beyond trade and investment. It also underscores the crisis of implementing AU's decisions and initiatives as well as validating the AU's Agenda 2063.

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107 AU Economic Commission for Africa, 'ECOWAS - Economic Community of West African States' https://www.uneca.org/oria/pages/ecowas-economic-community-west-african-states (accessed 26 August 2019).

108 AU Economic Commission for Africa, 'IGAD - Intergovernmental Authority on Development' https://www.uneca.org/oria/pages/igad-intergovernmental-authority-development (accessed 26 August 2019).

109 AU Economic Commission for Africa, 'SADC - Southern African Development Community' https://www.uneca.org/oria/pages/sadc-southern-african-development-community (accessed 26 August 2019).

110 TRALAC, 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html#:~:text=To%20date%2C%2030%20countries%20have,Niger%20on%207%20July%202019. (accessed 02 July 2020).

The eight recognised RECs do not only constitute key building blocks for economic integration in Africa, but are also key actors working in collaboration with the AU in ensuring *inter alia* economic stability in Africa.[111] Furthermore, as implementing arms of the AU and the AEC, these RECs have been central to various transformative programs on the continent.[112] Article 28 of the Abuja Treaty advocates for the full operation of RECs; and African states have embraced regional integration as an important component of their development strategies, primarily to overcome the economic constraint of small and fragmented economies working in isolation. Several pan-African organisations have worked in the past to strengthen economic, social, and political cooperation and integration in Africa.[113]

Regional integration creates incentives for governments to pursue less distorting domestic policies and more disciplined macroeconomic management.[114] Furthermore, it can assist regions in achieving economies of scale, as well as increasing their supply capacity and competitiveness. Africa will be able to close critical missing links, interconnect the continent, and implement reforms to facilitate cross-border trade, investment, and financial flows through targeted regional infrastructure.

African RECs play an important role in the development of international investment law; and have adopted investment instruments that they believe are more appropriate in light of African countries' specific needs. The most recent of which seeks to combine attracting foreign investment with achieving sustainable development goals. However, Jiboku Peace contends that while African leaders and policymakers easily sign regional agreements and treaties and formulate desirable objectives in the establishment of regional economic institutions, they are not politically committed to the principles of regionalism and effective implementation of regional resolutions.[115]

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111 UN Office of the Special Advisor on Africa 'The Regional Economic Communities (RECs) of the African Union' https://www.un.org/en/africa/osaa/peace/recs.shtml (accessed 11 May 2020).

112 *Ibid.*

113 Qobo Mzukisi, 'The challenges of regional integration in Africa: In the context of globalisation and the Prospects for a United States of Africa' (2007) 145 *Institute for Security Studies: Issue Paper* 2. An overview of regional integration proceedings on the continent is given in the section below.

114 Qobo Mzukisi, 'The challenges of regional integration in Africa: In the context of globalisation and the Prospects for a United States of Africa' (2007) 145 *Institute for Security Studies: Issue Paper* 2.

115 Jiboku Peace, 'The Challenge of Regional Economic Integration in Africa: Theory and reality' (2015) 3:4 *Africa's Public Service Delivery and Performance Review* 6.

Regionalism in Africa is problematic and influenced by political variables. Many arguments for speeding up the integration process have since been advanced from many quarters, including politicians, technocrats, business owners, and researchers in universities and think tanks.[116] In spite of a broad concurrence on the benefits of Africa's economic integration, the process has been slow and episodic.[117] Because of the underlying difficulty of promoting a big idea, and the inherent regional rivalries engendered by the process, regional integration has, at least outwardly, been based on the promotion of regional integration schemes, invariably based on dimensions of either monetary cooperation or economic union.

However, 'deep integration', which entails the removal of traditional trade barriers such as tariffs, the elimination of other barriers to the free movement of goods, services, and factors, and the harmonisation of economic policies and regulatory regimes, remains patchy, despite increased effort in recent years. Hegemonic politics, ideological differences, and colonial influence are all major factors influencing Africa's path to integration.

4.5 Gaps and challenges in regulating foreign investment in Africa

4.5.1 Lack of trust, respect and commitment for member states in negotiating and fulfilling their international obligations

Lack of trust, respect and commitment towards the AU dates back to the OAU days.[118] For years, many scholars have written about these challenges which not only affect the negotiation, but also impede the implementation of international agreements.[119] As a result, this has opened a gap at negotiation tables. Deborah Larson in 1997 bluntly opined that 'in international relational there is lack of trust despite its importance'.[120] Even though this discussion has been going on for years now, the issue of trust, respect and commitment still comes into play when African leaders are supposed to commit to their obligations at an international level. This is so even though the active

116 *Ibid.*

117 Kayizzi-Mugerwa Steve, 'Regional integration in Africa: An introduction' (2014) 26:S1 *African Development Review* 1.

118 Refer to chapter 3 above, where the reasons for the demise of the OAU are discussed.

119 Kwaku Danso, 'The African Economic Community: Problems and prospects' (1995) 42:4 *The Politics of Economic Integration in Africa* 31.

120 Deborah Larson, 'Trust and missed opportunities in international relations' (1997) 18:3 *Political Psychology International Society of Political Psychology* 702.

participation of member states in international agreements is an important condition for the ability of states to exert influence over the content of international norms and rules.[121]

Furthermore, many of the most important tactical moves in a negotiation take place 'away from the table'.[122] Such moves are critical for establishing the most favourable situation at the negotiating table. Indeed, if negotiators do not attempt to influence the negotiating structure, they are likely to be at an inherent disadvantage.[123] When states do not trust and respect the ideals of the negotiated instruments and international organisations, they will actively move from one agreement to the next with the hope of advancing their own individual objectives. A common strategy has been to switch between negotiations at continental and regional levels as well as at multilateral and bilateral levels.[124] Some states have delayed ratifying IIAs, while others attempted to withdraw from international agreements, international organisations, regional and global tribunals.[125] For example, Burundi was the first country to withdraw its membership from the International Criminal Court (ICC) after accusing the ICC of undermining its sovereignty and unfairly targeting Africans.[126]

South Africa attempted to withdraw from the ICC[127] and the SADC Tribunal,[128] however, on both occasions the South African Constitutional Court ruled against these decisions. Lesotho, Mozambique and Tanzania left COMESA, and joined other RECs,[129] while other states such as South Africa[130] and Morocco[131] have terminated

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121 *Ibid.*

122 Jones Emily, *Negotiating Against the Odds: A Guide for Trade Negotiators from Developing Countries* (Palgrave Macmillan, London 2013) 43.

123 *Ibid.*

124 *Ibid* 44.

125 Schill Stephan, 'International investment law and rule of law' (2017) 18 *Amsterdam Law School Legal Studies Research Paper* 1-2; See also OECD, 'Key issues on international investment agreements' (2017) 2.

126 UN's Africa Renewal, 'ICC: beyond the threats of withdrawal' https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal (accessed 16 November 2020).

127 *Democratic Alliance v Minister of International Relations and Cooperation and Council for the Advancement of the South African Constitution Intervening* 2017 (1) SACR 623 (GP).

128 See *Law Society of South Africa v the President of the Republic of South Africa* 2019 (3) SA 30 (CC).

129 SAIIA, 'A pending crisis of overlap' https://saiia.org.za/research/a-pending-crisis-of-overlap/ (accessed 19 November 2020).

130 South Africa has terminated about 11 BITs.

131 Morocco has terminated about 10 BITs.

some of their IIAs.[132] Some host states see limited advantages of international arbitration and are now leaning towards domestic dispute settlement system.[133] Some hosts states have raised concerns about arbitral tribunals' stringent review of their internal measures.[134]

Furthermore, the international investment dispute regime has been hit hard by an unprecedented upheaval against investment arbitration.[135] Some states have expressed dissatisfaction with the way the ICSID settles disputes and consequently, have withdrawn from international arbitration. The ICSID has been criticised for being a pro-investor and anti-host state, which affects the economic growth of host states.[136]

Furthermore, because of lack of trust, many African states have been reluctant to ratify international agreements. For example, Nigeria and South Africa were initially reluctant to ratify the AfCFTA Agreement.[137] For South Africa, it was a case of following its national processes for adopting international agreements in terms of its Constitution.[138] However, for Nigeria it was substantive issues dealing with the content of the AfCFTA Agreement.[139]

The Nigeria's national Effective Implementation of the AfCFTA Agreement for Industrialisation and Inclusive Economic Development 2019 deliberated on the implementation of the AfCFTA Agreement and concluded that an institutional framework to address rules of origin, technical barriers to trade and sanitary and

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132 UNECA, *Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration* (Economic Commission for Africa 2016) 26.

133 Gwynn Maria, 'Balancing the state's right to regulate with foreign investment protection: A perspective considering investment disputes in the South American region' (2018) 6:1 *Groningen Journal of International Law* 115.

134 Schill Stephan, *The Multilateralisation of International Investment Law* (Oxford University Press 2009) 375-376.

135 Mohammad Hamdy, 'Redesign as reform: A critique of the design of bilateral investment treaties' (2020) 51:1 *Georgetown Journal of International Law* 257.

136 Qumba Mmiselo, 'South Africa's move away from international investor-state dispute: a breakthrough or bad omen for investment in the developing world?' (2019) *De Jure Law Journal* 365.

137 McKenzie Sarah, 'Resolving the conflict between the protection of international investments and the state's right and responsibility to regulate' (unpublished LLM dissertation, University of the Witwatersrand 2017) 27.

138 See section 231 of the Constitution of South Africa.

139 The Nigeria's national Effective Implementation of the AfCFTA Agreement for Industrialisation and Inclusive Economic Development 2019 deliberated on the implementation of the AfCFTA Agreement and concluded that an institutional framework to address rules of origin, technical barriers to trade and sanitary and phytosanitary from national level to the AU level was needed. South Africa subsequently ratified the Agreement on 10 February 2019, while Nigeria ratified it on 11 November 2020.

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Furthermore, Agenda 2063 may face a commitment challenge, which may ultimately affect its practical implementation.[140] Given Agenda 2063's goal of eventually establishing a political union and supranational organs to act on behalf of African governments, some African leaders are unlikely to relinquish their sovereign power easily.[141] One of the reasons cited for Africa's lack of progress is governments' unwillingness to cede sovereignty over their macroeconomic policies to an international authority. The lack of strong and sustained political commitment, as well as macroeconomic instability, have stymied Africa's economic integration progress.[142] Africa thus needs to operate from a stance of trust right from the negotiation until the implementation stage.

4.5.2 Overlapping and differing binding international commitments

Treaties concluded by African states are generally heterogeneous in terms of scope, structure, purpose and content.[143] They cover foreign investment in a fragmented manner across the continent, and their obligations frequently overlap.[144] The challenge of aligning IIAs with national laws is directly linked to the lack of trust challenge. Many IIAs differ regarding application, interpretation and remedies at the global, continental, regional and national levels. The major challenge facing economies in Africa is not a lack of good policies and strategies, but lack of effective implementation of such policies. Crucial to the implementation of IIAs is an understanding of the political economy underpinning these agreements at the national level. Integration is one of the central themes of interdisciplinary approach to international relations.[145] For this

140 Ndizera Vedaste and Muzee Hannah, 'A critical review of Agenda 2063: Business as usual?' (2018) 12:8 *African Journal of Political Science and International Relations* 143.

141 *Ibid.*

142 Alemayehu Geda and Haile Kibret, 'Regional economic integration in Africa: A review of problems and prospects with a case study of COMESA' (2002) *Working Paper* 125.

143 Denters Erik and Gazzini Tarcisio, 'The role of African regional organisations in the promotion and protection of foreign investment' (2017) 18 *Journal of World Investment and Trade* 18 452; See Chidede Talkmore, 'The right to regulate in Africa's international investment law regime' *Oregon Review of International Law* (2019) 437-466.

144 *Ibid.*

145 Eke Jude and Kelechi Ani Kelechi, 'Africa and the challenges of regional integration' (2017) 6:1 *Journal of African Union Studies* 63.

reason, modern states, especially emerging states cannot afford the challenges of isolationism.[146]

As a result, each REC and each country has concluded at least one investment instrument.[147] Thus, the issue of maintaining consistency of a country's economic development policy needs to be addressed. Policy coherence, in general requires that the provisions of a country's IIAs be consistent with the country's investment policy.[148] Rights and obligations under IIAs are reciprocal, protecting foreign investors in the territory of a host state. However, what is important is not a mere conclusion of an international agreement as they need to be structured correctly so that the rights and obligations of all stakeholders are upheld.[149]

Motivated by the desire to maximise trade and investment interactions, states have been taking advantage of frameworks provided at the continental, regional and national levels.[150] The result of this is a complex web of relations where states owe multiple allegiances to the trading and investment regimes created at these levels. Hence, many African states have at least one instrument relating directly or indirectly to investment at the continental, regional and national level.[151] Some RECs have even concluded IIAs among themselves. An example of such IIA is the COMESA-EAC-SADC Tripartite Agreement by the regions of SADC, COMESA and EAC.[152]

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146 *Ibid.*

147 Mbengue Makane, 'The quest for a pan-African investment code to promote sustainable development' https://www.ictsd.org/bridges-news/bridgesafrica/news/the-quest-for-a-pan-african-investment-code-to-promote-sustainable (accessed 15 December 2020).

148 UNCTAD, 'Systemic issues in international investment agreements' UNCTAD/WEB/ITE/IIA/2006/2 4.

149 *Ibid;* See Africa Global 'Maximising investment protection in Africa: the role of investment treaties and investment arbitration' https://www.lexology.com/library/detail.aspx?g=1e540917-3888-460f-9b0c-298c52ad864e (accessed 22 November 2018).

150 Oduor Maurice, 'Resolving trade disputes in Africa: Choosing between multilateralism and regionalism: The case of COMESA and the WTO' (2005) 13 *Tulane Journal of International and Comparative Law* 178.

151 Luwam Dirar, 'Common market for eastern and southern African countries: Multiplicity of membership issues and choices' (2010) 18:2 *African Journal of International and Comparative Law* 218.

152 The Tripartite Agreement advocates for the harmonisation of programmes and policies within and between these three RECs, and to advance the establishment of the AEC on interpretation and application.

When one considers that many African states are members of two or more RECs at the same time, the picture becomes more complicated.[153] The *pacta sunt servanda* principle which requires all obligations from agreements to be honoured adds another challenge for developing countries. While the conclusion of IIAs and the establishment of RECs are widely perceived to benefit the economy and thus foster foreign and domestic investment, the multiple and overlapping commitments arguably make Africa's implementation efforts inefficient.[154] Providing a balanced and effective regulatory framework for foreign investment is generally a key challenge for investment policy makers.[155] As a result, it is challenging for host states to honour various obligations towards all the diverse stakeholders in the international arena. The effect being that it will have to comprise at some stage to bring forth the desired results for all stakeholders. Yet, the trend for concluding diverse IIAs at different levels continues.

This proliferation of IIAs as well as international institutions with different legal obligations has led to many binding and overlapping international obligations. The Preamble of the AfCFTA Agreement highlights the need to:

> [E]stablish clear, transparent, predictable and mutually-advantageous rules to govern trade in goods and services, competition policy, investment and intellectual property… by resolving the challenges of multiple and overlapping trade regimes to achieve policy coherence, including relations with third parties.

However, the AfCFTA Agreement does not deal with how this can practically be achieved. When many states concluded the first and second generation of BITs, the need to be part of the international economic community was the main priority. The effects and implications of concluding international agreements at various levels was not on the main agenda during negotiations of international agreements. An example of this can be seen through the eight RECs in Africa which provide different obligations while allowing member states to obtain memberships of other RECs and IIAs. There is currently a sizeable overlap between COMESA and SADC as seen in the case of the following seven countries; DRC, Madagascar, Malawi, Mauritius, Eswatini, Zambia and

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153 Mbengue Makana, 'The quest for a Pan-African Investment Code to promote sustainable development' https://www.tralac.org/news/article/9927-the-quest-for-a-pan-african-investment-code-to-promote- sustainable-development.html (accessed 04 December 2020).

154 Mbengue Makana and Schacherer Stefanie, 'The Africanisation of international investment law: The Pan-African Investment Code and the reform of the international investment regime' (2017) 18:3 *Journal of World Investment and Trade* 418.

155 Zhan James, *Investment Policies for Sustainable Development: Addressing Policy Challenges in a New Investment Landscape* (Cambridge University Press 2013) 13.

Zimbabwe which are members of both economic blocs.[156] In essence many states endeavour to cooperate in economic matters not only regionally in the SADC, SACU and AU, and but also the WTO, the International Labour Organisation (ILO), the UNCTAD, or the International Monetary Fund (IMF).[157]

In SADC, Mozambique is the only country that does not belong to more than one REC although discussions that may lead to Mozambique's membership of SACU are underway.[158] If SACU, SADC, COMESA, and the EAC insist on forming their own customs unions, the current regional integration agreements will be unsustainable.[159]

It is clear from the above that this legal growth has the potential to result in the exogenous differentiation of IIAs. For example, a definition of an investment, or the purview of the protection of foreign investment by these agreements may vary with respect to their obligations. Many economies tend to assume that all IIAs are good, and that investment promotes economic growth and development.[160] African states have signed many IIAs with developed states outside Africa and among themselves. They signed these agreements anticipating that doing so would promote FDI in their respective states, while often underestimating the potential liabilities these agreements could entail.[161]

Notwithstanding the fact that the scope of investment disputes is dependent on the definition of an investment, the International Centre for the Settlement of Investment Dispute Convention of 2006 (ICSID Convention) contains no precise definition of an

156 Dinka Tesfaye and Kennes Walter, 'Africa's regional integration arrangements history and challenges' (2007) 74 *European Centre for Development Policy Management: Discussion Paper* 7.

157 Panke Diana, 'African States in international organisations: A comparative analysis' (2019) 26:1 *South African Journal of International Affairs* 2. The Democratic Republic of Congo (DRC) and the Seychelles who joined both COMESA and SADC. Mauritius, a founding member of COMESA later joined SADC. Madagascar while maintaining its membership in COMESA also joined SADC. Finally, in 2006 Libya became a full member of COMESA.

158 SAIIA, 'A pending crisis of overlap' https://saiia.org.za/research/a-pending-crisis-of-overlap/ (accessed 19 November 2020).

159 *Ibid.*

160 UNCTAD, 'Systemic issues in international investment agreements' UNCTAD/WEB/ITE/IIA/2006/2 5; See Sauvant Karl, 'The international investment law and policy regime: Challenges and options' (2015) Geneva: International Centre for Trade and Sustainable Development and World Economic Forum.

161 Pearson Mark, 'Trade facilitation in the COMESA-EAC-SADC Tripartite Free Trade Area' https://www.tralac.org/publications/article/4220-trade-facilitation-in-the-comesa-eac-sadc-tripartite-free-trade-area.html (accessed 11 July 2020).

investment.[162] Many of the IIAs signed by African states follow the traditional format of contemporary IIAs without taking into account the unique factors of African states. As a result, African states became 'rule takers' in the negotiations of IIAs by subscribing to templates developed by high-income economies.[163] Africa should depart from this trend and attempt to restructure the international investment space so that it becomes a 'rule maker'.[164]

Article 19 of the AfCFTA Agreement deals with conflict and overlapping obligations of RECs. Article 19(1) of this Agreement asserts its own supremacy, and states that in the case of any conflict and inconsistency between the AfCFTA Agreement and any regional agreement, the former shall prevail. Article 19(2) of the AfCFTA Agreement contains an important provision about the future of RECs. This provision allows member states who have established a high level of integration to continue being members of RECs or custom unions and to conclude more IIAs without using the AfCFTA Agreement as a baseline even though it is at the continental level.[165]

As the Preamble of the AfCFTA Agreement recognises RECs as building blocks of the continental integration plan envisaged by the AU, the possibility of overlapping obligations is higher. The question that begs an answer is: What happens in a case where states have concluded multiple IIAs or established RECs which assert their own supremacy? The AfCFTA Agreement may supersede other IIAs and RECs, however, the problem at the regional level remains unresolved.

The overlap may allow for more 'forum shopping', affecting long-term economic development and relations. The 'higher level of integration' referenced in Article 19 of

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162 It is important to note that the study is confined to a single definition of investment. However, the definition of investment in the SADC FIP and the PAIC will be critically analysed in detailed in chapter 5.

163 Wolfgang Alschner and Dmitriy Skougarevskiy, 'Rule-takers or rule-makers? A new look at African bilateral investment treaty practice' (2016) 7 *Working Paper* 21; See also Mahnaz Malik, 'South-South bilateral investment treaties: The same old story?' (2010) *International Institute for Sustainable Development: IV Annual Forum for Developing Country Investment Negotiators Background Papers New Delhi* 1-7.

164 Pearson Mark, 'Trade Facilitation in the COMESA-EAC-SADC Tripartite Free Trade Area' https://www.tralac.org/publications/article/4220-trade-facilitation-in-the-comesa-eac-sadc-tripartite-free-trade-area.html (accessed 11 July 2020).

165 Article 19 (1) of the AfCFTA Agreement provides that 'state parties that are members of other regional economic communities, regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain such higher levels among themselves'.

the AfCFTA Agreement may be interpreted to mean that its member states who are also members of RECs are permitted to deepen their integration and adopt additional REC instruments in order to achieve a 'higher level of integration' than that provided for by the AfCFTA Agreement. REC member states are thus free to engage in any activity permitted by the applicable REC legal instruments, including the pursuit of deeper integration.[166]

An extensive network of IIAs has come into existence in Africa, however, these IIAs are fragmented in nature,[167] and chances of overlapping are higher. Many policy makers do not take into account the nature of national investment laws, when negotiating IIAs. In a country like South Africa where the Constitution asserts its own supremacy,[168] honouring IIAs obligations may be difficult if those obligations are not in line with the Constitution. National laws may thus prevent incompatible objectives of IIAs from being realised, even if they would have benefited other member states on a larger scale. If IIAs and national laws are not in line with each other, efforts in relation to foreign investment harmonisation and achieving sustainable economic development may be inefficient.

African states generally share common objective of achieving economic growth and sustainable development and relations; however, the current fragmentation of international trade and investment rules has generated concerns regarding the effectiveness of multilateralism.[169] The AU possesses ambitious structures that could transform Africa's sustainable economic development dream into reality.[170] It is, however, important to breathe life into these structures so that the execution of the AU economic agenda is utilised for the maximum benefits of all Africans.

This means that issues that affect economic growth in Africa should be dealt with from the grass root. All member states should be expected to structure their national

166 Erasmus Gerhard, 'What happens to the RECs once the AfCFTA is in force?' https://www.tralac.org/blog/article/14051-what-happens-to-the-recs-once-the-afcfta-is-in-force.html (accessed 18 September 2020).

167 UN Economic Commission for Africa, *Next Steps for the African Continental Free Trade Area: Assessing Regional Integration in Africa* (UN Economic Commission: Aria 9) 173.

168 Section 2 of the Constitution of South Africa.

169 Ngangjoh-Hodu Yenkong, 'Regional trade courts' in the shadow of the WTO dispute settlement system: The paradox of two courts' (2020) 28:1 *African Journal of International and Comparative Law* 31.

170 Olowu Dejo, 'Regional integration, development, and the African Union Agenda: Challenges, gaps, and opportunities' (2003) 13:1 *Transnational Law and Contemporary Problems* 220.

investment laws and policies in such a way that they not only benefit the country, but also provide the continent with a once-in-a-lifetime opportunity to boost economic development and pursue the goals outlined in Agenda 2063. As a result, it is critical for African governments and organisations to develop sound investment policies and effectively translate them into coherent and coordinated domestic, regional, and international legal instruments.[171] Governance beyond the state has grown in recent years, and the overlapping and nested character of regional and international organisations has brought about a high regime complexity at different levels. African states need to speak with a single voice when negotiating among themselves and with non-African states.

4.5.3 Balancing the responsibility (right) of host states to regulate in the public interest and privileges of foreign investors to have their investment protected

Linked to the issue of overlapping obligations, is the issue of balancing the rights and obligations of both the host states and foreign investors. The issue of the right of states to regulate has been largely dealt with by many international investment law scholars in the contemporary debate of this field of law. However, not many have dealt with the responsibility of states to regulate. In this regard, this thesis argues that regulating in the public interest is not only a right, but also a responsibility assigned to any state. Therefore, when dealing with the issue of regulating foreign investment at an international level, this responsibility should be at the forefront for policy makers, most especially in the African context.

There was no empirical evidence that previous generations of IIAs would serve the purpose of host states when they were concluded. Many states thus committed to the most financially risky international obligations in the world today without a credible empirical basis for claiming that they would achieve their stated goal.[172] Generally, IIAs operate on the basis that there will be equal treatment between all the stakeholders within the investment relationship.[173]

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171 *Ibid.*

172 Van Harten Gus, 'Five justifications for investment treaties: A critical discussion' (2010) 2 *Trade Law and Development* 11.

173 Mhlongo Lindelwa, 'A Critical Analysis of the Protection of Investment Act 22 Of 2015' (2019) 34:1 *Southern African Public Law Journal* 14.

However, the consequences of entering into these IIAs were overlooked until there were claims against many developing states where foreign investors alleged that their rights as foreign investors have been infringed.[174] IIAs previously entered into by many developing states are constrained by loose language, poor drafting and inherently short texts.[175] African countries are now balking at their policy sovereignty being encroached on since the previous generation of BITs prevented them from implementing legal reforms without the threat of dispute settlement proceedings against them. Many developing states have now realised that by signing these IIAs, they were unreasonable restricting their sovereignty in practice.

The conclusion of IIAs brings about many challenges for host states.[176] The main issue is that even though many developing states have signed many IIAs, these agreements generally have many gaps which make them susceptible to dispute resolution. The negotiators of first, second and third generations of IIAs in developing states generally lacked the skills and expertise required to put the interest of sending states during negotiations.[177] The bureaucrats who negotiated the first generation of IIAs were not lawyers and had little legal and technical expertise in international economic investment law.[178]

In an attempt to balance the obligations under the IIAs and the obligation to regulate, states are now moving towards the conclusion of innovative IIAs which will allow them to protect foreign investors without compromising the rights of citizens.[179] This

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174 Poulsen Lauge, 'Sacrificing sovereignty by chance: Investment treaties, developing countries, and bounded rationality' (unpublished PhD thesis, The London School of Economics and Political Science 2011) 290.

175 Van Harten Gus, 'Five justifications for investment treaties: A critical discussion' (2010) 2 *Trade Law and Development* 22.

176 Some of the challenges relate to the definition of investment, non-discrimination clauses and dispute resolution; See Mhlongo Lindelwa, 'The effect and impact of national and international law on foreign investment in South Africa' (unpublished LLM dissertation, University of South Africa 2017).

177 Poulsen Lauge, 'Sacrificing sovereignty by chance: Investment treaties, developing countries, and bounded rationality' (unpublished PhD thesis, London School of Economics and Political Science 2011) 290. Poulsen Lauge in his thesis, interviewed government officials who gave an example of a BIT which was signed without internalising the implication of signing such BIT. In this regard, during a formal visit to Mali, the South African foreign minister presented his counterpart with the draft BIT, who agreed to it. The process went so fast that the document sent back to the foreign office in Pretoria was just a copy of the South African mode that did not contain the two countries' names on it, which made it impossible to submit for ratification.

178 Mohammed Mossallam, 'Process matters: South Africa's experience exiting its BITs' (2015) 97 *The Global Economic Governance: Working Paper* 8.

179 *Ibid.*

obligation is entrenched in customary international law as a basic attribute of sovereignty.[180] A right to regulate denotes a state's inherent sovereign ability to legislate and adopt administrative acts in the public interest of that particular state. In the context of international investment law, this term denotes a legal and parallel right as well as an obligation that exceptionally permits the host state to derogate the international commitments it has undertaken by means of IIAs without incurring a duty to compensate.[181] It grants states control over their policy space within their territories.[182] Most IIAs recognise this obligation, however, with justification, it may be limited. The scope and limitation of the application of the right and an obligation of states to regulate ultimately depends on the wording and objectives of IIAs.[183]

The general objectives of concluding IIAs are similar in most jurisdictions, the challenge is translating these objectives into specific policies in such a way that the contracting parties do not excessively comprise their right and obligation to regulate within their territories. The current regime hampers the ability of states to act for their people in response to the requirements of human development and environmental sustainability.[184]

It is generally accepted that IIAs can complement domestic investment and facilitate policies by ensuring a stable and predictable investment climate.[185] However, the relationship of African states at the continental, regional and national levels is a delicate one. Generally, every state possesses a fundamental right to choose their economic, legal and social systems.[186] Furthermore, states are at liberty to form, maintain or

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180 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment* Law (Oxford University Press 2008) 91; See Titi Catharine, *The Right to Regulate in International Investment Law* (Hart Publishing 2013); See Henckels Caroline, 'Indirect expropriation and the right to regulate: Revisiting proportionality analysis and the standard of review in investor-state arbitration' (2012) 15:1 *Journal of International Economic Law* 225.

181 cf Titi Catharine, *The Right to Regulate in International Investment Law* (Hart Publishing 2013) 33.

182 *Ibid.*

183 Trujillo Elizabeth, 'Balancing sustainability, the right to regulate, and the need for investor protection: Lessons from the trade regime' (2018) 59:8 *Boston College Law Review* 2738.

184 Ghouri Ahmad, 'Positing for balancing: Investment treaty rights and the rights of citizens' (2011) 4:1 *Contemporary Asia Arbitration Journal* 98.

185 Zhan James, *Investment Policies for Sustainable Development: Addressing Policy Challenges in a New Investment Landscape* (Cambridge University Press 2013) 21. See UNCTAD, 'systemic issues in international investment agreements' UNCTAD/WEB/ITE/IIA/2006/2 5. See also Sauvant Karl, 'The international investment law and policy regime: Challenges and options' (2015) *Geneva: International Centre for Trade and Sustainable Development and World Economic Forum.*

186 Herdegen Matthias, *Principles of International Economic Law* (2013) 53.

terminate relations with other states.[187] This prerogative is derived from Article 2 of the UN Charter, which contains sovereign equality of states as one of the principles recognised in the Charter. Article 4 of the Constitutive Act of the AU also recognises, *inter alia,* sovereign equality of states and prohibits interference by a member state in the internal affairs of another.

The Charter of Economic Rights and Duties of States[188] provides for unfettered sovereignty of every state over its resources and economic life.[189] A state is not bound to continue with trade relations longer than it sees fit to do so in the absence of treaty obligations or other specified legal obligations. In *Nicaragua v USA*[190] the court held that states may freely determine economic relations with each other.[191] In spite of this freedom, however, states have opted to limit it for the realisation of economic liberalisation at the domestic, regional and global levels through, *inter alia,* the conclusion of IIAs. As a result, states concluded IIAs with each other to establish a particular legal relationship.

In the case of *Feldman v Mexico*,[192] the tribunal acknowledged host states' ability to frequently change their laws and regulations in response to economic and social conditions; and concluded that those changes may well make certain activities less profitable or even unprofitable to continue.[193] Contemporary IIAs buttress singular capital interests that lock states into a policymaking framework that is inconsistent with the needs of a particular host state.[194] However, policy makers at the international and regional levels should not lose sight of the state's legitimate regulatory interests and obligations.

The study will now deal with privileges of foreign investors to have their investment protected. Once an investment has been established and admitted in the host, the investor acquires procedural and substantive privileges in the host state through a BIT

187 *Ibid.*
188 Charter of Economic Rights and Duties of States A/RES/29/3281 (Charter of Economic Rights and Duties).
189 Article 2 of the Charter of Economic Rights and Duties. To read more on sovereignty see Bytyak Yuriy, 'The state sovereignty and sovereign rights: The correlation problem' (2017) 97:23 *Man in India* 577-588.
190 *Nicaragua v USA* (Merits) 1986 ICJ.
191 *Ibid* para 275.
192 *Feldman v Mexico*, ICSID Case No ARB(AF)/99/1 (2002).
193 *Ibid* para 112.
194 *Ibid.*

or MIT which has been concluded by contracting states. Furthermore, a foreign investor must meet certain conditions in the host state before the investment can be protected.[195] Notwithstanding the privileges that foreign investors have at an international level, such an investor is not a subject of international law in general or international economic law in particular but is simply an individual within the territorial sovereignty and jurisdiction of the host state.

Most IIAs focus on the protection of foreign investors and not the obligation of states to regulate. As a rule of international investment law, and the selective liberalisation, the host state decides on the 'opt-in' terms of admission and establishment requirements, and further subject the foreign investor to restrictions that the host state is permitted by the agreement to maintain.[196]

The evolution of international investment dispute resolution mechanisms has been geared towards protection of foreign investment, and naturally this has encouraged many foreign investors to utilise these mechanisms.[197] This has resulted in a surge of international investment disputes requiring settlement.[198] This has been partly due to host states reviewing some of their national laws, terminating or altering their existing IIAs. African states have started to balk at IIAs as their policy sovereignty is encroached upon and challenged or prevented from implementing legal reforms without the threat of dispute settlement proceedings.[199]

These radical developments and reformation processes have affected many foreign investors, and as such the number of ICSID cases has increased. In the recent past, many African states have found themselves in international investment disputes where foreign investors are challenging them and arguing that their rights have been

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195 UNCTAD, Series on Issues in International Investment Agreements: Admission and Establishment 2002 2.

196 *Ibid* 16.

197 Welsh Nancy and Kupfer Andrea, 'The thoughtful integration of mediation into bilateral investment treaty arbitration' (2013) 18:71 *Harvard negotiation Law Review* 74.

198 Schill Stephan, 'International investment law and rule of law' (2017) 18 *Amsterdam Law School Legal Studies Research Paper* 1-2; See OECD, 'Key issues on international investment agreements' (2017) 1. See further *Azurix Corporation v the Argentine Republic* ICSID Case No ARB/01/12 2006; *Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales del Agua SA v Argentina* ICSID Case No ARB/03/17 and *AWG Group Ltd v the Argentine Republic* UNCITRAL 2017.

199 Polity, 'Africa and bilateral investment treaties: To "BIT" or not?' https://www.polity.org.za/article/africa-and-bilateral-investment-treaties-to-bit-or-not-2014-07-23 (accessed 09 December 2020).

infringed. Many foreign investors are approaching the ICSID claiming that they have been treated unfairly by host states. Argentina is highest recipient of international investment claims with 62 cases by 2020.[200]

For example, in the case of *AHS Niger and Menzies Middle East and Africa SA v Republic of Niger,*[201] the claimants in their capacity as foreign investors challenged the two government orders made by the Republic of Niger. These orders reduced the BIT's duration between Niger and the claimants from ten to five years, repealed earlier provisions, and modified the structure of the ground handling operations.[202] In the case of *CMC Africa v Republic of Mozambique*,[203] the claimants alleged that Mozambique as a host state acted in bad faith, frustrated the claimants' legitimate expectation and was not transparent.[204] The tribunals rejected these claims in both cases.[205] Even though these cases have been dismissed, they exposes the gaps in the current IIAs framework.

Another example is that of the *Piero Foresti, Laura De Carli v Republic of South Africa* case (*Piero Foresti* case).[206] This case illustrates an example of challenges faced by South Africa when it attempted to regulate in the national interest against the concluded IIAs. It dealt with the mining interests owned by a group of European investors namely, Foresti Piero and De Carli Laura who had investments in South Africa. South Africa found itself entangled with a challenge of balancing its obligation to regulate in the public interest, and the need to protect foreign investment. Even though the case was not finalised as the court discontinued the proceedings at the request of the claimants, the case once again highlighted the challenges faced by host states whenever they attempt to change their domestic investment legal framework.

It is undeniable that an obligation of states to regulate in the public interest is moving towards the centre of the legal framework for foreign investment with a purpose of

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200 Investment Policy Hub, 'Investment dispute settlement navigator' https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2 (accessed 09 December 2020).

201 *AHS Niger and Menzies Middle East and Africa SA v Republic of Niger,* ICSID Case No ARB/11/11 (Summary English version).

202 *Ibid* 2.

203 *CMC Africa v Republic of Mozambique* ICSID Case No ARB/17/23 para 400-411.

204 *Ibid* paras 400-411.

205 *Ibid* para 465; See *AHS Niger and Menzies Middle East and Africa SA v Republic of Niger*; See also *Oded Besserglik v Republic of Mozambique* ICSID Case No ARB(AF)/14/2.

206 The *Piero Foresti, Laura De Carli v Republic of South Africa* ICSID case No ARB (AF) /07/1.

reducing negative aspects while fostering positive social, economic and environmental implications on the one hand and protecting foreign investment on the other hand. Brower Charles and Schill Stephan addressed and responded to a number of criticisms relating to legitimacy that affects decision-makers in host states. They criticised IIAs for elevating the interests of foreign investors over those of the host state. They opine that IIAs establish an asymmetrical legal regime that is detrimental to state's sovereignty.[207] In 1998, UNCTAD conducted a study which showed that the motivation for developing countries to conclude IIAs is to attract foreign investment, while the motivation for developed countries is investment protection.[208]

Unfortunately, this disjuncture is still one of the main challenges for developing economies.[209] As part of their responsibility, African states have been endeavouring to regain control of their natural resources from foreign interests. Many of these countries also imposed restrictions on controls over the entry and operations of foreign firms; with a view of excluding FDI from certain industries for the benefit of their states and citizens.[210] By balancing the protection of foreign investment on one hand and the right of states to pursue public policy interests on the other, IIAs will have the capacity to influence the type of foreign investments that can be admitted and the conditions under which they are made.[211]

Determining specific terms under which foreign investments are to be made, and ensuring the participation of citizens in major industries is a host state's responsibility.[212] There must, however, be proportionality between the obligation of states to regulate and the privilege of foreign investors to be protected. For example, in the *Myers Inc v Government of Canada* case, the Tribunal looked at the intent or motive, the legitimate goals, other legitimate ways of achieving the same results and

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207 Brower Charles and Schill Stephan, 'Is arbitration a threat or a boon to the legitimacy of international investment law?' (2008-2009) *Chicago Journal of International Law* 474.

208 UNCTAD, *World Investment Report 1998*: *Trends and* Determinants (UN Publications 1998) 135 and 140. See UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries: UNCTAD Series on International Investment Policies for Development* (UN Publications 2009) 10; See also Nunnenkamp Pete and Spatz Julias, 'Determinants of FDI in developing countries: Has globalisation changed the rules of the game?' (2002) 11:2 *Transnational Corporations* 1-34.

209 UNCTAD Bilateral Investments Treaties 8.

210 UNCTAD*, International Investment Agreements: Key Issues* UNCTAD/ITE/IIT/2004/10 1.

211 Centre for Global Development, 'International Investment Agreements: Not fit for the 2030 sustainable development Agenda' https://www.cgdev.org/blog/international-investment-agreements-not-fit-2030-sustainable-development-agenda (accessed 16 May 2020).

212 UNCTAD*, International Investment Agreements: Key Issues* UNCTAD/ITE/IIT/2004/10 1.

the method used to achieve the results when assessing the balance between the right/obligation of states to regulate and those of foreign investment to be protected.[213]

4.5.4 Failure to accommodate weaker states during international treaty negotiations

Linked to lack of trust during treaty negotiations, it is the failure of African states to take into account the level of development of weaker states. As said in chapter 3, the differences between member states over major political issues was one of the contributors to the failure of the OAU, and its subsequent demise. Even though African states have common objectives for the continent, their level of development differs significantly, and this should be taken into account when negotiating IIAs. In the international investment policy space, the inequality of states may affect the implementation and the realisation of objectives of a particular IIA.

For many years, developed countries sought to protect their foreign investors abroad against political risk in developing host states; while developing countries sought to attract investment from foreign stakeholders by promising to protect foreign investment.[214] Many IIAs between developed and developing states were thus asymmetric against developing states. In the end, developing states became reluctant to sign IIAs fearing that these agreements may unduly constrain their domestic policy space.[215]

However, in recent years, many developing states have embarked on a journey of reformation vis-a-vis IIAs. As the negotiating strength of developing countries in the area of international investment increased, there has been a shift in decision-making towards the advancement of their interest.[216] Vigilance on their part is crucial for defending against 'forum-shifting' tactics. States need to ensure that there is excellent coordination and communication among those representing their interest during

213 *SD Myers Inc v Government of Canada* (Partial Award) case paras 252-257; See also the *Pope and Talbot Inc v the Government of Canada,* UNCITRAL 1976 for another example of how the proportionality test was applied. The WTO Doha Ministerial Declaration also advocated for proportionality in balancing the right of all stakeholders at the international level. In this regard, para states that '[a]ny framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest.

214 Wolfgang Alschner and Dmitriy Skougarevskiy, 'Rule-takers or rule-makers? A new look at African bilateral investment treaty practice' (2016) 7 *Working Paper* 2.

215 *Ibid.*

216 Tshwane Tebogo, 'African trade far from free 'https://mg.co.za/article/2018-07-13-00-african-trade-far-from-free (accessed 22 November 2020).

negotiations. Unfortunately, this is not the case, and the asymmetric IIAs still exist, except that they are now between developing states.

Panke Diana argues that states which have higher capacities usually take the floor to voice their national and regional positions. [217] This means that state that possess high political level will generally dominate during the negotiations of IIAs. However, states which lack political and financial resources are more likely to be inactive during negotiations even if they possess natural resources to play an active role in achieving objectives of the anticipated legal instrument.[218] Power-dependence states are likely to underscore the importance of power in exchange relationships.[219] They may also attempt to assert more power than to defend the weaker states[220] during negotiations.[221] Therefore, if individual capabilities of states are not taken into account during negotiations, then there will always be lost opportunities in Africa, and weaker economies will retain their 'observer-like status', without much meaningful participation.

Tshwane Tebogo argues that persuading states to act for the greater good regardless of the personal cost will be a major political challenge.[222] Steps need to be taken to improve the political oversight of officials participating in negotiations in areas such as trade and investment.[223] Generally, states differ in their level of participation and negotiation of IIAs.[224] There are states which are active in international negotiations, and there are those who remain silent more often.[225] Tshwane Tebogo's assertions are indeed reflective of the reality of international negotiations, as weaker states

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217 Panke Diana, 'Dwarfs in international negotiations: How small states make their voices heard' (2012) 25:3 *Cambridge Review of International Affairs* 6.

218 *Ibid.*

219 *Ibid.*

220 In the context of this study, weaker states refer to state that lack financial and political resources when compared to their counterparts.

221 Mutharika Peter, 'The role of international law in the twenty-first century: An African perspective' (1995) 21:3 *Commonwealth Bulletin* 989.

222 *Ibid.*

223 Jones Emily, *Negotiating against the odds: A guide for trade negotiators from developing countries*
(Palgrave Macmillan 2013) 44; Salacuse Jeswald and Sullivan Nicolas, 'Do BITs really work: An evaluation of bilateral investment treaties and their grand bargain' (2005) 46 *Harvard International Law Journal* 67.

224 Panke Diana, 'African states in international organisations: A comparative analysis' (2019) 26:1 *South African Journal of International Affairs* 6.

225 *Ibid* 7.

(politically and financially weaker) tend to be overwhelmed by the prowess, political and financial domineering stance of states such as the USA.

An example of such can be found in the negotiation process of the AfCFTA Agreement. During its negotiations, RECs and customs territories were given only an observer-like status, with the right to attend and eventually make written or oral presentations upon request of the negotiating institutions.[226] Consequently, the RECs secretariats had only a secondary role to contribute their voice only through the AfCFTA Agreement Continental Taskforce (the continental advisory body to the negotiating institutions) or through regional consultations on the side of the negotiations.[227] The negotiating guiding principles required the negotiators to be conscious of the progress made in the RECs, yet the AfCFTA Agreement was driven by the individual interests of state parties, rather than those of the collective RECs.[228]

Furthermore, if smaller states are not accommodated in international negotiations, they may have a narrower range of interests that they can pursue in terms of such agreement. It is thus important to accommodate weaker states during these negotiations so that all member states benefit fully from the agreement. If policy makers can assess the capabilities of other negotiating states in observing and implementing the agreement, they will be in a better position to judge the probability of complying with the agreement. It is thus unfair to conclude that a member state has failed to comply with a 'one-size-fits-all' agreement when their capabilities were not taken into account during negotiations. At the global level, a combination of inflexible legal regimes and insurmountable opposing views between developing and developed states has contributed to the displeasures of the world trade and investment regime over the years.[229] Africa should not repeat this mistake and should attempt to move away from the system that fails to take into account the level of development of each contracting state.

Another practical example of this is Agenda 2063, a 'blanket project' which just like many international agreements out there did not take into account the different levels

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226 UN, Economic Commission for Africa *Next Steps for the African Continental Free Trade Area: Assessing Regional Integration in Africa* (UN Economic Commission: Aria 9) 48-49.

227 *Ibid.*

228 *Ibid.*

229 Denters Erik and Gazzini Tarcisio, 'The role of African regional organisations in the promotion and protection of foreign investment' (2017) 18 *Journal of World Investment and Trade* 464.

of development of African states. According to Agenda 2063's first performance report, the majority of African states did not perform as predicted, landing at an overall performance of 32 per cent.[230] This may be due to various determinants, however, the negotiators of the Agenda may have overlooked the capabilities of African states.

For example, larger and more developed African economies such as South Africa, Nigeria, and Egypt may view Agenda 2063 differently than smaller, less developed, or fragile countries such as the Kingdom of Eswatini, Burundi, or Guinea.[231] Even though all African states are still developing, the level of development, awareness and capacity as well as policy expertise is different in each state, and these factors should be taken into account when negotiating international agreements. This is because these states have diverse bureaucratic capacities which either work for or against them. International negotiations must elicit voluntary participation in order to be fruitful, which means that there must be enough agreement on common goals for weaker states to benefit from cooperation.

The widely disparate stages of development within the continent, the strength of other global and regional economic blocs, post-colonial ties, huge continental debts, and poor communications have been major obstacles hindering the continent's sustainable economic development and relations for decades now.[232] African countries' underdevelopment is generally attributed to their continued reliance on trade and investment policies, programmes, and binding international conventions that are not specifically tailored to their economic circumstances.[233] States must therefore reformulate integration in Africa and make every state, including weaker states genuine partners in the process.

4.5.5 Corruption and illicit enrichment motives by the transnational capitalist class

Linked to the failure to accommodate weaker states during international negotiations is the issue of corruption. Similar to the national level, at the international level

230 Agenda 2063: First Continental Report on the Implementation of Agenda 2063 (NEPAD 2020) 7.

231 DeGhetto Kaitlyn, 'The African Union's Agenda 2063: Aspirations, challenges, and opportunities for management research' (2016) 2:1 *Africa Journal of Management* 97.

232 Kwaku Danso, 'The African Economic Community: Problems and prospects' (1995) 42:4 *The Politics of Economic Integration in Africa* 31.

233 Clydenia Stevens, 'Reviving the right to development within the multilateral trade framework affecting (African) countries to actualise Agenda 2063' (2019) 19:1 *African Human Rights Law Journal* 472.

transnational capitalist motives continue to exist.[234] The robust debates regarding corruption have been going on for a while now. These debates range from lack of political will and illicit motives on the part of those in charge, to absent or inadequate institutional and legal frameworks for dealing with the problem of corruption. In most instances, weak legal regimes are blamed for giving birth to or fostering corruption. As Girling John demonstrates in his book titled '*Corruption, Capitalism and Democracy*' corruption does not disappear as states develop and modernise, instead, it takes new forms.[235]

Corruption entails debauchery of power, lack of good governance, authentic leadership, ethical leadership, as well as the desire to maximise personal gain or to benefit a group to which the role player owes allegiance.[236] Simply put corruption is the misuse of public office and its resources for private benefit.[237] It is important to note that the definition of corruption does not include transactions in which transnational organisations deprive developing states of revenue by failing to pay taxes and loans made.

There are various legal instruments adopted to fight corruption: (1) At the global level, the UN Office on Drugs and Crime (UNODC) coordinates efforts to fight corruption, international and transnational crime, and organised crime. It works with member states to prevent and constrain these socio-economic ills through the UN Convention against Corruption.[238]

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234 For examples of these transitional capitalist transactions see Chaikin David, 'Controlling corruption by heads of government and political elites' http://press-files.anu.edu.au/downloads/press/p228301/pdf/ch061.pdf (accessed 31 January 2021).

235 Girling John, *Corruption, Capitalism and Democracy* (Routledge 1997) 43.

236 Yasser Gomaa, 'Leadership and Corruption' (unpublished LLM dissertation, University Institute of Lisbon Business School 2018) 21-22.

237 There are three types of corruption: (1) Petty or administrative corruption relates to administrative fees paid by citizens, for example, unofficial fees are charged for public services, items are sold on the black market, and ghost workers pad government payrolls. These practices can generate public cynicism and mistrust of the authorities, as well as a culture of lawlessness that can cause a relapse to earlier violence. (2) Grand corruption typically involves high-level officials and the exchange of large sums of money and resources or other competitive advantages. It often manifests as outright theft of public funds, steering government contracts to family or friends, and various forms of patronage, cronyism, nepotism, and political favouritism. (3) State capture by economic interests highlights the influence of private business on state power and collusion with public officials to extract advantage. State capture can be the most insidious form of corruption for rebuilding states because it diverts needed assets to an elite few and prevents economic growth from diversifying across many stakeholders.

238 The Preamble of the UN Convention against Corruption of 2003.

(2) At the continental level, the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol)[239] which also criminalises corruption in article 28A(1). The Malabo Protocol, despite its many shortcomings, including its immunity clause,[240] serves to augment the AU Convention on Preventing and Combating Corruption.[241] Article 22 of this AU Convention establishes the AU Advisory Board on Corruption as an autonomous organ with a mandate, *inter alia*, to promote and encourage the adoption of measures and actions by state parties. It also seeks to encourage member states to ensure that corruption and related offences are prevented, detected, punished and eradicated.[242]

The AU Convention on Preventing and Combating Corruption contains the general international grounds for establishing jurisdiction.[243] Article 4 contains offences that are punishable under the Convention. This provision broadly encompasses acts of commission or omission of public officials or any other persons.[244] However, it does not cover the issue of negotiating international agreements with illicit motives. Article 7 requires public officials to declare their assets at the time of assumption of office, and after the end of the term of office. However, since the elements corruption are generally difficult to prove, many perpetrators of corruption go unpunished.

Even though the above instruments are in place, corruption continues to be a major challenge for the international community. On the African continent, there are many head of states who are maintaining their private businesses while serving in the office. For example, Cyril Ramaphosa who is the president of South Africa and the chairman

239 The AU Protocol on the Statute of the African Court of Justice and Human Rights.

240 The immunity clause is contained in Article 46(a)(bis) of the AU Protocol on the Statute of the African Court of Justice and Human Rights.

241 The AU Convention on Preventing and Combating Corruption of 2003.

242 Article 2 of the AU Convention on Preventing and Combating Corruption. At the regional level, SADC has adopted a number of instruments aimed at curbing corruption and state capture. These include, *inter alia*, the SADC Protocol on Corruption and the SADC Protocol on Illicit Drugs. Article 4 of the Protocol on Corruption enjoins member state to, *inter alia*, adopt legislative and other measures to prevent and combat corruption in both the public and private sectors. SADC has also set up an Anti-Corruption Sub- Committee (SACC) Task Team, whose major task was to develop a Five-Year SADC Anti-Corruption Strategic and Action Plan (SADC, 2017).

243 Article 13 of the AU Convention on Preventing and Combating Corruption.

244 These include, *inter alia*, bribery, illicit enrichment, laundering and conspiracy to commit corruption.

of the AU, continues to occupy about 13 directorships and partnership positions, holds shares, has land and other immovable properties.[245]

In Nigeria, the obligation to declare assets of public officials only started in 2015 when the president Muhammadu Buhari declared his assets. He declared that he owns five homes and two mud houses, as well as farms, an orchard and a ranch with 270 herd of cattle, 25 sheep, five horses and a variety of birds, shares in three companies, two undeveloped plots of lands and had bought two cars from his savings.[246]

It is accepted that although corruption is a global phenomenon affecting all states, the fight against this nemesis does not necessarily have to take the same format in every continent or region.[247] Each continent or region is influenced by political, historical and socio-economic considerations when deciding on the form of anti-corruption mechanisms it will employ. The conflict of interest associated with corruption may be perceived as unsystematic, and weaker states may be reluctant to delegate too much rulemaking authority to agencies that subsequently might be captured by the strong negotiating states.

As a general rule, public officials are only required to declare these interests in accordance with their domestic laws.[248] The AU Convention on Preventing and Combating Corruption does not contain any provision dealing with conflicting interests. Furthermore, the instruments discussed above do not criminalise conflicts of interest, influence peddling, nepotism, illicit enrichment, or bribery of private sector actors.[249]

The question that begs for an answer is: How can treaty negotiators ensure that there is no conflict of interest on the part of negotiators? Article 5(4) of the African Union's Convention Against Corruption only addresses internal accounting, auditing, and follow-up systems especially with regard to public income, customs, and tax receipts in the public sector but not in the private sector. As a result, heads of state who have

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245 Parliament Republic of South Africa Joint Committee on Ethics and Members' Interests: Register of Members' Interests (2017) 263-266.

246 BBC, 'Nigeria's President Muhammadu Buhari declares assets' https://www.bbc.com/news/world-africa-34150508 (accessed 22 February 2021).

247 Wolfgang Alschner and Dmitriy Skougarevskiy, 'Rule-takers or rule-makers? A new look at African bilateral investment treaty practice' (2016) 7 *Working Paper* 4.

248 See for example Article 8(5) UN Convention against Corruption.

249 The World Bank Group and the IMF which have robust sanctioning systems for contractors involved in projects they fund, did not focus on the role of corporate actors in illicit financial flows until very recently.

engaged in illicit transactions in their private businesses cannot be held accountable. This exclusive focus on public officials, public property, and public procurement and management of public finances opens a door for illicit transactions and illicit enrichment by heads of state.

4.5.6 Foreign monetary aid and the financial position of bargaining states

Linked to the failure to accommodate weaker states is the issue of international financial aid and the financial position of negotiating states. Financial resources are important in three ways: (1) They have the potential to influence how quickly and well the responsible ministries at the domestic level prepare good national instructions; (2) how well staffed and skilled delegations are in order to actively participate in negotiations; and (3) how they may influence the availability or frequency of the use of negotiation strategies.[250]

It may thus be difficult for a state which has obtained financial aid to properly advance the interest of such state during treaty negotiations. In other words, multinational organisations and states may use an asymmetric bargaining power during negotiations if the parties on the other side of the negotiating table are dependent financially on other states. In this study, the IMF is used as an example of where foreign financial aid has been used to the disadvantage of weaker states.[251] The IMF endeavours to assist member states that are experiencing actual or potential balance-of-payments problems.[252] Monetary support afforded to struggling economies includes financial loans,[253] however, the organisation also provides technical assistance.[254] These loans come with conditions which include prescribed economic policies that borrowing states must comply with.[255]

By focusing on the international financial aid of poor states, it becomes possible to shed light on how powerful states may take advantage of weaker states. Unfortunately, the IMF has been the subject of criticism for decades now. For example, in 1993, the

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250 Panke Diana, 'Dwarfs in international negotiations. how small states make their voices heard' (2012) 25:3 *Cambridge Review of International Affairs* 6.

251 The IMF was laid in 1944 in the Bretton woods conference and was established in 1945

252 IMF, 'IMF at a glance' https://www.imf.org/en/About/Factsheets/IMF-at-a-Glance (accessed 18 February 2021).

253 Fritz-Krockow Bernhard and Ramlogan Parmeshwar, *International Monitory Fund Handbook: Its Functions, Policies and Operations* (Cataloging-in-Publication Data 2007) 2.

254 *Ibid* 52.

255 *Ibid* 32-33.

IMF was criticised for its modes of operation, inflexibility in negotiations and policy conditions, which had the potential to infringe the sovereignty of states and alienate governments from the measures they are supposed to implement.[256] The sovereignty of states may be infringed because generally, the IMF commands significant resources and wields considerable authority.[257]

To this end, some critics of the IMF have argued that this Organisation is nothing more than an instrument in the hands of powerful states.[258] Stone Randall argues that the international organisations operate according to two parallel sets of rules, namely, formal rules, which embody consensual procedures, and informal rules, which allow exceptional access for powerful states.[259] The problem with the informal rules is that the organisation runs a risk of being captured by the most powerful states in the system.[260] Furthermore, international organisations generally reflect the interests of powerful states.[261] In this regard, these states may enjoy special relationships with major IMF shareholders and may be able to avoid extensive conditions when they borrow from the IMF.[262]

The AU as the biggest economic bloc in Africa should be conscious of the position (including financial position) of each negotiating state. During the bargaining process, negotiations vary in how much consensus there is around different aspects of the agreement. If the financial position of weaker states is not taken into account, or if those weaker states are overpowered, the agreement may go for years without ratification. As a result, many agreements out there are not in force as they still require a certain number of ratifications. The truth is, being economically weaker than the average participant during international negotiation is disadvantageous to weaker

256 Overseas Development Institute, 'Does the IMF really help developing countries?' (1993) *Briefing Paper* 1.

257 Stone Randall, 'The scope of the IMF conditionality' (2008) 62:4 *Cambridge University Press on behalf* of *International Organisation Foundation* 589.

258 Strange Susan, *States and Markets: An Introduction to International Political Economy* (Printer Publishers Limited 1993) 39.

259 Stone Randall, 'The scope of the IMF conditionality' (2008) 62:4 *Cambridge University Press on behalf* of *International Organisation Foundation* 590.

260 *Ibid.*

261 Dreher Axel and Nathan Jensen, 'Independent actor or agent? An empirical analysis of the Impact of U.S. Interests on IMF Conditions' (2007) 50:1 *Journal of Law and Economics* 107.

262 *Ibid.*

states since this has an impact on the effectiveness of their bargaining and persuasion strategies.

4.5.7 The protectionism approach as a hindrance to achieving sustainable economic development and relations

The protectionism phenomenon has been a subject of discussion for a while now. However, the focus has mostly been on trade[263] rather than investment. Protectionism occurs when a country tries to shield its own industries from international competition.[264] Practice has shown that most states are keen to engage in investment protectionism. The global financial crisis has led states to adopt a protectionist approach. Furthermore, in the wake of post-colonialism, developing countries sought to become part of the international economic community and embarked on missions to reshape the law that deals with protection of foreign investment.[265]

Despite the similarities in the general structure of IIAs provisions, the international community has not succeeded in adopting a standardised instrument aimed at regulating foreign investment. A study conducted by the Centre for Research and Studies on Coherence and Development on behalf of the Centre for Global Development (CGD) in 2017 showed that many IIAs between developing and developed states were generally one sided.[266] Many developing states have also realised this anomaly, since they have been struggling to achieve sustainable economic development and relations within their respective countries. This led to many developing states taking a protectionist approach towards foreign investment in their host states. For example, Nigeria is in the process of reviewing BITs and developing new model BITs, modernising existing old generation treaties which will enable the Government to put in place a coherent legal framework at all levels.[267]

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263 With regard to trade the protective measures generally relates to tariffs, subsidies, and quotas.

264 Our Economy, 'What is protectionism' https://www.ecnmy.org/learn/your-world/globalization/what-is-protectionism/ (accessed 19 February 2021).

265 Repousis Odysseas, 'Multilateral investment treaties in Africa and the antagonistic narratives of bilateralism and regionalism' (2017) 52:3 *Texas International Law Journal* 316.

266 This study analysed more than 300 IIAs, and the full report is available on https://docs.google.com/spreadsheets/d/1MQmSbSehBBh2MFaw_znrq_hpF6DKOeZRyoma5akxvAY/edit#gid=1512843216 (accessed 16 May 2020).

267 Business and Human Right Resource Centre, 'Nigeria: Government begins reforms of Bilateral Investment Treaties to comply with global standards on labour, human rights and environment' https://www.business-humanrights.org/en/latest-news/nigeria-government-begins-reforms-of-bilateral-investment-treaties-to-comply-with-global-standards-on-labour-human-rights-environment/ (accessed 23 February 2021).

As alluded to in chapter two, as a rule of international law, states are equal and sovereign. However, for the realisation of the international community's ideals, states enter into international agreements which may, to a large extent, limit a government's freedom to enact protectionist measures.[268] This approach influenced states to seek to protect their economic interests.[269] While the significance of international agreements cannot be undermined, there is a clear tension that exists between the binding nature of investment treaties and the concept of sovereign authority.[270]

For decades now, Africa's external relationship with the West has been centred around trade and investment whose decline has exacerbated the continent's economic performance.[271] Many developing states (including non-African states) conclude IIAs on the promise of economic development in return for protecting investment.[272] Carim Xavier defended South Africa's decision to terminate BITs and introduce a domestic legislation aimed at regulating foreign investment. In this regard, he opined that the reformation of South Africa's investment framework is overdue because the principles that underpin the previous generation of IIAs were motivated by post-colonialism initiatives and as such, they were in the context of the world war.[273] He further argued that as a result they are increasingly at odds with new and emerging challenges confronting the international community.[274] He further stressed that the African continent's new economic development programmes to effect structural transformation and achieve sustainable economic development may well be constrained by the terms and conditions imposed by IIAs.[275] This argument is based on a protectionist approach which many developing states resonate with.

The protectionist approach towards foreign investment is not the answer for developing states, as their investment environment is not matured enough to survive without

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268 Hobe Stephan and Jorn Griebel, 'New protectionism - how binding are international economic legal obligations during a global economic crisis' (2010) 2:2 *Goettingen Journal of International Law* 425.

269 *Ibid* 424.

270 McKenzie Sarah, 'Resolving the conflict between the protection of international investments and the state's right and responsibility to regulate' (LLM Dissertation, University of the Witwatersrand 2017).

271 Forer Malebakeng, 'New developments in international investment law: A need for a multilateral investment treaty?' (2018) 21 *Potchefstroom Electronic Law Journal* 3.

272 *Ibid.*

273 Carim Xavier, 'International investment agreements and Africa's structural transformation: A perspective from South Africa' (2015) *Investment Policy Brief* 1.

274 *Ibid.*

275 *Ibid.*

foreign relations. What is needed is a balance between the rights and obligations of both host states and foreign investors. Furthermore, it is of paramount interest to observe the degree to which states in crisis situations demonstrate their readiness to overstep existing legal boundaries and violate their international law obligations. AU member states should be subjected to all treaties and charters of the Union without prejudice.[276] If not, the competing foreign policy interests of AU member states through the protectionist approach to foreign investment may lead to the collapse of the AU in the near future.

4.5.8 Enforcement of the rule of law

The importance of dispute settlement cannot be over emphasised. Even though at the international level, the principle of *stare decisis* is not recognised,[277] it is important that decisions of arbitral tribunals are consistent. Consistency in FDI adjudication helps meet the needs of foreign investors for security and predictability, contributes to the legitimacy and perceived fairness of the dispute settlement system and can facilitate dispute settlement.[278]

The current foreign investment arbitration system has been criticised for failing to uphold democratic accountability, independence and impartiality of arbitrators, disapprove of the vagueness of treaty standards.[279] It has also been criticised for interpreting treaty standards in a way that restrict the right of host states to regulate in the public interest.[280] It has further been criticised for being pro-investors and anti-host states. In this regard, Van Harten Gus opines that:

> Investment treaty arbitration is often promoted as a fair, rules-based system and, in this respect, as something that advances the rule of law. This claim is undermined, however, by procedural and institutional aspects of the system that suggest it will tend to favour claimants and, more specifically, those states and other actors that wield power over appointing authorities or the system as a whole. On the other hand, other

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276 Yusuf Ibrahim, 'Has the African Union outlived its relevance? A retrospective and introspective analysis' (2019) 8:3 *Journal of African Union Studies* 44.

277 The stare decisis principle is a juridical command to the courts to respect decision already made in a given area of the law.

278 *Ibid.*

279 Schill Stephan, 'International investment law and rule of law' (2017) 18 *Amsterdam Law School Legal Studies Research Paper* 1-2; See also OECD, 'Key issues on international investment agreements' (2017) 2.

280 *Ibid.*

states and investors (especially those that bring claims against a powerful state) can expect to be disadvantaged.[281]

With the emergence of a new generation of IIAs, a number of patterns have emerged regarding the scope and application of IIAs.[282] As a result of these developments, foreign investors and host states are confronted with a complex and different universe of investment rules,[283] which makes it difficult to enforce the rule of law.[284] It has been difficult to enforce the rule of law, as some states have refused to comply with arbitral awards, especially when they are adverse.[285] Furthermore, states threatened to withdraw from many international agreements, while others have acted on these threats, and withdrew from IIAs.[286] The truth is the international investment arbitration system relies on states' voluntary compliance with arbitral awards.[287]

Member states generally have an obligation to avoid disputes with each other, however, disputes may occur between stakeholders. The question that begs for an answer is: Should states adopt a binding or flexible method to resolve disputes between member states of a particular agreement or organisation? An effective dispute resolution system would at the very least appreciate the perceived loss of sovereignty that comes with concluding international agreements. However, the main issue is not that states do not want to rescind their internal powers, since the fast-moving political economy of international relations in recent years has confirmed the willingness of states to readily cede/share aspects of their economic sovereignty with other states or

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281 Gus van Harten, 'Investment treaty arbitration, procedural fairness, and the rule of law' in Schill Stephan (ed) *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 1-2.

282 UNCTAD, 'Systemic issues in international investment agreements' UNCTAD/WEB/ITE/IIA/2006/2 2.

283 *Ibid.*

284 The rule of law can be defined as a 'principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. See UN General Assembly 'Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels' (2012) *Report of the Secretary General, UN Doc A/66/749*.

285 UNCTAD, *'Systemic issues in international investment agreements' UNCTAD/WEB/ITE/IIA/2006/2* 2.

286 *Ibid* 74.

287 Welsh Nancy and Kupfer Andrea, 'The thoughtful integration of mediation into bilateral investment treaty arbitration' (2013) 18:71 *Harvard Negotiation Law Review* 76.

supranational institutions.[288] The problem is that states feel like they are treated unfairly by the very system which is meant to protect them.

4.6 Has the African Union outlived its relevance?

Having discussed the efforts made and successes of the AU, failures and challenges facing the African continent, the question that begs for an answer is: Has the AU outlived its relevance? The reformation of foreign investment at the continental level is a real challenge for policy makers. What stands out in the above discussion is that, not only are the investment policies in Africa in need of reformation; the mind of African people is also in need decolonisation.

Soon after its formation, the AU was criticised for being a manifestation of the subtle agenda of the West to perpetuate its advantages in the lopsided global trade and investment system that has been institutionalised under diverse multilateral organisations.[289] The AU has also been criticised for the *lacunae* and incongruities in its visions as well as in the interplay of the machinery designed for the attainment of these visions.[290] These criticisms questions the legitimacy of the AU, and its abilities to govern for the benefit of the African people.

As indicated previously, the AU emerged as a transition from the defunct OAU because of the challenges during the 21st century, which required a new way of thinking and a different approach. Since then, Africa has been actively pursuing an agenda of continental integration as part of a broader development and transformation strategy. Despite these laudable efforts, the goal of an economically integrated Africa is not anywhere within reach. The Preamble of the LPA acknowledges that even though African leaders have made efforts to boost the African economy, Africa remains the least developed continent. Africa's integration efforts have not recorded the desired results, [291] and many of its objectives are yet to be realised. While other regions of the

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288 Ngangjoh-Hodu Yenkong, 'Regional trade courts' in the shadow of the WTO Dispute settlement system: The paradox of two courts' (2020) 28:1 *African Journal of International and Comparative Law* 30.

289 Olowu Dejo, 'Regional integration, development, and the African Union Agenda: Challenges, gaps, and opportunities' (2003) 13:1 *Transnational Law and Contemporary Problems* 215.

290 *Ibid.*

291 Eke Jude and Kelechi Ani, 'Africa and the challenges of regional integration' (2017) 6:1 *Journal of African Union Studies* 63.

world have successfully used foreign investment to improve their general wellbeing, Africa still has many challenges that it needs to contend with.[292]

Furthermore, even though Africa has put in place number of treaties aimed at improving its economic landscape, there is no single state categorised as a 'developed' state. A majority of African states are extremely poor, while others are developing. In this era of seemingly robust economic growth prospects, Africa's economic freedom is thus yet to be realised. Therefore, an attempt to change the status quo and move towards a continent that is well developed, must start with the mind. In other words, the mind must be the genesis of this transformational thinking, that is infusing a mental and paradigm shift in the minds of African people. This pressing need for decolonisation of the mind is much more applicable in the case of those political office bearers who are entrusted with the responsibility of transforming the AU into a powerful global economic player.

To answer the question posed above regarding the continued relevance of the AU, the answer is in the negative. The AU has not outlived its relevance. However, some of its policies are in serious need of reformation. The challenge for African states and the AU is to work out a formula for deconstructing the prevailing norms, rules and institutions so that the intentions and objectives as reflected in the AU Constitutive Act are fulfilled.[293] The AU has seized upon considerable domestic growth optimism at a time when African nations and businesses increasingly acknowledge that the continent is in need of greater intra-African trade and investment flows. In the past two decades, there has been significant changes in the way national and international policies are structured for the purpose of regulating foreign investment. These changes have been caused by the ongoing integration of the world economy and the changing role of foreign investment.

Consequently, these international policies have found expression in national laws and practices, and in a variety of international instruments on bilateral and multilateral basis. Following the end of the Second World War, attitudes towards foreign investment policies and conditions in host states were shaped by the prevalence of

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292 *Ibid.*

293 Makinda Samel and Okumu Wafula, *The African Union: Challenges of Globalisation, Security and Governance* (Routledge 2007) 6.

political support for state's control over the economy. As a result, African states attracted foreign capital on a larger scale. Such movement towards economic integration gave rise to a whole range of political and legal issues. These include sovereignty, free movement of goods and people, and the creation of effective machinery for the settlement of disputes among the member states.

One may wonder why states actively participate in regional integration. The truth is regional economic integration has considerable potential for driving more robust and equitable economic growth as well as promoting the reduction of poverty and unemployment in Africa.[294] It is thus important to align IIAs at the continental level with those at the regional level. Successful regional economic cooperation and integration can help the African continent to attain advanced economies.[295]

Quite often when scholars research the issue of regional economic integration, they usually refer to trade. Africa needs to get to a point where foreign investment is not a sub-issue, but one of the main drivers of economic growth. The structural reformation of IIAs is the backbone that is needed to realise the economic objectives in Africa. At the regional economic level, initiatives are underway to develop regulations that may assist regional member states in attracting more foreign investment in their sub-regional markets by providing uniform or harmonised investment protection and regulation. [296] However, the issue of moving towards the greater coherence and consistency at the African level will also require coordination and consistency at the regional and domestic levels.

Western Shaina posits that '[w]hether actors reach an agreement at the bargaining table often defines whether a negotiation was a success or a failure'.[297] However, this statement is to certain extent misleading as the success of international agreements should not be measured against the number of ratifications. It should be measured

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294 Kayizzi-Mugerwa Steve *et al,* 'Regional integration in Africa: An introduction' (2014) 26:S1 *African Development Review* 1.

295 Mwase Ngila, 'Coordination and rationalisation of sub-regional economic integration institutions in Eastern and Southern Africa: SACU, SADC, EAC and COMESA' (2008) 9:4 *Journal of World Investment and Trade* 334.

296 AMU, 'initiatives promoting coherence in investment regulation and supporting investment for Africa's transformation' https://www.uneca.org/oria/pages/initiatives-promoting-coherence-investment-regulation-and-supporting-investment-africa%E2%80%99s (accessed 28 March 2020).

297 Western Shaina, 'Bargaining power at the negotiation table and beyond' (2020) 25 *International Negotiation* 170.

against the successful implementation of such agreements. It does not help to have agreements that are good on paper but cannot be successfully implemented. Sikkink Kathryn noted in her innovative study of development policies that 'international investment [can] be perceived as an opportunity or as a danger, depending on the ideas held by policymakers.[298]

African states go on to sign IIAs at various levels, however, the question that begs for an answer is: To what extent and on what basis have African states surrendered their sovereignty at the regional and continental levels? Are there any power dynamics that inform the operations of African key institutions? Are African states even prepared to evince their readiness and willingness to the achievement of the AU ideals? These questions are necessary since the proposed AU Investment Agreement in this study can only usher in positive results if there is willingness from African states to actively participate and cooperate beyond the negotiating table. This will require African states to move away from 'blanket obligations' which do not consider the capacities of every participating state.

So far African states have had little success in their integration and development efforts.[299] They had hoped to achieve at the continental level what they had failed to achieve at the domestic level, namely economic development through a combination of sound policies.[300] Thus, regionalism as practiced in Africa can only be viewed as a form of escapism from real domestic challenges, as well as a strategy to consolidate alliances that would strengthen member states' political sovereignty.[301] However, policymakers cannot ignore the fact that domestic triumphs precede continental triumphs. The success of sound and functional policies at the domestic, regional, and continental levels should be used to gauge Africa's progress.

Even though it took 10 rounds of negotiations to launch the AfCFTA Agreement, its drafters failed to deal in detail with issues of foreign investment. Currently, it is also not clear whether the anticipated AfCFTA Agreement Investment Protocol will include

298 Sikkink Kathryn, *Ideas and Institutions: Developmentalism in Brazil and Argentina* (Cornell University Press 1990) 19.

299 Qobo Mzukisi, 'The challenges of regional integration in Africa: In the context of globalisation and the prospects for a United States of Africa' (2007) 145 *Institute for Security Studies: Issue Paper* 3.

300 *Ibid.*

301 *Ibid.*

binding commitments. It obviously remains to be seen how binding commitments on cooperation on investment will be captured within the AfCFTA Agreement. Binding regional treaties add further complexity to this entangled and overlapping investment regime. It may undermine existing flexibilities that African states enjoy in their multilateral and bilateral foreign investment obligations.

Considering the above, the study argues that there is a need for increased home-bred developmental policies against the neo-imperial ideas. Regulation of foreign investment should not only be integrated into the AfCFTA Agreement but should be regulated under its own and separate continental instrument. This agreement should feature new-generation foreign investment treaty innovations for predictable, forward-looking and transparent rules that are capable of paving the way for further economic relations.

Among its features should be substantive obligations, development-oriented foreign investor obligations and mutual commitments among African states based on the capacity of each individual state. To deal with the overlapping of IIAs and other international instruments, the proposed AU Investment Protocol would need to ensure that the following provisions are clearly dealt with at the continental level: (1) the definition of investor and investment, as they are protective measures of the host state and (2) the hierarchy of the investment instrument at the AU level in relation to other IIAs. This will ensure a clear scope of application and allow for proper implementation of the Agreement.

An AU foreign investment instrument involving only a cooperative framework for foreign investment fails to take advantage of many opportunities. These opportunities include developing tools for promoting regional integration, ensuring non-discrimination between member states by recognising their level of development. It is apparent from this part of the study that just like at the UN level, foreign investment in Africa is treated as a sub-issue that relates to trade. Influenced by the UN, the AU has taken a similar approach with the AfCFTA Agreement, and foreign investment will be regulated under an existing trade instrument. Trade at the UN level is regulated under the WTO, and at the AU level it is regulated under the AfCFTA Agreement. There is no comprehensive and binding foreign investment instrument at both these levels.

Furthermore, during the WTO Doha Round, negotiations on a number of issues were suspended. Nonetheless, foreign investment was removed from the negotiating agenda because the WTO member states had different interests and were unwilling to trade off concessions and benefits.[302] The WTO has been criticised for being increasingly incapable of responding to the rapidly changing world. If Africa is to build a strong sustainable economic development and relations, it needs to move away from the WTO approach and start regarding foreign investment as one of the main economic drivers.

The approach towards international trade law and international investment law appears to converge the two legal systems. If the intention is to introduce a new field of international law, then this should be clear. However, international investment law should not be treated as a sub field of international trade law.

4.7 Conclusion

Whilst still following the structure of looking at the past, the present and the future of IIAs in Africa, this chapter highlighted the state of affairs in Africa in terms of the current thinking and foreign investment policies. This chapter critically analysed the regulation of foreign investment from the AU's perspectives. It did this by first attempting to locate the place of Africa in the current economic legal order and found that even though the continent has not achieved its economic objectives, it has the potential to be one of the biggest and influential economic role players at the global level.

The study in this chapter found that Africa has made positive strides towards changing the status quo for Africans, however, there are still many gaps that needs to be addressed if Africa is to achieve economic freedom. Having critically analysed the regulation of foreign investment at the continental and regional levels as well as the challenges facing Africa in the achievement of sustainable economic development and relations, the study answered the question of whether the AU is still relevant. In this regard, the study concluded in the affirmative, arguing that the AU is still relevant, however, some of its policies are in desperate need of reformation and Africanisation.

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302 Denters Erik and Gazzini Tarcisio, 'The role of African regional organisations in the promotion and protection of foreign investment' (2017) 18 *Journal of World Investment and Trade* 464-465.

Overall, the discussion in this chapter shows that African states are reluctant to create supra-national bodies and transfer power to them. It highlighted the need for Africa get to a point where is has a solid grip of its economic landscape, and this will require trust from every stakeholder.

CHAPTER 5

A COMPARATIVE ANALYSIS OF THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY FINANCE AND INVESTMENT PROTOCOL AND THE PAN-AFRICAN INVESTMENT CODE: CHARTING A POSSIBLE WAY FORWARD FOR THE AU

5.1 Introduction

An important aspect of Pan-African investment and development is the revival and redevelopment of the 'African personality',[1] which temporarily submerged during the colonial era.[2] This 'African personality' is characterised by cheerfulness, love of nature and willingness to serve by simple and cordial relations and sympathy with best interest and every effort for freedom.[3] It embodies the spirit of unity, service, obedience, gentleness and patience.[4] The analysis in this chapter is from the argument that the current international investment legal framework was made for Africa as a replacement for colonial rules, mainly for the protection of capital, and it is in need of change.

This chapter compares and critically analyses provisions of the Southern African Development Community Finance and Investment Protocol[5] (the SADC FIP) and the Pan-African Investment Code[6] (the PAIC). It does this to ascertain whether these instruments are adequate to achieve Africa's sustainable economic development and *relations* which are infused with 'African personality'. For each analysis done, a recommended provision of the proposed AU Investment Agreement will be made on whether the provision should be maintained, or a totally new provision is required, or an amended provision to the existing provision of the SADC FIP and the PAIC is required.

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1 The phrase 'African Personality' was first introduced by Edward Blyden in a lecture titled Study and Race which was delivered in Sierra Leone, on 19 May 1893. See Araba Sam, 'Meet the pioneer of African personality who first challenged racist scientific theories' https://face2faceafrica.com/article/meet-the-pioneer-of-african-personality-who-first-challenged-racist-scientific-theories (accessed 27 April 2021).

2 This is covered in Chapter 3 above.

3 Araba Sam, 'Meet the pioneer of African personality who first challenged racist scientific theories' https://face2faceafrica.com/article/meet-the-pioneer-of-african-personality-who-first-challenged-racist-scientific-theories (accessed 27 April 2021).

4 *Ibid.*

5 Southern African Development Community Finance and Investment Protocol of 2016.

6 Pan African Investment Code of 2016.

The selection of provisions is based on the common provisions of a typical multilateral investment agreement. Where a certain provision only appears in one instrument, the omission/inclusion will be analysed to ascertain whether such omission is positive or negative, and a recommendation will be made for the proposed AU Investment Agreement based on the analysis. However, only provisions that are relevant to the study, and which are going to assist in drafting the AU Investment Agreement will be discussed below. Recommendations flowing from the SADC FIP and the PAIC are presented together with the analysis of these instruments in this chapter for reading with ease.[7] Therefore, the recommendations will be presented immediately after the analysis. The study will, however, not compare the Preambles of these two instruments, since they will not add much to the study.

5.2. Background, legal nature and reasons for choosing the SADC FIP and the PAIC

The SADC FIP and the PAIC were chosen because they are by far the most comprehensive multilateral investment instruments on the African continent. These instruments will therefore assist in drafting the proposed recommended provisions of the AU Investment Agreement. Both the SADC FIP and the PAIC are structured from the perspective of developing and least developed states. Furthermore, these two instruments contain several Africa-specific and advanced innovative features, which presumably make them unique legal instruments. The previous chapters looked at the past and present legal framework and approaches to regulating foreign investment in Africa. From this context, this chapter takes the discussion further and analyses the SADC FIP and the PAIC in order to find way to achieve sustainable economic development and *relations* in Africa.

The SADC FIP and the PAIC are both multilateral international investment agreements, which seek to balance and to address specific aspects of development in Africa. They do this by reformulating traditional treaty language, adding new provisions and omitting certain provisions completely. Both instruments are said to balance the rights and obligations of foreign investors and host states. They further contain both

[7] This way the reader will not have to do cross reference from different chapters to ascertain what the analysis was for a particular provision.

substantive investment protections that are aligned with international standards and investor-state dispute settlement.[8]

The PAIC represents a consensus on shaping international investment law at the continental level, while the SADC FIP mirrors the views of a regional economic bloc. The PAIC is a continental investment treaty model, and not a legally binding instrument, while on the contrary, the SADC FIP is binding. Furthermore, the scope of the PAIC is wider in general than that of the SADC FIP.

5.2.1 The Southern African Development Community Finance and Investment Protocol

Foreign investment in the SADC region is currently regulated by the Annex 1 of the 2016 SADC FIP (the SADC FIP). The SADC FIP is a subsidiary legal instrument which was concluded in terms of Articles 21 and 22 of the SADC Treaty. It was originally adopted in 2006, however, in 2016, the SADC member states decided to replace the 2006 SADC FIP (2006 SADC FIP) with a new one.[9] The Preamble of the Appendix of the SADC FIP noted flaws which were contained in the 2006 SADC FIP as the reason for the amendment. In this regard, it noted that the 2006 SADC FIP failed to 'adequately balance investor protection and development policy space for host states'. It further noted that the 2006 SADC FIP may have unintended consequences for SADC, and that other provisions of the same instrument also failed to adequately balance investment protection and development policy space for host states.[10]

Annex 1 of the 2006 SADC was amended in its entirely in terms of Article 26 of the 2006 SADC FIP[11] and Article 2 of Annex 1 of the 2016 SADC FIP.[12] The SADC FIP is thus a legally binding and internationally recognised document which creates rights and obligations for all member states and their investors.[13] The SADC FIP is drafted in

8 They also contain procedural investment protection provisions, however, for purpose of this study, only the substantive provisions will be analysed.

9 The Preamble of the SADC FIP.

10 *Ibid.*

11 Both Articles 26 of the 2006 SADC FIP and the SADC FIP deal with procedure for amending the SADC FIP.

12 The adoption by three-quarters of member states is a requirement in terms of Article 3 of the SADC FIP'.

13 Kondo Kondo, 'A comparison with analysis of the SADC FIP before and after Its Amendment' (2017) 20 *Potchefstroom Electronic Law Journal* 1. The rights and obligations established in this instrument are of an international nature and cannot be unilaterally amended at a domestic level.

line with the guidelines and principles contained in the SADC BIT Model.[14] It has many annexes,[15] however, of importance for the purpose of this study is Annex 1 which is titled 'Co-operation on Investment'. The SADC FIP is made up of 26 Articles.

5.2.2 The Pan-African Investment Code

The PAIC is Africa's first continental investment instrument elaborated under the auspices of the AU.[16] Its mandate is to develop a comprehensive investment model for Africa with a view of promoting private sector participation.[17] It aims to foster cross-border investment flows in Africa.[18] The decision to develop the PAIC was welcomed by African experts and policymakers as an opportunity to contribute to Africa's industrial and structural transformation.

The expectation is that the PAIC will: (1) Effectively restore the balance between foreign investors' rights and host states' obligations; (2) take into account states' sustainable development objectives; (3) streamline the investor-state dispute-settlement system (ISDS), and (4) overcome issues currently presented by the fragmentation of the international investment regime, due to the multiplicity of investment treaties and the diverse interpretative practice of arbitral tribunals.[19]

The PAIC's legal nature was at the centre of debate during its negotiations.[20] The term 'Code' caused confusion during discussions, particularly on the question whether the

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14 The SADC BIT model deals provided SADC member states guidelines to follow when concluding BITs.

15 These annexes are Annex 2: Macroeconomic convergence, Annex 3: Co-Operation in taxation and related matters, Annex 4: Co-operation and co-ordination of exchange control policies, Annex 5: Harmonisation of legal and operational frameworks, Annex 9: Co-operation in respect of development finance institutions, Annex 6: Cooperation on payment, clearing and settlement systems, Annex 7: Cooperation in the area of Information and communications technology amongst central banks, Annex 8: Cooperation and co-ordination in the area of banking Regulatory and Supervisory Matters, Co-Operation in respect of Development Finance Institutions, Annex 10: Co-Operation on non-banking financial institutions and services, and Annex 11: Co-Operation in SADC stock exchanges.

16 Mbengue Makana and Schacherer Stefanie, 'The "Africanisation" of international investment law: The Pan-African Investment Code and the reform of the international investment regime' (2017) 18 *Journal of World Investment and Trade* 414.

17 The Preamble of the PAIC.

18 *Ibid.*

19 Kane Madana, 'The Pan-African Investment Code: A good first step, but more is needed' (2018) 217 *Columbia FDI Perspectives on Topical Foreign Direct Investment Series* 1. The PAIC is made of seven chapters and 53 articles.

20 Kane Madana, 'The Pan-African Investment Code: A good first step, but more is needed' (2018) 217 *Columbia FDI Perspectives on Topical Foreign Direct Investment Series* 1.

proposed instrument was to be a binding international agreement or a model law.[21] Even though the PAIC meets all the requirements to be a binding instrument,[22] its scope applies as a guiding instrument for member states as well as investors and their investments in Africa.[23] The PAIC defines rights and obligations of member states as well as investors, and prescribes principles therein.[24] However, these are only a roadmap and strategy on how AU member states are to regulate foreign investment in Africa.[25] Taking stock of the progress achieved so far, it is disappointing to note that the original ambition to have a binding instrument replacing an existing intra-African investment agreements has been abandoned in favour of a guiding instrument.

The use of a soft law instrument may exacerbate the fragmentation of Africa's investment law regimes and jeopardize the PAIC's core objectives. It will also reduce the effectiveness of numerous substantive provisions in the current text, including provisions establishing states' rights to regulate admitted investments and to adopt measures related to environmental preservation, international peace and security, national security interests, and national development promotion (including through performance requirements and local content).[26] Notwithstanding the above, the PAIC further makes provision for adopting it as a binding instrument. Article 51 of the PAIC stipulates that it will come into effect once it has been adopted by Assembly of Heads of states. This reveals that the PAIC has the potential to be a binding instrument,

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21 Amr Hedar, 'The legal nature of the Draft Pan-African Investment Code and its relationship with international investment agreements' 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 (accessed 14 April 2021).

22 For an international agreement to be binding, such instrument must contain (1) international legal rules, (2) which are formulated in the form of a written agreement (3) and it must be signed by member states. Now testing the provisions of the PAIC, the criteria and conditions in the legal text should be analysed. In order words, the content, the rules as well as the formalities of signature and ratification to verify the compliance with international law in the PAIC must be analysed.

23 Article 2(1) of the PAIC.

24 *Ibid* Article 2(2).

25 Amr Hedar, 'The legal nature of the Draft Pan-African Investment Code and its relationship with international investment agreements' 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 (accessed 14 April 2021).

26 Kane Madana, 'The Pan-African Investment Code: A good first step, but more is needed' (2018) 217 *Columbia FDI Perspectives on Topical Foreign Direct Investment Series* 1.

however, at the time of writing this chapter, it was still a guiding and a model instrument.

5.3 A comparative analysis of the SADC FIP and the PAIC: Drawing from existing international instruments to propose an African Union Investment Agreement

5.3.1 Objectives

5.3.1.1 Southern African Development Community Finance and Investment Protocol

The large scope of the aims of the SADC FIP is dedicated to the SADC Central Banks.[27] The SADC FIP does not contain any specific objective, and since the 2006 SADC FIP was repealed in its entirely, the objectives contained therein are not applicable. In this regard, the study argues that the objectives in the 2006 SADC FIP should have been included. The first objective of the 2006 SADC FIP dealt with the issue of overlapping IIAs. Article 2(1) of the 2006 SADC FIP states that it aims to foster harmonisation of financial and investment policies of its member states in order to make them consistent with objectives of the SADC.

To achieve this main aim, the 2006 SADC FIP requires regional integration, co-operation and co-ordination within finance and investment sectors with the aim of diversifying and expanding investment by member states.[28] From this aim, it is clear that the drafters of the 2006 SADC FIP view overlapping of IIAs and their obligations as a challenge and attempted to ensure that there is harmony in the investment policy space. This challenge continues to exist, and the drafters of the SADC FIP should have included them. This was definitely a step in the right direction because the overlapping treaty obligations have for the longest time hindered the implementation of many IIAs.

The second objectives of the 2006 SADC FIP further aims to achieve sustainable economic development, growth and eradication of poverty in the SADC region through, *inter alia:* (1) creation of a favourable investment climate within SADC with the aim of promoting and attracting investment; (2) co-operation in respect of taxation and related matters; (3) co-operation in the area of SADC stock exchanges; (4) co-operation with regard to anti-money laundering issues amongst member states; and (5) co-operation

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27 For a detailed discussion on the aims of the SADC FIP in relation to the Central Bank; see Article 2(2)(d)(e)(f)(g) and (f).

28 *Ibid*.

in respect of a SADC Project Preparation and Development Fund.[29] Overall, the 2006 SADC FIP provide adequate objectives to realise the region's sustainable economic development goals and relations.

5.3.1.2 The Pan African Investment Code

The main objective of PAIC is to 'promote, facilitate and protect investments that foster sustainable development of each member state, and in particular, the member state where the investment is located'.[30] However, unlike the 2006 SADC FIP, the PAIC does not provide guidelines on how this objective is to be achieved. Furthermore, it should have included as an objective that it will adequately deal with inequalities of its member states even though this is covered in a separate provision. Since the level of development of each member state will always affect the implementation of an international instrument.

5.3.1.3 Recommended provision of the proposed AU Investment Agreement

In addition to the objectives contained in the 2006 SADC FIP, the proposed AU Investment Agreement should include sustainable economic development *and relations as well as balancing of equity between member states by recognising the level of development of each member state.*

5.3.2 Definition of an investor and an investment

5.3.2.1 Southern African Development Community Finance and Investment Protocol

Article 1 of the SADC FIP defines an investor as 'a natural or a juridical person of another [s]tate [p]arty making an investment in another [s]tate [p]arty, in accordance with the laws and regulations of the state party in which the investment is made'. This means that investors from outside the SADC region will not benefit under the SADC FIP. The SADC FIP thus contains a narrow definition of an investor by only recognising investors from SADC member states.

The negotiators of this instrument were probably motivated by the need to have control over their investment policy spaces. As a rule of thumb, only investors from member

29 *Ibid.*
30 Article 1 of the PAIC.

states and their investors should benefit from an IIA. This will ensure that investors from member states are prioritised. Therefore, in the African context including investors from third party states would defeat this objective. Structuring the definition of an investor in this way limits the operation of the SADC FIP, however, the need to have control over inward investment should take precedence over the number of investment admission in host states, most especially in developing states.

The SADC FIP's definition of an investor is adequate, however, it should have required that such investor must have its headquarters or at the very least have one of its principal places of business in the host state. This is in line with the hybrid theory discussed in chapter 2 above. It will further eliminate the issue of foreign investors setting up businesses in host states while operating from a distance. Furthermore, the extent of the legal effectiveness of this provision is also dependant on the hierarchy and relation of the SADC FIP with other IIAs. This is discussed in 6.3.3.1 below.

Just like the definition of an investor, the SADC FIP adopted a narrow approach to the definition of an investment. Article 1(2) of the SADC FIP defines an investment as:

> An enterprise within the territory of one [s]tate [p]arty established, acquired or expanded by an investor of the other [s]tate [p]arty, including through the constitution, maintenance or acquisition of a juridical person or the acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise is established or acquired in accordance with the laws of the [h]ost [s]tate and registered in accordance with the legal requirements of the [h]ost [s]tate.

The definition above is adequate, however, it should also include companies and corporations in addition to enterprises. Furthermore, definitions of natural or juristic persons should further be designed within the parameters of an investor and in accordance with the laws, regulations and policies of host states.

The SADC FIP further encompasses a closed asset-based definition of an investment by listing specific assets that could be possessed by an enterprise as an investment in the context of the SADC FIP. In this regard, it states that an investment includes, *inter alia*: (1) Shares, stocks, debentures and other equity instruments of the enterprise or another enterprise; (2) a debt security of another enterprise; (3) loans to an enterprise; (4) movable or immovable property and other property rights such as mortgages, liens or pledges; (5) claims to money or to any performance under contract having a financial value; (6) copyrights, know-how, goodwill and industrial property rights such as

patents, trademarks, industrial designs and trade names, to the extent they are recognised under the law of the host state; and (g) rights conferred by law or under contract, including licences to cultivate, extract or exploit natural resources.[31]

The SADC FIP includes exceptions to the definition of investment, such as debt securities issued by a government or loans to a government; portfolio investments; and claims to money arising solely from commercial contracts for the sale of goods or services by a national or enterprise in a member state's territory to an enterprise in another member state's territory, or the extension of credit in connection with a commercial transaction.[32]

Considering the number of the International Centre for the Settlement of Investment Dispute (ICSID) cases initiated against African countries, narrowing the definition of an investment may allow African host states to have internal control in various economic industries without a thread of dispute. However, the SADC FIP does not require physical presence of an investment within the jurisdiction of the host state. This means that SADC member states do not have ultimate control over an investment. This is a problem as it will be difficult to regulate the investment if it is in another jurisdiction.

What stands out from the definition above is that the SADC FIP has departed from the standardised elements of the definition of an investment and/or investor that include investment from third party state. This is a step in the right direction, as international instruments should benefit member states, and if non-member states are still benefiting from these agreements, then there will be no need to ratify these instruments. The scope of application of the SADC FIP has significantly been limited since only investors and investment from member states are covered. The definitions above do not only exclude investors from other parts of the continent and the world, but it also excludes investors from the SADC countries who have not ratified this instrument. Whether this will yield positive results remains to be seen.

5.3.2.2 Pan African Investment Code

The PAIC's definition of an investor is different from the one contained in the SADC FIP which covers only investors from member state's jurisdiction. To this end, Article

31 Article 1(2) (a)-(g) of the SADC FIP.
32 *Ibid.*

4(5) of the PAIC defines an investor as any national, company or enterprise of a member state or from any other state which has investment in the member state's territory. This means that the PAIC applies directly to foreign investors from third party states, and they generally enjoy equal benefits as investors from member states. Even though the PAIC is a continental instrument, it should have limited the scope of application by narrowing the definition to an investor to those from member states. It is important for states to realise that only member states and their investors should benefit from a particular IIA as this will encourage them to ratify IIAs.

Doing this would increase foreign investment flow between African states as many states will be likely to ratify such IIA, while ensuring that host states have control over foreign investment in their respective territories. There is no need to benefit states who are not part of the PAIC, as this will generally be contradictory to the objectives of the PAIC which rightfully identifies member states as main beneficiaries of this instrument. Furthermore, from an African context, if investors from third party states are to benefit, then there will be no need for African states to ratify the PAIC as they already benefit from it in any case. This may be one of the reasons why many states are reluctant to ratify IIAs.[33]

Even though the definition of an investor is generally wide, the PAIC gives host states some level of control over foreign investment by opting for a closed-asset based definition of an investment. The PAIC defines an investment as:

> An enterprise or a company which is established, acquired or expanded by an investor, including through the constitution, maintenance or acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise or company is established or acquired in accordance with the laws of the host state.[34]

The requirement that the investment must have been established in terms of the domestic laws of host states acts as a safeguard for these host states. This is because each state has different requirement for establishing investments, and if such investment is not in line with the host state's requirement, it should not give rise to rights or obligations; and if it does, there may be conflicts. Unlike, the SADC FIP, the PAIC also included companies in its definition of an investment but not corporations.

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33 This is discussed in chapter 1.

34 Article 3(4) of the PAIC.

The PAIC has included the following assets in the definition of an investment: (1) Shares, stocks, debentures and other equity instruments of the enterprise or another enterprise; (2) a debt security of another enterprise; (3) loans to an enterprise; (4) movable or immovable property and other property rights such as mortgages, liens or pledges; (5) claims to money or to any performance under contract having a financial value; (6) copyrights, know-how, goodwill and industrial property rights such as patents, trademarks, industrial designs and trade names. The PAIC further requires that these assets should also be recognised under domestic laws of the host state. This further grant host states control over what can be admitted into their territories.

The PAIC further excludes the following from the definition of an investment: (1) Debt securities issued by a government or loans to a government; (2) portfolio investments;[35] (3) claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a member state to an enterprise in the territory of another member state, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in subparagraphs (a) through (f) above; (4) investments of a speculative nature; (5) investments in any sector sensitive to its development or which would have an adverse impact on its economy and (6) commercial activities. This is another great provision which is aimed at protecting the host state by limiting the number of claims against them. Furthermore, this is in line with the direction that the current IIAs are taking in ensuring that host states are not subject to claims for investments/transactions which their domestic laws do not recognise as such.

5.3.2.3 Recommended provision of the proposed AU Investment Agreement

The definition of an investor should be couched as follows in the proposed AU Investment Agreement:

[35] In terms of the PAIC portfolio investment refers to any investment where the investor owns less than 10 per cent of shares in a company or through stock exchange, or otherwise does not give the portfolio investor the possibility to exercise effective management or influence on the management of the investment.

(1) A natural or juridical person of another member state making an investment *which is of economic value* in accordance with the laws, regulations *and policies* of the state party in which the investment is made.[36]

(2) In the context of investors, the term 'natural person' shall mean any natural person with the nationality of any member state.

(3) In the context of investors, the term 'legal person' shall mean any enterprise, corporation, or company with its head office or principal business in the territory of the host state and recognised as such by it through its domestic laws, policies and regulations.

Investment:

Regarding the definition of an investment, the definition under the SADC FIP above should be maintained, nonetheless, the following provision should also be added in the Proposed AU Investment Agreement:

(1) …Such investment as established in the host states should have its principal place of business or one of its principal businesses in the host state or have its headquarters in the host state.

(2) … For investment to meet the requirement of this provision, it must economically benefit the host state.

Assets covered:

With regards to the assets covered and exclusions thereof, the list in the PAIC should be maintained in the recommended AU Investment Agreement. This is because even though the list is generally wide, the definition of an investor as contained in the SADC FIP would work as a protective blanket for host states.

[36] This definition is generally from the SADC FIP.

5.3.3 Hierarchy and relationship with other international investment agreements

5.3.3.1 Southern African Development Community Finance and Investment Protocol

The SADC FIP does not assert its own supremacy; however, the issue of overlapping and conflicting IIAs' rights and obligations was at the fore front for its drafters. Article 17 of this instrument requires member states to harmonise investment regimes, policies, laws and practices in the SADC region. Article 23 of the same instrument further requires member states to pursue and promote policies that may increase cooperation with other regional and international organisations on issues relating to investment.

Notwithstanding the provisions above, Article 24 of the SADC FIP allows member states to conclude BITs with third party states. Obviously, since the definition of an investor and an investment are confined to those from member states, the SADC FIP will not be applicable to IIAs from third party states. Furthermore, since the harmonisation of investment regimes, policies, laws and practices is only confined in the SADC region, this still leaves a gap for member states to continue to conclude IIAs with third party states which may overlap with the SADC FIP.

5.3.3.2 Pan African Investment Code

As pointed out above, at the time of writing this chapter, the PAIC was not a binding instrument. However, it grants member states a discretion to review it with the aim of making it a binding instrument.[37] If this happens, the PAIC will replace the intra-African IIAs and investment chapters in intra-African investment agreements. This will occur at the date of termination determined by member states or after the termination period as set in existing IIAs.[38] Generally, the PAIC does not apply retrospectively, and as such, rights and obligations of member states which existed prior to its conclusion will not be affected.[39] This means that member states may not use their membership to the PAIC as an excuse to evade responsibilities emanating from previously concluded IIAs.

37 Article 3(2) of the PAIC.
38 *Ibid*.
39 *Ibid* Article 3(1) of the PAIC.

The PAIC requires member states and RECs to take into account its provisions when entering into any new agreements with third parties in order to avoid any conflict between their present or future obligations under the PAIC and their obligations in other agreements.[40] Whilst the definition of an investor under the PAIC is quite broad, this provision is necessary because conflicts and overlapping obligations may affect its implementation. The PAIC should not have only requested member states to avoid conflicts but should have included a provision which deals with its relationship with third party states in relation to the hierarchal relationship. Therefore, the PAIC should have asserted its own supremacy in the case of a conflict with other IIAs.

5.3.3.3 Recommended provision of the proposed AU Investment Agreement

Notwithstanding the argument made above regarding the PAIC, the study argues that the proposed AU Investment Agreement should apply retrospectively to avoid individually amending the existing IIAs. If the AU Investment Agreement applies retrospectively, this issue will be taken care of automatically. This is because, despite the recent push for regional investment policy reform in Africa, the vast majority of the existing stock of old-generation BITs in Africa concluded between 1980 and 2012, which were developed using developed-country models, remain in place.

In this regard, the proposed AU Investment Agreement should contain the following provision:

(1) Once the AU Investment Agreement enters into force, it shall be binding on every state that has ratified it. Each member shall ensure that the obligations under the Agreement are executed and implemented in good faith, taking into account the level of development of each member state.

(2) When entering into agreements with other member states or when entering into agreements with third party states, member states shall ensure that the obligations thereof are not in conflict with this agreement.

40 *Ibid* Article 3.

(3) In the case of a conflict with regard to the subject matter, interpretation or application, the AU Investment Agreement shall take precedence over other agreements unless otherwise stated.

(4) Member states shall ensure that there is a harmonisation of IIAs at the regional levels. Member state shall ensure that their national laws, policies and regulations are in line with this Agreement.

5.3.4 Admission and promotion of investment

5.3.4.1 Southern African Development Community Finance and Investment Protocol

Article 2(1) of the SADC FIP requires member states to promote investments in their territories and to admit such investments in accordance with their laws and regulations. The SADC FIP further requires host states to facilitate and create favourable conditions to attract foreign investment.[41] This places an obligation on host states to ensure that there is a favourable environment that can attract foreign investment, and if there is interest from foreign investors to invest, such investment should be admitted and established if they meet domestic requirements for a particular industry. The only control that host states have is that the foreign investment should meet domestic laws and regulations. This provision is generally phrased in broad terms and allows foreign investors to have pre-establishment and pre-admission *privileges* in the host state. This has been the trend for the previous generation of IIAs.

The problem with this trend is that it grants foreign investors a *privilege* in the host state before the admission of their investment. This relinquishes the host state's control over its economic environment. Generally, future investors should not have *privileges* until they are admitted in the host state, as this will ensure that a foreign investor cannot make a claim against host states that their investment was not admitted. However, to ensure that foreign investors are not left without protection member states should not unfairly and arbitrary refuse to admit investment if such an investment meets the laws, regulations as well as policies of the host state, and only if it will be in the best interest of host states to do so.

[41] Article 2(2) of the SADC FIP.

5.3.4.2 Pan African Investment Code

The PAIC requires member states to promote, encourage and facilitate investments that foster sustainable development in their respective states.[42] Similar to the SADC FIP, the PAIC requires member states to recognise pre-admission *privileges* of foreign investors before the establishment and admission of an investment. However, such entry, admission and establishment should be in accordance with the host state's laws and regulations with the aim of promoting free flows of investment in Africa.[43] Article 5 of the PAIC is similar to Article 2 of the SADC FIP as discussed above, and the criticisms thereof apply herein *mutatis mutandis.*

To ensure that there is fair competition between member states, the PAIC allows member states to harmonise incentives for investments that are of strategic interest to them.[44] This is a good provision because if there is a standardised incentive, the most advanced states cannot attract foreign investment to the detriment of those who cannot afford to offer more incentives.

5.4.4.3 Recommended provision in the proposed AU Investment Agreement

(1) *Member states shall promote investments in their respective territories in accordance with their laws, regulations and policies.*

(2) Member states shall promote, encourage and facilitate investments that foster sustainable *economic* development *and relations* in their respective states.

(3) Member states shall facilitate and create favourable conditions to attract foreign investment. *However, this provision does not grant investors a privilege to be admitted in the host state.*

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42 Article 1 of the PAIC.

43 *Ibid* Article 5.

44 The PAIC further allows member states in Article 6(2) a discretion to introduce incentives in order to attract investments. Such incentives may include, *inter alia*: Financial incentives in the forms of investment insurance; grants or loans at concessionary rates; fiscal incentives such as tax holidays, pioneer status and reduced tax rates; subsidised infrastructure or services, market preferences; development-oriented incentives, to encourage preferential markets schemes and specific investors within the region; incentives for technical assistance, technology transfer requirements; and investment guarantees.

(4) Member states shall not unfairly and arbitrary refuse the admission of foreign investors in their respective states.

(5) Member states shall not have obligations to admit foreign investment in their respective territories. However, once admitted, investors shall have privileges in the host states that are required for the realisation of their investment.

(6) In accordance with the principles of this Agreement, each member state shall ensure that all measures that affect foreign investment are administered in a reasonable, objective, and impartial manner, consistent with domestic legal system.

5.3.5 Most Favoured Nation Treatment

5.3.5.1 Southern African Development Community Finance and Investment Protocol

The SADC FIP does not contain the MFN clause. This principle is a core tenet of the WTO rule that states should trade without discrimination. It requires member states to accord investors of other member states a treatment that is no less favourable than the one it accorded, 'in like circumstances', to investors of any third party state or of a third states.[45] While the MFN clause was important because it prevented bias and discrimination against foreign investors in host states, it also brought with it challenges. For instance, it was not clear how the MFN clause was to be interpreted or how far its obligations extended. Furthermore, if a foreign investor or a member state failed to secure a desired standard of protection from an IIA by way of negotiation, such an investor or member state still had a chance of being a beneficiary of that protection by virtue of the MFN clause.[46] This enabled them to reap benefits granted to other investors or members in other BITs in ways not anticipated by the host state.[47]

The MFN clause also permitted 'treaty shopping' and 'free riding', in which foreign investors receive unearned benefits; undermining the concept of reciprocal concessions.[48] This clause therefore had unintended consequences of subverting the

45 Mhlongo Lindelwa, 'Clash of laws? Testing the effectiveness of the national treatment principle against black economic empowerment laws in South Africa' (2021) 3:2 *Speculum Juris* 73.
46 cf Salacuse Jeswald, *The Law of Investment Treaties* (2010) 252.
47 Kondo Tinashe, 'A comparison with analysis of the SADC FIP before and after Its amendment' (2017) 20 *Potchefstroom Electronic Law Journal* 10-11.
48 *Ibid.*

will of member states in a manner that altered the substance of an IIA.[49] The SADC FIP can thus be commended for omitting the MFN clause. This is also consistent with the SADC Model BIT's recommendation that the MFN treaty should not be included in IIAs because it has the unintended consequence of multilateralization.[50]

5.3.5.2 Pan African Investment Code

The MFN principle is enshrined in Article 7(1) of the PAIC, which requires member states to provide foreign investors from other member states with treatment that is no less favourable than that provided to foreign investors from any member state or a third state 'in like circumstances' with regard to the management, conduct, operation, expansion, sale, or other disposition of investment.

The PAIC attempted to clear the issues raised above under the SADC FIP by further including the criteria for the concept of 'in like circumstances'. In this regard, the PAIC requires an overall examination, on a case by-case basis, of all circumstances of an investment, including, *inter alia*: (1) Its effects on third persons and the local community; (2) its effects on the local, regional or national environment, the health of the populations, or on the global commons; (3) the sector in which the investor is active; (4) the aim of the measure in question; (5) the regulatory process generally applied in relation to a measure in question; (6) company size; and (7) other factors directly relating to the investment or investor in relation to the measure in question.[51]

The PAIC excluded the application of the MFN principle from the dispute settlement procedures provided for in other treaties.[52] The reasoning behind this is that substantive obligations in other treaties do not constitute treatment in and of themselves, and thus cannot give rise to a violation of Article 7.[53] Even though Article 8 of the PAIC contains exceptions to the MFN clause,[54] criticisms of the MFN principle

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49 *Ibid*.

50 SADC, *SADC Model Bilateral Investment Treaty Template with Commentary* (2012) 22.

51 *Ibid* Article 7(3).

52 *Ibid* Article 4.

53 *Ibid.*

54 *Ibid* Articles 8: (1) Member states may adopt measures that derogate from the MFN principle; (2) any regulatory measure taken by a member state that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute a breach of the MFN principle; (3) the measures taken by reason of national security, public interest, public health or public morals are not considered as a less favourable treatment, for the purpose of Article 7; (4) The MFN principle does not apply to sectors excluded in a member state's list of scheduled investment sectors; (5) the

under 5.3.5.1 above are still applicable herein, and thus the study maintains that the MFN principle should not be included in the current IIAs regime.

5.3.5.3 Recommended provision in the proposed AU Investment Agreement

The MFN principle should not be included in the proposed AU Investment Agreement.

5.3.6 Fair and equitable treatment

5.3.6.1 Southern African Development Community Finance and Investment Protocol

The SADC FIP does not contain the FET clause. The FET principle guarantees investors of member states a treatment that is fair and equitable in accordance with customary international law prescription on the treatment of foreign investors.[55] Even though the FET principle brings to the fore elements of fairness and equity drawn from customary international law, it is, however, not clear what constitutes fair and equitable.[56] Furthermore, the precise meaning of the FET is a controversial one. Generally, what is fair and equitable should be determined on the case-by-case basis.

In the *Asian Agricultural Products Ltd v Republic of Sri Lanka*[57] case, the connection of 'FET' with 'full protection and security' was noted, and the court held that both connote the same level of treatment.[58] The Court held, in the *Neer v Mexico*[59] case, that the FET principle requires the government to demonstrate an act or actions that are an outrage, in bad faith, constitute wilful neglect of duty, or insufficiency far short of international standards that every reasonable and impartial person would readily recognise its insufficiency.[60]

MFN principle does not oblige a member state to extend to the investors of another member state or of a third country the benefit of any treatment, preference or privilege.

55 Chow Marriane, 'Discriminatory equality v non-discriminatory inequality: The legitimacy of South Africa's affirmative action policies under international law' (2008-2009) *Connecticut Journal of International Law* 306.

56 Surya Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2012) 59.

57 *Asian Agricultural Products Ltd v Republic of Sri Lanka* ICSID case No ARB/87/ 3.

58 *Ibid* para 33(D).

59 *Neer v Mexico* 4 RIIA (1926).

60 Surya Subedi, *International Investment Law: Reconciling Policy and Principle* (2012) 60.

However, since African states are still developing, it will be difficult for a foreign investor to prove *mala fides* as host states can always claim that they acted in the public interest. The FET principle may work on other continents; however, it is generally ineffective in Africa. The SADC FIP can therefore be commended for excluding this clause.

5.3.6.2 Pan African Investment Code

Just like the SADC FIP, the PAIC does not contain a FET clause and should also be commended for excluding it as it is no longer relevant in the current investment regime.

5.3.6.3 Recommended provision of the proposed AU Investment Agreement

The FET treatment should not be included in the AU Investment Agreement. However, to ensure that foreign investors still have a level of protection, the following clause should be included in the proposed AU Investment Agreement:

Fair administrative and legislative process:

(1) Member states shall ensure that administrative and legislative processes are not arbitrary or deprive investors of administrative and procedural justice in relation to investments.

(2) Administrative decision-making processes shall include the right to be given written reasons.

(3) Investors shall in respect of their investments have access to government-held information in a timely fashion and in accordance with national policies, laws, and regulations.

5.3.7 National treatment

5.3.7.1 Southern African Development Community Finance and Investment Protocol

The SADC FIP contains the national treatment principle, which requires member states to treat investors and their investments no less favourably than they treat their own investors and investments 'in like circumstances' with regard to the management,

operation, and disposition of investments in their territory.[61] Article 6(2) SADC FIP recognises the complexity of the 'in like circumstances' requirement, and states that there should be an overall examination on a case-by-case basis of all factors of an investment. These include, *inter alia*: (1) Its effects on third persons and the local community; (2) its effects. on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment; (3) the sector the investor is in; (4) the aim of the measure concerned; (5) the regulatory process generally applied in relation to the measure concerned; and (6) other factors directly relating to the investment or investor in relation to the measure concerned.[62]

Having required member states to accord foreign investors a national treatment, the SADC FIP allows them to depart from granting domestic investors preferential treatment in line with the host state's domestic legislation in order to achieve national development objectives.[63]

Concerning this principle, the study argues that the national treatment clause should be done away with, as it is difficult to implement. This is because host states have an obligation to act in the public interest of their respective states. Since many African states are still developing, the public interest qualification will take precedence in host states. A foreign investor will never, practically be speaking; be 'in like circumstances' with a domestic investor.[64] For example, even though a domestic investor and a foreign investor both invested in the same mining industry, which meets the 'in like circumstances' requirement, they do not have equal rights. This is because certain benefits are afforded to domestic investors by virtue of the fact that they form part of the categories of legal persons who are entitled to certain benefits even though the domestic and foreign investors are both investing in the same market.[65] This makes the application of the national treatment principle difficult.

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61 Article 7(6) of the SADC FIP.
62 Article 6(2) of the SADC FIP.
63 *Ibid* Article 6(3).
64 To read more on this see Mhlongo Lindelwa, 'Clash of laws? Testing the effectiveness of the national treatment principle against black economic empowerment laws in South Africa' (2021) 3:2 *Speculum Juris* 84.
65 To read more on this see Mhlongo Lindelwa, 'Clash of laws? Testing the effectiveness of the national treatment principle against black economic empowerment laws in South Africa' (2021) 3:2 *Speculum Juris* 70-85.

5.3.7.2 Pan African Investment Code

Just like the SADC FIP, the PAIC also makes provision for the national treatment principle.[66] Article 9(1) of the PAIC requires member states to treat investors from other member countries and their investments no less favourably than they treat their own investors 'in like circumstances' in terms of investment management, conduct, operation, and sale or other disposition. It contains two similar provisions, but one is about an investor and the other is about an investment.[67]

Article 9(3) of the PAIC contains non-exhaustive factors that should be taken into account when dealing with the concept of 'in like circumstances'. In this regarding, it states that:

> The concept of 'in like circumstances' requires an overall examination, on a case by-case basis, of all the circumstances of an investment, including, among others: (1) its effects on third persons and the local community, (2) its effects on the local, regional or national environment, the health of the populations, or on the global commons, (3) the sector in which the investor is active, (4) the aim of the measure in question, (5) the regulatory process generally applied in relation to a measure in question, (6) company size; and (7) other factors directly relating to the investment or investor in relation to the measure in question.

Unlike the SADC FIP, the PAIC further contains exceptions to the national treatment principle in Article 10. In this regard, it allows member states to adopt measures that derogate from the national treatment principle provided such measures are not arbitrary.[68] These measures include national interests, public health, safety and environment.[69] Furthermore, member states may in accordance with their respective domestic legislation, grant preferential treatment to qualifying investments and investors in order to achieve national development objectives.[70]

In terms of Article 10(5) of the PAIC, a member state may deny national treatment if advantages available within the host state's economy are made for the exclusive benefit of its own nationals within the framework of its national development programs

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66 The wording of Article 9 of the PAIC is similar to the wording of Article 6 of the SADC FIP.

67 The second one states that member state shall accord to investments from another member state treatment no less favourable than it accords, in like circumstances, to investments of its own investors with respect to the management, conduct, operation, and sale or other disposition of investments. See Article 9(2) of the PAIC.

68 Article 10(1) of the PAIC.

69 *Ibid* Article 10(2).

70 *Ibid* Article 10(3).

or its list of scheduled investment sectors where applicable.[71] Furthermore, Article 10(7) allows member states to accord more favourable treatment to address the internal needs of designated disadvantaged persons, groups or regions in accordance with national laws and regulations.

These are typical affirmative action provisions, and they always make the practical application of the national treatment difficult. What is interesting is that the PAIC indemnifies host states from paying compensation to any foreign investor affected by these exceptions.[72] Even though the PAIC has paid careful attention to the application of the national treatment, the study maintains that this principle should be done away with as it is difficult to implement. Thus, the argument made in 5.3.7.1 above under the SADC FIP still applies to the PAIC.

5.3.7.3 Recommended provision of the proposed AU Investment Agreement

The national treatment provision should not be included in the proposed AU Investment Agreement as it is difficult to implement.

5.3.8 Expropriation

5.3.8.1 Southern African Development Community Finance and Investment Protocol

Article 5 of the SADC FIP deals with expropriation. In terms of this provision, a host state may not nationalise or expropriate foreign investment in their territories except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of fair and adequate compensation.[73] This is in line with the customary rule of international law that compensation must be paid where an investment or property has been expropriated or nationalised.[74]

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71 The PAIC further states that the national treatment principle does not apply: (1) To subsidies or grants provided to a government or a state enterprise, including government-supported loans, guarantees and insurance; or (2) to taxation measures aimed at ensuring the effective collection of taxes, except where this results in arbitrary discrimination. See Article 10(6) of the PAIC.

72 Article 10(8) of the PAIC.

73 Article 5(1) of the SADC FIP.

74 Porterfield Matthew, 'State practice and the (purported) obligation under customary international law to provide compensation for regulatory expropriations' (2011) 37:1 *North Carolina Journal of International Law and Commercial Regulation* 161.

In contrast to Article 5(10) of the SADC FIP, some international investment tribunals have indicated that regulatory measures may constitute acts of expropriation even if they only have a substantial or significant adverse impact on the value of an investment.[75] The fair and equitable compensation, therefore, acts as a safeguard of foreign investor's legitimate expectation for their economic interest.[76] As such, FET is 'the most relied upon and successful basis for [an investment] treaty claim'.[77] This highlights the gap in the international investment framework most especially where developing countries are concerned.

The SADC FIP further requires that fair and adequate compensation be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place.[78] In this respect, such assessment should not reflect any change in value occurring because the intended expropriation had become known earlier.[79] However, the SADC FIP further requires that the assessment, where appropriate, be based on an equitable balance between the public interest and the interest of those affected, having regard to all relevant circumstances and taking into account the following: (1) The current and past use of the property; (2) the history of its acquisition; (3) the fair market value of the investment; (4) the purpose of the expropriation; (5) the extent of previous profit made by the foreign investor through the investment and (6) the duration of the investment.[80]

This study argues that foreign investors are entitled to compensation in cases where their investments are expropriated, and the SADC FIP should be commended for not doing away with the requirement to compensate investors where their investments have been expropriated or nationalised. The goal should be to balance the right of states to regulate and those of foreign investors to have their investment protected.

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75 Porterfield Matthew, 'International expropriation rules and federalism' (2004) 23:3 *Stanford Environmental Law Journa*l 4-5.

76 *Ibid.*

77 UNCTAD, 'Latest developments in investor-state dispute settlement' (2009) ITA Monitor No 1 6.

78 Article 5(2) of the SADC FIP.

79 *Ibid*.

80 There are many sub-provision in Article 5 of the SADC FIP. However, they are not going to be analysed as they are not going to add value to the study.

5.3.8.2 Pan African Investment Code

Articles 11 and 12 of the PAIC deals with expropriation and compensation respectively. In terms of Article 11(1), investments in member states should not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation, except if the following conditions are met cumulatively: (1) a public purpose related to the internal needs of the host state; (2) on a non-discriminatory basis; (3) against adequate compensation; and (4) under due process of law.

Article 11(2) affords an investor who has been affected by such expropriation a right in terms of the domestic laws of host states to prompt review of the case or the evaluation of his investment. This review should be done by a judicial officer or other independent authority of that host state in accordance with the internal and domestic procedures in the host state.[81]

Article 11(3) allows member states to take measures that are non-discriminatory in nature; that are designed and applied to protect or enhance legitimate public welfare such as public health, safety, and environment.[82] Just like the national treatment principle and the FET principle, including this exception means that, practically, it will be difficult to hold a host state accountable for this type of expropriation. The study thus argues that the PAIC should not have included these exceptions.

Article 12 deals with compensation for expropriation. In terms of this provision, whether compensation is adequate should be assessed in relation to the fair market value of the expropriated investment immediately before the date of expropriation and shall not reflect any change in value occurring because the intended expropriation had become known earlier.[83] The computation of the fair market value of the property excludes any consequential or exemplary losses or speculative or windfall profits claimed by the investor, including those relating to moral damages or loss of goodwill.[84]

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81 Article 11(2) of the PAIC.

82 *Ibid* Article 11(3). Article 11(4) of the PAIC states that Article 11 does not apply to the issuance of intellectual property rights. However, it will not be discussed in detail as intellectual property rights are beyond the scope of this study.

83 Article 12(1) of the PAIC. This provision is similar to Article 5(2) of the SADC FIP discussed above.

84 Cornford Andrew for UNCTAD, 'Dispute Settlement in International Investment Agreements and the Rules of an Indian Model Bilateral Investment Treaty' (2018) Multi-Year Expert Meeting on Trade, Services and Development Session 4 9.

Furthermore, the assessment of adequate compensation should:

> [B]e based on an equitable balance between the public interest and interest of the investor affected, having regard to all relevant circumstances and taking into account the current and past use of the property, the history of its acquisition, the extent of previous profit made by the foreign investor through the investment, and the duration of the investment.[85]

If the host state fails to pay compensation within six months from the date of its determination, such compensation will attract simple interests at the normal commercial rate where applicable at the national level of the host state.[86] It is also important to note that the exercise of the right of states to regulate may result in direct or indirect expropriation. Therefore, a balance should be struck between the rights of the state to regulate and those of foreign investors to have their investors protected against uncompensated expropriation.

5.3.8.3 Recommended provision of the proposed AU Investment Agreement

The provision of the PAIC should be included in the proposed AU Investment Agreement as it contains a balanced approach to the right of the state to regulate and those of foreign investors to be protected.

5.3.9 Investors' obligations in the host state

5.3.9.1 Southern African Development Community Finance and Investment Protocol

With regard to investors' obligations, the SADC FIP only requires investors and their investment to abide by the laws, regulations, administrative guidelines and policies of the host state for the full cycle of those investments. The SADC FIP should have elaborated on foreign investor's obligations and covered various aspects such as non-discrimination and corporate governance.

85 *Ibid* Article 12(2).
86 *Ibid* Article 12(3).

5.3.9.2 Pan African Investment Code

Unlike the SADC FIP, the PAIC contains a detailed provision that deals with the investor's obligations in Article 19.[87] Investor's responsibility in terms of the PAIC includes corporate governance,[88] socioeconomic rights,[89] responsibility not to commit bribery,[90] corporate social responsibility,[91] obligations towards the use of natural resources,[92] business ethics and human rights.[93] The PAIC should be commended for ensuring that foreign investors have obligations. It is not enough to require investors to only abide by the laws and regulations of host states. Various aspects, whether economic or social should be taken into account, and the PAIC has done exactly that.

5.3.9.3 Recommended provision of the proposed AU Investment Agreement

The investors' obligations under the PAIC should be included in the proposed AU Investment Agreement, as they are more detailed and are in line with the current direction of the IIA regime.

5.3.10 Performance requirements of host state and investors

5.3.10.1 Southern African Development Community Finance and Investment Protocol

The SADC FIP does not have a performance requirement provision. This is a major shortcoming in the SADC FIP as foreign investors should not only have obligations but should also ensure that an investment benefits the host state. Therefore, the performance requirement should be used as a yardstick to test the effectiveness of a particular investment in contributing to the economy of the host state.

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87 In this regard, investments are required to meet national and internationally accepted standards of corporate governance for the sector involved, in respect of transparency and accounting practices to ensure that investors are able to achieve this obligation. The PAIC encourages host states, their public bodies and companies to improve the legal, institutional and regulatory framework for corporate governance and any other issues such as environmental or ethical concerns. See Article 19(2) of the PAIC.

88 Article 19(2) of the PAIC.

89 *Ibid* Article 20. Article 20(1) provides that investors shall adhere to socio-political obligations including, but not exclusively, the following: (1) Respect for national sovereignty and observance of domestic laws, regulations and administrative practices; (2) respect for socio-cultural values; (3) non-interference in internal political affairs; (4) non-interference in intergovernmental relations; and (5) respect for labour rights.

90 *Ibid* Article 21 of the PAIC.

91 *Ibid* Article 22.

92 *Ibid* Article 23.

93 *Ibid* Article 23.

5.3.10.2 Pan African Investment Code

Unlike the SADC FIP, the PAIC contains a performance provision. Article 17(1) requires member states to support the development of local, regional and continental industries that provide, *inter alia,* up-stream and down-stream linkages that have a favourable impact on attracting investments and generating increased employment in member states. Article 17(2) allows member states to introduce performance requirements to promote domestic investments and local market.[94]

Even though Article 17 is couched in discretionary terms, Article 22 which relates to investors is moulded in mandatory terms. In terms of this provision, investors are required to contribute to the economic, social and environmental progress with a view of achieving sustainable development of a host state. In this regard, foreign investment protection can only occur if such investment fosters sustainable development in the host states.[95] This does not mean that foreign investment is not protected, however, the PAIC first seeks to promote investments, then to facilitate investments, and finally to protect investments that benefit the host state. This is in line with the definition of an investor and investment recommended in 5.3.3 above.

5.3.10.3 Recommended provision of the proposed AU Investment Agreement

In addition to the provision under PAIC, the proposed AU Investment Agreement should provide for the balancing of equity between small economies and relatively large economies. This is because even though African states are developing economies, their level of development differs in each state or region.

In this regard, the following provision should be added in the proposed AU Investment Agreement:

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94 Measures covered by this paragraph include, *inter alia*: (1) granting preferential treatment to any enterprise so qualifying under the domestic law of a member state in order to achieve national or sub-national regional development goals; (2) supporting the development of local entrepreneurs; (3) enhancing productive capacity, increase employment, increase human resource capacity and training, research and development including of new technologies, technology transfer, innovation and other benefits of investment through the use of specified requirements on investors; and (4) addressing historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the adoption of the PAIC.

95 Article 22 of the SADC FIP.

(1) In assessing the performance requirement of foreign investment, the level of development of each member state shall be taken into account.

(2) Member states shall not arbitrarily or unfairly assess foreign investors' performance in their respective territories.

5.4.11 Rights and obligations of host states

5.3.11.1 Southern African Development Community Finance and Investment Protocol

Article 12 of the SADC FIP deals with the rights and obligation of states to regulate. It provides that host states have a right to take regulatory measures or other measures to ensure that development in their territories is consistent with the goals and principles of sustainable development, and other legitimate social and economic policy objectives that are in line with customary international law and other general principles of international law.

Furthermore, the host state's pursuit of its right to regulate should be understood as embodied within a balance of the rights and obligations of investors and investments as well as host states, unless these rights are expressly stated as an exception to the obligations of this instrument.[96] The SADC FIP indemnifies host states from claims against them on the basis of taking regulatory measures.[97] In this regard, non-discriminatory measures taken by a host state to comply with its international obligations under treaties will not constitute a breach of the SADC FIP.[98]

The right of states to regulate is one of the most important rights states can have as it gives them control over their territories. As discussed in chapter 4, the right of states to regulate is not only a right, but a responsibility, and the wording of the SADC FIP indirectly recognises this responsibility. The inclusion of the right of states to regulate in the SADC FIP is a step in the right direction. This has not always been the case as previous generations of IIAs did not embrace the right of states to regulate.

96 *Ibid* Article 12(2).
97 *Ibid*.
98 *Ibid* Article 12(3).

5.3.11.2 Pan African Investment Code

Even though the PAIC does not mention the term the rights of states to regulate, Articles 26 to 31 of the PAIC cover the obligations of host states in their respective territories. These include *inter alia,* obligations to: Negotiate and implement state contracts,[99] cooperate on issues that encourage and facilitate the use of public private partnerships,[100] not embark on anti-competitive investment conduct,[101] promote and encourage the transfer and acquisition of technology,[102] establish frameworks for cooperation and coordination between National Central Banks,[103] The PAIC deals with these obligations in detail, however, a detailed discussion of these obligations are beyond the scope of the study as they are of procedural, rather that substantive nature. Having stated this, the PAIC should be commended for providing details of how host states are supposed to execute their obligations in various sectors.

5.3.11.3 Recommended provision of the proposed AU Investment Agreement

The right of states to regulate in the SADC FIP should be maintained in the proposed AU Investment Agreement.

5.3.12 Intellectual property rights, traditional knowledge and cultural diversity

5.3.12.1 Southern African Development Community Finance and Investment Protocol

The SADC FIP does not deal with intellectual property rights or traditional knowledge.

5.3.12.2 Pan African Investment Code

Unlike the SADC FIP, the PAIC contains a provision dealing with the intellectual property rights and traditional knowledge. Member states are required to ensure the enforcement of intellectual property rights within their territories, and in accordance with the rights and obligations under the Trade Related Aspects of Intellectual Property Rights Agreement,[104] and other relevant international instruments.[105] Furthermore,

99 *Ibid* Article 26.
100 *Ibid* Article 27.
101 *Ibid* Article 28.
102 *Ibid* Articles 29 and 30.
103 *Ibid* Article 31.
104 Agreement on Trade Related Aspects of Intellectual Property Rights.
105 Article 25(2) of the PAIC. Article 25(2) allows member states to provide exceptions to the exclusive rights conferred by an intellectual property right, and allow for its use without the

Article 25(3) requires member states and investors to protect traditional knowledge systems and expressions of culture as well as genetic resources that are sought, used or exploited by investors; or are otherwise relevant to their contracts, practices and other operations in such member states, in accordance with generally accepted international legal standards and best practices.

In this regard, member states should provide, in line with national laws, principles for the patenting of biological materials or of traditional knowledge systems and expressions of culture for the protection of local communities in such member states.[106] Article 38 of the PAIC broadly deals with cultural diversity and allows member states to adopt policies on cultural and linguistic diversity in the promotion of investments.

These are important provisions in the contemporary IIAs as there is a growing need to protect Africa's traditional knowledge and systems. For the PAIC to recognise this need, it is really a step in the right direction, which has set the tone that Africans have systems that are worth recognising and protecting. This is a major departure from the traditional setup of IIAs, as they recognise the uniqueness of Africa, and this should not only be included in Intra-African IIAs, but also in IIAs with non-Africa states.

5.3.12.3 Recommended provision of the proposed AU Investment Agreement

The provision under the PAIC should be maintained in the proposed AU Investment Agreement.

5.3.13 Access to information and transparency

5.3.13.1 Southern African Development Community Finance and Investment Protocol

Article 7 of the SADC FIP provides for transparency. The first paragraph of this provision requires member states to promote and establish predictability, confidence, trust and integrity by adhering to and enforcing open and transparent policies, practices, regulations and procedures.[107] The second paragraph requires member

authorisation of the right holder, including use by the government or third parties authorised by the government.

106 Article 25(4) of the PAIC.

107 Article 7(1) of the SADC FIP.

states to notify the secretariat of the introduction of regulations within three months.[108] This provision is necessary as host states should account for actions which may affect the substantive and procedural rights of foreign investors.

5.3.13.2 Pan African Investment Code

The PAIC does not have a section that deals specifically with transparency. However, its Preamble affirms the desire of member states to promote a corruption free investment and trade regimes, and improved laws and regulations that promote transparency and accountability in governance. The PAIC should have required member states to ensure that they deal with each other and foreign investors in a transparent manner.

5.3.13.3 Recommended provision of the proposed AU Investment Agreement

With regard to transparency, the provision of the SADC FIP should be maintained in the proposed AU Investment Agreement.

However, in addition, the following provision should be added:

(1) Member states shall exchange information concerning investment in their respective territories. Whenever possible, the information shall, reveal, in advance, useful data on procedures and special requirements for investment, business opportunities and expectations for major projects.

(2) To achieve this purpose, member states shall provide, when requested: (a) Regulatory conditions for investment; (b) public policies and specific incentives that may affect investment; (c) Legal framework for investment, including legislation on the establishment of companies and enterprises; (d) related international treaties; (e) available infrastructure and public services (f) Social and labour requirements; (g) information on specific economic sectors or segments previously identified; (h) state and local government's projects and understandings on investment.

(3) Member states shall wherever possible, ensure that its laws, regulations and administrative rulings of general application are published in the shortest possible time

[108] Please note that the notification is only for information purposes.

and accessible, if possible, by electronic means, so as to enable interested people and the other stakeholders to become acquainted

(4) Member states shall give due publicity of this Agreement to their respective and private financial agents, responsible for technical evaluation of risks and the approval of loans, credits, guarantees and related insurances for investment in the territory of the other member state.

(5) Member states shall consult periodically on ways to improve transparency practices set out in this Article, publication of laws and decisions relating to investment.

5.3.14 Accommodating least-developed states

5.3.14.1 Southern African Development Community Finance and Investment Protocol

The SADC FIP contains a provision that covers guidelines on how to deal with least developed states. In this regard, Article 18(1) requires member states to establish conditions that favour the participation of least-developed states within the SADC region in the economic integration process, based on the principles of non-reciprocity and mutual benefit. Furthermore, for the purpose of ensuring that least-developed states within the SADC region receive effective preferential treatment, member states are required to investigate the establishment of market openings as well as the setting up of programmes, and other specific forms of cooperation in relation to derogations of investment incentives.[109]

As highlighted above in chapter 4, failure to recognise different levels of development of African states when negotiating IIAs has hindered the successful implementation of many of these agreements. The recognition of this challenge in the SADC FIP should be commended as an IIA means different things for different states depending on their level of development.

[109] Article 18(2) of the SADC FIP.

5.3.14.2 Pan African Investment Code

Article 33 of the PAIC deals with protection of the least-developed states. However, its focus is on finances rather than the overall economic factors. In this regard, it states that in the event of serious balance-off-payment and external financial difficulties or threat thereof, member states may adopt or maintain restrictions on investment under the provisions of the PAIC. However, these measures should be temporary and should be phased out progressively when there are changes in the initial circumstances surrounding the use of these measures.[110] It is important to point out at this juncture that, it is insufficient to focus only on difficulties regarding the payment of balances. Therefore, the PAIC should further include various aspects of performance requirement by weak states. These are dealt with in detail in chapter 4, and they will not be repeated in this section.

5.3.14.3 Recommended provision of the proposed AU Investment Agreement

In addition to the above provisions under both the SADC FIP and the PAIC, the proposed AU Investment Agreement should further include the following:

(1) Member states shall fulfil their obligations in good faith.

(2) Member states shall recognise the disparities in the ability of member states to shape relevant rules through domestic and international institutions and/or processes.

(3) In assessing member states' performance, the level of development of each member state shall be taken into account and assessed on a country-by-country basis.

(4) In assessing performance, member state's individual circumstances and capabilities shall be taken into account.

(5) If member states foresee the possibility of failure to perform in terms of the agreement, that state shall notify and provide reasons to the Secretariat of the AU in writing as soon as it becomes aware of such failure.

110 Article 33 of the PAIC.

5.4 Looking back, looking forward: Concluding thoughts on the ability of the SADC FIP and PAIC to adequately regulate foreign direct investment in Africa

In line with design, structure and approach of this thesis, which requires looking at the past, the present and the future, this chapter looked at the two most advanced investment instruments in Africa that currently regulate FDI in Africa. The international investment law regime is going through a period of review, and it is clear from the discussion above that the drafters of the SADC FIP and the PAIC were inspired by the current international reform discussions. Furthermore, the previous chapters made one fundamental factor abundantly clear: The previous foreign investment law regime was made for Africa as a replacement of colonial rules for the protection of capitalists. It is for this reason that the two instruments above attempted to correct the lingering historical baggage that continues to engender Africa's economic development and *relations*.

Having discussed an IIA at the regional level, and an IIA at the continental level, the question that begs for an answer is: Is foreign investment in Africa better regulated at the regional or continental level? There are different views regarding the ideal level for regulating foreign investment in Africa. Páez Laura argues that since there are limitations to what RECs can do, FDI should be regulated at the continental level.[111] However, she posits that the progress made at the regional level should be taken into account at the continental level.[112]

Ngobeni Tinyiko posits that FDI in Africa should be regulated at the continental level since this is in line with the harmonisation theme of African regional integration through AfCFTA Investment Protocol.[113] However, he argues that this instrument is not aligned to the direction being taken by AfCFTA. Mbengue and Schacherer take the argument further and posit that even though FDI in Africa should be regulated at the continental level, Africa is not yet ready for a binding legal instrument, and as such, a soft law

111 Páez Laura, 'Bilateral investment treaties and regional investment regulation in Africa: Towards a continental investment area?' (2017) 18 *Journal of World Investment and Trade* 403.

112 *Ibid.*

113 Ngobeni Tinyiko, 'The relevance of the Draft Pan African Investment Code (PAIC) in light of the formation of the African Continental Free Trade Area' https://www.afronomicslaw.org/2019/01/11/the-relevance-of-the-draft-pan-african-investment-code-paic-in-light-of-the-formation-of-the-african-continental-free-trade-area/ (accessed 14 April 2021).

instrument such as the PAIC is ideal.[114] Denters Erik and Gazzini Tarcisio posit that FDI is better regulated at the sub-regional or regional level.[115]

The study argues that foreign investment in Africa should be regulated at both the regional and continental levels. This is one of the main reasons for choosing to compare the SADC FIP and the PAIC. However, there must be harmonisation between these two levels, and a binding continental investment agreement should take precedence in a case of conflict. Different countries, RECs and continental bodies have adopted varying approaches to dealing with the regulation of investment, and this continues to be a challenge in Africa. A binding instrument at the continental level will resolve this issue.

The truth is that diversity on the African continent is large. No two countries have the same laws at domestic levels. The differences among African countries are significant and often unpredictable on the basis of other attributes at the national level.[116] For this reason, even though states should be allowed to regulate FDI at the regional level, IIAs should be in line with the proposed AU Investment Agreement. The model or soft law approach to regulating foreign investment in Africa will continue to hinder successful implementation of Africa's progress towards sustainable economic goals and *relations*. It is for this reason that the study recommends that an IIA which is separate from the AfCFTA should be introduced.

This will deal with the issue of possible overlapping and multiplying of reform efforts and negative effects on the multiplicity and complexity of international conventions that establish rules for regulating the treatment of investors in African states. There must be a higher level of coordination among African states to unite efforts and attempts in the development of international rules and provisions regulating treatment of investments.

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114 Mbengue Makana and Schacherer Stefanie, 'The "Africanisation" of international investment law: The Pan-African Investment Code and the reform of the international investment regime' (2017) 18 *Journal of World Investment and Trade* 417.

115 Denters Erik and Gazzini Tarcisio, 'The role of African regional organisations in the promotion and protection of foreign investment' (2017) 18 *Journal of World Investment and Trade* 465.

116 Van der Walt Andries, *Constitutional Property Clauses: A Comparative Analysis* (Juta 1999) 15-16.

Both the SADC FIP and the PAIC have the potential to be dominant or even an exclusive source of investment rules in Africa, and to also define the African investment legal landscape which will in turn inform IIAs between African states. The most outstanding features of the SADC FIP and the PAIC is trying to find a balance between providing an effective and substantive protection of investments, while preserving the right of host states to maintain their public interest obligations and achieve sustainable economic development and *relations*. To achieve this balance, policymakers of both instruments worked from an investor's context. As such, the approach taken was to draft rules and general provisions where most of the provisions begin by stating general objectives or principles of the protection of investors and their investments followed by exception to these rules.

Thus, the SADC FIP and the PAIC have to a certain extent redefined the African investment legal landscape with the purpose of turning African states into global role players. Both have reformulated some of the traditional treaty language, added new provisions and omitted certain provisions completely. The previous generations of IIAs have been criticised for being biased in favour of foreign investors, and for restricting policy space for host states. The effect of this in some cases was that host states were exposed to large claims when they attempted to implement domestic measures that were in conflict with the biased investment provisions.

It is important to note that the SADC FIP and the PAIC do not fundamentally contest the current system of IIAs, they rather attempt to reshape the existing international investment legal framework according to their own respective priorities. In other words, the two instruments are generally drafted from the basis that the current investment legal framework should not be done away with completely but should only be amended. This is in line with the argument in this study that there should be a moderate reformation of foreign investment in Africa.

The distinguishing factor between the SADC FIP and the PAIC is that the latter created two standards of treatment of foreign investors, one for intra-African investors and one for investors from outside Africa, while the SADC FIP only covers investors from member states. Non-discrimination has emerged as one of the most important safeguards afforded to foreign investors under the treaty system. The gist of this principle is that states cannot discriminate against investors based on their nationality.

Non-discrimination is frequently exemplified in international investment law by the national treatment, MFN, and FET principles.[117]

The proposed AU Investment Agreement takes the reformation further by doing away with provisions such as MFN, FET and national treatment. Replacing the FET principle with fair administrative and administrative process would allow host states to regulate in the public interest while ensuring that foreign investors are protected. Disputes either between member states or between member states and foreign investors may affect the relations of all stakeholders. It is for this reasons that the study has recommended (in chapter 4) that the goal should be to achieve sustainable economic development and *relations,* rather than just sustainable economic development.

A viable African continental investment area which amends the existing investment regime, in favour of more harmonised system that builds on existing institutions and processes is needed. This is in line with the stance that the study took in chapter one where three bases for reformation are discussed. In this regard, the study argued that even though there are many gaps in the current investment legal regime, it should only be amended in so far as it does not align with Africa's sustainable economic development and *relations* objectives.

5.5 Conclusion

This chapter analysed the two most developed IIAs in Africa with the intention of charting an improved version on an IIA that may assist in realising Africa's economic liberalisation. Nonetheless, economic liberalisation is a complex process that cannot be accelerated by a single panacea. It necessitates a slew of sound policies, laws, and institutions spanning a wide range of human activity. The international investment law regime is going through a period of review and revision, and it is clear from the discussion above that the drafters of the SADC FIP and the PAIC were inspired by the current international reform discussions. To a certain extent, they have embraced the change that is currently happening both at regional and international levels.

The study took a closer look at the two most contemporary investment instruments which claim to provide the most balanced rights and obligations of investors as well as

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117 Tinashe Kondo, 'A comparison with analysis of the SADC FIP before and after Its amendment' (2017) 20 *Potchefstroom Electronic Law Journal* 9.

host states in Africa. The SADC FIP and the PAIC reflects a consensus among African states on the shaping of international investment law landscape. These instruments thus endow Africa with a voice in the international debate on the future and reform of the investment regime. In both instruments, a consensus seems to emerge that regional and continental collective actions may be necessary to prevent African states from attracting the much-needed investment by unfairly competing against each other.[118] There must therefore be harmonisation of foreign investment at the regional and continental levels.[119]

The drafters of the SADC FIP and the PAIC did not intend to disregard the protection of investors and their investments but stressed the need to achieve an overall balance of rights and obligations among member states and foreign investors. Therefore, both the SADC FIP and the PAIC should be commended for putting in place investment instruments, which can be used as yardsticks for regulating investments in Africa. Notwithstanding the strides made in these two instruments, there are still gaps in the African Investment landscape, and the proposed AU Investment Agreement aims to deal with them. This will in turn reduce the number of overlapping IIAs and exclude provisions which do not align with Africa's economic development goals.

The proposed AU Investment Agreement will be an anchor for realising the common and unique objectives of African states. The next chapter continues with the reformation discussion and recommends provisions that are not in the SADC FIP or the PAIC, but that should be included in the proposed AU Investment Agreement. This chapter is already dense, hence the decision to further this discussion in a separate chapter.

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118 cf Daniela Zampini*, Developing a Balanced Framework for Foreign Direct Investment in SADC: A Decent Work Perspective* (Monitoring Regional Integration in Southern Africa Yearbook 2008) 4.

119 Harmonisation is the co-ordination and merging of processes, institutions and systems among aid agencies. See Department for International Development Working Paper 15 'Evaluating Progress Towards Harmonisation' http://www.oecd.org/countries/tanzania/35242854.pdf (accessed 12 April 2020).

CHAPTER 6

RECOMMENDATIONS: CHARTING PROVISIONS THAT ARE NOT INCLUDED IN BOTH THE SADC FIP AND THE PAIC, BUT THAT SHOULD BE INCLUDED IN THE PROPOSED AU INVESTMENT AGREEMENT

6.1 Introduction

As indicated throughout the study, there has been changing economic realities and multiple crises where investment policymakers in Africa are experiencing a paradigm shift. Inclusive growth, sustainable development and relations have emerged as key policy objectives. This chapter is a continuation from the previous chapter, and deals with provisions that are not in the SADC FIP or the PAIC but should, however, be included in the proposed AU Investment Agreement. These provisions will either allow for host states to have more control over their economic space, ensure that states are not overwhelmed by entering into this IIA, or and strengthen economic relations in Africa.

6.2 New provisions that should be included in the proposed AU Investment Agreement

6.2.1 Founding provisions

The AU through Agenda 2063 envisages an Africa that (1) is politically united; (2) has a strong cultural identity, common heritage, shared values and ethics; (3) whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children; and (4) is a strong, united and influential global player and partner.[1] This should not only form the basis of Agenda 2063, but should also be incorporated within IIAs in Africa, as it has the potential to build a strong harmonised Africa.

Therefore, the above should form part of the founding provisions of the proposed AU Investment Agreement. Furthermore, the points below should be included in the proposed AU Investment Agreement:

[1] AU, 'Agenda 2063: The Africa we want' https://au.int/en/agenda2063/overview (accessed 20 July 2021).

(1) Member states recognise the injustices caused by colonialism and marginalisation of African states and their people.

(2) Member states recognise the need to radically redress historical, social as well as economic inequalities and injustice caused by colonialism.

(3) The AU Investment Agreement is founded on effective governance, equality and dignity of states and their nationals in the achievement of sustainable economic development and relations.

(4) Member states shall promote the values and principles of democracy, human rights and the right to development.

(5) Member states endeavour to foster economic development, protect the environment, uphold the rights, values, and principles of this Agreement at national and regional levels with a purpose of achieving a progressive realisation of socio-economic rights.

(6) Member states shall deal with the pressing policy challenges which include: Strengthening the development dimension of the investment policy regime; ensuring sufficient policy space for host countries by balancing public and private interests; addressing serious deficiencies in the current international investment system and resolving issues stemming from the increasing complexity of the international investment policy regime.

(7) Member states shall implement the objectives, apply the principles and values, and respect the commitments enshrined in this Agreement.

6.2.2 Pan-African values and indigenous rights

Notwithstanding that the issue of infusing values into international law has been a subject of discussion in the past few years,[2] the relevance of values in IIAs has not been widely covered. As pointed out in chapter 3 above, Africa has always entrenched

[2] To read more on this see Mazzeschi Riccardo, 'Coordination of different principles and values in international law' (2019) 61:1 *German Yearbook of International Law* 209–250; Mazzeschi Riccardo and Alessandra Vivian, 'General principles of international law: From rules to values?' in Mazzeschi Riccardo and De Sena Pasquale, *Global Justice, Human Rights and the Modernisation of International Law* (Springer International Publishing 2018) 113-161.

values in its systems. In this chapter, the discussion showed that African principles and values, whether moral, political or economic, occupy a very wide area in the realm of law. With the end of the colonial era, one wonders if Africans are still rooted in the values that identify them. In other words, is there a missed opportunity for African states to define their own investment policy space which speak to and take into account their unique values? One of the ways of overcoming the colonial legacy is by concluding IIAs that embrace African values.

The Constitutive Act of the AU does not recognise African values. The policymakers at the AU level recognised this error and included African values in Agenda 2063. Aspiration 5 of Agenda 2063 aspires to have an Africa with a strong cultural identity, common heritage, values and beliefs. The first report of Agenda 2063 shows that Africa only achieved an aggregate of 12 percent towards this aspiration.[3] The AfCFTA Agreement does not incorporate African values, it only states that the AfCFTA Agreement should not be interpreted as derogating from the values of other instruments.[4]

Thus far the incorporation of African values in the IIAs is a missed opportunity, however, the AU can still remedy this by incorporating them in one document which is meant to be an umbrella of investment in Africa. Values and principles should occupy a central place in intra-African IIAs. If these IIAs were to reflect African principles and values in a practical sense, the potential to have a transformative effect on sustainable economic development and relations could be higher.

In this regard, the proposed AU Investment Agreement should contain the following provisions:

(1) Member states recognise peace, humanness, inclusiveness, unity and trust as guiding values of this Agreement.

(2) Member states shall modernise, improve and entrench African values in order to ensure a successful implementation of this Agreement.

3 Agenda 2063: First Continental Report on the Implementation of Agenda 2063 (2020) 7.
4 Article 12 of the AfCFTA Agreement.

(3) Member states shall promote moral values and indigenous rights inherent in the activities of foreign investors with a view to ensuring transparency in their respective states.

(4) When drafting national legal instruments that are related to investment, member states shall integrate and take into account African values and indigenous rights.

6.2.3 Equality and equity of member states

The discussion regarding equality and equity of member states relates to how host states should treat each other. History has shown us that there is a need for member states to infuse the principles of equality and equity in IIAs. The principle of equality and equity of member states in an IIA should be a fundamental element of any successful implementation of these types of treaties. Reducing inequalities between African states will address the power imbalance that currently exists and achieve the realisation of a fair economic landscape.

To achieve equity and equality of African states, member states will need to redress specific economic situations of historically harmed states. This may be done through the provision for special and differentiated treatment for least developed countries.[5] Such special treatment could refer not only to orthodox issues such as investment incentives, but also to specific forms of exceptions and carve outs, and by emphasis on freedom of governmental regulation.[6] To respond to the need to find a way to properly implement IIAs in Africa, member states will have to recognise the requirement for fundamental change to promote equity in ways that do not compromise sustainability of foreign investment. Therefore, reducing inequalities between member states should be part of the objectives, and not just an end in itself. It is noteworthy that inequalities in global distribution of income and wealth have emerged because of, *inter alia*, a historical process that was pervaded by grievous wrongs.[7]

To achieve the above, the proposed AU Investment should contain the following:

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5 Delany Louise *et al*, 'International trade and investment law: A new framework for public health and the common good' (2018) 602 *BMC Public Health* 5.

6 *Ibid.*

7 *Ibid* 3.

(1) In order to achieve equality and equity of African states, member states shall support the effective participation of countries and the participation of citizens within these countries in developing national and international policies related to foreign investment, with special emphasis on the poor countries and population groups.

6.2.4 Trust, confidence and reputation

Chapter four discussed in detail the need to have confidence and trust in the negotiated and concluded IIAs. In this regard, the proposed AU Investment Agreement should contain the following provision:

(1) Member states shall ensure that trust, confidence and reputation is maintained when they are taking regulatory measures in their respective states, and when dealing with each other on individual basis.

(2) Member states shall balance the interests of private investors and the policy space promoting regional integration.

(3) In order to strengthen transparent, fair, open and consultative processes for IIAs development and implementation, member states shall keep in mind the need to review various IIAs provisions in Africa.

6.2.5 Liberalisation of investment

For decades, African states have not only been struggling to get back their freedom from the colonial powers' economic dominance, but also to gain back their own economic sovereignty as well as to gain access to the global market.[8] As a result, nationalism and protectionist approaches which were in themselves a result of the anti-colonialist movements, spread throughout the colonised parts of Africa. Thus, as part of decolonisation, African states are now endeavouring to recover control over vital sectors of their economies from foreigners, who are largely investors of the former colonial powers.[9] Notwithstanding this effort, African states are still well below the

8 cf Thanadsillapakul Lawan, 'Investment liberalisation under FTAs and some legal issues of international law' (2010) 8 *Korea University Law Review* 2.

9 *Ibid.*

Gross Domestic Product (GDP). It is for this reason that African states should liberalise their inter-African investments. They need to take full advantage of the opportunity provided by integration and harmonisation of the African economy. Reflected by membership in the AU, it is essential that African countries build up appropriate supply capacity to be able to meet the standards of consumers and governments, most especially in leading sectors of growth for host states.

To ensure that there is investment liberalisation in Africa. The following should be included in the proposed AU Investment Agreement:

(1) In order to achieve investment liberalisation, member states shall reduce investment regulatory barriers to generate investment that is based on market consideration and advance fair competition.

(2) Member states may liberalise inward investment systems; privatise certain portion of state-run industries; decrease government expenditures; reform tax, investment and banking structures; and reduce wage as well as price controls.

(2) Member states shall stimulate investment exports where there is a relatively large margin in the development, provided that the costs are low. Where member states are in a similar level of development, they shall reduce investment, provided the costs of doing so are low.

(3) Member states shall reduce complex processes to make the available opportunities more visible for investors, including small and medium size investment.

6.2.6 Standardisation of common provisions in investment agreements with third parties

IIAs on the African continent are said to be fragmented, and as such many scholars and economists alike have highlighted the need to systematise and standardise these IIAs. Even though standardisation and systematisation have the potential to limit host states from tailor-enacting domestic investment policies which are relevant to their particular issues, they will ensure that there is a balanced and predictable investment landscape. In this regard, the proposed AU Investment Agreement should include the following:

(1) Member states shall ensure that the common provisions of IIAs concluded with third party states are standardised and systematised to ensure that there is a predictable investment environment.

(2) Common provisions of a typical IIA with third party states shall mirror the common provisions in this Agreement.

6.2.7 Public participation

Public participation in international economic law is not relatively new, even though it has not been widely embraced.[10] The concept of public participation came about after the diminished faith in the ability of governments to represent all stakeholders; a sentiment which made the traditionally state-centred structure of many organisations, appear under-inclusive and inadequate.[11]

Many authors have written widely on public participation in relation to the protection of investment. However, public participation should also be included in international investment law. Even though individuals are generally not subjects of international law, they should be consulted on issues that affect them including those which are international in nature. Both informal public participation such as meetings, symposiums and other types of consultative dialogue as well as formal public participation such as submissions through the normal system of traditional constituencies should be embraced in order to make contact with a wider audience in the society.

Considering the above, the proposed AU Investment Agreement should contain the following public participation provision:

(1) Member states shall encourage and recognise the involvement of the private sector and the public sector as key players in achieving sustainable economic development and relations.

10 During the 1990s, there were numerous calls to make the Bretton Woods institutions such as the World Bank, the International Monetary Fund (IMF), and the World Trade Organisation (WTO) more transparent and publicly accountable.

11 Chi Carmody, 'Beyond the proposals: Public participation in international economic law' (2000) 15:6 *American University of International Law Review* 1321.

(2) Member states shall allow public deliberations on issues that are related to investment.

6.2.8 *Anti-corruption*

As pointed out in chapter four, corruption gets in the way of boosting shared prosperity among stake holders. It has a disproportionate impact on the poor and most vulnerable, increasing costs and reducing access to services. In this regard, the proposed AU Investment Agreement should provide the following:

(1) Member states shall take reasonable measures and efforts to prevent as well as combat corruption regarding matters covered in this Agreement in accordance with their laws and regulations.

(2) Investors and their investments shall not, prior to the establishment of an investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the host state, or a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party to act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relations to an investment.

(3) A violation of this Article by an investor or an investment shall be considered a violation of the host state's domestic law governing the establishment and operation of such investment.

(4) Host states shall prosecute, and where convicted, penalise investors who have violated the applicable law in accordance with their applicable domestic laws, policies, and regulations.

6.2.9 Temporary safeguard measure

In chapter four the study pointed out that even though African states are developing, their level of development varies. African states should endeavour to deliver inclusive and sustainable development, as the continent refocuses on the struggling economic

development and independence of African states.[12] It is for this reason that the study argues that Africa should not follow a one-size-fits-all approach to regulating foreign investment on the continent.

In this regard, the proposed AU Investment Agreement should contain the following:

(1) In the event of serious balance of payments and external financial difficulties, or the threat of such difficulties, member states shall impose or maintain temporary restrictions on payments or transfers related to investments.

(2) When dealing with each other, member states shall ensure that the integrity of a party's financial system is maintained.

(3) In order to eliminate pressure on the balance of payments, member states shall maintain a level of financial reserves adequate for the implementation of its program of economic development.

(4) The restrictions referred to in this Article shall not exceed the necessary temporal safeguard measures which are required to deal with a particular circumstance.

6.3 Strategies for successfully implementing the proposed AU Investment Agreement

The study identifies four levels for ensuring that the proposed AU Investment Agreement is successfully implemented. The first one is the negotiation level, which advocates for policymakers in Africa to be guided by the realities of African states. At this level, there should be a broad investment policy road map for economic growth as well as sustainable economic development and *relations*. As such, they should define the roles of stakeholders in the FDI's strategic chain. This will necessitate African states that are developing IIA policies with the goal of increasing productive capacity and international competitiveness, with critical elements including human resource and

[12] *Ibid.* The AU's economic plan, as articulated in Agenda 2063, was to first develop a continent-wide FTA. Over time, this FTA will be converted into a customs union and, ultimately, a continental economic union (with a common currency and an African Central Bank). Investment is part of most regional and continental economic initiatives and will form an integral role to the success of the intended customs union.

skills development, technology and know-how development, infrastructure development, and enterprise development.

The second level of implementation strategies is the formalisation level, which establishes rules and regulations for balancing the rights and foreign investors with those of host states. This will ensure that FDI is geared toward long-term economic development and *relations*. Positive development effects of FDI do not always occur on their own, and FDI can have negative side effects. To reap the benefits of IIAs and related investment, policies that go beyond investment policies must be in place during the implementation stage. Member states should strive to enhance the regulatory framework and maximise the development benefits of investment in their respective countries.

Once the negotiations have been done and the formal rules are put in place, the third level is the execution stage. Here member states stage does what they undertook to do. The fourth and final stage of implementation strategy is an evaluation of effectiveness. This strategy necessitates policymakers to ensure that the concluded IIA continues to be relevant and effective. Measuring the effectiveness of policies is an important aspect of FDI policymaking. Investment policy should be based on a set of explicitly stated policy objectives with clearly defined priorities and time frames. Thus, assessing progress in policy implementation and verifying the application of rules and regulations at all levels is critical. It is important to note that the implementation stage does not commence after the formal level, it starts right from the negotiation stage hence the need to be mindful of each stakeholder's performance capacity.

Having discussed the four implementation strategies, it is important to note that investment promotion remains part of the host state's obligation. This will ensure that there is no additional obligation towards investors or lower regulatory standards, while host states attempt to harness foreign investment for sustainable development, economic development and relations. A cross-thematic dialogue among specialists and negotiators needs to be established when negotiating an IIA. The study encourages policymakers to consider the proposed AU Investment Agreement as a unique opportunity for complementarities and minimising undesirable overlaps. Policymakers can further use the proposed AU Investment Agreement as a reference for future negotiations and renegotiations of treaties between African states and non-

African states. Adopting a common African approach ensures coherence and provide greater negotiating leverage on the global scale.

According to the findings of the study, foreign investment, particularly intra-African investment can drive regional and continental integration, economic growth, and poverty reduction. However, Africa's investment policy landscape is fragmented, with ambiguous treaties that may create uncertainty and encroach on the policy space that is required for long-term economic development and relations.[13] As a result, the proposed AU Investment Agreement has the potential to restructure and unify the continent's investment policy. Deep continental economic integration requires RECs and each member state to be strengthened by streamlining their mandates and obligations. African states should further strengthen and resource their existing instruments aimed at promoting good governance, peace, and security at the national, regional, and continental levels. These will create the ideal conditions for the pursuit of Africanised and reformed foreign investment legal framework.

6.4 Conclusion

This chapter outlined new provisions to include in the proposed AU Investment Agreement. The proposed AU Investment Agreement is a revolutionary project that fundamentally necessitates the remaking of the international economic order to sustain subordinating relations between African states, rather than discouraging African states from pursuing reforms. Even though some of the recommendations in this chapter are radical, African states should continue to seek opportunities to cascade these changes, even if in small steps, as and when they arise.

The reformation and Africanisation of IIAs through the proposed AU Investment Agreement challenges the disruptive and exploitative impact of IIAs regimes. Ultimately, it has the potential to provide African states with tools that are necessary to attract investment, and harness it for sustainable economic development and relations. This chapter highlighted that the most important step in the realisation of Africa's economic objectives lies in the implementation of policies from all stakeholders. The recommendations in this study may assist in framing policy choices and institutional arrangements that are required for effective implementation of the proposed AU

13 *Ibid.*

Investment Agreement. It is about dispelling the ‘crisis of implementation’ of the AU decisions and initiatives, and validating the AU and its economic agenda. The next chapter is a concluding chapter. It contains both the summary and conclusion of the study.

CHAPTER 7

CONCLUSION

7.1 Summary of chapters

The study is centred around the Africanisation, reformation and decolonisation of the foreign investment legal framework in Africa. Policymakers in Africa continue to face multiple challenges. The study highlighted the most important ones in this regard, which are: how to strengthen the sustainability dimension of IIAs; how to preserve appropriate regulatory space for host states; how to deal with the complexity of a fragmented treaty regime that overlaps and is incoherent; and how to incorporate Africa's unique challenges in a practical way.

The study is structured in a sequential manner in that it traces the past, interrogates the present in order to plan for the future. It does this by identifying events that contributed to the development of foreign investment throughout the centuries. Throughout the thesis, the study debunked and challenged some prevailing notions on the regulation of foreign investment in Africa. In essence, the study is written from a de-colonial, Africanised and reformed perspective.

Chapter one:

Chapter one identified the legal issue that is central to the study. In this regard, it problematized the lack of a binding and standalone instrument at the AU level that is aimed at regulating foreign investment as a basis for the study. It has further problematized the Eurocentric approach to regulating FDI in Africa. The main research question of the study is: *How can the AU structure and align foreign investment in order achieve its sustainable economic development and relations goals?* In line with the legal problem and research question identified, the study sought to provide a new legal framework for regulating FDI in Africa through a proposed AU Investment Agreement.

Chapter one also dealt with two prominent approaches regarding the reformation of foreign investment on the African continent: Namely, radical Africanisation and moderate Africanisation of IIAs. In this regard, the study aligned itself with the moderate Africanisation of IIAs, since this reformation process requires eliminating what does not work and retaining what works for foreign investment in Africa.

Chapter two:

Chapter two underscored the Western historical events that shaped the foreign investment landscape through African eyes. It first dealt with three economic theories that influenced the type of approach to foreign investment. Here, the study first highlighted the classical Marxist theory which advocates that foreign investment shapes the economic environment in a host state; and as such argues that foreign investors should always be protected. The study then dealt with the dependence theory which advocates that if states want to achieve economic freedom, they should not solely depend on foreign investment. The study then dealt with the hybrid theory which encompasses both the classical Marxist theory and the dependence theory by advocating that foreign investment when regulated properly may boost the economy of a states. The study pointed out that the hybrid theory is the correct one since it balances the rights of foreign investors and host states.

Chapter two further looked at general principles of international law that have shaped foreign investment law as we have come to know it today. The chapter further critically analysed common provisions of IIAs that are aimed at protecting foreign investors. In this regard, the study argued that principles such as the national treatment and the FET should be done away with as they are difficult to practically implement in developing states as host states will argue that they are regulating in the public interest.

Chapter three:

Since chapter three is a de-colonial chapter, it first defined terms such as Africanisation, reformation, decolonisation and Eurocentrism. Chapter three underscored the historical events that shaped the foreign investment landscape in Africa to what we have come to know as foreign investment law. It traced the economic development in Africa from the pre-colonial era through the colonial era all the way to the post-colonial era. This chapter took a de-colonial approach with the purpose of highlighting the place of African history in the contemporary IIA framework. It did this by bursting the myth that Africa did not contribute to the development of international law or international economic law. In this regard, the study argued that Africa did not only contribute to the development of African customary law, but to other fields of law.

The study further debunked a notion by many scholars and historians that African states could not have contributed to the field of law since they were not recognised as states. In this regard, the study, criticised scholars for referring to African states as 'new' independent states, which suggest that African states only attained statehood in the 1960s. The study sought to and did provide historical events that proved that African states existed and had inter-African relations during the pre-colonial era. Chapter 3 further interrogated why and how the OAU was formed as well as the reason for its demise and found that its failure to meet the cumulative results of, *inter alia*, economic freedom affected its relevance. This chapter also highlighted how the colonial power took over Africa during the Berlin Conference, and how African leaders resisted colonialism in the territories. Additionally, it also alluded to the fact that force and intimidation were used by the colonial power to take over Africa.

Chapter four:

Chapter 4 looked at the efforts made by African states at the continental and regional level to regulate investment with the purpose of achieving sustainable economic development. In this regard, it looked at the structure of the AU and how economic freedom has been incorporated into Agenda 2063 aspirations. The study highlighted aspirations, successes, failures and gaps of Agenda 2063 in achieving sustainable economic development and relations. The chapter then critically analysed the AfCFTA Agreement by scrutinising closely its objectives, achievements and identified gaps in this instrument.

The study then moved on to critically analyse the attempts of African RECs to regulate and harmonise foreign investment. African RECs play a significant role in the development of international investment law by adopting their investment rules. The RECs adopted foreign investment instruments that they believe are more appropriate in light of African countries' specific needs. Following that, it critically discussed contemporary economic challenges confronting African states. The study concluded that the effectiveness and challenges of IIAs had been addressed in a number of research projects. However, few scholars addressed the fact that, while foreign investment is important for long-term economic development, it should not be the sole basis for concluding IIAs.

Chapter four showed that utilising the experiences of developed countries to optimise Africa's economic and development goals may not be appropriate and practicable, most specially because African states are still developing. After discussing the challenges and successes of the AU, the study went on to answer the question whether the AU has outlived its relevance, and whether Africans should consider forming a new continental bloc. The study answered this question in the negative, but argued that Africa needs to reassess, *inter alia,* its investment policy framework.

Chapter five:

Having identified the successes, challenges and gaps in the African foreign investment landscape, the study compared the SADC FIP and the PAIC in order to assess the ability of these two powerful instruments in regulating foreign investment. In other areas the chapter found that the instruments can provide a balance between the right of foreign investors and those of host states. However, there were many instances where the study argued that there should be a change in some of these provisions. Where the study found that a change was needed, it recommended new and improved provisions which could be added to the proposed AU Investment Agreement.

Chapter six:

Chapter six charted new and separate provisions from the SADC FIP and the PAIC. These are provisions not covered by both instruments but are necessary to provide in achieving achieve sustainable economic development and relations. This chapter then looked at four implementation strategies which are relevant in ensuring that the negotiated and signed IIA is successfully implemented by member states.

7.2 Conclusion

The thesis is centred around the lack of a binding and standalone continental investment agreement. In this regard, the study identified the following research questions as pillars for the research:

(a) How can the AU structure and align foreign investment in order achieve its sustainable economic development and relations goals?

(b) In order to answer the main research question, the following ancillary questions are posed:

ii) What are the African epistemologies and historiographies that shaped and contributed to the development of international investment law?

vi) What are the challenges that Africa is facing in realising its sustainable economic development and relations as well as balancing the rights of foreign investors and host states?

vii) How can Africa Africanise, decolonise and reform its foreign investment landscape?

viii) Is Africa ready for a continentally, binding and primary investment instrument, and if yes, how can such instrument be structured?

Regarding the main question, the study found that Africa needs to Africanise, decolonise and reform its foreign investment legal framework through the proposed AU Investment Agreement. Regarding the question on the epistemologies and historiographies that shaped Africa's investment legal framework, the study found that Africa has always been an active role player at the international level, even before the colonial powers took over many countries in Africa. As such, the study found that the rules of each era have always mirrored the power relations inherent in that era.

With regard to the challenges that are hindering Africa's progress towards sustainable economic development and relations, the study found that there has been issues in each era of economic development of Africa, and this is evident in each chapter. On the question regarding ways to Africanise, decolonise and reform its foreign investment landscape, the study compared the SADC FIP and the PAIC in order to chart a new and improved continental investment instrument that takes into account the unique needs of African states right from the negotiation stage up to the implementation stage. In this respect, the study recommended that African states should ensure that when negotiating IIAs, they recognise Africa's unique needs as well as their level of development and negotiate from this point of view. This is because the most important benefit of joining an international organisation and concluding an IIA is having an opportunity to influence the content of negotiations so that they are in line with a state's interests.

Regarding Africa's readiness for a binding and continental investment agreement, the study found that Africa is ready. However, Africa should not remove itself from the international community, instead it needs to be clear about its issues. For this reason, African states do not need to follow a 'one-size-fits-all' approach. They should thus consider the unique circumstances and economic levels of all member states. To operationalise the proposed AU Investment Agreement, the AU should recognise the economic set up of its member states as a potent vehicle for promoting the diversification of foreign investment, which will in turn usher in economic freedom.

It is undeniable that Africa is actively trying to find ways to improve economic development on the continent through foreign investment. However, Africa should operate from a stance of successful implementation of international instruments rather than just concluding these instruments. This will ensure that when negotiating IIAs, all issues which may arise from an agreement are not only provided for, but there are extensive principles aimed at dealing with possible challenges so that they can be successfully implemented.

There is growing interest from African states and foreign investors in harnessing investment opportunities in Africa.[1] Africa's macroeconomic policies, an improved governance and regulatory environment plays a positive role in attracting foreign investment.[2] Notwithstanding these improved prospects, the continent is still perceived as a risky and uncertain investment destination. This perception has impinged on its ability to realise its full investment potential.[3] In contemporary society, it is increasingly difficult for non-integrated states to be either economically or politically viable.[4] States cannot be isolated from the international economic community if they want to strive towards and achieve sustainable economic development.[5] However, this does not mean that states should put the needs of others above their own. African states should thus not be afraid to take advantage of a negotiating space that is free of traditional

1 AMU, 'Initiatives promoting coherence in investment regulation and supporting investment for Africa's transformation' https://www.uneca.org/oria/pages/initiatives-promoting-coherence-investment-regulation-and-supporting-investment-africa%E2%80%99s (accessed 28 March 2020).
2 *Ibid.*
3 *Ibid.*
4 Wadia Hamza, 'The Maghreb Union is one of the world's worst-performing trading blocs: here are five ways to change that' https://www.weforum.org/agenda/2017/06/five-ways-to-make-maghreb-work/ (accessed 02 April 2020).
5 *Ibid.*

political pressures associated with the West, post-colonial relationships, and to design more bespoke treaty provisions that will serve them. The time is now to make Africa great again.

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