CONTEMPORARY INTERNATIONAL INVESTMENT LAW TRENDS AND AFRICA'S DILEMMAS IN THE DRAFT PAN-AFRICAN INVESTMENT CODE

WON KIDANE*

INTRODUCTION

In 2015, a European Union Commission Concept Paper on international investment law made a resounding claim that "[i]nternational investment rules were invented in Europe."[1] As categorical a claim as it was, there is indeed credible support in the chronicles of history. As early as 1758, Vattel advocated a standard of treatment of foreign capital superior to the treatment of domestic investment for fear that certain domestic systems might offer inadequate protection.[2] Scholars have observed that "[i]t is a matter of historical fact that the international rules on the protection of foreign-owned property originated in the reciprocal arrangements of European nations."[3] The European nations at that particular historic moment (after the treaties of Westphalia of 1648) did possess more or less "equal bargaining power and sought to secure minimum standards of treatment for their citizens engaged in investment activity within the region."[4]

Professor *Muthucumaraswamy* Sornarajah plausibly argues that the conception of international standards of treatment of foreign investment was "intended to serve the interests of states which had

---

* Associate Professor of Law, Seattle University School of Law.

1. EUR. COMM'N, CONCEPT PAPER: INVESTMENT IN TTIP AND BEYOND – THE PATH FOR REFORM 1, http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.pdf [hereinafter EU COMMISSION CONCEPT PAPER] [https://perma.cc/W8WT-238Y].

2. MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 19 (3d ed. 2010) (analyzing Emer de Vattel's work, noting that Vattel's "view was motivated by the concern that the standards of treatment provided to nationals in a host state may be low and therefore unacceptable.").

3. KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDS OF CAPITAL 21 (2013); *see, e.g.*, CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES 11–12 (1985); H. NEUFELD, THE INTERNATIONAL PROTECTION OF PRIVATE CREDITORS FROM THE TREATIES OF WESTPHALIA TO THE CONGRESS OF VIENNA (1648–1815) 6 (1971); FRANK G. DAWSON & IVAN L. HEAD, INTERNATIONAL LAW, NATIONAL TRIBUNALS AND THE RIGHTS OF ALIENS 5 (1971).

4. MILES, *supra* note 3, at 21.

the ability to expand their overseas trade."[5] By the time voluntary trade was replaced by colonial control in the eighteenth and nineteenth centuries, the concept of international legal standards for the treatment of foreign capital, which presumes consent on both sides, was effectively replaced by the imperial system of protection of imperial capital.[6] Although Britain "relinquished control over the legislatures of the Empire settled by Anglo-Saxons in 1932 . . . . [t]he Asian and African colonies had to wait until after the end of the Second World War."[7] The colonial interruption in the European legal theorization of the treatment of foreign capital seemingly shifted the development of the core doctrine to the Americas because "investment flows from the United States into Latin America had to be secured in a non-colonial context."[8]

Although the context was not strictly colonial, the disparity in the level of development and negotiating power made Vattel's conception of external standards more appealing to the United States. This was articulated by none other than the bearer of the name Hull Formula, Secretary of State Cordell Hull, who in his July 21, 1938 letter to the then Minister of Foreign Affairs of Mexico articulated his concern about expropriation—Hull stated:

> 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.[9]

The response he got from Mexico was that there "does not exist in international law any principle universally accepted by countries, not by the writers of treatises on this subject, that would render obligatory the giving of adequate compensation for expropriations

---

5. Sornarajah, *supra* note 2, at 19.

6. *Id.* at 19–20. *Muthucumaraswamy* elaborated, noting:

> In the eighteenth and nineteenth centuries, investment was largely made in the context of colonial expansion. Such investment did not need protection as the colonial legal systems were integrated with those of the imperial powers and the imperial system gave sufficient protection for the investments which went into the colonies. In this context, the need for an international law on foreign investment was minimal. Within the imperial system, the protection of investment flowing from imperial state was ensured by the imperial parliament and the imperial courts.

Id. (footnotes omitted).

7. *Id.* at 20, n.58.

8. *Id.* at 19, n.57.

9. Andreas F. Lowenfeld, International Economic Law 475–476 (2d ed. 2008) (quoting Letter from U.S. Secretary of State Cordell Hull to Mexican Minister of Foreign Affairs (July 21, 1938)).

of a general and impersonal character."[10] This relies on the classic Calvo doctrine which simply states the notion that "foreigners merit more regard and privileges more marked and extended than those accorded even to the nationals of the country where they reside. The principle is intrinsically contrary to the law of equality of nations."[11]

Underneath this simple sounding legal dispute lurks the age-old philosophical and ideological divide regarding the ownership of private property which pulls each side in opposite directions. The debate within Western societies informed by enlightenment philosophers like Hobbes,[12] Locke,[13] Montesquieu,[14] and Rousseau[15] on the one side, and Karl Marx and Frederick Engels[16] on the other, has profoundly influenced other societies around the world. The enduring power hierarchy has nonetheless allowed the selective and creative use of doctrine for the benefit of those on the top of the hierarchy and to the detriment of those on the lower end. Whatever conceptions of law and property rights that might have existed under African customary law[17] were effectively superseded not only by colonial imposition but also by Western philosophical advances that continued to steer the voluntary discourse in a particular direction.

As such, the 1959 Bilateral Investment Treaty (BIT) between Germany and Pakistan,[18] which is considered the first modern BIT,[19] may have begun a new era in international investment codification but was by no means the beginning of international invest-

---

10. *Id.* at 477 (quoting Letter from Mexican Minister of Foreign Affair to U.S. Ambassador (Aug. 3, 1938)).

11. *Id.* at 473, n.13 (quoting DONALD R. SHEA, THE CALVO CLAUSE 17–19 (1955)).

12. *See* THOMAS HOBBES, LEVIATHAN (1651), *reprinted in* HOBBES'S LEVIATHAN (Oxford Univ. Press, 1909).

13. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1690), *reprinted in* TWO TREATISES OF GOVERNMENT (Legal Classics Lib. 1994).

14. *See* BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (1748), *reprinted in* THE SPIRIT OF LAWS: VOLUMES I AND II (Legal Classics Lib. 1984).

15. *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES (1762), *reprinted in* THE SOCIAL CONTRACT AND DISCOURSES (Easton Press, 1991).

16. *See* KARL MARX & FREDRICH ENGELS, THE COMMUNIST MANIFESTO (1848).

17. *See* T. OLAWALE ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW 162 (1956). In 1912, a Nigerian chief stated, "I conceive that land belongs to a vast family of which many are dead, few are living, and countless members are unborn." *Id.*

18. Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, Ger.-Pak., Nov. 25, 1959, 457 U.N.T.S. 23 (entered into force Apr. 28, 1962).

19. *See Database of Bilateral Investment Treaties*, ICSID, https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx [https://perma.cc/P38V-U9U3].

ment law. International investment law comes with a very old and lingering historical baggage that continues to engender doctrinal confusion and outright suspicion.

The historical record makes one fundamental factor abundantly clear: international investment law is not made *by Africa*, it was made *for Africa* as a replacement for colonial rules for the protection of capital. When Africa now attempts to use the normative universe for ordering intra-Africa relations—whether it is because of path-dependency or just because it happens to be in the path of a Darwinian process of selection[20]—it faces the same kinds of dilemmas that it faced in the immediate post-colonial period relative to colonial boundaries, colonial laws, and institutions. The dilemmas have their own history and the history presents its own contemporary dilemmas. The Pan-African Investment Code (PAIC or the Code) is nothing but a codification of these dilemmas. Understanding the dilemmas is essential in making the right choices. This Article identifies Africa's dilemmas and evaluates the

20. In his 1996 article, *Chaos and Evolution in Law and Economics*, Mark J. Roe borrows three theories from the classical evolutionary model in law and economics—chaos theory, path dependency theory, and modern evolutionary theory. *See* Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 Harv. L. Rev. 641 (1996). On Classical Evolutionary Paradigm, he notes the following:

> The classical evolutionary paradigm has a strong grip on law and economics scholarship. What survives is presumptively efficient: if it were inefficient, the practice, the law, or the custom would be challenged by its more efficient competitors. The success of the more efficient practice or law allows it to prosper, while its less efficient competitors wither and die.

Id. at 642. On path dependency:

> Evolutionary analysis depicts the rise of the fur trader to the summit of an adaptive peak when there were wolves to fear and fur to trade. Once society reached that summit, the next hill—a straight road through the forest that is easy to travel—can be reached only by going down the evolutionary hill, by going backwards and re-making the road. The competitor—the winding road—survived because it was best suited for yesterday's wolf-infested environment. But the missed adaptation—a straight road—would be best suited for today's environment. We did not have an evolutionary competition between straight and winding roads in today's environment. We are stuck in a local equilibrium. Again, survival does not imply present-day superiority to untried alternatives.

Id. at 644. On Chaos Theory:

> Institutions and rules would be comparatively rigid until a shock hit the system: an economic depression or political crisis for us, an asteroid smashing into the earth for the biologists. What survives is what is best adapted to persist during the crisis; once the survivors survive the crisis and the maladapted become extinct, nothing much important happens until the next crisis.

Id. at 663. Applying one of Roe's propositions, Joost Pauwelyn concludes that International Investment Law (IIL) is a function of accidental evolution rather than a rational design. *See* Joost Pauwelyn, *Rational Design or Accidental Evolution? The Emergence of International Investment Law*, *in* The Foundations of International Investment Law: Bringing Theory into Practice 15 (Zachary Douglas, Joost Pauwelyn & Jorge E. Viñuales eds., 2014).

Code in light of its purpose and existing and developing trends in international investment law. This is necessary not only because the Code will be the dominant or even the exclusive source of investment rules among African states until at least the process of integration is advanced, but also because it will define the African investment legal landscape which will in turn inform African states' treaties with the East and the West and the rest of the world.

This Article proceeds in seven parts. Part II provides historical context for the contemporary doctrinal dilemmas. Part III outlines the factual background of foreign direct investment in Africa and the existing mechanisms of its protection. Part IV profiles contemporary reform trends ranging from the European Union and North America to India and South Africa, and their implications for the Pan-Africa effort. Part V critically appraises the Draft Pan-African Investment Code in light of the historic origin of the normative universe that it attempts to modify and the most contemporary developments in the field. Part VI offers a brief summary of the salient features of the Code and demonstrates how the Code is a reflection of Africa's lingering dilemmas. Part VII offers a brief conclusion.

II. The Dilemmas of History and the History of Dilemmas in Foreign Investment Law

Present day international investment law is full of dilemmas and each dilemma has its own history. Ironically, the vacuum left by history has created a space in which normative dilemmas thrived. As Professor Joost Pauwelyn aptly describes, unlike today's normative and institutional domains such as the United Nations, the World Trade Organization, and regional communities that order various aspects of contemporary world affairs, International Investment Law (IIL) never had a universal capstone moment; it "emerged through an organic process of small increments and accidents" and it continues to evolve.[21] This Section sheds light on the history of dilemmas and the dilemmas of history in this evolutionary process, focusing on Africa's position within it.

21. Pauwelyn, *supra note* 20, at 15 (listing as examples, "centuries old rules on diplomatic protection and treatment of aliens, treaties on friendship, commerce and navigation (FCN treaties) and evolving generations of BITs and FTAs, UN resolutions, ILC reports and draft articles, World Bank OECD and IBA guidelines and codes of practice, rulings and awards by the PCIJ, ICJ, Iran-US, mixed claims, ICSID and UNCITRAL tribunals, studies and critiques by academics, NGOs, and influential organizations like UNCTAD").

A. *The History of Dilemmas*

Historical records support the E.U. Commission's suggestion that "[i]nternational investment rules were invented in Europe."[22] Credible historical accounts document treaties dating as far back as the 1500s between Western powers and the Ottoman Empire for the reciprocal protection of economic interests.[23] More specifically, however, the notion of protection of alien property and the need for compensation in case of seizure or expropriation is evident from the jurisprudence of early twentieth century European arbitral decisions. A notable example cited by Charles Lipson in *Standing Guard* is the 1913 arbitration stemming from Portugal's expropriation of properties belonging to religious associations of Britain, France, and Spain.[24] The basic principle of non-expropriation of alien property and compensation was duly acknowledged by all parties.[25]

Other scholars agree with Lipson and endorse the same view. Kate Miles, for example, writes that "[i]t is a matter of historical fact that the international rules on the protection of foreign-owned property originated in the reciprocal arrangements of European nations."[26] As indicated in the Introduction, the European nations at that particular historic moment (presumably after the treaties of Westphalia of 1648) did possess more or less "equal bargaining power and sought to secure minimum standards of treatment for their citizens engag[ed] in investment activity within the region."[27]

The first phenomenon that brought about the first normative dilemma in foreign investment law was the European nations' "process of applying these [original Eurocentric] standards to non-European states that became inextricably linked with colonialism, oppressive protection of commercial interests, and military inter-

22. EU Commission Concept Paper, *supra* note 1, at 1.

23. *See* Lipson, *supra* note 3, at 13 (providing the treaty between the Ottoman Empire and Venice as an example of a treaty concerning international investment rules during the 1500s).

24. *See id.* at 12, n.* (citations omitted).

25. *See id.* ("[The British, French, and Spanish governments] all agreed, at the very outset, that foreigners were owed compensation as a matter of principle, regardless of how host states treated their own nationals.").

26. Miles, *supra* note 3, at 21.

27. *Id.*

vention."[28] This shift, according to Miles, caused IIL to move from "a base of reciprocity, to one of imposition."[29]

Lipson, although not as explicit as Miles on this point, would agree that the norms changed their nature as the rest of the world's power relationship with Europe gradually shifted in the Western power's favor. He says in particular that "[b]y 1830, as the industrial revolution was starting and foreign trade expanding, the Western powers, and particularly [Great] Britain, felt that the markets of the Levant 'should become more accessible, secure and stable.'"[30] The manifestations of this new power relationship were many. An example of the normative shifting away from reciprocity is the 1838 Anglo-Turkish Convention. Lipson notes that a "one-sided agreement [gave] new meaning to the term *capitulation.* In place of genuine reciprocity, the treaty pried open the now-feeble Ottoman Empire to European manufactures and investments. Tariffs were drastically lowered and internal barriers removed."[31] Needless to say that this was followed by extensive concessions and the flourishing along with it of the concept of extraterritoriality

---

28. *Id.*

29. *Id.* Pauwelyn characterizes the developments somewhat differently. For him, between 1648 (Treaties of Westphalia) and the adoption of the U.N. Charter, "abuses occurred on both sides." Pauwelyn, *supra* note 20, at 21. For example:

> Host states abused their territorial power against aliens, discriminating, expropriating, or expelling them. Home states even more so, used their power to expand their territory, through conquest or colonialism, imposing their laws and courts for the benefit of nationals abroad (e.g. the British capitulation regime in China) and protected those nationals and their assets by use or threat of force including invasions, gunboat attacks, and blockade.

Id. In a related context, Professor James Gathii says that as far as Great Britain is concerned, in the majority of cases, "courts have found that there is no native title and if any such title existed, it was extinguished or abrogated by the conquering sovereign." JAMES THUO GATHII, WAR, COMMERCE, AND INTERNATIONAL LAW 67 (2010). As Gathii notes, the foundational theoretical predicate and legal theory for the European occupation of native land was articulated well by Chief Justice Marshall in the context of native American title claims. Chief Justice Marshall wrote in *Johnson v. M'Intosh* the following:

> The tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

Johnson v. M'Intosh, 21 U.S. 543, 574 (1823). On the basis of *Johnson* and other cases, Gathii concluded, "non-European use and occupation of land did not rise to private property rights and . . . treaties between colonial powers in the nineteenth and twentieth centuries effectively extinguished preexisting title to territory based on non-European use and occupation of land." GATHII, *supra* note 29, at 66.

30. LIPSON, *supra* note 3, at 13 (quoting *Imitiyâzât*, THE ENCYCLOPEDIA OF ISLAM: NEW EDITION 1187 (vol. 3, 1971)).

31. *Id.*

that protected Western interests in other jurisdictions including East Asia. Under the notion of extraterritoriality, "[f]oreign firms 'conserved their nationality' . . . and were governed according to the laws of their own country."[32] More importantly, as Lipson puts it: "When disputes arose [out of extensive concessions for mining, railroad, and port construction, etc.] between foreign investors and Ottoman authorities, as they did with bondholders in 1876, the Sultan was forced to accept *the creditors' interpretation* of the capitulations and commerce treaty."[33]

According to Sornarajah, investment made as a result of colonial expansion "did not need protection as the colonial legal systems were integrated with those of the imperial powers and the imperial system gave sufficient protection for the investments which went into the colonies."[34] European colonial or quasi-colonial economic control around the world employed different agents and utilized varied mechanisms at different ages and in different territories. Its objectives nonetheless remained the shielding of foreign investment from business risks otherwise considered ordinary in the place where the investment is made. The rules appear to be continually recalibrated in their maker's favor. Even the United States, when it was still a developing country, was reported to have had a similar attitude about the protection of foreign investment as the developing world of today.[35] That attitude shifted towards more protection as U.S. entities invested abroad, but the pendulum appears to be swinging back again to protectionism as concerns over regulations for the public interest continue to mount.[36]

---

32. *Id.* at 14 (quoting Eliot Grinnell Mears, Commerce Reports, May 22, 1920, *reprinted in* Eliot Grinnell Mears, Modern Turkey: A Politico-Economic Interpretation, 1908–1923 432–33 (1924)). In relation to the applicability of the principle of extraterritoriality in China, Sornarajah says: "With the end of the Opium Wars and treaties such as the Treaty of Nanjing, a system of extraterritoriality was introduced into China making the Chinese writ not applicable to European traders in the port cities. The indignity that was involved in the system could not easily be erased." Muthucumaraswamy Sornarajah & Jiangyu Wang, China, India and the International Economic Order 136 (2010).

33. Lipson, *supra* note 3, at 13–14 (emphasis added).

34. Sornarajah, *supra* note 2, at 19. Sornarajah further states, "[i]n this context, the need for an international law on foreign investment was minimal. Within the imperial system, the protection of investment flowing from imperial state was ensured by the imperial parliament and the imperial courts." *Id.* at 19–20.

35. Abram Chayes, Thomas Ehrlich & Andreas F. Lowenfeld, International Legal Process 851 (1969).

36. *See* Sornarajah, *supra* note 2, at 25; *see also* Methanex Corp. v. United States, Final Award on Jurisdiction and Merits (NAFTA Arb. Trib. 2005), http://www.italaw.com/sites/default/files/case-documents/ita0529.pdf (ruling in favor of the United States on the issue of indirect expropriation) [https://perma.cc/D7GA-6644]. For example, the Arbitration Tribunal stated:

The rules of each era have always mirrored the power relations inherent in that particular era.[37]

Pre-colonial non-state instrumentalities of the European powers, such as the British Indian Company, French East India Company, and the Dutch West India Company, "played an active role in the development of international legal doctrine favourable to their needs."[38] The interests of the companies were directly aligned with the empires that used them as instruments with more or less full sovereign function, including the ability to enter into treaties, build military forces, and set up settlements "without incurring the associated administrative and political burdens of formal annexation of territory."[39] Miles notes as follows:

> By the late eighteenth century, the Company's primary objective had shifted away from commercial enterprise and had instead turned to imperial acquisition and management. As such, the activities of the Company reflected its relationship with the government, manifesting in a blurring of its commercial interests with the political objectives of the state.[40]

As power shifted away from Great Britain to the United States, particularly in the post-World War period, the United States not only adopted the doctrinal milieus shaped through a long history of reciprocity, imposition, and double standards, but also equipped it with robust institutional mechanisms. Consider Lipson's instructive comment on this: "[T]he Americans, like the British before

---

> Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alia*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.

Id. pt. IV, ch. D, p.4, ¶ 7.

37. *See e.g.*, MILES, *supra* note 3, at 23 ("Through the assertion of foreign investment protection rules as existing international law, together with the use of force, capital-exporting states directed the evolution of international investment law into a mechanism that protected only the investor.").

38. *Id.* at 33, n.91 (citation omitted).

39. *Id.* at 34.

40. *Id.* The passage continues to state the following:

> Not only were international rules on foreign investment protection developed to protect the imperialist and commercial interests of European capital-exporting states and their nationals, but trading companies were also actively involved in the development of relevant international legal doctrines. Indeed, Grotius, described as 'the father of international law', was engaged as a legal advisor to the [Dutch East India Company]. Far from embodying a disinterested representation of the law, several of his most significant theories were actually designed to provide a legal basis for the activities of [the Dutch East India Company].

Id. at 34–35 (citations omitted).

them, deliberately tried to sustain a particular kind of global order and foster common expectations regarding acceptable treatment for foreign capital."[41]

The attempt to foster common expectations never succeeded. In 1910, Elihu Root made his oft-cited statement that "[t]here is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world."[42] But contrary to Root's claim, no such standard has ever been universally accepted. More than forty years earlier, in 1868, Argentine jurist Carlos Calvo famously articulated the opposite point of view.[43] The Latin American Calvoesque position remained that there "does not exist in international law any principle universally accepted by countries, nor by the writers of treatises on this subject, that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character."[44] And indeed, in its 1964 opinion in *Banco Nacional de Cuba v. Sabbatino,* the U.S. Supreme Court confirmed that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."[45]

In any case, unlike Pauwelyn, who emphasizes the incrementality of the development of IIL (discussed below), Lipson sees a more deliberate policy objective executed with knowledge and efficiency. As he puts it:

> The economic collapse of the 1930s was remembered with bitter clarity. To avoid any repetition, the State Department drew up plans for an integrated system of world commerce and investment. Fundamental programs were proposed: first the Bretton Woods system and the International Trade Organization and later the Marshall Plan and Point IV. Programs of this scale could not be constructed, as so much American policy always is, by small increments, by 'continually building out from the cur-

41. Lipson, *supra* note 3, at 271.

42. Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 2 (2d ed. 2012). Further, Root elaborated as follows:

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

Id.

43. *See id.* at 1–2.

44. Lowenfeld, *supra* note 9, at 477.

45. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

> rent situation, step-by-step and by small degrees'. . . . Instead, both government and private planners adopted a comprehensive perspective. Their strategies for investment protection were worked out by considering the basic obstacles and then contraposing various programs.[46]

A notable part of this robust plan was the adoption of the International Convention for the Settlement of Investment Disputes (ICSID),[47] which established the Center.[48] ICSID provided an unprecedented forum, not only for the resolution of investor-state disputes, but also for the development and refinement of contemporary doctrine.[49] When the World Bank asked the newly independent African states to join ICSID in 1964, they were rather unsure of what it meant for them beyond the promise of increased foreign investment.[50] Most joined the ICSID system with enthusiasm when their Latin American counterparts refused.[51] Then, predictably, many African states appeared before ICSID tribunals over the years, accused of unlawful expropriation and denial of justice (violations of the fair and equitable principle),[52] to mention just a few.[53] With almost no participation in the decision-making process, just like the Sultan of the feeble Ottoman Empire of the 1830s,[54] the African states continued to accept the "creditors' inter-

46. LIPSON, *supra* note 3, at 271–72 (quoting CHARLES E. LINDBLOM, THE SCIENCE OF MUDDLING THROUGH, IN POLITICS AND SOCIAL LIFE 340 (Nelson Polsby, Robert Dentler & Paul Smith, eds., 1963)).

47. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

48. *See International Centre for Settlement of Investment Disputes*, WORLD BANK, www.worldbank.org/icsid (providing information about the structure, operations, and other aspects of the International Center for Settlement of Investment Disputes) [https://perma.cc/XA5X-L49P]; CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2d ed. 2009) (providing a comprehensive commentary on the ICSID Convention).

49. *See* Won Kidane, *The China-Africa Factor in the ICSID Legitimacy Debate*, 35 U. PA. J. INT'L L. 559, 560 n.3, 618 (2014).

50. *See id.* at 561–62.

51. *Id.*

52. For example, Stephan Schill says, "Fair and equitable treatment is the clearest example of how vague the standard clauses in international investment treaties are formulated. It is characterized by a lack of clarity concerning not only of its scope, but its underlying normative concept." STEPHAN W. SCHILL, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT LAW, *in* INTERNATIONAL INVESTMENT LAW: THE SOURCES OF RIGHTS AND OBLIGATIONS 157–58 (Tarcisio Gazzini et al. eds., 2012). Although each concept is recognizably amorphous, there is no agreement on whether the problem and source of frustration is the inherent indeterminacy of the substantive rules, or their uneven interpretation and application by interested arbitral tribunals or both. *See id.* at 147–61.

53. *See, e.g.*, Kidane, *supra* note 49, at 606–17 (discussing three cases involving some of these principles).

54. This is a reference to Lipson's characterization. *See* LIPSON, *supra* note 3, at 13–14.

pretation" of the investment treaties with their wealthier and more powerful partners.[55] Such is the history of Africa's dilemmas.

B. *The Dilemmas of History*

Today's rules and institutions are products of history. They were designed to serve particular objectives at each specific time. Although they have shown remarkable adaptability from reciprocal rights and responsibilities among equals to instruments of subordination, the question remains whether they could be cleansed of their corrosive past and deployed for the genuinely egalitarian communion that the PAIC envisions.

Consider the following 1849 statement by then-governor of the British settlements in Gambia, Sir Richard Graves MacDonnell:

> On what do the English capitalists rely for their security? Of course on the prestige of English power. On the knowledge that English troops and guns are stationed in different positions along the Gambia–and also I am happy to add the more civilised and juster notions of the rights of property which the continued presence of European and the spread of legitimate commerce is producing.[56]

---

55. *See* Kidane, *supra* note 49, at 572, 591–606 (showing the absence of meaningful African participation in the development of the jurisprudence by statistics).

56. Lipson, *supra* note 3, at 16 (quoting Antony G. Hopkins, *Property Rights and Empire Building: Britain's Annexation of Lagos, 1861*, 40 J. Econ. Hist. 777, 782 (1980). Hopkins offers a more nuanced analysis of this duality that Lipson does not emphasize, for instance, commercial pragmatism under the aura of the British navy. *See id.* at 782–87. Hopkins notes, for example, that the Royal grant of prime land in Legos went to groups of Europeans as well as Africans. *See id.* at 790–91. He records in particular that:

> Most of the prime sites on the Marina and in Broad Street were snapped up by the mid- 1860s, and no less than 2,299 grants (about two-thirds of the total) were issued between 1869 and 1873, following the ordinance of 1869. An analysis of the names of the grantees suggests that about 100 grants were issued to Europeans, about 1,100 to Christian Africans, and the rest, roughly 2,300, to indigenous Lagosians.

Id. at 791 (footnote omitted). But this analysis could be misleading if what happened next is not mentioned. In Hopkins own words:

> The history of this site provides a commentary on one hundred years of colonial trade, and also draws attention to an unpublicized feature of the property market, the creation of a rentier class. Although African merchants ceased to compete with European firms soon after the turn of the century, they and their families clung tenaciously to landed property wherever possible. In becoming rentiers, they retained their gentility, and they used income from this source to finance the education of their children. In this way they helped to generate new forms of property based on the service industries, notably the professions and that greatest of all prizes, government employment.

Id. at 793. Notwithstanding the interesting twist that Hopkins gives it, what happened there is very clear. Notions of property rights made way for outright use of crude force until that in turn became unprofitable. Just like colonial control of economic benefits did not happen overnight, the process of decolonization has been unfolding gradually.

Lipson rather plausibly asserts as follows:

> It is sometimes suggested that the rules protecting foreign investors were developed specifically to constrain poor countries. That is simply wrong. It is certainly true that LDCs [Least Developed Countries] played no role in developing the traditional rules and were, in fact, constrained by them. But the rules were developed and applied first within Europe, where they were widely accepted. Only later were they extended to Africa, Asia, and Latin America.[57]

When they were extended to the Global South, such as it were since the nineteenth century, IIL acquired its own character defined by protection of Northern capital in the South. Doctrinal dilemmas ensued when the template, shaped by a long history, began to underpin South-South and even North-North treaties.[58] The modern-day North-North treaties could be characterized as progenies of the old treaties of capitulation, friendship, and commence without genetic mutation. The North-South treaties have gone through the history discussed in the previous Section. Their transition from the historic role of de-risking frontier markets to a mutual arms-length pact between and among equals requires confronting its genetic dilemmas inherited from the biological parents.

In the North-South context, the debate often focuses on whether BITs or investment provisions in FTAs help promote investment from the North to the South.[59] That debate is largely irrelevant in the South-South context because in the South-South context the

---

Postcolonial economic arrangements thus continue to have traces of their historic parentage.

57. LIPSON, STANDING GUARD, *supra* note 3, at 12, n.*.

58. *See* Won Kidane, *China's Bilateral Investment Treaties with African States in Comparative Context*, 49 CORNELL INT'L L. J. 141, 146–47 (2016) (discussing South-South BITs and demonstrating numerous South-South BITs are China-Africa BITs). An example of a North-North treaty is the E.U.-Canada Comprehensive Economic and Trade Agreement (CETA). *See In Focus: Comprehensive Economic and Trade Agreement (CETA)*, EUROPEAN COMM'N, http://ec.europa.eu/trade/policy/in-focus/ceta/ (providing comprehensive information and the text of CETA) [https://perma.cc/V5VN-ZSQH].

59. *See, e.g.*, United Nations Conference on Trade and Development, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, UNCTAD/DIAE/IA/2009/5 (September 2009), http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=432 [https://perma.cc/M6NT-3YZR]. Most studies in this area focus on the issue of whether or not BITs help attract investment. *See id.* at 85. For example, a report from the United Nations Conference on Trade and Development provides as follows:

> Overall, developing countries stand to benefit from engaging in IIAs in terms of increasing their attractiveness for FDI, and therefore the likelihood that they receive more FDI . . . . [However] - and this point cannot be emphasized enough - the conclusion of IIAs needs to be embedded in broader FDI policies covering all host country determinants of foreign investment. IIAs alone cannot do the

underlying assumption is different; it is the ordering of economic relations by law for its own sake although that might eventually encourage the movement of capital.

Contrary to what Lipson's suggestion discussed in the previous Section about a deliberate and robust public-private plan in the modern context, Pauwelyn, argues that the development of IIL is organic and incremental.[60] More specifically, that it grew out of:

> centuries old rules on diplomatic protection and treatment of aliens, treaties on friendship, commerce and navigation (FCN treaties) and evolving generations of BITs and FTAs, UN resolutions, ILC reports and draft articles, World Bank, OECD and IBA guidelines and codes of practice, rulings and awards by the PCIJ, ICJ, Iran-US, mixed claims, ICSID and UNCITRAL tribunals, studies and critiques by academics, NGOs, and influential organizations like UNCTAD.[61]

Although Pauwelyn recognizes that it was "heavily influenced by historical events and happenstance: colonization and protection of foreign investors through gunboat diplomacy up to the early twentieth century; decolonization and a general aversion against investment by developing countries in the 1950s to 1970s,"[62] one would be hard pressed to find any African contribution in shaping any aspects of this "organic" growth.[63] To the extent the growth is said

---

> job. Nonetheless, consideration could be given to further strengthen the role of IIAs as an investment promotion instrument.

Id.; *see also* Jason W. Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 Va J. Int'l L. 397, 398 (2010) (concluding that BITs are unlikely to play a major role in attracting investment, but noting, "the results of these various statistical exercises are inconsistent. Some studies show that BITs can have massive positive impacts on foreign investment; others show modest positive impacts; still others show no impact at all, or even a negative impact").

60. Pauwelyn, *Rational Design or Accidental Evolution?, supra note* 20, at 15.

61. *Id.*

62. *Id.* at 16.

63. This is a part of the larger debate about Africa's role in international law generally. Africa's role in the development of international law as we know it today is a subject of great controversy. Two schools of thought warrant a brief mention. According to James Gathii, the first is the "contributionist" school, which emphasizes Africa's contributions to the development of international law beginning from the pre-colonial era, considering colonialism an interruption. *See* James T. Gathii, *Africa and the History of International Law*, Albany L. Sch., Legal Stud. Res. Papers Series No. 48 of 2011–2012, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029019 [https://perma.cc/MX57-YKLA]. A vocal proponent of this school is former President of the International Court of Justice, T.O. Elias. *See* T.O. Elias, Africa and the Development of International Law (R. Akinjide ed., 1988). This thought and Elias's contribution is discussed very well in James Gathii's research paper, *Africa and the History of International Law. See* Gathii, *Africa and the History of International Law, supra* note 63. A good summary of Elias's point is the following excerpt:

> The way is thus clear for the emergent states of Africa today to be willing and ready to enter into new international relationships with other states, without feel-

to be organic, it is organic only to North-South and perhaps in the distant past, North-North relations, but never to South-South relations. The adoption of this normative universe to South-South relations, and in particular intra-Africa relations, requires confronting the dilemmas of history.

The dominant narrative is thus correct inasmuch as it documents the European origin of the normative milieu of reciprocity, its subsequent corrosion by colonial and imperial imposition, its degeneration into the justification of double standards, and the contemporary effort to revive balance and equity.[64] Any attempt to resolve the dilemmas of history must thus answer the perennial question of whether or not the existing doctrines and institutions could be sufficiently cleansed of their imperial and colonial DNA to be meaningfully deployed for the ordering of horizontal relations among those who had endured the indignities of subordination. The following Sections attempt to answer this question.

> ing too much like strangers in the international legal community. . . African customary law shares with customary international law the acceptance of the fundamental principles of *pacta sund servanda* as the basis for the assurances of a valid world order. In sum, the ruler like the ruled, must be under the law.

Id. at 12 (citing ELIAS, AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW, *supra* note 63, at 45).

Gathii also presents the "critical tradition" school of thought, which emphasizes the wrongful use of international law to justify every evil that has visited Africa and the African people ranging from the slave trade to colonialism and goes so far as to condemn "the international system as 'inhumane and immoral.'" *Id.* at 17. (citation omitted). Having discussed the various schools attempting to characterize Africa's relationship with international law, Gathii himself aptly concludes: "This difference in the emphasis is a reflection of that Africa's historical engagement with international law cannot be rendered in singular or consensual terms." *Id.* at 24.

64. While Lipson's and Pauwelyn's accounts appear somewhat inconsistent in regards to whether the evolution was purposefully steered in a particular direction, both are part of the dominate narrative that this paragraph summarizes. Every major work in this area touches on such evolution although with differing emphasis. For a classic account, see RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 1–19 (2d ed. 2012) (providing a classic account, which focusing on the debate surrounding customary international law of the treatment of properties of foreign nationals including the Calvo doctrine in the Americas); Peter Muchlinski, *Policy Issues, in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 3–48 (Peter Muchlinski et al. eds., 2008) (describing the development of the rules and institutions through a policy prism); PAUL E. COMEAUX & N. STEPHAN KINSELLA, PROTECTING FOREIGN INVESTMENT UNDER INTERNATIONAL LAW: LEGAL ASPECTS OF POLITICAL RISK 57–98 (1996) (focusing on the development of the rules in expropriation); IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 13–75 (Armand de Mestral & Céline Lévesque eds., 2013) (documenting the evolution of international investment treaties in Canada and the United States, the European Union and China).

III. Foreign Direct Investment in Africa and Its Protection

Africa is transitioning from an aid-dependent dark continent to one that is a magnet for investment. This Section provides a brief survey of the nature and scale of foreign investment in Africa and its protection.

A. *Trends in Foreign Investment in Africa*

In January 2015, the *Economist* quoted investors as saying, "[a] few years ago people would ask '[w]hy the hell are you in Africa?'. . . . Now they ask 'Why the hell aren't you?'"[65] All credible economic indicators suggest that foreign direct investment (FDI) in Africa has been increasing in recent years. According to a 2014 UNCTAD Report:

> Africa has experienced high and continuous economic growth in the past decade, prompting analysts to argue that the continent has reached a turning point in its development history and is poised to play a more significant role in the global economy in the twenty-first century. The average annual growth rate of real output increased from 1.8 per cent in the period 1980–1989 to 2.6 per cent in 1990–2000 and 5.3 per cent in the period 2000–2010. Furthermore, 12 countries had an average growth rate above the developing-country average of 6.1 per cent over the period 2000–2010, and two countries (Angola and Equatorial Guinea) had double-digit growth rates. Unlike in the 1980s and 1990s, Africa's average growth rate since the turn of the millennium has also been higher than the average growth rate of the world economy . . . .[66]

FDI Intelligence's 2015 African Investment Report offers a glimpse of who is investing in Africa and how much. In 2014, for example, unsurprisingly, in terms of the volume of capital, Africa's traditional partners from Western Europe still top the list with 47.6% of the total investment, followed by North America with 13%, Africa with 10%, Asia-Pacific with 9.6%, the Middle East with 5.5%, the rest of Europe with 0.6%, and Latin America and the Caribbean with 0.1%.[67] Be that as it may, the data also shows that if it is broken down into the actual number of projects, intra-Africa

65. *Foreign Investment in Africa: A Sub-Saharan Scramble: Private Equity Investors are Getting Hot for Africa*, Economist (Jan. 22, 2015), http://www.economist.com/news/business/21640327-private-equity-investors-are-getting-hot-africa-businesses-there-need-all-capital [http://perma.cc/Q7QX-TC99].

66. United Nations Conference on Trade & Dev., Economic Development Report 2014: Catalyzing Investment For Transformative Growth (2014), http://unctad.org/en/PublicationsLibrary/aldcafrica2014_en.pdf [http://perma.cc/S2EF-PTDD].

67. FDI Intelligence, The Africa Investment Report 2015: An FDI Festination on the Rise (2015), http://www.africanbusinesscentral.com/wp-content/uploads/2016/01/

investment overtakes North America. The actual reported project numbers are as follows: Out of a total of 660 new projects cumulatively representing $87 billion[68] in investments in Africa in 2014, 252 projects were from Western Europe, 131 from Africa, 104 from North America, 97 from East Asia, 45 from Middle East, 27 from the rest of Europe, and 4 from Latin America.[69] When the amount of capital invested is broken down into country by country, the respective percentages are as follows: 21% ($18.3 billion) from France; 12% ($10 billion) from Greece; 9% ($7.9 billion) from the United States; 7% ($6.1 billion) from China; 6% ($5.2 billion) from Belgium; 6% ($5.1 billion) from Canada; 6% ($5.0 billion) from United Arab Emirates; 5% ($4.6 billion) from South Africa; 3% ($2.7 billion) from Germany; 3% ($2.6 billion) from the United Kingdom; and 22% ($19 billion) from others.[70]

The data thus show that intra-Africa investment represents about 10% of Africa's total FDI. The data also show that South Africa accounts for 50% of the intra-Africa investment (i.e., African investment in Africa). Indeed, in that year alone, South African companies invested roughly $5 billion in 45 projects around Africa and that is out of a total of 131 intra-Africa projects amounting approximately to $10 billion.[71]

In a December 2015 speech at the China-WTO Roundtable, the World Bank's Anabel Gonzalez said that: "Africa has integrated with the rest of the world faster than with itself."[72] And that is because intra-Africa trade is artificially kept more expensive. Here is an example Gonzales provides:

> If the residents of San Francisco faced the same charges in crossing the Bay Bridge to Oakland as do residents crossing the Congo River between Kinshasa and Brazzaville, a similar distance, they would pay more than $1200 for a return trip. As a result passenger traffic at this obvious focal point for cross-border exchanges between the two Congos is around five times

The-Africa-Investment-Report-2015-fDi-Intelligence-Report.pdf [https://perma.cc/XEN9-EZLG].

68. *Id.* at 2.

69. *See id.* at 6.

70. *Id.*

71. *Id.*

72. Anabel Gonzalez, Senior Director, World Bank Group, Statement by Anabel Gonzalez at the Fourth China-WTO Accessions Roundtable: International Economic Cooperation and African Perspectives on the Future of the Multilateral Trading System, Nairobi, Kenya (Dec. 14, 2015), http://www.worldbank.org/en/news/speech/2015/12/14/deepening-african-integration-intra-africa-trade-for-development-and-poverty-reduction [https://perma.cc/ATX2-UPQE].

> smaller than that between East and West Berlin in 1988 – which was of course well before the dismantling of the Berlin Wall![73]

The World Bank's estimate is that "intra-African trade costs are around 50% higher than in East Asia, and are the highest of intra-regional costs in any developing region."[74] According to another reliable report by the African Development Bank, OECD and UNCTAD intra-Africa investment in 2015 accounted for about 12% of FDI in Africa compared to 33% intra-Asia investment. The report suggests that higher trade and investment barriers contribute to this problem.[75] The report also indicates that South Africa is the main investor in Africa.[76]

Although that is the observable current reality, Africa is attempting to expedite its integration. The PAIC is a part of that process. The nature and volume of the movement of goods, services, people, and capital provides context.

B. *Protection of Foreign Investment in Africa*

FDI in Africa, just like everywhere else, is protected by a web of BITs and investment rules in Regional Economic Agreements. Between 1972 and 2014, African states have been a party to at least 111 known investor-state ICSID cases constituting roughly 20 to 25 percent of all ICSID cases.[77] Almost all of these cases arose out BITs.[78] Although there are at least 335 Intra-Africa BITs, not a single Intra-Africa dispute reached ICSID tribunals.[79]

---

73. *Id.* ("In southern Africa, a truck serving supermarkets across a border may need to carry up to 1600 documents as a result of permits and licenses and other requirements. Slow and costly customs procedures and delays caused by other agencies operating at the border, such as standards, raise the costs of trading. For example, one supermarket chain in Southern Africa reports that each day one of its trucks is delayed at a border costs $500 and it spends $20,000 per week on securing import permits to distribute meat, milk, and plant-based goods to its stores in one country alone.").

74. *Id.*

75. *See* Afr. Dev. Bank Group et al, African Economic Outlook 2016: Sustainable Cities and Structural Transformation 88 (2016), www.africaneconomicoutlook.org/sites/default/files/2016-05/eBook_AEO2016.pdf [https://perma.cc/2AP2-75HR].

76. *Id.* ("Investment within Africa has been led by South Africa . . . mainly in banking, retail and telecommunications . . . South Africa is the top investor in its region. About 80% of foreign investment into Botswana, Lesotho, Namibia and Swaziland comes from South Africa[.]").

77. *See* United Nations Econ. Comm'n for Afr., Investment Policies and Bilateral Investment Treaties in Africa ix (2016), http://www.uneca.org/sites/default/files/PublicationFiles/eng_investment_landscaping_study.pdf [https://perma.cc/R5RG-SVZX].

78. *Id.*; *see generally* Kidane, *supra* note 49 (providing a systematic study of Africa's ICSID scorecard).

79. *See Cases, Advanced Search*, ICSID, https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx [http://perma.cc/YLK9-E4ED].

There are several Regional Economic Communities (REC) in Africa[80] with at least four containing fairly developed investment focused rules: (1) the Common Market for Eastern and Southern Africa (COMESA),[81] (2) the Economic Community of Western African States (ECOWAS),[82] (3) the Southern African Development Community (SADC),[83] and (4) the East African Community (EAC).[84] SADC has a detailed BIT Model with commentary that the drafters of the PAIC would have taken note of. In any case, fully integrated, the PAIC would have the potential to be the dominate instrument in Africa. Indeed, a recent comprehensive report by the Economic Commission for Africa (CEA) stated:

> A natural question arising from the regional initiatives—and from their limitations—is whether a common investment code at continental level would be desirable. If so, what legal and policy framework would be required, and does Africa already fulfil some of the preconditions for an African Continental Investment Code and other regional investment codes on the continent?
>
> Such codes would assist in simplifying investment rules and regulations, making them clearer and easier to understand, creating an environment more conducive to investment.[85]

It was to answer these questions that the African Union Commission took the initiative in 2012 to study the possibility of an Africa-wide Code, which resulted in the Draft-PAIC.[86] The PAIC is unveiled at a time the world is seriously rethinking the Post World War II investment regime from the European Union to North America to South Africa and India.

---

80. For a brief overview, see Kidane, China-Africa Dispute Settlement, *supra* note 79, at 195–205.

81. *See* Investment Agreement for the COMESA Common Investment Area, May 23, 2007, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3092 [hereinafter COMESA Investment Agreement] [http://perma.cc/JC2P-ATCL].

82. *See* Trade and Investment Framework Agreement Between the Government of the United States and The Economic Community of West African States, Aug. 5, 2014, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5102 [https://perma.cc/K7Y4-C3DK].

83. Protocol on Finance and Investment, Aug. 18, 2006, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2730 [hereinafter SADC Investment Protocol] [https://perma.cc/W599-HZX3]. SADC as also formulated a Model BIT. *See* SADC Model Bilateral Investment Treaty Template: With Commentary, July 2012, http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf [hereinafter SADC BIT Model] [https://perma.cc/4QZR-KR37].

84. *See* Treaty Establishing the East African Community, Nov. 30, 1999, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2487 [http://perma.cc/L58U-8KL6].

85. *See* United Nations Econ. Comm'n for Afr., Investment Policies and Bilateral Investment Treaties in Africa, *supra* note 77, at X.

86. *Id.*

Before the contents of the Draft-PAIC is evaluated, it is important to consider the most contemporary worldwide trends in the following Sections.

III. Contemporary Trends in International Investment Law and Implications for Africa

Michael Reisman is reported to have said the following:

> International trade and investment law also seems to be "wobbling," whether because it is "buckling" or "adjusting" to a new world order. . . . Unlike in the past, the "agitation for change" is not emanating from developing states in Asia, Africa and Latin America but from capital-exporting nations.[87]

Reisman also said "momentous social changes" are forcing those who created the legal regime to question its continued vitality.[88] In his opinion, "[a]ll states – developed, developing, liberal, socialist and communist – participated on an equal footing in fashioning it."[89] Regardless of the complete accuracy of the claim that equalizes the levels of participation, the movement for change is coming from all directions—developed, developing, or underdeveloped, North, South, East, or West.

The assertion that IIL principal preoccupation is the de-risking of frontier markets is simplistic. As Pauwelyn observes: "[i]f BITs were essentially a way for underdeveloped countries to signal their commitment to foreign investment and ICSID arbitration a palliative for dysfunctional host state courts, how do we explain that BITs (or investment chapters in FTAs) are concluded also between developed countries with highly sophisticated legal regimes?"[90] Responding to his own question, he says: "Although host state abuse of aliens may be less likely in developed legal systems, discrimination or unfair treatment of foreigners is not a phenomenon that necessarily disappears when a country becomes developed."[91] Pauwelyn's slightly nuanced take is thus "[t]he core achievement of IIL [and] is not only enhanced substantive investor protection, but also putting rules-based limits on the retaliatory forces of powerful home states."[92] He sees benefits on both sides, for instance, the

87. Alison Ross, *The End of "the Great Compact"? Reisman Declares International Investment Law at Cross-Roads*, Global Arbitration Review (Feb. 16, 2017), https://globalarbitrationreview.com/article/1081449/the-end-of-the-great-compact"-reisman-declares-investment-law-at-a-crossroads [https://perma.cc/RQ6R-PNPW].

88. *See id.*

89. *Id.*

90. Pauwelyn, *Rational Design or Accidental Evolution?*, *supra* note 20, at 39.

91. *Id.* at 40.

92. *Id.* at 38.

investors get protection and the state gets investors who will play by rules without seeking the direct involvement of their more powerful home states. An example of the latter is Argentina's participation in the arbitral process following its economic meltdown and the opportunity that the process gave Argentina to delay payment for ten years.[93] The suggestion being, without rules, the powerful debtors would have collected the debt in less civilized manners.

This interesting outlook aside, the current backlash and desire to reform is coming from all directions. This is a moment of reckoning for IIL around the world. Doctrine is debated everywhere. There is movement in every direction. The PAIC is a part of the worldwide movement. Evidence of competing schools of thought is emerging. This Section evaluates these competing schools through the prism of proposed and finalized arrangements such as Trans-Pacific Partnership (TPP),[94] Transatlantic Trade and Investment Partnership (T-TIP), the E.U.-Canada Comprehensive Economic Trade Agreement (CETA), India's new Model BIT and South Africa's alternative, and finally the PAIC.

A. *Trans Pacific Partnership (TPP)*

The Trans Pacific Partnership (TPP) was to be the largest regional trade and investment initiative of the United States and eleven Pacific Rim nations[95] before it suffered a political setback when the newly elected president withdrew the United States on his first full weekday in office,[96] prompting New York Times columnist, Thomas Friedman, to call him a Chinese agent, not a Russian one.[97] On January 23, 2017, under instructions from the newly elected president, the Office of the U.S. Trade Representative

93. *See id.* at 37–41.

94. *See* Trans-Pacific Partnership, ch. 9, Feb. 4, 2016, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf [hereinafter TTP Investment Chapter] (providing text of the investment chapter of the Trans-Pacific Partnership) [https://perma.cc/QS75-DT8P].

95. *See* Kevin Granville, *What is TPP: Behind the Trade Deal That Died*, N.Y. TIMES (Jan. 23, 2017), https://www.nytimes.com/interactive/2016/business/tpp-explained-what-is-trans-pacific-partnership.html?_r=0 [https://perma.cc/JWF5-ZX5R]. The eleven Pacific Rim nations are Canada, Mexico, Peru, Chile, New Zealand, Australia, Singapore, Malaysia, Brunei, Vietnam, and Japan. *See id.* Collectively, they represent about forty percent of the world's GDP with a total of $28 trillion. *Id.*

96. Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html [https://perma.cc/HCY6-MV8D].

97. Thomas L. Friedman, *Trump Is a Chinese Agent*, N.Y. TIMES (Mar. 29, 2017), https://www.nytimes.com/2017/03/29/opinion/trump-is-a-chinese-agent.html?mabReward=ACTM4&recp=5&action=click&pgtype=Homepage&region=CColumn&module=Recom

(USTR) officially informed the other signatories that the United States had "formally withdrawn from the TPP Agreement."[98]

The pact excluded China, and indeed, might even have been aimed at constraining it. However, China did not express serious dissatisfaction with it and instead continued to pursue its own regional initiatives, including the silk-road initiative.[99] Upon its withdrawal from the TPP, the United States officially announced its preference for bilateral trade and investment deals,[100] which effectively signaled the triumph of bilateralism, at least inasmuch as the United States is concerned.[101]

---

mendation&src=rechp&WT.nav=RecEngine&_r=0 [https://perma.cc/NLC2-SCDZ]. Friedman supports his allegation as follows:

> The big story everyone is chasing is whether President Trump is a Russian stooge. Wrong. That's all a smoke screen. Trump is actually a Chinese agent. He is clearly out to make China great again. Just look at the facts.
>
> Trump took office promising to fix our trade imbalance with China, and what's the first thing he did? He threw away a U.S.-designed free-trade deal with 11 other Pacific nations—a pact whose members make up 40 percent of global G.D.P.

Id.

98. Trans-Pacific Partnership, Office of the U.S. Trade Representative, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership ("The letter emphasizes the commitment of the United States to free and fair trade, and encourages future discussions on 'measures designed to promote more efficient markets and higher levels of economic growth.'") [https://perma.cc/HP2N-BYEH].

99. *See* Granville, *supra* note 95 ("China viewed the pact with concern, seeing a potential threat as the United States tried to tighten its relationship with Asian trading partners. At the same time, the deal provided China some cover as it pursues its own trade agreements in the region, such as the Silk Road initiative in Central Asia."). Thomas Friedman expressed his frustration with the new administration's decision to withdraw with unusual vigor:

> The Trans-Pacific Partnership was based largely on U.S. economic interests, benefiting our fastest-growing technologies and agribusinesses, and had more labor, environmental and human rights standards than any trade agreement ever. *And it excluded China. It was our baby, shaping the future of trade in Asia.*
>
> Imagine if Trump were negotiating with China now as not only the U.S. president but also as head of a 12-nation trading bloc based on our values and interests. That's called l-e-v-e-r-a-g-e, and Trump just threw it away . . . because he promised to in the campaign — without, I'd bet, ever reading TPP. What a chump! I can still hear the clinking of champagne glasses in Beijing.

Friedman, *supra* note 97. The Regional Comprehensive Economic Partnership (RCEP) could be viewed as China's alternative to the TTP. The member states of the RCEP are Australia, Cambodia, India, Japan, Lao PDR, Myanmar, Philippines, Thailand, Brunei Darussalam, People's Republic of China, Indonesia, Korea, Republic of, Malaysia, New Zealand, Singapore, and Viet Nam. *See Regional Comprehensive Economic Partnership*, Asia Regional Integration Ctr., https://aric.adb.org/fta/regional-comprehensive-economic-partnership [https://perma.cc/9NHA-B7E7].

100. *See* Granville, *supra* note 95 ("Mr. Trump's press secretary, Sean Spicer, later said the administration would push for bilateral trade agreements in the future.").

101. *See, e.g.*, Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 Harv. Int'l L. J. 427, 464 (2010) ("[G]iven the asymmetric nature of bilateral negotiations between a strong, developed country, and a usually much weaker developing country, the

Although it appears that it has now been put to rest, it was one of the principal indicators of the contemporary trends in investment law generally and investor-state dispute settlement (ISDS) in particular. The TTP Agreement[102] itself is a complex document covering many aspects of economic relations including investment. While it was active, it sought to remedy some of the real and perceived problems of IIL and dispute settlement.

1. Substantive Protection

The TPP's substantive protection provisions are more elaborate than their classic formulation because in addition to the National Treatment provision[103] and the Most Favored Nation provision,[104] a Minimum Standard of Treatment provision is included,[105] which emphasizes the fair and equitable treatment and full protection and security.[106] The TPP Investment Chapter does not define these terms. Instead, it leaves the definition to customary international law.[107] This effectively leaves a significant amount of discretion to arbitrators.

The expropriation provision contains the Hull Rule in its classic formulation including interpretation of "public purpose" by refer-

---

bilateral setting allows the developed country to use its power more effectively than does a multilateral setting, where the power may be much diluted."). Bilateralism could be beneficial to powerful economies. *See id.*

102. For the full text of the Trans-Pacific Partnership, see Trans-Pacific Partnership Full Text, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text [https://perma.cc/AD99-LPBJ].

103. *See* TTP Investment Chapter, *supra* note 94, art. 9.4.

104. *See id.* art. 9.5.

105. *See id.* art. 9.6.

106. *Id.* For example, paragraph 2(a) of the Minimum Standard of Treatment provision provides that "(a) '*fair and equitable treatment*' includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world." *Id.* art. 9.6(2)(a)) (emphasis added). Further, paragraph 2(b) of the same provisions states, "'*full protection and security*' requires each Party to provide the level of police protection required under customary international law." *Id.* art. 9.6(2)(b) (emphasis added).

107. *See id.* art. 9.6, n.15; *Id.* at Annex 9-A. Annex 9-A to the TTP Investment chapter provides:

> The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 9.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens.

Id.

ence to customary international law.[108] The provisions on the states' maintenance of regulatory discretion with respect to the environment and health,[109] as well as corporate social responsibility, are unremarkable.[110]

2. Investor-State Dispute Settlement

The ISDS provisions of the TPP contains some improvements but is by no means revolutionary. It maintains the traditional infrastructure, for instance, ICSID, ICISD Additional Facility Rules (with default appointing authority given to the Secretary General under 9.21(2)) or UNCITRAL Rules based on the parties' choice.[111] Most notably, suggesting a new trend, it expressly spells out the respondent state's right to submit counterclaims or even rely on its own claims as a set off in a proceeding initiated by the investor.[112] Even more indicative of the new trend is the express mandating of the openness of the proceedings to the public.[113] This is, of course, meant to address the widely held belief that secretly constituted tribunals operating in secret are ruling on the wisdom of state regulatory measures.[114]

---

108. *See id.* art. 9.8; *see also id.* art. 9.8, n.17 ("For greater certainty, for the purposes of this Article, the term "public purpose" refers to a concept in customary international law. Domestic law may express this or a similar concept by using different terms, such as "public necessity", "public interest" or "public use.").

109. *See id.* art. 9.16.

110. *See id.* art. 9.17.

111. *See id.* art. 9.21(2) (a), (b).

112. *See id.* art. 9.19(2) ("When the claimant submits a claim pursuant to [Article 9.19] paragraph 1(a)(i)(B), 1(a)(i)(C), 1(b)(i)(B) or 1(b)(i)(C), the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant.").

113. *See id.* art. 9.24 (requiring a respondent to an arbitral proceeding to provide the public, *inter alia*, with a "(a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials and briefs submitted to the tribunal by a disputing party and [certain other] written submissions; (d) minutes or transcripts of hearings of the tribunal . . . and (e) orders, awards and decisions of the tribunal").

114. *See e.g.*, Anthony Depalma, *Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. Times (Mar. 11, 2001), http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html [https://perma.cc/9NQE-3H4J]. Depalma elaborated:

> THEIR meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors under the North American Free Trade Agreement.

Id.

B. *Transatlantic Trade and Investment Partnership (T-TIP)*

According to the USTR, "[t]he Transatlantic Trade and Investment Partnership (T-TIP) is an ambitious, comprehensive, and high-standard trade and investment agreement being negotiated between the United States and the European Union (EU)."[115] The changes that the T-TIP makes are more structural especially on ISDS.

1. Substantive Protection

The three pillars as stated by the USTR are the following:

> We seek to secure for U.S. investors in the EU important rights comparable to those that would be available under U.S. legal principles and practice, while ensuring that EU investors in the United States are not accorded greater substantive rights with respect to investment protections than U.S. investors in the United State
>
> We seek to ensure that U.S. investors receive treatment as favorable as that accorded to EU investors or other foreign investors in the EU, and seek to reduce or eliminate artificial or trade-distorting barriers to the establishment and operation of U.S. investment in the EU;
>
> We seek to provide and maintain meaningful procedures for resolving disputes between U.S. investors and the EU and its Member States that are in keeping with the goals of expeditious, fair and transparent dispute resolution and the objective of ensuring that governments maintain the discretion to regulate in the public interest.[116]

The European Union's position is similar but with a different emphasis:

> In a nutshell, the EU and US would commit: not to discriminate against each other's investors on the grounds of nationality; not

---

115. *Transatlantic Trade and Investment Partnership (T-TIP)*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/ttip [https://perma.cc/GA27-NW34]. USTR described the parties to T-TIP and the Partnership itself as follows:

> The U.S. and EU economies are two of the most modern, most developed, and most committed to high standards of consumer protection in the world. T-TIP aims to bolster that already strong relationship in a way that will help boost economic growth and add to the more than 13 million American and EU jobs already supported by transatlantic trade and investment. T-TIP will be a cutting-edge agreement aimed at providing greater compatibility and transparency in trade and investment regulation, while maintaining high levels of health, safety, and environmental protection. T-TIP presents an extraordinary opportunity to strengthen the bond between vital strategic and economic partners.

Id.

116. *Transatlantic Trade and Investment Partnership (T-TIP)/ Investment, T-TIP Issue-by-Issue Information Center: Investment*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-t-tip/t-tip-5 [https://perma.cc/P5WU-G9JM].

> to take control of (expropriate) their assets, such as through nationalisation without paying them compensation . . . to protecting foreign investors against being unfairly treated in certain other ways, such as through denial of justice . . . .[117]

Both sides emphasize the traditional rules but appear genuinely desirous of significant shift from a purely investor protection regime to a more balanced approach of creating a favorable business environment without unfair advantage to the investor. The E.U. Commission's Concept Paper appears to be the best articulation of the perceived problems and the proposed solutions.[118]

The Concept Paper recognizes many of the problems of IIL and ISDS that developing countries have been complaining about for decades. For example, it expressly notes that "[i]n the past, investment agreements have often been drafted more with the protection of investments in mind than the state's right to regulate. Certain investment agreements have even explicitly included a reference to the rights of investors to a 'stable business environment.'"[119]

In view of all that, the European Union is proposing a more hands-on approach. For example, the proposal would confine such amorphous concepts as fair and equitable treatment and indirect expropriation to a closed list of conducts.[120] The European Union's proposed draft text of the T-TIP itself, for example, contains this closed list of the violation of the fair and equitable principle:

> A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or a series of measures constitutes: (a) denial of justice in criminal, civil or administrative proceedings; or (b) fundamental breach of due process, including a fundamental breach of transparency and obstacles to effective access to justice, in judicial and administrative proceedings; or (c) manifest arbitrariness; or (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or (e) harassment, coercion, abuse of power or similar bad faith conduct; or (f) a breach of any further ele-

117. European Comm'n, Fact Sheets on Investment Protection in TTIP 2 (2015), http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153018.pdf [https://perma.cc/GPM2-2NUY]; *see generally Documents and Events*, European Comm'n, http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#eu-position (providing comprehensive information on investment protection) [https://perma.cc/NES9-THSQ].

118. *See* EU Commission Concept Paper, *supra* note 1, at 1.

119. *Id.* at 5.

120. *See id.* at 6.

> ments of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.[121]

Although the expropriation provision appears in its classic formulation of the Hull Rule,[122] it makes express rules in the form of an annex for purposes of interpretation.[123]

Moreover, it empowers the state parties themselves to provide an authoritative interpretation of principles rather than leaving it to tribunals.[124] Almost all of the concerns that the Concept Paper raises are exactly the same concerns that the developing world has been complaining about for decades.

2. ISDS Proposal

The Concept Paper notes that "[i]t has also been argued in the public debate that arbitral tribunals, in interpreting the investment agreements, have only considered the objective of protecting the economic interests of the investors and have not balanced it against the sovereign right of States to legislate in the public interest."[125] But the solution that it proposes is far greater than the redefining of doctrine—it not only seeks to change the structure of

---

121. European Commission, Transatlantic Trade and Investment Partnership, Draft Text, ch. II, sec. 2, art. 3(2), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf [hereinafter Draft T-TIP] [https://perma.cc/4DBH-5GWW].

122. *See id.* art. 5(1) ("Neither Party shall nationalize or expropriate a covered investment either directly or indirectly through measures having an effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') except: (a) for a public purpose; (b) under due process of law; (c) in a non-discriminatory manner; and (d) against payment of prompt, adequate and effective compensation.").

123. *See Id.* art. 5(2). Annex I on expropriation provides in part:

> The determination of whether a measure or series of measures by a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors: (a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; (b) the duration of the measure or series of measures by a Party; (c) the character of the measure or series of measures, notably their object and content.

Id. at Annex I(2).

124. *See* EU Commission Concept Paper, *supra* note 1, at 6 (referring to the EU-Canada Treaty discussed below).

125. *Id.* at 5.

the decision-making but also the decision-makers.[126] That has sent shockwaves within the international arbitration community.[127]

It praised the already achieved reforms as contained in the ECTA/EU and Singapore FTAs, namely the incorporation of codes of ethics, the outsourcing of decisional authority on conflict to ICSID Secretary General away from the two arbitrators who are ordinarily asked to decide on the conflict of their colleague, the default appointing authority to Secretary General from a pre-agreed roster of arbitrators at the time of the agreement not dispute, and expertise in international law.[128] Unsatisfied with these changes, the Commission pursues a more serious and fundamental structural change by setting up a new permanent Investment Court System (ICS).[129]

The "main elements" of the new ICS are presented by the Commission as follows:

> The proposal for the new court system includes major improvements such as:

126. *See id.* at 6–7. The Concept Paper states:

> Currently, arbitrators on ISDS tribunals are chosen by the disputing parties (i.e. the investor and the defending state) on a case-by-case basis. The current system does not preclude the same individuals from acting as lawyers (e.g. preparing the investor's claims) in other ISDS cases. This situation can give rise to conflicts of interest – real or perceived [–] and thus concerns that these individuals are not acting with full impartiality when acting as arbitrators. The ad hoc nature of their appointment is perceived by the public as interfering in their ability to act independently and to properly balance investment protection against the right to regulate. It has also led to perceptions that this provides financial incentives to arbitrators to multiply ISDS cases.

Id.

127. *See* Stephan M. Schwebel, Judge, Int'l Court of Justice, Remarks at Sidley Austin: The Proposals of the European Commission for Investment Protection and An Investment Court System (May 17, 2016), http://isdsblog.com/wp-content/uploads/sites/2/2016/05/THEPROPOSALSOFTHEEUROPEANCOMMISSION.pdf [https://perma.cc/57TR-8KBL]. Former International Court of Justice judge and prominent arbitrator—Stephan M. Schwebel—is a vocal critic of the idea of a standing court system. *See id.* At a speech in Washington, D.C., Schwebel stated:

> A paramount question is, should ICSID in particular really be left to wither and expire after having successfully administered a very large number of cases, not because the criticism mounted against it and investor/State arbitration more broadly is valid but because uninformed or misinformed critics have made so much uninformed and misinformed noise that the EU has been moved to appease the views of those critics?

Id.

128. *See* EU Commission Concept Paper, *supra* note 1, at 7.

129. *Id.* at 11–12 ("Therefore, the EU should pursue the creation of one permanent court. This court would apply to multiple agreements and between different trading partners, also on the basis of an opt-in system. The objective would be to multilateralise the court either as a self-standing international body or by embedding it into an existing multilateral organization. Work has already begun on how to start this process, in particular on aspects such as architecture, organisation, costs and participation of other partners.").

- a public Investment Court System composed of a first instance Tribunal and an Appeal Tribunal would be set up;
- judgements would be made by publicly appointed judges with high qualifications, comparable to those required for the members of permanent international courts such as the International Court of Justice and the WTO Appellate Body;
- the new Appeal Tribunal would be operating on similar principles to the WTO Appellate Body;
- the ability of investors to take a case before the Tribunal would be precisely defined and limited to cases such as targeted discrimination on the base of gender, race or religion, or nationality, expropriation without compensation, or denial of justice;
- Governments' right to regulate would be enshrined and guaranteed in the provisions of the trade and investment agreements.

This builds on the EU's existing approach which ensures:

- proceedings will be transparent, hearings open and comments available on-line, and a right to intervene for parties with an interest in the dispute will be provided;
- Forum–shopping is not possible;
- Frivolous claims will be dismissed quickly;
- A clear distinction between international law and domestic law will be maintained;
- Multiple and parallel proceedings will be avoided.[130]

The European Union's Draft T-TIP proposes the establishment of a first instance tribunal in Section 3, Article 9 and an appellate tribunal under Article 10. The key details are the following: (1) The Tribunal of First Instance will initially be composed of fifteen judges (five from the European Union, five from the United States, and five from third countries) to be selected by a jointly set up committee.[131] The members, who need to have expertise in international law, and should have an expertise in IIL and international trade law, are selected for a period of six years with special rules at the beginning for purposes of ensuring a staggered membership.[132] More importantly, the Draft provides:

> The Tribunal shall hear cases in divisions consisting of three Judges, of whom one shall be a national of a Member State of the European Union, one a national of the United States and

130. European Commission Press release IP/15/5651, Commission Proposes New Investment Court System For TTIP and Other EU Trade and Investment Negotiations (Sept. 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm [https://perma.cc/ZN2E-LRGD].

131. *See* Draft T-TIP, *supra* note 121, § 3, art. 9.

132. *See id.* art. 9(2)–(5).

> one a national of a third country. The division shall be chaired by the Judge who is a national of a third country.[133]

It sets up a mechanism of ensuring that the selections are "random and unpredictable."[134] While temporarily the T-TIP suggests retaining judges for a nominal monthly fee for their availability, it envisions that the court will be transformed into permanent court with permanent members.[135]

The T-TIP also establishes a permanent appeals court with six members with two each from the European Union and from the United States and two from third countries.[136] The same rules of qualifications, appointment, retention, remuneration, and assignments as the first instance tribunal apply.[137] In both cases, either ICSID or the PCA is anticipated to provide secretariat services.[138] The most important aspect of the appeals process is the jurisdiction that appeals tribunal is granted. Its jurisdiction is stated as follows:

> Either disputing party may appeal before the Appeal Tribunal a provisional award, within 90 days of its issuance. The grounds for appeal are: (a) that the Tribunal has erred in the interpretation or application of the applicable law; (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or, (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).[139]

It cannot only correct errors of law but also errors of fact as long as it is "manifest" on top of all the annulment grounds under the ICSID Convention.[140] This is unprecedented and one of the manifestations of the frustration with the existing system. Other manifestations of added checks and balances include express and strict rules on ethics, which prohibits the revolving door phenomenon of arbitrator-counsel-arbitrator,[141] the dismissal of unfounded

---

133. *Id.* art. 9(6).
134. *Id.* art. 9(7).
135. *See id.* art. 9(11)–(15).
136. *Id.* art. 10.
137. *See id.*
138. *See id.* arts. 9(16), 10(16).
139. *Id.* art. 29(1).
140. *Id.*; *see also* ICSID Convention, *supra* note 47, art. 52(1) ("Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal;(d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.").
141. *See* Draft T-TIP, *supra* note 121, Sec. 3, art. 11(2).

claims,[142] ensuring transparency,[143] and even third-party intervention.[144] All of these measures are designed to fundamentally change the way investment arbitration has developed under various rules including ICSID and UNCITRAL rules over the last half-century.

C. *Comprehensive Economic and Trade Agreement Between the European Union and Canada (CETA)*

The Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA) is the most advanced and most contemporary arrangement currently in place. CETA was signed on October 30, 2016 and the European Parliament gave its approval on February 15, 2017.[145] Chapter 8 of the CETA deals with investment. It is in itself very comprehensive.[146] It contains its own definition of investment and addresses such matters as admission, treatment and non-discrimination, right to regulation, expropriation, and dispute settlement. The provisions on non-discrimination, regulation, expropriation, and dispute settlement are worth highlighting.

The non-discrimination provisions have maintained their classic formulation in the sense that both National Treatment and Most Favored Nation treatment are enshrined without significant reformulation.[147] One interesting feature is the equivalency that these provisions make between the constituent member states of the European Union and the federal provincial arrangements of Canada for purposes of non-discrimination.[148] One other notable

142. *See id.* art. 17.

143. *See id.* art. 18.

144. *See id.* art. 23.

145. *EU-Canada Trade Agreement Enters Into Force*, EUROPEAN COMM'N (Sept. 20, 2017), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1723 [https://perma.cc/C3RL-MJ2C]; *In Focus: Comprehensive Economic and Trade Agreement (CETA)*, *supra* note 58.

146. *See* Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, at 3, Jan. 1, 2017, 2017 O.J. (L 11) 23 [hereinafter CETA].

147. *See id.* art. 8.6(1) ("Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.").

148. *See id.* art. 8.6(2) ("The treatment accorded by a Party under paragraph 1 means, with respect to a government in Canada other than at the federal level, treatment no less favourable than the most favourable treatment accorded, in like situations, by that government to investors of Canada in its territory and to investments of such investors."); *id.* art. 8.6(3) ("The treatment accorded by a Party under paragraph 1 means, with respect to a government of or in a Member State of the European Union, treatment no less favourable

feature of the Most Favored Nation provision is its exclusion of the dispute settlement provision from being imported from other treaties with other countries.[149] This is understandable because of the establishment of an investment court system, which will be discussed below.

The states' right to regulate features prominently. The basic rule is stated forcefully: "the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity."[150] The expropriation provision is also reproduced in its most classic Hull formulation as follows:

> A Party shall not nationalise or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalisation or expropriation ("expropriation"), except:
> (a) for a public purpose;
> (b) under due process of law;
> (c) in a non-discriminatory manner; and
> (d) on payment of prompt, adequate and effective compensation.[151]

The dispute settlement provision has undergone the most serious modification. Section F constituting of Articles 8.18 to 8.45 contains detailed rules on ISDS. The most notable new features include the creation of first instance and appellate tribunals. The CETA defers the possibility of the establishment of an ICS for a multilateral arrangement[152] but sets up a tribunal of fifteen jurists, five from the European Union, five from Canada, and five from third countries.[153] A panel of three with a neutral chair selected by a CETA joint committee ordinarily hears each case unless the parties agree on a sole arbitrator.[154] If appointments are not timely

than the most favourable treatment accorded, in like situations, by that government to investors of the EU in its territory and to investments of such investors.").

149. *See id.* art. 8.7(4).

150. *Id.* art. 8.9(1). See *id.* art. 8.9(2)–(4) for additional details.

151. *Id.* art. 8.12(1); See *id.* art. 8.12(2)–(6) for additional details. Article 8.12 also incorporates an interpretive guide under Annex 8-A. *Id.* art. 8.12(1). Another notable feature is the reference to the possibility of domestic court determination of certain investor claims relating to expropriation. *See* Article 8.12(4) ("The affected investor shall have the right, under the law of the expropriating Party, to a prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Party, in accordance with the principles set out in this Article."). The relationship of this with the dispute settlement provision is discussed below.

152. *See id.* art. 8.29.

153. *Id.* art. 8.27.

154. *Id.*

made, the Secretary General of ICSID is given the authority to do so. And, indeed, ICSID also serves as the secretariat. In fact, the ICSID Rules or the Additional Facility Rules govern unless the parties choose the UNCITRAL Rules or some other procedural rules.[155]

CETA sets up a permanent appellate tribunal with the jurisdiction to, *inter alia*, "uphold, modify or reverse the Tribunal's award based on: (a) errors in the application or interpretation of applicable law [or] (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law."[156] Enforcement is through either the ICISD or the New York Convention.[157] It also adds several safeguards such as rules on ethics,[158] transparency,[159] and dismissal of manifestly unfounded claims.[160]

D. *India's New Mode BIT Proposal*

India entered the foray of BITs on May 14, 1994 by signing its very first BIT with the United Kingdom.[161] Official Indian government sources indicate that since then, India has signed eighty-three Bilateral Investment Promotion and Protection Agreements (BIPA) of which seventy-two have come into force.[162] India is also a party to thirteen additional treaties with investment provisions.[163]

India is not a member of ICSID[164] but it has ratified the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Award.[165] It has also adopted an arbitration law modeled

155. *See id.*

156. *Id.* art. 8.28.

157. *Id.* art. 8.41.

158. *See id.* art. 8.30.

159. *See id.* art. 8.36.

160. *See id.* arts. 8.32–33.

161. *See India: Bilateral Investment Treaties (BITs)*, INVESTMENT POL'Y HUB, http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu [https://perma.cc/4DBF-XBJZ].

162. *See List of Countries with Whom Bilateral Investment Promotion and Protection Agreements (BIPA) has been signed (As on December 2013)*, MINISTRY OF FIN.: DEP'T OF ECON. AFFAIRS, http://dea.gov.in/bipa?page=8 [https://perma.cc/AXX3-FZN7].

163. *See International Investment Agreements Navigator: India*, INVESTMENT POL'Y HUB, http://investmentpolicyhub.unctad.org/IIA [https://perma.cc/F9ZK-3CEX].

164. *See Database of ICSID Member States – ICSID/3*, ICSID, https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx [https://perma.cc/3BM7-8HV2]. Unlike India, China ratified the ICSID Convention on January 7, 1993. *Id.*

165. *See Contracting States – List of Contracting States*, N.Y. ARBITRATION CONVENTION, http://www.newyorkconvention.org/list+of©ontracting§tates [https://perma.cc/MA6K-Y3ZG].

after the UNCITRAL Model Law.[166] Although India has never been a member of ICSID, it was named as a respondent state in more than twenty known ad hoc investor-state arbitration cases.[167]

As a result of the high number of treaty-based investment claims against it, India has recently announced that it would overhaul its existing BIT regime.[168] Further, India served notice of termination to fifty-seven countries[169] and unveiled its own new BIT Model Text.[170]

---

166. *See Status UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html [https://perma.cc/2CT8-VK8G].

167. *See India – as a Respondent State*, INVESTMENT POL'Y HUB, http://investmentpolicyhub.unctad.org/ISDS/CountryCases/96?partyRole=2 (listing cases and links to the available information where India was named as a respondent state) [https://perma.cc/U328-GPH4]. The earliest case was filed in 2003. *Id.* India has more than ten pending investment claims against it as of January 2018. *Id.* As to the concluded cases, while one case was concluded through an award in favor of the claimant, the remaining nine were settled. *Id.* The case that was disposed by a final award is the White Industries v. India case. *Id.* It is believed to have exasperated India's dissatisfaction with the existing arbitral order that the BITs enabled. *See* White Industries Australia Ltd. v. India, UNCITRAL, Award (Nov. 30, 2011), http://investmentpolicyhub.unctad.org/ISDS/Details/378 [hereinafter Final Award, White Industries] [https://perma.cc/Y7N2-QKBL].

168. *See* Kavaljit Singh & Burghard IIge, *India Overhauls Its Investment Treaty Regime*, FIN. TIMES BLOG (July 15, 2016), https://www.ft.com/content/53bd355c-8203-34af-9c27-7bf990a447dc [https://perma.cc/XKJ4-S64U].

169. *See id.*

170. India first unveiled a draft in March 2015 for comment and consultations. *See* Grant Hanessian & Kabir Duggal, Note, *The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?* 32 ICISD REV. 216, 216 (2017). Comments were received from different sources including the Law Commission of India (LCI). *See id.* at n.6. Notably, a significantly modified Model was adopted in December 2015. *See* Annex – Model Text for the Indian Bilateral Investment Treaty, http://www.finmin.nic.in/sites/default/files/ModelTextIndia_BIT%20%281%29.pdf?download=1 [hereinafter Model Text for the Indian BIT] [https://perma.cc/E9YN-79EM]. On December 16, 2015, the Press Information Bureau of the Government of India announced that:

> [t]he Union Cabinet chaired by the Prime Minister Shri Narendra Modi has given its approval for the revised Model Text for the Indian Bilateral Investment Treaty. The revised Indian model text for Bilateral Investment Treaty (BIT) will replace the existing Indian Model BIT. The revised model BIT will be used for re-negotiation of existing BITs and negotiation of future BITs and investment chapters in Comprehensive Economic Cooperation Agreements (CECAs) / Comprehensive Economic Partnership Agreements (CEPAs) / Free Trade Agreements (FTAs).

Model Text for the Indian Bilateral Investment Treaty, GOV'T OF INDIA: CABINET PRESS INFO. BUREAU (Dec. 16, 2015), http://pib.nic.in/newsite/PrintRelease.aspx?relid=133411 [https://perma.cc/4ZFD-M3RX]. The December modifications to the Indian BIT now represent the official Model Text. *See* Model Text for the Indian BIT, *supra* note 170.

In addition to modifying many of the substantive provisions[171] and adding investor and home state responsibilities,[172] India's new Model BIT makes significant changes to the dispute settlement provision—most notably, the requirement of exhaustion of domestic judicial remedies or showing of futility after diligent pursuit and strict time-bars.[173] It also provides for the dismissal of frivolous claims, for instance, those that are "manifestly without legal merit or unfounded as a matter of law."[174]

Consistent with the contemporary trend, the Indian BIT Model proposes the establishment of an appellate mechanism.

> The parties may by agreement or after the completion of their respective procedures regarding the enforcement of this Treaty establish an institutional mechanism to develop an appellate body or similar mechanism to review awards rendered by tribunals under this chapter. Such appellate body or similar mechanism may be designed to provide coherence to the interpretation of provisions in this Treaty.[175]

E. *South Africa's Alternative*

South Africa's recent renunciation of its BITs and enactment of a new domestic investment law as a replacement[176] has been a part of the contemporary trend.[177] The South African Department of

---

171. For example, the Model Text Indian BIT maintains the National Treatment provision but eliminates the Most Favored Nation provision. *See* Model Text for the Indian BIT, *supra* note 170, art. 4. It also formulates certain provisions differently. *See, e.g.*, *id.* art. 3.1 ("No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through: (i) Denial of justice in any judicial or administrative proceedings; or (ii) fundamental breach of due process; or (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or (iv) manifestly abusive treatment, such as coercion, duress and harassment.").

172. *See id.* art. 11 (anti-corruption and tax liability rules), and art. 12 (corporate social responsibility rules.).

173. *See id.* art. 15.2 ("Where applicable, if, after exhausting all judicial and administrative remedies relating to the measure underlying the claim for at least a period of five years from the date on which the investor first acquired knowledge of the measure in question, no resolution has been reached satisfactory to the investor, the investor may commence a proceeding under this chapter by transmitting a notice of dispute ("notice of dispute") to the Defending Party.").

174. *Id.* art. 21.1.

175. *Id.* art. 29.

176. *See* Karen Bosman, *South Africa: Trading International Investment for Policy Space* (Stellenbosch Econ. Working Paper No. 04. 2016), http://www.ekon.sun.ac.za/wpapers/2016/wp042016/wp-04-2016.pdf (for a discussion of the process and what the new domestic investment law replaces) [https://perma.cc/25Q9-VCCD].

177. According to a press statement by the South African Department of Trade and Industry, "[t]he introduction of such investment protection legislation is consistent with

Trade and Industry's statement makes one fundamental point very clear—it is a point that all others are not prepared to make: that there is no relationship between BITs and attraction of investment.[178] South Africa's decisions to allow its existing BITs to lapse and to enact of the Protection of Investment Act of 2015 (PIA or the Act)[179] are thus predicated on this assessment.[180]

---

recent global trends. Countries such as Canada, Australia, India, Brazil and Indonesia have all undertaken reviews of their [BITs] with a view to enacting reforms." *See The Protection of Investment Act, 2015*, Republic of S. Afr. Dep't of Trade & Industry (Jan. 23, 2016), http://www.thedti.gov.za/editmedia.jsp?id=3630 [https://perma.cc/ZB3Z-7EH5].

178. *See id.* The exact words out of which the above assessment is extrapolated read:

> The latest investment report from the UNCTAD shows that FDI growth globally in 2015 was largely due to cross-border mergers and acquisitions (M&A), with only limited Greenfield investment projects in productive assets. A Greenfield investment typically refers to a project that creates a new physical facility which is considered productive, in part because they typically create jobs. Therefore a significant chuck of FDI in 2015 "was related to corporate reconfigurations involving large values . . . . but little movement in actual resources'' according to the UNCTAD report.
>
> The decrease in FDI in South Africa follows a global trend due to the decrease in demand for commodities. The UNCTAD report states that "flows faltered in Africa, Latin America and the Caribbean . . . reflecting the plummeting prices of their principal commodities exports". The decline in FDI in 2015 was therefore due to the challenging global conditions. South Africa needs to focus on diversification of its manufacturing base through the implementation of the Industrial Policy going forward.
>
> In order to address any concerns surrounding investments the President of South Africa has also announced the expansion of the Inter Ministerial Committee dealing with investment to be chaired by the President.

Id.

179. Protection of Investment Act, 2015 Act. 22 of 2015 (S. Afr.), http://www.gov.za/sites/www.gov.za/files/39514_Act22of2015ProtectionOfInvestmentAct.pdf [hereinafter PIA] [https://perma.cc/26JL-SD23].

180. *See* Bureau of Econ. and Bus. Affairs, U.S. Dep't of State, South Africa Investment Climate Statement 3–4 (2015), https://www.state.gov/documents/organization/241954.pdf [https://perma.cc/DB46-LLFG]. Needless to say, South Africa's new approach has concerned many of its investors. *See id.* The U.S. Department of State's 2015 Investment Climate Statement captures the concerns and the root causes of the policy shift. For example, the Statement provides:

> The biggest concern for investors has become the direction of economic policy. The South African government has since 2012 increasingly proposed laws, policies and reforms aimed at improving the lives of historically disadvantaged, generally black South Africans, arguing that the transition from apartheid over the last 20 years has not produced the expected economic transformation in terms of employment and ownership of companies. There is also a sense that the ANC and the South African Government feel they cannot rely on the private sector to complete this transformation in a timely manner, and thus the state needs to take a more direct hand in driving development, particularly by promoting greater industrialization. The need to improve economic outcomes for the unemployed and historically disadvantaged is broadly recognized within the business community, and companies have invested significant time and money in developing their staff and development opportunities in their communities[.] Recent initiatives have included tightening labor laws to achieve proportional racial representation in workplaces, performance requirements for government procurement such as ownership transfer and localization, and weakening commercial property rights.

Unlike BITs, the emphasis of the purpose of PIA is not exactly on the promotion and protection aspect of it. It is stated in the following terms:

> The purpose of this Act is to—(a) protect investment in accordance with and subject to the Constitution, in a manner which balances the public interest and the rights and obligations of investors; (b) affirm the Republic's sovereign right to regulate investments in the public interest; and (c) confirm the Bill of Rights in the Constitution and the laws that apply to all investors and their investments in the Republic.[181]

The Act itself is unusually brief for a domestic investment law but it challenges the foundations of IIL in more profound ways than is often acknowledged. As a matter of doctrine, it rejects the notion that South African domestic rules and processes are inadequate or fundamentally unfair and seeks to ensure that investors will receive fair domestic administrative treatment.[182] The emphasis again is in making sure that the domestic processes are adequate and that foreign investors have unlimited access to them.[183]

In terms of substantive protection, the PIA promises no more or no less treatment than that South Africa accords its own citizens[184] with the exception of the right to establishment.[185] Not only does the Act conspicuously omit the fair and equitable treatment and

> While some initiatives have gained the force of law, such as the updated 2013 Broad-based Black Economic Empowerment (B-BBEE) amendments, other initiatives remain the subject of debate, creating uncertainty about the future regulatory and investment climate. Sectors of specific concern have included the extractive industries, security services and agriculture.
>
> Despite policy uncertainty, South Africa is a destination conducive to U.S. investment, and should remain so as the dynamic business community is highly market-oriented and the driver of economic growth. South Africa offers ample opportunities, and continues to attract investors seeking a location from which to access to the rest of the continent.

Id.

181. PIA, *supra* note 179, § 4.

182. *See id.* § 6(1) ("The government must ensure administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural justice to investors in respect of their investments as provided for in the Constitution and applicable legislation.").

183. *See id.* § 6(4) ("Subject to section 13(4), investors must, in respect of their investments, have the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum consistent with section 34 of the Constitution and applicable legislation.").

184. *See id.* § 8(1) ("Foreign investors and their investments must not be treated less favourably than South African investors in like circumstances."); *see also id.* § 10 ("Investors have the right to property in terms of section 25 of the Constitution.").

185. *See id.* § 7(1) ("All investments must be established in compliance with the laws of the Republic."); *id.* § 7(2) ("This Act does not create a right for a foreign investor or prospective foreign investor to establish an investment in the Republic.").

most favored nation clauses, but it also reduces the principle of full protection and security to the provision of "physical security of property."[186]

And yet, the most profound change that the Act introduces relates to dispute settlement. Having provided for what appears to be meaningless mediation process as a pre-escalation rule,[187] as far as a binding resolution of disputes is concerned, it offers access to domestic justice[188] but adds the following very critical provision that rethinks the whole investor-state regime that has dominated IIL for the last half-century:

> The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. The consideration of a request for international arbitration will be subject to the administrative processes set out in section 6. Such arbitration will be conducted between the Republic and the home state of the applicable investor.[189]

This innocuous sounding provision effectively gets rid of the phenomenon known as investor-state arbitration enabled by investment treaties between South Africa and the home state of the investor but ostensibly attempts to permit a state-to-state arbitration without privy. This is analogous to the investor-state third party beneficiary formula considered revolutionary at the time as it suddenly made private parties subjects of international law. South Africa's new attempt now permits the private investor to grant *locus standi* to the home state presumably through a simple private contractual instrument. Even assuming that South Africa's permission in this regard is relevant, it is unclear how and under what circumstances and on the basis of what substantive rules the home state might assert a claim on behalf of its investor-citizen against the South African state. What is apparently anticipated is the assertion of the investor's contractual and domestic law rights by the home state without the benefit of an international treaty or custom.

---

186. *Id.* § 9. The physical security of property provision states, "[t]he Republic must accord foreign investors and their investments a level of physical security as may be generally provided to domestic investors in accordance with minimum standards of customary international law and subject to available resources and capacity." *Id.*

187. *See id.* § 13(1)–(3).

188. *See id.* § 13(4) ("Subject to applicable legislation, an investor, upon becoming aware of a dispute as referred to in subsection (1), is not precluded from approaching any competent court, independent tribunal or statutory body within the Republic for the resolution of a dispute relating to an investment.").

189. *Id.* § 13(5).

Procedurally, it would appear analogous to trade dispute settlement but in trade there is always a substantive treat rule that the moving state would invoke alleging its violations has harmed its citizens or its interests. South Africa's invitation of the home state's espousal of contractual claims would traditionally fall under the domain of diplomatic protection. It is also reminiscent of the pre-BIT days of self-help and gunboat diplomacy. By this Act, South Africa might have taken the most radical action so far. In any case, how it will play out in practice remains to be seen.

F. *Summary of Contemporary Trends*

TPP on the one side and T-TIP and CETA on the other might at first glance appear to be trends in the same direction, but their unification is more diagnostic than prescriptive. On the diagnosis, there is a fairly strong consensus among those who lead each one of these efforts that the substantive international investment rules scattered in the multitude of BITs not only lack clarity and coherence but also often undermine the states' right to regulate in the public interest.

Perhaps more importantly, there appears to be a consensus that because these rules are interpreted and applied by an economically interested epistemic community plagued by conflict of interest and secrecy, the ISDS system also needs to be modified.

The prescriptions for these real and perceived problems have not, however, been uniform particularly with respect to ISDS. As discussed above, each of these contemporary reform efforts has attempted to redefine some substantive provisions, to inject a more robust regulatory mandate, and to introduce ethical and transparency rules. Where they differ is more interesting: the TPP largely maintains the existing ISDS system, but the T-TIP and CETA adopt significant reforms including a standing and representative ICS.

The European Union is convinced that the existing ISDS system is too frail and has out-lived its usefulness. The United States is not so sure inasmuch at least as its relations with non-European partners are concerned. The initial TPP effort was an indication of that. As Thomas Friedman described it, TPP "*excluded China. It was our baby, shaping the future of trade in Asia.*"[190] However, matters now appear more complicated either because the new president has failed to understand the TPP's benefits as Friedman claims or

190. Friedman, *supra* note 97 (emphasis in original).

because the United States, like the European Union, now believes that the T-TIP approach might be the way of the future of IIL and ISDS.

India's disavowal of its BITs and new proposal also makes a part of the contemporary trend. India's proposed changes are fairly consistent with TPP, T-TIP, and CETA in terms of the modifications of some substantive rules but the requirement of exhaustion of local remedies in dispute settlement goes further than the other proposals, which seek to remedy the problem through standing court system and by providing appellate discipline.

South Africa's effort is revolutionary. It not only modifies substantive rules but totally eliminates investor-state arbitration altogether. The only arbitration that the South African Act permits is a state-to-state arbitration for injuries to the investor. Although the mechanics of how it will work remain unclear, the political decision signals a return to classical international law.

The following Section evaluates the proposed Intra-Africa Investment Code in light of the discussions of the history and the contemporary world trends in the previous Sections.

IV. The Pan-African Investment Code: Contemporary Norms and Residual Dilemmas

As shown above, African states are increasingly interconnected by trade and investment although the interconnectedness is nowhere it needs to be. The economic relations are governed by a network of regional and bilateral trade and investment treaties. The PAIC seeks to build on preexisting treaties and even replace most overtime. Substantively, as well as procedurally, it is by no means a complete novelty although the changes that it proposes are not exactly mundane. In particular, it builds on such treaties and models such as the SADAC Model.[191] This Section critically evaluates PAIC in light of the old rules and institutions and contemporary tends.

A. *Objectives*

The objective of PAIC is "to promote, facilitate and protect investments that foster the sustainable development of each Mem-

191. *See* Southern Afr. Dev. Community, SADC Model Bilateral Investment Treaty Template with Commentary arts. 20–22 (2012), http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf [https://perma.cc/6QWR-RHFQ].

ber State, and in particular, the Member State where the investment is located."[192] The emphasis is on the promotion, facilitation, and protection just like any traditional investment treaty; what is unusual is the focus on the nature of this investment, for instance, it has to be one that fosters not just any development but sustainable development.

The reference to the states' right to regulate for the sake of sustainable development is not the only interesting feature. It also expressly seeks "to achieve an overall balance of the rights and obligations between Member States and the investors under this Code"[193] and recognizes "the crucial role played by women and youth in the development of Africa."[194] Even more interestingly, it includes a matter almost every BIT or RTA expressly wishes to avoid and avoids—the free movement of persons. But the PAIC expressly says that: "the free movement of people is a fundamental pillar of African integration."[195]

B. *Scope and Structural: What Will It Replace?*

The PAIC enshrines the rights and responsibilities of not only the contracting states, but also the investors.[196] Although enshrining investor responsibilities in investment treaties was never a part of the original design of IIL, as indicated in previous Sections above, it is becoming increasingly fashionable. The PAIC is part of that trend in a way but the details are discussed in this Section below.

Structurally, the PAIC is designed to replace intra-Africa BITs and any other investment rules in RTAs whenever those rules permit their own replacement whether due to the expiry of time or through agreement.[197] In the event of concurrent existence, PAIC provides that the member states "may" provide that PAIC rules supersede.[198] The "may" in the current draft is a function perhaps of it being a draft but the idea is for the member states to make a choice in the final draft whether they want the Code to override all preexisting intra-Africa investment rules or perhaps permit a reser-

192. AFR. UNION COMM'N, Draft Pan-African Investment Code, ch. 1, art. 1 (Dec. 2016), https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf [hereinafter PAIC] [https://perma.cc/BUG8-4C8C].

193. *Id.* pmbl.

194. *Id.*

195. *Id.*

196. *Id.* art. 2.

197. *See id.* art. 3(1)–(3).

198. *Id.* art. 3(2).

vation. That is not a choice that the Draft has made yet. In any case, if adopted, PAIC will become the most dominant, if not the exclusive, intra-Africa investment rule, which will in turn, shape the African landscape even vis-à-vis the rest of the world.

C. *Substantive Rules*

The PAIC contains elaborate standards of treatment, expropriation, and compensation, as well as unique provisions on labor and environment, corporate social responsibility, ethics, and corruption.

1. Standard of Treatment

The most important rules on the treatment of investment are Most Favored Nation and National Treatment but the principles are stated with some clarity in terms of what is included and what is excluded. It begins with the classic Most Favored Nation formulation: "Each Member State shall accord to investors of another Member State treatment no less favorable than it accords, in like circumstances, to investors of any other Member State or of a third country with respect to the management, conduct, operation, expansion, sale or other disposition of investment."[199] It further defines what constitutes "like circumstances" in some detail,[200] but more importantly, it lists elaborate exceptions to the principle.[201]

The exceptions appear to have the potential to swallow the rule. First, the Code permits each state to have a list of prohibited sectors without imposing any limits.[202] Any member may submit such list at the time of ratification limiting their obligation. Nothing constrains their choice of limiting Most Favored Nation.[203] Second, the exception begins with this broad state power: "Member States may adopt measures that derogate from the Most-Favored-Nation principle."[204] And without linking this board power to any limitation, the following provision states: "[a]ny 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

199. *Id.* art. 7(1).
200. *See id.* art. 7(3).
201. *Id.* art. 8.
202. *See id.* art. 18.
203. *See id.* arts. 8(4), 18.
204. *Id.* art. 8(1).

the Most-Favored-Nation principle."[205] The next provision adds measures affecting "public morals."[206]

The most interesting aspect of the formulation is not the addition of the exceptions such as "public morals" not commonly seen in other investment treaties but the totally discretionary nature of what goes into the exceptions list. This is an excellent example of Africa's residual dilemma in this area. African states want to open their markets to each other but still have that fear of the strong stranger taking advantage of them. This might be a demonstration of their zealous guarding of their markets and interests although the strict guarding appears to be misdirected.

Although the National Treatment provision also maintained its classic formulation,[207] just like Most Favored Nation, it is burdened with broad exceptions. Curiously, however, the exception is stated slightly differently: "Member States may adopt measures that derogate from the National Treatment principle provided such measures are not arbitrary."[208] The Most Favored Nation exception stated above does not contain the arbitrariness limitation. In any case, the states maintain the right to discriminate when it is in the national interest, pertains to national security, health, environment, tax, and government subsidies aimed at national development.[209] Just like Most Favored Nation, the states also have preserved the discretion to attach a list of excluded sectors.[210] This again is another example of the codification of Africa's dilemma in IIL. It is essentially denying itself of the courtesy that it had accorded outsiders for ages.

2. Expropriation & Compensation

The expropriation provision does not follow the Hull Rule that almost all contemporary rules do. The Code states the rule in these terms:

> Investments in Member States shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation except if the following conditions are met in a cumulative manner:

205. *Id.* art. 8(2).
206. *Id.* art. 8(3).
207. *See id.* art. 9(1) ("A Member State shall accord to investors of another Member State treatment no less favorable than it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, and sale or other disposition of investments.").
208. *Id.* art. 10(1).
209. *See id.* arts. 10(2)–(8).
210. *Id.* art. 10(5).

> (a) a public purpose related to the internal needs of that Member State;
> (b) on a non-discriminatory basis;
> (c) against adequate compensation; and
> (d) under due process of law.[211]

While it adopts the common rule on the timing of the valuation, it omits the Hull principles of promptness and effectiveness of the compensation.[212] This is another example of the less favorable treatment of intra-Africa investment.

3. Additional Provisions

The PAIC enshrines numerous other rules that are not typically found in existing investment treaties and even in some of the new proposals.

Separate chapters are dedicated for development related issues and investor obligations. The development related issues under Chapter 3 comprise performance requirements in Article 17 and lists of scheduled investment sectors in Article 18. Both are detailed and grant enormous discretion to the member states. The discretion includes preferential treatment to local industries and enterprises and remedial measures for historically discriminated groups. The discretion, which essentially qualifies the standards of treatment, including Most Favored Nation and National Treatment, is stated in very broad terms:

> 2. Member States may introduce performance requirements to promote domestic investments and local content. Measures covered by this Paragraph include, *inter alia*:
> (a) Measures to grant 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;
> (b) Measures to support the development of local entrepreneurs;
> (c) Measures to enhance 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;
> (d) Measures to address 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 this Code.[213]

211. *Id.* art. 11(1).
212. *See id.* art. 12.
213. *Id.* art.17(2).

The Scheduled Lists under Article 18 permits member states to exempt any sectors from coverage and primarily from the application of National Treatment. Again, this discretion is unrestricted.[214]

The investor obligation chapter appears to be more elaborate and more intrusive than the traditional and even the contemporary trends. It requires that investments comply with "national and internationally accepted standards of corporate governance,"[215] and among other things must "[e]nsure the equitable treatment of all shareholders, in accordance with national laws."[216] Investors are also required to undertake "socio-political obligations" such as refraining from political interference and showing respect for "socio-cultural values."[217]

The PAIC also contains anti-bribery rules[218] and corporate social responsibility rules, including an obligation to contribute to the achievement of "sustainable development of the host state."[219] There are also elaborate provisions on business ethics and human rights. Most notably, these provision obligate member states to "support and respect the protection of internationally recognized human rights," and more significantly "ensure equitable sharing of wealth derived from investments."[220]

Finally, in what appears to be a unique addition, the PAIC provides: "Member States may adopt policies on cultural and linguistic diversity in promotion of investments."[221] What is not contained in PAIC is as interesting as what is included. There are two principles of IIL that have been sources of great controversy over the years: fair and equitable treatment and full protection and security. Many African states have been called on to answer charges of violating these principles in ICSID proceedings.[222] The PAIC conspicuously omits them.

214. *See id.* art.18(3) ("Any Member State may submit a List of scheduled investment sectors that are excluded from the National Treatment principle where applicable."); *id.* art. 18(4) ("The Lists of scheduled of investment sectors form integral part of this Code and Member States agree to respect them.").

215. *Id.* art. 19(1).

216. *Id.* art. 19(3)(a).

217. *Id.* art. 20.

218. *Id.* art. 21.

219. *Id.* art. 22(3).

220. *Id.* art. 24(a), (e).

221. *Id.* art. 38.

222. Kidane, *supra* note 49 (discussing the types of cases that African states were involved in and the results).

The PAIC rewrote some of the most entrenched substantive principles of IIL and added more provisions protective of the states' rights to regulate and shrunk the investor's latitude. Although most of that is consistent with contemporary trends, the PAIC advances the protectionist agenda one step further. The driving force behind this reformulation is a sense of enduring victimization. Ironically, however, the counter-reaction selects the least blameworthy for a particularly unfavorable treatment. Such is the codification of Africa's dilemmas.

D. *Investor-State Dispute Settlement (ISDS)*

ISDS is perhaps the most controversial aspect of IIL. As a preliminary matter, it is important to note before ISDS is discussed that the Code gives the African Court of Justice the ultimate jurisdiction to adjudicate state-to-state disputes pertaining to the Code. As the ISDS system the PAIC sets up is central to the aim of this comparative study, the exact terms are important to see for a meaningful commentary:

> Investor-State
>
> . . .
>
> (c) If consultations fail, the dispute may be resolved through arbitration, subject to the applicable laws of the host State and/or the mutual agreement of the disputing parties, and subject to exhaustion of local remedies; and
>
> (d) Where recourse is made to arbitration under Paragraph 3, the arbitration may be conducted at any established African public or African private alternative dispute resolution center. Arbitration shall be governed by the [UNCITRAL] rules.
>
> (2) Once recourse is made to a particular forum of dispute settlement, the forum chosen shall be used to the exclusion of the other. Decisions of this particular forum shall be final.[223]

First of all, this provision, although not entirely clear, appears to require the exhaustion of local remedies under host state's laws before the investor could resort to arbitration. Second, if arbitration is resorted to (presumably by the investor), it anticipates the use of existing or prospective African institutions. Finally, it also requires that, whoever administers the arbitration, the tribunal uses the UNCITRAL Rules, which means that the anticipated African Permanent Court of Arbitration or the African Union Court of Arbitration would not have its own rules of procedure but instead use the UNCTRAL Rules. In any case, as the design of either the African Permanent Court of Arbitration or the African Union

223. PAIC, *supra* note 192, art. 42.

Court of Arbitration is not yet complete, the details including the default appointing authority are not clear so far. Nonetheless, it is fair to expect that whether it is the Permanent Court or African Union Court of Arbitration, it would have its own rules of procedure although the UNCITRAL Rules could obviously play a foundational role in the constitutional design. This particular provision has just planted the seed for a Pan-African Court of Arbitration, whether it is called the Permanent Court or the African Union Court.

Another feature of the proposed ISDS system is allowing for host state counterclaims as follows:

> Counterclaims by Member States
>
> 1. Where an investor or its investment is alleged by a Member State party in a dispute settlement proceeding under this Code to have failed to comply with its obligations under this Code or other relevant rules and principles of domestic and international law, the competent body hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.
> 2. A Member State may initiate a counterclaim against the investor before any competent body dealing with a dispute under this Code for damages or other relief resulting from an alleged breach of the Code.[224]

Again, although this provision lacks clarity, the idea is to have the tribunal consider the investor's own possible violations of its obligations under the Code whether for the adjudication of fault (i.e., the merits) or assessment of damages. Relatedly, this provision also gives the host state the right to submit counterclaims and seek setoff or even independent damages in an action that the arbitrator initiates. The technical difficulties of ascertaining investor consent in a treaty between states notwithstanding, this is nothing revolutionary now as it is in line with contemporary trends discussed in previous Sections such as TPP, T-TIP and CECA. Classical IIL evolved as a one-way street largely because traditionally private actors are not considered subjects of international law.[225]

---

224. *Id.* art. 43.

225. Helene Bubrowski, *Balancing IIA Arbitration Through The Use Of Counterclaims, in* IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS, *supra* note 64, at 216 (noting that "as of [2013], IIA fail to impose clear obligations on investors. It remains unresolved whether, in general, private parties can be subject to obligations under international law"). To be sure, the ICSID Convention in Article 46 anticipates that states may submit counterclaims as long as consent is independently established. ICSID Convention, *supra* note 47, art. 46. The exact language is the following:

But this new trend does not resolve the dilemma completely because the admissibility of counterclaims would still depend on allegations of violations of the Code provisions pertaining to investor obligation such as ethics, environmental, and anti-bribery rules that would have other means of resolution such as domestic court litigation or contact arbitration. But again, whether the host state could counterclaim on the basis of breach of contract, for example, remains unsettled even in the contemporary drafts. The lack of clarity is not necessarily unintended. States may not necessarily desire an investment tribunal to decide on whatever causes of action that they may have against the investor. They might, for example, prefer to submit their claim to domestic court or even another arbitral tribunal on the basis contract.

In terms of enforcement, because the PAIC does not set up its own enforcement mechanism nor refers to the ICSID enforcement regime, the presumption is that enforcement will take place under the New York Convention. That said, while the preliminary policy choices that the drafters of the Code have made are clear, in its current formulation, the Code's ISDS provisions lack technical clarity.

To add to the above issues of lack of clarity, the Code also contains the following independent choice of law rule on top of the previously mentioned choice of law provision: "Any claim or dispute arising from this Code shall be decided in accordance with the provisions of this Code as well any other national, regional or international laws, rules or principles."[226] Article 42(c) appears to give the parties the right to choose the applicable substantive law when it states: "If consultations fail, the dispute may be resolved through arbitration, subject to the applicable laws of the host State and/ or the mutual agreement of the disputing parties."[227] This provision is unclear because "subject to the applicable laws" at first appears to refer to the host state's arbitration law but a closer scrutiny would render that interpretation meaningless because it would

> Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

Id. But the application of this provision has been a subject of controversy especially as it relates to the manner of expression of consent. Two recent cases have taken opposing views on this issue. *See* Spyridon Roussalis v. Rom., ICSID Case No. ARB/06/1, Award (Dec. 7, 2011) (declining jurisdiction); Goetz v. Burundi ICSID, Case No. ARB/01/2, Sentence (June 21, 2012) (upholding jurisdiction).

226. PAIC, *supra* note 192, art. 44.

227. *Id.* art. 42(c).

mean arbitration is available only to the extent it is mandated or permitted by domestic law. That would effectively reduce the whole ISDS provision to an ad hoc sovereign command not only because the parties could contract out of it or that the host could in its domestic law preclude it. To avoid that radical departure, "subject to" could be interpreted to refer to the choice of substantive law. In any case, this is a serious ambiguity that the drafters must correct going forward.

V. Africa's Dilemmas in Summary

Mark J. Roe, in his widely cited work, *Chaos and Evolution in Law and Economics*, observes that "[a] path dependence search can affect our presumption: if an institution, legal rule, or dominant practice arose to resolve a problem that is irrelevant today, then it should get less of a presumption of continuing utility."[228] Reformers from Europe to North America to Asia and Africa are now in agreement that the existing and old IIL-ISDS has faced a legitimacy crisis, and are attempting to free themselves of path-dependency and remedy the real and perceived deficiencies. Although they agree on the diagnosis, they are far from agreeing on the remedies.

On the one hand, TPP, in attempting to regulate the relationship between United States and eleven other Pacific Rim countries, sought to maintain the core principles and institutions of the old system. T-TIP and CETA, on the other hand, took it one step further by proposing or setting up (in the case of CETA) an Investor-State Court System. TPP's hesitation to join the T-TIP and CETA approach is curious from a historical standpoint.

Although the PAIC is a part of the most contemporary trend, it is also a documentation of Africa's unique positon and a codification of its dilemmas. From a historical vantage point, in the post-colonial period, Africa has been struggling to gain and preserve its agency and regulatory space vis-à-vis its Northern partners. It has never succeeded. It signed onto every legal instrument that it was asked to sign ranging from the New York Convention to the ICSID Convention to BITs. Africa used the same template to order its economic relations with itself. Because in the decades following independence, intra-Africa trade and investment was minimal, the adequacy and appropriateness of the legal infrastructure for the ordering of intra-Africa economic relations did not have the chance to be meaningfully debated. The remarkable increase in

228. Roe, *Chaos and Evolution in Law and Economics*, *supra* note 20, at 658.

the scale and complexity of the economic interactions of the last two decades has demanded a carful redesign of the legal infrastructure. The Pan-African Investment Code is a part of that development.

Interestingly, however, the Code appears to seek an old solution to a new problem. The Code's restriction of investor rights and broadening of the host sate's regulatory space would have been a desirable solution to the perceived one-sidedness of the investment protection regime *vis-à-vis* investors from the North because of the advantaged position that they have always occupied. But as long as the objective of the Code is to encourage intra-Africa investment, denying itself of the kind of courtesy that Africa historically accorded to its Northern investors might be punishing oneself for the perceived wrongs of another.

The drafting of the Code is clearly informed by contemporary developments in the field and guided by them but what it does not do is seek an African solution to an African problem. If the Africans want to order their investment relations with each other, they should consider a standard of treatment that is unique to Africa. Under the Code, for example, a South African investor in Rwanda would be treated less favorably than an investor from the United States because the U.S.-Rwanda BIT is more investor friendly.[229] The solution, therefore, is a fair and balanced Code that does not exclusively focus on regulatory space and state discretion but also encourages intra-Africa commerce and investment without losing sight of the historic origin and development of IIL.

The existing draft does not take the African Economic Community project forward. It under-appreciates the role of local parochialism in discouraging foreign investment and over-appreciates the value of regulatory space in the intra-Africa investment context by assuming that the challenges of regulating intra-Africa investments are similar to the regulation of investment from the North. With only 10% to 12% of investment in Africa coming from other African countries, African investment in Africa requires a more balanced protection than the harsh overreaction that the Pan-African Code contains. There is, for example, nothing inherently wrong in prohibiting the denial of justice as an aspect of "fair and equitable treatment" to foreign investors. This is not to understate the diffi-

229. *See* Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Enforcement and Reciprocal Protection of Investment, U.S.-Rwa., arts. 4–8, Feb. 19, 2008, T.I.A.S. 12-0101.

culty of ascertaining the exact meaning of this principle.[230] Getting rid of the principle just because arbitral tribunals have in the past interpreted it to accord undue benefits to private interests at the expense of the African public is not justified. The better approach would have been to provide for interpretive guidance as many other treaties and models have attempted to do.

Article 14 of the COMESA Investment Agreement, for example, provides the following:

> 1. Member States shall accord fair and equitable treatment to COMESA investors and their investments, in accordance with customary international law. Fair and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.
> 2. Paragraph 1 of this Article prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments and does not require treatment in addition to or beyond what is required by that standard.
> 3. For greater certainty, Member States understand that different Member States have different forms of administrative, legislative and judicial systems and that Member States at different levels of development may not achieve the same standards at the same time. Paragraphs 1 and 2 of this Article do not establish a single international standard in this context.[231]

The SADC Investment Protocol also contains the fair and equitable principle, which provides the following:

> 1. Investments and investors shall enjoy fair and equitable treatment in the territory of any State Party.
> 2. Treatment referred to in paragraph 1 shall be no less favourable than that granted to investors of the third State.[232]

Because of the obvious uncertainty of the principle, the SADC BIT Model offered two options. The first one is keeping the principle more or less in its classic formulation. The other one focuses

230. *See* Todd Grierson-Weiler & Ian A. Laird, *Standard of Treatment*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 64, at 265–66 (stating that "questions outnumber answers" as to what the fair and equitable treatment principles means and rhetorically asking "[w]hat else might 'fair and equitable treatment' include apart from an apparent prohibition against denials of justice or failure to accord due process[ ]?").

231. COMESA Investment Agreement, *supra* note 81, art. 14.

232. SADC, Investment Protocol, *supra* note 83, art. 6.

on administrative regularity. Explaining the choices that the Model has presented, the drafting committee has noted that:

> [t]he fair and equitable treatment provision is, again, a highly controversial provision. The Drafting Committee counseled against its inclusion in a treaty due to very broad interpretations in a number of arbitral decisions. It requested the inclusion of an alternative formulation of a provision on "Fair Administrative Treatment." Both options are now set out below.[233]

Option one of Article 5 reads: "Each State Party shall accord to Investments or Investors of the other State Party fair and equitable treatment in accordance with customary international law on the treatment of aliens."[234] The interpretive note reads: "For greater certainty, paragraph 5.1 requires the demonstration of an act or actions by the government that are an outrage, in bad faith, a wilful [sic] neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency."[235]

The second option in Article 5 focuses on administrative regularity:

> The State Parties shall ensure that their administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural [justice] [due process] to investors of the other State Party or their investments [taking into consideration the level of development of the State Party].[236]

---

233. SADC BIT Model, *supra* note 83, art. 5.

234. *Id.* art. 5 (Option 1).

235. *Id.*

236. *Id.* art. 5 (Option 2). There are many other examples of this. An example of the North-South variety is the 2012 U.S. Model BIT. *See* 2012 U.S. Model Bilateral Investment Treaty, U.S. Trade Representative, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [https://perma.cc/EPG3-U9WE]. It provides in Article 5:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
   a. "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
   b. "full protection and security" requires each Party to provide the level of police protection required under customary international law.

This is basically procedural due process including a fair hearing, appeals process, and even access to government information.

The PAIC gets rid of useful principles because of the real and perceived abuse by many arbitral tribunals. It makes the erroneous assumption that the principle is the problem when the problem might have been the system of international arbitration run amok without checks and balances. The more nuanced SADC BIT Model's approach would have been more meaningful.

The phenomenon of investment treaties as promoters of investment, as well as social and legal order, is increasingly attracting social science inquiry. At least one quantitative study has concluded that "[w]hile investors would in principle benefit from ever-increasing protection, it is possible that host countries have now reached the threshold level at which the commitments enshrined in international investment law bring no further benefits that outweigh the loss of policy freedom."[237] If, indeed, the Code is informed by these kinds of conclusions, it cannot justify its own existence, but if on the other hand, as it claims, the Code seeks "to promote, facilitate and protect investments that foster the sustainable development of each Member State, and in particular, the Member State where the investment is located,"[238] it must be revised to eliminate needless restrictions and unconstrained state discretion.

At the practical level, a notable omission in the text (despite the objectives section's promise) is the movement of persons or labor. The cross-border movement of persons is almost always absent from North-South agreements, mainly because of the obvious migration problems which is the result of the uneven levels of development. The PAIC appears to take that as a baseline again.

> 3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

Id. art. 5.

237. Mark S. Manger, *A Quantitative Perspective on Trends in IIA Rules*, *in* IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS, *supra* note 64, at 91. Manger also concludes that:

> [T]he 'templates' or 'models' are provided by the capital-exporting country, i.e.[,] usually but not always the developed country. Developing countries may bargain over some more marginal issues or exceptions and reservations, but by and large, to what extent a specific IIA deviates from a template agreement is strongly determined by the power asymmetries between the parties.

Id. at 82–83.

238. PAIC, *supra* note 192, art. 1.

Unlike COMESA,[239] for example, PAIC is completely silent about this issue.

The same quantitative study by Mark Manger of the London School of Economics cited above has concluded that:

> Ranking BITs according to their precision, we find that the top five are UK-Swaziland (1995), Canada-Ecuador (1996), Canada-Costa Rica (1998), Germany–Lebanon (1997) and United States–Kazakhstan (1994). These are both cases that directly reflect asymmetrical investment flows from important sources as well as countries that appear to set standards in international law more broadly. BITs at the lower end of the spectrum of precision tend to be South-South BITs and those in earlier time periods.[240]

The Pan-African Investment Code falls in the latter category not only because it lacks technical clarity but also because it shows the doctrinal dilemma and confusion. It cannot be useful if it does not resolve Africa's doctrinal dilemmas.

With respect to dispute settlement, PAIC's provisions are underdeveloped and unclear but the direction appears clear: exhaustion of local remedies and the establishment of African arbitral institutions. At least the first part cannot be considered a progressive development. COMESA, for example, gives the investor the option to go to local court or the COMESA Court of Justice, or arbitration under ICSID, UNICTRAL or other rules.[241] SADC's approach to dispute settlement is more or less the same providing options of going to SADC Tribunal or arbitration under ICSID or UNCITRAL Rules with the choice of forum given to either party (although the mechanics of the state's choice is not clear).[242] PAIC does not appear to be heading in that direction. It is going in the direction of the South African Investment Protection Act of local remedies discussed above.

---

239. *See* COMESA Investment Agreement, *supra* note 81, art. 16. Under Article 16—Movement of Labour, the COMESA Investment Agreement provides:

> [t]aking account of the need to facilitate the movement of labour resources in the CCIA, Member States shall accord to investors the right to hire technically qualified persons from any country. Such persons shall have full rights to enter and receive the necessary authorisations to reside in the Member State subject to the laws in force in that Member State promptly and without burdensome requirements. However, COMESA investors shall accord a priority to workers who possess the same qualifications and are available in the Member State or any other Member State.

Id.

240. Manger, *supra* note 237, at 87.

241. COMESA Investment Agreement, *supra* note 81, art. 28.

242. SADC, Investment Protocol, *supra* note 83, art. 2, Annex 1.

Finally, and in any case, the creation of a single market should, in theory, render BITs or any other types of investment treaties largely irrelevant. Indeed, they could even be unnecessary complications. An example of this is the European Union. Following an arbitral award in the *Micula* case[243] against Romania in favor of a Swedish investor on the basis of Romania-Sweden BIT, the E.U. Commission took the position that Intra-E.U. BITs are inconsistent with the E.U. rules establishing a common market, which include sufficient investor protection.[244]

Given the African Union's long-term plan of creating a common market,[245] PAIC might be viewed as a stop-gap measure that would

243. *See* Ioan Micula v. Rom., ICSID Case No. ARB/05/20, Award, ¶ 1329 (Dec. 11, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf (providing information about the Final Award) [https://perma.cc/TB8B-FYWD]; Ioan Micula v. Rom., ICSID Case No. ARB/05/20, Annulment Proceeding, Feb. 26, 2016) (providing information about the Annulment Proceeding).

244. *See* European Commission Press Release IP/15/5198, Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties (July 18, 2015) ("[A]ll Member States are subject to the same EU rules in the single market, including those on cross-border investments (in particular the freedom of establishment and the free movement of capital). All EU investors also benefit from the same protection thanks to EU rules (e.g. non-discrimination on grounds of nationality). By contrast, intra-EU BITs confer rights on a bilateral basis to investors from some Member States only: in accordance with consistent case law from the European Court of Justice, such discrimination based on nationality is incompatible with EU law. . . . For instance, one recent arbitration proceeding based on an intra-EU BIT has produced an outcome that the Commission considers incompatible with EU law, as the arbitral award constitutes illegal state aid."). The European Union did indeed, intervene in the *Micula* annulment proceedings arguing that since Romania and Sweden are both parties to the E.U. treaties occupying the same field, the BITs are superseded which meant that dispute settlement provision that gave the tribunal the jurisdiction does not exist. The ICSID Annulment Committee rejected the European Union's position. *See* Ioan Micula v. Rom., ICSID Case No. ARB/05/20, Annulment Proceeding, Feb. 26, 2016). The core of the argument is summarized as follows:

> (i) the EU Treaties contain a comprehensive set of rules which govern the protection of investments made by investors of one Member State in the territory of another (Chapters 2 and 4 of the TFEU on the right of establishment and on the free movement of capital and payments between Member States); and (ii) under Article 344 of the TFEU, EU Member States have agreed not to submit disputes that involve the interpretation or application of EU law to any other dispute settlement mechanism than that provided for in the EU Treaties, thus rendering the investor-State dispute settlement clause in the BIT incompatible with the TFEU. As a result of the incompatibility, Article 10 of the BIT (the grandfathering clause) is also inapplicable in this case.

Id. ¶ 332 (footnotes omitted). The Committee rejected the European Union's position mainly because it was not endorsed by Romania. *See id.* at 335, 339.

245. The African Union's Agenda 2063 contains many aspirations. One of them is:

> Africa shall be a strong, united, resilient, peaceful and influential global player and partner with a significant role in world affairs. We affirm the importance of African unity and solidarity in the face of continued external interference including, attempts to divide the continent and undue pressures and sanctions on some countries.

pave the way to meaningful integration. If that is the idea, it should encourage, not discourage, intra-Africa investment. The irony of it all is that South Africa, the largest intra-Africa investor, appears to be influencing the intra-Africa rules to its own detriment because its contribution is informed by its own experience as a recipient of investment, not a sender of capital. The PAIC is the cousin of the South African Investment Protection Act discussed in above. It is an excellent demonstration of Africa's age-old dilemma in IIL.

Conclusion

The Pan-African Investment Code does not resolve Africa's dilemmas; it merely codifies them. It denies African investors the courtesy that Africa accorded Northern investors for decades. This is not a function of animus but doctrinal confusion.

International Investment Law has been a part of the gradual legalization[246] of Africa's relationship with its former colonial rulers who sought an external standard of treatment of investment and required the "creditors interpretation"[247] of treaties in the form of investor-state arbitration. Africa took no part in the creation of the substantive rules or their interpretation.

Afr. Union, *Agenda 2063: Popular Version* (Sept. 2015), https://au.int/sites/default/files/pages/3657-file-agenda2063_popular_version_en.pdf [http://perma.cc/KA4H-CPMQ]. For a good account of the progress that has been made, see generally UNCTAD & African Union, Trade Liberalization, Investment and Economic Integration in African Regional Economic Communities Towards the African Common Market iv (2012), available at http://unctad.org/en/docs/ditctncd2011d2_en.pdf ("New strategies are required that foster a process of globalization focused on development, i.e. development-led globalization. While seeking to accelerate the pace and deepen the level of the intra-African economic integration process, African countries and the RECs together with the AU must take cognizance of, and ensure a stronger focus on, people-centered and development oriented outcomes. By generating results that benefit African enterprises, peoples and the countries, the African continental integration will become a meaningful reality.") [https://perma.cc/476D-VZL5].

246. The term "gradual legalization" is adopted from Dezalay and Garth's description of the end of colonialism and beginning of inter-state relations based on international law. *See* Yves Dezalay & Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order 64 (1996).

247. The "creditors' interpretation" was used in relation to the Ottoman Empire's acceptance of an unequal treaties and dispute settlement towards the end of its glory. *See* Lipson, Standing Guard, *supra* note 3, at 13–14. It is used here to show the similarities of the context in situations where the dispute is between an investor from the North and an Africa state, and all the decision makers are also from the North. For a statistical analysis of this phenomenon in ICSID cases, see Kidane, *supra* note 49 (showing that out of sixty-one ICSID cases involving African states as a respondent and that provide information about arbitrator nationality, the arbitrator was 59% percent likely to be from Europe, 14% from North America, and only 12% from Africa).

When the external standards and their application by a limited pool of international arbitrators began to affect the interests of the more advanced economic powers of the North, questions began to be raised about the wisdom of allowing private decision makers with largely unconstrained discretion to sit in judgment of public policy matters. A few high-profile cases added urgency to the reform effort. This in turn led to the proliferation of reform ideas, which resulted in the various proposals ranging from the European Union, North America, Asia, to Africa.

Most of the proposals focus on doctrine to stick a fair balance between investor rights and regulatory space without regard to the identity of the players. Doctrine is, however, not the only problem, especially as far as Africa is concerned. An aspect of the problem that is often overlooked and not sufficiently studied is the identity of the players.

There are at least two important players: the investor and the arbitrators, and the two have almost always been interrelated. Because the flow of much of the investment into Africa has been from its Northern partners, the arbitrators have almost always been from the North. Therefore, the rules were largely designed and interpreted by Africa's creditors. This created a level of resentment that has matured into reform efforts. South Africa's overreaction of disavowing all of its bilateral investment treaties and passing of the Investment Protection Act is one such example.

Unfortunately, however, that trend has resulted in a draft Pan-African Code, which is deeply informed by Africa's experience with the North and shaped by its frustration. Such frustration seems to have distorted the different realities of the intra-Africa dynamics. The objective of the PAIC is to aid Africa's integration into a functioning common market. The protectionist approach that the Code adopts does not promote integration; it sabotages it. The defensive posture is misplaced. The drafters must go back to the drawing board, eliminate the misdirected resentment, and redraft the Code with the ultimate objective of aiding the harmonization of rules and the creation of the African common market in mind.