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Africa as an Investment Rule-Maker: Decrypting the Pan-African Investment Code

Makane Moïse Mbengue, Stefanie Schacherer***

1 Introduction

The Pan-African Investment Code (PAIC)[1] is a legal instrument – shaped in the form of a model investment treaty – which has been drafted from the perspective of developing countries and least-developed countries focusing on sustainable development goals. It contains a number of Africa-specific and innovative features, which presumably makes it today a unique legal instrument. The PAIC presents an African consensus on the shaping of international investment law and has, since its adoption, influenced subsequent African investment law making. Moreover, the PAIC is serving as the main basis for the negotiations on the Investment Protocol to the Agreement establishing the African Continental Free Trade Area (AfCFTA).[2]

This article seeks to present and contextualize the PAIC by taking a comparative international law approach.[3] With regard to the PAIC, a comparative law analysis allows us to understand how African interests shape different approaches to international investment law and to see how the PAIC challenges

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1 The authors have been involved in the elaboration process from 2014–2015. Professor Mbengue has been the lead expert and negotiator during this period. The views of the authors do not necessarily reflect the views of the African Union or of other negotiators involved in the negotiation and drafting of the PAIC. Some of the information contained in this article is based on the experience of the authors.

2 Agreement establishing the African Continental Free Trade Area (AfCFTA) was adopted on 21 March 2018. The agreement is currently open for signature. The text is available at <https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf> accessed 18 April 2019.

3 See Anthea Roberts, Paul B Stephan, Pierre-Hugues Verdier and Mila Versteeg, "Comparative International Law: Framing the Field" (2015) 109 AJIL, 469.

traditional core approaches. The article compares, on the one hand, the PAIC's provisions to traditional international investment treaty practice in order to understand to what extent the PAIC builds upon these elements. On the other hand, it compares the PAIC's provisions to recent treaty practice, in particular that of Brazil and India, as well as investment chapters in comprehensive free trade agreements (FTAs), such as the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) and the Comprehensive Economic and Trade Agreement (CETA) between the European Union (EU) and Canada. This will provide insights into whether Africa's regional approach differs from current practices of other countries and regions. In addition, comparisons are made with the policy proposals of governmental and non-governmental organizations advocating for reform in the international investment law regime, including the United Nations Conference on Trade and Development (UNCTAD), the Southern Africa Development Community (SADC) and the International Institute for Sustainable Development (IISD). A comparison to the work of these organizations has the benefit of permitting to appraise the innovative character of the PAIC.

Notwithstanding the introduction, this article is divided into five main parts. Part 2 illustrates African continental initiatives in the context of foreign investment and presents the origins of the PAIC. Part 3 addresses the important question to what extent the PAIC incorporates traditional investment standards and to what extent it breaks with them. Part 4 explores the aspects of the PAIC which are truly innovative and which reveal the question of a reshaping of international investment agreements (IIAs). Part 5 looks at the dispute settlement mechanism provided by the PAIC and , in particular, the controversies around investor-State arbitration. Finally, Part 6 serves as an overview of the latest African investment instruments, which have been elaborated post-PAIC.

2 The Elaboration of the Pan-African Investment Code (PAIC)

At the continental level, it is the African Union (AU)[4] that is mandated by its Member States to enhance the political and socio-economic integration of

4 The African Union (AU) is a continental organization consisting of 55 African States. The AU was created in 2000 and established in 2001. Its headquarters are located in Addis Ababa, Ethiopia.

the continent and to promote sustainable development.[5] The most important integration endeavors currently undertaken by the AU are the establishment of the African Economic Community by the year 2034 as well as the establishment of a continent-wide Free Trade Area for which the first stage of negotiations have been finalized in 2017.[6]

In the spirit of enhanced economic integration, African Ministers responsible for continental integration decided in 2008 to initiate the work on a comprehensive investment code for Africa. The declared aim of the initiative was to attract greater flows of investments into Africa and to facilitate intra-African cross-border investments. Thus, the elaboration of the PAIC had started. From the beginning, it was the intention of the AU and its Member States to elaborate a text that would address Africa-specific needs. African independent experts drafted the text over several years. The groups of experts were composed of representatives coming from the different African regional economic communities (RECs), from academia as well as the private sector.

The process of elaboration can roughly be divided into three phases. In its first phase, the group of experts compiled African best practices in the field and elaborated a first draft. The next and decisive phase was during the year 2015, when the PAIC text was discussed at expert level. Two meetings of independent experts, all from Africa, were held in May 2015 in Tunisia and another one in September 2015 in Mauritius. Experts of AU Member States then reviewed the work of the independent experts during a continent-wide meeting in Uganda that took place in December 2015. The third phase started in the year 2016. At a ministerial meeting in Addis Ababa in March 2016, the competent African ministers approved the work of the PAIC. At the last meeting in Nairobi in November 2016, finally, governmental representatives agreed to adopt the PAIC as a non-binding model investment treaty.

3 An Introspective Exploration of the (Dis-)Integration of Traditional Investment Standards in the PAIC

The PAIC contains a couple of innovative features, the most striking ones will be examined in greater detail in this Section. The PAIC reformulates traditional treaty language, adds new provisions and omits certain provisions

5 Constitutive Act of the African Unionsigned on 11 July 2000 and entered in 26 May 2001), Art. 3 <www.achpr.org/instruments/au-constitutive-act/> accessed 18 April 2019.

6 The Agreement establishing the AfCFTA (see footnote 2).

completely. It seeks to be balanced and to address specific aspects of African development.

3.1 *Preamble, Objective and Scope of the PAIC*

Preambles have a primary significance as to how an IIA will be interpreted in the event of a dispute between the parties or between an investor and a State.[7] Today, new and broader investment treaty objectives have become more and more relevant, one of which is certainly the objective of sustainable development.[8] In the African context, sustainable development goals are crucial given the important economic, social and environmental challenges the continent is still facing.

The Preamble of the PAIC recognizes that the promotion of sustainable development requires investments (para. 7). Yet, these investments should have positive spillover effects such as to facilitate job creation, promote technology transfer, support long-term economic growth and contribute effectively to the fight against poverty.[9] The Preamble specifically refers to the right of AU Member States to regulate all aspects relating to investments within their territories with a view to promote sustainable development objectives.[10] The drafters of the PAIC did not intend to disregard the protection of investors and investments but stressed the need to achieve an overall balance of the rights and obligations among AU Member States and the investors under the PAIC (para. 11). The Preamble emphasizes also the need to promote corruption free investment and improved laws and regulations that promote transparency and accountability in governance (para. 9). The PAIC in fact seeks to promote responsible investments.

To be consistent with the sustainable development objectives as inscribed in the Preamble, the PAIC starts off with a first article addressing its primary objective:

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7 Rudolf Dolzer and Margete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff, 1995) 20.

8 UNCTAD, "Investment Policy Framework for Sustainable Development" (2015) <http://unctad.org/fr/PublicationsLibrary/diaepcb2012d5_en.pdf> accessed 18 April 2019 (hereafter: IPFSD). The term sustainable development is understood here as development, which relates to economic development, social development and the protection of the environment. See further also the contributions in Stephan W Schill et al (eds), *International Investment Law and Development: Bridging the Gap* (Edward Elgar 2015).

9 PAIC, preamble, para 8.

10 *Ibid.*, para 10.

> The objective of this Code is to promote, facilitate and protect investments that foster the sustainable development of each Member State, and in particular, the Member State where the investment is located.[11]

Once again, a clear link between investments and sustainable development is made.[12] Under the PAIC, investments are only protected when they foster sustainable development in AU Member States and in particular in the territory of the host States. It is also worth noting that the PAIC seeks to firstly to promote investments, secondly to facilitate investments and finally and investment protection is mentioned thirdly. Such a specific provision that states the objective of the treaty is rather unusual. The Canadian and US Model BITs for instance do not contain such a provision. However, stating the objective of the treaty in a specific provision can provide added weight to the objective, which in turn has consequences for the treaty interpretation.[13]

With respect to the scope of the PAIC, one aspect is important to highlight. Indeed, the PAIC by comparison to other IIAs does not only stipulate obligations on States and rights for investors,[14] it also "defines the rights and obligations of Member States *as well as investors*"[15] This latter provision introduces the very content of the PAIC and refers back to the endeavor stated in the Preamble for an overall balance of the rights and obligations among States and investors.

3.2 *Definition of Investment*

Since the objective of the PAIC is to attract investments that foster sustainable development, the drafting of the definition of an investment that would fall under the PAIC was highly critical.[16] The drafters of the PAIC considered that

11 PAIC, Art. 1.

12 See in the same sense, Art. 2.2 of the SADC Protocol on Finance and Investment (signed on 18 August 2006), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2730> accessed 18 April 2019; In August 2016, SADC Member States have adopted an amended version of the Protocol on Finance and Investment. The instrument will be discussed in Part 6.

13 See SADC, "SADC Model Bilateral Investment Treaty Template with Commentary" (2012) <www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> accessed 18 April 2019 (hereafter: 2012 SADC Model BIT), Commentary 8: the inclusion of a provision stating the objective is recommended by SADC. See also *ibid*, Art. 1. The SADC adopted a second edition of the Model BIT, which will be discussed in Part 6.

14 As will be evidenced by the further analysis of the PAIC text.

15 PAIC, Art. 2.2 (emphasis added).

16 Generally on the significance of the term "investment" see Jan Asmus Bischoff and Richard Happ, "The Notion of Investment" in Marc Bungenberg and others (eds), *International Investment Law – A Handbook* (CH Beck/Hart/Nomos 2015) 495–544.

protected investments should be those businesses that bring constructive economic and social benefits.[17] Henceforth, the PAIC contains an enterprise-based definition stating that an investment means

> an enterprise or a company …, which is established, acquired or expanded by an investor, including through the constitution, maintenance or acquisition of shares, debentures or other ownership instruments of such an enterprise […].[18]

The assets of the enterprise are included among the covered assets of the investor in an open and indicative list of assets.[19] Countries, such as India and Brazil, opted for similar approaches.[20] The SADC Model BIT presents the enterprise-based definition as being the most beneficial option for sustainable development.[21] The establishment or acquisition of an enterprise is what one generally associates with foreign direct investment, which, in return, is

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17 SADC Model BIT (see footnote 13), Commentary 13.

18 PAIC, Art. 4.4.

19 According to Art. 4 (4), an enterprise or company under the PAIC may possess the following assets: "shares, stocks, debentures and other equity instruments of the enterprise or another enterprise; a debt security of another enterprise; loans to an enterprise; movable or immovable property and other property rights such as mortgages, liens or pledges; claims to money or to any performance under contract having a financial value; copyrights, know-how, goodwill and industrial property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of the host State".

20 See Indian Model BIT (2015), Art. 1.4 <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/3560>; Investment Cooperation and Facilitation Agreement between the Federative Republic of Brazil and the Republic of Malawi (signed 25 June 2015, not yet in force), Art. 2 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4715>. However, the typical "every kind of asset" formulation remains the general approach, see *e.g.* Comprehensive Economic and Trade Agreement between Canada, of the One Part, and the European Union, of the other Part (signed 30 October 2016, parts are provisionally applied since 21 September 2017), Art. 8.1 <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> (CETA); Comprehensive and Progressive Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018), Art. 9.1 <https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/index.aspx?lang=eng> (CPTPP); Draft Norwegian Model BIT (2015), Art 2.2 <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/3350> all accessed 18 April 2019.

21 The SADC Model BIT contains three options for the definition of an investment: an enterprise-based definition, an asset-based definition with a closed list and an asset-based definition with an open list see SADC Model BIT (footnote 13), Commentary 12–13.

more likely to bear long-term interests in the host State.[22] The drafters of the PAIC followed the recommendation of SADC when deciding on the definition of an investment.

A series of investments are categorically excluded from the scope of the definition under the PAIC.[23] For instance, it is worth underlining that the PAIC excludes portfolio investments[24] all together.[25] It also excludes investments in any sector that is sensitive to the host State's development and investments that would have an adverse impact on its economy.[26]

The PAIC's investment definition refers implicitly to the full *Salini* test[27] and requires an investment to have the following characteristics:

> [the] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significant contribution to the host State's economic development.[28]

Today's treaty practice is fragmented regarding the incorporation of the *Salini* test. The US Model BIT was the first treaty text to make reference to the test, however always by excluding the "significant contribution to the host State's

22 *Ibid*, Commentary 13.

23 See PAIC, Art. 4(4): "For greater certainty, investment does not include: i. debt securities issued by a government or loans to a government; ii. portfolio investments; iii. claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Member State to an enterprise in the territory of another Member State, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in subparagraphs (a) through (f) above; iv. investments of a speculative nature; v. investments in any sector sensitive to its development or which would have an adverse impact on its economy; vi. commercial activities". Other IIAs also exclude certain categories. The most widespread exclusions in current treaty practice is the exclusion of pure commercial contract claims (CETA (footnote 20), Art. 8.1), the exclusion of loans issued by one Party to another Party as well as an order or judgment entered in a judicial or administrative action (CPTPP (footnote 20), Art. 9.1).

24 The definition of a portfolio investment under the PAIC is the following: "portfolio investment refers to any investment where the investor owns less than 10% of shares in a company or through stock exchange, or otherwise does not give the portfolio investor the possibility to exercise effective management or influence on the management of the investment", Art. 4.10.

25 Alike Brazil-Malawi CIFA (footnote 20), Art. 2.

26 PAIC, Art. 4 (i–iii).

27 *Salini et al v Morocco,* ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001), para 52.

28 PAIC, Art. 4.4 *in fine.*

economic development".[29] Similar to the US Model BIT are the approaches in the CPTPP and CETA.[30] Other treaties, such as those based on Model BITs from European countries, as well as some of Japan's recent BITs, adopt the traditional approach of not mentioning the elements of the *Salini* test at all.[31] The Indian Model refers, like the PAIC, to all four elements.[32] By including the last characteristic of the *Salini* test: "the significant contribution to the host State's economic development", the drafters of the PAIC left no doubt that a covered investment under the PAIC has to have a strong relationship with the development of the host State's economy.

3.3 *Definition of Investor*

The definition of an investor under the PAIC appears to be rather basic, stating that an

> "investor" means any national, company or enterprise of a Member State or a national, company or enterprise from any other country that has invested or has made investments in a Member State.[33]

However, given the enterprise-based definition of an investment under the PAIC, the crucial point here was to clearly define the notion of a legal person, *i.e.* an enterprise or company. In relation to legal persons, most IIAs rely essentially on three basic criteria to determine the nationality of a company: the concept of incorporation, the concept of the social seat and the concept of

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[29] See US Model BIT (2012), Art. 1 <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> accessed 18 April 2019.

[30] CPTPP (footnote 20), Art. 9.1, CETA (footnote 20), Art. 8.1. See also EU-Singapore Investment Protection Agreement (2018), Art. 1.2 <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> accessed 18 April 2019.

[31] German Model BIT (2008), Art. 1.1 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2865>; UK Model BIT (2008), Art. 1(a) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2847>; French Model BIT (2006), Art. 1.1 <www.italaw.com/documents/ModelTreatyFrance2006.pdf>; Agreement between Japan and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investment (signed 5 February 2016, entered into force 26 April 2017), Art. 1.1 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3578>; Agreement between Japan and Ukraine for the Promotion and Protection of Investment (signed 5 February 2015, entered into force 26 November 2015), Art. 1.1 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3324> all accessed 18 April 2019; with the exception of the Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment (signed 26 January 2015, entered into force 14 April 2017).

[32] Indian Model BIT (footnote 20), Art. 1.4.

[33] PAIC, Art. 4.5.

control.[34] A treaty that defines the nationality of a legal entity solely on the basis of the place of incorporation has potentially the largest coverage.[35] References to the place of incorporation are thus mostly coupled with one or more other criteria. Several new treaties require that the legal person in question has in addition to its place of incorporation a "substantial business activity" in the home State.[36] The PAIC builds on this concept and requires a substantial business activity in the Member State in which the enterprise or company is located.[37] In order to clarify the content of a "substantial business activity", the PAIC provides for a case-by-case approach by indicating four circumstances that should be taken into account for the assessment of the business activity in question in order to qualify as being "substantial". These criteria are the amount of investment to be brought into the host State, the number of jobs to be created, its effect on the local community, and the length of time the business has been in operation.[38]

3.4 *Rejection of Pre-Establishment Commitments*

The majority of existing IIAs only guarantee standards of treatment of foreign investment regarding the post-establishment phase, but there is a growing number of treaties that include commitments with respect to the pre-establishment phase. This is in particular the case with comprehensive FTAs.[39] Recent practice shows that besides the United States and Canada, the EU also has sought to include pre-entry commitments in its treaties.[40] Pre-establishment obligations are formulated by including references to MFN treatment as well as national treatment.[41]

The drafters of the PAIC have been aware of current treaty practice, but considered that in the context of African countries such provisions may preclude

34 Dolzer and Stevens (footnote 7), *op.cit,* 35.

35 UNCTAD, IPFSD (footnote 8) 91. See also, CETA (footnote 20), Art. 8.1 combines the place of incorporation with the criteria of direct or indirect control.

36 CPTPP (footnote 20), Art. 9.1; Indian Model BIT (footnote 20), Art. 1.2.

37 PAIC, Art. 3.1.

38 *ibid,* Art. 4.1.

39 Starting with North American Free Trade Agreement (NAFTA) (signed 17 December 1992, entered into force 1 January 1994) arts 1102 and 1103 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2413> accessed 18 April 2019; see also CPTPP (footnote 20), Art. 9.4.

40 CETA (footnote 22) arts 8.6 and 8.7; EU-Vietnam Free Trade Agreement (2018) < http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 19 April 2019 Arts 8.3 et ff. This is interesting to note since traditional BITs of EU Member States do not cover commitments relating to the pre-establishment phase.

41 See NAFTA (footnote 39), Art. 1103; US Model BIT (footnote 29), Art. 4; CPTPP (footnote 20), Art. 9.4.

a State from altering domestic law if circumstances so warrant in light of national sustainable development goals. To this effect, MFN and national treatment provisions do not contain any reference to establishment, acquisition and expansion.

3.5 *MFN and National Treatment*

The PAIC introduces new approaches to the relative standards of protection, that is. MFN and national treatment. It firstly makes express reference to the circumstances that should be taken into account when assessing the question of "like circumstances". The PAIC also adds, in a separate provision, specific exceptions to both MFN and national treatment.

3.5.1 Clarification of "Like Circumstances"

Relative standards of protection, such as MFN and national treatment, require a proper basis for comparison of investors or investments. Earlier treaties, such as NAFTA or US BITs, include the wording of in "like circumstances" or "like situations" in their respective MFN and national treatment clauses.[42] However, the unqualified reference to like circumstances did not lead to consistent case law. On the contrary, the breadth of the scope of likeness led to unpredictable outcomes.[43] This is why some current treaties include an additional criterion for the assessment of the concept of "in like circumstances".[44] As concerns the PAIC, it was the wording contained in the 2007 COMESA Investment Agreement that inspired the drafters.[45] The concept of in "like circumstances" under the PAIC requires an overall examination, on a case-by-case basis, of all the circumstances of an investment, such as "its effects on third persons and the local community or on the local, regional or national environment, the health of the populations, or on the global commons".[46] Relevant circumstances may also be the sector in which the investor is active, the aim of the measure in question or the company size and other factors directly relating to the investment or investor in relation to the measure in question.[47]

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42 See NAFTA (footnote 39), Arts. 1102 and 1103; US Model BIT (footnote 29), Arts. 3 and 4.

43 August Reinisch, "National Treatment" in Bungenberg and others (footnote 16), *op.cit*, 846 and 859.

44 CPTPP (footnote 20), Arts. 9.4 and 9.5.

45 See Investment Agreement for the COMESA Common Investment Area (signed 23 May 2007, not in force) <http://investmentpolicyhub.unctad.org/IIA/treaty/3225> accessed 18 April 2019, Art. 17.2.

46 PAIC, Arts. 7.3 and 9.3.

47 *Id.*

The list is non-exhaustive, but it ensures that a broad view is taken rather than to question whether the investors are in the same "economic" or "business" sector as several arbitral tribunals did.[48]

3.5.2 Exceptions to MFN

IIAs differ with regard to the exceptions from MFN treatment. Exceptions of regional economic integration organizations (REIOs),[49] taxation[50] and procedural issues[51] are among the usual ones, but States have used a variety of other explicit derogations from MFN treatment.[52] Whilst such exceptions are most often found in the MFN provision itself, the PAIC contains a specific article listing exceptions to the MFN clause. The PAIC provides that there is no breach of MFN treatment when an AU Member State adopts measures that are "designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment".[53] In addition, the PAIC precludes measures that are taken by reason of "national security, public interest, and public health or public morals to be considered as a less favorable treatment"[54] within the meaning of the MFN provision. A further paragraph contains the classic exceptions on REIOs and taxation matters. It provides that the MFN principle does not oblige a Member State to extend to the investor of any other

48 *SD Myers v The Government of Canada,* UNCITRAL, Partial Award (13 November 2000) para 251; *Archer Daniels Midland Company and Tat & Lyle Ingredients Americas, Inc v Mexico,* ICSID Case No ARB (AF)/04/5, Award (21 November 2007) para 198. Extreme approaches were taken by the tribunal in *Methanex v USA* taking into account only identical comparators as well as by the tribunal in *Occidental v Ecuador* by stating to compare all investors that are in a comparative relationship, *Methanex v United States,* UNCITRAL, Award (3 August 2005), part IV (chapter B) and *Occidental v Ecuador,* UNCITRAL, Award (1 July 2004), paras. 173 ff.

49 Agreement between the Government of the Republic of Mauritius and the Government of Romania on the Promotion and Reciprocal Protection of Investments (signed 20 January 2000, entered into force 20 December 2000), Art. 3 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1989> accessed 18 April 2019.

50 Agreement between the Government of the Republic of Finland and the Government of the Kyrgyz Republic on the Promotion and Protection of Investments (signed 3 April 2003, entered into force 8 December 2004), Art. 4 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1191> accessed 18 April 2019; French Model BIT (footnote 31), Art. 5.

51 CPTPP (footnote 20), Art. 9.5.3.

52 UNCTAD, *Most-Favored-Nation Treatment* (United Nations 2010) 10. Eg Canada for aviation and fishery, see Canadian Model BIT (2004) Annex III <www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf> accessed 18 April 2019.

53 PAIC, Art. 8.2.

54 *ibid,* Art. 8.3.

country the benefit of any treatment contained in an existing or future customs union, free trade area or international agreement to which the investor's home State is not a Party, or contained in any international agreement or domestic legislation relating wholly or mainly to taxation.[55]

3.5.3 Exceptions to National Treatment

Compared to the exceptions to MFN treatment, exceptions to national treatment are much less frequent, if not inexistent. Yet, the drafters of the PAIC considered it to be relevant to include a specific article on exceptions to national treatment in order to ensure African States the possibility to pursue national development objectives without breaching the national treatment standard.

Firstly, the national treatment exception clause contains a similar provision as for MFN in respect to the right of a Member State to adopt measures in order to promote public welfare objective.[56] Secondly, AU Member States may, in accordance with their respective domestic legislation, "grant preferential treatment to qualifying investments and investors in order to achieve national development objectives".[57] For instance, favorable treatment may be addressed to the internal needs of designated disadvantaged persons, groups or regions.[58] Thirdly, the PAIC reserves the right of AU Member States to deny an investor the benefits of the PAIC and to grant special and differential treatment in two instances: where there is no substantial business activity in that State, or the investor is engaged in activities inimical to the economic interest of Member States.[59] This latter clause is very similar to a typical denial of benefits clause, which can be found in many current treaties.[60] Fourthly, a categorical exclusion for the application of the national treatment principle is foreseen for subsidies or grants provided to a government or second, a State enterprise, including government-supported loans, guarantees and insurance or third, for taxation measures aimed at ensuring the effective collection of taxes, except where this results in arbitrary discrimination.[61] Finally, the PAIC sets out that the implementation of these exceptions to national treatment do not entitle an investor to "compensation for any competitive disadvantages".[62]

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55 *ibid*, Art. 8.5(b).

56 *Ibid.*, Art. 10.2.

57 *Ibid*, Art. 10.3.

58 *Ibid*, Art. 10.7.

59 *Ibid*, Art. 10.4.

60 CPTPP (footnote 20), Art. 9.14; CETA (footnote 20), Art. 8.16.

61 PAIC, Art. 10.6.

62 *Ibid*, Art. 10.8.

3.6 *Absence of a Provision on Fair and Equitable Treatment* (FET)

FET appears in nearly all of the more than 3,200 IIAs.[63] It is well known that FET has been the most invoked standard in investment disputes and the majority of successful claims pursued in international arbitration are based on a violation of the FET standard.[64] The content of the standard has arguably been developed through arbitral practice,[65] but even if some core principles can be distilled from the case law on FET,[66] arbitral tribunals are not obliged to follow previous decisions. For this reason, some authors argue that the standard simply remains uncertain in content.[67] Moreover, in the context of sustainable development the question is raised whether the standard hinders the promotion of sustainable development.[68] The reason is that the standard is apt to limit more than other standards the regulatory freedom of host States, including for socially and environmentally sensitive areas.[69]

Given the current controversy about the standard, ongoing reform approaches in particular seek to draft clearer and more predictable FET provisions.[70] One of the striking examples is the list of FET violations contained in the CETA:

> A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:

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63 UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* (United Nations 2015) 322.

64 Dolzer and Schreuer (footnote 7) 130.

65 For a conceptualization see Stephan W Schill and Marc Jacob, "Fair and Equitable Treatment: Content, Practice, Method" in Bungenberg and others (footnote 16) 700–763.

66 *Ibid*, 717.

67 Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law of Foreign Investment* (CUP 2015) 247. Schreuer held that the lack of precision might be a virtue rather than a shortcoming, since in practice it would be impossible to anticipate in the abstract the range of possible types of infringements upon investor's legal position, see Christoph Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) 6 JWIT 365.

68 For greater detail see Roland Kläger, "Fair and Equitable Treatment and Sustainable Development" in Cordonier Segger et al (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 241–259.

69 *ibid* 251. See also Eric De Brabandere, "Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties – Navigating Between Generally and Contextual Specificity" (2017) 18 JWIT 3 530.

70 Stephan W Schill and Marc Jacob, "Trends in International Investment Agreements, 2010–2011: The Increasing Complexity of International Investment Law" in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2011–2012* (OUP 2013) 142. Consider eg CPTPP (footnote 20), Art. 9 in combination with annex 9-A; Indian Model BIT (footnote 31), Art. 3 as well as COMESA Investment Agreement (footnote 45), Art. 14.

(a) denial of justice in criminal, civil or administrative proceedings;
(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
(c) manifest arbitrariness;
(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
(e) abusive treatment of investors, such as coercion, duress and harassment; or
(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.[71]

This approach certainly is an example to mitigate potentials for abuse in litigation by establishing an exhaustive list of indicators.[72] However, the FET provision of CETA also includes the concept of legitimate expectations, which re-introduces uncertainty regarding its interpretation.[73] CETA's FET provision further reads:

> When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.[74]

The Indian Model BIT also seeks to further clarify the content of the FET standard. Under the Indian model, the parties shall not subject investments of investors to measures which constitute a denial of justice under customary international law, un-remedied and egregious violations of due process, or manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment.[75] Whether these provisions prove to better guide

71 CETA (footnote 20), Art. 8.10.2.

72 Frank Hoffmeister, "The Contribution of EU Trade Agreements to the Development of International Investment Law" in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law – More Balanced, Less Isolated, Increasingly Diversified* (OUP 2015) 357, 366.

73 UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (United Nations 2015) 137.

74 CETA (footnote 20), Art. 8.10.4.

75 Indian Model BIT (footnote 20), Art. 3.

arbitral tribunals has to be seen in future disputes. A different reform approach towards FET is to avoid any inclusion of the standard in the treaty.[76] This latter option has been used by South Africa and Brazil[77] and is recommended by SADC.[78] In light of the prevailing uncertainties of interpretation, also in regard of the more precise FET provisions, the drafters of the PAIC decided not to include the FET standard.

3.7 *Exceptions to the Transfer of Funds*

Provisions on the transfer of funds are part of the vast majority of modern IIAs. Although they have been drafted in different ways, such provisions generally deal with three fundamental issues: the types of payment that are covered by the right to make transfers, the question of convertibility and exchange rates as well as the limitations on free transfer.[79] The issue of free transfer of funds bears a conflict between the interests of a host State and those of a foreign investor. For the investor, the repatriation of capital, including profits, into the home country or third country will often be the major business purpose of the investment. However, the host State seeks to administer its currency and its foreign reserves, meaning that large currency transfers into the country and out of the country need to be monitored and controlled in order to protect national policies.[80]

Treaty practice shows that completely unlimited transfer of funds is rare.[81] Most of the newer treaties contain limitations. The transfer of funds is typically subjected to the laws and regulations of the host State relating *inter alia* to bankruptcy and insolvency, to criminal or penal offences, or to ensuring compliance with orders or judgments in judicial or administrative proceedings.[82] Often IIAs contain provisions to allow the host State to impose restrictions on capital movements during balance of payments difficulties.[83] The PAIC contains a provision on the transfer of funds that lists in an illustrative

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76 Recommended by SADC, see 2012 SADC Model BIT (footnote 13) Commentary 22.

77 Promotion and Protection of Investment Bill of South Africa (adopted 2015, entered into force on 13 July 2018) <https://investmentpolicyhubold.unctad.org/InvestmentLaws/laws/157/download/3> accessed 18 April 2019; see also Brazil-Malawi CIFA (footnote 20).

78 2012 SADC Model BIT (footnote 13) Commentary 22.

79 Dolzer and Stevens (footnote 7) 86.

80 *Ibid*, 212–213.

81 The German Model BIT contains such absolute free transfer clause, German Model BIT (footnote 31), Art. 6.

82 US Model BIT (footnote 29), Art. 7.4; French Model BIT (footnote 31), Art. 7.

83 CETA (footnote 20), Art. 8.13.3; CPTPP (footnote 20), Art. 9.8.4.

way the types of transfers.[84] In another provision, the possible exceptions to the guarantee of free transfer of funds are indicated.[85] The drafters of the PAIC considered it to be relevant for the developing economies of Africa to have clearer and stronger safeguard-provisions to ensure the ability of Member States to reply to emergency situations.[86]

Firstly, restrictions can be adopted provided that they are "in accordance with taxation as well as financial laws and regulations" of the concerned Member State.[87] Secondly, AU Member States can prevent a transfer

> in a non-discriminatory manner and in accordance with its laws and regulations relating to:
>
> a) bankruptcy, insolvency or other legal proceedings to protect the rights of creditors;
> b) criminal or administrative violations; or
> c) ensuring the satisfaction of judgments in adjudicatory proceedings.[88]

Thirdly, the PAIC foresees the possibility for AU Member States to derogate from their obligation under the transfer of funds provision in the two cases:

> a) in the event of serious balance-of-payments and external financial difficulties or threat thereof; or
> b) in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.[89]

The measures adopted on either of these cases, have to "be made public, be temporary and be eliminated as soon as conditions permit".[90]

3.8 *Performance Requirements*

Performance requirements are often termed as conditions that host States impose on multinational enterprises, requiring them to meet certain specific

84 PAIC, Art. 15.
85 *Ibid*, Art. 16.
86 This approach has been recommended by SADC; see 2012 SADC Model BIT (footnote 13) Commentary 29.
87 PAIC, Art. 16.1.
88 *Ibid.*, Art. 16.3.
89 *Ibid.*, Art. 16.4.
90 *Ibid.*, Art. 16.5.

goals with respect to their business activities in the host State.[91] An exhaustive list of what type of measures can constitute performance requirements does not exist.[92] Measures can vary from ensuring a level of local content for products and services to carrying out environmental and social actions.[93] The economic effects of performance requirements are controversial. Whether they create economic inefficiencies or are beneficial for the host State remains an open question.[94] Looking at treaty practice, it can be seen that the traditional approach has been not to mention performance requirements in IIAs, with the exception of US BITs that have always included provisions that prohibit host States from imposing performance requirements.[95]

Today, there is a growing number of IIAs that contain comprehensive clauses on the prohibition of performance requirements;[96] at the same time, a number of newer treaties still do not include provision prohibiting performance requirements.[97] Yet, performance requirements can be able to serve as a tool for economic development policies. For instance, the transfer of technologies or the employment of local workers can help materialize beneficial spillover effects for the host State.[98] The possible positive impacts for the economic and social development of the host State led the drafters of the PAIC to include a provision on performance requirements that encourages AU Member States to use them as policy measures. As such, the PAIC's provision sets out an indicative list of measures that can be taken by a State "with the aim to promote domestic and local content".[99] These measures can be specific programs that support the development of local entrepreneurs;[100] or enhance "research and

91 UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries* (United Nations 2003).

92 David Collins, *Performance Requirements and Investment Incentives Under International Economic Law* (Edward Elgar 2016) 10.

93 For an illustrative list see Suzy H. Nikièma, "Performance Requirements in Investment Treaties" (IISD Best Practice Series, December 2014) 2–3 <www.iisd.org/sites/default/files/publications/best-practices-performance-requirements-investment-treaties-en.pdf> accessed 25 November 2019.

94 *Id.*

95 Andrew Newcombe, "The Americas" in Bungenberg and others (footnote 16) 202, 207; US Model BIT (footnote 29), Art. 8.

96 CETA (footnote 20), Art. 8.5; EU-Vietnam Free Trade Agreement (footnote 40), Art. 8.8; CPTPP (footnote 20), Art. 9.10; Draft Norwegian Model BIT (footnote 20), Art. 8.

97 Indian Model BIT (footnote 20); Brazil-Malawi CIFA (footnote 20).

98 UNCTAD, IPFSD (footnote 8) 99.

99 PAIC, Art. 17.

100 *Ibid.*, Art. 17.2 (c).

development including new technologies, technology transfer, innovation and other benefits of investment".[101]

4 Towards a Reshaping and Restructuring of IIAs?

The reformulation of traditional provisions is a good way to reform international investment law. However, it is questionable whether such an approach is capable of addressing the more systemic criticism, such as the asymmetry of rights and obligations between foreign investors and host States. This Section presents the truly novel features of the PAIC, which mainly consist of direct obligations of investors as well as shared obligations between investors and States.

4.1 *The PAIC and Investor Obligations*

International investment law is traditionally and until today predominantly concerned with the protection of foreign investors and their investments. Most IIAs stipulate reciprocal obligations on the contracting States parties and do not impose any direct legal responsibilities on the investor under international law as regards their business conduct.[102] As for the majority of traditional and current treaty practice, there is no balance between the rights and obligations of investors and those of States under international investment law. At this time, it is safe to affirm that the inclusion of direct obligations on the conduct of a foreign investor has not gained real recognition in investment treaty practice.

Yet, there are a few early treaties that include investor obligations, such as the Community Investment Code of the Economic Community of Great Lakes countries (ECGLC)[103] as well as the Charter on a Regime of Multinational Industrial Enterprises of Eastern and Southern African States.[104] More recent treaties have included, for instance, the obligation of foreign investors to

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101 Id.

102 Karsten Nowrot, "Obligations of Investors" in Bungenberg and others (footnote 16) 1154, 1155. It is important to remember that foreign investors have always had legal obligations under the national law of the host State or under the investor-State contract.

103 Art 19 ECGLC Community Investment Code (1982) requires inter alia "respect and ensure staff rights, establish and keep to a program for training manpower and promoting the advancement of managerial staff who are national of the member country, as well as to the protection of the environment".

104 Charter on a Regime of Multinational Industrial Enterprises of Eastern and Southern African States (signed 23 November 1990), Art. 17 (1991) 30 ILM 696.

comply with all applicable domestic law and measures of the host State,[105] or to accord priority to workers coming from the concerned State provided they have the same qualifications.[106] The International Institute for Sustainable Development (IISD) was first in adopting an alternative approach in its 2006 Model Investment Agreement.[107] This notwithstanding, most countries remain reluctant to stipulate direct obligations for investors, although it is a legally feasible option to ensure an appropriate balance in the realm of investment treaty practice between the legal protection granted to foreign investors, on the one side, and their responsibilities towards the societies in which they operate, on the other.[108]

As outlined above, the PAIC is intended to be a balanced legal instrument. In this respect, it contains a specific chapter on the direct obligations of investors,[109] counterbalancing the chapter on the guarantees of treatment for investors and investments. The chapter on investors' obligations contains six provisions entitled: (1) framework for corporate governance, (2) socio-political obligations, (3) bribery, (4) corporate social responsibility (CSR), (5) obligations as to the use of natural resources and (6) business ethics and human rights.

Under the PAIC, an investor has to comply with national and international standards of corporate governance for the sector concerned. The investor is required to comply in particular with transparency and accounting standards.[110]

The information that has to be disclosed by an investor includes the financial situation, performance, ownership, and governance of the company, as well as risks related to environmental liabilities. An investor also has to provide information relating to human resource policies, such as programs for human resource development.[111] The PAIC also provides for a specific article on Corporate Social Responsibility (CSR). The central element of the CSR clause is that investors shall act in accordance with host States' laws, regulations, administrative guidelines and policies and, in addition, investors shall make sure that

105 COMESA Investment Agreement (footnote 45), Art. 13; SADC Protocol on Finance and Investment (footnote 12), Art. 10, annex 1.
106 COMESA Investment Agreement (footnote 45), Art. 16.
107 IISD Model International Agreement on Investment for Sustainable Development (2005) pt 3 <www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> accessed 19 April 2019.
108 Nowrot (footnote 102) 1162.
109 PAIC, chapter 4.
110 *Ibid.*, Art. 19.1.
111 *Ibid.*

their economic objectives do not conflict with the broader socio-economic objectives of the host State.[112]

Furthermore, the PAIC sets out socio-political obligations to which the investor is held to adhere, including for instance the respect for cultural values, the non-interference in internal political affairs as well as the non-interference in intergovernmental relations.[113] In the same spirit, the investor is prohibited from influencing the appointment of persons to public office or finance political parties.[114] Likewise, any act of bribery is generally prohibited under the PAIC.[115]

As far as the use of natural resources is concerned, the investor is held not to exploit or use them to the detriment of the rights and interests of the host State and to respect the rights of local population as well as to avoid land grabbing practices vis-à-vis local communities.[116] The PAIC addresses principles that should govern compliance by investors with business ethics and human rights in the implementation of their investments, such as to support and respect the protection of internationally recognized human rights, to eliminate all forms of forced and compulsory labor, including the effective abolition of child labor, or to eliminate discrimination in respect of employment and occupation.[117] Finally, under the PAIC, investors are "encouraged" to facilitate the transfer of technology in the course of their business activities;[118] and to provide adequate financial resources relating to environmental technologies and should thereby assist those host States that are "particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to, or mitigation of those adverse effects".[119]

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112 PAIC, Art. 22. The text states: "1. Investors shall abide by the laws, regulations, administrative guidelines and policies of the host State. 2. Investors shall, in pursuit of their economic objectives, ensure that they do not conflict with the social and economic development objectives of host States and shall be sensitive to such objectives. 3. Investors shall contribute to the economic, social and environmental progress with a view to achieving sustainable development of the host State.

113 *Ibid.*, Art. 20.1.

114 *Ibid.*, Art. 20.2.

115 *Ibid.*, Art. 21.

116 PAIC, Art. 23.

117 *Ibid*, Art. 24. This provision is the only provision in the chapter using non-binding and only encouraging language.

118 PAIC, Art. 29(2): "Investors are encouraged to adopt in the course of their business activities, practices that permit the transfer and rapid diffusion of technologies and know-how, with due regard to the protection of intellectual property rights, on reasonable terms and conditions and in a manner that contributes to the research and development goals of the host State".

119 PAIC, Art. 30(2).

Direct obligations for investors need to be effectively enforced. Options for enforcement are, for instance, the denial of treaty protection for the investor or the possibility of a State to file counterclaims in an arbitral proceeding. The drafters of the PAIC opted for the possibility of counterclaims as will be presented here below in Part 6.

4.2 *The PAIC, "Horizontal" Obligations and Systemic Issues*

International investment law was traditionally not concerned with the conservation of natural resources, environmental protection and social well-being of host States, even though these aspects directly relate to most investment operations in a host country. Today, the perception has changed and objectives of sustainable development have become recognized guiding principles for developing and developed States.[120] In recent treaty practice, societal concerns have prudently been introduced into IIAs.[121] However, according to UNCTAD, there is still a need to harmonize new IIAs with the broader common concerns of a society.[122] An important aspect is the fact that most IIAs do not interconnect investment protection with other fields of international law, such as trade, finance, health and the environment, undermining the systemic coherence of international law.[123]

The PAIC's chapter on 'Investment-Related Issues' contains different aspects of policy-making that are concerned with the implementation of sustainable development objectives in African countries.[124] As mentioned before, the drafters of the PAIC consider that AU Member States should attract responsible investors with investments that are not harmful to the environment and bring economic and social benefits to host countries. The provisions of the chapter on 'Investment-Related Issues' are addressed to both investors and AU Member States and some provisions are addressed to either the investor or AU Member States. Some of the main features of this Chapter shall be presented here.

4.2.1 Transfer of Technology

The question of transfer of technology comes up more and more often in treaty practice. Whereas developing countries seek to encourage the transfer of technology, developed countries often exclude obligations for foreign investors

120 Steffen Hindelang and Markus Krajewski, "Conclusion and Outlook: Whither International Investment Law?" in Hindelang and Krajewski, *op. cit.,* (footnote 72) 377, 381.

121 CPTPP (footnote 20), Art. 9.15.

122 UNCTAD (footnote 73) 127.

123 UNCTAD, IPFSD (footnote 8) 17.

124 PAIC, ch. 5.

to do so.[125] In order to encourage the transfer of technology, different approaches have been suggested, varying from establishing cooperation mechanisms[126] to the inclusion of performance requirements.[127] The PAIC contains a specific provision dedicated to the transfer of technology.[128] This approach is until now unique in international treaty practice.

Under the PAIC, investors are encouraged to adopt in the course of their business activities, practices that permit the transfer and rapid diffusion of technologies and know-how on reasonable terms in a manner that contributes to the research and development goals of the host State.[129] AU Member States are invited to cooperate and facilitate the international transfer of technology by various measures, such as providing training for research, engineering, design and other personnel engaged in the development of national technologies or in the adaptation and use of technologies transferred. Finally, AU Member States are held to provide assistance in the development and administration of laws and regulations with a view to facilitating the transfer of technology.[130]

4.2.2 Environmental Protection

The right for a host State to adopt environmental measures has increasingly become part of modern IIA practice and most treaties contain provisions specifically addressing the relationship between investment and the environment.[131] Common to many IIAs, are "non-lowering of standards"-clauses.[132] Measures that protect or conserve the environment prominently figure in the general exceptions of many IIAs and assure the host State's right to regulate in this

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125 US Model BIT (footnote 29), Art. 8.1(f) on performance requirements stating that neither party may impose or enforce to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory.

126 See 2012 SADC Model BIT (footnote 13) preamble, para 2; PAIC, Art. 17.2(c). See also Indian Model BIT (footnote 20), Art. 1.2.1(iv). States might even establish cooperation amongst them in order to promote technology transfer (see COMESA Investment Agreement (footnote 45) schedule 1, let b (iv)).

127 2012 SADC Model BIT (footnote 13), Art. 21.2(b): "Notwithstanding any other provisions of this Agreement, a State Party may seek to enhance…technology transfer…through the use of specified requirements on investors made at the time of establishment or acquisition of the investment and during its operation".

128 PAIC, Art. 29.

129 *ibid*, Art. 29.2.

130 *ibid*, Art. 29.3.

131 Lise Johnson and Lisa Sachs, "International Investment Agreements, 2011–2012: A Review of Trends and New Approaches" in Andrea Bjorklund (ed), *Yearbook on International Investment Law & Policy 2012–2013* (OUP 2014) 219, 234.

132 NAFTA (footnote 39), Art. 1114.2; US Model BIT (footnote 29), Art. 12.

field.[133] Yet, binding provisions on the protection of the environment in an IIA are rare or even inexistent.[134]

By contrast, a number of obligations contained in the PAIC are drafted in a binding manner addressed to investors as well as for AU Member States in relation to the environment.[135] AU Member States are required to ensure that their laws and regulations provide for environmental protection. The investor, in turn, has to protect the environment; where the investor's activity causes damages to the environment, it has to take reasonable steps to restore it as far as possible. Both States and investors are to carry out environmental impact assessments (EIA) in relation to investments. Finally, the PAIC also contains a "non-lowering of standards"-clause that states that any relaxation of domestic environmental legislation in order to attract investments is prohibited.[136] As mentioned before, the PAIC contains specific exceptions to MFN and national treatment, also relating to the environment, that state that when a Member State intends to adopt measures for the protection of the environment the MFN and national treatment standards are not violated.[137]

4.2.3 Labor Issues

Like the environment, labor standards became part of modern IIA practice. Some treaties included references to non-binding codes, such as the International Labor Organization (ILO) Tripartite Declaration of Principles on Multinationals and Social Policy or the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.[138] When labor issues are addressed, a "non-lowering of standards"-clause is also very

133 US Model BIT (footnote 29), Art. 12.3.

134 2012 SADC Model BIT (footnote 13), Art. 14 requires investors to undertake environmental impact assessments, investments have to maintain an environmental management system consistent with recognized international environmental management standards and investors are obliged to respect international environmental standards binding on the host or home State.

135 For instance, Arts. 19, 22 and 37 of PAIC.

136 *ibid*, Art. 37.1.

137 *ibid* Arts 8.2 and 10.2. See analysis *supra* Section 3.5.2.

138 International Labor Organization, "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy" (2017) < https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm>; OECD, "OECD Guidelines for Multinational Enterprises" (2011) <www.oecd.org/corporate/mne/48004323.pdf>; see eg South Korea-US FTA (signed 30 June 2007, entered into force 15 March 2012), Art. 19.1–2 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2542> and Free Trade Agreement between the EFTA States and Montenegro (signed 14 November 2011, entered into force 1 September 2012), Art. 35 <www.efta.int/media/documents/legal-texts/free-trade-relations/montenegro/montenegro-main-agreement.pdf> all accessed 19 April 2019.

often used.[139] However, the PAIC contains several more innovative aspects. It foresees a mechanism of consultation and cooperation between the host State and the foreign investor relating to labor and employment objectives.[140] For instance, the investor may consult the host State authorities in order to keep manpower plans in harmony with national social development policies.[141] Furthermore, the investor is obliged to comply with international conventions and existing labor policies, and, in particular, not use child labor.[142] In the following provision, the PAIC encourages Member States to develop their human resources capacity. Such policies may include incentives to encourage employers to invest in training, capacity-building and knowledge transfer.[143] Special attention also has to be paid to the needs of youth, women and other vulnerable groups.[144]

4.2.4 Intellectual Property Rights and Traditional Knowledge

Intellectual property rights (IPRS) traditionally fall under the scope of application of IIAS, most obviously since IPRS are a covered investment under most IIAS.[145] This means that IIAS provide protection of IPR as a form of foreign investment.[146] The drafters of the PAIC also included IPRS in the list of assets that an enterprise may possess, such as copyrights, know-how, goodwill and industrial property rights.[147] The PAIC contains a specific article on IPRS in the chapter on "Investment-Related Issues", which provides that Member States shall ensure the enforcement of IPRS in their territory in accordance with the rights and obligations under the Agreement on Trade-Related Aspects of

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139 US Model BIT (footnote 29), Art. 13.2; Agreement between Japan and the Republic of Iraq for the Promotion and Protection of Investment (signed 7 June 2012, entered into force 1 February 2014), Art. 22 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1663> accessed 19 April 2019.The PAIC also sets out the obligation for AU Member States not to relax their domestic labor legislation as an encouragement for the establishment, maintenance or expansion of an investment in its territory.

140 See PAIC, Art. 34.2(b).

141 *Ibid.*

142 *Ibid.*, Art. 34 (3).

143 *Ibid.*, Art. 36 (1).

144 *Ibid.*, Art. 36.2.

145 Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (signed 25 November 1959, entered into force 28 April 1962), Art. 8 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1387> accessed 19 April 2019, already covered IPRS. For greater detail see Lahra Liberti, "Intellectual Property Rights in International Investment Agreements: An Overview" (2009) 6 TDM 1, 5–9.

146 Henning Grosse Ruse-Kahn, "Investment Law and Intellectual Property Rights" in Bungenberg and others, *op. cit.*, (footnote 16) 1692, 1695.

147 PAIC, Art. 4.4(f).

Intellectual Property Rights (TRIPS) and other relevant international instruments.[148] However, the drafters of the PAIC considered it to be crucial to reiterate the right of Member States to provide for exceptions to IPRs.[149] Such exceptions might in particular be relevant in the context of access to pharmaceutical products and medicine.

Another consideration of the drafters of the PAIC was to ensure that African traditional knowledge receives adequate protection. In this respect, the PAIC states that

> Member States and investors shall, in accordance with generally accepted international legal standards and best practices, protect traditional knowledge systems and expressions of culture as well as genetic resources that are sought, used or exploited by investors, or are otherwise relevant to their contracts, practices and other operations in such Member States.[150]

The notions of "traditional knowledge systems and expressions of culture" has been taken from the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Diversity of Cultural Expression.[151]

5 The PAIC and Investor-State Dispute Settlement: quo Vadis?

The current version of the PAIC foresees the possibility of investor-State dispute settlement (ISDS) as most currently existing IIAs do.[152] Over the last five years, ISDS became extremely controversial and probably constitutes the most controversial issue in today's investment reform debate. The increase in the number of ISDS cases, the often very high sum of compensation and costs of

148 *Ibid.*, Art. 25.1.

149 *Ibid.*, Art. 25.2.

150 *Ibid.*, Art. 25.3.

151 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (signed 20 October 2005, entered into force 18 March 2007) <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> accessed 19 April 2019. The Convention recognizes traditional knowledge systems as part of humanity's cultural heritage and their protection and promotion as an ethical imperative.

152 UNCTAD, *Investor-State Dispute Settlement* (UNCTAD Series on Issues in International Investment Agreements II, United Nations 2014) 18.

arbitration as well as unexpected and inconsistent interpretations of IIAs by arbitral tribunals have resulted in rising criticism of the existing system.[153]

There are two general alternative ways discussed on how to reform ISDS: either to keep and reform it as some countries have done,[154] or to abandon and replace it with national courts or with by setting up an ombudsman system as some countries have done.[155] The global debate is perfectly mirrored in Africa, and ISDS did not fail to be the most controversial aspect during the elaboration of the PAIC. In fact, the provisions dealing with ISDS are the only ones in the PAIC on which no agreement between the drafters could be found. It is well known that South Africa, for instance, has a clear policy against ISDS. The country recently reviewed all of its IIAs and terminated most of them. The law that will be applicable to foreign investors in South Africa is the Promotion and Protection of Investment Bill adopted in 2015, which does not contain ISDS.[156] During the PAIC experts' meetings, South Africa, together with a couple of other countries, argued for the exclusion of ISDS.[157] In fact, all SADC Member States are meanwhile opposed to ISDS as is evidenced by the amendments of August 2016 to the SADC Protocol on Finance and Investment.[158] The amended version no longer contains any reference to ISDS and only provides for State-State dispute resolution.[159]

However, the majority of African countries still see a need for having ISDS in the PAIC in order to render their countries attractive for foreign investors. It is arguably true that foreign investors have poor trust in African judicial systems. Hence the need for ISDS seems, at least for the time being, inevitable.

153 UNCTAD (footnote 73) 145.

154 Such as the establishment of a permanent investment court system in EU treaties see CETA (footnote 20) Arts. 8. 18 ff; see also EU-Vietnam Investment Protection Agreement <http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157394.pdf> 3.1 ff. The Indian Model BIT (footnote 20), Art. 14 prohibits investors to threaten the State to use ISDS in order to obtain benefices, limits the scope of claim, and foresees the exhaustion of local remedies.

155 Such as South Africa and Brazil. See for the ombudsman system, Brazil-Malawi CIFA (footnote 20) Arts. 4 and 13.

156 Promotion and Protection of Investment Bill of South Africa (footnote 77).

157 SADC recommends the exclusion of ISDS, see 2012 SADC Model BIT (footnote 12), Art. 29.

158 Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment (signed 17 May 2017, not yet entered into force) (Agreement Amending Annex 1) <http://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf> accessed 18 April 2019.

159 *ibid.*

Among the countries in favor of ISDS was a consensus to shape provisions on ISDS in a manner so as to avoid the shortcomings of this mechanism and to address some of the criticism. Consequently, the ISDS provisions of the PAIC include a couple of important reform approaches. The PAIC provides that "disputes arising between investors and Members States under the specific agreements that govern their relations shall be resolved under those agreements".[160] In this respect it works as an "anti-umbrella clause".[161] The PAIC further requires that the investor and the concerned Member State

> should initially seek to resolve the dispute within 6 months at the latest, through consultations and negotiations, which may include the use of non-binding, third-party mediation or other mechanisms.[162]

Another critical question is the exhaustion of local remedies. The traditional approach of IIAs is to provide for direct access to international arbitration for a foreign investor, usually after a "cooling-off period".[163] It was for a long time considered that in many countries an independent judiciary cannot be taken for granted and that the defending State might influence the outcome of investor-State disputes in its own courts.[164] However, some authors argue that today the situation in most countries, including African countries, has changed; consequently the exhaustion of local remedies could and should revive.[165]

According to UNCTAD, the requirement of dispute resolution before the domestic courts of the host country has several advantages, and not least might foster sound and well-working legal and judicial institutions in the host States.[166] SADC as well as IISD also consider this approach to be beneficial for

160 PAIC, Art. 42.1.

161 Recent trends show that umbrella clauses are no longer included into IIAs, see UNCTAD (footnote 73) 113.

162 PAIC, Art. 42.1(b).

163 UNCTAD (footnote 152) 18. A number of IIAs require pursuing local remedies for a period of time, see eg Agreement between the Belgium-Luxembourg Economic Union and the Republic of Botswana on the Reciprocal Promotion and Protection of Investments (signed 7 June 2006, not yet in force), Art. 12.2 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/331>; Agreement between the Republic of Korea and the Government of the Republic of Argentina on the Promotion and Protection of Investments (signed 17 May 1994, entered into force 24 September 1996), Art. 8.3(a) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/102> all accessed 19 April 2019.

164 Dolzer and Schreuer (footnote 7) 235.

165 See Sornarajah (footnote 67) 190.

166 UNCTAD (footnote 73) 149.

host States, since notably the exhaustion of local remedies can prevent frivolous claims and avoid the considerable costs of international arbitration.[167] Recent treaty practice shows that the requirement of the exhaustion of local remedies remains quite rare with the exception of the Indian Model BIT.[168] The drafters of the PAIC decided to include the requirement for foreign investors to first exhaust local remedies in the Member State where their investment is located before a request for arbitration can be submitted.[169] In this way, investor-State arbitration becomes a remedy of last resort under the PAIC.

In addition, the PAIC contains an important limitation to the investors' access to ISDS. The State's consent for arbitration is given on a case-by-case basis or on the basis of national law. "[T]he dispute may be resolved through arbitration, subject to the applicable laws of the host State and/or the mutual agreement of the disputing parties".[170] This rather peculiar provision implies that if the host State's law do not allow for ISDS, such as in the case of the South African Investment Bill,[171] ISDS cannot take place. And even if the host State's law provides for ISDS, the investor would still need the agreement of the host State to initiate ISDS proceedings. *Last but not least,* even in case of silence in the host State's law, ISDS can only take place upon the mutual agreement of the disputing parties.

A further important aspect of the ISDS provisions of the PAIC is the express possibility for a State to file a claim against an investor in an investor-State arbitration, a so-called counterclaim. It is noteworthy that the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) accepts counterclaims under certain conditions.[172] However, in practice, tribunals often enough deny jurisdiction on counterclaims due to the absence of a clear treaty provision expressly allowing for such claims by the State.[173] The inclusion of an express reference to counterclaims thus clarifies any doubt that investors do consent to the tribunal's jurisdiction

167 IISD Model (footnote 107), Art. 45; 2012 SADC Model BIT (footnote 13), Art. 29.4(b).

168 Indian Model BIT (footnote 20), Art. 14.3.

169 PAIC, Art. 42.1(c).

170 *Ibid.,* Art. 42.1(c).

171 Promotion and Protection of Investment Bill of South Africa, (footnote 77), Art. 13.

172 ICSID Convention, Art. 46; see also Rule 40 ICSID Arbitration Rules. Yet Article 46 of the ICSID Convention does not, by itself, vest a tribunal with competence over counterclaims, the requirements of Article 25 of the ICSID Convention as well as of the applicable investment treaty must also be satisfied. See *Urbaser v Argentina,* ICSID Case No ARB/07/26, Award (8 December 2016), para 1117.

173 See *Spyridon Roussalis v Romania,* ICSID Case No ARB/06/1, Award (7 December 2011), paras 859–877 and *Saluka Investments BV v The Czech Republic,* UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim (7 May 2004).

over these claims. Yet, there are very few examples of treaties that contain an express reference to counterclaims. The first was the COMESA Investment Agreement[174] followed by SADC.[175] Recently India also included the possibility of counterclaims in its Model BIT.[176] The Indian provision "Counterclaims by Parties" states that:

(i) A Party may initiate a counterclaim against the Investor or Investment for a breach of the obligations set out under Articles 9, 10, 11 and 12 of Chapter III of this Treaty before a tribunal established under this Article and seek as a remedy suitable declaratory relief, enforcement action or monetary compensation.

(ii) In assessing the monetary compensation to be paid to a Party under this Article, the tribunal can take into consideration the following:
   a. whether the breach justifies an award of damages; and
   b. whether that Party has taken steps to mitigate its losses.

(iii) The Parties agree that a counterclaim made in accordance with this Article 14.11 shall not preclude or operate as a res judicata against applicable legal, enforcement or regulatory action in accordance with the Law of the Host State or in any other proceedings before judicial bodies or institutions of the Host State.

(iv) An initiation of a counterclaim by a Party shall not be deemed to be a waiver of that Respondent Party's objection to the tribunal's jurisdiction over an Investment Dispute.[177]

In comparison to the Indian provision, the PAIC provision dealing with counterclaims reads as follows:

> 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

174 COMESA Investment Agreement (footnote 45), Art. 28.9: "A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defense, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages".

175 2012 SADC Model BIT (footnote 13), Arts. 19 and 29.19.

176 Indian Model BIT (footnote 20), Arts. 14.11 and 14.2 (i) (b).

177 *Ibid.*, Art. 14.11.

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.[178]

The inclusion of a provision allowing counterclaims by States will ensure the enforceability of investor obligations contained in the PAIC.[179] This means that a State can invoke any violation of any relevant international treaty protecting the environment, human rights and labor standards under the PAIC's provision on counterclaims. The breadth of potential legal bases of a State's counterclaim is thus very large. Allowing such a broad scope for claims for States goes further than the approaches taken by COMESA, SADC or in India's recent Model BIT, as the latter models foresee that the basis of a counterclaim has to be a breach by the investor of an obligation set out in the actual IIA.[180]

In sum, the dispute settlement provisions of the PAIC thus seek to establish a better balance between the rights and obligations of investors and host States. They seek in particular to avoid certain shortcomings of the existing ISDS system.

6 Post-PAIC African Investment Instruments

The previous Sections have shown that the PAIC contains a number of innovative features. With the adoption of the PAIC, Africa has become more and more an investment rules maker. Yet, this development has not stopped with the PAIC but can be further illustrated by subsequent investment instruments, which have all been elaborated in Africa, either at the regional, bilateral or national level. The most recent and progressive instruments shall be presented in the following.

6.1 *2016 Amendments to Annex 1 of the SADC Protocol on Finance and Investment*

Annex 1 to the SADC Protocol on Finance and Investment (the Annex), which was adopted in 2006 encourages SADC Member States to create a predictable investment climate in order to attract investment in their territories. The main

178 PAIC, Art. 43.1.

179 There are other ways of enforcement of investors' obligations, such as by creating a monetary liability in domestic courts of the host State for a breach of the treaty obligations by an investor, SADC Model BIT (footnote 13) Commentary 39.

180 COMESA Investment Agreement (footnote 45), Art. 28.9; 2012 SADC Model BIT (footnote 13), Art. 19.2; Indian Model BIT (footnote 20), Art. 14.11.

purpose of the Annex has been, since its adoption, to provide for substantive investment protection standards including provisions on expropriation, FET, and ISDS. The instrument in its version of 2006 has become highly controversial as a number of investment claims have been filed against SADC Member States.[181] The initial version of the Finance and Investment Protocol contained remarkably broad provisions, leading an arbitral tribunal to recently deem that it applied to all foreign investors, as well as domestic investors.[182] Against this backdrop, SADC Member States have elaborated an amended version of Annex I to the SADC Protocol on Finance and Investment which was finalised in August 2016. Among the key changes is the deletion of the FET provision and the complete removal of the investor-state dispute settlement mechanism.[183] Additionally, the amended version of the Finance and Investment Protocol will limit protection only to investors of a SADC Member State investing in another SADC Member State thereby excluding investors of third States.

6.2 *2016 Morocco-Nigeria BIT*

In December 2016, Morocco and Nigeria signed a BIT that like the PAIC shows to what extent more balanced investment agreements are feasible.[184]

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181 Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment (signed 17 May 2017, not yet entered into force) (Agreement Amending Annex 1) <http://www.sadc.int/files/7114/9500/6315/Agreement_Amending_Annex_1_-_Cooperation_on_investment_-_on_the_Protocol_on_Finance__Investment_-_English_-_2016.pdf> accessed 18 April 2019.

182 A very broad interpretation was made by the tribunal in *Swissbourgh Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust and others v The Kingdom of Lesotho*, PCA Case No 2013–2029 (First Case), UNCITRAL, Partial Award on Jurisdiction and Merits (18 April 2016). The award is not published. For more detail see Luke Eric Peterson, "INVESTIGATION: Lesotho is held liable for investment treaty breach arising out of its role in hobbling a regional tribunal that had been hearing expropriation case" *IAReporter* (14 July 2016) <https://www.iareporter.com/articles/investigation-lesotho-is-held-liable-for-investment-treaty-breach-arising-out-of-its-role-in-hobbling-a-regional-tribunal-that-had-been-hearing-expropriation-case/> accessed 18 April 2019.

183 Agreement Amending Annex 1 (footnote 158), Art. 25 "Access to Courts and Tribunals": "State parties shall ensure that investors gave the right of access to the courts, judicial and administrative tribunals, and other authorities competent under the laws of the Host State for redress of their grievance in relation to any matter concerning their investment including but not limited to the right for judicial review of measures relating to expropriation or nationalization and determination of compensation in the event of expropriation or nationalization".

184 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 3 December 2016, not yet in force) <https://investmentpolicyhubold.unctad.org/Download/TreatyFile/5409> accessed 18 April 2019.

The Morocco-Nigeria BIT starts off by making sustainable development the overarching objective of the treaty. Not less than four references are made to the concept within the treaty's preamble. As regards the substantive provisions of the BIT, a balance between the investors' rights and obligations has been made. The set of investors' rights are comparable to those that are traditionally contained in IIAs. The scope of protection is, however, limited to those investment that fulfil the criteria of the treaty's investment definition. This definition requires, as it is the case under the PAIC, that an investment has to display all the four characteristics of the *Salini* test; stating that investments have to contribute the sustainable development of host States.[185]

Moreover, the definition also excludes portfolio investments.[186] Different from the PAIC, the Morocco-Nigeria BIT includes a provision on FET. Under its Article 7 investors are entitled to the minimum standard of treatment guaranteed under customary international law. The same provision further states that FET 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 a Party", while full protection and security refers to "the level of police protection required under customary international law".[187]

The investment protection standards are then counter-balanced with a series of obligations upon investors. Pre-establishment, investors must comply with environmental assessment screening and assessment processes as well as a social impact assessment.[188] In the post-establishment phase, investors must apply the precautionary principle;[189] must maintain an environmental management system and uphold human rights in accordance with core labour and environmental standards as well as labour and human rights obligations of the host State or home State;[190] shall never engage or be complicit in corruption practices and must meet or exceed national and internationally accepted standards of corporate governance;[191] and lastly shall adhere to high levels of socially responsible practices and apply the ILO Tripartite Declaration on Multinational Investments and Social Policy.[192] Investors' rights can be enforced through investor-State arbitration if the dispute could not be settled within six

185 *Ibid,* Art. 1(3).
186 *Ibid.*
187 *Ibid,* Art. 7
188 *Ibid,* Art. 14(1–2).
189 *Ibid,* Art. 14(3).
190 *Ibid,* Art. 18.
191 *Ibid,* Art. 19.
192 *Ibid,* Art. 24.

months by the Joint Committee which is the main (political) body established under the BIT.[193] Lastly, the BIT introduces a novel provision on the liability of investors, who "shall be subject to civil actions for liability in the judicial process of their home State for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host State".[194]

6.3 *2017 Reviewed SADC Model BIT*

As mentioned before, SADC has, next to the Protocol on Finance and Investment, a Model BIT. A first edition was published in 2012;[195] and has recently been updated by a second edition.[196] In the reviewed SADC Model BIT one can find similar approaches as in its previous version that are also reflected in the PAIC and the Morocco-Nigeria BIT; *i.e.* sustainable development is the overarching objective of the instrument;[197] the definition of investment is linked to the criteria requiring investments to contribute to the sustainable development of host States;[198] investment protection standards are incorporated but are counter-balanced with a set of investor obligations.[199] With respect to the ontroversial standard of FET, the reviewed SADC Model BIT maintains the standard of "Fair Administrative Treatment".[200] In the same vein than the PAIC, the new instrument also reiterates that investment protection is to be

193 *Ibid*, Art. 26.

194 *Ibid*, Art. 20.

195 2012 SADC Model BIT (footnote 13).

196 SADC Model Bilateral Investment Treaty Template with Commentary, Second Edition, June 2017. (Reviewed SADC Model BIT); the instrument is not publicity available (on file with the authors).

197 *Ibid.*, preamble and, Art. 1.

198 *Ibid*, Art. 2.

199 A series of obligations have been maintained including investor obligations against corruption (art 10), compliance with domestic laws (Art. 11), obligations on information and transparency with respect to investment contracts (Arts. 12 and Art. 18); the obligation to conduct an environmental and social impact assessments (Art. 13); other obligations on environmental protection, labour protection and human rights (Arts. 14 and Art. 15); and lastly the obligation to respect corporate governance standards (Art. 16).

200 *Ibid*, Art. 5 (1): "The States Parties shall ensure that their administrative, legislative and judicial processes do not operate in a manner that is manifestly arbitrary or constitutes:
a. denial of justice in criminal, civil or administrative proceedings;
b. un-remedied and egregious violations of due process;
c. targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or
d. manifestly abusive treatment, such as coercion, duress and harassment and other similar issues".

limited to the post-establishment phase.[201] Lastly, the new Model BIT takes a stronger stand than its previous version in excluding ISDS as it removes ISDS from the treaty text.[202] However, as some SADC Member States requested, an appropriate text on ISDS has been annexed to the reviewed model.[203]

6.4 *2017 Egyptian Investment Law*

The reform of the regulation of international investment in Africa also had its impacts on national investment laws. A recent and likewise telling example is the Egyptian Investment Law that was adopted in 2017.[204] Sustainable development is once more the key objective.[205] And the definition of "investment", which entails "using money for the set-up, expansion, development, funding, holding, or management of an Investment Enterprise in a manner that *contributes to the comprehensive and sustainable development of the State*" (emphasis added).[206] Investment guarantees[207] are also under this instrument counterbalanced with investor obligations. In its Article 15, the law provides for the social responsibility of investors and introduces a very interesting requirement according to which investors have to dedicate a percentage of their annual profits to the creation of social development systems outside of their projects, including in areas such as environmental protection, healthcare, social care, cultural care, technical education, and research and development.[208] In addition, the Egyptian Law is noteworthy for its emphasis on investment incentives and investment facilitation. Concerning investment incentives, the law provides a number of general, special and additional financial and procedural incentives for investment. The special incentives, for instance, seek to support

201 *Ibid*, Part 2 "Investor Rights Post-Establishment".

202 *Ibid*, Part 5.

203 *Ibid*, Annex 1 "Investor-State Dispute Settlement".

204 Egyptian Investment Law No 72 of 2017, published in the Official Gazette on 31 May 2017, available at <https://investmentpolicyhubold.unctad.org/InvestmentLaws/laws/167> accessed 18 April 2019.

205 *Ibid.*, Art. 2. The sustainable development objective is corroborated by a number of principles that should govern any investment activity in Egypt, *i.e.* (1) Equality of investment opportunities and non-discrimination and supporting emerging companies, entrepreneurship and micro, small and medium enterprises (MSMEs); (2) Consideration of the social dimension, public health and environment protection; (3) Freedom of competition, prevention of monopoly and consumer protection; (4) Compliance with principles of governance, transparency, prudent management and non-conflict of interests; (5) Maintaining stability of investment policies; (6) Expedition and facilitation of investors' transactions; (7) Preserving national security and public interest.

206 *Ibid*, Art. 1.

207 *Ibid*, Arts. 3–8.

208 *Ibid*, Art. 15.

development-oriented enterprises on a geographic and sectoral basis. Investors may deduct from their taxable net profits 50 percent of investment costs in a given sector and 30 percent of investment costs in another sector.[209] The percentage of the tax incentives is thus based on the distinction between the sectors which in return is based on the different needs for development. As regards investment facilitation, the law further simplifies the procedure for investors to establish in Egypt. The new law creates the Investor Service Centre to facilitate company incorporation and the issuance of approvals, permits and licenses for the set-up or management of investment enterprises and to provide aftercare services, among others.[210] Moreover, the law mandates the automation and unification of procedures related to incorporation and post-incorporation services, including Electronic Incorporation;[211] and provides that the conditions, procedures and dates prescribed for the allocation of the real estate properties and the issuance of the approvals, permits and licenses related to investment must be made available on the website and publications of the competent authorities.[212]

6.5 *2018 ECOWAS Common Investment Code*

Finally, the on-going process of adoption of the latest African investment instrument – next to the renegotiation of the COMESA Investment Treaty[213] – deserves to be mentioned here. In 2018, the Economic Community of Western African States (ECOWAS) has adopted the draft ECOWAS Common Investment Code (ECOWIC).[214] The PAIC is a blueprint for the ECOWIC.

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209 *Ibid*, Art. 11. The law distinguishes between the so-called Sector A that includes the geographic locations that most urgently need development, and Sector B that covers all other areas in Egypt.

210 *Ibid.*, Art. 21.

211 *Ibid.*, Art. 48.

212 *Ibid.*, Art. 19.

213 The renegotiation of the 2007 COMESA Investment Treaty (which has never entered into force) has been finalized at the time of writing of this contribution. However, the text is not yet publicly available (on file with the authors). Article 2 of the Revised Investment Agreement for the COMESA Common Investment Area follows the trends set forth by the PAIC and reads as follows: "The objective of this Agreement is to establish a competitive COMESA Common Investment Area in order to: (a) promote investments that support sustainable development in Member States; promote a more liberal and more transparent investment environment (…) (c) provide COMESA investors with certain rights in the conduct of their business within an overall balance of rights and obligations between investors and Member States (…9).

214 ECOWAS Common Investment Code (ECOWIC), July 2018; the document is not publicly available (on file with the authors).

The new Code is to apply to investors of a given ECOWAS Member State investing in another Member State. In overall, the Code contains very similar approaches to the discussed instruments. Typically, the main objective is sustainable development and the definition of an investment is linked to the investment's contribution to the development of the host State;[215] also it does not include a provision on FET. A striking similarity with the PAIC is that the ECOWAS Code likewise contains a set of horizontal obligations on broader policy issues, such as environmental protection, labour standards and economic development including anti-corruption that apply to both the investors and the Member States. The provisions dealing with these sustainable development issues are very comprehensive and each area received a specific chapter. Content-wise, the commitments of Member States span from non-lowering of standards commitments, the reaffirmation to international standards and a high level of social and environmental protection to public participation and increased regional cooperation.[216] The right to regulate of ECOWAS Member States has been emphasized, especially in relation to national economic development measures, such as the support of local entrepreneurs or the increase of human resource capacity and training.[217] Investor obligations are also comprehensive, including socio-economic obligations,[218] environmental protection and transfer of environmentally sound management practices,[219] as well as responsible business conduct and the fight against corruption.[220]

The ECOWIC emphasises in its Preamble, "the right of each Member State to establish its own level of domestic environmental protection and its own sustainable development policies and priorities" while recognizing "the need to establish within the ECOWAS region, reliable, transparent, harmonised and predictable conditions for investments".

Building upon the PAIC, the ECOWIC innovates further and strengthens some of the progressive approaches to investment law-making that have been initiated with the PAIC. For instance, Article 9 of the ECOWIC ("General Exceptions") provides a more exhaustive list of exceptions (*i.e.* legitimate objectives) that could be invoked than the ones mentioned in the PAIC. Indeed, Article 9 reads a follows:

215 *Ibid.*, Art. 1(h), here "a significant contribution to the host State's economic development".
216 *Ibid.*, Arts. 21–26, 30–31, 35–37 ff.
217 *Ibid.*, Arts. 17 and 31.
218 *Ibid.*, Art. 32.
219 *Ibid.*, Arts. 27 and 29.
220 *Ibid.*, Arts. 34 and 38.

Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Member States or their investors in like circumstances, nothing in this Code shall be construed to prevent the adoption or enforcement by any Member State of measures taken in good faith and designed and applied:

(a) to protect public morals or to maintain public order;
(b) to protect human, animal, or plant life or health;
(c) to secure compliance with the national laws or regulations which are not inconsistent with this Code, including those relating to:
  (i) for the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract;
  (ii) to the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or
  (iii) for safety reasons;
(d) to ensure the equitable or effective imposition or collection of direct taxes in respect of investors of another Member State and their investments;
(e) to protect national treasures of artistic, historic, or archaeological value;
(f) for the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.
(g) to promote the achievement of equality in its territory, land planning, or designed to protect or advance categories of disadvantaged persons.
(h) to preserve and promote cultural and linguistic diversity.
(i) to preserve and protect the biodiversity and the rights of local communities, in conformity with the relevant multilateral instruments.

The ECOWIC also stresses the need for responsible investment and innovated with certain provisions such as the ones in relation with environmental protection. As an example, Article 21 ("General Protection of the Environment") reads as follows:

1. The Member States re-affirm their commitment to promote within the ECOWAS territory mutually supportive environmental-related investment policies, encourage high levels of environmental protection, facilitate the effective enforcement of national environmental

laws, and enhance the capacities of the Member States to address environmental-related investment issues through regional co-operation.

2. For the purpose of this section, "environmental legislation" means any legislation of Member States, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of harm to human, animal, or plant life or health, including but not limited to legislation related to the:
   (i) prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;
   (ii) control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto;
   (iii) protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Member State's territory; implementation of any relevant and subsequent agreements on environment.
3. The Member States further recognize that it is unlawful under this Code to encourage investment by relaxing national health, safety, or environmental measures. Accordingly, no Member State shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its national territory.

6.6 *Ongoing Negotiations on the Investment Protocol to the AfCFTA*

As mentioned at the outset of this article, the PAIC is serving as the main basis for the negotiations on the Investment Protocol to the Agreement establishing an African Continental Free Trade Area (AfCFTA). The crucial question is to what extent continent-wide consensus can be found on some of the remaining controversial issues of international investment regulation. From the post-PAIC African investment instruments, one can conclude that there is not yet a clear consensus on whether or not the FET standard is to be completely excluded or rather be adapted to a standard of fair administrative treatment. In the same vein, ISDS and the appropriateness of its alternatives continue to be controversial among African countries. In contrast, clear consensus is given for making sustainable development the overarching objective of investment regulation, for having investment definitions that are linked to the economic or

sustainable development of host States, and lastly for clear and binding obligations on foreign investors.

7 Conclusion

Over the last fifty years of international investment law practice, African countries have been perceived as "investment rules takers". This is partly due to the asymmetry in terms of economic development between African host countries and investors' home countries.[221] In the hope to attract more foreign investment, African countries concluded numerous BITs with capital-exporting countries, usually by accepting the pre-drafted Model BITs of those countries. However, African States, African regional economic communities and the African Union gradually became "investment rules makers" with the adoption of modern investment treaties and model investment treaties. The PAIC adopted in 2016 is so far the first continent-wide model investment treaty. Despite its non-binding nature, the PAIC has already and will in the future serve as a guide for African States' IIA negotiation. In addition, the PAIC is the basis for negotiation of the Investment Protocol to the AfCFTA.

As shown in the analysis of this article, the PAIC is intended to be a balanced legal instrument,[222] meaning it seeks to balance between investment protection and non-investment-related public interests. The drafters of the PAIC did not underrate the need for attracting foreign capital into Africa; yet this need should not neutralize the long-term goal of sustainable development. Consequently, sustainable development plays a prominent role throughout the PAIC. As already indicated, the very objective of the PAIC is "to promote, facilitate and protect investments that foster the sustainable development of each Member State". Africa is one of the world's regions that will certainly attract foreign investment in the next years because of its many and precious natural resources. What is at stake now is to regulate which type of investments and what type of investors operating in Africa should be protected under international law. The answer of the drafters of the PAIC is that is has to be investments that

221 Alfredo Crosato, Evin Durmaz and Aliki Semertzi, "Africa's Investment Regime: Assessing International Investment Agreements in the Light of Current Trends and Needs in Africa" (The Graduate Institute: Trade and Investment Law Clinic Papers, 2016) 30.

222 Sornarajah considers balanced treaties to be the solution against current systemic criticism, (footnote 67) 347–365.

further the bigger interests and needs of African societies, its economies, and that do not harm the environment. Thus, foreign investments that will be made in Africa in the future shall be investments that are responsible.

The drafters of the PAIC were inspired by the current international reform discussion. Thus, several of the ideas that can be found in the PAIC text are what can be called common approaches in the international discussion on reforming the investment law regime as a whole. Such ideas mainly concern the reformulation of certain treaty standards, the inclusion of societal concerns as well as the rethinking of the ISDS system. Africa, unlike Brazil, is not making a fundamental contestation of the system of IIAS. The PAIC is rather an African tuning or recalibration of an IIA.[223] It reflects the development that new IIAS are no longer based on either the North American or European models, but that other regions also engage in shaping IIAS according to their level of economic development and social needs.

Some aspects in the PAIC are highly innovative. The inclusion of direct obligations of investors, for instance, or the specific exceptions to MFN and national treatment, or the complete omission of a FET standard remain very rare features of IIAS or other model investment treaties. With the PAIC, African countries are yet in the minority to further develop these approaches.

The elaboration of the PAIC has permitted African countries to deliberate on their vision of the future shape of IIAS and to build awareness amongst them of the broader implications of foreign investment for their sustainable development. The PAIC thus reflects the broad consensus of all AU Member States on precise provisions over foreign investment regulation and endows Africa with a voice in the international debate on the future and reform of the international investment regime. In particular, the strong emphasis on sustainable development goals in the PAIC bears the potential for the PAIC to become a model for innovation also outside Africa.

For now, it will definitely serve as benchmark for the drafting and shaping of the future Investment Protocol to the AfCTA. The AfCTA represents a great opportunity to foster trade integration in Africa but it also represents a crucial momentum for a greater stimulation of investment flows in Africa. Investment relations must be based on a "Win-Win" scenario and the PAIC has shown that investment law can provide for such an approach by better integrating investment facilitation and protection with the sustainable

223 Generally on refining and recalibrating IIAS see Federico Ortino, "Refining the Content and Role of Investment 'Rules' and 'Standards': A New Approach to International Investment Treaty-Making" (2013) ICSID Review 28(1), 152–168.

development objectives of African States. Investment facilitation for sustainable development should be the leitmotiv of any investment law instrument within Africa, The PAIC has set the tone for that. It is now for the Investment Protocol of the AfCTA to crystallize that path…