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A TWAIL Approach to Reforming the International Investment Regime

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A TWAIL APPROACH TO REFORMING THE INTERNATIONAL INVESTMENT REGIME

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1. INTRODUCTION

There is no gainsaying the fact that the International Investment Regime (IIR) was introduced to provide legal protection against the abuse of power and egregious behaviour of governments. In fact, when entering into Bilateral Investment Treaties (BIT) arrangements, host states recognised that concessions had to be made for the sake of economic development in their countries. However, the problem is that there are concerns that the current IIR may have diminished the overall welfare of developing countries in particular. There have been several conflicts between obligations of host states to protect foreign investments and their other international and domestic law obligations. As a result of these conflicts, foreign investors have challenged a wide range of government measures that impact negatively on their investment through the Investor-State Dispute Settlement (ISDS) mechanism. For instance, more than 40 cases were instituted against the government of Argentina due to emergency measures taken to deal with the economic and financial crisis of 2001.[1] Other instances include claims that arose due to legislative reforms in the renewable energy sector,[2] or the right to regulate to protect public health under the Fair and Equitable Treatment (FET) and indirect expropriation clauses.[3] In sum, investment treaties have become "an open invitation to unhappy investors, tempted to complain that a financial and business failure was due to improper regulation, misguided macroeconomic policy or discriminatory treatment by the host government and delighted by the opportunity to threaten the national government with a tedious, expensive arbitration".[4]

One of the main points in this chapter is that the IIR provides reasons to suspect regime bias as described by Gathii based on its neoliberal agenda of foreign investment protection; its disregard for the host states' environmental or sustainable development goals, the need for the protection of health and safety, labour rights; and the way the regime eludes developing countries' effective participation in its dispute settlement process.[5]

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[1] Reed (2009), Scorecard of Investment Treaty Cases Against Argentina since 2001, Kluwer Arbitration Blog of 2nd March 2009. Available at http://arbitrationblog.kluwerarbitration.com/2009/03/02/scorecard-of-investment-treaty-cases-against-argentina-since-2001/ (last accessed 31 January 2023).

[2] UNCTAD' May 2017 IIA Issues Note on Investor-State Dispute Settlement: Review of Developments in 2016. Available at https://unctad.org/system/files/official-document/diaepcb2017d1_en.pdf (last accessed 1 April 2023).

[3] Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7.Available at https://www.italaw.com/cases/460 (last accessed 1 April 2023).

[4]Peterson (2001), p. 13

[5] Gathii (2008), pp 261-264.

How then can developing countries address this bias in IIR? The regime is at a watershed moment and a lot of changes are going on globally. The important questions to ask are, what type of foreign investment protection rules would best suit the interests of developing countries? Most importantly, in what ways can developing countries avoid the consequences of the earlier treaties of the 1990s and early 2000s? What is the most effective way to approach the reform? These questions are of great importance because presently, the world is witnessing power-bases shift in the investment regime, the developing states are becoming capital-exporting states, and unlike during the 20th century, they are now in a position to influence the development of a balanced international investment regime. These circumstances present developing countries with an opportunity to reform the IIR and transform it in such a way that they are no longer just rule takers but effective rule makers.

This chapter is structured into three main sections. The first section will discuss briefly the evolution of the IIR and the controversy surrounding the regime between the developed and developing countries. The next section focuses on the recent efforts made by some developing countries at the national and bilateral levels to address the inequities in the IIR. The third section discusses the need for harmonized efforts by developing countries at the regional and continental levels in reforming the IIR.

Finally, this chapter argues that the piecemeal approach adopted at the national and bilateral levels will not tackle all the defects in the system. It is therefore recommended that developing countries have a better chance at reforming the IIR by implementing new investment policies through harmonized efforts at the regional and continental levels. The MERCOSUR State Parties' Protocol on Investment Cooperation and Facilitation and The African Union's African Continental Free Trade Area (AfCFTA) serve as good examples for other developing countries to adopt at the regional or continental levels.

2. CONTROVERSY IN THE IIR FROM A TWAIL PERSPECTIVE

IIR has generated significant controversy in recent years.[6] In fact, the issue of controversy in the regime can be traced to as far back as the middle of the 20th century when formerly colonized states

[6] See e.g. a recent public statement on the international investment regime supported by numerous academics with expertise relating to international law, investment law, arbitration and regulation Van Harten et al., (2010) Public Statement on the International Investment Regime, Osgoode School of Law. p. 1 Available at: http://www.osgoode.yorku.ca/public_statement (last accessed 31 January 2023).

gained their independence.[7] During this period, decolonized states from Africa, Asia and Latin America, based on their mutual ideological views started questioning the provisions of international rules regulating foreign investment.[8]

The controversy between colonisers and formerly colonised states centred mainly on the type of rules regulating foreign investment such as the minimum standard of treatment, settlement of disputes, the standards of compensation and national treatment.[9] Developing countries' grievances with the international investment regime primarily lie in the fact that those rules emanated from Europe and were therefore imposed on them without giving them any other option than to accept the rules. The exclusion of developing countries from the design of the international investment framework was affirmed in a 2015 European Commission Concept Paper on international investment law where it was claimed that "international investment rules were invented in Europe".[10]

To buttress this point further, as far back as 1758, Vattel advocated for a special standard of treatment for Europeans investing abroad, a treatment superior to that given to the domestic investors based on the fear that certain domestic legal systems might not offer adequate protection to the foreigners.[11]

To the newly independent states, the rules governing foreign investments have their foundation in the 'colonial encounter'[12] and it has evolved into a system that protected only the interests of the western countries.[13]

Throughout the nineteenth century and over the years, the developing countries have, with a united voice rejected all proposals from developed countries for multilateral investment treaties.[14] A major bone of contention was that the provisions of these draft treaties demanded that foreign investors be treated in accordance with the minimum standard of treatment provided for by

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[7] Sornarajah (2010), p. 1
[8] Ibid., Newcombe and Paradell (2009), p. 26.
[9] Sornarajah, supra note 7 p. 1
[10] European Commission, Concept Paper, Investment in TTIP and beyond–the path for reform Enhancing the right to regulate and moving from current ad-hoc arbitration towards an Investment Court. [insert date of the paper]. (2015) p. 1. Available at https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5651 (last accessed 1 April 2023).
[11] Sornarajah (2010), p. 19.
[12] Anghie (2004), pp. 6–7.
[13] Miles (2012). p. 2
[14] Ibid.

international law.[15] Developing countries wanted foreign investors to receive the same treatment as their nationals while the developed countries demanded that foreign investors be treated in accordance with the minimum standard principle of international law.[16] The developed and developing countries also failed to reach a consensus on the applicable laws when settling disputes and the compensation to be paid. The provisions of the draft conventions required the disputes to be settled in the host state courts by applying the host state law, however, developed countries did not sign the draft conventions on the ground that the provisions were far behind the position of the law at the time as they failed to recognize the minimum standard principle.[17]

As for the developed countries, the hostility of developing countries toward foreign investment caused them to strengthen their efforts to provide legal protection for foreign investment through international investment agreements. These agreements, although relatively few, were focused on providing increased protection for foreign investment against political risk.

The desire for self-determination in the post-colonial era made developing countries to constantly pursue a different vision of international investment principles from that of developed countries.[18]Although, a multilateral framework for investment principles could, arguably, result in a more transparent and predictable investment regime than the current patchwork of bilateral obligations, the era witnessed several failed attempts by the world community, especially the UN and OECD, to form a comprehensive multilateral investment agreement. This was largely due to the difficulty in reaching a consensus between developed and developing countries. Developing countries always wanted to protect their sovereignty and natural resources while developed nations wanted maximum protection of their investments abroad.

The scale of hostilities towards a multilateral treaty on foreign investment rules has over the years made it difficult for developed and developing countries to reach a consensus at the global level.[19]

As newly emergent states, the desire of developing countries for a reformed international law that takes into account their socio-economic interests led to the formation of the Third World

[15] Dodge (2006) p. 3; Newcombe and Paradell (2009) p. 20
[16] Newcombe and Paradell (2009) supra note 15, p. 16.
[17] Ibid.
[18] Poulsen (2010), p. 107.
[19] Ibid.

Approaches to International Law (TWAIL).[20] This approach emerged as an analytical tool which sought to assess the validity and the claim of universality of international law's relation with developing countries.[21]

This chapter draws on the theoretical perspective of TWAIL in order to analyse the IIR.[22] In particular, the chapter adopts TWAIL as a lens through which the bias or the inequities in the investment regime is revealed. TWAIL's main claim is that "international law disadvantages countries that were subjected to colonialism and benefits narrow elites, based especially in the West."[23] According to Okafor, TWAIL is a

> "movement within the discipline of international legal studies ... viewed as a broad dialectic ... of opposition to the generally unequal, unfair, and unjust character of an international legal regime that all-too often . . . helps subject the Third World to domination, subordination, and serious disadvantage."[24]

To Professor Gathii, TWAIL is a tool for critical examination of international law.[25] Gathii's definition is very apt for this paper as TWAIL is being used as a lens to critically assess the international investment law regime from developing countries' viewpoint.

TWAIL is different from the conventional theoretical framework in the sense that there is no generally accepted approach amongst its scholars, they are all however united in their opposition to the politics of empire and attuning international law to the plight of developing countries.[26]
TWAIL jurists illustrate the manner in which development of foreign investment law has excluded the active participation of developing countries and how developed countries have always tailored the rules to suit their interests. Due to the recent rise in claims brought against developed host countries in Investor State Dispute Settlement (ISDS) cases, they are once again significantly engaging in the re-development of foreign investment law.[27]

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[20] Badaru (2008), p. 380.
[21] Ibid.
[22] The TWAIL perspective is approached on its own terms, that is, it is used as a basis for review and not subjected to close scrutiny for its claims and assumptions.
[23]Van Harten (2011), p. 3
[24] Okafor (2005), p 176
[25] Gathii (2011), p. 27.
[26] Eslava and Pahuja (2011), p. 104.
[27] Alvarez (2009), pp. 943–975.

While recognising the need to continue to encourage the inflow of foreign direct investment (FDI) to developing countries, research carried out reveals that the current IIR is biased towards the "economically powerful investors" from developed countries.[28] As at the early 80s, the main objective for signing BITs was to create a favourable and conducive environment for foreign investment however, the rise in investor-state disputes has brought to light the unanticipated downside of these treaties which is their one-sided approach and their exclusive emphasis on the rights and privileges of foreign investors without addressing their corresponding duties.

Furthermore, the International Investment Agreements (IIAs) and arbitral decisions did not give due considerations to economic development and other public policy objectives that are relevant to developing countries.[29] This is partly due to the fact that many of these IIAs were entered into by desperate developing countries with developed countries as a means of attracting FDI.[30] Therefore,, those agreements were negotiated between parties of unequal bargaining power.[31] The developed countries that wanted to invest in developing countries mostly used BIT templates designed by them during the negotiations of the investment agreements, with many of the treaty standard clauses being non-negotiable.[32] Tienhaara likened this with non-negotiable standard form contracts, except according to her, "while standard form contracts are to be read in the powerless consumer's favour, BITs are not interpreted in the 'less-powerful' developing country's favour".[33]

For instance, a review carried out by the United Nations Economic Commission for Africa (UNECA) on BITs in Africa, revealed that a number of these agreements were negotiated and

[28] UNCTAD's World Investment Report: Reforming International Investment Governance (2015), pp. 112-114. Available at http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (last accessed 1 April 2023). Many scholars have written in great details on the structural bias in favour of the investors in the international investment regime. Insert further references about named scholars. See Harten (2007) pp 12-43; Waibel et al (2010) p.433; Sornarajah (2002) p.103; Subedi (2012) p.2; Liberti (2007) p. 174; Schneiderman (2010) p. 383; Odumosu (2007) pp 251-287; Hippolyte (2016) pp 34-52.

[29] Investment Treaties in a state of Flux: Strategies and Opportunities for Developing Countries. Meeting Report of the 9th Annual Forum of Developing Country Investment Negotiators held in Brazil in 2015.pp 1-28. Available at https://www.iisd.org/system/files/meterial/IISD%209th%20Annual%20Forum%20Meeting%20Report%20English.pdf (last accessed 1 April 2023).

[30] Tienhaara (2009), p. 48.

[31] Ibid.

[32] Ibid, p. 14.

[33] Ibid.

signed without taking into consideration the complexities of socio-economic challenges as well as national development policies and strategies of African countries.[34]

Furthermore, after reviewing the IIAs signed in the post-apartheid era, the South African government concluded that the government "had no history of negotiating IIAs and the risks posed by such treaties were not fully appreciated at that time. [...] As a result the Executive entered into agreements that were heavily stacked in favour of investors without the necessary safeguards to preserve flexibility in a number of critical policy areas".[35]

Regarding the dispute settlement system, (ISDS), recent research shows that claims under BITs are overwhelmingly directed against developing countries, with very few filed against developed countries.[36] In a study carried out by Gallagher and Shresthra in 2011, the average claim brought by investors from the United States against host developed countries was about 150 million USD, while the average claim against host developing countries was about 451 million USD.[37] The amounts claimed by investors in 2016 alone ranged from $10 million[38] to $16.5 billion.[39] A damage of $2 billion was awarded against Egypt in 2018.[40] According to the 2022 UNCTAD IIA Issues Note, as in previous years, the majority of new cases were brought against developing countries.[41]The South African government in expressing its lack of confidence in the international arbitration system alleged that the decisions of these arbitral tribunals are heavily influenced by private firms and multinational corporations.[42] As stated, studies carried out reveal that some

[34] United Nations Economic Commission for Africa (2016) Investment Policies and Bilateral Investment Treaties in Africa: Implications for Regional Integration pp 1-46 .Available at https://archive.uneca.org/sites/default/files/PublicationFiles/eng_investment_landscaping_study.pdf (last accessed 1 April 2023).

[35] Republic of South Africa 2009: IIA Policy Framework Review, Government Position Paper, Pretoria, June 2009. As cited by Fritz T, (2015), pp 7-9, available at https://www.tni.org/files/download/iias_report_feb_2015.pdf (last accessed 1 April 2023).

[36] UNCTAD's IIA Issues Note, No 1: (2022) Facts on Investor-State Arbitration in 2021: With a Special Focus on Tax-Related ISDS Cases. p 2. Available at:https://unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf (last accessed: 31 January 2023).

[37] Gallagher and Shresthra (2011), p. 927.

[38] Grot and Others v. Moldova and Görkem Insaat v. Turkmenistan (ICSID Case No. ARB/16/30) Available at https://www.italaw.com/cases/6338 (last accessed 1April 2023).

[39]Cosigo Resources, Ltd., Cosigo Resources Sucursal Colombia, Tobie Mining and Energy, Inc. v. Republic of Colombia. Available at https://www.italaw.com/cases/3961 (last accessed 1 April 2023).

[40] See the case of Union Fenosa Gas, S.A v Arab Republic of Egypt. ICSID case No ARB/14/4. Available at https://www.italaw.com/cases/2456 (last accessed 1 April 2023).

[41] UNCTAD's IIA Issues Note, supra note 36 p.2

[42] Mossallam (2015), pp7-10

arbitrators have business connections with foreign investors and that international investment arbitration is no longer cost effective because of undue delays.[43] And to worsen the issue, there is no appellate mechanism and as argued, this prevents host states from fully seeking redress. The international arbitration system is not equipped to deal with domestic policy issues in the disputes therefore, the arbitrators are likely to render decisions which would 'upset the delicate balance that the Investment Act seeks to achieve'. [44]

At the international level, the United Nations Conference on Trade and Development (UNCTAD) acknowledges huge flaws in the ISDS. In one of their reports, it was noted that concerns with the current ISDS system relate, among other things, to a perceived deficit of legitimacy and transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; questions about the independence and impartiality of arbitrators, and concerns relating to the costs and time of arbitral procedures".[45]

Furthermore, investor-state arbitration developed in response to the need to better protect foreign investors and their investments. This protection was achieved by establishing International Centre for Settlement of Investment Disputes (ICSID) to provide a more effective and depoliticised forum for the resolution of investor-State disputes. Simultaneously, developed States drafted and concluded BITs mostly with developing countries which later offered arbitration under ICSID and are seemingly skewed in favour of investors. However, the prominence of ICSID as the preferred forum for ISDS and the proliferation of BITs as well as investment tribunal practice, have not been favourable to developing host countries who have had to defend a relatively high percentage of ICSID arbitrations. According to the July 2022 UNCTAD IIA Issues Note, as at the end of 2021, the total number of ISDS cases have risen to 1,190, and about 65 percent of these cases were brought against developing countries.[46]

While developing countries signed several BITs at the height of their pursuit of FDI, they had little if any input in their drafting or the subsequent development of investment arbitration. The

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[43] Ibid.

[44] Ibid.

[45] Reform of Investor-state Dispute Settlement: In Search of a Roadmap. UNCTAD IIA Issues Note Report No, 2 June 2013. Available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf. (last accessed 1 April 2023). See also Eaton (2013), Multiple Countries Reject Investor States. Available at: http://www.sierraclub.ca/en/main-page/multiple-countries-reject-investor-state-2013-update (last accessed 31 January 2023).

[46] UNCTAD's IIA Issues Note, supra note 36, p.2

consequence of the imbalance of negotiating power became even more problematic in the past two decades, as investors have increasingly used BITs not as a shield as was expected, but instead as a sword by employing the treaty standards as tools in challenging host states' regulatory measures.[47]

Developing countries have always viewed the ISDS system with suspicion. This may be because the ISDS system evolved based on the assumption that their domestic legal systems and legal processes are weak and, as such, their courts are unable to deliver fair judgments.[48]
Their dissatisfaction with the system is aggravated due to the fact that these developing host countries "tend to find themselves strangers in their own cases when arbitrating in Europe or North America".[49] They often appear before arbitrators who are usually from developed countries in matters administered by international dispute settlement institutions in which they have limited or no representation at all.[50] For instance, Kidane observed that "frustration with the imposition of external substantive standards has been exacerbated by the lack of African representation in the decision-making process".[51] This was revealed in the most recent publicly available statistics of the World Bank's ICSID. While cases against developing countries constituted more than 60% of the total caseload, only about 21% of arbitrators, conciliators and ad hoc Committee Members appointed in ICSID and Additional Facility held cases were from developing countries.[52] Furthermore, it is no surprise that developing countries have expressed their dissatisfaction and frustration with the ISDS system given the fact that the arbitrators are from developed countries who may not really appreciate the plight of the developing countries. According to Kidane, although many developing countries did not appreciate the consequences of their choices as at when they signed the BITs, they now dread being called upon to defend claims of expropriation, denial of fair and equitable treatment, discrimination and such other violations of treaty standards before "all-Western tribunals".

[47] Ibid, p. 54.
[48] Kidane (2018), p. 5
[49] ibid.
[50] Ibid.
[51] For a discussion and statistical analysis of ICSID cases involving African states, see generally Kidane (2014), p. 35.
[52] The ICSID Caseload- Statistics (2022)Available at https://icsid.worldbank.org/sites/default/files/publications/The_ICSID_Caseload_Statistics_2022-2_ENG.pdf (last accessed 30 January 2023).

More generally, it is often alleged that many Investor-State Arbitration awards display little coherence in the tribunals' reasoning and interpretation of similar concepts.[53] In particular, the approach taken by arbitrators to the concept of fair and equitable treatment or the concept of indirect expropriation is by no means uniform and often difficult to reconcile with earlier awards. Observers have also expressed concerns about the intellectual independence of arbitrators, particularly those who have acted as counsel in some cases and as arbitrators in others.[54] There have been calls for this practice to stop or, at least, for the adoption of codes of conduct to regulate the selection and actions of arbitrators.[55] There have been many calls, too, for greater transparency of the dispute resolution process, both as to the selection of arbitrators and with respect to the conduct of proceedings and the publication of awards.[56]

Many developing countries, after a long "honeymoon" with foreign investors, have been re-considering the pros and cons of the ISDS mechanism and have become more cautious in their negotiations of BITs and IIAs in general. While some are calling for a reform of the system either in form of creating an appeal mechanism, others are advocating for a complete change in form of replacing the present system with an international investment court.

The next section discusses some major changes that some developing countries have introduced to address the shortcomings of the ISDS system.

3. EFFORTS BEING MADE AT REFORMING THE IIR

The South African government's view about the existing investment agreements and investment arbitration sums up the general view about the investment regime, at least from the perspective of developing countries. The government stated that:

> "Unequal and exploitative investment agreements, which prohibit the very policies developing countries need to fight poverty, is no way to put trade and investment at the

[53] De Mestral (2017), The Impact of Investor-state Arbitration on Developing Countries. Available at https://www.cigionline.org/articles/impact-investor-state-arbitration-developing-countries/ (last accessed 1 April 2023).
[54] Ibid.
[55] Ibid.
[56] Ibid.

service of sustainable development. Existing international investment agreements are based on a 50-year-old model that remains focused on the interests of investors from developed countries. Major issues of concern for developing countries that are vital from the perspective of sustainable development are not being addressed in the current negotiating processes.'[57]

It goes on to point out that:

> 'Host states may put certain policies in place that seek to promote and enhance human rights interest. Examples of such intervention may include . . .policy measures designed to promote the right to food, the right to health or the right to water. These measures may be challenged through international [investment] arbitration.'[58]

In fact, it is generally agreed that the regime is in a watershed moment as developing host states are beginning to realise the impact of the treaties signed in the 1990s and early 2000s on their economy. A lot of debates are going on globally on how to address the concerns about the investment regime. Indeed, this period could be the perfect opportunity needed by developing countries to address their grievances against the international investment regime.[59] As far back as 2003, Howard Mann noted that the investment regime was at a crossroad and that it could either "crystallize as a new form of colonialism or evolve into a new field of global cooperation on development".[60] It is hoped that the developing countries would take active steps in ensuring that the investment regime is reformed into a field of global cooperation on development.

Before the 1990s, investment rules seemed legitimate and acceptable to major capital-exporting countries, until investor-state arbitration cases were instituted against them.[61] Since then, it became a global concern that the investment rules are biased in favour of investors' interests, and now, economically powerful states are increasingly adopting formerly untenable "Third World"

[57] Republic of South Africa Department of Trade and Industry, "Bilateral investment treaty policy framework review, Government position paper (June 2009), p. 46. Available at http://www.thedti.gov.za/ads/bi-lateral_policy.pdf (last accessed 31 January2023).
[58] Ibid.
[59] Perrone (2015), pp 12-14
[60] Mann (2003), p. 247.
[61] Odumosu (2007), pp. 251, 256.

arguments against the investment regime.[62] These earlier rejected arguments, including concerns about the interference with regulatory sovereignty of developing host states, have gained prominence and acceptance globally.[63] Host states, from both developed and developing countries are now intensifying their efforts to ensure that the IIR respects their policy spaceIt is impossible to overstate the importance of a BIT as it guarantees standards of protections for investors however, it is important to note that investor protection is only a means to advance public welfare and not an end in itself. There is need for a reformed IIR which recognises that developing host States have a fundamental right to regulate on behalf of the public welfare and this right must not be subordinated to the interests of foreign investors where this right is exercised in good faith and for a legitimate purpose. It is therefore recommended that new BITs need be negotiated with clear analysis, taking into consideration the national development strategies and changing socio-economic development of the developing countries.

In the last couple of years, there have been more calls by developing countries for a new international investment policy framework. The first challenge policymakers in developing countries face is simply to get the contents of IIAs right. New treaty templates should be drafted in a way that takes into account their experience with ISDS cases. This is important as these cases reveal how investment treaties have been used by foreign investors successfully or not, to challenge the executive, legislative or judicial actions of host states.

Furthermore, the treaty templates should reflect national policy priorities enshrined in the body of national investment-related laws and regulations. Alongside the need to increase the capacity of their bureaucracies, developing countries must develop strategies to avoid investor–state arbitration by implementing alternative methods of dispute resolution.

The backlash against the IIR has generated some major reactions from stakeholders and the debate and policy review in developing countries is taking many forms.

[62] See the OECD's Government perspectives on investor-state dispute settlement: a progress report. Freedom of Investment Roundtable held on14 December 2012, p. 83. Available at: https://www.oecd.org/daf/inv/investment-policy/ISDSprogressreport.pdf. (last accessed 31 January 2023).
[63] Alvarez and Park (2003), pp. 368-371.

As rightly noted by Gazzini[64], dissatisfaction with traditional BITs has generated four main types of reaction:

(a) reluctance to ratify BITs. (in Africa, only 25 BITs, including 3 between African countries have entered into force since 2012[65];

(b) conclusion of facilitation agreements, which radically downgrade the substantive protection standards found in traditional BITs and do not provide for arbitration[66] (see for example, treaty between Brazil and Mozambique.);

(c) termination of BITs and adoption of investment legislation (see South Africa Protection of Investment Act, 2015[67]) and;

(d) introduction of new models of BITs that aim to strike a better balance between the private and public interests at stake.[68] India's 2015 Model BIT and the 2016 BIT concluded, but not in force yet, between Morocco and Nigeria.

The 2021 World Investment Report records that all IIAs concluded in 2020 contain reform-oriented provisions aimed at preserving regulatory space and promoting sustainable investment. In particular, they focus on preservation of regulatory space, investment dispute settlement reform, more sustainable development-oriented provisions, and investment promotion and facilitation.[69]

The 2022 World Investment Report records four substantive IIAS concluded in 2021 which feature provisions that mainly preserve regulatory space while also ensuring the protection of investments.[70] The IIAs also made clarifications on the Fair and Equitable Treatment (FET) standard and the scope of indirect expropriation.[71] Three of the IIAs contain general exceptions

[64] Gazzini (2017), Nigeria and Morocco Move Towards a "New Generation" of Bilateral Investment Treaties, Available at https://www.ejiltalk.org/nigeria-and-morocco-move-towards-a-new-generation-of-bilateral-investment-treaties/ (last accessed 31 January 2023).
[65] Ibid.
[66] Ibid.
[67] The Protection of Investment Act is available at https://investmentpolicy.unctad.org/investment-laws/laws/157/south-africa-investment-act (last accessed 31 January 2023).
[68] Gazzini (2017), supra note 64.
[69] The UNCTAD World Investment Report (2021): Investing in Sustainable Recovery. p. 131. Available at: https://unctad.org/system/files/official-document/wir2021_en.pdf (last accessed 31 January 2023).
[70] UNCTAD World Investment Report (2022): International Tax Reforms and Sustainable Investment p. 86. Available at: https://unctad.org/system/files/official-document/wir2022_en.pdf (last accessed 31 January 2023).
[71] Ibid. p.86

for the protection of human, animal or plant life or health while two IIAs incorporated provisions on the promotion of corporate social responsibility standards.[72]

Brazil's response to the criticisms of the current regime was to deviate totally from the adversarial approach of the BITs and to adopt a cooperative approach, focusing on the elements of mutual benefit to foreign investors and states.[73] The Brazilian government in an attempt to avoid the deficiencies of traditional BITs decided to adopt a model that aims to promote investment, and not just protect it.[74] With that in mind, a governmental team led by the Ministries of Finance (MF), Foreign Relations (MRE) and Industry and Foreign Trade (MDIC), in consultations with other institutions and private sector coalitions, developed the Cooperation and Facilitation of Investments Agreements (CFIA) model.[75] These new agreements focus on investment promotion more than protection, and on dispute prevention more than resolution.[76] All CIFAs concluded include innovative preambular language, a best-efforts obligation on corporate social responsibility (CSR), and safeguards to restrict transfers. The provision on CSR for investors surely addresses the issue of imbalance in the investment regime as it will ensure investors take active steps in contributing to the sustainable development of the host states in one way or the other.

India's approach is to renegotiate existing BITs around the substantive protections in its 2015 Model BIT while retaining arbitration as the means of ISDS.[77] With this new model BIT, India intends to increase its policy space, while at the same time reduce its risk of exposure of receiving claims by foreign investors. With the absence of protections such as Most Favored Nation, Fair and Equitable Treatment and the specific exclusion of claims based on taxation or provision of non-commercial services by the State in this new model, it is evident that India is seeking to reduce

[72] Ibid. p.86

[73] Martins (2017) Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and Recent Developments. Available at https://www.iisd.org/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/ (last accessed 31 January 2023).

[74] Ibid.

[75] Ibid.

[76] Ibid.

[77] Chaudhary , India's Bilateral Investment Treaties: Once BITten 57 times More Shy, (2016). Available at: http://www.hindustantimes.com/analysis/india-s-bilateral-investment-treaties-once-bitten-57-timesmore-shy/story-2d0VyByBuCC55TYz0zDzNK.html (last accessed 31 January 2023).

exposure to future investment claims by limiting protections afforded to foreign investors considering recent experiences.

In 2007, South Africa undertook a thorough review of its BITs with a view of assessing their impact on both the economic growth of the country and its regulatory powers. The result of the review was published in June 2009 by the DTI in a position paper titled the Bilateral Investment Treaty Policy Framework Review.[78] The review highlighted the one-sided nature of the protection provided to foreign investors by first-generation BITs and exhibited suspicion regarding investment arbitration. The overall conclusion reached was that the system had opened the doors "for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration that may constitute direct challenges to legitimate, constitutional and democratic policy-making".[79] It was therefore recommended, among other things, that South Africa review its practices with a view to developing a model BIT which would be in line with its development needs; that the need for investor certainty should not compromise South Africa's own legitimate interests; and that further domestic legislative intervention could be brought to ensure that a proper balance is achieved.[80]

It has been suggested that the cause of the review was due to the challenge of the Black Economic Empowerment (BEE) policy by foreign investors in the 2007 Foresti case.[81] In that case,[82] the investors challenged South Africa's Mineral and Petroleum Resources Development Act, which required foreign-owned mining companies to divest a percentage of their equity to historically disadvantaged South Africans at fair market value to encourage greater ownership of mining industry assets by these individuals. The investors maintained that the legislation breached BIT provisions on expropriation, fair and equitable treatment, and national treatment.

[78] South Africa Department of Trade and Industry, Bilateral Investment Policy Framework Review, General Notice 961, Government Gazette 32386 (7 July 2009). Available at: https://www.gov.za/sites/default/files/gcis_document/201409/32386961.pdf (last accessed 1 April 2023).
[79] Carim (2013), p. 1
[80] Department of Trade and Industry Bilateral Investment Treaty Policy Framework Review (2009) p. 56
[81] Farish (2016), Protection of Investments Act -A balancing Act between policies and investments. Available at https://www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/ (last accessed 31 January 2023).
[82] Piero Foresti, Laura de Carli and others v. Republic of South Africa (ICSID Case No. ARB(AF)/07/1). Available at https://www.italaw.com/cases/446 (last accessed 1 April 2023).

The case raised concerns in South Africa over whether the protections the BITs provided hindered the South African government's ability to redress the negative economic and social effects of apartheid through legislation.

As a response to the ruling in that case, the Department of Trade and Industry in 2010 indicated its intention to codify its BITs into a single piece of legislation and review the BITs to which South Africa was a party.[83] Subsequently, in the face of foreign criticism, the government terminated its BITs with European countries such as Denmark, Spain, Germany, Belgium, Luxembourg, Switzerland and the Netherlands.[84] The cancellation of BITs was a clear signal that South Africa was on a firm path to change the investment regime.

In 2015, the Protection of Investment Act 22 of 2015 was enacted and it came into force in July 2018. Some of the concerns which led to this Act are stated in the preamble. They include the need to secure "a balance of rights and obligations of investors to increase investment in the Republic" and "the government's right to regulate in the public interest in accordance with the law."[85]

After South Africa terminated its BITs with EU countries, it also took steps to implement subsequent treaties that addressed the limitations of the traditional investment treaties and engage in a more region- and continent-driven approach. To this end, a South African Development Community Model BIT was created with the specific goal of developing a comprehensive approach from which South African Development Community Member States can choose to use all or some of the model provisions as a basis for developing their own specific model investment treaty or as a guide through any given investment treaty negotiation.[86]

Although the South African Model BIT maintains some of the common features of IIAs, such as expropriation and FET standards, it also adds some clauses that seek to remedy the inadequacies of the old treaties, such as, among others:

a. requiring foreign investors or their investments to comply with environmental and social assessment screening criteria and prior to the establishment of their investment;

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[83] Qumba (2016) p.48
[84] Ibid.
[85] The Act is available at https://www.thedti.gov.za/gazzettes/39514.pdf. (last accessed on 31 January 2023).
[86] SADC Model Bilateral Investment Treaty Template, available at www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf (last accessed on 31 January 2023).

b. making foreign investors subject to civil actions for liability in the judicial process of their home state for acts, decisions or omissions made in the home state in relation to investment where these acts, decisions or omissions lead to significant damage, injury and loss of life in the host state;
c. reserving the right of a state party to grant preferential treatment in accordance with domestic legislation to any qualifying enterprise, to achieve national or sub-national regional development goals; and
d. proposing comprehensive reforms to the ISDS mechanism.

The 2016 Morocco-Nigeria BIT which is yet to come into force has been described as one of the most innovative and balanced BITs ever concluded.[87] The BIT provides some innovative approaches to the balance of rights and obligations as between investors and the respective host States. In particular, Articles 13, 14 and 15 of the BIT ensure that each contracting party reserves the right to adopt, maintain or enforce any measure to ensure that investment activities in its territory is undertaken in a manner that is sensitive to environmental and social concerns. Unlike traditional investment treaties, the new model imposes additional obligations on investors and as aptly noted, it appears to address, to a certain extent, the criticism that the old BITs were too heavily geared towards protecting investor interests.[88] Furthermore, the BIT imposes environmental obligations on investors and provides for the recognition and enforcement of high levels of labour and human rights protection appropriate to each contracting party's economic and social situation.

An analysis of these new generation of treaties shows that they depart greatly from the traditional treaties. This is evident from the content of these new investment instruments, which except for Brazil, show that they respond to the inequities of the ISDS claims as these new trends shift the focus of their purpose away from the sole protection of foreign investors and their investments to accommodating each countries' local needs. Furthermore, the fact that these new treaties or

[87] Gazzini (2017), supra note 64, p. 3. See also Leon et al (2017) Is the recently signed Morocco-Nigeria BIT a step towards a more balanced form of intra-African investor protection? Available at https://hsfnotes.com/arbitration/2017/05/23/is-the-recently-signed-morocco-nigeria-bit-a-step-towards-a-more-balanced-form-of-intra-african-investor-protection/ (last accessed 31 January 2023).
[88] Leon et al. (2017), supra note 87.

investment policies place emphasis on each country's specific needs affirms the fact that they are home-grown investment treaties.

This approach is apparent not only in the inclusion of specific provisions aimed at balancing out the rights and obligations of host States and investors but also in the limitation of coverage or omission of certain investment protection provisions.

4. THE NEED FOR A HARMONISED EFFORT IN REFORMING THE INVESTMENT REGIME

The new approaches adopted by the above stated countries are laudable, however it is contended that a plethora of new investment treaties and policies at the national and bilateral levels would only make the investment regime more complex, rather, it is submitted that a harmonised approach by the developing countries at the regional and continental levels would bring about a systematic and coherent investment framework.

In order to address the allegation of bias in the IIR, this chapter adds a voice to the widening choir recommending that the developing countries need to depart from the traditional investment policy framework and design more of their own model of investment treaties, devoid of western influence.[89] They need to learn from the shortcomings and deficiencies of traditional BITs that were imposed on them as a result of their economic weakness and negotiate a new all-inclusive investment policy framework that not only promotes and protects foreign investment but that which safeguards the host states' right to regulate and also enhances sustainable development. There is no doubt that the promotion and protection of investment is an important factor in the investment regime, however, these rights are not absolute. The duty to promote and protect foreign investment should be weighed against a variety of non- investment concern matters, such as environmental protection, health and safety regulations, protection of human rights and labour, and wealth redistribution through taxation.

Also, these new treaties would need to consider the different socio - economic conditions of developing host states. To do this, the regulatory freedom of the host states to pursue measures for

[89] See generally Gathii (2008); Hippolyte (2019), pp. 72-125; Adeleke (2016), p. 48; Odumosu (2007), pp. 251-287; Gazzini (2017), supra note 64.

welfare or legitimate public policy purposes must not be compromised. In addition, these treaty templates should reflect national policy priorities enshrined in the body of national investment-related laws and regulations of the host states while also ensuring that they strike the right balance between the interests of investors and the public interest.

As stated earlier, one major contributing factor to an unequal investment regime was the desperation of the individual developing countries to attract more foreign investments than their neighbouring countries. They were so desperate that they waived their developmental needs for robust investment protection clauses in order to attract the investors to their countries. Hence, as individual countries, they lacked the economic power to negotiate for a balanced investment treaty.

To reform the dispute settlement system, a more pragmatic approach to alleviate developing countries concerns about the investment regime is to enhance their participation in the system. One way to do this is if the institutions for dispute settlement such as ICSID encourage the appointment of more arbitrators from developing countries. Also, the establishment of dispute settlement centers in developing countries should be encouraged. This would pave the way for a more constructive engagement of developing countries in the international investment regime Also, establishing more dispute settlement centres in developing countries will bring the dispute settlement system closer to the local people thereby encouraging their participation through many ways, one of which is through the amicus curia briefing. It will also prevent the domination of the developed countries, as the lack of participation of developing countries right from the inception is part of what has enabled the developed countries to be so powerful.

Therefore, it is recommended that a balanced, all-inclusive investment framework may be more achievable through regional and continental efforts given the fact that some developing countries have stronger economies and louder voices in the global world than others. To the TWAIL jurists, a legitimate international regime is one which considers the needs of developing countries, values their contributions while also ensuring their equal participation with the developed countries. Therefore, it is suggested that developing countries need to rise through their regions in order to meaningfully engage in shaping the international investment regime according to their priorities.

5. CONCLUSION

An analysis of the new treaty models being introduced by developing countries signify that they have once again attempted to attune the international investment regime to also serve their interests albeit mostly at the national and bilateral levels. The policy makers in these countries have introduced some important novelties meant to rebalance the rights and obligations of the various stakeholders as well as to safeguard host States' policy space. Evident that these new approaches are a response to the inequities of the ISDS claims as the new trends shift the focus of their purpose away from sole protection of foreign investors and their investments to also accommodating each country's local needs.

To answer the question whether the new treaties and policies depart from the traditional ones, the answer is yes. These new treaties and policies are home grown, without western influence in that they not only include specific provisions aimed at balancing out the rights and obligations of host states and investors but also in the limitation of coverage or omission of certain investment provisions.

The contents of their new investment treaties have been brought more in line with the evolution of international law, especially with regard to the protection of the environment, social and human rights, transparency, corruption, public scrutiny, economic development, and corporate social responsibility.

However, it is argued that in order to avoid the consequences of the traditional international investment regime, a legitimate and effective system is one which not only addresses the bias, it is one which also bring uniformity to a fragmentized structure caused by the plethora of BITs. What the system needs is for developing countries to reach a consensus on a model of investment treaties that would then be adopted at the national or bilateral levels.

Furthermore, all the new approaches adopted by these developing countries are laudable, however it is argued that a plethora of new investment treaties and policies at the national and bilateral levels will only add to the complexity of the system.

It is suggested that a balanced, all-inclusive investment framework may be more achievable through harmonised efforts at the regional and continental levels given the fact that some developing countries have stronger economies and louder voices in the global world than others.

To this end, this section discusses the MERCOSUR Protocol on Investment Cooperation and Facilitation and the African Continental Free Trade Area (AfCFTA) as these two different agreements adopted at the regional and continental level serve as good models of harmonized efforts in reforming the IIR.

5.1 THE MERCOSUR PROTOCOL ON INVESTMENT COOPERATION AND FACILITATION[90]

In April 2017, the States Parties of the MERCOSUR (Argentina, Brazil, Paraguay, and Uruguay) signed the Protocol on Investment Cooperation and Facilitation ("MERCOSUR Protocol"). The Protocol is fashioned after the Brazilian model of Agreement on Cooperation and Facilitation of Investments (the ACFI), which stands out for departing from the traditional design of BITs, particularly, by excluding the possibility of the ISDS mechanism.[91]

The emergence of the MERCOSUR Protocol is significant in the IIR, as it represents a step towards the regionalization of the Brazilian model. It reflects the attempt to include in a single document, the realities of four countries with important political, economic and investment policy differences, as expressed by the varying paths taken by Argentina and Brazil in the investment area.[92]

The aim of the MERCOSUR Protocol on Investment Cooperation and Facilitation is to develop and adopt an instrument that would "promote a transparent, agile, positive environment for investment in member countries".[93] It recognizes "the fundamental role of investment in promoting sustainable development, economic growth, poverty reduction, job creation, expanding production capacity, and human development.[94]

Furthermore, the Protocol provides a strategic institutional legal framework to encourage reciprocal investment and afford the necessary predictability to attract extra-regional investors.

The MERCOSUR Protocol excludes the standards of "fair and equitable treatment", "full protection and security" and the protection against indirect expropriation.[95] The MERCUSOR

[90] Perez Aznar and Choer Moraes (2017) The MERCOSUR Protocol on Investment Cooperation and Facilitation: regionalizing an innovative approach to investment agreements. Available at https://www.ejiltalk.org/the-mercosur-protocol-on-investment-cooperation-and-facilitation-regionalizing-an-innovative-approach-to-investment-agreements/ (last accessed 1 April 2023).
[91] Ibid.
[92] Ibid.
[93] Takene (2018), p.78.
[94] Ibid.
[95] See Article 6.6 of the Intra MERCOSUR Cooperation and Facilitation Investment Protocol (2017) (hereafter referred to as The Protocol) Available at https://investmentpolicy.unctad.org/international-investment-

protocol aims at striking a balance between the rights and duties of foreign investors and the right of States to make regulations on environmental, labor, health and safety policies.[96]

One of the major components of the Protocol is that it focuses specifically on conflict prevention. The Protocol establishes a National Focal Point or Ombudsman, whose main responsibilities consist in providing support to foreign investors locally.[97]

With regards to settlement of disputes, the procedures set out therein include direct State-to-State negotiations[98], intervention by the MERCOSUR's (diplomatic level) Common Market Group[99] and 'ad hoc' State-to-State arbitration.[100] The Protocol also provides for a permanent review procedure[101] as well as a procedure for claims submitted by (natural and legal) private persons.[102] This innovative dispute prevention and resolution system reflects the Member States' commitment as a bloc to introduce a harmonized legal framework that would lead to a significant increase in intra-regional investment.[103]

As aptly stated by Takene, the conclusion of the Protocol indicates Mercosur member states' willingness to revive their economic and trade agenda with a new vision of the bloc's integration process, strongly focused on their economic growth and sustainable development.[104]

A mechanism that reduces investment uncertainty within the region is an essential prerequisite for expanding trade flows and taking full advantage of the wider MERCOSUR market.

5.3 THE AFRICAN CONTINENTAL FREE TRADE AREA (AfCFTA)

Africa is also a good model through its adoption of a continent-wide investment treaty model under the auspices of the African Union. The African Continental Free Trade Area (AfCFTA) could provide a legal basis to rewrite the rules in a way that better integrates the interests of African nations while also providing a fair and balanced investment regime for foreign investors and host states.

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agreements/treaties/treaties-with-investment-provisions/3772/intra-mercosur-cooperation-and-facilitation-investment-protocol-2017- (last accessed 1 April 2023).

[96] Takene (2018), supra note 93, p. 78. See also Article 13 of the Protocol for duties of foreign investors.

[97] Ibid.

[98] Article 4 of the Protocol.

[99] Articles 6-9 of the Protocol

[100] Articles 9-16 of the protocol

[101] Articles 17-22 of the Protocol.

[102] Articles 39-44 of the Protocol.

[103] Takene (2018), supra note 93, p. 78.

[104] Ibid.

The ongoing negotiation of the Phase II protocols of the African Continental Free Trade Area (AfCFTA) seeks to facilitate, promote and protect intra-Africa investors and investments. It will also encourage investors and investments from outside Africa. The extent to which the AfCFTA will attract investment depends on how its commitments and legal instruments will be implemented, and how it creates a balance between investment protection and the developmental needs of Africa.

The AfCFTA does not exclusively focus on trade in goods, it also covers a broader spectrum of issues critical to FDI strategies and activities including trade in services, competition policy, intellectual property rights, investment and dispute settlement. Such an approach allows for greater policy coherence within the AfCFTA.

The AfCFTA protocol on investment should endeavour to address barriers to investment entry in Africa, reduce time and costs of investment approvals, enhance transparency, improve efficiency, and promote investment-related cooperation and coordination across the continent, and also address the imbalance between investment protection and the developmental needs of Africa. Investors should have direct access to effective dispute settlement mechanisms and access to remedies when their rights are violated by the host governments rather than placing reliance on their home governments to initiate dispute settlement proceedings on their behalf.

The Phase II protocol of the AfCFTA, if properly negotiated, could contribute to attracting more investment into Africa. However, the end goal is not to attract more investment into Africa, but to attract quality investment that will contribute to the sustainable development needs of the continent. Investment can help the continent to address challenges of youth unemployment, skills development, industrialisation, women empowerment and infrastructure development. The current regime has done little in addressing these challenges and it is hoped that a continental coordination of investment policies will achieve what a fragmentized system could not.

The AfCFTA protocol on Investment can lead to enhanced cooperation and coordination of investment policy at the continental level. Governments will need to reform their investment policies to harness the investment benefits into the host economies. Most countries lack cohesive, synergised and coordinated strategies to harness investments in the growth sectors. Domestic investment policies should harmonise regulatory and institutional frameworks for investment and strengthen the linkages between foreign and domestic investors, among other things.

The recent moves adopted by developing countries indicate a good start of a significant change in the international investment regime. The tide has turned in the investment regime against "powerful foreign investors" and it is obvious that there is a deliberate shift away from just focusing on the promotion and protection of foreign investments, active steps are being taken to ensure that the system also accommodates non-investment concerns of the public. Third world countries have changed from being mere observers and rule takers in the international investment regime to fully fledged rule makers and active participants in the system.

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