The Nationalisation of Kenya's Bilateral Investment Interaction During the New Age of Sustainable Foreign Direct Investment

Natasha Karanja

The modern-day international investment regime is held to be one that is 'plagued' by the recurring talks of a 'legitimacy crisis.' The crisis is held to be representative of structural inequalities which place certain stakeholders at a disadvantage when interacting within the regime. Specifically looking towards African states, interactions are passive; their ability to interact restricted by the imbalanced nature of the regime. Such a nature could be attributed to the regime's mechanisms which promote the overprotection of private property over the right to regulate. Such practices however are held to be redundant within the contemporary international order. The order is one reflective of a balanced approach which promotes principles of sustainability and mutual reciprocity between its actors. Thus, the following paper seeks to argue that there is need for African states, in particular the Kenyan state, to 'nationalize' their investment interactions to reflect the above principles whereby the state could actively shape it shape its interactions in a manner promoting its national agenda and wellbeing.

1. Introduction

The following article looks towards assessing the utility of the International Investment Regime (IIR) in the modern day, within the African context. Specifically, it looks towards assessing the function of its mechanisms, namely Bilateral Investment Treaties (BITs)[1] and the Investor-State Dispute Settlement (ISDS).[2] I assess this within the Kenyan context, where I aim to explore bilateral interactions of developing states (Kenya) and developed states (the United Kingdom), when utilising the above mechanisms. The discussion will display the unequal nature of the interaction which is heavily influenced by historical practices of the West. This falls in line with the current issue of the 'legitimacy crisis' within the IIR,[3] wherein BITs and the ISDS are held to be stumbling blocks by developing states when regulating investment law in regard to public interest.[4]

This article argues that Kenya's bilateral investment interactions are still reliant on the historical practises of the West. This reliance limits the interaction from evolving into one that would be of a balanced nature. An evolved interaction would assist in empowering the state to regulate its bilateral interactions in a manner that would promote its developmental agenda. Emphasis is placed on the need for the Kenyan state to "decolonise its bilateral interaction".[5] This can be done by "nationalising" the interaction into one that reflects a "contextual approach"[6] in investment regulation. The article is reflective of current academic practices that heavily focus on the reform of IIR. In particular, the article is an attempt to join the 'Africanization' movement of investment policy that focuses on the reformulation of IIR in a manner that "better reflects the well-being of African states and their developmental priorities".

---

[1] BITs are agreements that protect and promote investments through inferring rights and obligations between parties (host states and investor states).
[2] ISDS is an arbitral forum that deals with investor disputes arising from violations of rights afforded to investors through BITs.
[3] Frank J. Garcia and others, 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) 18 Journal of International Economic Law 861; Stakeholders of the system share a 'frustration' with the structural defects of the system that provide asymmetrical relations with developing states and developed states, where privileges of the system benefit one party over the other.
[4] Fabio Morosini and Michelle Ratton Sanchez Badin, *Reconceptualizing International Investment Law from the Global South* (Cambridge University Press 2017).
[5] Natasha Karanja, 'The Pan-African Investment Code (PAIC), the much-needed saviour? Assessing the decolonisation of Bilateral Investment Treaties through the use and promotion of PAIC as a guiding framework for African States' (LLM Thesis, SOAS 2020).
[6] ibid 9.

1.1 Roadmap of the Article

The article is divided into three chapters. The chapters are set within a cumulative setting whereby each chapter assists in providing an informed lens when viewing the next chapter. Chapter one aims to provide a historical development of the IIR. Discussions are centred around assessing the interactions of the Global North and South within the regime. The chapter sets out the thematic argument of the article (the imperialist agenda) which assists in comprehending how IIR cumulated to its current form. This sets the scene for chapter two. Discussions here are centred around exploring the Kenyan interaction within IIR. The focal point is assessing the bilateral interactions of the state with the UK. Assessment of the UK-Kenya BIT 1999 and the *Cortec* case provide grounds for this, as they assist in exploring the thematic argument of the article. In addition, the discussion pinpoints the current deficiencies present within the interaction. Chapter three is a means of addressing the deficiencies pointed out within chapter two. It looks towards providing a solution for said deficiencies by exploring African initiatives which may reform the interaction. Discussions here adopt an evaluative approach, where the aim is to assess whether the initiatives are applicable and suitable for the context.

2. International Investment Regime and its Imperialist Agenda

2.1 Introduction

Unlike its fellow international counterparts,[7] the IIR did not emerge through a constitutional revolution.[8] Rather, its emergence is rooted within an evolving process believed to be an "organic process of small increments and accidents".[9] The organic process is underpinned by a

[7] Zachary Douglas, Joost Pauwelyn, Jorge E. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014); Joost Pauwelyn (ed), *Rational Design or Accidental Evolution? The Emergence of International Investment Law* (Oxford University Press 2014).
[8] ibid.
[9] ibid.

"decentralized interaction between a myriad of components".[10] Therefore, the interactions are held to be the system itself.[11]

The following chapter aims to explore the interactions of capital exporting states (European states) and developing states (African states). When examining the interactions between these states, one has to acknowledge the interplay of power relations during the formulation and development of IIR.[12] This is because legal rules of a particular era always mirror the power relations present within that period.[13] Adopting a Third World Approaches to International Law (TWAIL) lens,[14] the following chapter aims to argue that IIR is a product of the "colonial encounter" that prioritizes interests of the Global North.[15] In this, the organic growth of the system is rooted within a 'European experience' which ensures legal norms and interactions are fixated upon the "European Ego".[16] Consequences of such a fixation lead to the creation of an asymmetrical relationship between capital exporting states and developing states when interacting within the regime.[17] Thus, acknowledging that modern IIR rules and principles are "products of history",[18] this chapter will seek to explore how the Global North has utilised its "imperialist control" through "employing different mechanisms" at different times with the view of maintaining dominance.[19]

2.2 Structure of Arguments

---

[10] ibid.
[11] ibid.
[12] Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (Cambridge University Press 2013).
[13] Won Kidane, 'Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code' (2018) 50 George Washington International Law Review 523.
[14] Makau Mutua, 'What is TWAIL' (2000) 94 Proceedings of the ASIL Annual Meeting 31; TWAIL scholarship has its roots in the anticolonial movement, acknowledging International Law as an 'imperial project'. Thus, the movement is centred around "understanding, deconstructing and unpacking" the uses of international law as a means of maintaining a hierarchical structure of international norms and institutions that naturally exclude non-European actors.
[15] Miles (n 12) 19.
[16] James Thuo Gathii, 'International Law and Eurocentricity' (1998) 9 European Journal of International Law 184.
[17] Ibironke Tinuola Odumosu, 'ICSID, Third World Peoples and the Reconstruction of the Investment Dispute Settlement System' (PhD, University of British Columbia 2010).
[18] Kidane (n 13) 534.
[19] ibid 530.

The starting point of discussion will aim to explore this interaction within the colonial context. The presence of trading companies will serve as an illustration of this. Discussion will then move on to analysing the post-colonial period where the focal point will be on the emergence of newly independent developing states and their efforts of establishing a new international economic order (NIEO). Analysis within this section aims to demonstrate that the activism of developing states was met with a pattern of reassertion by capital exporting states which aimed to maintain dominance within the IIR.[20] This assertion will be highlighted through exploring the creation of legal regimes, in particular BITs and ISDS, as a means of safeguarding the "imperialist control" within the realm of the IIR.

2.3 Colonial Context

Investment during the colonial period was centred around the objective of colonial expansion.[21] Hence, "investment did not need protection" as "the legal systems were integrated with those of the imperial powers".[22] Therefore, the "imperial system" provided adequate protection for investments made in relation to the colonies.[23] This is evident from the presence of trading companies.[24] These companies were a "fusion" of commercial entities with a political purpose.[25] The agenda of these companies aligned with those of their home state[26] where they promoted imperial desires through commercial means.[27] They exercised "full sovereign function" as they had the ability to formulate "unequal treaties" and "obtain commercial concession agreements",[28] resulting in various "trading investment privileges" and "jurisdictional rights" within the empires.[29] This assisted in the "process of infusing European-based notions of property rights" which secured the

[20] Miles (n 12) 74.
[21] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (4th edn, Cambridge University Press 2017).
[22] ibid.
[23] ibid.
[24] Miles (n 12) 20; Miles gives examples such as the East India Company and the Dutch West India Company, arguing that they were created to "pursue State interests", without incurring the political and administrative costs of annexing a territory.
[25] ibid 41.
[26] ibid 25-26.
[27] ibid 23; Imperial desires entail acquisition and management of territories.
[28] ibid 25-29.
[29] Charles Lipson, *Standing Guard; Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (University of California Press 1985).

safeguarding of European political and commercial influence across the empires.[30] The alignment of the companies' interests and those of the state was a close association; this association created influence in the IIR.[31] This influence led to the creation of an "imperialist environment".[32] The above ties in with the European tradition which was being created within the international sphere where there was a "silencing of rights and interests of non-Western societies".[33] Thus it was an "exploitative relationship".[34]

Outside the colonial context, a different interaction was present. This interaction represented one of mutual reciprocity.[35] This dynamic was a symmetrical relationship, limited to the prerequisite of a European or Western (developed) identity.[36] Friendship Commerce and Navigation treaties (FCNs) serve to illustrate this. Often described as "forerunners" of BITs,[37] FCN treaties were legal instruments formed with the purpose of creating trade relations. They served as a "charter of rights" that guaranteed protection of the property of foreigners.[38] The rights included commercial privileges and equal standards of treatment for foreigners within the host state.[39] Protection of foreigners and their property took precedence within these agreements and freedom of movement and right to trade were safeguarded.[40] These agreements assisted in formulating a "network of reciprocal trade measures and formed a framework for international protection of foreign capital".[41] However, one has to acknowledge that the conclusion of FCN treaties with non-European states was one that signified a different reality.[42] The following section aims to illustrate this by exploring the post-colonial context and interactions of these actors.

---

[30] Miles (n 12) 31.
[31] Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge University Press 2001) 10- 11; Influence here is in the power dynamics of colonial powers. The dynamic shaped the creation of legal rules that form the basis of modern-day law on foreign investment protection.
[32] Miles (n 12).
[33] Gathii (n 16) 203.
[34] ibid.
[35] Pauwelyn (n 7) 26.
[36] ibid.
[37] Sornarajah (n 21) 208.
[38] Kenneth J. Vandevelde, 'A Brief History of International Investment' (2005) 12 UC Davis Journal of International Law and Policy 157.
[39] Miles (n 12) 24-25; Equal standards of treatment include national treatment and most favoured national status.
[40] ibid.
[41] ibid.
[42] ibid 25.

2.4 Postcolonial Context

The postcolonial period led to alterations in the international sphere which inevitably interfered with the power dynamics of capital exporting states and developing states within the IIR.[43] For developing states, this period symbolised optimism as attainment of sovereignty gave rise to the presumption of their equal participation as independent states.[44] This presumption was fuelled by the belief that sovereign states had acquired the necessary prerequisites of formal political and legal independence.[45] However, this presumption was one that never materialised. The evidence of formal sovereignty was held to be "a verbal commitment"[46] as the "euphoria of decolonisation"[47] was suppressed with the growing frustration of the developing states.[48] The stationary stance of the IIR serves as evidence of this wherein the interests of capital exporting states remained unscathed.[49] With this in play, developing states aimed to curate a New International Economic Order (NIEO). This would assist in changing the power dynamic of the global order to one which would provide a balanced forum to ensure participation within the IIR.

The movement was fuelled by the "shared experience of imperialism".[50] Utilising the law-making mechanism of the United Nations General Assembly,[51] developing states aimed to implement this movement by promoting the need to safeguard their right to regulate their resources[52] as well as modify the inequitable agreements made during the colonial era.[53]This posed a risk for capital

---

[43] ibid 78.
[44] Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1997) 16 Wisconsin International Law Journal 353, 362.
[45] ibid.
[46] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011) 33; International law and its promise of universality and equality is merely considered to be a verbal commitment that assists in giving international law an 'imaginative appeal'.
[47] Miles (n 12) 93.
[48] Mickelson (n 44) 362-363; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 211-216.
[49] ibid.
[50] ibid 362-365.
[51] Declaration on the establishment of a New International Economic Order, GA Res 3201 (SV1) UN DOC A/Res/S-6/3201 [1974].
[52] Declaration on Permanent Sovereignty over Natural Resources, GA Res 1803 (XVII) ,17 GAOR, Supp 17 UN DOC A/5217,15 [1962].
[53] Anghie (n 48) 211.

exporting states as their status quo was challenged,[54]creating the emergence of a newfound fear. With this fear, there was a need to safeguard "imperialist control" over the management and application of investment rules. This was done by creating legal doctrines that sought to crystalize an "imperialist agenda" within the international sphere.[55]

2.5 Emergence of BITs and ISDS

BITs were a denunciation by capital exporting states of the joint effort of the NIEO.[56] Considering the presence of "serious deficiencies" in customary international law, BITs were presented as an effective means of safeguarding the protection of foreign investment law.[57] Justifications of the agreement centred around the general expectation of reciprocity, and contemplation of two-way flow of investment and obligations.[58] However the expectation was never met.[59] The agreements were perceived to be "non-reciprocal in practice, due to the obligations falling upon the developing state".[60]

The participation of developing states was limited by the "pre-drafted nature" of the agreements where priority was placed on the interests of capital exporting states.[61] The securing of investor rights within the domestic realm was preferred without the "regulatory interruption" of developing states.[62] Therefore the conclusion of these agreements took place between "unequal partners"[63] within an "unequal bargaining platform".[64] Despite the earlier efforts of promoting an NIEO within the IIR, developing states found themselves vulnerable to BITs as they were facing "stagnant

---

[54] Ibironke T Odumosu, 'The Law and Politics of Engaging Resistance in Investment Dispute Settlement' (2007) 26 Penn State International Law Review 251, 255.
[55] Miles (n 12) 81.
[56] Vandevelde (n 38) 168.
[57] ibid 159-169; He argues that customary international law offered an "inadequate mechanism for the protection of foreign investment". Pinpointing to the international minimum standard as evidence of this, he states that the standard was 'vague' and 'not demanding' to secure the rights of investors within the IIR.
[58] Miles (n 12) 89.
[59] Vandevelde (n 38) 171.
[60] ibid.
[61] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press 2010) 57.
[62] ibid.
[63] Sornarajah (n 21) 207.
[64] Miles (n 12) 89; Unequal bargaining platform is inclusive of "unequal political and economic conditions between capital exporting states and developing states".

economic growth".[65] Thus, BITs were deemed to be viable sources of capital. They were perceived to encourage Foreign Direct Investment (FDI) which would in turn provide sufficient capital to assist in funding the developmental agendas of the state.[66] Hence, BITs and their biased nature were further justified by the "quid pro quo" rationale.[67] This saw FDI sacrificed for regulatory autonomy inevitably creating a pro-investor environment[68] across developing states, that solidified the stringent investor protection that capital exporting states had been seeking.[69]

The promotion of these "imperialist desires" led to the exclusion of developing states and their interests. This is evident from practices such as the reduction of the "social price" of regulating investment.[70] Guzman argues that with the highly competitive FDI market, developing states found themselves adopting a lax approach whereby there was a "dilution" of regulatory conditions of investment. This was to "attract as much investment as possible".[71] This inevitably hindered the "multilateral" efforts of the NIEO in securing the rights of developing states to regulate within the IIR.[72] Thus, the lax approach was based on the assumption that the costly "social price" of regulation would discourage the securing of FDI.[73]

The incorporation of the ISDS clause within BITs was a further innovative means of promoting the "imperialist agenda". The ISDS clause was representative of a consensual agreement of both parties to refer investment disputes to an arbitral tribunal, particularly looking at ICSID as an ISDS instrument.[74] The mechanism was sold to developing states as a "minimalist project" that evaded

---

[65] Talkmore Chidede, 'The Right to Regulate in Africa's International Investment Law Regime' (2019) 20 Oregon Review of International Law 437, 439.
[66] ibid.
[67] Michael N. Jacobs, 'Do Bilateral Treaties Attract Foreign Direct Investment to Developing Countries? A Review of the Empirical Literature' (2017) 5 International Relations and Diplomacy 583.
[68] Chidede (n 65) 437.
[69] United Nations Conference on Trade and Development (UNCTAD), 'International Investment Agreement Database' <http://investmentpolicyhub.unctad.org/IIA> accessed 1 September 2021; 735 BITs present between African nations and the Global North.
[70] Andrew T Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Virginia Journal of International Law 639, 671-672.
[71] ibid; Regulatory conditions referred to conditions such as pollution controls and relaxed employment regulations.
[72] Miles (n 12) 90.
[73] Guzman (n 70).
[74] The ICSID Convention 1966 ratified by 155 States established an international arbitration institution for dispute settlement and conciliation between international investors and host states. Its main aim is to provide a neutral and depoliticised ground for dispute resolution.

"ideological discussions",[75] placing investment protection within "the realm of law rather than politics".[76] Hence, the mechanism was held to be an assurance of "immediate and neutral dispute resolution", that assisted in encouraging "investment liberalisation" among developing states.[77] This appealed to developing states as they were actively involved in the negotiations, drafting and ratification of the ICSID convention.[78]

However, this was more of a façade, as the mechanism was one which operated as a "politically based system of IIR", with the appearance of a legal system.[79] It enabled capital exporting states and their investors (transnational corporations) to engage "politically outside the diplomatic sphere".[80] This is evident from the system promoting and prioritising the rigid regime of investor protection over the regulatory autonomy of developing states. An illustration of this was the institutional framework of the mechanism where adjudicative rights were reserved for investors.[81] These rights provided the opportunity for investors to challenge the host state's right to regulate on the basis of profitability.[82] Such a challenge would be immune to the threat of an appeal by host states as they lacked an appellate mechanism.[83] These institutional deficits ensured that the economic interest of capital exporting states was stationed within structures that were available when needed, and dominated by them.[84] With this in play, developing states and their stakeholders found themselves exposed to the asymmetrical nature of the mechanism. Thus, the mechanism was held to be a 'colonial playground' which promoted the capitalistic objectives of investors at the expense of dismissing the rights of the host state (developing states).

---

[75] Pauwelyn (n 7) 27.
[76] Vandevelde (n 61) 59.
[77] Peter Muchlinski, *Multinational Enterprise and the Law* (2nd edn, Oxford University Press 2007) 718.
[78] Antonio R. Parra, 'Participation of African States in the Making of the ICSID Convention' (2019) 34 ICSID Review 270.
[79] Miles (n 12) 87.
[80] Pablo Leandro and Ciocchini Stefanie Khoury, 'Investor State Dispute Settlement: Institutionalising "Corporate Exceptionality"' (2018) 8 Onati Socio-Legal Series SLS 976, 982.
[81] ibid.
[82] ibid.
[83] ibid.
[84] Odumosu (n 54) 254.

2.6 Conclusion

One has to acknowledge that failure to engage with the "coercive realities of colonial history" assists in the preservation and maintenance of a distorted view of the IIR.[85] With this in play, there is a historical elimination of imperial politics.[86] This in turn has the costly consequences of a blurred view in modern-day understanding as repression occurs in terms of acknowledging Western hegemony over non-Western states.[87] Appreciating this assists in comprehending why African states are held to be rule consumers in a system that is plagued with "structural defects".[88] Therefore, this chapter attempts to provide an "informed" lens when viewing the modern-day investment regime and its interactions.[89] Allowing for scrutiny of the modern-day regime in the next chapter will allow it to be "proactive" rather than "reactive" to the historical undertones of the IIR within the modern day.

3. Kenya's Bilateral Interactions Within the International Investment Regime (IIR)

3.1 Introduction

Building on the previous chapter, this chapter provides an illustrative example of the previous theoretical discussions. It seeks to explore the 'imperialist agenda' in the modern-day functions of the IIR. The chapter is centred around assessing the asymmetrical nature of the relationship between developing states and capital exporting states. Focus will be on the detrimental consequences that occur from maintaining such a relationship. The chapter will focus on the Kenyan experience. Discussions will be limited to exploring the interaction between Kenya (host state) and the United Kingdom (UK), where analysis will be on the bilateral investment relations between the two states.

---

[85] Bart Moore-Gilbert, *Post-Colonial Theory: Context, Practises and Policy* (Verso Books 1997) 11.
[86] ibid.
[87] ibid.
[88] Garcia (n 3).
[89] Jean E. Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill 2015); Jeffrey Sullivan and David Ingle, 'Interim Costs Orders: The Tribunal's Tool to Encourage Procedural Economy' (2015) 4 NIILS 731; "The source of the problem must be understood before a proper solution can be identified".

3.2 Structure of Arguments

The chapter will commence by assessing the current 'quid pro quo' rationale of traditional BITs that the UK-Kenya BIT 1999 echoes. Appreciating this will aid in supporting the proposition that the BIT is of an 'asymmetrical nature'. Assessment will aim to highlight the "Eurocentric nature" of the bilateral relations embedded within the investment agreement.[90] Focal points will look towards the "investor protection agenda" that the agreement reflects, and the absence of the host state's interests and needs within the agreement.[91] Therefore, the core argument will contend that the agreement in place is one that highlights an "insufficient quid pro quo".[92] The current bargain promotes the 'imperialist agenda', which looks towards promoting and protecting FDI as a means of satisfying the quid pro quo rather than providing a balanced forum that looks towards securing modern-day objectives of sustainable FDI.[93] It highlights the need to untangle the agreement from its 'imperial roots' in order for the agreement to reflect the new era of sustainable FDI[94] in which the needs and interests of Kenya are present. Assessment of the interaction will then look towards the consequences of upholding such an agreement through exploring the ISDS interaction. Discussions here will explore the interaction between the two states, particularly within the ICSID system. *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*[95] will be the focal point of discussion within this section when assessing the interaction.

3.3 Is the UK–Kenya BIT Redundant Within a New Era of Sustainable FDI?

The rationality of the IIR and its legal creatures are framed within the 'developed-developing state dichotomy' where one state perceives the interests of the other state as a "zero sum game of some sorts".[96] As earlier stated, such interests are placed within a 'quid pro quo' justification where the

---

[90] Kidane (n 13) 523; "International Investment rules were invented in Europe".
[91] Interests and needs: preservation of the right of the state to regulate.
[92] Sornarajah (n 21) 207.
[93] Karl P. Sauvant and Howard Mann, 'Towards an indicative list of FDI Sustainability characteristics' [2017] ICTSD 1, 2.
[94] Karl P. Sauvant, 'Promoting sustainable FDI through international investment agreements' [2019] Columbia FDI Perspectives 1, 2-3.
[95] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya* [2015] ICSID Case No. ARB/15/29.
[96] Roberto Echandi, 'What Do Developing Countries Expect from the International Investment Regime' in Jose E. Alvarez and others, *The Evolving International Investment Regime: Expectations, Realities and Options* (Oxford University Press 2011) 3.

interests of developing states are exclusively limited to the incentive of attracting FDI flows into their economies in return for investor protection.[97] However the extent to which BITs contribute to the flow of FDI is one that is controversial; academia contains a mixture of differing opinions regarding this matter.[98] There are discrepancies in the correlation of FDI and BITs as assessment of the correlation is one that is not straightforward.[99] Quantitative and qualitative evidence is "incapable of assessing the impact BITs have in generating FDI".[100] Therefore dependence on the legal instrument as a means of promoting FDI is not reliable, as BITs are neither necessary nor sufficient to attract FDI.[101] Appreciating this observation, we move to analysing the UK–Kenya BIT 1999 with the view that the FDI expectations are not necessarily a satisfactory means of justifying the over-protection of investor rights.

The UK-Kenya 1999 BIT is reflective of a traditional BIT, that promotes the investor protection agenda of capital exporting states. The objective of the agreement is solely focused on the traditional role of promoting and securing FDI.[102] The imbalanced nature of the agreement is seen through the security of interests and rights of investors, with minimal attention given to the interests and rights of the host State (Kenya).[103] This proposition is supported by an analysis of the treaty provisions.

Starting with the preamble to the agreement, one can observe that the agenda of an investor friendly environment is highly endorsed. This is evident in the wording of the clause that seeks to promote

---

[97] Jacobs (n 67).
[98] There is extensive debate offering differing opinions on whether BITs are instruments that promote FDI. Scholars such as Neumayer and Spess argue BITs contribute to FDI flows. Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' [2005] LSE Research Online 1; Whilst scholars such as Hallaward-Driemeier argue BITs fail to significantly contribute to FDI. Mary Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investments? Only a Bit... And They Could Bite' (2003) The World Bank Development Research Group Investment Climate <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=636541> accessed 1 September 2021.
[99] Muthucumaraswamy Sornarajah, 'State Responsibility and Bilateral Investment Treaties' (1986) 20 Journal of World Trade Law 79.
[100] United Nations Conference on Trade and Development UNCTAD, *Trade and Development Report, 2014*.
[101] Xavier Carim, 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa', in Kavaljit Singh and Burghard Ilge (eds), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (ENDS, Madhyam and SOMO, 2016) 58.
[102] Faith Simiyu, 'Rethinking and Recasting Bilateral Investment Treaties as Integrative Tools for Sustainable Development: The Kenyan Experience' [2014] European Journal of Sustainable Development 373, 374.
[103] ibid 85.

the safeguarding of investor protection by ensuring "favourable conditions for greater investment".[104] Preamble clauses are held to be the "sources of evidence of a treaty's objective and purpose" and assist in establishing the normative standard for interpretation of the agreement as a whole.[105] One can deduce that the scope of the preamble is limited to protection of investments. This is consistent with the pro-investor agenda[106] where the interests and needs of the host states are absent.[107]

Moving on to definitions, the investment definition is an asset-based definition. Such a definition is reflective of a "traditional open-ended" definition.[108] The open-ended nature of the definition provides coverage of all forms of assets, providing a strong incentive for investment, which falls in line with the main goal of promoting FDI.[109] However, there is a high risk of the open-ended definition extending its parameters to cover economic transactions such as short-term speculative investments.[110] Such investments are problematic as they hinder the prospect of achieving capital to fund long-term developmental objectives of the host state.[111]

The substantive provisions are tailored towards securing investor rights. Key examples include minimum standards of treatment such as Article 3 of the BIT which promote Most Favoured Nation (MFN) and National Treatment (NT). The MFN provision ensures equality of opportunities. In this, the host state limits any possibility of discrimination by ensuring that the treatment of a third state investor is the same as that afforded to other investors. The clause ensures harmonization of treatment. However, treatment is open to a broad interpretation that tends to "complicate conscious

---

[104] UK-Kenya BIT 1999 <https://treasury.go.ke/agreements/Kenya%20UK%20and%20Northern%20Ireland%20BIT.pdf> 2, accessed 1 September 2021.
[105] Max H. Hulme 'Preambles in Treaty Interpretation' (2016) 164 University of Pennsylvania Law Review 1281, 1300.
[106] Miles (n 12) 222.
[107] International Policy Hub; International Investment Agreements Navigator, Kenya-UK BIT 1999 <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment- treaties/2225/kenya---united-kingdom-bit-1999-> accessed 1 September 2021.
[108] UNCTAD, Investment Policy Framework for Sustainable Development [2015] 93 <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp content/uploads/2016/06/diaepcb2015d5_en.pdf> accessed 1 September 2021.
[109] ibid.
[110] ibid.
[111] ibid.

treaty making".[112] The NT provision seeks to limit any discriminatory practices based on the nationality of investment by guaranteeing a "competitive equality" between nationals and foreign investors.[113] Although the standard is generally perceived to be "conducive to good investment governance",[114] the current agreement fails to expound or clarify on the relevant criterion of utilising and applying the treatment. Lack of clarity inherently limits the freedom of the host state to regulate specific issues that would only be applicable within a national context, as it would have to adhere to a standard treatment.[115]

The expropriation provision ensures investors are protected against "arbitrary or uncompensated" expropriations.[116] Thus the provision contributes to a stable legal environment that is "conducive" towards facilitating investment.[117] This provision is particularly utilised as a ground for challenge when the regulatory actions of the host state impact the profitability of investments.[118] Controversy lies in establishing a "borderline" to distinguish between expropriation (in most cases indirect expropriation)[119] and legitimate regulatory measures of the state.[120] The agreement lacks clarification on this 'borderline.' Hence difficulty is present when distinguishing and defining the above actions.[121]

Moving on to the exceptions provision,[122] the provision and its subsections are still rooted within the theme of investment protection. Examples such as the sub-provision that shields investment from taxation regulation serve as evidence.[123] The use of exceptions here fails to provide room for policy shaping that would promote the host state's right to regulate. In particular, absence of

---

[112] ibid 96.
[113] ibid.
[114] ibid.
[115] ibid 82. "States may want to be able to accord preferential treatment to national interests/investments (e.g. through temporary grants or subsidies) without extending the same benefits to comparable foreign owner companies".
[116] ibid.
[117] ibid.
[118] ibid.
[119] UNCTAD, Special Update on Investor State Dispute Settlement: Facts and Figures (UN 2017, Issue 3) 1 <https://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf> accessed 1 September 2021. "75% of all ISDS claims are initiated by alleged indirect expropriation of investment by host state".
[120] OECD, Working Papers on International Investment Law: *Indirect Expropriation and the Right to Regulate in International Investment Law* (2004/04 OECD Publishing) 22.
[121] ibid.
[122] UK-Kenya BIT 1999 (n 104) art 7.
[123] ibid art 7 (b).

relevant regulatory practices such as corporate social responsibility or labour and environmental regulations[124] is alarming as it points towards the absence of the state's interests. The substantive provisions assist in providing "an assured and predictable climate for investment activities".[125]

Placing this agreement within the wider frame of the 'quid pro quo' justification, only one end of the bargain has been satisfied. While investor rights within the agreement remain certain, the host state's interests and rights are absent. The 'overprotection' of investment limits the scope and flexibility of the agreement to be inclusive of the interests of both parties. Therefore, such an agreement is reflective of the asymmetrical relation between the two states where the dynamic of the relationship is held to be one of "rule maker" and "rule taker".[126] Such a dynamic is rooted within the imperialist agenda of the Global North, as a means of preserving dominance within the bilateral interactions involving developing states. The justification of the FDI expectation through upholding the pro-investor agenda is an "insufficient quid pro quo".[127] Therefore, Kenya cannot rely on the expectation that by upholding the investor agenda it can reap 'developmental benefits' from the 'expected' capital generated from FDI.[128]

Appreciating that the host state's expectations cannot simply be satisfied from the perspective of capital alone, assists in dismantling the fixation on investor rights.[129] The agreement should not be solely focused on the investor agenda, as the host state's wellbeing is a matter of priority. Failure to appreciate this promotes an imbalanced regime which in turn affects the host state's ability to be accountable to its citizens.[130] Recognizing this assists in "decolonising the agreement".[131] The decolonising process involves promoting modern-day principles of sustainability[132] that are part and parcel of the global objective and commitment to fostering sustainable development.[133] The

---

[124] UNCTAD Investment Policy Framework for Sustainable Development (n 108) 103.
[125] Simiyu (n 102).
[126] Makane Moïse Mbengue, 'Africa's voice in the Formulation, Shaping and Redesign of International Investment Law' [2019] ICSID Review FIIJ 486.
[127] Sornarajah (n 21).
[128] Simiyu (n 102). Assessing results from a UNCTAD 2008 report, Simiyu concludes that from the year 2006, Kenya's FDI inflows have remained volatile. Thus, FDI as a means of securing capital for advancing the state's developmental agenda is not reliable.
[129] Garcia (n 3) 874.
[130] Carim (n 101).
[131] Karanja (n 5).
[132] ibid.
[133] Simiyu (n 102) 374.

notion of sustainable development is "universally" held to be the general standard for regulating international interactions between states.[134] Thus promotion of sustainable FDI is a means of achieving this as focus would shift from encouraging "quantity of investment to assuring quality of investment".[135] Aligning the general expectation of FDI with the above would support the objective of securing sustainable investment whereby investments made would have to contribute to the economic, social, political and environmental wellbeing of the host state.[136]

Incorporating sustainable FDI into the present agreement can be done through expanding the objective and interpretation of the treaty to align with the developmental agenda of the state.[137] Introduction of investor obligations as treaty provisions could aid in this process.[138] Investor obligations would be a means of supporting the regulatory autonomy of the host state as the host state would have the ability to formulate obligations that mirror the developmental agenda of the state.[139] The obligations would address the current imbalance by ensuring they are reciprocal.[140] There would be a two-way flow of obligations and rights.[141] With this in play, Kenya would be able to shape regulation of investment in accordance with its needs and interests whilst providing a "hospitable investment environment".[142] However, we have to recognize that the current agreement in place is incapable of providing such a framework as it is exclusively reserved for promoting investor rights. Therefore, reformulation of the agreement would have to occur to reflect a balanced forum of interests and rights.

---

[134] Zeng Huquan, 'Balance, Sustainable Development, and Integration: Innovative Path for BIT Practise' [2014] Journal of International Economic Law 325; Diane A. Desierto, 'Deciding International Investment Agreement Applicability: The Development Argument in Investment' in Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press 2013). "Sustainable development is a well-entrenched norm of international law".
[135] Howard Mann, 'Reconceptualising International Investment Law: Its role in sustainable development' (2013) 17(2) Lewis & Clark Law Review 534.
[136] Sauvant (n 94).
[137] Claudia Salgado Levy, 'Drafting and Interpreting International Investment Agreements from a Sustainable Development Perspective' (2015) 3(1) Groningen Journal of International Law 72. "There is need to ensure drafting of the agreement creates synergies with wider developmental goals, foster responsible investment and ensure policy effectiveness".
[138] Karanja (n 5).
[139] Wolfgang Alschner and Elisabeth Tuerk, 'The role of international investment Agreements in fostering sustainable development' in Baetens (n 134) 220.
[140] Huquan (n 134) 324.
[141] Vandevelde (n 61).
[142] Simiyu (n 102) 385.

3.4 *Cortec Mining v. Kenya*: A Justified Cost?

Foreign investors are afforded a 'menu' of substantive claims through BITs. Therefore, they possess exclusive substantive rights that are enforceable through the ISDS system. ISDS enables investors to sue the state directly on the basis that the regulatory actions of the state are interfering with their profitability.[143] States are merely respondents within the forum. Therefore, the system upholds the profitability of investors as they can pursue damages without facing the threat of appeal by host states.[144] This highlights the power disparity. Such disparity creates "a government dilemma"[145] wherein host states find themselves prone to a "lengthy, cumbersome and politicised process" of the system.[146] We explore this dilemma within the Kenyan context.

Cortec Mining v Kenya (hereinafter, "*Cortec*") is an ICSID case under the UK-Kenya BIT 1999.[147] The claimants (Cortec) attempted to sue the state on the grounds of the revocation of a mining license. They believed the revocation was a direct expropriation that was contrary to the BIT. To further support their claim, they argued that their investment was nationalized as it fell in line with the "resource nationalism" which arose during the change of government.[148] However the respondents (the Kenyan State) contended that the license had been unlawfully obtained due to the claimants' failure to obtain the mandatory environmental impact assessments that were needed for the license.[149]

---

[143] Leandro and Khoury (n 80).
[144] ibid.
[145] Joachim Karl, 'Investor - state dispute settlement: A government's dilemma' (2013) 89 Columbia FDI Perspectives 2. "Host states are prone to the unpredictable arbitration practices without having the legal safety net of an appellate body".
[146] Kalicki (n 89); Amal Bouchenaki and Tan Liang-Ying, 'Limiting Investor Access to Investment Arbitration: A solution without a problem' (2015) 4 NIILS 250.
[147] *Cortec* (n 95).
[148] ibid para 28.
[149] Lorenzo Cotula and James T. Gathii, 'Cortec Mining Kenya Limited, Cortec (Ply) Limited and Stirling Capital Limited v Republic of Kenya' (2019) 113(3) American Journal of International Law 576. Under Kenyan legislation, there was a need to satisfy certain prerequisites to gain a mining licence and the requirements of the special location of the mining project, Mrima Hill (a nature reserve and national monument).

The tribunal held that the investment made had to be protected under the BIT[150] as it had to be in "substantial compliance" with the significant legal requirements of the host state.[151] Despite the lack of an express obligation of the above, the tribunal established an implied obligation.[152] With this in place, the burden of proof was placed on the claimants to establish whether the license was in line with the regulatory practices of the Kenyan state. Based on the assessment of the evidence provided, the tribunal held that the license acquired was a mere "piece of paper"[153]. It had no legal bearing as there was a failure to satisfy the necessary regulatory preconditions.[154] Therefore, the tribunal held that the BIT could not be interpreted as one that protected "non-existent assets".[155] As a result, the tribunal concluded it had no jurisdiction over the claim made.[156]

The case touches upon wider issues of balancing rights and obligations within the IIR.[157] It particularly brings to light the debate around the "appropriate role" of BITs in providing grounds for the state to regulate.[158] As the agreement should be reflective of the regulatory practices of the host state, this ties in with our earlier arguments of neutralising the imbalanced grounds of the BIT through preserving policy space for the Kenyan state. Such grounds would enable obligations to be placed on the investor. However, for the purposes of this section, focus is placed on the cost element in terms of the state's involvement with the dispute.

Investment losses are not "insured under international law" as there is a constant risk that host states are vulnerable to the unpredicted costs of engaging with ISDS.[159] Vulnerability is further supported by the fact that ISDS (in particular ICSID)[160] is plagued with "disruptive and unpredictable" activity that contributes to the "sheer cost and complexity" of the mechanism.[161] The

---

[150] Investment had to fall within the asset-based definition of investment found within the BIT.
[151] *Cortec* (n 95) 321.
[152] ibid paras 254-62.
[153] ibid para. 333(b).
[154] ibid para. 222.
[155] ibid para. 319.
[156] ibid para 333.
[157] Cotula and Gathii (n 149) 574.
[158] ibid.
[159] Susan D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Cambridge University Press 2019) 141.
[160] Reference to ICSID and ISDS is used interchangeably.
[161] Leon E. Trakman, 'The ICSID under siege' (2012) 45 Cornell International Law Journal 616**.** Further, looking towards how costs are influenced by factors such as finality of the arbitral award, parties prolong the arbitral process by seeking remedies against the award.

above is held to be a "functional challenge" of the system that contributes to general concerns of legitimacy.[162] A 2018 study found that the average cost for respondents engaging with ICSID was around USD 3,567,707.14, while the average cost of a tribunal case was around USD 876,815.94.[163] Evaluating this against the economic capabilities of the developing states, the cost of engaging in disputes is one that is not rationally justified.[164] In addition, such costs deter the financial attention of the state away from developmental priorities that would benefit from such capital, prompting questions as to whether the commitment to the system is justified.

The presence of the ISDS clause as a means of commitment to the FDI expectation is one that is not rational, as it assists in maintaining the 'imperialist agenda' of the Global North. The use of ISDS (in particular ICSID) is perceived as a "capitalist apparatus" that preserves the economic interests of these states, through the structural defects present in the system.[165] Such structures naturally place developing states at a disadvantage.[166] Appreciating this, we look towards the Kenyan context. The *Cortec* award reduced the claimant's plea by 50% allowing the Kenyan state to recover half of the claim.[167] Despite the prospect of the recovery of cost the Kenyan state faces further challenges of rebutting the annulment of the award by the claimant whilst trying to enforce the award.[168] Thus, the state faces further financial hurdles.[169] The ISDS system prioritises the securing of compensation at the cost of diminishing the prospect of "a working relationship between the disputing parties".[170] Therefore, the commitment cost of ISDS may be one that is held to be unnecessary for the Kenyan state. Recognising this can assist the state in assessing other options at its disposal such as non-adjudicative dispute settlement processes and exhaustion of local remedies which would aim to minimise unnecessary loss.[207]

---

[162] ibid.
[163] Jeffery Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration* (Oxford University Press 2018) para 10.17.
[164] Trakman (n 161).
[165] Leandro and Khoury (n 80).
[166] ibid.
[167] *Cortec* (n 95).
[168] Proceedings are still ongoing with the latest activity being the annulment hearing held on the 16th of September 2020.
[169] 'Kenya's foreign trade disputes costly-experts' <https://www.the-star.co.ke/business/kenya/2019- 04-25-kenyas-foreign-trade-disputes-costly-experts> accessed 1 September 2021. "Kenya spends at least 500 million in defending a single case filed by investors under BITs".
[170] Trakman (n 161) 617.

3.5 Conclusion

The present chapter has attempted to assess the bilateral investment interactions between Kenya and the UK. Discussion has emphasized that the interaction is one which fails to deliver a balanced forum where Kenya would be provided with the opportunity to actively participate within the relationship in a manner promoting its needs and interests. The interaction between the states is one which is still fixated within a "European experience".[171] Such a fixation limits the evolution of the interaction to one that promotes a two-way flow of obligations and interests within the interaction. Acknowledgement of this assists in creating self-awareness within the interaction. Discussion in the next chapter will aim to explore how this awareness can be applied to ensure the interaction is one that is reflective of a reciprocal nature.

4. The Way Forward? The Path of Consciousness for Kenya

4.1 Introduction

States are "dissatisfied" with the imbalanced nature of the IIR need to adopt a strategic outlook when addressing the imbalance and 'reassertion of sovereign control' within the regime.[172] Therefore, the state has to make an "informed decision" which reviews the "instrumental calculations" and "background factors" needed when assessing the strategic route the state should adopt during reform.[173] Strategic formulae should aim to reaffirm sovereign control through encouraging "sovereign manoeuvrability" which preserves space for state policies.[174] With this in play, states have the ability and freedom to shape investment policy in a manner advancing the developmental agenda of the state without necessarily withdrawing commitment to the IIR. Appreciating this, this chapter seeks to explore the above solutions within an African-centred approach where discussion will look towards continental initiatives which would be appropriate for the Kenyan context.

---

[171] Anghie (n 48).
[172] Malcolm Langford, Daniel Behn and Ole Kristian Fauchauld, 'Backlash and State Strategies in International Investment Law' in Tanja Aalberts and Thomas Gammeltoft-Hansen (eds), *The Changing Practises of International Law* (Cambridge University Press 2018) 72.
[173] ibid 73.
[174] ibid.

4.2 Structure of Arguments

Discussions will embark by assessing the potential strategic route that the Kenyan state can adopt when seeking to achieve a balanced forum. This will be centred around assessing new generation BIT models as a means of implementing the above. Focus will be on the model which the African continent has produced.[175] An evaluative approach will be taken in terms of assessing how effective the model is against the main objective of the Kenyan state.

4.3 The African Formula to a Balanced Forum?

The 'rule taker' narrative within the African context is being dismantled as the continent actively takes up the role of ruler maker within the IIR.[176] This is evident from the "forward-looking approach"[177] where the 'design of regulation' is in accordance with the developmental needs and interests of the continent and its members. Such an approach symbolises the 'Africanization' of the IIR.[178] Appreciating this, we look towards exploring initiatives that would suit the Kenyan context.

PAIC (Pan African Investment Code) is held to be part of the African Union's (AU) continental approach of designing a treaty in accordance with its developmental agenda of 2063.[179] The treaty is also held to be the main guidance for the consultations on the establishment of the Investment Protocol to the Agreement establishing the African Continental Free Trade Area (AfCFTA).[180] The continental initiative is solely rooted in promoting sustainable development as the "overarching"

---

[175] Regional efforts such as the South African Development Community (SADC) model and the East African Community (EAC) model are reflected within PAIC, as the code mirrors and refines the initiatives present within these agreements.

[176] Makane Moïse Mbengue and Stefanie Schacherer, 'Evolution of International Investment Agreements in Africa: Features and Challenges of Investment Law "Africanization"' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh, *Handbook of International Investment Law and Policy* (Springer 2019) 1, 1-2.

[177] Hamed El-Kady and Mustaqeem De Gama, The Reform of the International Investment Regime: An African Perspective' [2019] ICSID Review - FILJ 483.

[178] Mbengue and Schacherer (n 176) 2.

[179] Chidede (n 65) 447. "AU 2063 agenda promotes a coherent strategic framework for development whose foundation is the promotion of sustainable growth as the engine of structural transformation for the continent".

[180] Mbengue & Schacherer (n 176) 19. AfCFTA art 4(c) aims to provide a harmonized approach to investment with the objective of ensuring that the main goal of attaining sustainable and socio-economic development is achieved.

goal of investment regulation.[181] Here, the treaty elements are reflective of definitions which are linked towards developmental agendas of the host states and are translated into binding obligations.[182] The code is held to be a novel means of reformulating the traditional approach of the promotion of FDI as it balances out the forum to one that includes provisions that assist member states in promoting their wellbeing.[183] This is evident from provisions that touch upon due diligence and obligations for investors in relation to human rights, corporate social responsibility and the encouragement of responsible behaviour when utilising natural resources of member states.[184]

PAIC provides clarification within the existing standards of treatment as there is emphasis on the host state's right to regulate investments in line with the state's developmental needs and interests.[185] This aids in limiting the scope of treatments present through establishing exceptions. We turn towards NT.[186] The NT exception ensures that the state's right to achieve national developmental objectives is unfettered as states are given the choice to "grant preferential treatment" to qualifying investors who aid in the process of achieving national goals.[187] Thus, member states "reserve" the right to "deny" investors' preferential treatment in situations where there is no substantial investment made, as well as in situations where investor activities contradict the economic wellbeing of the state.[188] The exception also includes acknowledgement of the "internal needs" of member states[189] whereby states are permitted to grant favourable treatment to national investors with the view of addressing "internal needs".[190] Hence, the scope of treatment is limited to one that requires a national prerequisite.[191] Looking towards expropriation and the

---

[181] ibid.
[182] ibid. Definitions of investments in this instance is linked to long term investments that allow the state to rely on the investment as a means of achieving long term development goals.
[183] ibid 18.
[184] Draft Pan-African Investment Code (PAIC) 2016 <https://au.int/sites/default/files/documents/32844-doc- draft_pan-african_investment_code_december_2016_en.pdf> accessed 1 September 2021. Chapter 4 of the agreement expounds on the investor obligations.
[185] Stefanie Schacherer and Makane Moïse Mbengue, 'The 'Africanization' of International Investment Law: The Pan African Investment Code and the Reform of the International Investment Regime [2017] Journal of World Investment and Trade 414, 428.
[186] Exceptions also include MFN exceptions, however due to the paper's limitations, discussion is limited to providing an illustration of one standard of treatment.
[187] PAIC (n 184) art 10.
[188] ibid.
[189] ibid.
[190] ibid.
[191] ibid. National prerequisite is in reference to "designated disadvantaged persons, groups or regions.".

compensation provision, we see the code expound on the 'borderline' that distinguishes expropriation and regulatory measures. This is evident with the "cumulative criterion" present which expounds on when expropriation would be regarded as an appropriate regulatory measure.[192]

Moving on towards the ISDS provision, the code adopts a neutral stance on the incorporation of the clause providing 'a middle ground' for African states that are "pro ISDS or anti ISDS".[193] The provision starts with a dispute preventive approach. Here, the first step includes resolving disputes through other means of dispute resolution (negotiation and consultations) which require the intervention of a non-binding third party or mechanism.[194] Such an approach is already practised within the IIR; states such as Brazil have adopted it. Brazilian Agreements on Cooperation and Facilitation of Investments (ACFI) looks towards promoting preventative measures. This is done through negotiations held by joint committees of the parties and the use of a "dedicated" ombudsman as the primary means of dispute resolution; investment arbitration is viewed as a last resort.[195] This assists in providing an equal ground for the parties to participate in the dispute. Such an approach looks towards establishing a working and balanced relationship. However, we note that the negotiation route within the code is restricted to a six-month deadline.[196]

Therefore, if disputes are not resolved with the above means, parties move onto the domestic route which includes exhaustion of local remedies.[197] The domestic route is one which goes against the traditional approach of BITs as the prospect of ISDS is pushed back. This assists in efficient regulation of "unmeritorious" claims which would be costly towards host states.[198] In addition, it strengthens the application of the rule of law within the domestic sphere as host states are afforded "the opportunity of addressing investor claims."[199] Addressing the claims helps in "clarifying" the necessary domestic legal standards which would promote clarity and guidance for investors when

---

[192] ibid art 11.
[193] Chidede (n 65).
[194] PAIC (n 184) art 42;1 (b).
[195] Andrew Lang and Nicolás M Perrone, 'Experimenting with International Investment law: Initiatives from the Global South' in Morosini and Badin (n 4) 289.
[196] PAIC (n 184).
[197] ibid art 1(c).
[198] Bouchenaki and Liang-Ying (n 146) 253.
[199] Matthew C Porterfield, 'Exhaustion of local remedies in Investor-State dispute settlement: An idea whose time has come' (2015) 41 Yale Journal of International Law 6.

adhering to domestic regulation.[200] Hence the route is promising, as it has the prospect of remedying the institutional deficiencies of BITs and the ISDS.[201]

Looking towards the last resort (ISDS), there is a restriction on how the right is practised by investors. This is evident from the code providing clarification on what constitutes consent to commence proceedings against the host state. It adopts a case-by-case approach that also includes the recognition of national law and its prohibitions when engaging with the ISDS.[202] The above implies that if there are inconsistencies present where the BIT stipulates consent whilst national law does not, ISDS cannot take place.[203] Such practises are present within the IIR, with examples including the South African Investment Bill Act.[204] The Act does not permit the state to engage with the ISDS meaning agreements which reflect consent cannot prevail in light of national law.[205] In addition, the code limits ISDS to taking place within the continent therefore encouraging the use of African dispute centres.[206] Proceedings are governed by United Nations Commission on International Trade Law (UNCITRAL) rules therefore preserving the neutral element of ISDS.[207]

4.4 Is the African Formula Suitable Within the Kenyan Context*?*

PAIC would be an appropriate guide for neutralising the bilateral interactions present.[208] The code can assist in empowering the state to make an 'informed decision' when reformulating the interaction as it provides a detailed guideline as to how states can reformulate their BITs to fit their needs. It promotes consciousness within bilateral interactions as it assists in preserving policy space for the state to regulate investment in a manner which promotes the state's interests. This is evident from the presence of investor obligations which promote principles of accountability and sustainability within the agreement. These principles assist in providing a balanced platform where the parties' interests would be reflected within the bilateral interaction.

---

[200] ibid.
[201] UNCTAD, World Investment Report 2015: Reforming International Investment Governance (United Nations 2015).
[202] PAIC (n 184) art 42.3.
[203] Schacherer and Mbengue (n 185).
[204] Promotion and Protection of Investment Bill of South Africa 2015, art 13.
[205] ibid.
[206] PAIC (n 184) art 42 (d).
[207] ibid.
[208] Karanja (n 5).

In addition, the investor protectionist environment breadth would narrow as their rights are monitored against the interests of the state. This is evident with the introduction of exceptions to standards of treatments. Moreover, the code's approach to ISDS is one which would benefit the state as it looks towards promoting a dispute preventive approach wherein the prospect of ISDS is a last resort. Such an approach would aid the state in mitigating disputes in a cost-effective manner and resolution would aim to establish a working relationship between the parties before utilising ISDS as a primary means of dispute resolution.

However, we appreciate that the state should be strategic with its approach and should look towards borrowing the best practises of the code, rather than adopting a 'copy-and-paste' approach. Specifically, we look towards the contextual approach the code takes, when promoting the developmental agenda of the continent (African Union Agenda 2063). The Kenyan state can emulate this by "synergising"[209] Kenya's developmental agenda with its investment regulation. Such an approach is already in practise as the state has curated an investment policy which mirrors its developmental agenda. The policy is one which touches upon "investment growth for sustainable development".[210] Here, it advances the 'twin targets' of Kenya-Vision 2030 of attracting and retaining FDI with the view of assisting the state in acquiring "middle income country status".[211] Principles of the policy are centred around investment promotion and facilitation whereby focus is on attracting "high quality FDI".[212] Regulation of FDI is present, as the code promotes the need for investment assessments to evaluate whether FDI is contributing to the "economic, social and environmental objectives" of the state.[213] However, we have to recognise that the above is representative of developmental language that requires legal translation within the investment context. PAIC can assist in filling this gap as it provides legal grounds that would be appropriate and sufficient to promote such an agenda within the bilateral investment interactions of the state.

---

[209] James X. Zhan, 'International Investment Rule-making: Trends, Challenges and Way Forward' in Singh & Burghard (n 101) 17, 21.
[210] Draft Kenya Investment Policy: Investment growth for sustainable development <https://www.tralac.org/news/article/11795-draft-kenya-investment-policy-investment-growth-for-sustainable-development.html> accessed 1 September 2021.
[211] ibid.
[212] ibid.
[213] ibid.

4.5 Conclusion

The present chapter has sought to explore the continental initiatives present as a means of providing guidance for the Kenyan state. The application of the continental initiative (PAIC) is appropriate as it tackles the deficiencies identified in chapter two. In addition, discussion has encouraged the need for consciousness when adopting the continental practises. It acknowledges the need for a contextual approach wherein the state adopts a strategic stance which ensures the continental practises are matched with its developmental agenda.

5. Overall Conclusion

Host states "hold the pen" when outlining both substantive treaty rights and "procedural remedies" in BITs with other states.[214] Therefore, states have the ability to align treaty drafting with 'pro state terms' which push forth "pro state outcomes".[215] Appreciating this, this article has pushed for the above practises within the Kenyan context. Specifically, the article has highlighted the need to 'nationalise' its bilateral interaction in order for it to be reflective of modern-day principles of sustainability and mutual reciprocity. This has been done through a reflective approach which looks towards the historical practises of the IIR. Analysing the interaction has assisted in supporting the fact that it is still rooted within historical practises of the West. Hence, it displays the need for the state to decolonise its interactions to ensure they assist the state in advancing its interests and needs. Discussions have looked towards the role of the African initiative (PAIC) as a means of advancing its interests. The initiative has been argued to be a guideline for the state when consciously interacting within the IIR. The article highlights the need for consciousness within treaty making as consciousness assists the state in 'nationalising' its interactions within the IIR.

[214] Franck (n 159) 148.
[215] ibid.

Bibliography:

Primary Sources:

Treaties

- United Nations Declaration on the establishment of a New International Economic Order, GA Res 3201 (SV1) UN DOC A/Res/S-6/3201 [1974]
- United Nations Declaration on Permanent Sovereignty over Natural Resources, GA Res 1803 (XVII), 17 GAOR, Supp 17 UN DOC A/5217,15 [1962]
- Draft Pan African Investment Code 2016
- South African Development Community Bilateral Investment Treaty Model 2012. East African Community Model Investment Code 2006
- United Kingdom and Kenya Bilateral Investment Treaty 1999

International Reports and Databases

- United Nations Conference on Trade and Development (UNCTAD), Special Update on Investor State Dispute Settlement: Facts and Figures (United Nations 2017, Issue 3)
- United Nations Conference on Trade and Development (UNCTAD), Investment Policy Framework for Sustainable Development [2015]
- United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2015: Reforming International Investment Governance (United Nations 2015)
- United Nations Conference on Trade and Development (UNCTAD), Trade and Development Report [2014]
- Organisation for Economic Co-operation and Development (OECD), Working Papers on International Investment Law: *Indirect Expropriation and the Right to Regulate in International Investment Law* (2004/04 OECD publishing)

Domestic Laws

- Kenya Treaty Making and Ratification Act 2012
- Promotion and Protect of Investment Bill of South Africa 2015

ICISD Cases

- *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* [2015] ICSID Case No. ARB/15/29

Secondary Sources:

Books

- Aalberts T & Gammeltoft-Hansen T, *The Changing Practises of International Law* (Cambridge University Press 2018)
- Anghie A, Imperialism, *Sovereignty and the Making of International Law* (Cambridge University Press 2005)
- Baetens F, *Investment Law with International Law: Integrationist Perspectives* (Cambridge University Press 2013)
- Benton L, *Law and Colonial Cultures: Legal Regimes in World History 1400- 1900* (Cambridge University Press 2002)
- Chaisse J, *Handbook of International Investment Law and Policy* (Springer 2019)
- Commission J & Moloo R, Procedural Issues in International Investment Arbitration (Oxford University Press 2018)
- Douglas Z, Pauwelyn J & Viñuales E J, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014)
- Franck D S, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Cambridge University Press 2019)
- Gilbert M B, *Post-Colonial Theory: Context, Practises and Policy* (London: New York Verso 1997)
- Kalicki E J & Joubin-Bret A, *Reshaping the Investor State Dispute Settlement System: Journeys for the 21st Century* (Nijhoff International Investment Law, Volume 4 2015)
- Lipson C, Standing Guard; *Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (University of California Press, Berkley 1985)
- Miles K, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013)
- Muchlinski P, *Multinational Enterprise and the Law* (Oxford University Press 2nd Edition 2007)
- Pahuja S, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011)

- Ratton M & Morosini F, *Reconceptualizing International Investment Law from the Global South* (Cambridge University Press 2018)
- Sauvant P K and Alvarez E J, *The Evolving International Investment Regime: Expectations, Realities and Options* (Oxford University Press 2011)
- Singh K & I Burghard, *Rethinking Bilateral Investment Treaties; Critical Issues and Policy Choices* (Both Ends, Madhyam & Somo 2016)
- Sornarajah M, The International Law on Foreign Investment (Cambridge University Press 2nd edition 2009)
- Sornarajah M, *The International Law on Foreign Investme*nt (Cambridge University Press 4th edition 2017)
- Trubek D & Santos A, *Introduction in the New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006)
- Vandervelde J K, *Bilateral Investment Treaties: History, Policy and Interpretati*on (Oxford University Press 2010)

Journal Articles

- Chidede T, The Right to Regulate in Africa's International Law Regime [2019] Oregon Review of International Law, Vol 20
- Cotula L & Gathii J, *Cortec Mining Kenya Limited, Cortec (Ply) Limited and Stirling Capital Limited v Republic of Kenya* [2019] The American Journal of International Law Vol 113:3
- Gathii T J, International Law and Eurocentricity [1998] European Journal of International Law Vol 9:1
- Garcia J F, Ciko L, Gaurav A & Hough K, Reforming the International Investment Regime: Lessons from International Trade Law [2015] Journal of International Economic Law Vol 18
- Guzman A, Why LDCs Sign Treaties that Hurt Them: Explaining the popularity of Bilateral Investment Treaties [1998] Virginia Journal of International Law Vol 38:4
- El-Kady H & DeGama M, The Reform of the International Investment Regime: An African Perspective [2019] ICSID Review- FILJ
- Hallward-Driemeier M, Do Bilateral Investment Treaties attract FDI? Only a bit. and they could bite [2003] World Bank, Policy Research Working Paper 22
- Humble H M, Preambles in Treaty Interpretation [2016] University of Pennsylvania Law Review Vol 164

- Huquan Z, Balance, Sustainable Development and Integration: Innovative Path for BIT Practise [2014] Journal of International Economic Law Vol 17:2
- Jacobs N M, Do Bilateral Treaties Attract Foreign Direct Investment to Developing Countries? A Review of the Empirical Literature [2017] International Relations and Diplomacy Vol 5:10
- Karl J, Investor- state dispute settlement: A government's dilemma [2013] Columbia FDI Perspectives, No 89
- Khoury S & Ciocchini P L, Investor State Dispute Settlement Institutionalising 'Corporate Exceptionality' [2018] Oñati Social Legal Services Vol 8:6
- Kidane W, Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan African Investment Code [2018] George Washington International Law Vol 50:3
- Levy S C, Drafting and Interpreting International Investment Agreements from a Sustainable Development Perspective [2015] Groningen Journal of International Law Vol 3:1
- Mann H, Reconceptualising International Investment Law: Its role in sustainable development [2013] Lewis Clark Law Review Vol 17:2
- Mbengue M M, Africa's Voice in the Formation, Shaping and Redesign of International Investment Law [2019] ICSID Review- FILJ
- Mickelson K, Rhetoric and Rage: Third World View in International Legal Doctrine [1998] Wisconsin International Law Journal Vol 16:2
- Mutua M, What is TWAIL [2000] Proceedings of the ASIL Annual Meeting, 94
- Neumayer E & Spess L, Do Bilateral Investments Treaties Increase Foreign Direct Investment to Developing Countries? [2005] World development 33 (10)
- Odumosu T I, The Law and Politics of Engaging Resistance in Investment Dispute Settlement [2007] Penn State International Law Review Vol 26:2
- Parra R A, Participation of African States in the making of the ICSID Convention [2019] ICSID Review Vol 34:2
- Porterfield C M, Exhaustion of local remedies in Investor-State dispute settlement: An idea whose time has come [2015] Yale Journal of International Law Vol 41
- Trakman E L, The ICSID under siege [2012] Cornell International Law Journal Vol 45
- Sauvant P K & Mann H, Towards an indicative list of FDI sustainability characteristics [2017] Geneva: International Centre for Trade and Sustainable Development &World Economic Forum

- Sauvant P K, 'Promoting sustainable FDI through international investment agreements,' [2019] Columbia FDI Perspectives, No. 251
- Simiyu F, Rethinking and Recasting Bilateral Investment Treaties as integrative Tools for Sustainable Development: The Kenyan Experience [2014] European Journal of Sustainable Development
- Schacherer S & Mbengue M M, The 'Africanization of International Investment Law: The Pan African Investment Code and the Reform of the International Investment Regime [2017] Journal of World International Trade 18
- Sornarajah M, State Responsibility and Bilateral Treaties [1986] Journal of World Trade Law Vol 20
- Vandevelde J K, A Brief History of International Investment [2005] University of California Davis, JILP Vol 12:1

Student Papers

- Karanja Natasha, The Pan-African Investment Code (PAIC), the much-needed saviour? Assessing the decolonisation of Bilateral Investment Treaties through the use and promotion of PAIC as a guiding framework for African States (Unpublished LLM SOAS 2020)
- Odumosu T I, ICSID, Third World Peoples and the Reconstruction of the Investment Dispute Settlement System (PhD, University of British Columbia 2010)

Online Articles/ Statements

- *Cortec* Case details <https://icsiddev.prod.acquia-sites.com/cases/case- database/case-detail?CaseNo=ARB/15/29 > accessed 1 September 2021
- Draft Kenya Investment Policy: Investment growth for sustainable development < https://www.tralac.org/news/article/11795-draft-kenya-investment-policy-investment-growth-for-sustainable-development.html> accessed 1 September 2021
- International Policy Hub; International Investment Agreements Navigator, UK- Kenya BIT1999 <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2225/kenya---united-kingdom-bit- 1999-> accessed 1 September 2021

- Kenya's foreign trade disputes costly – experts <https://www.the-star.co.ke/business/kenya/2019-04-25-kenyas-foreign-trade-disputes-costly- experts/> accessed 1 September 2021
- UNCTAD, Special Update on Investor State Dispute Settlement: Facts and Figures (UN 2017 Issue 3) <https://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf> accessed 1 September 2021