BRIDGING THE GAP: INTERNATIONAL INVESTMENT LAW AND INVESTOR-STATE DISPUTE SETTLEMENT MECHANISM AS A CATALYST FOR ECONOMIC DOWNTURN AND HUMAN RIGHTS VIOLATIONS IN DEVELOPING COUNTRIES

by

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First to Almighty Allah, then family and lastly to friends and loved ones who turned family

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Abstract

At the very core of international investment law (IIL) lies the protection of foreign investments which are often exhibited by clauses found in Bilateral Investment Treaties (BIT's) or investment chapters of Free Trade Agreements (FTA's). These protections contain standard clauses that usually includes investor-state dispute settlement (ISDS) as a mode of resolving disputes.

For developing countries, the presence of foreign direct investment (FDI) within the territory of their host state signals development. However, the existence of certain standards for protecting FDI and foreign investors alike, as found in BIT's or investment chapters of FTA's, have meted out deleterious effects on the regulatory powers and developmental status of developing countries. As a result, this thesis aims at examining the resulting consequences of IIL on developing countries. In so doing, I adopt the use of TWAIL constructivism as a main method to reveal how the power imbalance that plagued the history of IIL contributed to its present-day lopsided nature in terms of who the dominant actors are and how the latter affects the process of norm formation under international law. Using the example of the recent trends in Africa, I note that developing states need to ensure that the rulemaking trends taking place isn't merely reactionary to the lopsided nature of IIL within their respective jurisdiction. To this end, to ensure a body of IIL that will work both at the national and international level, the following questions, which will eventually lead to a multistakeholder approach must be considered: who are the actors? Does an actor have the capacity to speak and be heard? What is the actor saying and how is the actor saying what it purports to be said?

LIST OF ABBREVIATIONS USED

1. AfCFTA – African Continental Free Trade Agreement
2. AU – African Union
3. BIT – Bilateral Investment Treaty
4. CIL – Customary International Law
5. COMESA – Common Market for Eastern and Southern Africa
6. ECHR – European Court on Human Rights
7. ECOWAS – Economic Community of West African States
8. EU – European Union
9. FET – Fair and Equitable Treatment
10. ICSID – International Center for the Settlement of Investment Disputes
11. IIA – International Investment Agreement
12. IIL – International Investment Agreement
13. ISDS – Investor State Dispute Settlement
14. MIC – Multilateral Investment Court
15. NIEO – New International Economic Order
16. OECD – Organization for Economic Development
17. PAIC – Pan African Investment Code
18. SADC – South African Development Community
19. TWAIL – Third World Approach to International Law
20. UNCTAD – United Nations Conference on Trade and Development
21. UNCITRAL – United Nations Commission on International Trade Law
22. WG BHR – Working Group on Business and Human Rights

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CHAPTER ONE – INTRODUCTION

1.1 Overview

The overarching goal of this thesis lies in ascertaining how the negative impact of international investment law (IIL), and investor-state dispute settlement (ISDS) – as exhibited from the activities of foreign investors – can be averted in developing countries. The need to embark on this venture arose from the dominant role that the regimes of IIL and ISDS played and continues to play in the current system of international economic order as found in bilateral investment treaties (BITs) and investment chapters of free trade agreements that are concluded between countries in the global north and south. IIL and ISDS has always been identified as central systems of economic governance under international law.[1]

The prominence of IIL and ISDS grew because of the belief that their existence helps to protect investors which by extension, advance developing country's wellbeing in meeting developmental ends.[2] This belief, is now being challenged.[3] The key factors driving the former are multifarious and are closely attached to the damaging effect that IIL, through the machinery of ISDS, has occasioned in developing countries. For instance, it has been opined that investors weaponize the system of ISDS to obtain huge monetary sum against

[1] Stephan W Schill, *The Multilateralization of International Investment Law*, (New York: Cambridge University Press, 2009)

[2] Ibironke T Odumosu, "The Law and Politics of Engaging Resistance in Investment Dispute Settlement" (2007) 26 Penn State Intl L Rev 251 [Odumosu, "*The Law and Politics of Engaging Resistance in Investment Dispute Settlement"*]

[3] Jennifer Tobin & Susan Rose-Ackerman, "Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties" (2005) Center for Law, Economics and Public Policy Research Paper No 293.

developing countries in a way that impoverish and worsen their economic situation and outlook.[4] In their article, Kevin Gallagher & Elen Shrestha, identified how developing countries were subject to more ISDS claims than developed countries. The authors highlighted how claims and awards against developing countries were "financially significant and higher than those of developed countries."[5] The infringement of states' regulatory powers in a way that undermines their sovereignty to undertake legitimate policies is another effect that has been recognized.[6] Often, this arises from the standards of protection, such as the fair and equitable treatment clause, given to investors at the expense of host states.[7] Closely related to the restraint on the exercise of regulatory power is human rights. In addition to the probable impact of a huge ISDS award preempting developing countries from meeting the socioeconomic rights of its citizenry,[8]

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[4] Kevin P Gallagher & Elen Shrestha, "Investment Treaty Arbitration and Developing Countries: A Re-Appraisal" (2011) Global Development and Environment Institute Working Paper No. 11-01. Gallagher and Shrestha undertook an empirical study that revealed how developing countries stand at the tail end regarding the financial impact of claims arising from ISDS. See also Micheal T Kelly, "What Macroeconomic Conditions Lead Financial Crisis?" (2018), online (pdf): <systemicrisk.ac.uk/sites/default/files/images/2.%20Kiely_LSE_April2018.pdf>

[5] *Gallagher & Shrestha*, *supra* note 4 at 9

[6] Muthucumaraswamy Sornarajah, "Mutations of Neo-Liberalism in International Investment Law" (2011) 3:1 Trade L & Development 203 [Sornarajah, "Mutations of Neo-Liberalism in International Investment Law"]; B S Chimni, "The World of TWAIL: Introduction to the Special Issue" (2011) 3:1 Trade L & Development 14; Mavluda Sattorva, "Do developing Countries really benefit from investment treaties? The impact of international investment law on national governance" (21 December 2018), online: *investment treaty news* <iisd.org/itn/en/2018/12/21/do-developing-countries-really-benefit-from-investment-treaties-the-impact-of-international-investment-law-on-national-governance-mavluda-sattorova/>

[7] *Tecnicas Medioambientales Tecmed, S.A v. The United Mexican States*, (2003), italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Mr. Carlos Bernal Verea, Prof. Jose Carlos Fernandez Rozas and Dr. Horacio A. Grigera Naon) [*Tecmed v Mexico*]

[8] Dr Mavluda Sattorova, Book Review of *International Investment Law and Development: Bridging the Gap* by Stephan W Schill, Christian J Tams & Ralner Hofman (Cheltenham: Edward Elgar, 2015), online (pdf): <unctad.org/system/files/official-document/diaeia2017d3a5_en.pdf>; Claiton Fyock, "International Investment Law and Constraining Narratives of 'Development': 'Economic Development' in the definition of Investment, (24 February 2020), online (blog): <afronomicslaw.org/2020/02/23/international-investment-law-and-constraining-narratives-of-development-economic-development-in-the-definition-of-investment>; Chaisse J & Choukroune S, eds, *Handbook of International Law and Policy*, (Singapore: Springer, 2020), DOI: <10.1007/978-981-13-5744-2_83-1>; Barnali Choudhury, "International Investment

investors have on several occasions engaged in acts and omissions that not only threatens but also violates the interests of the citizens of developing countries in areas spanning across environmental degradation,[9] climate change,[10] and human rights as a whole.[11] As a corollary, investors responsible and engaged in acts of gross infractions are often overlooked due to their non-accountable status under international law.[12] To reiterate this notion, Kweku Adams et al[13] undertook a study in 2021 that revealed two hundred and seventy-three cases of human rights violations committed by one-hundred and sixty investors from the global north in developing countries, with those from the United Kingdom and United States leading the pack.[14] With the clear goal of forestalling

Law and Noneconomic Issues" (2020) 20:245 Vanderbilt J Transnational L 1, online (pdf): <discovery.ucl.ac.uk/id/eprint/10091379/1/InvArticle.pdf>

[9] Andreas Kulick, *Global Public Interest in International Investment Law*, (Cambridge: Cambridge University Press, 2012) 225

[10] Sara Seck, "Climate Change, Corporate Social Responsibility, and the Extractive Industries" (2018) 31:3 J of Environmental L & Practice 271; Anatole Boute, "The Potential Contribution of International Investment Protection Law to combart climate change" (2009) 27:3 J of Energy and Natural resources L 333

[11] Ludovica Chiussi, "The Role of International Law in the Business and Human Rights Process" (2019) 21:1 Intl Community L Rev 35, DOI: <10.1163/18719732-12341389>

[12] James Thuo Gathii, "Reform and Retrenchment in International Investment Law" (13 January 2021), DOI: <10.2139/ssrn.3765169> [Gathii, "Reform and Retrenchment in International Investment Law"]; Kabir A N Duggal & Nicholas J Diamond, "Human Rights and Investor–State Dispute Settlement Reform: Fitting a Square Peg into a Round Hole?" (2021) 12:2 J of Intl Dispute Settlement, 291, DOI: <10.1093/jnlids/idab006>; Daniel J Gervais, "Investor-State Dispute Settlement: Human Rights and Regulatory Lessons from *Lily v. Canada*" (2018) 8:459 UC Irvine L Rev 459, online (pdf): <law.uci.edu/lawreview/vol8/no3/Online_Gervais.pdf>

[13] Kweku Adams et al, "Multinational corporations and human rights violations in emerging economies: Does commitment to social and environmental responsibility matter?" (2021) 280:15 J of Environmental Management 111689, DOI: <10.1016/j.jenvman.2020.111689>. In the study, the authors identified the "corporate hypocrisy" of multinational and transnational corporations(M/TNCs) as they all "claimed compliance with human rights policies" by expressing their commitment to ethical business conduct in their annual operational report even though in practice, their conducts showed otherwise. Interestingly, it was also shown that ninety percent of the M/TNCs had social responsibility/sustainability committee, the firms are signatories to the United Nations Global Compact and likewise, have all reported compliance with International Labour Organization.

[14] The presence of M/TNCs from United States (US) and United Kingdom (UK) and their engagement in gross human rights violations isn't coincidental. Historically, the US and UK were instrumental in devising ideational rules of IIL that was principally geared towards protecting the interest of their citizens who invested in overseas colonies. As would be discussed in greater details in chapter 2, the invention of "self-interested" rules, representing neoliberal capitalism, later evolved and were disguised as seemingly

situations as this, in 2014, the United Nations, at the request of South Africa and Ecuador, initiated the process of creating a binding treaty that would hold investors responsible for human right violations.[15] However, key players i.e., countries in Europe and the US whose interest seems to be at stake, have been frustrating the process of creating a draft treaty.[16] The actions of these countries highlights an important point in this thesis i.e., the dominant nature of power dynamics which historically has been used as a weapon for marginalizing developing countries and their people.[17]

Generally, the existence of power had always been at play under IIL. As Ibironke Odumusu succinctly explained "…the development of the international law on foreign investment has always involved power exertion and struggles within the international order…"[18] Whether in early form of imperial ventures as exhibited from colonialism or in the modern context of influencing treaty making where dominance is often asserted over developing countries,[19] it becomes obvious that a systemic set of socially constructed norms were used and manipulated as legal doctrines, rules, and principles which by and large, influenced the current trajectory of the rules of the international economic order to the

objective laws, touted as standards of protections, that transmuted and elevated the former into a system of IIL which ISDS inevitably became an extension of.

[15] Bernaz N, "Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty (2021) 22 Human Rights Rev 45, DOI: <10.1007/s12142-020-00606-w>

[16] Planet Labour, "UN: draft Treaty on corporate accountability for human rights violations still stalled" (last visited 4 July 2022), online: <planetlabor.com/en/corporate-social-responsibility/initiatives-from-the-public-authorities-and-other-stakeholders/un-draft-treaty-on-corporate-accountability-for-human-rights-violations-still-stalled/>

[17] Anthony Anghie, *Imperialism, Sovereignty, and the making of international law*, (Cambridge: Cambridge University Press, 2005) [Anghie, *Imperialism, Sovereignty and the Making of International Law*]

[18] Ibironke T Odumusu, "The Antinomies of the (Continued) Relevance of ICSID to the Third World" (2007) 8:345 San Diego Intl L J 345 at 352 -353 [Odumusu, "The Antinomies of the (Continued) Relevance of ICSID to the Third World"]

[19] Anghie, *Imperialism, Sovereignty and the Making of International Law*, *supra* note 17

disadvantage of developing countries.[20] The existence of these sets of constructed norms which was preserved through ISDS, vide the institution of the International Center for the Settlement of Investment Dispute (ICSID), an institution created by the World Bank to settle investment disputes, was used to facilitate the continuance of socially constructed norms that favoured the north, both in substance and procedure.[21] In one vein, Ibironke Odumusu attributed this phenomenon to the domineering role of certain class of actors existing under IIL.[22] She asserted that the identity of the hegemon constitutes a crucial factor with which norms are established.[23] In the other vein, she contended that these identities can be altered within the same structure if they are resisted and reconstituted.[24] In line with the latter proposition, the need for the ICSID to accommodate and consider multiple and diverse interests was underscored.[25] However, the extent to which this proposition has been achieved remains to be seen and will form part of the inquiry that I will undertake in this thesis as would be revealed from Tecmed v Mexico, Bear Creek v

[20] Katie Miles, *The Origin of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013). Though outside the scope of this work, the point above evokes an equally important concept which revealed how the set of norms preserved as rules, principles and doctrines constituted legal transplantation.

[21] M Sornarajah, *The International Law on Foreign Investment*, 3rd ed (New York: Cambridge University Press, 2010) [Sornarajah, *The International Law on Foreign Investment*]

[22] Ibironke T. Odumusu, "Challenges for the (Present/) Future of Third World Approaches to International Law (2008) 10:4 Intl Community L Rev 467, DOI: <10.1163/157181208X361430>

[23] Ibid

[24] Ibid

[25] Odumusu, "The Antinomies of the (Continued) Relevance of ICSID to the Third World", *supra* note 18

Peru, Pierro Forresti v South Africa[26] and Siag v the Arab Republic of Egypt[27] – cases I will examine subsequently.

As I would discuss in further details in subsequent chapters, the circumstances that bred the current rules of the international economic order that excluded the global south has revealed its ill-fitted nature. Countries in the global south have start to challenge the system. The regime of IIL and ISDS is under attack and countries like Bolivia, Venezuela, and South Africa are amongst those that have abandoned the system.[28] These trends show the frail nature of the current international economic order in a way that exemplifies the revolt taking place within the structure of IIL itself. And though an on-going reformatory process of the regime of ISDS seems to be ongoing as found under the mandate of the United Nations,[29] as I would subsequently reveal, the process is riddled with the historic nature of power imbalance that characterized the interaction between various actors that are found in the global north and south under IIL. Hence, considering recent trends, I will situate the framework of this thesis by examining certain damaging effects of IIL and ISDS with the consequent goal of exploring how they can be averted

[26] *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, (2010) italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Professor Vaughan Lowe QC, The Hon Charles N. Brower, and Mr Joseph M. Matthews)

[27] *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, (2009) italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Mr. David AR Williams QC, Prof Michael Pryles and Prod Francisco Orrego Vicuna) [*Siag v Egypt*]

[28] Trishna Menon & Gladwin Issac, "Developing Country Opposition to an Investment Court: Could State to state Arbitration Dispute Settlement be an alternative?" (17 February 2018), online (blog): *Kluwer Arbitration Blog* <arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/>

[29] United Nations Commission on International Trade Law, "Working Group III: Investor-State Dispute Settlement Reform" (last visited 31 July 2022), online: < uncitral.un.org/en/workinggroups/3/investor-state>

through a process of resistance that will accommodate and be inclusive of the interest of state and non-state actors, as found in developing countries, under IIL.

The central discourse in this thesis will also be positioned under the broader context of placing IIL and ISDS under the umbrella of enabling sustainable development in developing countries. The idea of establishing IIL within the praxis of sustainable development is grounded "in a shift in focus from looking at the quantity of investment as the only issue, to the quality of investment as the key issue."[30] In recent times, the use of sustainable development which the attraction of sustainable investment is predicated upon, has an impact that implicates the north-south relationship. Developing countries are emphasizing on the qualitative aspects of an investment to further their developmental growth.[31] This in turn has led to the understanding that only sustainable investment warrants attraction in developing countries.[32] The existence of the immediately preceding fact shows that the relationship between IIL and ISDS on the one hand and the idea of attracting sustainable investment to further sustainable development on the other hand, ought to be mutually exclusive.[33] However, such a relationship is often bedeviled with tension.[34] Wolfgang Alschner and Elizabeth Tuerk identified how investment protection, achieved through IIL and ISDS, conflicts with policy

[30] Howard Mann, "Reconceptualizing International Investment Law: Its Role in Sustainable Development" (2013) 17:2 Lewis & Clark L Rev 521

[31] Naomitsu Nakagawa, "How Quality Infrastructure Investment is making a difference in development" (1 June 2022), online (blog): *world bank* <blogs.worldbank.org/ppps/how-quality-infrastructure-investment-making-difference-development>

[32] OECD, *Investment for Sustainable Development*, OECD Element paper 2015/11-3, online (pdf): <oecd.org/dac/Post%202015%20Investment%20for%20sustainable%20development.pdf >

[33] Manjiao Chi, *Integrating Sustainable Development in International Investment Law*, (London: Routledge, 2017)

[34] Ibid

objectives related to sustainable development such as the preservation of the environment, promotion of social equality and protection of public health.[35] The authors concluded with the proposition for inter-state cooperation so that the friction between the regime of IIL and sustainable development will be better addressed.[36]

At a glance, it becomes apparent that the notion of inter-state cooperation strikes at the very heart of power dynamics, thus calling into question the identities of the actors involved in effecting a change as well as those controlling how the change will be effected. To highlight this, Malgorzata Blicharska et al undertook a study that revealed the uneven nature of the partnership between the north and south in promoting sustainable development.[37] In the study, the authors revealed the global inequalities plaguing the ideas driving sustainability by identifying how low-income countries, often found in the south, were involved in few partnerships' arrangement with high income countries, often found in the north. It was observed that the current trajectory of ideas and implementation measures driving sustainable development goals (SDGs)[38] have the propensity of being driven by a northern agenda. The authors cautioned against this and noted how the millennium development goals, i.e., the predecessor of the current SDGs,

[35] Wolfgang Alschner & Elisabeth Tuerk. "The role of international investment agreements in fostering sustainable development" in Freya Baetens, ed, *Investment Law within International Law: Integrationist Perspectives*, (Cambridge: Cambridge University Press, 2013) 217.
[36] Ibid
[37] Malgorzata Blicharska et al, "SDG Partnership may perpetuate the global North-South divide" (2021) 11 Scientific Report 22092
[38] According to the United Nations, the Sustainable Development Goals are "the blueprint to achieve a better and more sustainable future for all. They address the global challenges we face, including poverty, inequality, climate change, environmental degradation, peace, and justice." United Nations, "Take Action for the Sustainable Development Goals" (last visited 12 August 2022), online: <un.org/sustainabledevelopment/sustainable-development-goals/>

prioritized northern needs as opposed to southern views. They believed this could be forestalled and remedied with the existence of the SDGs.[39]

The uneven handedness and the propensity of creating a sustainable agenda that would be primarily driven by northern ideology reveals that the exact connotation of sustainable development, is as a matter of fact, a concept with a high relative meaning. Clearly, as commentators have acknowledged, "sustainability is an idea that has different meanings in different settings and to neglect this concept is to limit the theoretical breath of the concept."[40]

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[39] Blicharska et al, *supra* note 36. Though outside the scope of this thesis, the existence of power dynamics on the overall notion of sustainable development becomes obvious when viewed against the effects of investment activities in occasioning injustice for the global south. For instance, in the field of environmental law, studies have shown how those found in the global south stands in a disadvantageous position regarding the effects of mining activities on the environment and climate. To this end, suggestions have been made regarding the use of distributive and environmental justice to apportion the historical harm that the north has occasioned but whose detriment will be mostly borne by individuals and communities found in the global south. See generally, Acala Chandani, "Distributive Justice and Sustainability Gap as a Viable Foundation for the Future Climate Regime" (2007) 1:2 Carbon & Climate L Rev 152; Sumudu A Atapattu, Carmen G Gonzalez & Sara L Seck, "Intersections of Environmental Justice and Sustainable Development: Framing the Issues" in Sumudu A Atapattu, Carmen G Gonzalez & Sara L Seck eds, *The Cambridge Handbook of Environmental Justice and Sustainable Development* (Cambridge: Cambridge University Press, 2021); Alan Carter, "Distributive Justice and Environmental Sustainability" (2002) 41:4 The Heythrop J 449

[40] Richard Vercoe & Robert Brinkmann, "The Tale of Two Sustainabilities: Comparing Sustainability in the Global North and South to Uncover Meaning for Educators" (19 March 2012), online: *The Journal of Sustainability Education* <susted.com/wordpress/content/a-tale-of-two-sustainabilities-comparing-sustainability-in-the-global-north-and-south-to-uncover-meaning-for-educators_2012_03/> To shed light into this conclusion, in 2012, Richard Vercoe and Robert Brinkman undertook a food sustainability study within the Northern region of Long Island, New York in United States and the Southern region of Chiloé in Chile to better understand and proffer insight into the dependence of sustainability on factors such as cultural experiences and geography. Both regions were compared to show that in Long Island, food sustainability emerged in reaction environmental degradation and excessive urban development. Nevertheless, it remained an expensive option making the resident of the city to participate in industrialized food systems without any regards for its impact on the planet. In contrast, the residents in Chiloé sought to prevent the impacts attached with the neoliberal policies of the highly industrialized food market to preserve sustainable food practices and protect local natural resources. While the above analogy was in respect of food sustainability, as the authors recognized, "the same conundrum exist for many other sustainability themes such as economic development." Thus, the difference in meaning of what should embody sustainability in the global south needs to be adequately tailored to reflect the whims of the state and non-state actors embedded within it.

At this point, it is crucial to note that though I refer to developing countries, the jurisdictional limitation, with emphasis on the current trends taking place within the third world to challenge IIL, of this work will center on the developments occurring within the continent of Africa.[41] Adopting an Afrocentric approach is primarily fixated on the fact that historically, African nations had always been subject to the interplay of power dynamics. Signed BITs often reflected rules that were developed by countries in the global north.[42] The deleterious impact of these treaties to the peculiar situation of Africa countries and their citizens alike have however led to a more active approach towards rulemaking at the regional and continental level.[43] For instance, the South African Development Community Protocol on finance and Investment contained provisions which prevented the use of ISDS as a form of dispute resolution in the region.[44]

[41] According to the International Monetary Fund, countries in the global south are seventy-eight in all. To this end, addressing the challenges faced by each developing country under IIL would be completely outside the scope of this thesis. Though I should point out that in certain cases, there are similarities in issues peculiar to the continent of Africa and certain other regions. In some cases, I will refer to the issues plaguing the regime of IIL and how it affects African states. Nevertheless, certain differences occur as would be made obvious from chapter 5 i.e., the trends taking place within the continent of Africa to address the ills of IIL in the region. See "Developing Countries" (last visited 12 August 2022) online: *WorldData* <worlddata.info/developing-countries.php#:~:text=According%20to%20the%20IMF%20definition,and%20numerous%20other%20island%20states.>

[42] Hamed El-Kady & Mustaqeem De Gama, "The Reform of the International Investment Regime: An African Perspective" (2019) 34:2 ICSID Rev – Foreign Investment L J 482; Alschner Wolfgang & Skougarevskiy Dmitriy "Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice" (2016) World Trade Institute Working Paper No 7; Stefanie Schacherer, "The AfCFTA Investment Protocol: An Opportunity to converge and propel the Pan African Investment Code (PAIC): Insights from the Negotiations of the PAIC, Paper delivered at the African Arbitration Association 2nd Annual International Arbitration Conference 15th – 16th April 2021, online (blog): <afaa.ngo/page-18097/10440007>

[43] El-Kady & De Gama, *supra* note 42

[44] Makane Moise Mbengue & Stefanie Schacherer, "The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime" (2017) 18:3 J World Investment & Trade 414

Recently, the Pan African Investment Code (PAIC), a non-binding document with the potentials of becoming binding upon adoption by African leaders, was created in 2015 as a model for facilitating sustainable investment on the continent. The PAIC contains innovative provisions that is well tailored towards the context of driving sustainability for African countries. For instance, it makes an express provision on business and human rights in a way that investors will be held accountable for human rights violations.[45] Provisions relating to the protection of the environment, [46] and labour rights[47] were made. The PAIC also contained provisions highlighting the importance of an investment's contribution to development and sustainable development.[48] In the realm of disputes, provisions were made for a system of state-to-state dispute resolution.[49] The PAIC anticipated investor-state disputes as well by making a tailored provision in that regard.[50] Article 42 contains provision localizing the use of arbitration by stating the binding law to be that of a host state involved subject however to the exhaustion of local remedies. In further localizing investment disputes, the PAIC expressly provided that arbitral proceedings will be conducted in centers located in Africa.[51] Thus, there was no express mention of the International Center for the Settlement of Investment Dispute.[52]

[45] *Pan African Investment Code*, 2015 Art 24 [*PAIC*]
[46] *PAIC*, Art 37
[47] *PAIC*, Art 34
[48] *PAIC*, Art 22
[49] *PAIC*, Art 41
[50] *PAIC*, Art 42
[51] Ibid
[52] As would become obvious in succeeding chapters, the International Center for the Settlement of Investment Disputes (ICSID) was developed under the aegis of the World Bank to serve as an institutional body for settling investment disputes between contracting states and investors of other state parties establishing it. The use of the ICSID is significant because developing countries have generally criticized its use. In fact, the instance of Bolivia, Venezuela and South Africa referred to earlier and regarding the use of

The innovative provisions of the PAIC, though lauded,[53] remains to be seen in terms of its impact. This is because there have questions regarding whether its use should be constrained to the south-south or north south relationship. Different positions have emerged. Some have indicated that the PAIC embodies the rulemaking prowess of African states and as such, must be elevated as a body of norms at the international level.[54] Others on the other hand have suggested that it can inform the process of rulemaking even at the continental level because the PAIC is believed to be well tailored for Africans since African countries have adopted European model of rulemaking for long.[55] At this point, the relevance of the PAIC as an instrument of change, regarding both the north-south and south-south relationship, becomes obvious. Particularly for south-south relationships, speculations have been made that the PAIC will inform the relationship of African states at the continental level, considering the existence of the African Continental Free Trade Agreement (AfCFTA).[56]

ISDS entailed their withdrawal from the treaty establishing the ICSID because often, ISDS disputes are undertaken through the auspice of the ICSID. To this extent, the exclusion of the ICSID is instrumental because of the criticism that the institution promotes neoliberal ideals and fails to consider the factors that would help propel the economic development of developing countries. See Odumusu, "The Antinomies of the (Continued) Relevance of ICSID to the Third World", *supra* note 18.

[53] Mbengue & Schacherer, *supra* note 44

[54] Makane Moise Mbengue & Stefanie Schacherer, "Africa and the Rethinking of International Investment Law: About the Elaboration of the Pan-African Investment Code" in Anthea Roberts et al, eds, *Comparative International Law*, (New York: Oxford University Press, 2018) 547

[55] Ibid

[56] Rose Rameau, "The African Perspective: The Development of Investment Laws, the Pan-African Investment Code (PAIC), and the African Continental Free Trade Area in the 'New Economic World Order'" (2020) 114 Proceedings of the ASIL Annual Meeting 62. NB: The AfCFTA is the first free trade agreement of its kind. Its geographical scope, which extends to all African countries, creates the largest free trade area in the world. Its impact in transforming the African continent is truly revolutionary and its projected to lift about 50 million people from poverty and also, raise incomes by 9% by the year 2035. Valentino Desilvestro, "Free Trade Deal Boosts Africa's Economic Development" (30 June 2022), online: *The World Bank* <worldbank.org/en/topic/trade/publication/free-trade-deal-boosts-africa-economic-development>

The AfCFTA which entered into force in 2019, is currently in its second phase of negotiation where the terms of an investment protocol will be the center of discussion with the anticipation of reaching a conclusive agreement by December 2022.[57] This investment protocol (AfCFTA Investment Protocol) is a related instrument of the main AfCFTA. It is instrumental because it is anticipated to form the bedrock for advancing the interests of African states at the first the south-south level before the north-south level.[58] The implication of this is that the AfCFTA Investment Protocol serves as an incremental mechanism for advancing the interest of African states, first at the continental level and then the global level.

Though at the moment, the negotiation for the AfCFTA Investment Protocol is underway, the extent to which the PAIC, should inform the negotiation of the investment protocol will be a subject of inquiry in this work because of the propensity it has in formulating a north-south relationship. Considering the pioneering development taking place across the continent of Africa, it is obvious that the recent trends constitute an attempt to restructure the continent in a way that would align with fostering a well-tailored approach towards sustainability.[59] To this end, it can be said that the developments constitute Africa's efforts to re-order the system of IIL starting from within itself. In so doing, there is likelihood that the continent's efforts have the unprecedented opportunity to lead the

[57] "Explanatory Session on the AfCFTA Investment Protocol in Kenya" (last visited 4 July 2022), online (blog): *IISD* <iisd.org/events/explanatory-session-afcfta-investment-protocol-kenya>
[58] Olabisi D Akinkugbe, "Africanization and the Reform of International Investment Law" (2021) 53:1 Case W Res J Intl L 7
[59] Makane Mbengue, "The quest for a Pan-African Investment Code to promote sustainable development" (21 June 2016), online (blog): *Tralac* <tralac.org/news/article/9927-the-quest-for-a-pan-african-investment-code-to-promote-sustainable-development.html>

reconstruction of the regime of IIL, through the investment protocol, in a manner that will create an inclusivity for all stakeholders.

1.2 Research Question

With this research, the sole question – from which other questions and analysis flow – that I posit is:

> "How can the detrimental effects of international investment law in developing countries be addressed?"

1.3 Methodologies

Considering the numerous literature that exists on key areas that I will touch upon in my thesis, I will adopt the following methodologies to make this work align with the scholarly novelty that it requires:

1.3.1 Third World's Approach to International Law

As a tool of critique, a substantial portion of this thesis will make use of the Third World's Approach to International Law (TWAIL) as a form of methodology. In recent years, TWAIL scholarship has emerged to challenge the mainstream account of IIL.[60] TWAIL scholars views international law as a construct that operated to "dominate and subordinate the people of the third world."[61] In the realm of IIL and ISDS, TWAIL has been used to

[60] Richard Falk, "Foreword: Third World Approaches to International Law (TWAIL) special issue" (2016) 37:11 Third World Quarterly 1944, DOI: <10.1080/01436597.2016.1205443>

[61] Mutua Makau, and Antony Anghie. "What Is TWAIL?" (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 31. It should be noted that in this thesis, I will interchange the use of third world with developing countries in certain instances and in others the global south. Conversely, I will use the west interchangeably with developed countries and the global north.

challenge the neoliberal history and rules of the current international economic order. [62] As James Thuo Gathii explained, "the relations between colonial peoples and their … overloads cannot be understood outside the prism of power, hegemony, and control."[63] The existence of hegemonic power and control was and is still at play in contemporary times. This definitive feature characterizes the nature of IIL to such an extent that the very idealized notion of human rights protection, as Makau Mutua explained, is predicated upon the universalization of European principles and norms."[64] As will be examined in chapter three below, the veracity of this statement would be found in the ICSID tribunal's approach in the *Tecmed case* where the notion of human rights was determined not by its constitutive and inherent nature of the third world people in that case, but by the yardstick espoused by European courts.

1.3.2 TWAIL Constructivist

The research methodology of TWAIL Constructivist is an interdisciplinary methodology rooted in the constructivist theory of international relations as well as the TWAIL. It was espoused by Ibironke Odumusu who explained the need to create an interactional theory of law that actively incorporates the perspective of Third World People in an area that fails to have an active engagement with them.[65]

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[62] James Thuo Gathii, "The Promise of International Law: A Third World View" (2021) 36:3 American University Intl L Rev, online: <digitalcommons.wcl.american.edu/auilr/vol36/iss3/1> [Gathii, "The Promise of International Law: A Third World View"]

[63] See James Thuo Gathii, "Imperialism, Colonialism and International Law" (2007) 54 Buffalo L Rev 1013 at 1016

[64] Makua*, supra* note 60

[65] Ibironke Odumosu, *ICSID, Third World Peoples And The Re-Construction of The Investment Dispute Settlement System* (PhD Dissertation, University of British Columbia, 2010) [unpublished] [Odumosu, *Third World Peoples And The Re-Construction of The Investment Dispute Settlement System*]

Constructivist theory of international relations identifies the interactions between different actors under the umbrella of international system.[66] The theory perceives law in terms of how it is socially constructed by the actors within its sphere. In addition, it goes beyond interpreting legal provisions *simpliciter* to recognizing the existence of power and interest of different classes of actors in the society.[67] Nevertheless, the theory failed to make an inquiry into the nature of the relationship between the classes of actors within its scope. To fill this gap, Odumusu adopted the use of TWAIL.

To Odumusu, the use of TWAIL alongside the constructivist theory operates to factor in the existence of imperialism alongside its consequences on the third world people.[68] In other words, she believed the combination of TWAIL, and the constructivist theory will pave way for an undertaking that would facilitate the inclusion of the third world people under the auspice of IIL. Going by this, four key components of the TWAIL constructivist theory was used to define the engagement of the third world people under the international economic order i.e., "the identity of relevant actors, the power relations, the origin of socio-legal norms and ideational factors in the international system and the mode of engagement in the international order."[69]

In terms of identifying who the relevant actors are, Odumusu identified the multiplicity of various actors under the international system. Accordingly, these actors are

[66] N Onuf, "Constructivism: A User's Manual" in V Kubalkova, N Onuf & P Kower, eds,, *International Relations in a Constructed World* (London, ME Sharpe, 1998) 58
[67] Ibid
[68] Odumosu, *Third World Peoples and The Re-Construction of The Investment Dispute Settlement System*, *supra* note 65
[69] Ibid

characterized by the stake they have under the general auspice of the global order.[70] For the second category which recognize the role of power, she posited the question: "*does an actor have the capacity to speak?"* The import of this question focuses on the power dynamics and though she constrained her analysis to the third world people *qua* people, in this thesis, I will deploy its use in relation to third world states and third world people. I adopt this approach because the subjugation of third world state and non-state actors, via the indices of power dynamics, deserves a considerable attention. Regarding the origin of sociolegal norms and ideational factors, the history of the current legal system of IIL is considered alongside the status of ideas in reconstituting the economic order. The role of history is important and as would become obvious in subsequent chapters, it helps to proffer insight into the steps that are currently being undertaken by developing countries today. Additionally, the recent developments in the continent of Africa fulfils the ideational vision that has the propensity of reconstructing the system of IIL and ISDS. However, since it is expected that the presence of different ideas breeds tension, with some prevailing over others, the question as whether the recent trends in Africa will succeed under IIL remains to be explored. Finally, the method of engagement adopted by African states will be examined to determine its effectiveness against the backdrop of IIL.

1.3.3 A critical analysis of Law and History

The idea behind using law and history as a methodology is grounded in providing insights about past events, occurrence, and persons for the purpose of drawing inferences and

[70] Ibid

conclusions.[71] This method also seeks to gather evidence about past events, evaluate those evidence within the period of study to contribute to the understanding of the time that is being assessed.[72]

Objectivity is a central theme of the method of law and history.[73] Perhaps, a possible explanation could be tied to the notion of embarking on the quest for the discovery of a "truth." The possibility for discovering a truth can however be subject of challenge because Buckner Melton noted that the use of legal history is rapidly evolving.[74] This view seems to align with that of Laurence Lee Howe who stated that one of the fundamental purposes of history as a method is to ascertain "what actually happened and how we know it."[75] Howe's explanation has an important element of subjectivity which will help to validate the various experiences of third world states and people that I hope to highlight in this thesis. Though with emphasis on third world states and people, my goal is to dispel the idealized notion associated with maintaining an objective reality because I hold the view that historical accounts do not exist in isolation.

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[71]"Historical Research Method" (last visited 30 January 2022), online: <schools.yrdsb.ca/markville.ss/history/honours/researchmethods.html#:~:text=The%20purpose%20of%20historical%20research,requires%20interpretation%20of%20the%20information.>

[72] "Humanities Research Strategies: Historical Methodologies" (last visited 30 January 2022), online: *USC* <libguides.usc.edu/humanitiesresearch/historical>

[73] Robert H Jackson, "Full faith and Credit – The Lawyer's Clause of the Constitution, (1945) 45 Columbia L Rev 1

[74] Buckner F Melton Jr., "Clio at the Bar: A Guide to Historical Method for Legists and Jurists" (1998) 83:2 Minnesota L Rev 377

[75] Laurence Lee Howe, "Historical Method and Legal Education" (1950) 36:2 Bulletin of the American Association of University Professors (1915-1955) 346, online: <www.jstor.org/stable/40220732?seq=8#metadata_info_tab_contents>

Using law and history also serves the end of legitimizing the use of TWAIL as an approach because it will help trace the recent marginalization of developing countries and the third world people along the pages of history with the overall goal of ascertaining how the body of IIL can be best adept to consider the interest of those groups. To draw on the words of RP Anand: "to assess what should be done to make international law more effective and acceptable, it is imperative to look at the problem historically.[76]

Further, the use of law and history will ultimately lead me down the pathway of employing a micro history approach in focusing on and interpretating the mainstream interpretation of IIL in showing how in 1938, Mexico breached the international rule of protecting foreign property by expropriating the interests of foreign investors in the oil and agrarian industry.[77] The aim of doing this like Sigurður Gylfi Magnússon, & István M. Szijártó noted is to avoid the complexity intertwined with past events[78] because focusing on an individual event will make narratives easy to understand.[79] In doing this however, I will employ a critical analysis when interpreting the microhistory of Mexico. One key reason that I undertake this approach is because:

> "There is no singular method of writing the history of international law. Rather, scholars can select their own

[76] RP Anand, *New States and International Law*, 2nd ed (Gurgaon: Hope India Publications, 2008), 2; Obiora Chinedu Okafor, "Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective" (2005) 43 Osgoode Hall L J 171 at 177 [Okafor, "Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective"]; Antonius Rickson Hippolyte, "Correcting Twail's Blind Spots: A Plea for a Pragmatic Approach to International Economic Governance" (2016) 18:1 Intl Community L Rev 34

[77] Enrique Krauze, *Mexico: biography of power: a history of modern Mexico 1810-1996*, (New York: Harper Collins Publishers, 1997)

[78] Sigurður Gylfi Magnússon, & István M. Szijártó, *What is Microhistory? : Theory and Practice*, (Canada: Routledge, 2013)

[79] Ibid

> appropriate method among a variety of different approaches...as long as it addresses the specific research question of the author."[80]

Additionally, I deploy the use of microhistory to focus on the events that transpired in Mexico because unlike developing states of Africa, Mexico, as a developing country, attained independence from colonialism in the early 19th century.[81] This fact implicates the idea of examining the extent to which the country was able to contribute to the formation of legal norms under IIL. As would be examined, in chapter two, the country's experience played a decisive role in influencing newly emerging decolonized states, especially those from Africa, from accepting the rules of IIL as it were.

My use of law and history is also relevant in light of the ascertaining the implication of ISDS and the current reform agenda against its effects on third world states.

Doctrinal Methodology

The third methodology I will employ is the doctrinal method of research. Doctrinal research is concerned with the formulation of legal 'doctrines' through the analysis of legal rules.[82] The relevant features of doctrinal scholarship involve a critical conceptual analysis of legislation and case law to reveal a statement of the law relevant to the matter under investigation.[83]

[80] Valentina Vadi, "International Law and Its Histories: Methodological Risks and Opportunities" (2017) 58:2 Harv Int'l LJ 311g

[81] Virginia Guedea, "The Process of Mexican Independence" (2000) 105:1 American Historical Rev 116

[82] Paul Chynoweth, "Legal Research", in A Knight & L Ruddock, eds, *Advanced Research Methods in the Built Environment* (Oxford, UK: Wiley-Blackwell, 2008) 28 at 29.

[83] Terry Hutchinson, "The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law", (2015) 8:3 Erasmus L Rev 130

With respect to this thesis, I majorly deploy the use of the doctrinal methodology to critique the regime of IIL from a third world perspective. I use this to show how the process of norm creation emerged in a discriminatory way that fails to consider the interest of the third world. Unfortunately, the failure to consider third world interest eventually created a ripple effect where tribunals rely on earlier decisions to continuously subjugate the interest of third world states and people. In this regard, the primary case I focus on is Tecmed v Mexico.[84]

Though I consider other cases as well, the reason I use the Tecmed case is because of the implication of the tribunal's decision in defining several standards of protections under IIL i.e., standards such as the fair and equitable treatment and indirect expropriation under IIL. As a matter of fact, it constitutes the locus classicus wherein the meaning of legitimate expectation was given to the fair and equitable treatment clause and the test of proportionality was devised to ascertain the extent of indirect expropriation under IIL. My goal with using these cases is to show the central role that developed countries play in formulating legal norms, through the interpretations given to standards of protections, and how such norms implicate the third world.

[84] *Tecmed v Mexico, supra* note 7. Additionally, I will examine the cases of *Bear Creek Mining Corporation v. Republic of Peru*, (2017), italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Prof Karl-Heinz Bockstiegel, Dr. Michael Pryles & Prof. Phillippe Sands QC) and Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt, italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Mr. David AR Williams QC, Prof Michael Pryles and Prod Francisco Orrego Vicuna)

1.4 The use of International Law

This thesis will also rely heavily on international law. International generally is a body of law that regulates states conduct. It can exist either in the public or private sense with the implication that the former regulates states' conduct while the latter usually arise in relation to conflict of law issues as found in transactions between private entities.[85]

The focus of this thesis will be in relation to the public aspect of international law otherwise known as public international law. This is because the system of IIL has been recognized and considered as an aspect of public international law.[86] Moreover, the issues threatening the existence of IIL such as its impact on the regulatory powers of host states fall within the domain of public law thus lending credence to why IIL should be considered as an extension of public international law.

With the foregoing in mind, it should be pertinent to note that there are several sources of international law.[87] This includes customs, treaties, general principles of law, judicial decisions, and opinion of jurists.[88] Usually, treaties, customs and general principles have been recognized as primary sources of international law because of the believe grounded

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[85] Malcolm Nathan Shaw, *International Law*, (Cambridge, Cambridge University Press, 2003)

[86] Stephan Schill, *International Investment Law and Comparative Public Law*, (Oxford: Oxford University Press, 2010)

[87] Sources of international law is generally found under Article 38(1) of the statute of the international court of justice. The said article provided that:
The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states.
b. International custom, as evidence of a general practice accepted as law.
c. The general principles of law recognized by civilized nations.
d. Subject to the provisions of Article 59, judicial decisions, and the teachings of the most qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[88] *Shaw*, *supra* note 84

in their binding nature[89] while jurists' opinions and judicial decisions are seen as secondary sources of public international law. [90]

Beginning with the primary source of international law, it should be noted that treaties form the most common source of international law.[91] They are agreements entered into by states for the purpose of creating binding obligations.[92] States' obligations towards treaty provisions is generally based on the idea of *pacta sunt servanda*, a Latin phrase denoting that agreements must be kept and held in good faith.[93] While states might be obliged to follow through with treaty provisions, it should be understood that in certain cases, treaties might not necessarily be binding upon states except the additional step of ratification within their respective jurisdictions have been undertaken.[94] Because of the importance of treaties under IIL, this thesis will consider and have recourse to the provision of certain investment agreements binding upon states. This is because often, they constitute the bulwark of the regime regulating IIL today.[95]

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[89] David Kennedy, "The Sources of International Law" (1987) 2:1 American University Intl L Rev 1

[90] *Shaw*, *supra* note 84

[91] Malgosia Fitzmaurice & Anneliese Quast, *Law of Treaties*, (United Kingdom: University of London Press, 2007)

[92] Ibid

[93] Lukashuk, I I, "The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law" (1989) 83:3 American Journal of International Law 513

[94] Francois Stewart Jones, "Treaty and Treaty-Making" (1987) 12:3 Political Science Quarterly 420; Natalie Baird, "To ratify or not to Ratify? An Assessment of the Case for ratification of International Human Rights Treaties in the Pacific" (2011) 12 Melbourne J of Intl L 2. Though this raises the same question for Bilateral Investment Treaties, because of the binary nature of the number of parties involved, their entry into force is usually less cumbersome since in certain cases, parties' states that such treaties become effective upon signature. See United Nations Conference on Trade and Development, *The Entry into Force of Bilateral Investment Treaties (BITs)*, UNCTAD/WEB/ITE/IIA/2006/9, 2006

[95] Jeswald W Salacuse, "The Treatification of International Investment Law" (2007) 13:1 Law & Bus Rev Am 155

In addition to treaties, customs as another primary source of international law constitutes another aspect of international law that will be given detailed attention. Usually, customary international law (CIL) finds its basis in consistent practice of states as well as *opinio juris.*[96] Together, these two components signifies that the consistent actions of states will amount to a legal obligation on their part to be bound by such acts.[97] Though CIL constitutes a primary source of international law, it has been criticized and described as "deceptively simple."[98]

Daniel Joyner who likened CIL to the previous description highlighted the problematic nature of its dual components by asking questions such as "how many states does it take to manifest their state practice?" "How long must this practice have continued?" "What kind of state practice counts?" "Does the practice of some states matter more than the others?" "What does it mean for a state to act under a sense of legal obligation?" "Do they actually have to think what they are doing is required by existing law?" "And what does it mean for a state to think this?"[99]

B.S Chimni on his own part criticized the existence of CIL from the perspective of the third world. He identified the scarce nature of third world state's practice and explained that its non-availability denotes that the formation of CIL rests only in the hands of developed capitalist nations.[100] Chimni and Joyner's criticisms touch on the question of state

[96] Roozbeh (Ruby) B Baker, "Customary International Law in the 21st Century: Old Challenges and New Debates" (2010) 21:1 European J of Intl L 173
[97] Ibid
[98] Daniel H Joyner, "Why I Stopped Believing in Customary International Law" (2019) 9:1 Asian J of Intl L 31
[99] Ibid
[100] BS Chimni, "Customary International Law: A Third World Perspective" (2018) 112:1 American J of Intl L 1 [Chimni, "Customary International Law: A Third World Perspective"]

inclusivity during the formation of CIL. Thus, necessitating whether CIL is truly representative of the whims of all states. In this regard, the doctrine of persistent objector emerged to preserve states' diversity under international law as Shelly Aviv Yeini explained.[101]

The doctrine of persistent objector is rooted in the fact a state that objects to CIL during its formation will be precluded from its application.[102] Though certain scholars have denied its existence,[103] James Green believed that its presence is grounded under international law when considering the antecedental backdrop of certain cases as well as the legal writings of early international jurist on the matter.[104] To reveal the presence of the rule, it has been opined that certain requirements must be met. First, the objection must be raised during the formation of CIL as a rule and not after it.[105] The former, is believed, differentiates a persistent objector from a subsequent objector with the implication that only the former and not the latter would be valid under international law.[106] Secondly, a state's objection to the formation of a custom must have been repetitious.[107] Third, such objection must be consistent.[108] Consistency in this case can

[101] Shelly Aviv Yeini, "The Persistent Objector Doctrine: Identifying Contradictions" (2022) 22:2 Chi J Int'l L 581
[102] Ibid
[103] Patrick Dumberry, "The Last Citadel! Can a State Claim the Status of Persistent Objector to Prevent the Applications of a Rule of Customary International Law in Investor-State Arbitration?" (2010) 23 Leiden J of Intl L 379; Holning Lau, "Rethinking Persistent Objector Doctrine in International Human Rights Law" (2005) 6 Chinese J of Intl L 495
[104] James A Green, *The Persistent Objector Rule in International Law*, (United Kingdom: Oxford University Press, 2016)
[105] Ibid
[106] Ibid
[107] Andrew T Guzman, "Saving Customary International Law" (2005) 27 Michigan J of Intl L 115
[108] Green, *supra* note 104

however be rebutted by passive contradictions,[109] judicial decisions,[110] voting in an international forum,[111] international agreements,[112] passive contradictions, domestic legislations and statements made by officials.

At a glance, it might appear as though the persistent objector doctrine can be used to address representational issues that the previous authors raised. However, in the persistent objector doctrine lies some implicit bias. Curtis Bradley and Mitu Gulati[113] explained that the doctrine emerged during the era of decolonization and was recently developed to address the independence of third world states. In this sense, George Rodrigo Bandeira Galindo & Cesar Yip[114] noted that the use of the doctrine was "an exhaustive valve so that traditional states would not be bound by the norms put forward by the third world." Galindo & Yip's assertions touch on an important point in this thesis i.e., the relationship between power dynamics and the espousal of ideas in the creation of legal norms as well as the role of powerful actor's identity in preempting the emergence new norms. The existence of this state of affairs will lead me to identify areas where third world states have attempted and failed to create norms even in situations where they objected.

Asides customs, consideration will also be given to general principles as primary sources of international law. My decision to examine principles as a source of law is to reveal its

[109] Yeini, *supra* note 101 at 606
[110] Ibid at 603
[111] Ibid at 600
[112] Ibid at 603
[113] Curtis Bradley & Mitu Gulati, "Withdrawing from International Custom" (2010) 120 Yale L J 233
[114] George Rodrigo Bandeira Galindo & Cesar Yip, "Customary International Law and the Third World: Do not Step on the Grass" (2017) 16:2 Chinese J of Intl L 251

nature in the formation of legal norms and how inherently, its construction operates to reinforce the identity of the dominant actors under IIL. In this regard, I will examine the good faith principle and its use as a foundation for determining the connotation of a standard of protection in the Tecmed case. Here, the principle of good faith was used without considering its inherently lopsided nature against the third world.

In addition to the primary source of law, I will also consider judicial authorities as found in the decisions of international arbitral tribunals. Though under IIL, awards rendered by IIL ought not to have precedential value because of the bilateral nature of agreements wherein investment disputes usually arise,[115] the converse often occur because in certain cases arbitral tribunals adopt the reasoning that earlier tribunals formulated. This as I would later reveal in chapter 3, contributed to the lopsided nature of IIL against developing states because the flawed and lopsided reasoning of the initial tribunal is often adopted by a subsequent tribunal. Thus, leading to the creation of legal norms that are constructed against third world.

In addition to the above, non-binding sources of law such as the PAIC, as referred to earlier, will be considered. Though non-binding upon African states, the PAIC has been lauded and scholars have suggested how its provisions can be transmuted into a binding norm that on the one hand, would advance the interests of African states at the south-

[115] Tai-Heng Cheng, "Precedent and Control in Investment Treaty Arbitration" (2006) 30:4 Fordham Intl L J 1014; Iren M Ten Cate, "The Cost of Consistency: Precedent in Investment Treaty Arbitration" (2013) 51:418 Columbia J of Transnational L 419; Richard C Chen, "Precedent and Dialogue in Investment Treaty Arbitration" (2019) 60:1 Harvard Intl L J 47;

south level[116] and on the other hand, could form a model treaty that would help elevate the interests of Africans in north-south relationships.[117] In the African context, the use of the PAIC is significant because it constitutes Africa's attempt at reconstructing the system of IIL from within. As scholars have explained, the PAIC has the propensity of becoming a set of binding norms through the existence of the AfCFTA Investment Protocol whose negotiation is currently underway. If that happens, then the AfCFTA Investment Protocol will constitute a formidable weapon wherein the Africa states would incrementally devise a workable system that would help to reinstate their identity and thus, allow them to contribute to the norm making process under IIL.

1.5 Scope of the Thesis

The topical issue that the thesis cover is broad, however, it is limited in scope in certain respect. For instance, consideration will only be given to the fair and equitable treatment clause and indirect expropriation as standards of protection. I limit my focus to these two areas because those clauses constitute the most prominent grounds upon which an action is often initiated in ISDS.[118] In so doing, I limit myself to the use of ISDS cases decided by the International Center for the Settlement of Investment Disputes (ICSID) because of its dominant role as the main institutional body responsible for deciding investment disputes. However, in using decisions facilitated by the ICSID, I encountered certain

[116] Franciso Seatzu and Paolo Vargiu, "Africanizing Bilateral Investment Treaties (BITs): Some Case Studies and Future Prospects of a Pro-Active African Approach to International Investment (2015) 30 Connecticut J of Intl L 143

[117] Akinkugbe, *supra* note 58

[118] Yannick Radi, "Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox" (2012) 37:4 North Carolina J of Intl L 1108 at 1115

challenges in terms of cases to access because often, they are subject to confidentiality except parties agree that they should be published.

In addition, the key issues I distill from are the negative effect of IIL and ISDS on human rights, economic development, and government regulatory space.

Additionally, I explained earlier that attention will be fixated on the trends going on in the continent of Africa. In this regard, it should be noted that because of how broad the title of developing countries is, it was necessary that I limit the scope of these countries. In so doing, I focus on the African region for the purpose of showing an example of third world's resistance to the regime of IIL. The resistance of African states to the regime of IIL is a reaction to the lopsided regime of IIL as it affects third world states generally. Also, regarding the recent trends taking place in Africa, I focused primarily on the PAIC and the AfCFTA Investment Protocol which is currently underway.

1.6 Summary of Chapters

Chapter two highlights the history of IIL today. I start with the history of Latin America states and concluded with the micro history of Mexico. I do this because unlike other developing countries, Latin American states attained independence early. This implicated their participation in the formation of the body of rules constituting IIL today. As the chapter would also reveal, the state of Mexico had a role to play in influencing other developing countries after decolonization.

Chapter three conducts an inquiry into the nature of standards of protection under IIL. In so doing, reliance was placed on the Fair and Equitable Treatment clause as well as

indirect expropriation. I focus on these two clauses because the meaning that has been attributed to them implicates developing countries in multiple ways. The chapter also reveals the interaction between developed and developing countries and how the machinery of IIL is used to preserve the ideological predilection of the west.

Chapter four focus on ISDS. Though as a standard of protection on its own, ISDS deserved discussion under a different chapter because it serves as the vehicle for preserving the dominant role of developed countries in forming norms under IIL. Moreover, its use has implicated third world states in certain ways which the chapter seek to address. Additionally, the chapter looks to modern trends regarding the reform of ISDS and what implication, if any, that it would mete on developing countries.

Chapter five highlights the trends taking place in Africa. It notes that though the recent trends aim at meeting the ends of sustainable development, it also serves as means of third world's resistance of the rule of IIL. To this end, this section examines the extent to which the trends should inform the investment rule making both at the continental and global level.

Chapter six concludes.

CHAPTER TWO - TRACING INTERNATIONAL INVESTMENT LAW THROUGH HISTORICAL LENS

2.1 The core of the chapter's structure

Historical phenomenom is central to the TWAIL constructivist perspective. For the purpose of this thesis, the origin of legal norms under IIL plays a crucial role in understanding how ideas emanating from developed countries became dominant to the detriment of third world states. Going by this premise this chapter aims at revealing the manner wherein the rules of IIL today emanated from developed countries. In so doing, it partly focuses on the region of Latin America.

The focus on Latin America is simply because as opposed to other developing countries found in Africa for instance, states in Latin America attained independence in the early 19th century.[119] The result of their independent status meant that those states competed with developed countries for the espousal of ideas and the formulation of legal norms under IIL. But to what extent was this achieved? This chapter will inquire into the former question because it is only by understanding and conducting an inquiry into the question that the current struggles of developing states will be better appreciated. The participation of Latin American states in the formation of IIL at a time when most states were under colonialism also shed light into the context underlying the nature of the ideological predilections driving the interests of developed countries and third world

[119] Micheal P Costeloe, "Spain and the Latin America Wars of Independence: The Free Trade Controversy, 1810-1820" (1981) 61:2 Hispanic American Historical Rev 209; Leandro Prados de le Escosura, "The Economic Consequences of Independence in Latin America" in Victor Bulmer-Thomas, John Coatsworth & Roberto Cortes Conde, eds, *The Cambridge Economic History of Latin America* (New York: Cambridge University Press, 2006) 463

states especially those from Africa. As would be obvious in the succeeding chapters, the interaction between developed and developing countries will help to proffer insight into the asymmetrical nature of IIL as it is today.

Going by the foregoing, this chapter is subdivided into three sections. Section 2.2 provides a historical backdrop of IIL regarding the participation and interaction between developed countries and Latin American states. It does this to show that the central position of developed countries during colonization helped to reinforce their identity in a way that marginalized that of Mexico's, as a third world state. Section 2.3 adopts the use of micro history to specifically state the events the led to Mexico's act of nationalizing the assets of United States investors. I make this part of history a focal point because it reveals the contextuality and motives driving the respective ideas that were put forth by developed countries and that of Mexico as a developing country. This section is important because it is key to understanding the interaction between developed, the role of Mexico and the emerging decolonized third world states as found in section 2.4. Section 2.5 concludes with the summary of the chapter.

2.2 Historical antecedent of international investment law[120]

History matters! An introduction without history is a lurch in the dark. One may eventually find illumination, but it takes a long groping. History, being a record of past events, shapes the future. The history of a subject provides grounding on its shaping factors.[121] The question of historical antecedent is question of perspective. Concerning the translation and narration of historical account, several notions that has been (and is still often) propagated includes the fact that the interpretation of historical events should reflect an objective reality.[122] The problematic nature of this perception is rooted in the fact that historical events do not exist in isolation. In contrast, I hold the view that there are dangers associated with attuning oneself with the so-called objective reality. Todd Weiler made a warning about the perils of adopting a purely objective analysis of historical events. He argued that unfettered use of objectivity may eventually lead to the adoption of "a teleological approach that says more about the ideological and personal policy predilections of the interpreter" rather than the meaning of an event itself.[123] For Jeffery

[120] My goal for this chapter is not to state and replicate the history of international investment law as several scholars have already done that exhaustively in their scholarly writings. Instead, my goal here is to lend a critical voice to the historical dimension of international investment law while using TWAIL as the framework. For the general history of international investment law, see generally, M Sornarajah, *The International Law on Foreign Investment*, *supra* note 21; Frank J Garcia, et al, "Reforming the International Investment Regime: Lessons from International Trade Law" (2015) 18:4 J of Intl Economic L 861, DOI: <10.1093/jiel/jgv042>; Kenneth J Vandevelde, "A Brief History of International Investment Agreements" (2005) 12:1 U C Davis J Int'l L & Policy 157; Jeanrique Fahner, "The Contested History of International Investment Law: From a Problematic past to Current Controversies" (2015) 17:3 Intl Community L Rev 373;

[121] Joseph EO Abugu, *Principles of corporate law in Nigeria*, (Lagos: MIJ Professional Publisher, 2014) 45

[122] White Hayden, "Interpretation in History" (1973) 4:2 New Literary History: A J of Theory & Interpretation 281, DOI: <0.2307/468478>; Bevir Mark, "Objectivity in History" (1994) 33:3 History & Theory 328, DOI: <0.2307/2505477>; Kloppenberg James T, "Objectivity and Historicism: A century of American Historical Writing" (1989) 94:4 The American Historical Rev 1011, DOI: <10.2307/1906593>

[123] Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context*, (Leiden: Martinus Nijhodd Publishers, 2013)

Hewitt it is called "the dangers of perspectivelessness."[124] In the sphere of international investment law, this danger of perspectivelessness, may lead the public to only adopt and pay deference to the mainstream historical narration that international investment law was only necessary for protecting foreign properties abroad, which in most if not all the cases, were developing countries.[125] On the flip side however, there is another perspective when viewed from the lens of the third world.

As a starting point, it must be understood that international investment law and the protection of private property (as it is currently) had its origin in European dealings and transactions.[126] European states were said to operate on an equal footing to secure the "best minimum standards for their citizens."[127] However, Kate Miles pointed out that "the process of applying these standards to non-European states became inextricably linked with colonialism, oppressive protection of commercial interests and military intervention."[128] Miles' point reflects how foreign standard of protecting private property can best be described as a usurpation of the preexisting identity and rights of the third

[124] Jeffery G Hewitt, Decolonizing and Indigenizing, Some Considerations for Law Schools" (2016) 33 Windsor YB Access to Justice 65. Hewitt coined the word "perspectivetivelessness" to reiterate his point as to why legal education in Canada needed to be purged of colonial remnants. He stated that in line with furthering the mandate of truth and reconciliation which aims at advancing indigenous values, law school curriculum in Canada must be critically revisited to do away with the "normative culture of objectivity" which in his opinion, enables students and professors alike to perpetuate the myth of "perspectivelessness."

[125] This injustice was often said to include insufficient or lack of redress, and bias towards local interests.

[126] Alshahrani Sarah M, "What Should We Know About the Origins of International Investment Law?" (2020) 48:3 Intl J of Legal Information 122; Lipson Charles, *Standing Guard: Protecting Foreign Capita and Twentieth Centuries*, (Berkeley: University of California Press, 1985); Muthucumaraswamy Sornarajah, "Disintegration and Change in the International Law on Foreign Investment" (2020) 23:*2* J of Intl Economic L 413 [Sornarajah, "Disintegration and Change in the International Law on Foreign Investment"]

[127] Sornarajah, "Disintegration and Change in the International Law on Foreign Investment", *supra* note 106

[128] Kate Miles, "International Investment Law: Origins, Imperialism and Conceptualizing the Environment" (2010) 21:1 Colorado J Int'l Environmental L & Policy 1

world and its people. It also shows how historically, the third world had always been marginalized under international investment law.

Countries, such as those in Africa, that were under the annex of western powers were directly subjugated because the application of rules protecting private properties of colonial endeavors within their territories was achieved through laws that were carved out of colonial extension.[129] The problem however was with the not so powerful Latin American countries who had attained independence but had to contend with the oppressive act of western powers most of whom adopted the ideology of "speaking softly and carrying a big stick."[130] The act of speaking softly and carrying a big stick – a term synonymous with gunboat diplomacy – which unleashed terror on Latin American states was met with great resistance by Carlos Calvo, the Argentine Jurist who was of the view that the protection of foreign property should not be different from that of the host country and should thus be regulated by national laws.[131]

The entry of Carlos Calvo – whom the famous Calvo Doctrine was named after – into the scene at that time had several significances. The first which I will pay deference to is that it can be seen as an extension of the battles developing countries are waging today regarding the "uninternational" nature of international law.[132] Today, this notion forms

[129] Sornarajah, *The International Law on Foreign Investment*, *supra* note 21
[130] National Geographic, "Sep 2, 1901 CE: Big Stick Diplomacy" (last visited 5 July 2022), online: <education.nationalgeographic.org/resource/big-stick-diplomacy>
[131] Kathryn Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution*, (Cambridge: Cambridge University Press, 2021) 109.
[132] Gathii "The Promise of International Law: A Third World View", *supra* note 62

part of TWAIL scholarship which seek to contest the idea that international law is applicable everywhere and should therefore be regarded as a view from nowhere.[133] As observed, Calvos' work also challenged the very core of "international law." In this regard, international law, including customary international law, could be seen as the genesis of how weaker countries in Latin America wanted to reject external control and assert economic sovereignty.[134] More so, the opposition of those Latin American countries to western ideology can be viewed as a resistance to foreign law within their territory. They understood that considering the power dynamics and their level of development relative to western powers, the context in which the use of gunboat diplomacy, as a means of protecting aliens within their territory, arose would eventually wreak havoc within their jurisdictions. This meant that the application of western laws and ideologies were seen as malignant. This fact is crucial because the notion of what constituted customary international law as resisted by Calvo ought to have created a dent which should ordinarily have transformed not only the unfavourable state practice of gunboat diplomacy but the inherited rules of protecting foreign properties in Latin America. However, while the use of gunboat diplomacy collapsed, protection of foreign properties survived.

[133] Ibid; See also Obiora Chinedu Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2008) 10:4 Int'l Comm L Rev 371; Shirley V Scott & Orli Zahva, *Developing Countries and International Law*, (United Kingdom: Oxford University Press 2017)

[134] James Thuo Gathii, "Third World Approaches to International Economic Governance" in Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens, eds, *International Law and the Third World* (New York: Routledge-Cavendish, 2008) 255 at 258

The end of gunboat diplomacy saw the beginning of another form of battle. Western powers saw the need to devise rules that would protect their citizens in Latin American states[135]. These states however resisted based on the Calvo doctrine.[136] The resistance from Latin American States can be viewed as an extension of the malignancy of western rules initially alluded to. Prof. Sornarajah also took cognizance of this when in his book on *the Law of Foreign Direct Investment*, he explained that the taking of foreign property which warranted the use of gunboat diplomacy in the earlier times was different from those that took place for economic reasons.[137] The immediately preceding point made by Prof. Sornarajah appears to be a reason why tension existed between Latin American states and the western powers. The former believed foreign property should be protected under national laws while the latter rejected it and instead, opted for the rule of minimum standard of protection to operate independently from the national sphere of Latin American States.[138]

The malignancy of the rule on the protection of alien property can also be traceable to the extenuating circumstance wherein it emerged. To put this into perspective, Elihu Roots, (the previous secretary of states for the United States and a one-time president of the American Society of International Law) is often cited and credited for stating and reiterating the predominant position of customary international law for the protection of

[135] Manuel R Garcia-Mora, "The Calvo Clause in Latin American Constitutions and International law" (1950) 33:4 Marquette L Rev 205
[136] Ibid
[137] Sornarajah, *The International Law on Foreign Investment*, *supra* note 21
[138] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2nd ed., (Oxford: Oxford University Press, 2012) at 2

foreign property. He is famously known to have stated the basic condition and standard of justice which is accepted by all *civilized nations*. He said:

> **There is a standard of justice**, very simple, very fundamental and **of such general acceptance by all civilized countries** as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.[139]

Elihu Roots' statement referenced the notion of civility. This reference clearly depicts the popularly held belief that weaker and colonized nations were uncivilized and barbaric.[140] Such belief which held sway was the legitimate tool the colonizers relied upon to not only dominate, subjugate, and replace the naturally endowed identity of most of the citizens of the developing world but also, to replace their legal system with an alienated one.[141] The dichotomy between the civilized and uncivilized nations also led to the creation of rules and doctrines that used western criteria to further the difference between western and non-western countries.[142] Because of this, it was obvious non-western and *uncivilized* countries were reduced to objects and were eschewed from having a say and contributing to international law. The understanding that customary international law must reflect the generally acceptable standard of civilized nations reinforces the position that

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[139] Elihu Root, "The Basis of Protection to Citizens Residing Abroad" (1910) 4:3 American J of Intl L 517 .

[140] Tezenlo Thong, "Civilized Colonizers and Barbaric Colonized: Reclaiming Naga Identity by Demythologizing Colonial Portraits" (2012) 23:2 J of History and Anthropology 375, DOI: <10.1080/02757206.2012.697060>

[141] Ibid

[142] Anthony Angie, "The evolution of International Law: Colonial and Postcolonial Realities" (2006) 27:5 Third World Quarterly 739

international investment law considered the ideals held by Latin American states as lesser and illegitimate.

To this end, the failure to acknowledge the status and nature of the western rules and even the tacit approval of Elihu Root's statement by western countries and scholars alike in recent times showed how its implication were never considered important. Moreover, the lax attitude towards this uneven handedness crops up during discussions about the period when nationalization and expropriation by Latin American Countries threatened the protection of foreign properties and consequently, customary international law. In these discussions, one seems to be particularly striking. Dolzer & Schreurer stated that Mexico, a Latin American country, attacked the traditional standard of international law when the country nationalized the interests of United States nationals in Mexican agrarian and oil businesses.[143] However, what these scholars failed to acknowledge was the reason why the government of Mexico embarked upon the act of nationalizing the properties and interests of the US citizens. To put this situation into perspective, and using the microhistory approach, I will focus on the events that transpired and led up to the Mexican government's act of nationalizing the interest of US citizens. The point here is to show that contrary to the mainstream believe that the Mexican government "attacked international customary law for protecting foreign property", the other unconventional account under international investment law is the government of Mexico expropriated the properties because of socioeconomic issues.

[143] Dolzer & Schreuer, *supra* note 138

2.3 Using TWAIL and microhistory to address the neglected account of Mexico's act of nationalizing US oil companies.

Chimamanda Ngozi Adichie is renowned for warning us about the dangers of a single story. She is famous for having said "the single story creates stereotypes and the problem with stereotypes is not that they are untrue, but that they are incomplete. They make one story become the only story."[144] The one story that seems to have been propagated – under IIL – about the historical narrative of Mexico's act of nationalizing properties belonging to US corporations was that it unjustly infringed upon the right of foreigners under customary international law because the country eroded their interests and breached the customary rule on expropriation.[145] From this standpoint, the narrative – which only focused on Mexico's act of unlawful expropriation – neglects other accounts since it is only fixated on protecting investments. On the flip side however, the other story which has been whittled down under the history and mainstream conversation of international investment law is that those corporations were not only responsible for violating human and indigenous rights – of the citizens of Mexico as third world people,[146] they were also engaged in several acts that operated to threaten the economy and existence of Mexico as a sovereign state.[147] To put the situation into perspective, it is crucial to understand that before the Government of Mexico took the drastic step

[144] Chimamanda Ngozi Adichie, "The dangers of a Single Story" (July 2009) at 00h:13m:04s, online (video): *YouTube* <www.youtube.com/watch?v=D9Ihs241zeg&vl=en>

[145] Ibid. See also Francis J & Nicholson SJ, "The Protection of Foreign Property Under Customary International Law" (1965) 6 Boston College L Rev 391, online: <lawdigitalcommons.bc.edu/bclr/vol6/iss3/1>

[146] Shrinkhal R,"Evolution of Indigenous Rights Under International Law: Analysis from TWAIL Perspective" (2019) 19:1 The Oriental Anthropologist: A Bi-Annual Intl J of the Science of Man 7, DOI: <10.1177/0972558X19835387>

[147] Ibid

towards nationalization, foreign companies – which were mostly from the United States – enjoyed autonomy.[148] This autonomy was so huge that Enrique Krauze described them as a state within a state.[149] The powers exercised by these companies were enormous to such an extent that their presence on Mexican soil equated imperialism.[150] Like the consequent effect of any imperial act which is often exploiting in nature, the activities of the oil companies left nothing but wasteland in the areas of their operations.[151] This situation was so detrimental for locals and indigenous people that Michael Inbar equated them to "the unheard and the less documented voices."[152]

From the beginning of the 20th century, it is right to deductively infer that Indigenous people in Latin America went through the travails that were associated with rules of protecting foreign property because investors held unfettered rights which affected their land rights and socioeconomic situations.[153] These travails, which evoked the struggles of the people of the third world in the earlier period, began when President Jose de la Cruz Porfirio Diaz Mori ("President Diaz") of Mexico decided to open the nation to foreign capital, and abolished the previous constitutional provision wherein Mexican lands were reposed in the state of Mexico.[154] In terms of the history of international investment law,

[148] Richard Huizar, "The Politics of Mexico's Oil Monopoly" (last visited 17 August 2022), online: *Chicano Studies Institute*, <escholarship.org/uc/item/7797b4bq#author>
[149] Krauze, *supra* note 77
[150] Michael Inbar, "Localized Voices Within the Mexican Oil Industry (~1900-1938)" (2021) 2 The Macksey J 40
[151] Ibid
[152] Ibid
[153] Ibid
[154] Ibid

the action of President Diaz constituted a decisive step because it can be seen to mark the beginning of an era when foreign investors dominated key industries that operated to affect the overriding interests of third world state and their people.

President Diaz took steps that led to the creation of economy policies which ushered in a wave of industrialization that attracted western investors (especially from the United States and Europe) who acquired land and invested in the agriculture and oil sector.[155] However, the policies were lopsided. In some cases, rural inhabitants, who were indigenous people, lost their lands to the economic policies which operated to further the industrialization strategies of President Diaz.[156] In certain other cases, there were land grabbing by foreign investors thus deepening the chasm between the haves and the haves-not.[157] Jürgen Buchenau noted that the existence of foreign investment in infrastructure, mining and agriculture increased social inequality because it resulted in the "alienation of peasant land and increased the marginalization of the poor."[158]

Perhaps, the fact that Mexicans were out of colonialism should have appealed to the investors regarding the deleterious impact of their activities. However, this continued, thus creating an instance where Mexico had a history that was rooted in not only injustice but exploitation of its people. Mexicans at that time felt discontent with the debilitating

[155] Ibid
[156] Donald Fithian Stevens, "Agrarian Policy and Instability in Porfirian Mexico" (1982): 39.2 The Americas 153, DOI: <doi.org/10.2307/981332>
[157] Jürgen Buchenau, "The Mexican Revolution, 1910-1946" (2015) Latin American History, Oxford Research Encyclopedia of Latin American History, DOI: <10.1093/acrefore/9780199366439.013.21>
[158] Ibid

and miserable working conditions that came with foreign investment within their national space.[159] As it also turned out, they felt trampled and discontent with their marginalization which ultimately led them to revolt in a way that forcefully led to the removal of President Diaz from office. [160]

The events leading to President's Diaz's removal serves as an important indicator depicting the method of revolt that the third world people adopted in relation to challenging the unjust[161] and "uneven representation" that existed alongside the operations of foreign investments. As Anthony Anghie and B.S Chimni's reasoned, it is "the actual experience of the third world people that should constitute the "interpretative prism" for evaluating the rules of international (investment) law.[162] The authors explained that it is the resistance or acceptance of the third world people to international rules and practice that should substantiate whether such rules and practices can be deemed to be of a just or an unjust nature.[163] In this case, the act of revolt by the Mexican people against their subjugation and the unjust system of protecting foreign property reconstructed the system in a manner that paved way for a new leadership that represented their interest.

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[159] Ibid

[160] Ibid. See also Richard Cavendish, "The events leading up to the Mexican dictator's fall from power on 25 May 1911" (last visited 14 August 2022), online: *History Today* <www.historytoday.com/archive/months-past/ousting-porfirio-d%C3%ADaz>

[161] Okafor, "Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective", *supra* note 76; Mohsen al Attar & Rebekah Thompson, "How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self Determination" (2011) 3:1 J Trade L & Development 65

[162] Antony Anghie & BS Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2:1 Chinese J Int'l L 77

[163] Ibid

In 1934, Lázaro Cárdenas was appointed as President.[164] President Cárdenas and the party he contested under promised to liberate and bring prosperity to workers and the locals.[165] Under his leadership, he restructured land ownership to the *campesinos* i.e., the indigenous peasant farmers. [166] The labour union also grew fervently under his control, though with the support of the executives of oil companies.[167] The activities of the labour union were really prominent because they formed an established body which organized strike actions and demanded better pay, working conditions and compensation from the foreign companies[168] because wage payment to Mexicans were incredulously low.[169] As Robert Huesca noted, though "wages were frequently mentioned as being the highest paid in Mexico, the bulk of native workers fell below the lowest tiers of the salary scale."[170]

On a hierarchical scale, Mexicans workers constituted the least paid because the highest paid workers were the nationals of the operating companies, then other foreigners and then Mexicans.[171] In response to this grueling situation, a labour arbitration board were formed to decide the claims of the labour union.[172] It is crucial to understand that this board was initially formed at the request of the oil companies who were foreign investors

[164] Thomas M Leonard, *Central America and the United States: The search for Stability*, (United States: University of Georgia University Press, 1991)
[165] Jürgen, *supra* note 157
[166] Ibid
[167] Robert Huesca, "The Mexican Oil Expropriation and the Ensuing Propaganda War" Pre-publication working paper of the institute of Latin American Studies University of Texas, Paper No. 88-84, online (pdf): <lanic.utexas.edu/project/etext/llilas
[168] "Not so Private Negotiations" (last visited 26 February 2022), online: *history matters* <historymatters.gmu.edu/d/5170/>
[169] Huesca, *supra* note 167
[170] Ibid
[171] Ibid
[172] Ibid

in Mexico.[173] However, when the board gave decision on behalf of the workers, the foreign companies appealed the decision to the Mexican Supreme Court who ordered that they pay the amount demanded by the union within a specified timeline.[174] In a move that obviously depicted defiance to the legal authority of the highest judicial authority in Mexico, the foreign companies refused to comply with the order of the Supreme Court.[175] In fact, it was reported that the foreign companies expressed their discontent and stated that they would disregard the court order.[176] This act, including other political upheaval that took place, was what led to the radical act of President Cardenas' expropriation of the foreign companies in 1938.[177]

The events after President's Cardenas act were filled with turmoil at the international pane. Questions arose as to the legitimacy of his acts and the amount payable as compensation to the foreign countries.[178] Early and recent writers, who were mostly in support of the foreign companies, dismissed the social peculiarities that warranted the need for Mexico's act of nationalization. One writer in particular stated and acknowledged that the reason government of Mexico expropriated the interest of foreign investors was because the standards of living of the third world people at that time – who

[173] Ibid
[174] BA Wortley, "The Mexican Oil Dispute 1938-1946" (1957) 43 Transaction of the Grotius Society 15, online: <jstor.org/stable/743142>. See also Yessika Monagas, "U.S. Property in Jeopardy: Latin American Expropriations of U.S. Corporations' Property Abroad" (2012) 34:2 Hous J Int'l L 455, online: <heinonline.org/HOL/Page?collection=journals&handle=hein.journals/hujil34&id=474&men_tab=srchresults>; Mario Ramon Beteta, *Petroleum and Mexico's Future*, 1st ed., (New York: Routledge 2019), DOI:<10.4324/9780429301551>
[175] Huesca, *supra* note 167
[176] Wortley, *supra* note 174
[177] Ibid
[178] Luis J Creel Jr, "Mexicanization: A Case of Creeping Expropriation" (1968) 22:2 SMU L Rev 281

constituted more than 80 percent of the total population – needed to be improved.[179] However, in contradistinction to this stance, he noted that although the steps taken by Mexico will emit sympathy because of the social issues involved, "the question is a legal one and not one of sympathy."[180] This line of thought which can be said to have permeated into the modern day approach of rulemaking under international investment law and as I will show later, can be seen as an extension of the reason why international investment law suffers from legitimacy crisis today.[181] The problem could be said to have stemmed from the fact that the laws and legal principles of the western power were seen as superior while Mexico's was categorized as inferior. In addition, it brings to light how the application of western laws was never really predisposed to the contextual setting of developing countries as it was with Latin American countries.

Unfortunately, decades after President Cardenas nationalization of the oil companies, the need for shielding the public interest of the third world people still exist. With foreign countries undertaking exploitering expeditions in colonies and new independent state, international law, and the rule of protection of foreign ought to have been revisited. As

[179] Gaghan, JF, *Some legal phases of the expropriation of American oil properties in Mexico* (Doctoral dissertation, 1939, Georgetown University) [unpublished]
[180] Ibid
[181] Daniel Behn, Ole Kristian Fauchald & Malcolm Langford. "Introduction: The Legitimacy Crisis and the Empirical Turn" in Daniel Behn, Ole Kristian Fauchald & Malcolm Langford, eds, *The Legitimacy of Investment Arbitration: Empirical Perspectives*, Studies on International Courts, and Tribunals, ed (Cambridge: Cambridge University Press, 2022) 1; Susan D. Franck, "The Legitimacy Crisis in Investment treaty Arbitration: Privatizing Public International Law through Inconsistent Decision" (2005) 73:4 Fordham L Rev 1521; Garcia Blesa, JJ, "Indeterminacy, Ideology and Legitimacy in International Investment Arbitration: Controlling International Private Networks of Legal Governance?" (2021) 35 Intl J Semiotics L 1967 DOI: <10.1007/s11196-021-09819-9>

would also be discussed under the next heading, developing countries attempted to revisit these rules but failed.

2.4 Developing States, the creation of a new international economic law order, and the echoes from the past

The period after the second world war was marked by economic tussle between developed and developing countries and the need to alter the state of international economic governance.[182] The need to revamp the system of the international economic order as it was begun with Mexico. Perhaps, it is right to say that the country's lived experience as enumerated above must have prompted the then President, Luis Echevarria, to incite the third world to clamour for the creation of a just world where protection will be afforded to the rights and obligations of weak states.[183] To this end, developing countries formed a coalition by attempting and demanding at the United Nations Conference on Trade and Development (UNCTAD) that international law create rules that would advance their interest.[184]

From the time developing countries presented their interests at the floor of the UNCTAD, one obvious reality was that although they demanded for economic sovereignty, it was made alongside the protection of human rights.[185] Direct reference was made to the Universal Declaration on Human Rights and the International Covenant on Human

[182] Keisuke Lida, "Third World Solidarity: The Group of 77 in the UN General Assembly" (1988) 42:4 Intl Organization 375

[183] UNCTAD, *Proceedings of the United Nations Conference on Trade and Development* E.73.II.D.4, 3rd Sess, UN Doc TD/180 (1972)

[184] John Toya, "Assessing the G77: 50 years after UNCTAD and 40 years after NIEO" (2014) 35:10 Third World Quarterly 1759

[185] UNCTAD, *supra* note 183

Rights.[186] From this, it becomes obvious that the needs of the third world and its people were inextricably linked to their economic interests as well as their ability to have a say on key issues concerning them. This perhaps could have resulted from the lived experiences of these countries and the marginalization they had to endure in the struggle for fight for freedom and independence. To this extent, the reference and description of developing countries attempt at creating a new international legal order as "utterly unrealistic"[187] seems insidious for nations who were fresh out colonialism and had to contend with exploitation of natural resources whose by products were left to rot on their people.[188]

Probably with the foregoing knowledge in mind, President Echevarria's ambitions quickly translated into a reality when developing countries formed a historic allegiance to create a New International Economic Order (NIEO). In the formation of this allegiance, African states played a huge role. This is because the case of Africa under IIL was unique. Unlike Latin America countries where gunboat diplomacy was utilized, African states were colonized through direct and indirect rule and as such, issues with the application of imperial rules within African colonies didn't arise.[189] This scenario led Kidane to conclude that IIL isn't made for Africa. Rather, "it was made for the continent as a replacement for

[186] Ibid
[187] Nils Gilman, "The New International Economic Order: A Reintroduction" (2015) 6:1 Humanity: An Intl J of Human Rights Humanitarianism & Development 1, online: <humanityjournal.org/issue6-1/the-new-international-economic-order-a-reintroduction/>
[188] Adam Vaughan, "Oil in Nigeria: a history of spills, fines and fights for rights" (4 August 2011) *The Guardian*, online: <theguardian.com/environment/2011/aug/04/oil-nigeria-spills-fines-fights>
[189] Kwame Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism*, (London: Thomans Nelsons & Sons Ltd, 1966)

colonial rules for the protection of capital."[190] Colonialism in Africa as Maurice Kamto explained had the effect of preempting African states from gaining economic independence even after the departure of colonialists.[191] As she observed, the "period of lawlessness was replaced by a system of unfair international investment law, whereby African countries found themselves obliged to provide for the protection of those real investors' exploiting them."[192]

Though one author believed that Africa's allyship wouldn't have had any impact because of how the continent was the least developed amongst all third world of that time,[193] nevertheless, their participation was important because economic independence was seen as an extension of political independence which states across the continent had fought and were still fighting for at the time of the NIEO.[194]

In explaining the importance of the NIEO, KC Morrison, at the time he wrote his article, believed that the NIEO could have helped African states on their path to alleviating structural inequality that stemmed from colonialism. He reinforced the fact that the solidarity between African states and those in Latin American arose because of the existing patterns of dependency whereby European colonization was used as a form of

[190] Won Kidane, "Contemporary International Investment Law and Africa's Dilemmas in the Draft Pan-African Investment Code" (2018) 50:3 The George Washington Intl L Rev 523 [Kidane, "Contemporary International Investment Law and Africa's Dilemmas in the Draft Pan-African Investment Code"]

[191] Maurice Kamto, "The Development of International Investment Law in Africa" in Yenkong Ngangjoh Hodu & Makane Moise Mbengue, eds, *African Perspectives in International Investment Law*, (Manchester: Manchester University Press, 2020) 7 at 14

[192] Ibid

[193] Hugh M Arnold, "Africa and the New International Economic Order" (1980) 2:2 Third World Quarterly 295

[194] KC Morrison, "The New International Economic Order and Africa" (1984) 9:4 African Development 133

"economic machination."[195] Like he explained, the movement was borne out of fundamental questions as to whether "European nations have moral rights to exploit third world resources without engaging in a fair exchange."[196] For the author, the simply answer was a big "no" thus necessitating their attempt to transform the international economic system.[197] From this, one can see the parallel between the struggles of Mexico and its people, as revealed from the previous section, and that of African states in the attempt to create the NIEO.

Besides the attempt at transforming the international economic order, newly decolonized African states participated and were instrumental in creating the charter on the economic rights and duties of states at the United Nations General Assembly (The Charter).[198]

The Charter brought the third world close to torpedoing the way the international economic order was being operated. As Adeoye Akinsanya and Arthur Davies noted, the content of the charter wasn't to deny the value of foreign investment but instead, to show how inconceivable it was for developing countries to be preempted from taking appropriate actions when an investor's interest is at variance with theirs.[199] The ideas of these authors – which I would address in the succeeding chapter – resonates with the same reason why third world states have become averse to the traditional form of IIL.

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[195] Ibid at 10
[196] Ibid at 11
[197] Ibid
[198] Branislav Gosovic & John Gerard Ruggie, "On the creation of a new international economic order: issue linkage and seventh special session of the UN General Assembly" (1976) 30:2 U Wisconsin Press J Division 309, online (pdf): <scholar.harvard.edu/files/john-ruggie/files/on_the_creation_of_a_new_international_economic_order.pdf>
[199] Adeoye Akinsanya & Arthur Davies, "Third World Quest for a New International Economic Order: An Overview" (1984) 33:1 Intl & Comp L Quarterly 208, online: <www.jstor.org/stable/759614>

Also, it is inherent from the authors' assertion that all developing countries seek to propagate was the notion of sustainable investment and development. This principle seems at odd with an opinion which called the solidarity of third world "irrational."[200] Argument was premised on the fact that a group (of developing countries) so large and so diverse and whose members have non-complementary and conflicting interest cannot maintain unity.[201] In my opinion, there is an inherent fallacy in this assertion. If this argument were to hold water, then it strikes at the procedural heart for the formation of customary international law, which requires large number of states and opinio juris.[202] Additionally, it will confirm the historic debate that international law, which aims at governing diverse groups of countries, is no law at all.[203] Perhaps, our minds should be averted to the fact that there cannot be "a new international economic order without a new national economic order."[204] In fact, it seems as though this idea has been the watchword for third world states because countries are now reordering their national affairs to reflect investment measures that would fit and cater to their specific circumstances as developing countries.[205]

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[200] Hansen, Roger D, "The political economy of North-South relations: How much change?" (1975) 29:4 International Organization 921.
[201] Ibid
[202] Stefan Talmon, "Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion" (2015) 26:2 European J of Intl L 417, DOI: <10.1093/ejil/chv020>
[203] Anthony D'Amato, "Is International Law Really Law" (1984-1985) 79:5 & 6 Nw U L Rev 1293; Harold Hongju Koh, "Why Do Nations Obey International Law" (1997) 106:8 Yale LJ 2599; Jack L Goldsmith & Eric A Posner, *The limits of International Law*, (New York: Oxford University Press, 2005)
[204] Akinsanya & Davies, *supra* note 199
[205] Mbengue & Schacherer, *supra* note 44

With this being said, it is crucial to understand that most developed countries were against the move that were being undertaken by the third world.[206] In all these, one country's resistance to the global south's attempt for creating a new global order stood out. The United States made some reservations by claiming that the cause of poverty in developing countries was because of internal and not external factors.[207] The United States' expression of this opinion is crucial because it automatically transmuted into a situation whereby the west abandoned the international arena and instead, adopted policies that targeted the third world at the national level.[208]

The strategy automatically led to creation of international investment agreements (IIAs) where the third world rushed to enter transactions with western countries based on clauses which originated and had been devised by them.[209] The rapid departure of the south from its opinionated stance has been critiqued and subjected to inquiry from several legal angles which posited that there were discrepancies in how the global south evinced what it wanted,[210] thus paving way for investment agreements that favored foreign investors. In my opinion however, there are no contradictions. On the contrary,

[206] R Omotayo Olaniyan, "The New International Economic Order (NIEO): A Review" (1987) Nigerian Institute of International Affairs, online: <africaportal.org/documents/7148/The_New_International_Economic_Order.pdf>
[207] Ibid
[208] Ibid
[209] Ibid
[210] Francisco V Garcia Amador, "The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation" (1980) 12 U Miami Inter-American L Rev 1, online: <repository.law.miami.edu/umialr/vol12/iss1/2>; Roland Klager, *Fair and Equitable Treatment in International Investment Law*, (Cambridge: Cambridge University Press, 2011) at 25

the actions of the developing countries lend credence to the fact that they wanted to attract sustainable investment but instead, ended up with a disguised version.

The idea for scrambling to attract what they mistook for sustainable investment can be explained in light of how there was a lacuna in the requisite understanding of a tried and tested system of investment policy that confirmed the use of foreign investment as a tool for economic development. And with the propagation of foreign investment and by extension international investment law as the ultimate saviour, the third world must have felt the need to adopt and verify this untested hypothesis whose results have now been challenged in recent times. This is irrespective of the fact that there were marked differences between their stance at the national and international level. In fact, the third world states themselves acknowledged this when in the content of the Charter of the Economic Rights and Duties of States, they recognized the responsibility of a country's development in its national space.[211] This was acknowledged even though they canvassed for a global order that would enable them to achieve their developmental goals efficiently.

2.5 Conclusion and chapter summary

This chapter proffered insight into the antecedental backdrop of IIL. The relevance of historical underpinnings, which the TWAIL Constructivist method emphasize, is crucial to understanding the situation of the current crisis which IIL suffers from today. From this

[211] Hiroshi Kitamaru, "The Rationale and Relevance of the New International Economic Order" (1978) 16:4 The Developing Economies 341, DOI: <10.1111/j.1746-1049.1978.tb01069.x>

chapter, we learned that the power wielded by developed countries continued and emerged as ideas at a time when colonization was waning.

As would be revealed subsequently, these ideas have been structuralized and now drives the regime of IIL in a way that gives little room for third world states and people to espouse their idea.

CHAPTER THREE – standards of protecting foreign investors: an ideological reflection of the west and their effects on the third world

3.1 The Core of this chapter's content

From a TWAIL constructivist perspective, IIL today can be said to be riddled with the dominant ideologies that the north propagated through the making of international investment agreements (IIAs). The previous chapter revealed[212] that the third world's attempt at reconstructing the rules of international economic order failed due to the emergence of IIAs.

In the formation of IIL, the emergence of IIAs was crucial. Not only because it constituted an avenue wherein northern ideological preferences, exhibited through neoliberalism,[213] found its way and became situated into the system of the current international economic order, it helped to preserve the identity of the west as the domineering actor which the third world, as the others, must always be subjected to.[214] In reiterating this point, Sornarajah explained that "neo-liberal principles will continue to show vitality, particularly because the dominant transnational class prefers to maintain such vitality by recasting the old structures in new forms."[215] Interestingly, standards of protections constituted one way whereby the north succeeded at this remodification and preserved its ideological predilections under IIL.[216]

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[212] Olaniyan, *supra* note 206
[213] Sornarajah, "Mutations of Neo-Liberalism in International Investment Law" *supra*, note 6
[214] Ibid
[215] Ibid at 205
[216] Ibid

As inherent from its name, standards of protections under IIL are criterions used to safeguard the interest of foreign investors. The issue however is that as in a zero-sum game, investors gain more often than not, result in losses for the third world. To put this into perspective, Olivia Chung, while referring to ISDS as a mechanism for protecting investors, highlighted the lopsidedness of IIL. She noted that while the increasing frequency of ISDS – as a protective standard – might be encouraging to risk-averse investors who are majorly from capital exporting states, for developing countries, the trend is troublesome because capital flows usually in one direction.[217] In similar vein, Sornarajah explained that:

> History demonstrates that foreign investment was a means of exploitation of host economies. Though its enormous potential for increasing economic development must be recognized, the harm that it could cause to the host economy if its effects (on the economy, social conditions or the environment, for example) remain unregulated has become the basis for the alternative argument that international law should not provide absolute guarantees for foreign investment. Through such absolute guarantees, the instrumentalism of free market fundamentalism fragments international law without paying heed to prescriptions of law relating to the environment, human rights or labour standards.[218]

Even with the presence of its deleterious impact on the third world, apologists of neoliberalism have canvassed points indicating that standards of protections serve as seemingly neutral tools. Stephan Schill held the view that standards of protections as

[217] Olivia Chung, "The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration" (2007) 47:4 Va J Int'l L 953
[218] Sornarajah, "Mutations of Neo-Liberalism in International Investment Law" *supra*, note 6

found under IIL helps to promote the rule of law that would have otherwise been lacking.[219] Jeswald Salacuse in his own part opined that IIL and IIAs have several objectives which includes the "promotion of economic welfare and human development."[220] The idea of putting forth neutral ideas for neoliberalism, as the former authors have done, underscores the attempt at creating a preferential and general acceptance of the concept by all and sundry under IIL. This time however, it is masked up as superficially impartial idea geared towards the promotion of the "greatest good" for the third world, the west and foreign investors alike. As Sornarajah explained:[221]

> "…Neo-liberals principally seek to couch their arguments in terms of the rule of law, human rights law, the vision of a global administrative law to maintain global standards of governance and customary international law… argument is now made through reinterpretation that neoliberal tenets have now become universally applicable or that, in the alternative, avenues should be explored to make them universally applicable. The strategy that these techniques employ not only seeks to give legitimacy to the neo-liberal norms, it also seeks to make them applicable globally. An iniquitous regime of absolute protection of foreign investment becomes laundered through venerated doctrines like the rule of law so as to give them a new lease of life. Thereafter, it is foisted on the world as universally applicable norms. It is a good strategy, but unaccompanied by power which made such strategies succeed in earlier periods of foreign investment, it is bound to fail. Regimes can be created and sustained only in situations where there is a strong hegemonic leader desiring such a regime."

[219] Stephan W Schill, "International Investment Law and the Rule of law" (2017) Amsterdam Center for International Law Working Paper 2017-15
[220] Jeswald W Salacuse, *The Law of Investment Treaties*, 3rd ed. (New York: Oxford University Press, 2021)
[221] Sornarajah, "Mutations of Neo-Liberalism in International Investment Law" *supra*, note 6 at 218

Contrary to foregoing, neoliberalism disguised and promoted as "the rule of law" or that which is necessary for "human development" does not devalue its true connotation. As a matter of fact, it lends credence to the repetitious nature that has characterized the formation of asymmetrical norms and ideas that informs the power relations between the west and the rest. Norm repetition, as have been asserted, was and is still integral to imperial venture till date.[222] Odumusu explained the role of repetition in institutionalizing norms. She noted that often, the former results in "asymmetric power relations in the international system which develops through the interaction of actors with different scope of influence. Thus, informing further interactional practices.[223] Accordingly, these interactional practices underline a social conception of power while focusing on the connection between legitimacy, hegemony, and norms[224] on the one hand and the intersubjective belief that dominant actors share on the other hand.[225]

At this point, examining the way in which IIL interact with the third world via protective standards under IIL will further the aim of understanding norm construction and their consequent influence on the former group. In other words, this chapter seeks to address the question - how does standards of protections under IIL inform the interaction between the agency of the third world and the west in the process of norm creation? The succeeding sections will answer this question. It will reveal the nature of the interaction

[222] Lauren Breton, *Law and Colonial Cultures: Legal Regimes in World History 1400-1900*, (Cambridge: Cambridge University Press, 2001)
[223] Odumosu, *Third World Peoples and The Re-Construction of The Investment Dispute Settlement System*, *supra* note 65
[224] Christian Reus-Smith, "Constructivism" in Scott Burchill et al, *Theories of International Relations* (New York: Pagrave MacMillan, 2005)
[225] Martha Finnemore & Kathryn Sikkink, "Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics" (2001) 4 Annual Rev of Political Science 391

that third world, both as people and states, have with the regime of IIL considering the extent in which the system accommodates the ideas, if any, that is espoused by them. In so doing, the use of the fair and equitable treatment clause, and indirect expropriation will be examined as protective measures because, as will become obvious, those standards operate to shed light in the manner whereby the third world interact with other actors such as developed countries.

Going by the foregoing, this chapter will proceed as follows. Section 3.2 begins by examining the meaning of the fair and equitable treatment clause under IIL. In examining this, I pay close attention to its interpretation as a minimum standard under CIL as well as legitimate expectations. I focus on these connotations to inquire into the nature of the rule and what how it shapes the interaction between developed and third world states. Section 3.3 highlights the meaning of indirect expropriation, with a focus on the principle of proportionality. Still with the goal of examining how third world states and developed countries interact, this section inquiries into the nature of the principle of proportionality, how it emerged and the consequence of the former on the third world. Section 3.4 concludes with the chapter's findings

3.2 The meaning of the fair and equitable treatment clause

One might easily conclude that the term "fair" and "equitable" will be likened to the notion of fairness and equity – two words that are synonymous and attributed to the concept of justice.[226] However, under IIL, the idea of what is fair and equitable is in a state

[226] Roger Slee & Gordon Tait, *Ethics and Inclusive Education* (Switzerland: Springer, 2022); In certain jurisdictions, the idea of fairness and equity as found under constitutional provisions, is closely linked to the

of flux. It has no inherent and easily recognizable meaning. Explaining the term, the International Center for the Settlement of Investment Dispute (ICSID)Tribunal noted in Tecmed v Mexico – a case I will analyze shortly – that the fair and equitable (FET) standard arises when:

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation."[227]

In another case, the ICSID tribunal noted that the FET clause operate to ensure that states' provide full protection and security, prohibit arbitrary and discriminatory measures and also, create responsibility to observe contractual obligations towards investors.[228] It has also been viewed as a tool for maintaining a stable framework for investments so as to

concepts of natural justice as found in the right to be heard and the ability to be able to present one's case. See David J Mullan, "Natural Justice and Fairness--Substantive as Well as Procedural Standards for the Review of Administrative Decision-Making?" (1982) 27:2 McGill L J 250; Lawrence B Solum, "Natural Justice" (2006) 51 Am J Juris 65

[227] *Tecmed v Mexico*, *supra* note 7

[228] *Noble Ventures, Inc. v. Romania*, (2005) italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Professor Karl-Heinz Bockstiegel, Sir Jeremy Lever KCMG QC and Professor Pierre-Marie Dupuy) at 182

ensure a maximum and effective use of economic resources.[229] Likewise, Yannick Radi explained the FET to be "a normative outcome of a balancing legislative process aimed at the protecting foreign investors against discriminatory and arbitrary state conducts."[230] From these definitions, the equivocal[231] nature of the clause becomes apparent.

[229] *CMS Gas Transmission Co. v. Republic of Argentina*, (2005) italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Professor Francisco Orrego Vicuña, The Honorable Marc Lalonde P.C., O.C., Q.C., H.E. Judge Francisco Rezek) [*CMS Gas Transmission Co. v. Republic of Argentina*]

[230] Yannick Radi, "The Human Nature' of International Investment Law" (2013) Grotius Centre Working Paper 2013/006-IEL 8

[231] The creation of what amounts to the FET was proposed by the United States under article 72(1)(c)(i) of the Havana Charter of 1948. The provision stipulates that:

The Organization shall perform the functions attributed to it elsewhere in this Charter. In addition, the Organization shall have the following functions:

(c) to undertake studies, and, having due regard to the objectives of this Charter and the constitutional and legal systems of Members, make recommendations, and promote bilateral or multilateral agreements concerning, measures designed:

(i) to assure just and equitable treatment for foreign nationals and enterprises.

The Havana Charter sought to create the International Trade Organization. However, its creation was lopsided against developing countries. As Richard Toye pointed, the membership of the organization's activities – which focused on reducing tariffs on industrial goods – were such that developing countries had little motives to join. See Toye Richard, "Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947-1948" (2003) 25:2 The Intl History Rev 282, online: <www.jstor.org/stable/40109320>; Islam R, *The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration. International Law and the Global South (Perspectives from the Rest of the World)*, (Singapore: Springer, 2018). It should be noted that before the advent of the Havana Charter, transactions were carried out under the treaties of Friendship, Commerce and Navigation (FCN) between the United States and several countries such as France, Netherlands, Sweden and Spain. Interestingly, the provisions of the treaties entered into with these countries didn't exactly have specific provisions on the FET clause but was generally concerned with protecting the properties of foreign nationals. On the other hand, the FCN entered into with certain developing countries contained express provisions of the FET clause. For instance, the FCN treaty entered into with the Republic of Togo in 1966 contained a clause stating in Article IV that:

"Each Party shall at all times accord fair and equitable treatment to nationals and companies of the other Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws." See Article IV of the Togo Amity and Economic Relations Treaty, online: <tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005406.asp>; See also John F Coyle, "The Treaty of Friendship, Commerce and Navigation in the Modern Era" (2013) 51:2 Colum J Transnat'l L 302. Given these marked differences, it is obvious that a lopsided categorization in the application the FET based on the status of the country that was involved. Thus, lending credence to what TWAIL scholars have always voiced out against.

Describing its ambiguous nature, Sornarajah labeled the clause otiose.[232] The Organization for Economic Co-operation and Development (OECD) called it vague[233] while Rudolf Dolzer attributed the significance of the clause to its diverse nature.[234] Undoubtedly, the various definitions ascribed to the FET describes its feature to an extent. Nevertheless, Sornarajah's adjectival qualification stood out for the sole reason it challenged the practical utility of the FET. This begs the question – to what extent is the clause useful to the third world state and people? The key importance of this question lies in the antecedental undertaking that the west attempted at devising the rules of IIL.

In its working paper, the OECD explained that references to the FET emerged in the first negotiating attempt of multilateral trade and investment agreements (MAI).[235] However, since the former failed, it became "established as a principle through the increasing network of bilateral investment treaties."[236] The failure of the MAI, as commentators have pointed out, occurred mainly because of third world resistance to its creation.[237] This fact leads to a strong inference. That the third world resistance to the MAI extended to the FET as well. The ground within which I draw this deductive conclusion isn't far-fetched. The third world resistance to the creation of the MAI was based on the latter's emphatic

[232] Sornarajah M, *The international law on foreign investment*, 2nd ed (New York: Cambridge University Press, 2007)
[233] OECD, "Fair and Equitable Treatment Standard in International Investment Law" (2004) OECD Working Papers on International Investment, 2004/03, DOI: <10.1787/675702255435>
[234] Rudoff Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties" (2005) 39:1 Int'l Law 87
[235] OECD*, supra* note 233
[236] Ibid
[237] Peter T Muchlinkski, "The Rise and Fall of the Multilateral agreement on Investment: Where now?" (2000) 34:3 Foreign L Year in Rev 1033; Riyaz Dattu, "A journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment" (2000) 24:1 Fordham Intl L J 275

stance on investor and investment protection.[238] This point may be inferred from Tarald Laudal Berge and Helge Hveem's[239] opinion who noted that the MAI didn't fail in its entirety because the substantive clauses they contained subsequently found their way into BITs that were signed by OECD countries.[240]

The third world's resistance to the FET as an ideological preference of the west and the subsequent elevation of the former through bilateral investment treaties further reveals the systemic means in which the predilections of the third world was silenced through the process of treaty making. One commentator provided a vivid image of this process by stating the following:

> Developed countries, like the United States, take advantage of their strong bargaining position to obtain ideal conditions for their investors. The United States uses a model BIT to propose a "take it or leave it" type of deal. The other negotiating partner is thereby forced to simply accept the model BIT because it feels that it must enter into the arrangement or that it would be foolish not to. This approach results in a "one way conversation of imposed terms. A BIT negotiation is not a discussion between sovereign equals. It is more like an intensive training seminar conducted by the United States, on U.S terms, on what it would take to comply with the U.S Draft.[241]

[238] Ibid. In actual fact, the initiation of the MAI began with the United States who thought it possible to have a distinct set of global rules that would regulate the protection of investment ideas. This attempt, which quickly became a reality, operated as a tool to create a worldwide view for its neoliberal policies. Soon after, the European commission joined in the race by pushing the same agenda bit failed as well.

[239] Tarald Laudal Berge & Helge Hveem, "The International regime for investment: A history of Failed Multilateralism" in Andreas Nolke & Christian May, *Handbook of the International Political Economy of the Corporation*, (United Kingdom: Edward Elgar Publishing, 2018) [Berge & Hveem, "The International regime for investment: A history of Failed Multilateralism"]

[240] Ibid

[241] Gennady Pilch, "The Development and Expansion of Bilateral Investment Treaties, (1992) 86th American Society of International Law Proceedings

To corroborate the above, Makane Moise Mbengue and Stefanie Schacherer, in their article on *Evolution of International Investment Agreements in Africa: Features and Challenges of Investment Law Africanization"*, revealed how African styled BITs and IIAs were modelled after "European-styled IIAs" especially in relation to intercontinental investment agreements.[242] The true nature of the treaty making process between developed and third world states of Africa further uncovers an important fact as to why the FET is "otiose". It reveals that indeed, its fluid nature serves the end of creating constant leeway for western ideologies to remain dominant. With no true substantial meaning, the use of the FET had the potential of remaining open-ended and being manipulated to suit the whims and caprices of developed countries.

Though open-ended, one fact that has remain undisputed about the FET is its further categorization either as an extension of customary international law (CIL) or an autonomous clause.[243] The significance of these connotations has an immense implication because as it will be revealed, it helps to shed light into the nature of interaction between third world states and developed countries and how the former affects the rule-based system under IIL.

[242] Mbengue, MM & Schacherer, S, "Evolution of International Investment Agreements in Africa: Features and Challenges of Investment Law "Africanization" in Chaisse, J., Choukroune, L. & Jusoh, eds, *Handbook of International Investment Law and Policy* (Singapore: Springer, 2021) DOI: 10.1007/978-981-13-3615-7_77
[243] Olivia Chung, *supra* note 217, see also Tucker TN, *Judge Knot: Politics and development in International Investment Law,* (United Kingdom: Anthem Press)

3.2.1 The meaning of the Fair and equitable treatment as an extension of customary international law: a critique from a third world's perspective

As pointed above, the definition of what is fair and equitable under IIL is difficult to identify. In a bid to remedy this situation, the meaning of the FET was attributed to CIL with the implication that there is a minimum standard of protection existing under international law for foreign investors.[244] However, CIL, as found in the international minimum standard for the treatment of aliens, emanated from the major western powers as found in Europe and the United States.[245] Consequently, its origin and attribution to what the FET means isn't farfetched either. The relationship between the FET and CIL emanated from the decision in the Neer's case in 1926.[246] The Neer's case which arose from the murder of an American in the city Mexico is popularly known to have laid the framework for FET as an extension of CIL as follows:

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

The test laid down above has been perceived as a safety net for the third world because of the supposedly strict standards it entails.[247] However, this supposed safety is riddled

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[244] Charles Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries*, (United States: University of California Press, 1985)

[245] Ibid

[246] LFH Neer & Pauline Neer (USA) v United Mexican States (1926) 4 RIAA 60

[247] Hussein Haeri, "A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law: *The Gillis Wetter Prize*" (2011) 27:1 *Arbitration International,* 27, DOI: <10.1093/arbitration/27.1.27>

with some level of uncertainty[248] because in certain instance, the ICSID tribunal have been found to abide by earlier non-precedential case to expand the scope of the clause outside CIL.[249]

Regarding its two-faced nature, Sornarajah expressed some level of doubt by questioning whether in light of the decision above, the FET and CIL, as laid down in the Neer's case, can occur contemporaneously.[250] Sornarajah's argument was predicated upon the fact that there was a contextual difference between the facts that gave rise to the decision in Neer case and those existing under the current system of international investment law. To this end, he concluded that "unless some specific content can be given to the international minimum standard in the modern context, the mere assumption that the standard is not static remains rhetorical."[251]

In the same vein, David Fidler questioned the circumstances under which the CIL will apply to the FET considering modern realities by asking "under which modalities would such a standard be applied in an evolutionary manner?"[252] Mārtiņš Paparinskis shared Fidler and Sornarajah's assertion. However, he referred to the historical context of the case by

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[248] Matthew C Porterfield, "A distinction without a difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunal" (22 March 2013), online (blog): *Investment Treaty News* <iisd.org/itn/en/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable treatment-under-customary-international-law-by-investment-tribunals/#_ftnref13 >

[249] *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina* (2007) itaLaw Reporter (International center for the Settlement of Investment Disputes) (Arbitrators: Judge Francisco Rezek, Judge Thomas Buergenthal, and Mr. Peter D Trooboff); *Railroad Development Corporation (RDC) v. Republic of Guatemala*, (2012) itaLaw Reporter (International Center for the Settlement of Investment Disputes) (Arbitrators: Dr Andres Suerda, Honorable Stuart E. Eizenstat and Professor James Crrawford)

[250] Sornarajah, *The International Law on Foreign Investment*, *supra* note 21

[251] Ibid

[252] David P Fidler, "Revolt against or from within the West - TWAIL, the Developing World, and the Future Direction of International Law" (2003) 2:1 Chinese J Int'l L 29

stating that the test devised was nothing short of an elaboration of the disagreement between the claimant's state and the respondent's state.[253] Vasciannie Stephan also expressed some doubts regarding the interrelation between the FET and CIL by contending that there are only few instances wherein states have indicated that a connection should exist between the two principles.[254] Likewise, Ioana Tudor argued that the existence of the clause in IIAs isn't sufficient to draw a conclusion as to its customary nature.[255]

The foregoing scholarly expressions depicts an important point that is central to this thesis i.e., but for the contextual nature of the decision in the Neer's case, CIL can and in actual fact should apply to the FET. The implication of the implicit conclusion emanating from the previous author's assertions reveals the interactional process between developed and third world states in the formulation of the meaning attached to the FET as a rule of CIL. It is clear that the decision largely excluded third world states. This is because the decision in the Neer's case was devised at a time where third world states like those in Africa were still colonized. As such, through the elevation of the Neer's case as a rule of custom, the systemic interest of developed countries was secured through the stability of a legal norm that operates to protect the interests of global capitalism.[256]

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[253] Mārtiņš Paparinskis, *The International minimum standard and fair and equitable treatment*, 1st ed (Oxford: Oxford University Press, 2013)

[254] Vasciannie Stephan, "The Fair and Equitable Treatment Standard in International Investment Law and Practice" The British YB of Intl Law (2000) 70:1 99 at 144

[255] Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, (Oxford: Oxford University Press, 2008)

[256] Chimni, "Customary International Law: A Third World Perspective", *supra* note 100.

In this instance, the existence of the persistent objector doctrine will do little to help third world states' because as noted at the inception of this thesis,[257] the doctrine only exists during the formational stage of a custom and not when the former has become established. This as Moises Montiel Mogollon noted, "destines states that did not take part in the formation process of rules of customary international law to be bound by them anyway."[258]

At a glance, it becomes obvious that the meaning attached to the FET as an extension of CIL, automatically bind third world states without room for objection. This scenario is problematic because it leads states to be bound by rules of customs which they make no substantial contribution to and whose contextual undertaking differs largely from the way wherein it is being applied. Against this stance and those of the former authors, Patrick Dumberry, argued that FET as CIL and as a protective measure should not be considered as such. In drawing this inference, he conducted an empirical study of the existing BITs found on the website of the UNCTAD as of 2014.[259] He sought to examine the extent to which the presence of the FET in BITs could be found to be reflective of a custom under international law. He carved out an analysis by referring to the requirements that give rise to the formation of new rules of customs under CIL. These requirements which typically consist of state practice and *opinio juris* is used as a reference point that for a

[257] Yeini, *supra* note 101

[258] Moises Montiel Mogollon, "The Consent-Based Problems Surrounding the Persistent Objector Doctrine" (2022) 43 Mich J Intl L 301

[259]Patrick Dumberry, "Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?" (2017) 8:1 J of Intl Dispute Settlement 155, DOI: <10.1093/jnlids/idw002> [Dumberry, "Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?"]; Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Netherlands: Wolters Kluwer 2013)

custom to be so called under international law, there must be a presence of a uniform and consistent actions of *specially affected/a large number of* state parties as well as their willingness to be bound by same, which then will be binding *on all states*.[260]

In his analysis, he stated the conditions where a treaty provision will evolve into a rule of custom. For the former to occur, a *significant number of states* must have BITs that contain the same provision or should be similarly worded and also, states must have adopted the type of conduct prescribed in the treaty provision outside the ambit of the treaty itself.[261] Based on this test, he concluded that though FET is general, widespread and is representative of state practice, its use isn't sufficiently uniform to devolve into state practice. Moreso, there doesn't seem to be any evidence regarding the use of the FET-as CIL- outside the scope of treaty framework containing it.[262] As for the test of *opinio juris*, Dumberry in his findings asserted that there wasn't any conclusive evidence regarding states' obligations to be bound by FET in treaties. Hence, the clause shouldn't exist as a rule of custom under IIL.[263]

The position maintained by Dumberry is of significant magnitude because while I subscribe to his conclusion, the mechanical way wherein he arrived at it is faulty. His assertion failed to consider who the actors are. This oversight undoubtedly undermines the fact that the identity of an actor plays a crucial role in not only shaping the

[260] Michael P Scharf, "Accelerated Formation of Customary International Law" (2014) 20:2 ILSA J of Intl & Comp L 305
[261] Dumberry, "Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?", *supra* note 259
[262] Ibid.
[263] Ibid.

interactional trajectory between states but also, the formation of legal norms. To this end, it is pertinent to consider the process through which the law emanated[264] by determining whether FET as CIL is indeed general, widespread, and representative. This is because the existence of FET as CIL reveals ways wherein developed countries maintain a dominant role to shape and construct legal norms to their advantage under IIL.

In considering the foregoing, the International Law Association, in its report,[265] noted that the identity of state actors involved is what truly matters when determining the generic nature of state practice. Likewise, the International Court of Justice, in the North Sea Continental Shelf case, highlighted the identity of state actors by noting that consideration will only be given to the identity of states that were specially affected.[266] The emphasis on state actors' identity begs the question – whose identity counts?[267]

With the centrality of identity as a determinant for rules of custom under international law, it becomes obvious that the third world is situate within the praxis of a system that implicates it in a severe manner. History of course has a role to play in fueling this unfortunate situation. B.S Chimni traced the roots of CIL to its colonial heritage and noted that the formalistic requirement of state practice "underplays the role of the world of ideas and beliefs in the formation of CIL, even as power plays a critical role."[268] In similar vein, Yasuaki Onuma observed that the practice of few, yet powerful and influential

[264] Mohammed Bedjaoui, "Non-Alignement et Droit International" (1976) 151 RCADI 382
[265] *Draft Conclusions on identification of Customary International Law with Commentaries*, ILO A/73/10 (2018)
[266] *North Sea Continental Shelf Case*, [1968] ICJ Reports 3
[267] Maurice H Mendelson, "The Formation of Customary International Law" in *Collected Courses of the Hague Academy of International Law*, (Leiden: Nijhoff and The Hague Academy of International Law, 1998)
[268] Chimni, "Customary International Law: A Third World Perspective", *supra* note 100

western states are chosen and then regarded as "representative of general state practice."[269] By highlighting these features, it becomes obvious that CIL, as a historical tool of privilege and manipulation, is used to transmute power into norms that continuously disadvantage the third world under the auspice international law.[270]

Interestingly, the existence of CIL and its potential in subjugating the third world isn't necessarily infallible. Through the persistent objector's doctrine which permits states to opt out from CIL before and during,[271] it might appear as though the third world states possess the capability of preempting the construction of norms that counteract their interest. However, as Bradley and Gulati explained, a case cannot be made out for a subsequent objector.[272] In order words, where a rule of customs have been formed as in the case with the FET, the persistent objector doctrine wouldn't apply.

Until recently, the attribution of the FET to CIL has been prominent among the third world.[273] BITs entered into with the west highlighted a trajectory that revealed a pollination of the clause into third world states as depicted from the Peru-USA FTA[274] as well as the Burkina Faso – Canada[275] BIT which contain the attribution of the FET clause

[269] Yasuki Onuma, *A Trans civilizational Perspective on International Law: Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century*, (Leiden: Martinus Nijhoff Publishers, 2010)
[270] Galindo & Yip, *supra* note 114
[271] Green, *supra* note 104
[272] Bradley & Gulati, *supra* note 113
[273] David Gaukrodger (2017) "Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law" OECD Working Papers on International Investment 2017/03, OECD Publishing, DOI: <10.1787/0a62034b-en>
[274] United States -Peru Free Trade Agreement, United States of America and Peru, (1 February 2009)
[275] Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, Canada and Burkina Faso, (11 October 2017)

to CIL. The former examples which are reflective of the third worlds' use of the clause led David Gaukrodger to note the importance of creating a normative framework as found in governmental actions.[276] However, undertaking this approach undermines the very nature of the manner which such rules evolve in the first place.

Whether as a construction of the decision of the Neer's case or evidence of governmental actions, the dominant role of the west, with the United States in particular, has been intense in the formation of FET as CIL.[277] Asides exposing the relative restrictions constraining the views of the third world, the use of FET as CIL undercuts the idea of inclusivity which ought to lend a third world perspective into its composition. Thus, going by this very structure, the scope of the FET as CIL can be best described as dubious regarding its existence and application to the third world.

3.2.2 The fair and equitable treatment as legitimate expectation

The definition of the FET as an autonomous clause has been espoused with different meanings. Due diligence,[278] and denial of justice are amongst the yardsticks that have been created to interpret the clause.[279] In this section however, focus will be predicated

[276] Gaukrodger, *supra* note 273
[277] Ibid
[278] Yulia Levashova, "Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law" (2020) 67 Netherlands Intl L Rev 233, online: <link.springer.com/article/10.1007/s40802-020-00170-7>; Shaun Matos, "Investor Due Diligence and Legitimate Expectations" (2021) J of World Trade & Investment 1, online: <brill.com/view/journals/jwit/aop/article-10.1163-22119000-12340231/article-10.1163-22119000-12340231.xml#FN000001>
[279] Pablo Jaroslavsky & Florencia Wajnman, "The *Chevron* Saga: The Denial of Justice Standard under the Fair and Equitable Treatment and Customary International Law" (2019) European Investment Law & Arbitration Rev 274

on its attribution to the concept of legitimate expectation because as Yulia Levashova explained, legitimate expectation constitutes the central component of the FET clause. [280]

Legitimate expectation is an interpretation that operates to limit host states' powers by making them liable for acts that might have induced an investor to alter his position.[281] In certain situations, it has also been construed to mean that a host state must always maintain a static legal environment.[282] Often, these interpretations are justified because of their objectivity for assessing state conduct as opposed to the subjectivity for investment protection. [283] However, in this justification lies a paradox because objectivity is itself subjective since it lacks an adequate standard of measurement.[284] In explaining this phenomenon, George Wright questioned the essence of the test and noted how an

[280] Yulia Levashova , *The Right of States to Regulate in their Public Interest and the Right of Investors to Receive Fair and Equitable Treatment* (United States: Wolters Kluwer, 2019); See also, Leite, Kendra, "The Fair And Equitable Treatment Standard: A Search For A Better Balance In International Investment Agreements" (2016) 32:1 American University Intl L Rev:, online: <digitalcommons.wcl.american.edu/auilr/vol32/iss1/2>; Marcin Kaldunski, "Some Remarks on the Protection of Legitimate Expectations in International Investment Law" (2019) 25 Comp L Rev 215; Michele Potesia, "Legitimate Expectations in Investment Treaty law: Understanding the roots and the limits of a controversial concept" (2013) 28 ICSID Rev 88

[281] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, (2014) italaw (International Center for the Settlement of Investment Disputes) (Arbitrator: professor Pierre Marie Dupuy, Professor David AR Williams, Professor Piero Bernardini)

[282] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, italaw (International Center for the Settlement of Investment Disputes) (Arbitrator: Mr. L Yves Fortier CC QC, Mr. David AR Williams QC and Professor Brigette Stern)

[283] Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contours" (2013) 12:1 Santa Clara J Int'l L 7; See *El Paso International Energy Company Co. v. The Argentine Republic*, (2011) italaw (International Center for the Settlement of Investment Disputes) (Arbitrator: Prof. Lucius Caflisch, Prof. Piero Bernardini and Prof. Brigitte Stern)

[284] R George Wright, "Objective and Subjective Tests in the Law" (2017) 16:1 The University of New Hampshire L Rev 121 at 124 – 125, online (pdf): <scholars.unh.edu/cgi/viewcontent.cgi?article=1277&context=unh_lr>; Victoria Nourse, "After the Reasonable Man: Getting over the Subjectivity Objectivity Question" (2008) 11 New Criminal L Rev 33, online (pdf): <scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2133&context=facpub>;

attempt to compartmentalize objectivity and subjectivity has been met with great futility.[285]

The effect of FET as legitimate expectation has been critiqued because its very nature undermines the policy space of governments.[286] The unnecessary constraints of regulatory space by investors, often multinational corporations, who allege infringement has an implication on the third world both as states and people.[287] In addition to limiting the extent to which developmental purpose of third world states and people can be fostered, the interpretation of legitimate expectation operates to neglect their perspectives by capitalizing on investors' interest.[288] Interestingly, there seems to be no basis upon which this subjugation is done.[289] Going by Anthea Roberts observation, the use of legitimate expectation lacks a methodological approach.[290] Its creation under IIL was used as a tool of interpretation can be seen an avenue to continuously trump and dismiss the existence of third world ideas on the pretext of their i*nferiority*.[291] This in turn has been used by tribunals as an opportunity to create legal jurisprudence where little

[285] Wright, *supra* note 284
[286] Shamila DLF, "Rationalize of Host States Regulatory Measures and Protection of Legitimate Expectations of Foreign Investor: Analyzing the State of Necessity in the Investment Treaty Context" (2013) 2:3 South East Asia J of Contemporary Business, Economics and L 34
[287] Rumana Islam, *The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries in Context*, (Singapore: SpringerLink, 2018)
[288] Ibid
[289] Potestà, *supra* note 280
[290] Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States" (2010) 104:2 Am J Int'l L 179
[291] *Tecmed, v. Mexico*, *supra* note 7

consideration is given to actual practice, interest and treaty provisions of the third world.[292] To proffer insight into this, I will revert to the case of Tecmed v Mexico.[293]

a. Tecmed v. Mexico

My decision to examine the case of Tecmed v. Mexico was because it was the first case under IIL to define FET as legitimate expectation.

In that case, Tecmed as claimant, initiated a case against the government of Mexico at the ICSID while relying on the Spain-Mexico BIT. The case arose from a dispute regarding the claimant's license and renewal permit on a hazardous landfill that it had a right to operate within the municipality of a province in Mexico.[294] Issues arose which preempted the government of Mexico from renewing the claimant's licensing rights while terminating the claimant's interest in the landfill. Also, as asserted by the claimants, public oppositions to the claimants' investment in the region could have spurred the government to undertake the measures it did.[295] These events led the claimant to invoke the arbitral clause on several grounds including the FET clause. The claimant stated that the government of Mexico breached the FET clause which in its opinion, embodied a duty to respect the "legitimate trust that was generated in the investor."[296] In its decision, the tribunal had to consider the interpretation of Article 4(1) of the BIT which stated that "Each contacting party will guarantee in its territory fair and equitable treatment,

[292] Roberts, *supra* note 290
[293] *Tecmed, v. Mexico*, *supra* note 7
[294] Ibid at para 35
[295] Ibid at para 43
[296] Ibid at para 58

according to International Law, for the investments made by investors of the other Contracting party."[297] The tribunal adopted an autonomous interpretation[298] and reached the conclusion that the FET clause was breached. In doing this, it premised its rationale on the "good faith" principle under international law to hold that:

> The Arbitral Tribunal considers that this provision of the Agreement, in light of the *good faith principle established by international law*, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle. Therefore, compliance by the host State with such pattern of conduct is closely related to the above-mentioned principle, to the actual chances of enforcing such principle, and to excluding the possibility that state action be characterized as arbitrary; i.e. as presenting insufficiencies that would be recognized "…by any reasonable and impartial man.[299]

[297] Ibid at para 152
[298] Ibid at para 155
[299] Ibid at para 154

Without considering whether the case would have been decided otherwise, the tribunal's reference to the principle of good faith under international law – as a basis for explaining FET as legitimate expectation[300] is itself problematic. Reliance was placed on the provisions of Article 26 and 18 of the Vienna Convention of the law of Treaties (VCLT) to hold that "the tribunal shall take into account the principle of good faith, as the *general expression of a principle of international law*."[301]

Though using the provision of the VCLT, good faith as a doctrine is a recognized principle of international law which derives its legitimacy from Article 38(1)(c)[302] of the Statute of the International Court of Justice as a source of international law.[303] In fact, the tribunal was explicit in its reference to this provision by stating in paragraph 116 of the award that "*in addition to the provision of the agreement, the Arbitral Tribunal has to resolve any dispute submitted to it by applying international law provisions…for which purpose the arbitral tribunal understands that disputes are to be resolved by resorting to the sources described in Article 38 of the Statute of the International Court of Justice*."[304] For the sake of emphasis, the provision of Article 38 typically states that "*The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall*

[300] Ibid at para 70
[301] Ibid
[302] *Charter of the United Nations and Statute of the International Court of Justice*, 24 October 1945, 33 UNTS 993 (24 October 1945)
[303] Tania Voon, "Good Faith in international Investment Arbitration" (2019) 30:4 European J Intl L 1458, online: <academic.oup.com/ejil/article/30/4/1458/5822856?login=true >; Emily Sipiorski, *Good Faith in International Investment Arbitration*, (Oxford: Oxford University Press, 2019)
[304] *Tecmed, v. Mexico*, *supra* note 7

apply the general principles of law recognized by civilized nations." From the provision, it is observed that the notion of civility lies at the core of the principle.

Principles are in themselves relevant. Like signposts, they operate to guide courts and tribunals as to how decisions should be constructed. Several authors recognized this regarding the use of the good faith principle to interpret FET as legitimate expectations.[305] However, the very core of the principle and its foundational attribution of civility as a notion which ought to serve as a yardstick for determining the allocation of rights and obligations under IIL, is a clear attempt at fueling the anachronistic nature of the term.

The idea of civility, as understood, was a notion that was used to displace and dismiss the identity of the third world people as inferior.[306] It was seen as a justificatory tool whereby the third world underwent an evolutionary phase of savagery, to barbarism and then civility.[307] Under international law, it was used to minimize the engagement of the third world in a way that sought to reform regulatory and governance structures while charting the course of future development.[308] Anghie and Chimni explained that as an aspect of

[305] Astha Mishra & Anand Mishra, "Fair and Equitable Treatment Standard in International Investment Law: An Analysis Vis-a-Vis Public International Law" (2012) 11 Kor U L Rev 107; Stephan W Schill, "General Principles of International Law and International Investment Law" in Andrea Gattini, Attila Tanzi & Filippo Fontanelli, eds, *General Principles of Law and International Investment Arbitration*, (Brill: Nijhoff, 2018) [Schill, "General Principles of International Law and International Investment Law"]; Patrick Dumberry, "The emergence of the Concept of 'General Principle of International Law' in Investment Arbitration Case Law" (2020) 11:2 J of Intl Dispute Settlement 194

[306] Nora Berenstain, "Civility and the Civilizing Project" (2020) 49:2 Philosophical Papers 305

[307] Edward Taylor, *Primitive Culture: research into the Development of Mythology, Philosophy, Religion, Art and Custom*, (London: John Murray, 1871)

[308] Andrew Linklaters, "The Standard of Civilisation in World Politics" (2016) 5:2 Social Character, Historical Processes, online: <hdl.handle.net/2027/spo.11217607.0005.205>

colonialism, the notion of civility constituted a "moral basis for the economic exploitation of the third world."[309]

From a TWAIL constructivist approach, the reference to the principle of good faith and its foundational basis of civility under international law implicates both Mexico, as a third world state and Mexicans, as third world people. Ordinarily, the interaction between these two groups and the regime of IIL ought to facilitate a contact that should have furthered their experiences under the international system.[310] However, with the use of the "good faith" principle, it becomes obvious that the origin of investment rules and history continues to shape the asymmetric relationship of actors" under IIL as Odumusu observed.[311]

Regarding the implication of the decision on Mexico as a third world state, paragraph 46 of the award actually revealed how the country argued that the decision to prevent the renewal of the license resulted from the public interest involved.[312] Interestingly, the claimant also referred to this in their assertions.[313] The tribunal however dismissed this assertion while emphasizing the importance of international law.[314] In addition, the work of James Crawford was cited to reiterate this primacy and was used to dismiss the public interest argument of Mexico on the ground that it contravened investors' interest even if

[309] Anthony Angie & BS Chimni, "Third World Approach to International law and Individual responsibility in Internal Conflict" (2004) 36 Studies of Transnational Legal Policy 185
[310] Odumosu, *ICSID, Third World Peoples And The Re-Construction of The Investment Dispute Settlement System*, *supra* note 65
[311] Ibid at 58
[312] *Tecmed v. Mexico*, *supra* note 7 at para 12
[313] Ibid at para 74
[314] Ibid at para 120

such contravening act was done in furtherance of a legitimate governmental measure.[315] The relationship between the dismissal of Mexico's argument on public policy measure and the consequent citation of James Crawford's work to arrive at a conclusion against the third world state is instructive. This is because the use of James Crawford's work constituted a basis for an unconscious social construct where the ideational interest of western powers was disseminated through the interpretation that was given to this standard. [316] It was a means whereby ideas were adopted and transmuted into power.[317] This is because:

> In order for an idea to become power in global society, however, it needs another kind of power. It is a power that can disseminate the idea and help it become widely shared and accepted. Even the best idea cannot be a power if it lacks the linguistic, informational, educational and economic means to be globally disseminated and shared. In the Twentieth century it was the West-Centric structures composed of leading Western experts, media, educational and research institution… that possessed such means of dissemination and propagation. The combination of the two types of ideational power, one, the substantial, and the other, instrumental, is crucial for an idea to have a globally predominant ideational power.[318]

For the third world people of Mexico, the good faith principle could be said to have forestalled their engagement with the system of IIL in this case. With the incorporation of a principle that embodies the notion of civility into it, the identity of these third world people was dismissed as irrelevant. Moreover, contrary to Odumusu's presupposition

[315] Ibid
[316] Onuma, *supra* note 269
[317] Ibid.
[318] Ibid

which clamoured for the accommodation of the perspective of third world people *qua* people,[319] the tribunal in this case displayed an utter intolerance towards the interest of Mexicans via the measures because of the lack of deference to their interest.[320]

The impact of the Tecmed decision is far-reaching because it constitutes a precedential yardstick where investors[321] and tribunals alike adopt the questionable reasoning of the tribunal to propagate the formation of a rule-based system that operates to marginalize the third world as would be seen in Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt[322] (Siag v Egypt) below.[323]

b. Siag v Egypt

The case of Siag v Egypt is instructive because it revealed an instance wherein the decision of the Tecmed tribunal was adopted in maintaining and propagating a systemic construct

[319] Odumosu, *ICSID, Third World Peoples And The Re-Construction of The Investment Dispute Settlement System*, *supra* note 65

[320] Though outside the scope of this paper which targets issues arising from developing countries, it should be noted that the ills of IIL as found in the Tecmed case above is somewhat universal. This is especially because of the distinction that lies between a state and its people. Often, community members in the developed world have also have to grapple with opposition to the dangers of investment activities within their territory. See Clayton/Bilcoin v Canada, an award was issued in favour of a foreign investor despite opposition to the existence of such an investment. *Bilcon of Delaware et al v Government of Canada*, (2015) italaw (Permanent Court of Arbitration) (Arbitrator: Judge Bruno Simma, Professor Donald McRae and Professor Bryan Schwartz) and Lone Pine Resources Inc v Canada (2017) italaw (UNCITRAL) (Arbitrator: Albert Van Den Berg). This case is still ongoing.

[321] *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, (2008) itaLaw Reporter (International center for the Settlement of Investment Disputes) (Arbitrators: Mr Bernard Honotiau, Mr Gary Born and Mr Toby Landau). In the Biwater case, the tribunal did not find the government of Tanzania responsible for breaching the investor's legitimate expectations. Nevertheless, it shows how the reasoning of the Tecmed tribunal created a ripple effect that has the potential of affecting third world states. This is because the investor categorically cited the decision of the Tecmed tribunal to refer to the principle of good faith and how it forms the basis of the FET under IIL (para 524). The government of Tanzania however believed that such argument was unfounded.

[322] *Siag v Egypt*, *supra* note 27

[323] As opposed to third world people, this case implicates third world state of Egypt alone.

of rules against third world states, which in this situation was an African state.[324] In that case, an investor sued the government of Egypt at the ICSID alleging that the country in addition to certain other obligations, breached its right to be treated fairly and equitably because it was preempted from undertaking the construction of its hospice project in the region allocate to it.[325] In determining whether this standard of protection was breached, the tribunal relied on the Tecmed decision.[326] What was instructive was that the Siag tribunal expressly cited the principle of good faith as the bedrock of the FET without undertaking an analysis of how it was applicable to that particular case.[327]

Still without giving consideration to if the decision against the government of Egypt would have been decided otherwise, what is observed here is that the Siag decision facilitated the reasoning of the Tecmed tribunal. It also showed the Tecmed tribunal's contribution to the regime of IIL in terms of creation of norms whose crux lies on a questionable foundation. For James Thuo Gathii, this signals regime bias.[328] Gathii explained that the regime bias approach reveals how the international economic system disadvantage the most vulnerable because of how it seeks to integrate the third world into a neo-liberal economic agenda where developed countries dominate the global economy. He explained that it shows how norm interpretation, application and adjudication allow

[324] This case touch on a number of issues but my concern here is the manner in which the tribunal utilized the decision of Tecmed and the implication it has on the third world.
[325] *Siag v Egypt*, *supra* note 27 at para 421. I will not dwell on the facts of this case because as the tribunal noted, "there was no real dispute as to the primary facts of the case (para 12). Instead, my purpose for using this case is to show a pattern in terms of how rules constructed have a ripple effect (against third world states) from Tecmed case where it was first espoused.
[326] Ibid at note 450
[327] Ibid
[328] Gathii, "Third World Approaches to International Economic Governance", *supra* note 134

powerful economies to manage the tension of taking advantage of the international economic order while preventing others from doing the same.[329] In similar vein, Sornarajah explained that "regimes succeed when there is a commitment by a hegemonic leader to maintain the regime of rule."[330] In contradistinction to Gathii however, Sornarajah believed that the regime of IIL is becoming weak.[331] Sornarajah canvassed his argument upon the fact that the idealized regime under IIL becomes fragile when hegemonic states, like the United States, withdraw from the principles they created because of their position as capital importing states. To this end, he believed that a new phase of norm conflict is emerging whereby developed countries and third world states will wrestle in the fight for norm prescription.

The authors points touch on the foundational basis of the rules under IIL as found with the case of legitimate expectation which is under inquiry. With the concept of good faith and civility as an extension of legitimate expectation and its express reference by the Siag tribunal, a regime bias emerged in a way that the use of its interpretation will continue to foster injustice on the third world. In this situation, the foundation of legitimate expectation is faulty. This must be remedied. However, it is hard to see how this remedial process could be achieved under the agency of the system that created it. However, like Sornarajah postulated, the existence of a new phase of norm conflict can be used to challenge not just the foundational basis but the interpretation given to the FET as

[329] Ibid
[330] Muthucumaraswamy Sornarajah, "The Case Against a Regime on International Investment Law" in Leone E Trakman & Nicola W Ranieri, eds, *Regionalism in International Investment Law*, (New York: Oxford University Press, 2013) 475 [Sornarajah, "The Case Against a Regime on International Investment Law"]
[331] Ibid at 276

legitimate expectation. This phase has approached and would be given better insight in the next two succeeding chapters.

3.3 Indirect expropriation and the principle of proportionality

When highlighting the north-south divide regarding the emergence of expropriation as a standard of protection under international investment law, attention is sometimes paid to the north's desire for the Hull principle (which demands that compensation for expropriation should be prompt, adequate and effective)[332] and the south's historic preference for the Calvo doctrine which stipulates the application of national laws to compensation as was prominent in the Charter of the Economic Rights and Duties of States.[333] Without dismissing the relevance of this contention which arose in the context of direct expropriation, an evolutionary process occurred to cover instances of indirect expropriation where legitimate regulatory measures have been designated as expropriating if they impugn on an investors' investment.[334] Because this form of

[332] Felix Okpe, "A Historical Account of the Internationalization of Invest Disputes: What the Global South should know when negotiating bilateral investment treaties" (2017) 12:2 Florida A&M U L Rev 219

[333] The Charter of the Economic Rights and Duties of States arose from the attempt of Developing countries to create the New International Economic Law Order. Article 2(2)(c) was a direct attack on developed countries understanding of the popularized believe regarding the customary rule of treatment of aliens as well as the Hull principle in that it provided:
Each State has the Right:
"To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means."

[334] OECD (2004), "Indirect Expropriation" and "the Right to Regulate in International Investment Law", OECD Working Paper on International Investment, 2004/04, OECD Publishing, DOI: <10.1787/780155872321>

expropriation targets governmental powers, it has been criticized because of its potential in stifling the regulatory powers of host states and causing regulatory chill.[335]

From the angle of the third world, the appearance of indirect expropriation under IIL can be and has been subject of critique.[336] Its Americentric origin[337] is problematic in that the contextual circumstances which give rise to its emergence differ considerably from that within which it is being applied today.[338]

Moreover, its scope is uncertain and can at best be described as being in a state of flux.[339] In a bid to remedy this situation, the test of proportionality was devised to strike a balance between investors protections and host states.[340] The test which is used to determine the

[335] Maryam Malakotipour, "The Chilling Effect of Indirect Expropriation Clauses on Host States' Pubic Policies: a Call for a legislative Response" (2020) 22 Intl Community L Rev 235; Montserrat Corbella-Valea, "Indirect Expropriation and Resource Nationalism in Brazil's Mining Industry" (2014) 46:1 U of Miami Inter-American L Rev 61; Julia G Brown, "International Investment Agreement: Regulatory Chill in the Face of Litigious Heat?" (2013) 3:1 Western J of Legal Studies 3; Satwik Shekhar, "Regulatory Chill: Taking Right to Regulate for a Spin" (2016) Center for WTO Studies Working Paper CWS/WP/200/27

[336] David Khachvani, "Non-Compensable Regulation versus Regulatory Expropriation: Are Climate Change Regulations Compensable?" (2020) 35:1-2 , ICSID Rev Foreign Investment L J, 154, DOI: <10.1093/icsidreview/siaa009>

[337] Courtenay Barklen & Enrique Alberto Prieto-Rios, "The concept of "Indirect Expropriation" (2011) 11:21 Civilizar Ciencias Sociales y Humanas 77, online: <scielo.org.co/scielo.php?script=sci_arttext&pid=S1657-89532011000200006>, its appearance in the international system and its effects in the regulatory activities of governments" See also the *Chorzow factory case* (*Germany v Poland)* (1927), PCIJ (Ser A) No 9; See also, Felix E Torres, "Revisiting the Chorzow Factory Standard of Reparation – Its Relevance in Contemporary International Law and Practice" (2021) 90 Nordic J of Intl L 190, online: <brill.com/view/journals/nord/90/2/article-p190_190.xml?language=en#fn000006 >

[338] Barklen & Prieto-Rios, *supra* note 337. The Alberta Bela Reet was one of the first cases that laid the groundwork for what became indirect expropriation. In that case, government of Hungary banned the sale of liens and thereafter placed liens upon the occupancy of its "dwelling houses and courtyards. The international claims commission was said to have held that even though the title in the property never passed to the Hungarian government, placing restriction on the free use of property amounted to an expropriation.

[339] Fortier L Yves & Drymer Stephan L, "Indirect Expropriation in the Law of International Investment: I know it when I see it, or Caveat investor" (2005) 13:1 Asian Pacific L Rev 79; Malakotipour, *supra* note 335

[340] Malakotipour, *supra* note 335

legitimacy of a government measure against its effect on investors' investments[341] was an ingenious attempt towards the propagation of non-third world predilections. One commentator believed it will facilitate the promotion of the rule of law.[342] On the contrary, Sornarajah believed the creativity fosters "indeterminacy" and "subjectivity" since it continuously subject democratic functions of states to constant review.[343]

Like legitimate expectation, the doctrine of proportionality had no place in IIL until it first appeared in Tecmed case above.[344] Contextually, it arose when the tribunal decided to conduct an inquiry into whether Mexico's attempt at refusing to renew the licensing agreement was justified. In so doing, the tribunal reacted in the negative, holding instead that the measures taken in furtherance of public interest could not serve as a justificatory basis for undermining the investors' interest and therefore constituted indirect expropriation.[345] Rather than stop here, the tribunal took one further step to determine whether the measures taken in public interest were proportional to the violation of protection granted to the investor.[346] Cases, such as *Mellacher v. Austria*",[347] "*Pressos Compania Naviera and others v Belgium*"[348] and "*In the case of James and others*" as decided by the European Court of Human Rights were relied upon to hold that "there

[341] OECD, Directorate for Financial and Enterprise Affairs, *Indirect Expropriation and the Right to regulate in International Investment Law*, Working Paper on International Investment 2004/04 (2004)
[342] Schill, "General Principles of International Law and International Investment Law", *supra* note 305
[343] Sornarajah M, "An International Investment Court: Pancrea or Purgatory? (2016) Columbia Center on Sustainable Investment FDI Perspectives Research Report No. 180
[344] Han Xiuli, "The Application of the Principle of Proportionality in Tecmed v. Mexico" (2007) 6:3 Chinese J Int'l L 635
[345] *Tecmed v. Mexico, supra* note 7 at para 121
[346] Ibid at para 122
[347] *Mellacher v. Austria*, 10522/83, [1990] EHRR 391
[348] *Pressos Compania Naviera and others v Belgium,* [1995] ECHR 20

must be a reasonable relationship between the means employed and the aim sought to be realized."[349]

The tribunal's use of the proportionality test implicates the third world people in multiple ways. First, unlike legitimate expectation which affected them indirectly, the use of the proportionality test affected the third world people of Mexico directly. The Tecmed decision showed the tribunal's intolerance towards their needs by categorizing their resistance and revolt against the health and environmental impact of the hazardous landfill as a "political problem."[350] By doing this, their peculiar interest was subsumed under Mexico's as state.

The failure to acknowledge the interest of Mexicans and the consequent step of categorizing the former as a political problem had an immense consequence because the approach in which these categories of persons used in resisting the system of IIL was discarded and seen as illegitimate. Interestingly, the tribunal used the illegitimated resistance as an important component for assessing the proportionality of the validity of Mexico's failure to renew the license against the deprivations of investment protection suffered by Tecmed.[351] But in so doing, a critical question of methodology arises. Because while it might seem like the tribunal embarked on the frolic of evening out a state and investor's interest, in actual fact, it wasn't because as Stavos Tsakyrakis explained, there is really no common metric for examining what goes into the process of balancing and

[349] Ibid
[350] *Tecmed v. Mexico*, *supra* n 7 para 129
[351] Ibid at para 133

proportioning distinct interest.[352] And even though the proportionality test seemed to be deployed towards the achievement of an objective reality,[353] in the true sense, it could be inferred that it was used to further neoliberal agenda through its reliance on European authorities.

Interesting, while the tribunal's approach toward the use of the proportionality test has been praised,[354] certain commentators have critiqued the manner in which the tribunal arrived at its decision.[355] These criticisms have targeted the methodological approach of the tribunal.[356] In the converse, those criticism failed to address the significant issue as to why the Tecmed tribunal relied on the decisions of the European Court of Human Rights (ECHR) to formulate the ratio of its award. Hence necessitating the question – why was the decision of the ECHR relied upon?

Though arbitral tribunal's use of EHCR decisions came with little surprise because of how constrained the use of ideas under international law have been greatly limited to Europe and the west,[357] it was alarming that in using cases that sought to protect human rights,

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[352] Stavros Tsakyrakis, "Proportionality: An assault on human rights?" (2009) 7:3 Intl J of Constitutional L 468, DOI: <10.1093/icon/mop011>

[353] Ibid

[354] Xiuli, *supra* note 344

[355] Peter D. Isakoff, "Defining the Scope of Indirect Expropriation for International Investments" (2013) 3:2 Global Bus L Rev 189; Ben Mostafa, "The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law" (2008) 15 Australian Intl L J 268; William W. Burke-White & Andreas Von Staden, "Private Litigation in a Public Sphere: The Standard of Review in Investor-State Arbitrations" (2010) 35:2 Yale J Int'l L 283; Caroline Henckels, "Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration" (2012) 15:1 J of Intl Economic L, 223, DOI: <10.1093/jiel/jgs012>; Esmé Shirlow, "Deference and Indirect Expropriation Analysis in International Investment Law: Observations on Current Approaches and Frameworks for Future Analysis," (2014) 29:3 *ICSID Rev - Foreign Investment L J,* 595, DOI: <10.1093/icsidreview/siu012>

[356] Ibid

[357] Gathii "The Promise of International Law: A Third World View", *supra* note 62. In this article, James Gathii explained how constrained international law had been in its territorial and ideological application.

the tribunal was dismissive of the human rights of Mexicans. This in turn reveals the paradoxical nature of the proportionality test because why should the yardstick, which aimed at balancing the rights of multiple actors under IIL, fail to consider the totality of human rights knowing that the proportionality test rests upon the preservation of human rights in its entirety? The test's inability to effectively consider the *sui generis* nature of the rights of different actors under IIL leads to the conclusion that its use is erroneous.[358] Unfortunately though, the tecmed decision now has precedential value and was adopted in the recent case of Beer creek Mining Corporation v Republic of Peru (the Bear Creek case).[359] However, unlike the Tecmed case, the third world people actively participated and even tried espousing their interest at the ICSID tribunal through the presence of a non-profit organization as *amici*.

[358] Tarcisio Gazzini, "Drawing the Line between Non-Compensable Regulatory Powers and Indirect Expropriation of Foreign Investment - An Economic Analysis of Law Perspective" (2010) 7:3 Manchester J Int'l Econ L 36. Tarcisio Gazzini argued in the same manner by noting that:
"If the introduction of the proportionality test must be welcome, the application of the test remains rather rudimental and inaccurate. On the one hand, it is difficult to compare the aim of the measure(s) with the charge imposed on the foreign investor. This may work in the field of human rights where tribunals are used and allowed to strike a balance between the general interest and the protection of the individual while recognizing a wide margin of discretion to States. The transposition to foreign investment of this approach seems rather problematic. The proportionality test as elaborated by the ECHR, moreover, seems inappropriate in respect of measures affecting a plurality of subjects. In this case, proportionality must be applied taking into account inter alia the global impact of the measures for two reasons. First, the test will not only produce a partial and misleading result, but also make it extremely difficult - if not impossible - to prove a case of indirect expropriation. Second, since the impact of the regulatory measures on different investor may be different, the individual application of the proportionality test is likely to lead to inconsistent outcomes."

[359] *Bear Creek Mining Corporation v. Republic of Peru*, *supra* note 84

a. The Bear Creek case[360]

The case of Bear Creek was a recent decision where the tecmed tribunal's reasoning was relied upon.

The relevant facts of the case were that Bear Creek was engaged by the Republic of Peru for the operating and mining silver within the Santa Ana mine. The local and indigenous community however protested on the grounds that the project would impact their indigenous land negatively[361] and requested that the project should be halted.[362] To quell the situation, Bear Creek engaged some indigenous community that were closest to the location of the project. However, it failed to consult some others. Peru found this wanting and viewed it as a breach of some of some the laws applicable within its jurisdiction. Bear Creek however resisted and contended that while it might be obliged to consult with indigenous communities under Peruvian law, it had no duty to obtain their consent before undertaking its mining operations.[363] Peru however disputed this.[364] An Amici, submitted by a non-profit, informed the tribunal about the implication of the project and the stance of some indigenous community who were averse to the project. The non-profit in its

[360] During the course of this thesis, I encountered a challenge of analyzing how the concept of proportionality has been interpreted in an ISDS case involving third world states of Africa. This is because as at the time I wrote this thesis, the website of the international center for the Settlement of Investment Dispute showed that most cases were African nations were state parties to a dispute were either discontinued or made private. In fact, the private nature of ISDS is one reason why the dispute settlement mechanism has been criticized. To this end, I decided to use the Bear Creek case, which involves the government of Peru, a third world state to depict how the idea of proportionality has been constructed under IIL. See Ariel Anderson, "Saving Private ISDS: The Case for Hardening Ethical Guidelines and Systematizing Conflict Checks" (2018) 49 Georgetown J of Intl L 1144

[361] Ibid at para 152

[362] Ibid at 169 – 170.

[363] Ibid at 241

[364] Ibid at 258

submission also noted that if Bear creek had approached things differently, perhaps, the situation would have been different."[365] Bear Creek continued to resist and argued that under the international law, it had no legal obligation towards the community members as it was the Republic of Peru and not it, that ought to be directly responsible to the communities.[366] Going by this, Peru revoked the mining license and Bear creek initiated arbitration on several grounds including indirect expropriation, claiming that the revocation of its license eroded its interest. In its decision, the tribunal was split.

Prof Philippe Sands dissented[367] while Prof. Karl-Heinz Bockstiegel and Dr. Michael Pryles, who constituted the majority ("the majority"), relied on the decision of the Tecmed tribunal and its use of the proportionality test to hold that the Government of Peru's action for revoking the licensing wasn't commensurate to the loss suffered by the investor. For the sake of emphasis, the majority noted that:

> The impact of the measure and its purpose – and proportionality is wholly lacking in Supreme Decree 032. The severity of Supreme Decree 032 is beyond question: it permanently deprives Claimant of its ability to own and operate its lawfully-acquired mining concessions. The disproportionality between this and the stated goal of quelling political pressure and social protests is evident, and Respondent could have enacted a temporary measure instead. Indeed, when a nondiscriminatory measure that is designed and applied to protect legitimate public welfare objectives is "*so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith*", that constitutes an indirect expropriation.[368]

[365] Ibid at 218
[366] Ibid at Para 236
[367] In this thesis, I will not examine the dissenting opinion of Prof Philippe Sands because he concurred with the majority on key substantive points. He only disagreed with the amount that was awarded in damages.
[368] Ibid at Para 347

The bear creek case and the decision rendered is informative because in addition to adopting the *ratio* of the Tecmed tribunal, it evokes key issues that threatens the legitimacy of ISDS today. Before coming to address those issues shortly, it should first be noted that unlike the Tecmed tribunal, the record of proceeding provided a graphical illustration of the third world people's engagement with the mining activity at the Santa Ana mine.

There was direct and unequivocal evidence which revealed that the local's resistance to the activities at the Santa Ana Mine was what led to the government's decision to revoke Bear Creek's license. The government itself argued against this when it noted that its action was done in furtherance of a legitimate public purpose.[369] This assertion was also reinforced by the participation of DHUMA, a non-profit that had represented the interest of the locals for over thirty years, as *amici curie*.[370] DHUMA's evidence revealed that the third world people weren't engaged and even where they were, there were technical difficulties which made communication impossible.[371] Though this evidence provided insight into what transpired, the weight attached to its use was dependent on the tribunal's discretionary power. Thus, the majority, just as in Tecmed, noted that the protest of the locals was politically motivated since it targeted the prevention of mining activities as a whole and not the specific activity of Bear Creek's mining operation.[372] Here,

[369] Ibid at 363
[370] Ibid
[371] *Bear Creek Mining Corporation v. Republic of Peru*, supra 84 at 225
[372] Ibid at 247. Because of the private nature of certain arbitral awards on the ICSID website, it was difficult to obtain an African case where the doctrine of proportionality, as an extension of indirect expropriation, was invoked. However, there are cases where the interests of locals came into question during arbitral proceedings. For instance, in Bernhard von Pezold and others v Republic of Zimbabwe, though the breach of allegation of expropriation was based on direct expropriation, it touched upon the rights of locals. In that

the majority's compartmentalization was flawed for the sole fact it was the latter that triggered the former. By failing to recognize the former distinction, identities and ideas of the locals were subverted because ignoring locals has not only distributive but also recognition implications which meant that the identity and way of life of those communities were at stake."[373]

Identity affects voice for it is only through the former that the latter can be recognized and vice-versa. The failure to pay deference to the voice and identity of the third world people negates the social perception of law as a tool that ought to be continuously shaped by human interaction.[374] Jutta Brunnée and Stephen Toope, who conceived law as a social phenomenon, emphasized how legal rules should be generated and sustained by human conduct and not vice versa.[375] The authors' conception of law could be viewed in light of

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case, there was uncontested evidence that the government of Zimbabwe directly expropriated the farmlands belonging to white investors. The government claimed to have undertaken the measure it did under the pretext that it needed to engage in a land reform that would help distribute land to its indigenous people. Though the investors refuted, and the tribunal also found the measures discriminatory because of the impact on white and black landowners, the crucial point worthy of note here was that indigenous community members petitioned to join in the arbitral proceedings. However, the claimants objected, and the tribunal objected to that objection. In arriving at its conclusion, the tribunal noted that the circumstance of the case gave rise to doubts as to the independence or neutrality of the petitioners. Moreover, it was noted that because of a party's objection (which in this case was the claimant), the tribunal's hands were tied and as such, the petition couldn't be entertained because its powers are simply discretionary. The tribunal's analysis regarding the neutrality of petitioners in this case was of high importance because it begs the question as to how neutrality could be determined. At what point can it be said that a third non-disputing party is neutral? I put forth this question because of the glaringness of such parties in aiding the case of disputing parties. Moreover, such parties who are willing to joined, often do that to advance their interest which by extension advance the position of a party to a dispute. To this end, the tribunal's decision in determining what constituted neutrality ought to have been clearer because in actual fact, a non-disputing party to a dispute isn't necessarily neutral. Berhard Friedrich & others v Republic of Zimbabwe, (2015) italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: The Hon. L Yves Fortier PC, CC, QC, Professor David AR Williams QC and Mr Michael Hwang) [*Berhard v Zimbabwe*]

[373] Nicolas M Perrone, "Local communities, extractivism and international investment law: the case of five Colombian communities" (2022) 19:6 Globalizations 837

[374] Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (United Kingdom: Cambridge University Press, 2010)

[375] Ibid

how the interaction of the third world people ought to have facilitated a sensitivity that would accommodate their perception. In trying to integrate this perception, sometimes, the interaction between the third world people and the traditional actors[376] under IIL breeds tension as seen in bear creek. According to Balakrishna Rajagopal, this type of resistance has the propensity to lead to the third world people's self-determination.[377] However, as opposed to attempting to attain a state like sovereignty, such self-determination serves the end of furthering goals that would enable the developmental interest of the people of the third world because as Rajagopal explained, social movement helps in propagating the evolution of international law.[378] To Odumusu , the resistance was explained as a "struggle for the construction of meaning."[379] Meaning which in turn helps to determine the legal norms that will regulate the conduct of actors under IIL.[380]

Under IIL, meanings that become transposed to legal norms only consider the binary nature of states and investors as actors. By so doing, the non-inclusive nature of IIL has led to the invisibility of locals as Nicolas Perrone observed.[381] Similarly, Odumusu argued in the same vein.[382] In addition, she took a step further by suggesting the use of a "multi-actor investor" contract which would serve as an agreement between host states,

[376] i.e states and foreign investors.
[377] Balakrishna Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (New York: Cambridge University Press, 2003)
[378] Ibid
[379] Ibironke Odumosu, *ICSID, Third World Peoples and The Re-Construction of The Investment Dispute Settlement System*, *supra* note 65
[380] Ibid at 249
[381] Perrone, Nicolás M. "The 'Invisible' Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime" (2019) 113 AJIL Unbound 16.
[382] Ibironke Odumosu, *ICSID, Third World Peoples And The Re-Construction of The Investment Dispute Settlement System*, *supra* note 65

investors and local communities especially those that will be affected by extractive industries as found in the Bear creek case.[383] This type of agreement as Sara Seck explained, will help alleviate the concerns of local communities since their consent will be sought.[384] The essential agreement, which would help to protect the interest of the third world people was predicated upon the recognition that their agency should be legitimized as a distinct group and recognized as people *qua* people.[385] As a category on their own, Odumusu refuted the idea of subsuming the interest of the third world people underneath those of states because interest may sometimes clash.[386] Lorenzo Cotula and Mika Schroder explained why this might occur by noting that the fear of regulatory chill and arbitration claims have the potential to forestall a government from meeting community needs.[387] However, while these arguments are ingenious, times have changed in ways that might accommodate the ideas of the third world both as states and people.

In recent times, third world states have been preoccupied with attracting sustainable investment which emphasizes the qualitative and not quantitative nature of investment activities.[388] As I would argue in chapter 5, the third world focus on attracting sustainable

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[383] Ibironke T Odumusu -Ayanu, "Governments, Investors and Local Communities: Analysis of A Multi-Actor Investment Contract Framework" (2014) 15 Melbourne J of Intl Law 1

[384] Sara L Seck, "Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations" (2011) 3:1 Trade L & Dev 164.

[385] Odumusu, "The Antinomies of the (Continued) Relevance of ICSID to the Third World", *supra* note 18 at 149

[386] Ibid

[387] Lorenzo Cotula & Mika Schroder, *Community perspectives in investor-state arbitration* (United Kingdom: International Institute for Environment and Development, 2017)

[388] Marie – Claire Cordonier et al, *Sustainable Development in World Investment Law*, ed. (Alphen aan den Rijn: Kluwer Law International, 2011); Lise Johnson et al, "Aligning International Investment Agreements with the Sustainable Development Goals" (November 2020), online (pdf): *Columbia Center on Sustainable Investment* <ccsi.columbia.edu/sites/default/files/content/docs/publications/Briefing-Aligning-International-Investment-Agreements-with-the-Sustainable-Development-Goals.pdf>

investments has altered the need to categorize the need of the third world state and people as separate because by its inherent nature, sustainable investments seek to advance the development of third world state and people.[389]

3.4 Conclusion and chapter summary

Through the lens of the FET and indirect expropriation, this chapter sought to inquire and reveal the nature of the interactional relationship between the third world and developed states. As seen from the discussion above, the dominant and domineering identity of developed countries shaped the interaction between them and the third world in the creation of norms.

Moreover, it became obvious as to how wielded power (as seen in Chapter two) transmuted into ideas which evolved into legal norms under IIL. This was seen with the connotations assigned to standards of protections under IIL. With the FET as a minimum standard under CIL, the marginalization of third world states was observed in its formational process. Even the persistent objector's doctrine will not avail the third world in this instance because of the already completed nature of the custom.

As for FET as legitimate expectations, the historical underpinning of the suppression of the third world still echoes round its connotations. The idealized notion of civility, which historically, was used to silence the third world, permeates through the foundational basis of the clause to continue to favor the institution put in place by developed countries.

[389] Karl P Sauvant, "Improving the distribution of FDI benefits: The need for policy-oriented research, advice and policy" (2021) 4:2 J of Intl Business and Policy 244

Likewise, indirect expropriation and the origin of the principle of proportionality revealed that the rule emanated from Europe and has continued to drive the meaning of the clause in a way that implicates the third.

The common thread amongst the standards examined reveals the presence of ISDS as a means for facilitating the lopsided decisions that implicates the third world. Even though ISDS on its own is a standard of protection, it deserves a close attention because of its consequences on the third world and the current attack that has threatened its legitimacy.

CHAPTER FOUR – INVESTOR STATE DISPUTE SETTLEMENT, THE LEGITIMACY CRISIS AND RECENT DEVELOPMENTS UNDER INTERNATIONAL INVESTMENT LAW

4.1 The core of this chapter's content

This chapter is a continuation on the discussion of the previous chapter on standards of protection. However, attention here will be paid to ISDS because in addition to being a protective standard, ISDS implicates the third world in certain areas especially those pertaining to human rights, and the preservation of states' regulatory regime. These issues which arose from the implication of ISDS as a mechanism for preserving the ideologies of developed countries as found in standards of protections led to the creation of the reform agenda that is currently underway at the United Nations. But to what extent will this reform serve the interest of the third world? Is it a disguised attempt to continue the marginalization of the third world states and its people? In seeking to answer the former questions, this section proceeds as follows:

Using a third world perspective, section 4.2 proffers insight into the nature of ISDS. To show its lopsided nature, I revisited the historical account that led to the use of the ISDS as the dominant mechanism for settling investment disputes under IIL. Section 4.3 addresses the procedural and substantive effects of ISDS. Section 4.4 examines the current reforms under IIL and ISDS. Through the lens of history, I put forth the hypothesis in section 4.5 that the reform agenda taking place is a trap for third world states and should as such, refrain from further participation. Section 4.6 parallels the reform mode of dispute resolution alongside the current reform agenda and what is at stake for third world states and people. Section 4.7 concludes.

4.2 Understanding ISDS and the ICSID from a third world perspective: a critical insight

Investor state dispute settlement (ISDS) like the name depicts is a mechanism for settling disputes arising between investors and host states. Under IIL, ISDS emerged primarily as a means of protecting investors. In the book titled *Resistance and Change in the International Law of Foreign Investment*, Sornarajah explained that the presence and protection of foreign investors as key actors under IIL first emerged through domestic contracts that protected them.[390] The use of contracts as Sornarajah later explained paved way for surmounting several theoretical hurdles before the project of protective standards that helped preserved the role and identity of those actors as accomplished through ISDS. This phenomenon as he later demonstrated, revealed that:

> Private power can wield significant authority in constructing systems of rules in international law, even if they run counter to its essential theoretical base…It demonstrates that systems of rules could be created and maintained despite their being inconsistent with international law as long as a base of power support the venture.[391]

The system of ISDS was later preserved through the International Center for the Settlement of Investment Disputes (ICSID). [392] The institution of the ICSID was created by the World Bank. Its existence surfaced after the descent of the NIEO and the emergence of IIAs and bilateral investment treaties concluded between developed and developing

[390] M Sornarajah, *Resistance and Change in International Law on Foreign Investment*, (Cambridge: Cambridge University Press, 2015) [Sornarajah, *Resistance and Change in International Law on Foreign Investment*]

[391] Ibid

[392] I understand that there are other institutions that holds ISDS disputes such as the permanent court of arbitration, and the international chamber of commerce. However, in this work, I only give consideration to the ICSID as an institution because of the central role it plays in facilitating ISDS cases.

states.[393] The institution was created to facilitate the resolution of disputes arising from investment activities. It was meant to further to perform the dual role protecting foreign investments and promoting economic development.[394] However, as seen in the cases that were analyzed in the preceding chapter, the ICSID has been preoccupied with investment protection in contradistinction to promoting economic development in the third world.[395] To this end, the ICSID has been criticized.

Angie suggested that the creation of the ICSID under the auspice of the world bank was meant to further neoliberal ideologies.[396] To him, the policies and instrumentalities devised by the World Bank were made under the pretext of programs that sought to ensure good governance in third world states.[397] This initiatives, as he noted, equates the civilizing pursuit that was used to dominate the third world people even though such was said to be an extension of international human rights law. Angie also explained that human rights was propagated as an extension of development with the implication that those two concepts was linked to the idealized notion of good governance in third world state. He later concluded that the idea of human rights was used through the rhetoric of governance to advance western ideologies because often, actions are situated within the

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[393] Olaniyam, *supra* note 206

[394] *The Convention on the Settlement of Investment Disputes Between States and Nationals of other Contracting States*, 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) [*ICSID Convention*]

[395] Omar E Garcia-Bolivar, "Defining an ICSID Investment: Why Economic Development should be the core" (13 April 2012), online: *Investment Treaty News* <iisd.org/itn/en/2012/04/13/defining-an-icsid-investment-why-economic-development-should-be-the-core-element/>; To worsen the situation, ICSID awards have an element of finality. The decision rendered is synonymous with the decision of the final court of a host state and cannot be subject of appeal. See *ICSID Convention,* Art. 54

[396] Anghie, *Imperialism, Sovereignty and the Making of International Law*, *supra* note 17; See also Ray Kiely, "Neoliberalism Revised? A Critical Account of World Bank Conceptions of Good Governance and Market Friendly Intervention" (1998) 28:4 Intl J of Health Services 683

[397] Anghie, *Imperialism, Sovereignty and the Making of International Law*, *supra* note 17

realm of reforming third word states instead of the structure of the international economic order.[398]

4.2.1 The ICSID and ISDS: a problem for the third world

Angie's point is of immense magnitude because it leads me to put forth two hypotheses in this thesis regarding the nature of the ICSID, an institution developed by the World Bank to encourage investment promotion and economic development. First, contrary to the popular belief that the ICSID was created to further economic development in third world states, it is my contention here that economic development was never part of the ICSID's undertaking when the dots are connected. Second, without denying the scholarly opinions that developing countries, including African countries, were consulted, and actively participated in the formation of the ICSID,[399] it is submitted that the question of active participation and consultation differs largely from the willingness to be bound by ISDS and ICSID as a means of dispute resolution for investment disputes. While the former undoubtedly occurred, it is my contention that the latter didn't.

To put the foregoing point into perspective, it must be understood that the creation of ISDS was never unique as a mode of dispute settlement in developing countries. It purposefully emanated from the global north to protect their very own who[400] ventured

[398] Ibid

[399] Antonio R Parra, "The Participation of African States in the Making of the ICSID Convention" (2019) 34:2, ICSID Rev-Foreign Investment L J 270, DOI: <10.1093/icsidreview/siz012>; Odumusu, "The Antinomies of the (Continued) Relevance of ICSID to the Third World, *supra* note 18

[400] Gus Van Harten,*The Trouble with Foreign Investor Protection*, (Oxford: Oxford University Press, 2020)

into developing states to undertake investment activities.[401] For this to succeed in the recipient developing countries however, the untested notion economic progress was sold as the messianic pill for the ailing status of third world states.[402] Time has shown otherwise. The futility of the untested ideals has been discovered as a hoax and the third world in particular have been aggressive with discarding this pill[403] in a bid to attract what they always wanted i.e., sustainable investments.[404]

The ICSID which is an appendage of the World Bank, was created to facilitate disputes between investors and states, protect foreign investments and promote economic development.[405] In fulfilling its mandate, questions have been put forth in recent years whether the ICSID performed the broad spectrum of economic development for which it was created.[406] Odumusu canvassed an important point that will be relevant to the conversation at hand. She noted that even though economic development was

[401] Georg Schwarzenberger, "Present-Day Relevance of the Jay Treaty Arbitrations (1978) 53 Notre Dame L. Rev. 715, online: <scholarship.law.nd.edu/ndlr/vol53/iss4/3>. To put this into context, the precursor of the modern day ISDS was the Jay treaty of 1794. The Jay treaty was a treaty of Friendship, Commerce and navigation between the United Kingdom and the United States. See: "Prof Dr Christian Tietja & Prof Dr Freya Baetens, "The Impact of Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership" (2014), online: <www.eumonitor.eu/9353000/1/j4nvgs5kjg27kof_j9vvik7m1c3gyxp/vjn8exgvufya/f=/blg378683.pdf>

[402] Lise Johnson et al, "Investor-State Dispute Settlement: What are We trying to achieve? Does ISDS get us there? (11 December 2017), online (blog): *Columbia Center on Sustainable Investment* <ccsi.columbia.edu/news/investor-state-dispute-settlement-what-are-we-trying-achieve-does-isds-get-us-there>; Felix O Okpe, "Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States" (2014) 13 Rich. J. Global L. & Bus. 217, online: <scholarship.richmond.edu/global/vol13/iss2/3>

[403] The notion of foreign investment serving as the antidote for economic development came from United Nations Resolution passed at the 510th meeting of the General Assembly; See UNGA, 7th Sess, 510th Mtg, UN Doc A/RES/622 (1952).There was no basis in which this conclusion was achieved.

[404] Johnson et al, *supra* note 388

[405] *ICSID Convention, supra* note 394

[406] Garcia-Bolivar, *supra* note 395

anticipated by the drafters of the ICSID, its interrelation with public interest issues might not have been so.[407]

The magnitude of Prof. Odumusu's assertion lie in the distinction between economic development and its impact in the real sense. The facilitation of foreign investment as known does not necessarily translate into progress especially in relation to people's living standards.[408] This distinction has always been acknowledged and can even be deemed as a well-settled economic principle.[409] Angie himself implied this when he argued that the world bank subsumed human rights under the development and the concept of good governance to promote western ideologies.[410] Had the drafters of the ICSID Convention factored in the fact that a distinction lied between economic development and its impact in reality and in this case, the protection of human rights, ample protection would have undoubtedly been provided for the third world and their people because at the surface level, the need to advance the status of developing countries *appeared* as one of the reasons underlying the establishment of the ICSID as an institution.[411] As Ahmed Sadek El-Kosheri explained, "The ICSID Convention did not have it in mind…to encourage investments in industrialized countries."[412]

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[407] Odumosu, "The Antinomies of the (Continued) Relevance of ICSID to the Third World", *supra* note 18
[408] Amit Kapoor & Bibek Debroy, "GDP is not a Measure of Human Well-Being" (4 October 2019) Harvard Business Rev, online: <hbr.org/2019/10/gdp-is-not-a-measure-of-human-well-being>; Anita Frajman Ivković &Josip Juraj Strossmayer, "Limitations of GDP a measure of Progress and Well-Being" (2016) UDK Rev Article 257, online (pdf): <www.bib.irb.hr/824529/download/824529.4217-12346-1-PB.pdf>; BF Giannetti et al, "A review of limitations of GDP and alternative indices to monitor human wellbeing and to manage eco-system functionality" (2015) 87 J of Cleaner Production 11
[409] Kapoor & Debroy, *supra* note 408
[410] Anghie, *Imperialism, Sovereignty and the Making of International Law*, *supra* note 17
[411] Ahmed Sadek El-Kosheri, "ICSID Arbitration and Developing Countries" (1993) 8:1 ICSID Rev – Foreign Investment L J 104, DOI: <10.1093/icsidreview/8.1.104>
[412] Ibid

Perhaps, should it be termed a coincidence or inadvertence that the ICSID, under the auspice of the World Bank, a global *economic* institution, failed to consider this important distinction?[413] As one may only postulate what the answer might be or even consider the

[413] Overall, the years, third world resistance have facilitated the World Bank to move from its neoliberal policies that was primarily geared towards investment protection to safeguards and sustainability measures. Such measures, according to the bank, were established to prevent or mitigate the adverse effect of project on individuals and the environment. In 2017, a new framework (i.e., the Environmental and Social Framework) was enacted in response to harmful practices of investment projects that were financed by the bank. However, while commendable, the Bank's role in reshaping the ICSID has been relatively minimal and has been constrained to procedural reforms of the ICSID institution through the creation of rules that entered into force in July 2022. The issue with the ICSID reform by the world bank is that it is only meant to further the end of modernizing the institution in terms of technological facilities. As will be discussed in the succeeding sections, one of the criticisms of the ICSID and ISDS has been in relation to human rights protection. The institutional reform however failed to address this.

Kabir Duggal & Nicholas Diamond however seemed to believe otherwise. They categorically noted that the procedural reforms are protective of first-generation rights. This conclusion was based on the fact that certain procedural reforms aim at the early dismissal of frivolous suit and meeting the end of procedural justice which they deemed integral to civil and political rights as first-generation rights. Thereafter, they drew the distinction between first generation rights as civil and political rights, second generation rights as socioeconomic rights and third generation rights as collective rights. The authors believed that the reform agenda would help to meet developmental ends particularly through the lens of sustainability. They believed that procedural reform helps to further the end of justice as found in the Sustainable Development Goal 16 which seek "to promote peace and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institution at all levels. Going by this, it was concluded that all generation of rights should be infused into the reform process to circumvent the tension between international investment law, human rights and ISDS. The points canvassed by Duggal and Diamond seemed to have several consequences which in implicates developing countries. First, the distinction between all generation of rights is simply apparent and not real. As Freedman contended, the immutability of the categorization has blurred up. This is made obvious when it is realized that for citizens in developing countries, the fulfillment of their first-generation rights is dependent on the other sets of rights. In short, the right to life or dignity – as a first generation right – for an economically disadvantaged citizen of a developing country will be meaningless if there are no guarantees for their second and third generation rights such as right to basic necessities of life and a right to a healthy environment.

For people in the global south, the categorization and compartmentalization of human rights is just a question of semantics. This must be recognized because the reality on ground and the lived experiences of these individuals differs from the distinction as to whether a particular subset of right should be paid deference or not. Secondly, the idea that the fixation of the reform agenda exists to propagate SDG 16 is clearly misplaced. For the sake of repetition, the SDG goal in question operates to "to promote peace and ***inclusive societies*** for sustainable development, provide ***access to justice for all*** and ***build effective, accountable and inclusive institution*** at all levels." I emphasize on the words and phrases highlighted because it must be questioned if the procedural reforms are truly forging an inclusive society for all. Clearly, Kabir Duggal & Nicholas Diamond didn't provide an answer to this question or even seemed to have addressed it. The idea of inclusivity is predicated on equality and everyone's full participation in the society and in this instance, the ICSID as an institution of international investment law and ISDS. Even if it were agreed that some form of inclusivity exists, it is doubtful whether the test of "full participation", central to inclusiveness, will be met. My argument is predicated upon the fact that although the ICSID reform made

former as a rhetoric, nevertheless, it is worth reminiscing about because the failure to pay the requisite deference to the former distinction has mete a great cost on developing countries and its people as found on the impact of arbitral awards on the finances and balance of payment of countries[414] in the global south as well as key human rights[415] and sustainability issues.[416] The relevance of this question becomes stronger when the history of the ICSID is considered against its antecedental backdrop of facilitating economic

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ample provisions for the submission of non-disputing parties, its scope is limited to what deemed appropriate for the disputing parties since the latter can decide the fate and conditions upon which a non-disputing party would be permitted to file a submission. Moreover, in considering SDG 16 goal of seeking to meet the end of justice, it is relevant to ask Ibironke Odumusu's thought provoking question by asking "justice for whom?"

This question leads me to recognize the relative meaning of what justice is and how international organizations including the United Nations in the case of SDG 16 has failed to clearly define what exactly justice is because really from whose perspective should justice be adjudged? In other words, what is justice? As far as I am concerned, justice is an empty word with no true connotation or an inherent meaning that is immediately recognizable at a glance. Perhaps, that explains why it is being used in several ways. The Idea of justice must be clearly defined because I doubt if the intention of the creators of SDG 16 would be to limit institutional justice to certain parties without considering the full and inclusive participation of the citizens of the global south who happens to be the subject of what it seeks to protect. Until we recognize this and have a clearly defined notion of justice to serve as a guide, the pendulum of justice will continue to swing left or right with no definite direction as to exactly what it should entail. See World Bank, "Safeguards and Sustainability Policies in a Changing World: An Independent Evaluation of World Bank Group Experience" (last visited 17 August 2022), online: <openknowledge.worldbank.org/handle/10986/2571>; Peters Jeremy, "What is inclusion?" (1999) 2:5 The Rev J of Undergraduate Student Research 15, online: </fisherpub.sjfc.edu/ur/vol2/iss1/>; Freedman R, "Third generations rights: is there room for hybrid constructs within International Human Rights Law?" (2014) 2:4 Cambridge J of Intl & Comp L, DOI: < 10.7574/cjicl.02.04.134>; Nicholas J Diamond & Kabir AN Duggal, "ISDS Reform and Advancing All "Generations" of Human Rights" (17 June 2020), online (blog): *Kluwer Arbitration Blog* <arbitrationblog.kluwerarbitration.com/2020/06/17/isds-reform-and-advancing-all-generations-of-human-rights/>; Duggal & Diamond, *supra* note 12

[414] Charity L Goodman, "Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina" (2014) 28:2 U Penn L 449, online (pdf): <scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1179&context=jil>; Tarald Laudal Berge & Axel Berger, "Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity" (2021) 12:1 J of Intl Dispute Settlement, 1–41, DOI <10.1093/jnlids/idaa027>

[415] Gathii, "Reform and Retrenchment in International Investment Law", *supra* note 12; Gervais, *supra* note 12

[416] Aaron Cosbey, "Can Investor-State Dispute Settlement be Good for the Environment?" (12 April 2017), online (blog): *IISD* <www.iisd.org/articles/policy-analysis/can-investor-state-dispute-settlement-be-good-environment>

development.[417] Or rather, its historical underpinning that was masked as a way of facilitating economic development.

Regarding my second argument, the series of events that led and occurred after the creation of the ICSID is highly pertinent to my contention. This began when Aaron Broche, the previous General Counsel at the World Bank, and the founder of the ICSID, presented his note to the Executive Directors of the Bank in 1961.[418] In that note, Mr. Broche highlighted how the failure of a proper mechanism for the settlement of investment disputes constituted a problem.[419] He spoke about the need for suggesting a solution and thereafter indicated the use of ISDS.[420] Before this however, he noted that "some investors, mostly large corporations especially in the field of extractive industry, had negotiated arbitration agreements with host Governments, providing for detailed rules regarding the selection of arbitrators, the arbitral procedure and in some cases, the law to be applied by the arbitral tribunal."[421] When this statement is connected to the world events that were occurring at that time, the subtlety of ISDS, as preserved through the ICSID, as a forced mechanism for dispute resolution would become obvious.[422]

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[417] Odumosu, *Third World Peoples And The Re-Construction of The Investment Dispute Settlement System*, *supra* note 65

[418] International Center for the Settlement of Investment Dispute, *History of the ICSID Convention – Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, (Washington: ICSID Publication, 2009) 1

[419] Ibid

[420] Ibid at 2

[421] *International Center for the Settlement of Investment Dispute*, *supra* note 418

[422] Andreas F Lowenfield, one of the founders of the ICSID, before he died in the year 2014, gave a vivid picture into the events that transpired during the creation of the ICSID. His article showed and lent credence to how its neoliberal agenda was masked under the guise of the institution's neutralized forum. For more details, see Andreas F Lowenfield, "The ICSID Convention: Origin and Transformations" (2009) 38:47 Georgia J of Intl & Comp L 48

The extractive industry which Mr. Broche alluded to was largely known to be operational in newly emerging decolonized developing countries, especially those in Africa.[423] As history revealed, these countries wanted economic freedom and clamoured for permanent sovereignty over their natural resources[424] as found in the Charter for the Economic Rights and Duties of States (the Charter) which developing states forged an allegiance to create in the year 1972.[425] Though this charter made no provision for a dispute settlement clause, its existence can be implied from Article 2 of the Charter which provided that:

> Each State has the right:
>
> (a) To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment.

The foregoing article depicted that the third world's preference and first recourse to dispute settlement would be those found within their national space. Interestingly though, the above provision as contained in the Charter came into existence in the year 1972. The Convention on the Settlement of Investment Disputes between States and Nationals of Other Contracting States ("the Washington Convention"), which established the ICSID, on the other hand came into force in the year 1966.[426] These dates showed a mismatch. Six years after the Washington Convention came into existence, developing

[423] Erica Greco, "Africa, extractivism and the crisis this time" (2020 47:166 Rev of African Political Economy 511; Japhace Poncian, "Resource nationalism and community engagement in extractive resource governance: insights from Tanzania" (2021) 48:170 Rev of African Political Economy 529.
[424] UNGA, *Charter on the Economic Rights and Duties of States*, 29th Sess, UN Doc A/9631 (1975) Res 3281
[425] Ibid
[426] *ICSID Convention*, *supra* note 394

countries, like developed countries of that time, still fought that their interest be protected within their national space.

Could it be an omission or an oversight that the Charter, which developing countries considered key to their development, left out the ICSID? Even if it were to be agreed that the Charter's subject matter seemed generic and was not constricted to dispute settlement, could it be said that the failure to refer to a system of international adjudication in such an important document was an act of inadvertency? I do not think so. The omission was intentional. Clearly, developing countries knew what was at stake and didn't trust the system. Their reluctance in referring to the ICSID or even an international system of adjudication can only be explained in terms of their non-acceptance. This is despite the fact that the formation of the Washington Convention showed a trajectory of consulting and involving developing countries at its foundational stage.[427] This doesn't add up, there are missing pieces to the puzzle and the only explanation to this piece is that ICSID and ISDS was hoisted on developing countries.

The use of ISDS and the creation of the ICSID wasn't a case of creating a solution to a problem. It was so much more. The strong evidence depicting this can also be explained in terms of developed countries' strong opposition to the Charter.[428] Therefore, even if Mr. Broche's stance were to be accepted that the formation of ISDS and ICSID was a solution for settlement of disputes, behind the curtain were uncanny motives that sought

[427] *International Center for the Settlement of Investment Dispute*, *supra* note 418
[428] Charles N Brower, "The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?" (1975) 9:2 The Intl Lawyer 295.

to protect the interests of developed nations. This shows that countries, especially in investment matters, are and will always be self-interested. And, in this case, the creation of the ICSID is nothing but an institution depicting the self-interest of developed countries which in fact was hoisted and made to apply on developing countries. The consequent unfitness of ISDS and the ICSID has been shown and the third world resistance has begun again.

4.3 Effects of the neoliberal roots of ICSID and ISDS for third world states

The unfit nature of ISDS as found in the preceding section has generated a number of issues that threatens third world states. Depending on how it is viewed, these issues are can be grouped into procedural and substantive issues and would be considered below:

4.3.1 ISDS and procedural legitimacy: a third world problem

For certain developed countries, the criticism of ISDS and its legitimacy issue are often tilted towards procedural mishaps relating to fairness,[429] impartiality, uncertainty, and

[429] Sebastian Timothy Whiteford Curtis, "Resolving Investor State Dispute Settlement's Legitimacy Crisis: The Case for Reinstating the Requirement to Exhaust Local remedies" (2021) 7 London School of Economics L Rev 327; For instance, during the negotiations of the now defunct Transatlantic Trade and Investment Partnership (TTIP) with the United States in 2015, the European Commission (EC) undertook a public consultation with the goal of ascertaining whether ISDS should be included in the TTIP. From the consultation, the EC deduced some germane issues regarding the use of ISDS such as the supervision and functioning of arbitral tribunals, the relationship between ISDS and domestic remedies as well as the review of ISDS decision for legal correctness through an appellate mechanism. The existence of these issues revealed the public's preference for a permanent investment court which the European Union has been trying to establish as a multilateral institution. See European Commission, *Report on the online consultation on investment protection and investor-state dispute settlement in Transatlantic Trade and Investment Partnership Agreement*, online: <ec.europa.eu/commission/presscorner/detail/en/MEMO_15_3202>; European Commission, *Report: online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, online (pdf): <trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf>; "TTIP draft to be prepared by July: ISDS being built on both EU and US proposals" (16 May 2016), online (blog): *Investment Treaty News* <iisd.org/itn/en/2016/05/16/ttip-draft-to-be-prepared-by-july-isds-being-built-based-on-both-eu-and-u-s-proposals/>

inconsistency of arbitral decision.[430] Even though the former issues pertain to third world states as well, nevertheless, there are peculiar procedural concerns confronting the latter group.

These issues are unique in content and can at best, be described as reflective of developed countries' dominant identity and the power dynamics that had plagued the system of IIL. For instance, in an empirical study undertaken by Andrea K Bjorklund et al, the diversity gap between arbitrators from the third world and developed states was revealed.[431] It was discovered that ISDS wasn't "geographically diverse" because from the six hundred and ninety-five arbitrators who sat on cases, only 35% were from non-western states with 2% from sub-Saharan Africa.[432] In reiteration, "the median international arbitrator in ISDS was a fifty-three year old man who was a national of a developed state and had served as arbitrator in ten arbitrator cases."[433] In short, the authors recognized how historic and structural factors played a role in the constant appointment of "white men from North America and Europe."[434] Critiques have argued that the absence of arbitrators, especially those from Africa, shows the system deliberate attempt to avoid diversity.[435] This lack of representation as Mmiselo Freedom Qumba explained, has the tendency of affecting the

[430] Franck, *supra* note 181
[431] Andrea K Bjorklund et al, "The Diversity Deficit in International Investment Arbitration" (2020) 21:2-3 J of World Investment & Trade L 410
[432] Susan D Franck et al, "The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration" (2014) 53 Columbia J of Transnational L 429; See also Jonathan Bonnitcha et al, *The Political Economy of the Investment Treaty Regime*, (Oxford: Oxford University Press, 2017) 255
[433] Bjorklund et al, *supra* note 431
[434] Ibid
[435] Alec R Johnson "Rethinking Bilateral Investment Issues in sub-Saharan Africa" (2015) Emory L Rev 920

quality the decisions and outcomes since such arbitrators might not be deemed to be culturally competent in specific issues involving the third world states of Africa.[436]

Implicit in the problem with diversity is the problem with selections of arbitrators. Often, arbitrators who handle ISDS cases are selected from pool of individuals whose background is constraint to commercial arbitration. This raises a question of competency regarding the ability of such arbitrators to effectively handle issues (such as human rights and regulatory measures) that may emanate during the course of an ISDS proceeding.[437] Undoubtedly, this affects the third world states particularly in instances where legitimate measures are undertaken in public interest. To this end, concerns have been raised for this state of affairs to be remedied.[438]

4.3.2 Substantive legitimacy: regulatory issues and public interest

States commitment to regulate in areas for the interest of their citizens has been an uphill battle because of obligations owed to investors under BITs.[439] The situation is dire to such an extent that even in instances where third world states were forced and undertook measures to address emergency crisis, such measures have been held to be in breach of investors' rights under IIL.[440] This situation has in turn, forestalled states from legislating

[436] Mmiselo Freedom Qumba, "South Africa's move away from international investor-state dispute: a breakthrough or bad omen for investment in the developing world?" (2019) 52:1 De Jure L J 358
[437] Anthea Roberts & Zeineb Bouraoui, "UNCITRAL and ISDS Reform: Concerns about Arbitral Appointments, Incentives and Legitimacy" (6 June 2018), online: *EJIL Talk!* <ejiltalk.org/uncitral-and-isds-reforms-concerns-about-arbitral-appointments-incentives-and-legitimacy/>
[438] Ibid
[439] Vera Korzun, "The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs" (2017) 50:2 Vanderbilt J of Transnational L 355
[440] *CMS Gas Transmission Co. v. Republic of Argentina*, *supra* note 229

and enacting policies in key areas of concern such as the environment and human rights.[441]

Often, this normally have a deleterious impact on the economy of developing states because the UNCTAD recognized that majority of ISDS cases are often against developing countries.[442] Though largely a third world issue, the negative impact of IIL and ISDS on host states' regulatory powers is also borne by developed countries in areas such as environmental protection.[443] Thus, prompting them to be highly interested with how to prevent the negative impact of IIL and ISDS on their regulatory powers.

To this end, new models of BITs, often called "new generation BITs", have tilted towards investment regulation and protection of policy space in a way that will further sustainable development.[444] For instance, the new Model BIT of the Kingdom of Morocco contains forward looking provision that seek to ensure that investors must comply with regulatory measures. The fair and equitable treatment clause and its interpretation as legitimate

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[441] *Compania del Desarollo de Santa Elena S.A v Republic of Costa Rica*, (2000) italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Mr. L Yves Fortier C.C Q.C, Professor Sir Elihu Lauterpacht C.B.E, Q.C and Professor Prosper Weil); *Pac Rim Cayman LLC v Republic of El Salvador* (2016) italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: VV Veeder Esq, Professor Dr. Guido Santiago Tawil, and Professor Bridgette Stern); *Metalclad Corporation v The United Mexican States* (2000)) italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Professor Sir Elihu Lauterpacht QC CBE, Mr Benjamin R Civiletti and Mr Jose Luis Siqueiros)

[442] UNCTAD, "Investor-State Dispute Settlement Cases Pass the 1000 Mark: Cases and Outcomes in 2019" (last visited 19 August 2022), online (pdf): <unctad.org/en/PublicationsLibrary/diaepcbinf2020d6.pdf>

[443] Stefanie Schacherer, *Sustainable Development in EU Foreign Investment Law*, (Netherlands: Brill Nijhoff, 2021)

[444] Hamed El-Kady & Yvan Rwananga, "Morocco's New Model BIT: Innovative Features and Policy Considerations" (20 June, 2020), online: *Invetsment Treaty News* <iisd.org/itn/en/2020/06/20/moroccos-new-model-bit-innovative-features-and-policy-considerations-hamed-el-kady-yvan-rwananga/>;
Hamamoto, Shotaro, "Regulatory Power and Investors' Interests: Striking a Balance in Investment Treaties Concluded by Japan" in Mahdev Mohan & Chester Brown, eds, *The Asian Turn in Foreign Investment*, ed (Cambridge: Cambridge University Press, 2021) 103.

expectation was prohibited.[445] ISDS was preserved but there was a time bar for instituting ISDS. Also, its use was limited to instances where the Kingdom violates its treaty obligations.[446] In 2021, Italy also published its new model BIT.[447] The Italian model BIT contained an express provision on the state's right to regulate.[448] It also contains multiple dispute settlement clauses which includes the use of its domestic court, and ISDS.[449] However, the provision of the Italian model BIT forbade an investor from initiating an ISDS dispute if such has been handled under the domestic law or procedure of the Italian state.[450]

These recent trends help to ensure that BITs and IIL transcends the tradition paradigm of investment protection. Irrespective, opinions have been generated as to how old generation BITs, which aimed at investment protection only, can be reconciled with new ones.[451] Suggestions have ranged from termination of old BITs[452] to renegotiation.[453] One

[445] *Morocco Model BIT*, (2019)
[446] Ibid, Article 28
[447] Maria Chiara Malaguti, "The New Italian Model BIT between Current and Future Trends" (2021) 1:1 Italian Rev of Intl & Comp L 113
[448] *Italy Model BIT*, (2020), Article 5
[449] Ibid, Article 14
[450] Ibid, Article 14(4)
[451] Lauge N Skovgaard Poulsen & Geoffrey Gertz, "Reforming the Investment treaty Regime" (17 March, 2021), online: *Brookings* <brookings.edu/research/reforming-the-investment-treaty-regime/>
[452] Nathalie Bernasconi-Osterwalder et al, "Terminating a Bilateral Investment Treaty"(2020) IISD Best Practice Series, online (pdf) : <iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf>
[453] Wolfgang Alschner & Florencia Sarmiento, "An Interview with Wolfgang Alschner on Investment Arbitration and State-Driven Reform: New Treaties, old Outcomes" (4 July 2022), online: *Investment Treaty News* <iisd.org/itn/en/2022/07/04/an-interview-with-wolfgang-alschner-on-investment-arbitration-and-state-driven-reform-new-treaties-old-outcomes-wolfgang-alschner-florencia-sarmiento/>; Tuuli-Anna Huikuri, "Keep, Terminate or Renegotiate? Bargaining Power and Bilateral Investment Treaties" (Paper delivered at Political Economy of International Organization Conference, 2020), online (pdf): <peio.me/wp-content/uploads/2020/02/PEIO13_paper_158_1.pdf> [unpublished]; Tienhaara, Kyla "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement" (2018) 7:2 Transnational Environmental Law 229; Raphael Lencucha, "Is it Time to say Farewell to the ISDS System?" (2017) 6:5 Intl J of Health Policy Management 289

commentator however opined that the former options are unsuitable because of sunset clauses which gives investors leeway to initiate an action years after a BIT had been terminated. He believed that as in termination, survival clauses be will applicable to renegotiations as well.[454] To this extent, it was suggested that it will be best for there to be a "plurilateral interpretative mechanism" to preserve governments interpretative statements as to the status of old generation BITs.[455] This method was believed to be best because it is seen to be flexible as it will permit governments to determine how ambitious or cautious they want to be, politically attractive because states will present themselves as ruler makers and innovative and cheaper because it will exculpate the need to engage in multiple interpretation exercise by states.[456] However, while the foregoing appears to be reasonable, it failed to take asymmetric nature of IIL into consideration. It presupposes the equality of third world and developed states.

In principle, while states might be equal under international law,[457] the terrain of IIL has shown that the states in the west are more equal than the others. Asides from understanding, as shown in the preceding section, that states are indeed self-interested, the presumption of equality also fails to consider the question of identity and its impact on the outcome of provisions that will merge from such interpretative exercise.

[454] Poulsen & Gertz, *supra* note 451
[455] Ibid
[456] Ibid
[457] Alex Ansong, "The Concept of Sovereign Equality of States in International Law" (2016) 2:1 GIMPA L Rev 14; Ann Van Wynen Thomas & AJ Thomas Jr, "Equality of States in International Law: Fact or Fiction?" (1951) 37:6 Virginia L Rev 791

4.3.3 Corporate responsibility, accountability and the protection of human rights

One issue that has continuously emanated in the use of IIL and ISDS is human rights. Often, old generation BITs paid little deference to human rights.[458] Additionally, states were found to be the primary duty of this right because historically, that has been the default position under international law. The effect of this situation becomes heightened when it is observed that under the general auspice of international law, states are responsible for protecting human rights of their citizens at all times including where an investors undertakes and act or omission that affects public interest.[459] From this, it becomes obvious that a conflict exists between the scope in which human rights and investment protection can occur.[460] As a result, it has been opined that the former should take primacy over the latter,[461] some have canvassed for a balanced system[462] while others have noted that it is possible for human rights to be well accommodated under IIL through a dialogue process that will help ensure that ISDS tribunals consider the totality of international law in their decisions.[463]

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[458] Adam McBeth, *International Economic Actors and Human Rights* (Abingdon: Routledge, 2010)
[459] Ibid
[460] Fabio Giuseppe Santacroce, "The applicability of Human Rights Law in International Investment Disputes" (2019) 34:1 ICSID Rev – Foreign Investment L J 136
[461] Sabine Sclemmer-Schulte, "Fragmentation of International Law: The Case of International Finance & Investment Law versus Human Rights Law" (2012) 25 Pac McGeorge Global Business & development L J 410;
[462] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, (2016), italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Professor Andreas Bucher, Professor Pedro J. Martínez-Fraga, Professor Campbell McLachlan QC) [*Urbaser v. Argentina*]
[463] Crina Baltag & Ylli Dautaj, "Promoting, Regulating, and Enforcing Human Rights Through International Investment Law and ISDS" (2021) 445:1 Fordham Intl L J 1

Basically, the interaction between IIL and the regime of human rights brings another key observation to light i.e., the contact between two seemingly valid equal international laws with one protecting neoliberalism and the other protecting the third world. Most ISDS cases where there has been in contention that investors were involved and should be responsible for breach of human rights of third world people, largely arose within socioeconomic pretext whereby for instance, an investor was undertaking an investment that protects the former[464] or where a state undertook measures to further human rights and also protect the environment.[465] In certain instances, provisions of legally recognized international human rights instruments were used by third world states to reiterate their stance. Though these scenarios undoubtedly depict a situation of "norm conflict as has been noted,[466] in reality, it is also an attempt whereby the third world tries to tactically beat the asymmetrical regime within itself by leveraging on supposedly favorable rules that indirectly protects their interests to create norms to their advantage.

Interestingly though, the third world came close to achieving its goals. In one instance, it was noted that while investors could not be responsible for positive obligations, they could be for negative obligations.[467] Simply put, an investor will be liable where a BIT refrains him from doing an act as opposed to where an act must be done. While this

[464] *Urbaser v. Argentina*, *supra* note 462
[465] Ibid; see also the Ethyl Corp. v Government of Canada (1998) 2016), italaw (International Center for the Settlement of Investment Disputes) (Arbitrators:Prof. Karl-Heinz Bocstiegel, Mr Charles Brower and Mr Marc Lalonde)
[466] Lone Wandahl, Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (London: Routledge, 2016) and
[467] *Urbaser v. Argentina*, *supra* note 462

position has been lauded,[468] in actual fact, the distinction between positive and negative obligation is thin. For instance, if investor Y invested in the third world state of X in a sector as sensitive as that for the provision of water, it may appear that in case of a breach, investor Y won't be liable for human rights violation to water because he is engaged in an act that requires the provision of a service. However, on the flip side, the moment investor Y undertook an obligation to perform such a service, it is inherent that in any instance, he will refrain from doing any act that will negatively affect it to prevent the violation of human rights.

At the global front, steps are being taken to devise ways whereby corporations would be held liable for human rights violations. One of the most laudable steps that has been taken so far is in relation to the creation of the United Nations Guiding Principles ("Guiding Principles). The Guiding Principle is situated within three key pillars which seek to ensure that states protect human rights, businesses respect human rights and, that an appropriate remedy exist for victims of human rights violations.[469] Though not immutable from the other pillars, the second pillar is of relevance here.

[468] Yulia Levashova, "The Right to Access to Water in the Context of Investment Disputes in Argentina: Urbaser and beyond" (2020) 16:2 Utrecht L Rev 110; Edward Guntrip, "Private Actors, Public Goods and Responsibility for the Right to Water in International Investment Law: *Urbaser v. Argentina*" (2018) 1:1 Brill Open L 37, DOI: <10.1163/23527072-00101004 >

[469] United Nations Human Rights Guiding Principles on Business and Human Rights, "Implementing the United Nations "Protect, Respect and Remedy" Framework" (last visited 17 August 2022), online (pdf): <ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> [The Guiding Principles]

According to the second pillar, businesses have the responsibility to recognize international human rights instruments. This duty to respect exists independently of the duty that a state has, and it covers avoiding contributory impact to adverse human rights violations through business activities, remedying such impacts when it occurs and mitigating/preventing adverse human rights impacts that are directly linked to their operations.[470] In achieving this responsibility, businesses are expected to set policies in place to address their commitment to respect human rights, undertake a human rights due diligence and also process the remediation of any adverse human rights impact.[471]

Though the foregoing pillar is commendable, and has had tremendous impact,[472] its weakness lies in the fact that investors only have the responsibility to respect. They are immune from any legal obligation and liabilities.[473] This fact sheds light into how accountability differ from responsibility with the implication that the latter, as found in the guiding principle, is simply voluntary and non-binding. The existence of this situation has been subject of criticism.[474] In response, questions have arisen as to how investors can be held liable for violations of human rights.

[470] The Guiding Principles, Principle 14
[471] Ibid, Principle 15
[472] The guiding principle has had a tremendous impact regarding the requirement that companies must undertake human rights due diligence in their operations. In addition, businesses included the principles of in commercial contracts. See Ruggie John Gerard, Caroline Ress & Rachel Davis, "Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations" (2021) 6:2 Business and Human Rights J 179
[473]Chairman Okoloise, "Contextualizing the Corporate Human Rights Responsibility in Africa: A Social Expectation or Legal Obligation?" (2017) 1 African Human Rights YB; Brigette Ham, "The Struggle for Legitimacy in Business and Human Rights Regulation – a Consideration of the Processes Leading to the UN Guiding Principles and an International treaty" (2022) 23 Human Rights Rev 103
[474] Okoloise, *supra* note 473

Suggestion has been made to the extent that home states should be responsible for regulating the accountability mechanism of human right.[475] However, for this to occur, Sara Seck argued that some level of caution must be exercised.[476] She contended that where home states exercise their jurisdiction for the purpose of furthering their internal economic goals, such a regulation, even If it serves the end of advancing the human rights of third world people will constitute an imperialistic venture.[477] In addition, she warned about the status of such regulations being transmuted as rule of CIL through regular practice.[478] The formation of CIL as she explained is lopsided against the third world and to that extent any rule that emanates from such a venture will at best, be categorized as neocolonialism.[479] Irrespective, to Seck, the regulation by home states of investors' conduct is permitted and such should incorporate the marginalized and those that will be affected in the host state.[480]

Seck's point is pertinent because in the process of explaining why home states can exercise jurisdiction over investors in host state, she noted that it is possible for there to

[475] Emeka Duruigbo, "Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Changes" (2008) 6:2 Northwestern J of Intl Human Rights 222; Nadia Bernaz, "Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Portion?" (2013) 117:3 J of Business Ethics 493

[476] Sara Seck, "Canadian Mining Internationally and the UN Guiding Principles on Business and Human Rights (2011) 49 Canadian YB of Intl L 51

[477] Sara Seck, Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?" (2008) 46 Osgoode Hall L J 565; See also Sara L Seck, "Home State Regulation of Environmental Human Rights Harms as Transnational Private Regulatory Governance" (2012) 13:12 German LJ 1363 at 1382

[478] Ibid

[479] Ibid

[480] Ibid

be concurring or overlapping jurisdictions.[481] Objection to this jurisdiction as she later explained could arise where there is an infringement that falls outside an area of concern for the home state.[482] To resolve this issue, Seck noted that a home state shouldn't request its investor in the host state to run afoul of the host state's law.[483] This is so even in situation where there is no conflict in the jurisdiction of both states but the subject matter dealt with by the home state touch on vital areas that deals with the host states sovereignty.[484] As a corollary, it is inherent in Seck's assertion that there could be a consensual relationship between the home and host state especially in cases of conflicting jurisdiction or where there is none but the exercise of jurisdiction by the home state will infringe upon the host state's sovereignty. However, under IIL, it is hard to imagine how this consensual relationship could be formed between third world states and developing countries. The reason is because of the historic power dynamics involved in treaty making process between third world states and developed countries.[485]

Moreover, the will from developed countries, as home states, to hold their investors accountable for human rights violations is minimal. I draw this inference because in 2014, the United Nations Human Rights Council, at the request of Ecuador and South Africa, initiated an intergovernmental working group that seek to create a binding treaty that

[481] Sara L Seck, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 Yale Hum Rts & Dev LJ 177
[482] Ibid
[483] Ibid
[484] Ibid
[485] Chung, *supra* note 217

would hold businesses and MNCs responsible for human rights violations.[486] However, the process as reported, is being frustrated by developed countries.[487] For instance, the United States expressed its preference for a non-binding set of framework instead of a binding treaty.[488] The United Kingdom equally intimated its preference for an alternate approach.[489] The European Union on its own part agreed to help develop the legally binding principle. However, it conducts depicts otherwise because of its limited intervention in clarifying questions as well as its failure in making any material suggestions.[490]

As one might only anticipate, third world states from the region of Africa, Latin America and Asia are actively participating in the process by making concrete proposals during the session of the intergovernmental working group.[491] The discrepancy in the attitude of developed and developing countries questions whether the former can forge a relationship with the third world when it comes to them exercising jurisdictions over their investors found in the territory of the latter.[492] While a positive response to this question

[486] Business & Human Rights Resource Center, "Binding Treaty: A brief Overview" (last visited 26 July, 2022), online: <business-humanrights.org/en/big-issues/binding-treaty/>
[487] Joe Zhang, "Breakthrough in business and Human Rights binding treaty Negotiation but be prepared for a bumpy road ahead" (20 December, 2021), online (blog): *Investment Treaty News* <iisd.org/itn/en/2021/12/20/breakthrough-in-business-and-human-rights-binding-treaty-negotiation-but-be-prepared-for-a-bumpy-road-ahead/>
[488] Ibid
[489] Ibid
[490] Ibid
[491] Ibid
[492] Developing countries identified the importance of forming a consensual relation with home states to hold investors responsible for human rights violations. For instance, the Economic Community of West African States (ECOWAS) Supplementary Act of 2008 initiated a new provision that has gained momentum across the continent of Africa. The ECOWAS Supplementary Act in Article 29 conferred on the home state the obligation to ensure that it doesn't preempt victims of human rights violations from the business

seems bleak, nevertheless, as highlighted by the United Nations Working Group on Business and Human Rights (WG BHR),[493] states seem to have a role to play in holding investors liable for human rights violations, especially under IIL.

In the recently published report, the WG BHR[494] noted that the voluntary nature of holding investors responsible for human rights violations could be elevated and be made to acquire binding status through IIAs that states conclude.[495] In this regard, certain states have made a national action plan commitment to include the provisions of the guiding principles into newly negotiated IIAs.[496] These measures are commendable to the extent that it will serve as a roadmap that will help ensure that human rights provisions are

activities in host states, the right of standing in their court. Also, in such proceedings, the applicable law will be the law of the host state. In this regard, the use of the host state law might be problematic in situations where the home state has a higher standard. Perhaps, to remedy this situation, it might be imperative to state that the applicable law will be that of the state with the most stringent law. Likewise, Article 30 criminalized the offence of bribery and corruption and noted certain acts that must be undertaken by home states to ensure that their investors are brought to the book. These developments, as Tarcisso Gazzini noted, initiated the trend in different BITs. The South African Development Community (SADC) BIT model, the Nigerian- Morocco BIT earlier referred to and the Indian Model BIT all reflected the ECOWAS Supplementary Act provision. However, as Gazzini later observed with the case of India, the provision for home state responsibility has been excluded from recent investment agreements signed with other countries. This according to the author, "is an indication that states might be reluctant to accept international obligations in that respect." Despite this drawback, it is obvious that third world states are taking steps to bridge the consensual gap. This in my opinion is instructive because as it contributes to the self-reconstructive nature of international law which the third world can then take advantage of to write their ideological norms under IIL. See Tarcisso Gazzini, "Beyond Protection: The Role of the Home State in Modern Foreign Investment Law", in: Catharine Titi, ed, *Public Actors in International Investment Law*, (Switzerland: Springer, 2021)

[493] UNGA, *Human Rights compactible International Investment Agreements*, 76th Sess, UN Doc A/76/238

[494] Ibid

[495] Ibid para 7

[496] United Nations Human Rights Office of the High Commission, "National Action Plans on Business and human Rights" (last visited 17 August 2022), online: <ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights>. This includes Kenya who made a commitment that revise IIAs to make them conform with international human rights law

incorporated into IIAs. Additionally, the presence of human rights obligations for investors in IIAs can serve as a unique way of holding investors liable under IIAs.[497]

Already, new generation treaties in developing countries have started to incorporate human rights provisions. For instance, appendix 3 of the Economic Community of West African States (ECOWAS) Treaty also contains innovative provisions that cater for human rights.[498] Article 18(2) of the Nigeria-Morocco BIT also contains an express provision that creates obligations for investors and MNCs within the sphere of human rights.[499] This provision has been lauded because of its innovative approach in creating direct obligations for non-state parties.[500] By doing this, Okechukwu Ejims believed that issues associated with host states obligations of pursing public interest initiatives will be greatly reduced because the provision will force investors to adopt measures that will protect and promote human rights.[501] Niccolo Zugliani described the treaty as the "most forward

[497] The WG BHR itself noted in its report that the express inclusion of human rights provisions and obligations in IIAs would help advance human rights within the field of IIL. See UNGA, *Human Rights Compactible International Investments Agreements*, 76th Sess, UN Doc No A/76/238 (2021) at para 69 [UNGA Report, 2021]

[498] *Revised Treaty of the Economic Community of West African States*, (1993); In addition, there are a number of BITs containing provisions on corporate social responsibility. For instance, Argentina Qatar BIT of 2016, the Brazil Malawi BIT and even the Nigerian – Morocco BIT contains CSR provisions. However, in light of IIL and ISDS, such has been criticized to the extent that the provisions are simply voluntary with the adverse implication that they will further retrench the neoliberal roots of IIL. See Claire Cutler & David Lark, "Incorporating corporate social responsibility within investment Treaty Law and Arbitral Practice: Progress or fantasy remedy?" (19 December 2020), online: <iisd.org/itn/en/2020/12/19/incorporating-corporate-social-responsibility-within-investment-treaty-law-and-arbitral-practice-progress-or-fantasy-remedy-claire-cutler-david-lark/>; see also, David Gaukrodger, Business Responsibilities and Investment Treaties" OECD Working Paper on International Investment 2021/02, OECD Publishing, DOI: <10.1787/4a6f4f17-en>

[499] *Reciprocal Investment Promotion and Protection Agreement Between The Government of the Kingdom of Morocco and The Government of the Federal Republic of Nigeria,* (2016) [*Nigeria-Morocco BIT*]

[500] Okechukwu Ejims, "The 2016 Morocco-Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?" (2019) 34:1 ICSID Rev – Foreign Investment L J 62

[501] Ibid

looking investment instrument concluded."[502] She based this off the fact that unlike other treaties which are limited to protecting specific rights, the Nigeria-Morocco BIT contains comprehensive provisions geared towards the protection of human rights.[503]

The existence of human rights in treaties is undoubtedly innovative and will chart the course of IIL in the coming years. Considering current practice, the extent to which such provisions will be interpreted however remains to be seen.

4.4 ISDS and the UNCITRAL reform

Substantive and procedural issues as addressed earlier led to reform efforts that are currently underway. Under the aegis of the United Nations, a working group for the reform of ISDS (UNCITRAL WG III) was established to address concerns relating to ISDS, consider whether reform was desirable in light of identified concerns and develop solutions if it concludes that reform was desirable.[504] The textual document of the United Nations General Assembly (UNGA) revealed that the process of consultation would be majorly driven by governments.[505] With this direct specification from the UNGA, the ISDS reform provided the third world with an evident platform to express their ideas and reinstate their identity at the global pane. They participated with high hopes that change would indeed be induced.

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[502] Niccolo Zugliani, "Human Rights in International Investment Law: The 2016 Morocco-Nigeria Bilateral Investment Treaty" (2019) 68:3 Intl & Comp L Quarterly 761

[503] Ibid

[504] *Report of the United Nations Commission on International Trade Law*, UNGA 77th Sess, Supp No 17, UN Doc A/72/17 (2017) 46

[505] Ibid

Mali identified the cost and unevenness between the west and third world states to suggest the replacement of ISDS with a state-state dispute settlement.[506] South Africa highlighted human rights and developmental concern and proposed the use of dispute prevention devices, alternative dispute resolution, domestic administrative procedures, domestic courts, ombudsman as well as state-state cooperation.[507] Thailand emphasized the need for considering key substantive issues.[508] Burkina Faso underscored the issue with amount awarded as cost and how it majorly constitutes a third world problem.[509]

The ideas espoused by some third world states differed considerably from countries from the west. While ideas from the south targeted some issues identified above, countries in the west who participated in the reform were either preoccupied with preserving the system of ISDS[510] or creating a standing mechanism of a permanent investment court with

[506] The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Mali*, 39th Sess, UN Doc A/CN.9/WG.III/WP.181 (2019)
[507] The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of South Africa*, 39th Sess, UN Doc A/CN.9/WG.III/WP.176 (2019)
[508] The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Comments from the Government of Thailand*, 35th Sess, UN Doc A/CN.9/WG.III/WP.147 (2018)
[509] The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Burkina Faso*, 40th Sess, UN Doc A/CN.9/WG.III/WP.199 (2020)
[510] The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Russia*, 39th Sess, UN Doc A/CN.9/WG.III/WP.188 (2020)

an appellate mechanism[511] that would help address issues regarding predictability and inconsistency of awards.[512]

In its decision, the UNCITRAL WG III felt the need to limit its mandate to simply procedural undertakings which included addressing lack of consistency and predictability of arbitral decisions, the cost and duration of ISDS proceedings as well as the creation of a Multilateral Investment Court (MIC) with an appellate mechanism.[513] Amidst the decision of the UNCITRAL WG III, the creation of the MIC merits some discussion because of the consequent impact it will have on third world states.

4.5 Theorizing about the MIC: a third world perspective

With the exception of countries like Russia who wanted the system of ISDS preserved,[514] it would be proper to categorize the west and third world states into two extreme poles of "systemic reformers"[515] and "paradigm shifters."[516] Anthea Roberts explained the difference in this categorization by noting that while the former group championed the replacement of ISDS with the MIC, the latter group wants the system completely

[511] The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union*, 37th Sess, UN Doc A/CN.9/WG.III/WP.159 (2019)
[512] The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union*, 35th Sess, UN Doc A/CN.9/WG.III/WP.145 (2018)
[513] The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Note by the Secretariat*, 38th Sess, UN Doc A/CN.9/WG.III/WP.166 (2019)
[514] The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Russia*, *supra* note 510
[515] Stephan W Schill, "Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward" (last visited 17 August 2022), online (pdf): <e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf>
[516] Anthea Roberts, "Incremental, Systemic and Paradigmatic Reform of Investor State Arbitration" (2018) 112 Am J of Intl L 410

overhauled.[517] Though Anthea Roberts thought the distinction was a bit oversimplified,[518] from a TWAIL constructivist perspective, it is not because on the one hand, the decision of the UNCITRAL WG III created an ideological bias towards the systemic reformers while on the other hand, it preempted the reconstructive element of the ideas espoused by the third world. In further discussing this notion, I put forth a theory that the MIC, whose establishment arose from the EU, is an attempt seeks to unwittingly create a multilateral rule that would regulate investment activities.

4.5.1 **The MIC: a multilateral investment agreement in disguise**

My theory here is based off the fact that with the MIC, the EU had the uncanny motive of resurrecting the west's failed attempt of creating a multilateral investment agreement that would be binding on all states.

As Odumusu noted, "institutionalized norms and repetitive interaction could facilitate social structures that create asymmetrical power relations" under IIL.[519] The institution of the MIC will further the distort the power relations in a way that will drive the interest of third world states to the bottom of the food chain. History has shown that the west always had the agenda of continuously repeating and attempting to institutionalize a binding

[517] Ibid

[518] Ibid. Anthea Roberts based off her arguments on the fact that in reality, the categorization between these distinct groups do not exists at polemic ends because of the possibility of adopting a mixture of the two.

[519] Odumosu, "*The Law and Politics of Engaging Resistance in Investment Dispute Settlement" supra* note 7 at 63

norm that would regulate investment activities.[520] It began between 1947 and 1948, after the end of the second world war.[521]

The International Trade Organization (ITO) was being negotiated alongside the Bretton Wood system which comprised of the International Bank for Reconstruction and Development, the predecessor of the modern-day World Bank and the International Monetary Fund.[522] The ITO, which was negotiated under the auspice of the Havana Charter, however failed because developing countries resisted[523] as the agreement contained little to no provisions that would serve the interest of the third world.[524] Moreover, it only contained rules on investors' protection with no substantive obligations for investors.[525] Soon after came the Abs-Shawcross Draft Convention on Investments Abroad in 1959.[526] This agreement outlined measures for investment protection but failed because capital importing countries, who were mostly developing countries, didn't support it.[527]

[520] AA Fatourous, "An International Code to Protect Private Investment – Proposals and Perspectives" (1961) 14:1 U of Toronto L J 77
[521] Georg Schwarzenberger, "The ABs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary" (1960) 9:1 J Pub L 147
[522] Ibid
[523] Jeffrey A Hart & Joan Edelman Spero, *The Politics of International Economic Relations*, 6th ed (United States: Routledge, 1997)
[524] Richard Toye, "Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization" (2003) 25:2 The Intl History Rev 282
[525] Berge & Hveem, "The International regime for investment: A history of Failed Multilateralism" *supra* note 239
[526] Fatourous, *supra* note 520
[527] Berge & Hveem, "The International regime for investment: A history of Failed Multilateralism" *supra* note 239

Then came the OECD Draft Convention for the Protection of Foreign Property in 1967.[528] Though limited to OECD members only, this also failed because capital importing states within the bloc opposed it.[529] As one would anticipate, in the 1960s, developed countries tried again. This time, they met with success through the enactment and negotiation of the Washington Convention which established the ICSID as an institution for settling investment disputes. One may wonder why despite the third world's resistance to the earlier attempt at devising a multilateral system regulating investment undertakings, the ICSID succeeded. A possible explanation, as noted by one commentator, was because the Washington Convention embodied procedural and not substantive rules.[530] Thus, while the developed countries saw the convention as a means for depoliticizing risks, the third world saw it as a neutral forum.[531]

Odumusu in her article, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, however seemed to have challenged this. She explained that though the establishment of the ICSID and the Washington Convention promised to further economic development in the third world, the internationalization of investment disputes reflected a dissatisfaction with the legal process of the third world states and their ability to occasion justice to protect foreign investors and their interest.[532] Thus, as Odumusu further argued, "by placing investment disputes within the international domain, former

[528] MJ Van Emde Boas, "The OE.D Draft Convention on the Protection of Foreign Property" (1963)1 Common Market L Rev 265
[529] Berge & Hveem, "The International regime for investment: A history of Failed Multilateralism" *supra* note 239
[530] Ibid
[531] Ibid
[532] Odumusu, "The Antinomies of the (Continued) Relevance of ICSID to the Third World", *supra* note 18

colonial powers could ensure that their economic interests remained within structures that were accessible to (and dominated by) them at the time."[533]

The success of the Washington Convention came with an intensified act by developed states. Seeing its relative accomplishment, the United States in 1986 presented a proposal for an agreement on investment protection at the General Agreement on Trade and Tariff Ministerial Conference in Este de Punto.[534] India challenged this attempt.[535] Thus, leading to another failed attempt. The failure didn't stop here. The west tried again. This time at the OECD through a Multilateral Agreement on Investment (the MAI). The attempt at creating the MAI deserves some attentions as there are connecting lines between the role EU played in its formation and what is being done regarding the MIC today

During the inception of the MAI, the EU alongside the United States spearheaded the call for instituting "negotiations for a multilateral agreement on investment."[536] Sir Leon Brittan, the onetime vice-president of the European Commission was at the forefront of pushing this agenda. In his speech at a conference in 1995, he laid emphasis on the total liberalization of investments across the world as well as the need for a multilateral investment rule.[537]

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[533] Ibid

[534] General Agreement on Tariffs and Trade, Minutes of the Meeting held on 29 August 1986, online (pdf): <wto.org/gatt_docs/English/SULPDF/91230080.pdf>

[535] Ibid

[536] Muchlinski, *supra* note 237

[537] Sir Leon Brittan, "Call for European and American Leadership to open World Market for Foreign Investment" (Brussels, 21 June 1995), online: <ec.europa.eu/commission/presscorner/detail/en/SPEECH_95_126>

Likewise, in 1998, he clamoured for the creation of a multilateral system and intimated that the "WTO is the best long-term home for this work for which the MAI has already provided valuable signposts."[538] The European Union attempted to push its agenda for multilateralism of investment rules at the WTO and failed as exhibited from the Doha Development Agenda.[539] Third world states of course resisted this. In most cases, the European Union arguments in favour of creating a multilateral investment system was and is still based off "reducing uncertainty."[540] Sir Brittan was explicit with this in his 1998 speech regarding the creation of the MAI. Unsurprisingly, this constitutes one of the major grounds wherein the EU is aggressively pushing its agenda on the whole world. Cecilia Malmström, the Trade Commissioner for the European Parliament, stated in her speech to the European parliament in 2018 that "only a permanent body can help create predictability and consistency."[541]

In addition, the EU in its submission to the UNCITRAL WG III, suggested that the creation of the MIC was for the need to maintain a predictable and consistent system.[542] Undoubtedly, the quest for creating a predictable system have been ongoing for a while. Developing countries seemed to have supported this too. This was made evident from

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[538] European Parliament, Plenary Sess, *Declaration: MAI*, SPEECH/98/212 (1998), online: <ec.europa.eu/commission/presscorner/detail/en/SPEECH_98_212>

[539] Berger Axel, "Do we really need a multilateral investment agreement?" (2013), online (pdf): *German Development Institute* <www.die-gdi.de/uploads/media/BP_9.2013.pdf>

[540] Peter Nunnenkamp & Manoj Pant, "Why the case for a Multilateral Agreement on Investment is Weak" (2000) Kiel Institute for the World Economy Kieler Diskussionsbeiträge, (2003) Kiel Institute for World Economy Working Paper No 400

[541] European Parliament, *supra* note 538

[542] The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union*, *supra* note 512

the stance of certain countries in the third world. For instance, during the ISDS reform process, Burkina Faso raised the issue on inconsistency in arbitral decisions.[543] In addition, scholars have also castigated the regime of ISDS on the basis that it failed to create a predictable system.[544]

The foregoing makes it clear that the pursuit of predictability is indeed a legitimate cause. This legitimate cause has in turn been leveraged upon by the EU to uplift its own agenda of transmuting its national and regional interest into a global adventure. These fact patterns show an attempt to revive the ghost of the MAI which Wallace-Bruce predicted as far back as 2001 that:

> Those who dreaded the MAI and campaigned hard for its demise, may hope that it is dead and gone forever. But…the MAI is too important a concept to be allowed to vanish… The MAI has simply suffered a temporary setback and far from being dead and buried, is bound to rise from the ashes in one form or the other in the not too distant future.

Moreover, when observation is had to the submission it made to the UNCITRAL, it becomes obvious that the MAI ghost has lingered long enough and is on the verge of being resurrected from the dead. As one commentator explained, "the continuance of international institutions and hegemonic powers which supports the neo-liberal instrumentalism assures that in the absence of caution, there will be a revival of this

[543] The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Burkina Faso*, *supra* note 509

[544] Won Kidane, "Alternatives to investor-state dispute settlement" (January 2018), online (pdf): *Global Economic Governance* <media.africaportal.org/documents/GA_Th3_DP_kidane_20180129.pdf>; El-Kady & De Gama, *supra* note 41

hydra-head apparition in the future. Ideas have cyclical pattern: if in decline at a stage in history, they lurk about until events become propitious for them to be revived."[545]

The evidence whereby the west is trying to devise its tried, tested, and failed attempts, of creating a multinational framework for regulating investments, becomes stronger when we observe the implication of certain fact patterns. For the sake of emphasis, the EU stated in its submission that:

> Given the general formulation of investment protection standards and conscious of repeat function stakeholders (governments, investors, civil society) look at precedents in order to understand how obligations in treaties are being or should be interpreted. This occurs both within the same treaty and across treaties, given the relatively high degree of homogeneity of the treaties. This means the adjudicative role is key in elaborating and further refining the precise meaning of the substantive obligations.[546]

It is rather interesting that homogeneity of treaties was alluded to. The reference to this word and its contextuality as a way of using the MIC to further consistent and precise meaning of treaty clauses further lends credence to the point I have made regarding the resurrection of the multilateral agreement on investment. As history has shown, developing countries has always been skeptics in relation to a multilateral investment agreement. This is tied to the believe that their bargaining position will be weakened.[547]

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[545] Sornarajah, *Resistance and Change in International Law on Foreign Investment*, *supra* note 390

[546] *The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute settlement Reform), Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union*, *supra* note 511

[547] Nunnenkamp & Pant, *supra* note 540

With the MIC, this fear will become a reality. This will happen under the guise of using the court's precedential decision as a yardstick for interpreting provisions.

The court will in turn give primacy to the jurisprudence and legal system of the EU because of the value that will be attached to the ECHR's decisions. Sornarajah noted that:

> The establishment of an Investment Court would dissociate that Court from democratic control. As in the case of other permanent international tribunals, the Court would arrogate additional powers and create regimes through precedents in the area in which it operates…The danger is that neoliberal principles will become set in stone beyond the power of democratic processes. To date, there is no doctrine of precedent in investment arbitration. This will not be so when there is a permanent judicial body.[548]

The precedential value attached to ECHR in ISDS cases has already taken shape. It happened in the *Tecmed* tribunal and was later adopted by the *Siag* and *Bear Creek Tribunals*. James Thuo Gathii also highlighted how the impact and jurisprudential reasoning of courts in third world states have been relatively downplayed when compared to those of their European counterparts.[549] He revealed that in the 2006 when the International Law Commission prepared a report on the fragmentation of international law, courts in the third world such as those in Africa wasn't recognized.[550] Asia appeared once.[551] In sharp contrast, "Europe was cited over 170 times with a whole

[548] Sornarajah M, "An International Investment Court: Pancrea or purgatory? (2016) Columbia Center on Sustainable Investment FDI Perspectives Research Report No. 180, online: <hdl.handle.net/10419/254014>
[549] Gathii, "The Promise of International Law: A Third World View", *supra* note 62
[550] Ibid at 385
[551] Ibid at 385

subsection dedicated to European Court of human Rights on the question of systemic Integration."[552]

In situation where the court's precedential decision carries little to no precedential value, because the MIC will exist as a multilateral institution, and with the participation of a large number of states, proponents will argue that its decisions constitute customary international law and so should bind all states alike.

On the latter point, the decisions of the MIC might constitute CIL if a large number of states accede to it as well as if there is opinio juris. The fulfilment of these elements will be a walk in the park if countries especially those in the global south participate. It is already known that for customary international law to exist, the assent of all countries isn't a requirement. This as I revealed earlier has been criticized because it largely excluded third world actors. However, with the third world's participation in the establishment of the MIC will meet this requirement and even more. It is for this reason that developing countries must object and desist from taking any steps that would lead to the creation of the MIC. This is because the creation of the MIC hasn't begun yet since it is still at its inception and formational stage.[553] Doing this will earn them the status of persistent objectors and like their attempt at the floor of the UNCTAD, it will constitute a historic record. Most importantly, it will halt the formation of new rules that would

[552] Ibid at 386

[553] The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Standing Multilateral Mechanism: Selection and Appointment of ISDS tribunal members and Related Matters*, 42nd Sess, UN Doc A/CN.9/WG.III/WP.214 (2022)

transmute into the creation of a customary international law. Thus, preventing the legitimization of a global investment rule the same way the MAI didn't.[554]

4.6 **The ICSID, MIC and third world: what should we expect?**

Because the MIC targets investment disputes, it necessary to ask a fundamental question. i.e., how will the preexisting mode of ISDS as undertaken by the ICSID intersect with the MIC? Jansen Calamita addressed a similar question by inquiring into extent to which the MIC and its appellate body can be accommodated within the structure of the ICSID.[555] She argued against the former and noted that the institutional structure of the MIC permits an appellate review system which is expressly forbidden for ICSID awards.[556] The existence of such a structure, as she asserted, is fundamental and any alteration to that effect will require the consent of all state parties to the ICSID. On the contrary, she explained that the ICSID can expand its scope through the ICSID additional facilities rules because doing so will not require an amendments and consequently, state parties' consent.[557] Jose Alvarez on his part emphasized upon the primacy of ISDS as undertaken by the ICSID.[558]

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[554] Marcela Klein Bronfman, "Fair and Equitable Treatment: An evolving Standard" (2005) 38:5 Revista De Estudio Internacional 89. A possible argument might be tilted against my assertion to the extent that the current reforms of the regime of IIL need not end up like the MAI. However, while this might be a valid point, it is hard to imagine because of the identity of the parties involved.

[555] Jansen Calamita, "The Challenge of Establishing a Multilateral Investment Tribunal at ICSID" (2017) 32:3 ICSID Rev – Foreign Investment L J 611

[556] Ibid

[557] Ibid

[558] José E Alvarez, "ISDS Reform: The Long View" (2021) 36:2 ICSID Rev - Foreign Investment L J 253, DOI: <10.1093/icsidreview/siab036>

He believed that ISDS is here to stay. According to him, the fragmentation of multiple dispute settlement regimes will make any other reform agenda unattractive.[559]

While the preceding views which addresses certain procedural impact of the ICSID and MIC are indeed valid, there are key procedural issues which in my opinion touch on the third world i.e., what status will the third world people have in relation to the MIC? How will the creation of the MIC affect third world states?

4.6.1 The effect of the MIC on third world people

It has been identified that the creation of the MIC doesn't explicitly procure answers to issues relating to public interest and human rights.[560] Nevertheless, it was suggested that through a provision on *amicus curiae*, the MIC will be well disposed to handle issues that touch on the interest of the public because institutions like the ICSID have similar provisions.[561] While this specific suggestion might seem ingenious because the ICSID jurisprudence has shown great permission for *amici* participation,[562] in actual fact, third party intervention is greatly limited.

To begin with, the Washington Convention grants discretionary powers to a tribunal on whether an *amici* should be allowed to participate as non-disputing parties in an ISDS

[559] Ibid. Alvarez's point here touches on the question of forum. However, in contrast to his stance, the presence of the MIC doesn't preclude the existence of other means of dispute resolution such as the ISDS. Moreover, exclusive/mandatory jurisdiction clauses can be used by parties to highlight their preference from one forum over the other. See Tanya Monestier, "When Forum Selection Clauses Meet Choice of Law Clauses" (2019) 69 American University L Rev 325

[560] Carla Lessard, "The Multilateral Investment Court and the Public Interest" (29 June 2020), online: *iAffairs* <iaffairscanada.com/2020/the-multilateral-investment-court-and-the-public-interest-the-usefulness-of-amici-curiae-in-the-multilateral-investment-court-agenda/#_ftnref7>

[561] Ibid

[562] *Compania de Aguas Del Aconquija SA and Vivendi Universal SA v Argentine Republic*, *supra* note 249

proceeding.[563] In one case, the position was clarified that as a non-disputing party, an *amici* operates to ensure the fairness and efficiency of the arbitral process and thus, their participation must be aligned with the rights of disputing parties.[564] This position has been subject to criticism. One commentator explained that the *amici* proceeding doesn't operate to give voice to those whose interests are at stake in a proceeding since such participation only aims to provide tribunals with relevant legal and factual information.[565] The question of voice touches on identity which in turn touches on parties interaction and their ability to participate in the creation of norms.[566] This begs the question – to what extent will the MIC accommodate third world people's participation such that their interests will be adequately represented, and their interaction will contribute to the creation of legal norms? Though this question can at best be deemed a rhetoric, it is important because it throws another question to light i.e., to what extent will third world people have access to justice under the MIC?

Going by my advice that third world states should refrain from taking part in the formation of the MIC, which is currently underway, it is hard to imagine how the third world people will be implicated. However, in the event that my warning doesn't manifest, third world states must ensure that third world people have access to justice under the MIC because

[563] *ICSID Convention*, Article 37
[564] *Piero Foresti v South Africa*, *supra* note 26
[565] Lorenzo Cotula & Nicola M Perrone, "Reforming investor-state dispute settlement: what about third party rights?" (last visited 25 July 2022), online: <pubs.iied.org/sites/default/files/pdfs/migrate/17638IIED.pdf >
[566] Odumusu, "The Antinomies of the (Continued) Relevance of ICSID to the Third World", *supra* note 18

of the disadvantaged position they stand in relation to other actors like states and investors under IIL.

The situation of the third world people was succinctly captured by Odumosu, who in her article titled *locating third world resistance in the international law on foreign investment*, noted that generally, third world people have been disadvantaged as non-traditional actors under IIL. She explained that the interest of those people should not be represented by their states because of such representation betrays the differentiation that exist between a state and its population.[567] Odumosu's point touch on access to justice for the third world people. Thus, to what extent will the third world be able to remedy the wrong occasioned to them?

In considering the foregoing, the existent of the third pillar of the guiding principle will undoubtedly be relevant. This third pillar, as found in principle 25 of the Guiding principle, aims at providing access to effective remedy for victims of human rights violations.[568] The commentary to the principle explained that the mechanism for ensuring access to remedy for victims of human rights violations can be state or non-state based, judicial or non-judicial. In this regard, the WG BHR suggested in its 2021 report that as opposed to ISDS, states should undertake a reformatory process where affected community members will be able to pursue a direct claim against investors via arbitration.[569] This report aligns with

[567] Ibironke T Odumosu, "Locating Third World Resistance in the International Law on Foreign Investment" (2007) 9:4 Int'l Comm L Rev 427; As found in the Bear Creek and Berhard v Zimbabwe discussed in footnote 372 above, third people have attempted and succeeded in participating in ISDS cases through amici. However, such participation is limited and is often left to the discretion of the arbitrator to decide whether to allow such noon-disputing party to present their case. See *Berhard v Zimbabwe*, *supra* note 372
[568] *Guiding principle*, principle 25
[569] UNGA Report, 2021 at para 69

the proposals that have been made for the establishment of business and human rights arbitration (BHR arbitration).[570]

Currently, a draft procedural rule (i.e., the Hague Rules on Business and Human Rights Arbitration) was drafted to specifically cater to this type of specialized arbitration. With this development taking place, one cannot help but question how the existence of BHR arbitration will be made to exist alongside the MIC. This is because in one vein, the WG BHR suggested the use of BHR arbitration while in another vein, recommended that states utilize the UNCITRAL WG III to bring about substantive and systemic changes to IIA in multilateral settings. As far as I am concerned, the two field can be made to exist alongside each other. In the case of the MIC however, procedural rules must be devised to ensure that third world people and victims of human rights violations will be able to challenge investors at the MIC directly.

4.6.2 The effects of the MIC on third world states

While the foregoing deals with the consequence of the MIC on third world people, at this point, it is important to consider the effect that the MIC will have on third world states.

I explore this inquiry because criticism of the ICSID towards the third world has been directed towards constraining the latter's interest. Kendall Grant[571] identified the institution's ideological bias towards third world states. As an appendage of the World

[570] The Business and Human Rights Arbitration was a project that was launched in 2017 by the Hague Institute for Global Justice. The project seeks to create a set of draft rules that would specifically cater for process access to justice for victims of human rights violations (by businesses) via arbitration.
[571] Kendall Grant, "ICSID's Reinforcement? UNASUR and the Rise of Hybrid Regime for International Investment Arbitration" (2015) 52:3 Osgoode Hall L J 1115 at 1121

Bank, certain third world states like those in Latin America fear that their express criticism of the institution will jeopardize their relation with the bank which will inevitably hinder their access to the bank's line of credit.[572] An instance like this, as Grant later explained, prevents developing countries from adequately advancing their interest at the expense of more powerful states because the failure to comply with ICSID awards have a larger implication on their economy as a whole.[573] The ICSID's failure to adequately address issues relating to health, and economic development has also been identified.[574] Felix Okpe argued that contrary to its pro-western and foreign investors bias, the aim of the Washington Convention, which established the ICSID, was for the "promotion and protection of foreign investment for economic development in host states."[575] Interestingly, while the ICSID once upheld this viewpoint,[576] several tribunals in their decisions have recognized that economic development isn't part of the purpose for which the Washington Convention was established.[577] These decisions which created an uneven distribution of rights and obligations failed to consider the peculiarities of the third world

[572] Ibid
[573] Ibid
[574] Kate M Squnik, "Making Amends: Amending the ICSID Convention to Reconcile Competing Interest in International Investment Law" (2009) 59:2 Duke L J 2009
[575] Felix O Okpe, "Endangered Element of ICSID Arbitral practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States" (2014) 13:2 Richmond J of Global L & Business 225
[576] *Salini Costrttori SPA and Italstrade SPA v Kingdom of Morroco,* (2001*)* italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Maitre Robert Briner, Maitre Bernardo Cremades and Professor Ibrahim Fadlallah)
[577] *Saba Fakes v. Republic of Turkey* (2010) *)* italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Professor Emmanuel Gaillard, Professor Hans van Houtte and Dr Laurent Levy);
Victor Pey Casado and President Allende Foundation v. Republic of Chile, italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Professor Pierre Lalive,Sr Mohammed Chemloul and Professor Emmanuel Gaillard)

and their resistance towards the system.[578] Several developing countries have denounced the system[579] while some have expressly excluded its application to them.[580] All these steps were taken with the view that investments must be sustainable and should in fact conform with the sustainable development.[581]

With the third world's emphasis on sustainable investment and the ICSID's failure to achieve same, to what extent will the MIC allay the preoccupation of these states? As far as I am concerned, the situation is bleak. The MIC provided the UNCITRAL with the opportunity to remedy the criticism that had been levied against the ICSID. However, with its concentration on procedural and systemic reforms, it is doubtful whether the MIC will be the savior of third world states. James Thuo Gathii opined that there is a high chance that the so-called reforms will entrench the fundamental problems of international investment law and its direct relevance to the most vulnerable population who are impacted by investments.[582] In similar vein, it was described as "a missed opportunity and, at worst, a process that is all but set to lock in a system of dispute settlement that is

[578] Uma Kollamparabil, "Why Developing Countries are Dumping Investment Treaties" (23 March 2016), online: *The Conversation* <theconversation.com/why-developing-countries-are-dumping-investment-treaties-56448>

[579] Diane Marie Wick, "The Counter-Productivity of ICSID Denunciation and Proposals for Change" (2012) 11:2 J of Intl Business and L 2; Jia Liu, "Developing States Challenge ICSID" (2013) International Conference on Education, management and Social Science 149; Emmanuel Gillard, "The Denunciation of ICSID Convention" 237:122 New York L J

[580] James J Nedumparar & Aditya Laddha, *India joining the ICSID: A new look at an old debate*, 1st ed (London: Routledge, 2021); Engela C Schlemmer, "An Overview of South Africa's Bilateral Investment Treaties and Investment Policy" (2016) 31:1 ICSID Rev- Foreign Investment L J 167; Abhisar Vidyarthi, "Revisting India's Position to not Join the ICSID Convention" (2 August 2020), online (blog): *Kluwer Arbitration Blog* <arbitrationblog.kluwerarbitration.com/2020/08/02/revisiting-indias-position-to-not-join-the-icsid-convention/>

[581] Juri Suehrer, "The Future of FDI: Achieving the Sustainable Development Goals 2030 through Impact Investment (2019) 10:3 Global Policy 413

[582] Gathii, James Thuo, Reform and Retrenchment in International Investment Law", *supra* note 12

fundamentally at odds with inclusive sustainable development."[583] These criticism exposed the fundamental flaw in the MIC's foundation. Thus, revealing that criticism of the ICSID will have a ripple effect on the MIC as well.

4.7 Conclusion and summary

This section revealed the effects of ISDS and IIL on developing states. The effects led to the current reform agenda that seek to remedy the issues confronting ISDS today. With the reform agenda, we again see that developed countries are pushing the ideas like history revealed. To this end, third world states must beware in fully participating in the so-called reform because the failure to do so would lead to a rule of CIL which will be binding upon them all.

[583] Lisa Sachs et al, "The UNCITRAL Working Group III Work Plan: Locking in a Broken system?" (4 May 2021), online (blog): *Columbia Center on Sustainable Investment* <ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system>

CHAPTER FIVE – SUSTAINABLE DEVELOPMENT AND A DETAILED ACCOUNT IN AFRICA: A CASE OF THIRD WORLD RESISTANCE AND RECONSTRUCTION OF IIL FROM WITHIN

5.1 The core of this chapter's structure

Though the previous chapters refer to the neoliberal roots of IIL and ISDS while referring to African states in some instances, this section focuses on the trends taking place in Africa. This is because the developments taking place in the continent reveals third world's states mode of resistance and engagement outside the system of IIL. In considering this, recourse will be had to the notion of sustainable development because the idea that IIL must conform with the former is and has been gaining momentum.[584] Scholars have identified the need for streamlining IIL and ISDS with the overall notion of sustainability because it is believed that the neoliberal history of ISDS which targets investment protection is ill fitted with sustainable development.[585]

From the going, this chapter proceeds as follows, section 5.2 highlights the relevance of sustainable development while pointing out the difference that exists between developed and developing countries' understanding of the term. Section 5.3 identifies the investment law making trends taking place in the continent of Africa. Section 5.4 underlines the importance of the PAIC as well as the innovative provisions it contains. Section 5.5 proffers insight into the nature of the African Continental Free Trade Investment Protocol. Section 5.6 underlines the relationship between the PAIC and the

[584] Saverio Di Benedetto, *International Investment Law and the Environment*, (: Edward Elgar Publishing, 2013)

[585] Haniehalsadat Aboutorabifard, "Integrating Sustainable Development in International Investment Law", Book Review of *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implication* by Manjiao Chi, (2021) 57:2 Osgoode Hall L J 519;

African Continental Free Trade Investment Protocol and the extent to which the former can inform the current negotiation of the latter agreement. Section 5.7 questions the prospects for change regarding how the trends in Africa can inform those taking place at the global level. Section 5.8 concludes.

5.2 Sustainable development: a technique for calibrating third world ideological preference under IIL

Within the concept of sustainable development in IIL lies a huge potential of emancipatory freedom for the third world states and people. International law as Odumusu argued is by its very nature reconstructive.[586] As she observed, international law's self-reconstruction serves as a basis for accommodating alternative views and the actors that help to shape the system.[587] To this end, the propensity of reconstructing IIL using sustainable development is endless. One reason is because sustainable development in IIL encompass developing states' regulatory space to better address issues and challenges arising from investment activities.[588]

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[586] Odumosu, *Third World Peoples and The Re-Construction of The Investment Dispute Settlement System*, *supra* note 65; Balakrishna Rajagopal, "Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy" (2006) 27 Third World Quarterly 767 [Rajagopal, "Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy"]

[587] Odumosu, *Third World Peoples and The Re-Construction of The Investment Dispute Settlement System*, *supra* note 65 at 56

[588] Nico Schrijver, *The Role of International Administrative Law at International Organizations*, (Leiden: Nijhoff, 2020). Asides the immense potential of sustainable development, it has been criticized on different fronts including the fact that emphasis on economic development as opposed to other facets of sustainability which embodies environmental protection. For instance, Katrin Grossmann et al, explained how in the discourse on sustainability, socio-ecological justice occupies a lesser position. The authors explained that the focus of sustainability of economic undertaking breeds tension that helps to foster socio-ecological injustice. To this end, it was suggested that it would be imperative to consider the former aspects when thinking and acting under the umbrella of sustainability. See Katrin Grossmann, "From sustainable development to socio-ecological justice: Addressing Taboos and Naturalizations in order to Shift Perspectives" (2021) 3 Environment and Planning E: Nature and Space 1; Atapattu, Gonzalez & Seck, *supra* note 39, Scott D Campbell, "Sustainable Development and Social Justice: Conflicting Urgencies and the Search for Common Ground in Urban and regional Planning" (2013) 1 Michigan J of Sustainability 75;

BITs, in both third world states and developed countries alike, have expressly referred and embodied the notion of sustainable development. For instance, the Comprehensive Economic and Trade Agreement between the EU and Canada contains explicit provisions in chapter 22 which seek to promote sustainable development between Canada and the members of the European Union.[589] In addition, section D which covers investment protection provides for the coverage of investment by regulatory measures by reaffirming state parties' rights to regulate "within their territories to achieve legitimate policy objectives."[590] Similarly, the Netherlands model BIT has a provision dedicated to sustainable development.[591] Interestingly, it does so in a way that preserves the regulatory right of contracting parties.[592] The idea of promoting sustainable development is also found in some investment agreements between third world states. For example, the Nigeria – Morocco BIT preserved states' right to regulate to meet the ends of sustainable development goals.[593] In a bid to promote sustainability, it also contains some groundbreaking provisions which seek to hold investors liable and for human rights violations.[594]

Sustainability also implicates third world people specifically. Because of how entwined the concept is with the notion of human rights and development,[595] the third world people

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Christopher Degryse & Philippe Pochet, "Paradigm Shift: Social Justoce as a Prerequisite for Sustainable Development" (2009) European Trade Union Institute Working Paper 2009.02.

[589] *Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part and The European Union and Its Member States*, (2014) [*CETA*]

[590] *CETA*, Art 8.9

[591] *Netherlands Model Investment Agreement*, (2019), Art 6(1)

[592] *Netherlands Model Investment Agreement*, Art 6(2)

[593] [*Nigeria-Morocco BIT*], Art 23

[594] *Nigeria-Morocco BIT*, Art 20

[595] Ibid

have the chance to rewrite their experiences in a way that will alter the current course of IIL's normative framework. In this sense, the understanding that investments must be sustainable, meet socioeconomic ends and consider the interest of all stakeholders, especially those of local communities,[596] offers the third world people a chance to immense themselves towards espousing their ideas in a meaning way, though alongside the third world states they exist in.

At a glance, the similarity between third world states and developed countries in attempting to further the end of sustainable development becomes obvious. This would easily give rise to the presumption that the existence of this similarity connotes a vantage point for the third world to take the opportunity to espouse their idea in reshaping the current system of IIL. In spite of this utopian expectation, there is a caveat. Though sustainable development has an emancipatory potential for third world states and people, caution must be taken because as it is, the idea of sustainability, just like Won Kidane observed, "is coming from all directions – developed, developing, or underdeveloped, North, South, East or West."[597]

[596] Dharam Ghai & Jessica M Vivian, ed, *Grassroots Environmental Action: People's Participation in Sustainable Development*, (New York: Routledge, 2005); Lea Fobbe & Per Hilletofth, "The Role of Stakeholders Interaction in Sustainable Business Models: A systemic Literature Review" (2021) 327 J of Cleaner Production 129510, DOI: <10.1016/j.jclepro.2021.129510>

[597]Won Kidane, "Contemporary International Investment Law and Africa's Dilemmas in the Draft Pan-African Investment Code" (2018) 50:3 The George Washington Intl L Rev 523

In reality, sustainable development in the third world differs from sustainable development in the west. This is even in instances where it seems as though similar issues exist between them.[598]

This necessitates the question – what does sustainable development mean within the context of IIL? I ask this question because as revealed from the previous chapter, pertinent substantive issues are being evaded by developed countries as seen from the UNCITRAL WG III and intergovernmental working group for the creation of a treaty model that will hold MNCs accountable for human rights violations. The context surrounding those proceedings and the behaviour exhibited by the western nations only depicts their preference for wanting to keep the status quo. This conclusion further reveals that the meaning of sustainable development to the west differ largely from what it signifies to the third world just as Jean d'Aspremont and Alicia Koppen[599] noted that – "contestation while being located in both the global north and the global south, seem more genuine and earnest when they emanate from the latter." The authors assertions point implicates

[598] A clear example of this exists within the realm of climate change where third world states believe that historical contribution to climate change should be used in allotting responsibilities while the west thinks otherwise. The idea is primarily fixated on the concept of distributive justice which operates to ensure that in order to meet the ends of environmental sustainability, the benefits and costs of resource allocation must be done reasonably, and equitably. In this light, Meinhard Doelle and Sara Seck explained and proffered insight on how those who will suffer from the adverse effects of climate change can pursue remedies from those who have contributed to it. The authors developed a conceptual framework by identifying the actors who can bring such claims as well as those who the claims can be brought against and the remedial opportunities open to them. M Davodi- Far, "Environmental sustainability and distributive Justice: are the two Concepts Compactible?" (2009) 1:4 Sustainable Development and Planning 224; Meinhard Doelle & Sara Seck, "Loss & Damage from Climate Change: From Concept to remedy?" (2020) 20:6 Climate Policy 669

[599] Jean d'Aspremont & Alicia Koppen, "Global reform versus regional emancipation: the principles on international investment for sustainable development in Africa" in Yenkong Ngangjoh Hodu & Makane Moise Mbengue, ed, *African Perspectives in International Investment Law*, (Manchester: Manchester University Press, 2020) 18

the idea that sustainable development from a third world perspective vary from the west's conception of the term. Going by this, a similar but somewhat different question arises again – what does sustainable development mean to the third world?[600]

In the absence of a clear empirical evidence, the answer to the foregoing question will clearly be a herculean task. Nevertheless, state practice could proffer insight into what the former entails. Thus, with the example of the developments taking place in Africa, I argue here that the trends towards enabling sustainable development for investment purposes reflect the third world's ideological predilections based on their experience with IIL. For African states to truly be emancipated in a way that the structure of IIL will be deconstructed and reconstructed, they must discover and maintain their idea of what sustainable development connotes because it is only in doing so that African states will contribute to the legal and normative framework of IIL in a way that would be beneficial to them and the third world people within the continent.

[600] The connotation of what sustainable development means has been criticized for being unnecessarily vague. For instance, Michael Jacobs identified the vague nature of the term and explained that any attempt to define it is actually "misguided." The author explained that the meaning of sustainable development is subject to the whims of different interests and political values. He noted that disagreement over the meaning of the term is really not a question of semantics but a substantive political argument. Michael Jacobs, "Sustainable Development as a Contested Concept" in Andrew Dobson, ed, *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (New York, Oxford University Press, 1999). For more on the contested meaning of sustainability, see John C Dernbach & Federici Cheever, "Sustainable Development and Its Discontent" (2015) 4:2 Transnational Environmental L 247; Steve Connelly, "Mapping Sustainable Development as a Contested Concept" (2007) 12:3 Intl J of Justice and Sustainability 259. Because of the contested meaning of the term, we shall come to see that the the trend in Africa shows the continent's subjective approach towards its connotation.

5.3 Challenging the status quo: Africa's revolt from within and of itself

Like other third world states, African states suffered from the neoliberal origin of IIL. Rose Rameau noted that after colonialism, African states adopted the investment regime of the United States and the European Union as models for development.[601] Justice Osei-Afriye described this system of IIL as unfair by noting that its existence wasn't accidental but was purposely designed to be the "default setting of the foreign investment regime."[602] The situation is however changing. Hamed El-Kady and Mustaqeem De Gama recognized that changes are taking place at the national, regional, and continental level.[603]

At the national level, countries like Namibia and South Africa have reorganized their investment regime. Though Namibia's hasn't been made public because it is still yet to be finalized as at the time of writing this paper,[604] South Africa for instance discarded the use of IIL within its territorial jurisdiction.

South Africa is the only third world state that has taken the radical step of terminating BITs and openly renouncing the system of ISDS.[605] The step emanated from the case of

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[601] Rameau, *supra* note 56

[602] Justice Osei-Afriyie, "Foreign Investment Treaties and Sovereignty" in Yenkong Ngangjoh Hodu & Makane Moise Mbengue, ed, *African Perspectives in International Investment Law*, (Manchester: Manchester University Press, 2020) 30 at 45

[603] El-Kady & De Gama, *supra* note 42

[604] Xinhua, "Namibia at final stages of enacting new investment act – Minister", *News Ghana* (24 March 2022), online: <newsghana.com.gh/namibia-at-final-stages-of-enacting-new-investment-act-minister/>

[605] Public Citizen, a non-profit undertook an empirical study that revealed little connection between investment treaties and investment flows. Though the study cautioned against believing that termination necessarily leads to investment flows, the study actually revealed a boost in investment flows in countries who have terminated BITs with ISDS provisions. It was shown that from the time South Africa terminated its BITs in 2010, FDI stock increased from 1.8 trillion rand to 2.0 trillion rand. Specifically, when the country terminated its BIT with Germany in August 2014, FDI increased from an annual average of 93 billion rand to 95 billion rand. See Public Citizen, "Termination of Bilateral Investment Treaties has not Negatively Affected Countries' Foreign Direct Investment Inflows" (16 April 2018), online: <citizen.org/article/termination-of-bilateral-investment-treaties-has-not-negatively-affected-countries-foreign-direct-investment-inflows/>

Piero Forresti wherein on the ground of indirect expropriation and FET, an investor sued the government of South Africa at the ICSID for introducing a law aimed at empowering the historically marginalized Blacks in South Africa simply because its profit expectations wasn't fully maximized.[606] The country took drastic measures by enacting the Investment Promotion Act of 2015 which removed the use of ISDS and instead opted for state-to-state dispute resolution and the use of local courts. The government of South Africa came to the conclusion that the current regime of IIL focused on investors economic interests while those with national interests were open to an arbitrary system preserved through ISDS which undermined states' sovereignty and its ability to preserve its policy environs.[607]

Though the case was settled, it has some significance. In this regard, Kidane opined that it constitutes third world's resistance to the contention that they lack independent judicial and are thus, ill-disposed to handle investment related issues.[608] For Jean d'Aspremont and Alicia Koppen, the effect and the consequent policy option undertaken by the country of South Africa was to show "that the best way to ensure a balance between foreign investment protection and host states' policy interests is to prioritize

[606] *Piero Foresti v South Africa*, *supra* note 26
[607] Mmiselo Freedom Qumba, "South Africa's move away from international investor-state dispute: a breakthrough or bad omen for investment in the developing world?" (2019) 52:1 De Jure L J 358
[608] Won Kidane, "China's Bilateral Investment Treaties with African States in Comparative Context" (2016) 49 Cornell Intl L J 170

national (constitutional) law.[609] The step the government took, is believed to serve the end of balancing the interests of investors against those of host state.[610]

In adopting its "balancing measures", the government of South Africa has been criticized to the extent that even though the step undertaken by the state could have been used to preserve its regulatory powers, it operated as a protectionist regime which serve the end of political gains.[611] This type of criticism reveals how ideas emanating from the third world on issues pertinent to their development will be discarded by detractors. However, the steps taken by South Africa is akin to and is nothing short of what developed countries did to translate their ideas into norms under IIL as shown earlier. In criticizing the South African approach, Tarcisio Gazzini seemed to opine that the country's act was a radical departure from the nature of IIL. He argued that irrespective, the government of South Africa was bound by customary international law and such, the country will be responsible under international law despite its contrary stance.[612] Gazzini's argument is interesting because it shows how in rejecting the third world's ideology, the supposedly universal nature of customary international law will be invoked even though the country's act, in

[609] *d'Aspremont & Koppen*, *supra* note 599 at 23. The authors observation calls the international framework that exist to address the discrepancy between IIL and sustainable development into question. The UNCTAD investment Policy Framework for Sustainable Development contains set of binding principles that details several policy options for policy makers to abide by so as to reconcile the conflict between IIA and sustainable development. On countless occasion, the framework stated its overarching goal of meeting the end of sustainable development which includes maintaining balance between investor and states' interest. However, in failing to exactly define what sustainable development is, the extent to which such vague and overly broad terms will address the seeming balance is highly questionable when considered in light of the varying needs that exist between the third world and developed countries.

[610] Qumba, *supra* note 607

[611] Gloria Maria Alvarez, "A Response to the Criticism against ISDS by EFILA" (2016) 33:1 J of Intl Arbitration 1, online (pdf): <core.ac.uk/download/pdf/83952088.pdf>

[612] Tarcisio Gazzini, "Travelling the National Route: South Africa's Protection of Investment Act 2015" (2018) 26:2 African J of Intl & Comp L 242

this case its constitution, showed otherwise. However, this view must be rejected because asides the fact that the formation of CIL is itself undemocratic, as Gathii noted, the idea that international law is a view from nowhere and should therefore be applicable everywhere must be contested.[613]

At the regional level, there are a number of fragmented investment agreements which includes the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA),[614] the South African Development Community (SADC) Finance and

[613] Gathii "The Promise of International Law: A Third World View", *supra* note 62; So far, South Africa is the only African country that has been open about its disliking towards the regime of IIL and ISDS. In so doing, the country to a large extent influenced the trends taking place in Africa, particularly at the regional and continental level with the whole idea of aligning investment activities with sustainability. See Schlemmer, *supra* note 580

[614] *Revised Investment Agreement for the COMESA Common Investment Area*, (2007). The COMESA is one of the regional economic communities recognized by the African Union. It is made up of twenty-one African states who formed a regional bloc for the purpose of promoting trade and development of natural and human resources for the mutual benefit of people in the region. (These countries include the Republic of Burundi, Union of Comoros, Democratic Republic of Congo, Republic of Djibouti, Arab Republic of Egypt, Kingdom of Eswatini, Eritrea, Ethiopia, Libya, Madagascar, Malawi, Mauritius, Rwanda, Somalia, Sudan, Uganda, Zambia, and Zimbabwe). It was established in the year 1981 (as the Preferential Trade Area for Eastern and Southern Africa) under the framework of the Organization of African Unity Lagos Plan of Action. In the year 1994, the Preferential Trade Area became the COMESA. The regional bloc is regulated by the COMESA treaty. Part of this treaty is the Investment Agreement for the COMESA which regulates investment activities. The Investment agreement of the COMESA. The investment agreement is innovative in that it contains provisions of business ethics and human rights (Art 29). See "Overview of the COMESA: COMESA's Priorities and Objectives" (last accessed 18 August 2022), online: <www.comesa.int/overview-of-comesa/>

Investment Protocol,[615] and the ECOWAS Supplementary Act.[616] Though not as radical as South Africa's approach, these investment agreements contain provisions that seek to preserve their regulatory space in a way that would checkmate the excessiveness of the current IIL regime.[617] The former agreements also departs from the use of ISDS as a means of dispute resolution as it is under IIL. For instance, the ECOWAS Supplementary Act provide for ISDS with the qualification that such dispute will be done at national courts or local arbitral institutions.[618] SADC Finance and Investment Protocol provides that dispute will be resolved on a state-to-state basis.[619] The COMESA on its own part gave investors

[615] *The South African Development Community Protocol on Finance and* Investment, (2015). The South African Development Community (SADC) is another regional economic community in Africa. It comprises of 16 states which includes Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, and Zimbabwe. The regional community was established in 1992 and is committed to Regional Integration and poverty eradication within Southern Africa through economic development and ensuring peace and security. The SADC investment regime is regulated by the SADC investment finance and investment protocol (SADC FIP). The SADC FIP was created in 2006 and was amended in 2015. It has the objectives of creating a favorable investment environment with the aim of investment promotion. The agreement is innovative in that unlike its 2006 counterpart, the 2015 agreement contained no provision on the fair and equitable clause. The agreement also contained the right to regulate (Art 14). It also makes provision for investors obligations. Unlike the 2006 agreement, the 2015 agreement contains no provision on the use of ISDS (article 26). Instead, it provides that state to state dispute will be resolved by a tribunal to be established in the protocol. The removal of the ISDS from the new investment agreement arose from the influence of South Africa who insisted that the concerns associated with ISDS makes it ill fitted for the SADC FIP 2015.See Tinashe Kondo, "A comparison with Analysis of the SADC FIP before and after its amendment" (2017) 20:1 Potchefstroom Electronic L J 1

[616] *ECOWAS Supplementary Act on Investments*, (2009). The ECOWAS is another regional bloc in Africa which comprises of fifteen west African countries. It was founded in 1975. Its member states include Benin, Burkina Faso, Cabo Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. In 2008, the regional bloc adopted the Supplementary Act on Common Investment Rules for the purpose of promoting investment that furthers sustainable development within the regional bloc. Like its previous counterpart, the agreement confers obligations on investors (Article 11) and also create investor liability in cases where there are damage, injuries or loss of life arising from investment activities.

[617] Talkmore Chidede, "The Right to Regulate in Africa's International Investment Law Regime" (2019) 20:437 Oregon Rev of Intl L 437; See also Article 11 of the SADC Finance Protocol, Article 2 of the Investment Agreement for COMESA, Article 24 of the ECOWAS Supplementary Act,

[618] *ECOWAS Supplementary Act*, Art 35.

[619] *Southern African Development Community Protocol*, Art 25

the option of initiating ISDS via the ICSID in addition to bring an action before domestic courts of state parties and the COMESA Court of Justice.[620]

In addition to the regional trends, there are developments taking place at the continent-wide level. These innovations constitute the focus in this area and deserve some discussion and would be dealt with in greater details below.

5.4 The Pan African Investment code

The Pan African Investment Code (PAIC) was developed under the mandate of the African Union (AU) to create a balanced investment regime that would help preserve the policy space of African states.[621] During the third ministerial conference of African leaders in May 2008, the need to "*develop a comprehensive investment code for Africa with a view to promoting private sector participation*" was suggested.[622] Subsequently, the African Union at another ministerial conference in 2012 highlighted the need to establish a Pan-African Investment Code.[623] Finally, in 2015, the PAIC was enacted with the goal of developing new generation investment agreements at the regional level.[624]

The PAIC has the objective of promoting, facilitating and protecting investments in a way that would foster sustainable development of each member state especially for those

[620] *Investment Agreement for the COMESA Common Investment Area*, Art 28
[621] Rameau*, supra* note 56
[622] African Union, News release, "Uganda Hosts the Continental Consultative Meeting for the review of the Pan African Investment Code" (30 November 2015), online: <au.int/en/pressreleases/20151130-0>.
[623] Ibid
[624] Dr Amr Hedar, "The Legal Nature of the Draft Pan-African Investment Code and its relationship with International Investment Agreements" (2017) South Center Investment Policy Brief No 9

where investments are located.[625] It was, as Fola Adeleke explained, a reaction to the lopsided models of investment agreement that was detrimental to the developmental purpose of Africa.[626] Rameau on her own part stated that it was "written by Africans and from the African perspective as it caused the drafters of the PAIC to use or eliminate old tools such as the traditional clauses that are common in most BITs in new ways"[627] so that sustainable development will be supported and promoted in Africa.

According to Article 2 of the PAIC, the code is a guiding instrument for member states of the AU. The existence of this provision signifies that the code is a non-binding instrument as Tinyiko Ngobeni explained.[628] Nevertheless, the provision of Article 3(2) suggests that the provision of the code could be reviewed to become a binding instrument.

Generally, the PAIC contains several innovative provisions. For instance, Article 11 made provision for expropriation and compensation. It states that investments in member states shall not be nationalized or expropriated or subject to measure having such effects except if the following are met in a cumulative manner i.e., a public purpose related to

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[625] *The Draft Pan African Investment Code,* [*PAIC*] Art 1; As already noted, the creation of the PAIC fits within the broader context of the African union as found under the African Charter. To this end, its reference to the idea of meeting the ends of development fits into the broad framework of the African Charter on Human and People's Rights. Specifically, Article 22(1) of the Charter provides that "All Peoples shall have the right to their economic, social and cultural development with due regards to their freedom and identity and in the equal enjoyment of the common heritage of mankind. Article 22(2) states that states shall have the duty, individually or collectively, to ensure the exercise of the right to development. *African Charter on Human and People's Rights*, (entered into force 21 October 1986).

[626] Fola Adeleke, *International Investment Law and Policy in Africa: Exploring a Human Rights-Based Approach to Investment Regulation and Dispute Settlement* (United Kingdom: Routledge, 2018)

[627] Rameau, *supra* note 56

[628] Dr Tinyinko Ngobeni, "The Relevance of the draft Pan African Investment Code (PAIC) in Light of the Formation of the Continental Free Trade Area" (15 January 2019), online (blog): *Afronomics* <afronomicslaw.org/2019/01/11/the-relevance-of-the-draft-pan-african-investment-code-paic-in-light-of-the-formation-of-the-african-continental-free-trade-area>

the internal needs of a member state, on non-discriminatory basis, against adequate compensation and under due process of law. What is striking about this provision is that it serves the end of balancing different interest. Contrary to the opinion that the PAIC is averse to investors interest, what we see here is a general rule that seek to protect investors' subject to exceptions that a state must show before an infringing act can be deemed justified. Unlike the regime of IIL, the said article provides an investor with right of access to court or independent authority in the territory of the expropriating state and in accordance with the laws of that state.[629] The provision also guard against indirect expropriation by noting that non-discriminatory measure that are taken in lieu of legitimate public welfare objectives such as public health, safety and the environment will not amount to indirect expropriation.[630] The converse would mean that when discrimination occurs, a state would be responsible and might be made to pay compensation.

On human rights, the PAIC contains some ethical principles that businesses should abide by.[631] It stipulates that business should support and respect the protection of internationally recognized human rights,[632] as well as ensure that they are not complicit in human rights abuses.[633] Though laudable, this provision was not couched in a mandatory manner. In case this code is elevated as a binding instrument as the PAIC

[629] *PAIC,* Art 11(2)
[630] *PAIC,* Article 11(3)
[631] *PAIC,* Article 24
[632] *PAIC,* Article 24(a)
[633] *PAIC,* Article 24(b)

anticipated under Article 2, this particular provision might have an unintended consequence such that investors will be able to evade their responsibilities.

As for the dispute settlement clause, provision was made for state-state dispute settlement.[634] Member states were required to consult, negotiate, or mediate first. Opportunity for arbitration was also created.[635] Such arbitration must however be conducted at any dispute resolution center in Africa.[636] In cases where the foregoing fails, members can, within six months, apply to the African Court of Justice to settle such issue and in so doing, the decision of the court will be final.[637]

Asides state-to-state dispute settlement, provision was also made for investor-state dispute settlement. Such a dispute would first be resolved through consultations and negotiations which may include the use of a third party mediation process.[638] Where consultation fails however, resort may be had to arbitration subject to the applicable law of the host state and the exhaustion of local remedies.[639] And in any case where arbitration is used between an investor and a host African state, such arbitration may be conducted at any established arbitral institution in Africa and shall be governed be the United National Commission on International Trade Law rules.[640] Regarding the use of

[634] *PAIC,* Article 41
[635] *PAIC,* Article 41(1)
[636] Ibid
[637] *PAIC,* Article 41(2)
[638] *PAIC,* Article 42(1)(b)
[639] *PAIC,* Article 42(1)(c)
[640] *PAIC,* Article 42(1)(d)

ISDS, Uche Ofodile Eweluka noted that ISDS is incapable of dealing with African developmental issues.[641]

Mmiselo Freedom Qumba had a contrary view and believes that the system of ISDS should be preserved.[642] He based his argument upon the fact that it helps to preserve the neutrality and also maintain the continent's outlook as an investment destination.[643] In contradistinction to maintaining two opposing view, the PAIC clearly factored multiple instances that will give investor leeway to explore state-state dispute, arbitration and even the use of a court system. However, the use of a particular forum automatically translates to the exclusion of all others.[644] On investor-state dispute proceedings, the PAIC also confers host states with the ability to make a counterclaim against an investor where the latter has breached certain obligations.[645]

The existence of the foregoing provisions led scholars to concluded that Africa has shifted the paradigm from being rule takers to rule makers.[646] Makane Moise Mbengue & Stefanie Schacherer noted that systemic criticism of IIL necessitated the creation of the PAIC because regions outside those Europe and North America has realized the need to shape IIL according to their "level of economic development and social needs."[647] The authors points reflect positively to the need for creating a system of norms that would

[641] Uche Ofodile Eweluka, "Africa and the system of Investor-State Dispute Settlement: To Reject or Not to Reject?" (2014) 11 Transnational Dispute Management 1
[642] Qumba, Mmiselo Freedom. "Assessing African Regional Investment Instruments and Investor–State Dispute Settlement" (2021) 70:1 Intl and Comp L Quarterly 197.
[643] Ibid
[644] *PAIC,* Article 42(2)
[645] *PAIC,* Article 43
[646] Mbengue & Schacherer, *supra* note 44; Seatzu & Vargiu, *supra* note 116
[647] Mbengue & Schacherer, *supra* note 44

drive the peculiar situation of Africa. However, the extent to which this will inform the practice and policy of the entire regime in Africa remains to be seen.

5.5 The African Continental Free Trade Agreement Investment Protocol

The African Continental Free Trade Agreement (AfCFTA) was created under the aegis of the AU for the purpose of attaining sustainable development on the African continent.[648] It entered into force at the 10th extraordinary meeting of the assembly of head of states of the AU when forty-four African countries signed the agreement on the 21st of March 2018.[649] As at of August 2022, the agreement had been signed by fifty four out of fifty five African countries.[650] The AfCFTA has been projected to be of immense impact. In 2020, it was estimated by the World Bank that the agreement has the potential of lifting thirty million people out of extreme poverty while also raising the income of sixty-eight million people who live on less than $5.50 per day.[651]

According to Article 6 of the AfCFTA, the scope of the agreement covers trade in goods, services, investment, intellectual property rights and competition policy.[652] It is anticipated that the implementation of the agreement will be done in three phases. Phase

[648] "African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents" (last visited 18 August 2022), online (blog): <tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html>

[649] Vera Songwe et al, "The African Continental Free Trade Area: A Historical Moment for Development in Africa" (2021) 8:2 J of African Trade 12

[650] All African countries except for Eritrea have signed the AfCFTA. African Union, "Creating One African Market" (Last visited 18 August 2022), online: <au-afcfta.org/>

[651] The World Bank Group, *The African Continental Free Trade Area:Economic and Distributional Effects*, (New York: World Bank Publications, 2020)

[652] *The Agreement Establishing the African Continental Free Trade Agreement*, (30 May 2019), [*AfCFTA*]

1 covers negotiations of trade in goods and trade in services.[653] Phase 2 covers intellectual property rights, investments, and competition policy[654] while phase 3 covers negotiations in e-commerce.[655] With the coming into force of the AfCFTA, phase 1 negotiations were concluded. Currently, Phase 2 negotiations are ongoing with the anticipation that an investment protocol will emerge.[656]

The AfCFTA Investment Protocol is anticipated to contribute to the potentials that the agreement is expected to have on the continent. Rwatida Mafurutu explained that if negotiated properly, the benefits of the investment protocol are immeasurable because it has the potentials of enabling economic integration, alleviating poverty and creating employment opportunities.[657] Currently, negotiations for the AfCFTA Investment Protocol are underway with the expectation that later in the year 2022, negotiations will be concluded.[658] Though it is not certain what the protocol should embody, there is a high propensity that the PAIC will serve as a guide for realizing the "African Dream." To this end, the next subheading will be dedicated to addressing the immediately preceding point.

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[653] Talkmore Chidede, "AfCFTA Phase II and III Negotiations – Update" (10 February 2021), online (blog): *tralacBlog* <tralac.org/blog/article/15090-afcfta-phase-ii-and-iii-negotiations-update.html>;
[654] *AfCFTA*, Article 7
[655] Chidede, *supra* note 653
[656] Landry Signe & Colette Van der Ven, "Keys to success for the AfCFTA Negotiations" (2019) Brookings Institute Policy Brief
[657] Rwatida Mafurutu, "The AfCFTA Investment Protocol: Preparations for the negotiations and expectations" (9 December, 2021), online (blog): <tralac.org/blog/article/15456-the-afcfta-investment-protocol-preparations-for-the-negotiations-and-expectations.html#:~:text=The%20AfCFTA%20envisages%2C%20eventually%2C%20a,Settlement)%20have%20made%20early%20progress.>
[658] Sherillyn Raga et al, "AfCFTA Investment Protocol: Issues and Opportunities for Kenya" (2022) ODI Policy Brief

5.6 The Pan African Investment Code and the African Continental Free Trade Agreement Investment Protocol

Of critical importance is the question – to what extent should the PAIC influence the AfCFTA Investment Protocol? For Olabisi Akinkugbe, it is to a great level. Akinkugbe explained that the PAIC's influence in informing the AfCFTA investment Protocol shouldn't be underestimated because it will help to advance the interest of Africans and challenge the "systemic inequalities of IIL."[659] Though on a different premise, Naa Lamle Orleans-Lindsay also opined that the PAIC serves as a good model for negotiators to use in devising the AfCFTA Investment Protocol.[660] She premised her argument on the fact that the incidence with the global pandemic, wherein states adopted stiff regulatory measures against investors and their investments, has rendered the need for states to adopt measures that would help ensure that investments must be driven by sustainable development goals.[661] To this end, she explained that negotiators for the AfCFTA Investment Protocol must leverage on this because unlike before, there is an understanding that states' must preserve their regulatory rights to respond to emergency crisis.[662] To Mouhamadou Madana Kane, the PAIC can serve as a basis for negotiating the AfCFTA Investment Protocol because of how tailored and well-suited it is for meeting the specificity of African states.[663] In addition, he believed that the code will help to unify the

[659] Akinkugbe, *supra* note 58
[660] Naa Lamle Orleans-Lindsay, "The AfCFTA Investment Protocol: Recommended Perspectives for Country Negotiators" (Paper delivered at the AfAA 2nd Annual International Arbitration Conference, 15th-16th April, 2021), online: <afaa.ngo/page-18097/10472580>
[661] Ibid
[662] Ibid
[663] Mouhamadou Madana Kane, "The Pan-African Investment Code: a good first step, but more is needed" (2018) Columbia FDI Perspectives on Topical Foreign Investment No 217, online (pdf): <cademiccommons.columbia.edu/doi/10.7916/D8CC2GN9/download>

fragmented investment regime[664] which arose from the adoption of investment model from western countries[665] In similar vein, Talkmore Chidede opined that though the PAIC is non-binding, it serves as a model instrument that would help transmute its status as a non-binding instrument to a binding one through the provision of the AfCFTA Investment Protocol which is currently underway.[666]

Kidane however had a contrary view. While he believed in the potentials of the PAIC, he issued a note of caution regarding its use at the intra-continental level.[667] In doing this, he asserted that the provisions of the code which unduly constrained investment protection to give leeway to governmental regulatory powers would have been appropriate in a typical north-south relationship as opposed to a south-south relationship which the AfCFTA seek to promote.[668] This is because the creation of the PAIC arose within the pure context of the challenges that was confronted by African states and its neoliberal origin under IIL.[669] Accordingly, he believed that so long as the aim of the PAIC is to further intra-African trade, Africa "denying itself of the kind of courtesy that it historically accorded to its northern investors might be punishing oneself for the perceived wrong of another."[670] Kidane further explained that discarding principles because ISDS tribunals have construed them against Africans to benefit foreign investors in the past isn't enough for such principles to be discarded. Instead, he believed, it would have been apt to provide a

[664] Ibid
[665] Rameau*, supra* note 56
[666] Chidede*, supra* note 653
[667] Kidane, "Contemporary International Investment Law and Africa's Dilemmas in the Draft Pan-African Investment Code", *supra* note 190
[668] Ibid
[669] Ibid
[670] Ibid

mechanism for interpretative guidance that would be binding on states. In short, Kidane's point as he succinctly concluded is that the PAIC doesn't provide "an African solution to an African problem."

To an extent, Kidane's point shows that the creation of the PAIC was simply Africa's reaction to the lopsided regime of IIL. While this statement and the extent to which the PAIC will be ill disposed to govern investment issues amongst Africans cannot be doubted, the conclusion arrived at by the scholar is questionable to the extent that the preservation of principles as developed under IIL should be made to apply in Africa and tested within the context of an intra-Africa setting. I make this contention because the principles that exists under IIL arose within a different contextual setting that operated to further the agenda of developed countries in promoting neoliberal policies.

As shown from the preceding chapters, the creation of standards of protection such as the FET was inherently lopsided against the third world.[671] This lopsidedness explains why the clause has no clearly defined meaning. The author himself acknowledged this when he opined that he didn't intend to "understate the difficulty of ascertaining the exact meaning of the fair and equitable treatment." Like the FET, indirect expropriation and its current construction also emanated from the west and went through a transitory period and has been used to demean key aspects that affect regulatory measures as seen in the *Bear Creek* case. These point calls into question the origin of the principles under IIL and

[671] Mishra & Mishra*, supra* note 305

if truly, they can be well tailored to address the African experience even where those rules are reconstructed through an "interpretative guidance."

In my opinion, I will submit otherwise. As the popular African saying goes, "when the root is deep, there is no reason to fear the wind." The roots of principles as found under IIL wasn't tailored for the African situation. Kidane himself identified this when he stated that "the adequacy and appropriateness of the legal infrastructure for the ordering of intra-African economic relations did not have the chance to be meaningfully debated."[672] As opposed to planting a tree with a weak root from the preexisting rules and principles under IIL, Africa states, leaders and all relevant stakeholders must discover, debate and identify what must be done to further the African experience. This task has to be undertaken because it has never been done.[673] The PAIC was simply reactionary towards the asymmetrical nature of IIL towards African states.

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[672] Ibid

[673] Kidane, "Contemporary International Investment Law and Africa's Dilemmas in the Draft Pan-African Investment Code", *supra* note 190. As opposed to African states, certain countries in Latin America seems to have embraced the use of investment facilitation which targets investment promotion as opposed to protection. For instance, before the government of Brazil, where investment facilitation originated from, opted for its use, it engaged with various stakeholders before a workable model that regulates investment activities could be devised. This in turn has proven to be a success and the country is undertaking efforts to make its use applicable across the globe. At a round table event of the World Trade Organization which took place in May 2021, Alicia Bárcena, the Executive Secretary of the Economic Commission for Latin America and the Caribbean, made an important statement that signaled that the region will not adopt a system of rules that is alienated to their jurisdiction. It was reported that she said:

> …Many Latin American and Caribbean countries have already made progress on investment facilitation measures on their own, *so this new agreement* in the framework of the WTO represents an important step and *should not be perceived as an outside imposition*

The statement above tacitly implies that Latin American nations will not adopt a system that a foreign to their environment. Alicia Bárcena subtly hinted the elevation of investment facilitation as a system of global trading because according to her, investment facilitation is unlike the traditional mode of investment protection because it places emphasis on cooperation between foreign investors and host governments to pursue mutually beneficial outcomes. She also believed that investment facilitation served as an

Moreover, the notion that African states, and all relevant stakeholders must engage in meaningful conversion shows that at the continental level, the ideological preference of states still needs to be explored. With the diversity existing in terms of the people, culture and even geography, whatever engagement that will occur should be conducted in a manner that should address the four critical questions Odumusu put forth in her TWAIL constructivist approach i.e., *Who are the actors? Does an actor have the capacity to speak and be heard? What is the actor saying? And how is the actor saying what it purports to be said?* In other words, the quest of embarking on a trend that would eventually lead to the creation of binding legal norms in Africa must identify all relevant actors, both traditional and non-traditional. The interaction between the actors must be given great consideration such that their unequal status will be adequately considered, and their

opportunity for greater coherence in the multilateral system and the attainment of sustainable development goals. Currently, the creation of a multilateral system of rules for investment facilitation is being negotiated at the WTO. While Latin America States are pushing this, it is being opposed by certain developing countries. This means that states are being wary. A likely reason could be because the exact scope of investment facilitation is unknown. In fact, Nyaguthii and Nikièma cautioned Africa against the use of investment facilitation simpliciter because "there is no widely accepted benchmark on what constitutes investment facilitation in scope, nor which kind or form of investment facilitation works best in specific context. The authors believed that the absence of an exact connotation and a deeper knowledge of investment facilitation could serve as a challenge during the negotiation of the Investment Protocol of the African Continental Free Trade Agreement. Africa can learn from the Brazilian example. Not as a means of embracing investment facilitation simpliciter, but as a way of devising rules that is well tailored to suit its unique experience. See Negotiations in the Framework of the WTO are a New Model of Governance for Foreign Direct Investments: Alicia Bárcena", "The United Nations" (6 May 2021), online: <www.cepal.org/en/pressreleases/negotiations-framework-wto-are-new-model-governance-foreign-direct-investment-alicia>; Martin Dietrich Brauch, "A risky tango? Investment facilitation and the WYO Ministerial Conference in Buenos Aires" (20 December 2017), online: *IISD* <www.iisd.org/articles/policy-analysis/risky-tango-investment-facilitation-and-wto-ministerial-conference-buenos>; Choer Moraes, Henrique & Felipe Hees. "Breaking the BIT Mold: Brazil's Pioneering Approach to Investment Agreements" (2018) 112 AJIL Unbound 197; Suzy H Nikiema & Nyaguthii Maina, "Negotiating the AfCFTA Investment Protocol: An Opportunity for Africa to set its own Investment Facilitation Agenda" (3 September 2021), online: *Afronomics* <www.afronomicslaw.org/category/analysis/negotiating-afcfta-investment-protocol-opportunity-africa-set-its-own-investment>

interests accommodated for the purpose of creating an inclusive rule. Next, the ideas espoused by all relevant actors and stakeholders should be factored into consideration to examine how such could transmute into a legal norm. Lastly, attention must be paid to the various means wherein relevant stakeholders engage with the process of devising rules that will eventually translate into norms.

As one commentator noted, the AfCFTA Investment Protocol will "have a direct impact on the ability of the AfCFTA to function as an all-inclusive instrument that will attract investment and promote economic development in a holistic manner."[674] Thus, in my opinion, lessons must be learned and it is only be doing the immediately preceding points that African states and all relevant stakeholders will be able to create a meaningful norm under the AfCFTA Investment Protocol that is currently underway.

5.7 Prospects for change?

At this point, it is crucial to ask what are the prospect for change? In reality the response to this question isn't as easy as it appears because it would require the need to determine the level wherein change will be attained.

As in the case of Africa, third world states have to beware that the rules they are adopting within their respective territories aren't simply reactionary to the asymmetric rule of IIL. Steps must be taken for them to understand what truly works for them. For this to occur, the following questions as explained above must be considered i.e., *Who are the actors?*

[674] Gerhard Eramus, "An Investment Protocol for the AfCFTA" (23 march 2021), online (blog): *tralacBlog* <tralac.org/blog/article/15152-an-investment-protocol-for-the-afcfta.html>

Does an actor have the capacity to speak and be heard? What is the actor saying? And how is the actor saying what it purports to be said?

The case at the international level is somewhat different because third world states have been marginalized and silenced for long. Their response, as exemplified from the case of African states, shows that the long overdue fight for reconstructing IIL has begun. Akinkugbe prompted African nations in his clarion call that they should be radical and fearless in transmuting their continental and regional reforms to treaties concluded with developed countries at the global level.[675] For the sake of sound as though I am generalizing, Akinkugbe's point underscores the very need of preserving the identity, uplifting the voice, and disrupting the asymmetric power relations to accommodate the views and ideas of the third world in a way that will foster the creation of a binding new norms under IIL, as anticipated by TWAIL constructivism.

While this of course is the goal, to what extent is it achievable? The only possible answer to this question depends on time. Nevertheless, the incremental steps undertaken by the third world has chart a new course with potentials to rewrite their neglected experiences anew under IIL. The extent to which IIL will adequately accommodate the experiences of the third world alongside those of the west remains to be seen and that is if in fact it ever remains to be seen. Irrespective, momentum has gathered. As Malcolm X popularly said, "you to have to pick the gun up to put the gun down." The third world have picked up the gun of resistance which can at best be said to be in preparation to fight for the battle of

[675] Akinkugbe, *supra* note 58

norm creation. However, the question is – to what extent is the third world willing to fight the battle of putting down the gun of the asymmetrical nature of IIL? Again, only time will tell. This is because "the prospects for the transformation of international law into a purely counter-hegemonic tool, capable of aiding the weak and the victims and of holding the powerful accountable, are bleak on its own."[676]

5.8 **Conclusion and chapter summary**

This chapter focused on third world's resistance to the rules of IIL by noting the trends taking place across Africa. In the previous sections, it was revealed that in a bid to advance sustainable development, African nations are devising innovative investment regimes. With the most prominent being PAIC, African nations will be well positioned to strike a balance between varying interests that exist under IIL. Though without any legal force, the PAIC has the potential of becoming binding with the indices of the AfCFTA Investment Protocol. In so doing however, caution must be taken. This is because the PAIC was adopted in response to the lopsided nature of IIL. To this end, while the use of the PAIC at the global level would help the third world states of Africa to rewrite their experiences, the extent to which the code will inform regional trend is questionable because the PAIC cannot respond to the needs of African states. Thus, African leaders must engage to discover a system of investment regime that will be best predisposed to solving their peculiar interest.

[676] Rajagopal, "Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy", *supra* note 586

CHAPTER SIX – CONCLUSION

IIL today was fashioned out of ideas. Ideas which were conceived by the west at a time when the third world was subjugated and marginalized as found during the period of colonialism. Though colonialism as it previously existed has waned, its vestiges continued and has evolved to create the systemic power dynamic between the west and the third world. Clearly, as revealed in this thesis, the machineries under IIL promotes the ideals of those who fashioned it to the detriment of the weak who should in fact be protected.

With the consequent effects on the economy, human rights, and regulatory space of the third world, resistance to the status quo has begun. Just as in the case of the west, the challenge by the former has the potential of giving the third world the opportunity to espouse their ideas, regain their identity and contribute towards forging the creation of norms under international law. The resistance is timely because with the concept of sustainable development being promoted, third world states can battle the system using the very concept it created. However, care must be taken.

Though the idea of sustainable development is of peculiar interest to both developed states and the third world, recent world events have suggested that both groups have different agendas. With the west still trying to maintain their neoliberal undertaking, the third world must beware that sustainable development isn't used to trample the ideas that is being espoused by them as shown with the case of Africa above.

Undoubtedly, sustainable development has potentials of emancipatory freedom for the third world, both as states and people. It is in this light that they must hold on to preserve

their predilection under IIL. In my opinion, that is the only way out to break out of the shackles of ideological bondage that the west has held on to for so long. While there are potentials in this regard, only time will tell and the impact of the third world movement of course, remains to be seen.

Bibliography

LEGISLATION: FOREIGN

Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part and The European Union and Its Member States, (2014)

Charter of the United Nations and Statute of the International Court of Justice, 24 October 1945, 33 UNTS 993 (24 October 1945)

ECOWAS Supplementary Act on Investments, (2009)

Italy Model BIT, (2020)

Morocco Model BIT, (2019)

Netherlands Model Investment Agreement (2019)

The Convention on the Settlement of Investment Disputes Between States and Nationals of other Contracting States, 18 March 1965, 575 UNTS 159

Pan African Investment Code, 2015

Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and The Government of the Federal Republic of Nigeria, (2016)

Revised Investment Agreement for the COMESA Common Investment Area, (2007)

Revised Treaty of the Economic Community of West African States, (1993)

The Draft Pan African Investment Code

The South African Development Community Protocol on Finance and Investment, (2015)

Togo Amity and Economic Relations Treaty

JURISPRUDENCE: FOREIGN

Bear Creek Mining Corporation v. Republic of Peru, (2017), italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Prof Karl-Heinz Bockstiegel, Dr. Michael Pryles & Prof. Phillippe Sands QC)

Berhard Friedrich & others v Republic of Zimbabwe, (2015) italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: The Hon. L Yves Fortier PC, CC, QC, Professor David AR Williams QC and Mr Michael Hwang)

Bilcon of Delaware et al v Government of Canada, (2015) italaw (Permanent Court of Arbitration) (Arbitrator: Judge Bruno Simma, Professor Donald McRae and Professor Bryan Schwartz)

Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, (2008) itaLaw Reporter (International center for the Settlement of Investment Disputes) (Arbitrators: Mr Bernard Honotiau, Mr Gary Born and Mr Toby Landau)

Chorzow factory case (*Germany v Poland)* (1927), PCIJ (Ser A) No 9

CMS Gas Transmission Co. v. Republic of Argentina, (2005) italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Professor Francisco Orrego Vicuña,The Honorable Marc Lalonde P.C., O.C., Q.C., H.E. Judge Francisco Rezek)

Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina (2007) itaLaw Reporter (International center for the Settlement of Investment Disputes) (Arbitrators: Judge Francisco Rezek, Judge Thomas Buergenthal, and Mr. Peter D Trooboff)

Compania del Desarollo de Santa Elena S.A v Republic of Costa Rica, (2000) italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Mr. L Yves Fortier C.C Q.C, Professor Sir Elihu Lauterpacht C.B.E, Q.C and Professor Prosper Weil);

El Paso International Energy Company Co. v. The Argentine Republic, (2011) italaw (International Center for the Settlement of Investment Disputes) (Arbitrator: Prof. Lucius Caflisch, Prof. Piero Bernardini and Prof. Brigitte Stern)

Gold Reserve Inc. v. Bolivarian Republic of Venezuela, (2014) italaw (International Center for the Settlement of Investment Disputes) (Arbitrator: professor Pierre Marie Dupuy, Professor David AR Williams, Professor Piero Bernardini)

LFH Neer & Pauline Neer (USA) v United Mexican States (1926) 4 RIAA 60

Mellacher v. Austria, 10522/83, [1990] EHRR 391

Metalclad Corporation v The United Mexican States (2000)) italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Professor Sir Elihu Lauterpacht QC CBE, Mr Benjamin R Civiletti and Mr Jose Luis Siqueiros)

Noble Ventures, Inc. v. Romania, (2005) italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Professor Karl-Heinz Bockstiegel, Sir Jeremy Lever KCMG QC and Professor Pierre-Marie Dupuy)

North Sea Continental Shelf Case, [1968] ICJ Reports 3

Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador, italaw (International Center for the Settlement of Investment Disputes) (Arbitrator: Mr. L Yves Fortier CC QC, Mr. David AR Williams QC and Professor Brigette Stern)

Pac Rim Cayman LLC v Republic of El Salvador (2016) italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: VV Veeder Esq, Professor Dr. Guido Santiago Tawil, and Professor Bridgette Stern);

Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, (2010) italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Professor Vaughan Lowe QC, The Hon Charles N. Brower, and Mr Joseph M. Matthews)

Pressos Compania Naviera and others v Belgium, [1995] ECHR 20

Railroad Development Corporation (RDC) v. Republic of Guatemala, (2012) itaLaw Reporter (International Center for the Settlement of Investment Disputes) (Arbitrators: Dr Andres Suerda, Honorable Stuart E. Eizenstat and Professor James Crrawford)

Saba Fakes v. Republic of Turkey (2010) *)* italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Professor Emmanuel Gaillard, Professor Hans van Houtte and Dr Laurent Levy);

Salini Costrttori SPA and Italstrade SPA v Kingdom of Morroco, (2001) italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Maitre Robert Briner, Maitre Bernardo Cremades and Professor Ibrahim Fadlallah)

Tecnicas Medioambientales Tecmed, S.A v. The United Mexican States, (2003), italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Mr. Carlos Bernal Verea, Prof. Jose Carlos Fernandez Rozas and Dr. Horacio A. Grigera Naon)

Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, (2016), italaw (International Center for the Settlement of

Investment Disputes) (Arbitrators: Professor Andreas Bucher, Professor Pedro J. Martínez-Fraga, Professor Campbell McLachlan QC

Victor Pey Casado and President Allende Foundation v. Republic of Chile, italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Professor Pierre Lalive,Sr Mohammed Chemloul and Professor Emmanuel Gaillard)

Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt, (2009), italaw (International Center for the Settlement of Investment Disputes) (Arbitrators: Mr. David AR Williams QC, Prof Michael Pryles and Prod Francisco Orrego Vicuna)

SECONDARY MATERIALS: ARTICLES

Adams, Kweku et al, "Multinational corporations and human rights violations in emerging economies: Does commitment to social and environmental responsibility matter?" (2021) 280:15 J of Environmental Management 111689, DOI: <10.1016/j.jenvman.2020.111689>

Akinkugbe, Olabisi D., "Africanization and the Reform of International Investment Law" (2021) 53:1 Case W Res J Intl L 7

Akinsanya, Adeoye, & Arthur Davies, "Third World Quest for a New International Economic Order: An Overview" (1984) 33:1 Intl & Comp L Quarterly 208, online: <www.jstor.org/stable/759614>

Al Attar, Mohsen & Rebekah Thompson, "How the Multi-Level Democratisation of International Law-Making Can Effect popular Aspirations Towards Self Determination" (2011) 3:1 J Trade L & Development 65

Alshahrani Sarah M, "What Should We Know About the Origins of International Investment Law?" (2020) 48:3 Intl J of Legal Information 122

Alvarez, José E, "ISDS Reform: The Long View" (2021) 36:2 ICSID Rev - Foreign Investment L J 253, DOI: <10.1093/icsidreview/siab036>

Alvarez, Gloria Maria, "A Response to the Criticism against ISDS by EFILA" (2016) 33:1 J of Intl Arbitration 1, online (pdf): <core.ac.uk/download/pdf/83952088.pdf>

Amador, Francisco V Garcia, "The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation" (1980) 12 U Miami Inter-American L Rev 1, online: <repository.law.miami.edu/umialr/vol12/iss1/2>

Anderson, Ariel, “Saving Private ISDS: The Case for Hardening Ethical Guidelines and Systematizing Conflict Checks” (2018) 49 Georgetown J of Intl L 1144

Angie, Anthony, “The evolution of International Law: Colonial and Postcolonial Realities” (2006) 27:5 Third World Quarterly 739

Anghie, Antony & BS Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2:1 Chinese J Int'l L 77

Angie, Anthony, & BS Chimni, “Third World Approach to International law and Individual responsibility in Internal Conflict” (2004) 36 Studies of Transnational Legal Policy 185

Ansong, Alex, “The Concept of Sovereign Equality of States in International Law” (2016) 2:1 GIMPA L Rev 14

Arnold, Hugh M, “Africa and the New International Economic Order” (1980) 2:2 Third World Quarterly 295

Baird, Natalie, “To ratify or not to Ratify? An Assessment of the Case for ratification of International Human Rights Treaties in the Pacific” (2011) 12 Melbourne J of Intl L 2

Baker, Roozbeh (Ruby) B, “Customary International Law in the 21st Century: Old Challenges and New Debates” (2010) 21:1 European J of Intl L 173

Baltag, Crina & Ylli Dautaj, “Promoting, Regulating, and Enforcing Human Rights Through International Investment Law and ISDS” (2021) 445:1 Fordham Intl L J 1

Barklen, Courtenay & Enrique Alberto Prieto-Rios, “The concept of “Indirect Expropriation” (2011) 11:21 Civilizar Ciencias Sociales y Humanas 77, online: <scielo.org.co/scielo.php?script=sci_arttext&pid=S1657-89532011000200006 >

Bedjaoui, Mohammed, “Non-Alignement et Droit International” (1976) 151 RCADI 382

Berenstain, Nora, “Civility and the Civilizing Project” (2020) 49:2 Philosophical Papers 305

Berge, Tarald Laudal & Axel Berger, “Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity” (2021) 12:1 *J of Intl Dispute Settlement,* 1–41, DOI <10.1093/jnlids/idaa027>

Bernaz, Nadia, “Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Portion?” (2013) 117:3 J of Business Ethics 493

Bjorklund, Andrea K et al, “The Diversity Deficit in International Investment Arbitration” (2020) 21:2-3 J of World Investment & Trade L 410

Boas, MJ Van Emde, “The OE.D Draft Convention on the Protection of Foreign Property” (1963)1 Common Market L Rev 265

Boute, Anatole, “The Potential Contribution of International Investment Protection Law to combart climate change” (2009) 27:3 J of Energy and Natural resources L 333

Brower, Charles N, “The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?” (1975) 9:2 The Intl Lawyer 295

Bradley, Curtis & Mitu Gulati, “Withdrawing from International Custom” (2010) 120 Yale L J 233

Bronfman, Marcela Klein, “Fair and Equitable Treatment: An evolving Standard” (2005) 38:5 Revista De Estudio Internacional 89

Brown, Julia G, “International Investment Agreement: Regulatory Chill in the Face of Litigious Heat?” (2013) 3:1 Western J of Legal Studies 3

Buchenau, Jürgen “The Mexican Revolution, 1910-1946” (2015) Latin American History, Oxford Research Encyclopedia of Latin American History, DOI: <10.1093/acrefore/9780199366439.013.21>

Burke-White, William W & Andreas Von Staden, "Private Litigation in a Public Sphere: The Standard of Review in Investor-State Arbitrations" (2010) 35:2 Yale J Int'l L 283

Calamita, Jansen, “The Challenge of Establishing a Multilateral Investment Tribunal at ICSID” (2017) 32:3 ICSID Rev – Foreign Investment L J 611

Cate, Iren M Ten, “The Cost of Consistency: Precedent in Investment Treaty Arbitration” (2013) 51:418 Columbia J of Transnational L 419

Chen, Richard C, “Precedent and Dialogue in Investment Treaty Arbitration” (2019) 60:1 Harvard Intl L J 47;

Cheng, Tai-Heng, “Precedent and Control in Investment Treaty Arbitration” (2006) 30:4 Fordham Intl L J 1014

Chidede, Talkmore, “The Right to Regulate in Africa’s International Investment Law Regime” (2019) 20:437 Oregon Rev of Intl L 437

Chimni, BS, “Customary International Law: A Third World Perspective” (2018) 112:1 American J of Intl L 1

Chimni, B S, "The World of TWAIL: Introduction to the Special Issue" (2011) 3:1 Trade L & Development 14

Chiussi, Ludovica, “The Role of International Law in the Business and Human Rights Process” (2019) 21:1 Intl Community L Rev 35, DOI: <10.1163/18719732-12341389>

Choudhury, Barnali, “International Investment Law and Noneconomic Issues” (2020) 20:245 Vanderbilt J Transnational L 1, online (pdf): <discovery.ucl.ac.uk/id/eprint/10091379/1/InvArticle.pdf>

Chung, Olivia, "The Lopsided International Investment Law Regime and Its Effect on the Future of Investor-State Arbitration" (2007) 47:4 Va J Int'l L 953

Corbella-Valea, Montserrat, “Indirect Expropriation and Resource Nationalism in Brazil’s Mining Industry” (2014) 46:1 U of Miami Inter-American L Rev 61

Costeloe, Micheal P, “Spain and the Latin America Wars of Independence: The Free Trade Controversy, 1810-1820” (1981) 61:2 Hispanic American Historical Rev 209

Coyle, John F, "The Treaty of Friendship, Commerce and Navigation in the Modern Era" (2013) 51:2 Colum J Transnat'l L 302

Creel Jr , Luis J, “Mexicanization: A Case of Creeping Expropriation” (1968) 22:2 SMU L Rev 281

Curtis, Sebastian Timothy Whiteford, “Resolving Investor State Dispute Settlement’s Legitimacy Crisis: The Case for Reinstating the Requirement to Exhaust Local remedies” (2021) 7 London School of Economics L Rev 327

D'Amato, Anthony, "Is International Law Really Law" (1984-1985) 79:5 & 6 Nw U L Rev 1293

Dattu, Riyaz, “A journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment” (2000) 24:1 Fordham Intl L J 275

DLF, Shamila “Rationalize of Host States Regulatory Measures and Protection of Legitimate Expectations of Foreign Investor: Analyzing the State of Necessity in the Investment Treaty Context” (2013) 2:3 South East Asia J of Contemporary Business, Economics and L 34

Dolzer, Rudoff, "Fair and Equitable Treatment: A Key Standard in Investment Treaties" (2005) 39:1 Int'l Law 87

Dolzer, Rudolf, "Fair and Equitable Treatment: Today's Contours" (2013) 12:1 Santa Clara J Int'l L 7

Duggal, Kabir A N & Nicholas J Diamond, “Human Rights and Investor–State Dispute Settlement Reform: Fitting a Square Peg into a Round Hole?” (2021) 12:2 *J of Intl Dispute Settlement,* 291, DOI: <10.1093/jnlids/idab006>;

Dumberry, Patrick, “Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?” (2017) 8:1 J of Intl Dispute Settlement 155, DOI: 10.1093/jnlids/idw002

Dumberry, Patrick, “The emergence of the Concept of ’General Principle of International Law’ in Investment Arbitration Case Law” (2020) 11:2 J of Intl Dispute Settlement 194

Dumberry, Patrick, “The Last Citadel! Can a State Claim the Status of Persistent Objector to Prevent the Applications of a Rule of Customary International Law in Investor-State Arbitration?” (2010) 23 Leiden J of Intl L 379

Duruigbo, Emeka, “Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Changes” (2008) 6:2 Northwestern J of Intl Human Rights 222

Ejims, Okechukwu, “The 2016 Morocco-Nigeria Bilateral Investment Treaty: More Practical Reality in Providing a Balanced Investment Treaty?” (2019) 34:1 ICSID Rev – Foreign Investment L J 62

El-Kady, Hamed & Mustaqeem De Gama, “The Reform of the International Investment Regime: An African Perspective” (2019) 34:2 ICSID Rev – Foreign Investment L J 482

El-Kosheri, Ahmed Sadek, “ICSID Arbitration and Developing Countries” (1993) 8:1 ICSID Rev – Foreign Investment L J 104, DOI: <10.1093/icsidreview/8.1.104>

Eweluka, Uche Ofodile, “Africa and the system of Investor-State Dispute Settlement: To Reject or Not to Reject?” (2014) 11 Transnational Dispute Management 1

Fahner, Jeanrique, “The Contested History of International Investment Law: From a Problematic past to Current Controversies” (2015) 17:3 Intl Community L Rev 373;

Falk, Richard, “Foreword: Third World Approaches to International Law (TWAIL) special issue” (2016) 37:11 Third World Quarterly 1944, DOI: <10.1080/01436597.2016.1205443>

Fatourous, AA, “An International Code to Protect Private Investment – Proposals and Perspectives” (1961) 14:1 U of Toronto L J 77

Fidler, David P, "Revolt against or from within the West - TWAIL, the Developing World, and the Future Direction of International Law" (2003) 2:1 Chinese J Int'l L 29

Finnemore, Martha & Kathryn Sikkink, “Talink Stock: The Constructivist Research Program in International Relations and Comparative Politics” (2001) 4 Annual Rev of Political Science 391

Fobbe, Lea & Per Hilletofth, “The Role of Stakeholders Interaction in Sustainable Business Models: A systemic Literature Review” (2021) 327 J of Cleaner Production 129510, DOI: <10.1016/j.jclepro.2021.129510>

Fortier L Yves & Drymer Stephan L, “Indirect Expropriation in the Law of International Investment: I know it when I see it, or Caveat investor” (2005) 13:1 Asian Pacific L Rev 79

Franck, Susan D, “The Legitimacy Crisis in Investment treaty Arbitration: Privatizing Public International Law through Inconsistent Decision” (2005) 73:4 Fordham L Rev 1521

Franck, Susan D et al, “The Diversity Challenge: Exploring the ‘Invisible College’ of International Arbitration” (2014) 53 Columbia J of Transnational L 429

Galindo, George Rodrigo Bandeira & Cesar Yip, “Customary International Law and the Third World: Do not Step on the Grass” (2017) 16:2 Chinese J of Intl L 251

Garcia, Frank J, et al, “Reforming the International Investment Regime: Lessons from International Trade Law” (2015) 18:4 J of Intl Economic L 861, DOI: <10.1093/jiel/jgv042>

Garcia-Mora, Manuel R, “The Calvo Clause in Latin American Constitutions and International law” (1950) 33:4 Marquette L Rev 205

Gathii, James Thuo, “Imperialism, Colonialism and International Law” (2007) 54 Buffalo L Rev 1013 at 1016

Gathii, James Thuo, "The Promise of International Law: A Third World View" (2021) 36:3 American University Intl L Rev, online: <digitalcommons.wcl.american.edu/auilr/vol36/iss3/1>

Gazzini, Tarcisso, “Beyond Protection: The Role of the Home State in Modern Foreign Investment Law”, in: Catharine Titi, ed, *Public Actors in International Investment Law*, (Switzerland: Springer, 2021)

Gazzini, Tarcisio, "Drawing the Line between Non-Compensable Regulatory Powers and Indirect Expropriation of Foreign Investment - An Economic Analysis of Law Perspective" (2010) 7:3 Manchester J Int'l Econ L 36

Gazzini, Tarcisio, “Travelling the National Route: South Africa’s Protection of Investment Act 2015” (2018) 26:2 African J of Intl & Comp L 242

Gervais, Daniel J, "Investor-State Dispute Settlement: Human Rights and Regulatory Lessons from *Lily v. Canada*" (2018) 8:459 UC Irvine L Rev 459, online (pdf): <law.uci.edu/lawreview/vol8/no3/Online_Gervais.pdf>

Giannetti, BF et al, "A review of limitations of GDP and alternative indices to monitor human wellbeing and to manage eco-system functionality" (2015) 87 J of Cleaner Production 11

Gillard, Emmanuel, "The Denunciation of ICSID Convention" 237:122 New York L J

Gilman, Nils, "The New International Economic Order: A Reintroduction" (2015) 6:1 Humanity: An Intl J of Human Rights Humanitarianism & Development 1, online: <humanityjournal.org/issue6-1/the-new-international-economic-order-a-reintroduction/>

Goodman, Charity L, "Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina" (2014) 28:2 U Penn L 449, online (pdf): <scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1179&context=jil>

Gosovic, Branislav & John Gerard Ruggie, "On the creation of a new international economic order: issue linkage and seventh special session of the UN General Assembly" (1976) 30:2 U Wisconsin Press J Division 309, online (pdf): <scholar.harvard.edu/files/john-ruggie/files/on_the_creation_of_a_new_international_economic_order.pdf>

Grant, Kendall, "ICSID's Reinforcement? UNASUR and the Rise of Hybrid Regime for International Investment Arbitration" (2015) 52:3 Osgoode Hall L J 1115 at 1121

Greco, Erica, "Africa, extractivism and the crisis this time" (2020 47:166 Rev of African Political Economy 511;

Guedea, Virginia, "The Process of Mexican Independence" (2000) 105:1 American Historical Rev 116

Guntrip, Edward, "Private Actors, Public Goods and Responsibility for the Right to Water in International Investment Law: *Urbaser v. Argentina*" (2018) 1:1 Brill Open L 37, DOI: <10.1163/23527072-00101004 >

Guzman, Andrew T, "Saving Customary International Law" (2005) 27 Michigan J of Intl L 115

Haeri, Hussein, "A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law: *The Gillis Wetter Prize*" (2011) 27:1 *Arbitration International,* 27, DOI: <10.1093/arbitration/27.1.27>

Ham, Brigette, “The Struggle for Legitimacy in Business and Human Rights Regulation – a Consideration of the Processes Leading to the UN Guiding Principles and an International treaty” (2022) 23 Human Rights Rev 103

Hayden, White, “Interpretation in History” (1973) 4:2 New Literary History: A J of Theory & Interpretation 281, DOI: <0.2307/468478>

Henckels, Caroline, “Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration” (2012) 15:1 J of Intl Economic L, 223, DOI: <10.1093/jiel/jgs012>

Hewitt, Jeffery G, Decolonizing and Indigenizing, Some Considerations for Law Schools” (2016) 33 Windsor YB Access to Justice 65

Hippolyte, Antonius Rickson, “Correcting Twail’s Blind Spots: A Plea for a Pragmatic Approach to International Economic Governance” (2016) 18:1 Intl Community L Rev 34

Howe, Laurence Lee, “Historical Method and Legal Education” (1950) 36:2 Bulletin of the American Association of University Professors (1915-1955) 346, online: <www.jstor.org/stable/40220732?seq=8#metadata_info_tab_contents>

Hutchinson, Terry, “The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law”, (2015) 8:3 Erasmus L Rev 130

Inbar, Michael, "Localized Voices Within the Mexican Oil Industry (~1900-1938)" (2021) 2 The Macksey J 40

Isakoff, Peter D, "Defining the Scope of Indirect Expropriation for International Investments" (2013) 3:2 Global Bus L Rev 189

Ivković, Anita Frajman &Josip Juraj Strossmayer, “Limitations of GDP a measure of Progress and Well-Being” (2016) UDK Rev Article 257, online (pdf): <www.bib.irb.hr/824529/download/824529.4217-12346-1-PB.pdf>

J, Francis & Nicholson SJ, “The Protection of Foreign Property Under Customary International Law” (1965) 6 Boston College L Rev 391, online: <lawdigitalcommons.bc.edu/bclr/vol6/iss3/1>

JJ, Garcia Blesa, “Indeterminacy, Ideology and Legitimacy in International Investment Arbitration: Controlling International Private Networks of Legal Governance?” (2021) 35 Intl J Semiotics L 1967 DOI: <10.1007/s11196-021-09819-9>

Jackson, Robert H, “Full faith and Credit – The Lawyer’s Clause of the Constitution, (1945) 45 Columbia L Rev 1

Jaroslavsky, Pablo & Florencia Wajnman, “The *Chevron* Saga: The Denial of Justice Standard under the Fair and Equitable Treatment and Customary International Law” (2019) European Investment Law & Arbitration Rev 274

Jeremy, Peters, “What is inclusion?” (1999) 2:5 The Rev J of Undergraduate Student Research 15, online: </fisherpub.sjfc.edu/ur/vol2/iss1/>

Johnson, Alec R, “Rethinking Bilateral Investment Issues in sub-Saharan Africa” (2015) Emory L Rev 920

Jones, Francois Stewart, “Treaty and Treaty-Making” (1987) 12:3 Political Science Quarterly 420

Joyner, Daniel H, “Why I Stopped Believing in Customary International Law” (2019) 9:1 Asian J of Intl L 31

Kaldunski, Marcin, “Some Remarks on the Protection of Legitimate Expectations in International Investment Law” (2019) 25 Comp L Rev 215

Kendra, Leite, "The Fair And Equitable Treatment Standard: A Search For A Better Balance In International Investment Agreements" (2016) 32:1 American University Intl L Rev, online: <digitalcommons.wcl.american.edu/auilr/vol32/iss1/2>

Kennedy, David, “The Sources of International Law” (1987) 2:1 American University Intl L Rev 1

Khachvani, David, *“*Non-Compensable Regulation versus Regulatory Expropriation: Are Climate Change Regulations Compensable?” (2020) 35:1-2 *,* ICSID Rev Foreign Investment L J*,* 154, DOI: <10.1093/icsidreview/siaa009>

Kidane, Won, “China’s Bilateral Investment Treaties with African States in Comparative Context” (2016) 49 Cornell Intl L J 170

Kidane, Won, “Contemporary International Investment Law and Africa’s Dilemmas in the Draft Pan-African Investment Code” (2018) 50:3 The George Washington Intl L Rev 523

Kiely, Ray, “Neoliberalism Revised? A Critical Account of World Bank Conceptions of Good Governance and Market Friendly Intervention” (1998) 28:4 Intl J of Health Services 683

Kitamaru, Hiroshi, “The Rationale and Relevance of the New International Economic Order” (1978) 16:4 The Developing Economies 341, DOI: <10.1111/j.1746-1049.1978.tb01069.x>

Kloppenberg James T, “Objectivity and Historicism: A century of American Historical Writing” (1989) 94:4 The American Historical Rev 1011, DOI: <10.2307/1906593>

Koh, Harold Hongju, "Why Do Nations Obey International Law" (1997) 106:8 Yale LJ 2599

Kondo, Tinashe, “A comparison with Analysis of the SADC FIP before and after its amendment” (2017) 20:1 Potchefstroom Electronic L J 1

Korzun, Vera, “The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs” (2017) 50:2 Vanderbilt J of Transnational L 355

Kyla, Tienhaara, “Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement” (2018) 7:2 Transnational Environmental Law 229

Lau, Holning, “Rethinking Persistent Objector Doctrine in International Human Rights Law” (2005) 6 Chinese J of Intl L 495

Lencucha, Raphael, “Is it Time to say Farewell to the ISDS System?” (2017) 6:5 Intl J of Health Policy Management 289

Levashova, Yulia, “Fair and Equitable Treatment and Investor’s Due Dilligence Under International Investment Law” (2020) 67 Netherlands Intl L Rev 233, online: <link.springer.com/article/10.1007/s40802-020-00170-7>

Levashova, Yulia, “The Right to Access to Water in the Context of Investment Disputes in Argentina: Urbaser and beyond” (2020) 16:2 Utrecht L Rev 110

Lida, Keisuke, “Third World Solidarity: The Group of 77 in the UN General Assembly” (1988) 42:4 Intl Organization 375

Linklaters, Andrew, “The Standard of Civilisation in World Politics” (2016) 5:2 Social Character, Historical Processes, online: <hdl.handle.net/2027/spo.11217607.0005.205>

Lowenfield Andreas F, “The ICSID Convention: Origin and Transformations” (2009) 38:47 Georgia J of Intl & Comp L 48

Lukashuk, I I, “The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law” (1989) 83:3 American Journal of International Law 513

Makau, Mutua, and Antony Anghie. “What Is TWAIL?” (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 31

Malaguti, Maria Chiara, “The New Italian Model BIT between Current and Future Trends” (2021) 1:1 Italian Rev of Intl & Comp L 113

Malakotipour, Maryam, “The Chilling Effect of Indirect Expropriation Clauses on Host States’ Pubic Policies: a Call for a legislative Response” (2020) 22 Intl Community L Rev 235

Mann, Howard, "Reconceptualizing International Investment Law: Its Role in Sustainable Development" (2013) 17:2 Lewis & Clark L Rev 521

Mark, Bevir, “Objectivity in History” (1994) 33:3 History & Theory 328, DOI: <0.2307/2505477>

Matos, Shaun, “Investor Due Dilligence and legitimate Expectations” (2021) J of World Trade & Investment 1, online: <brill.com/view/journals/jwit/aop/article-10.1163-22119000-12340231/article-10.1163-22119000-

Mbengue, Makane Moise & Stefanie Schacherer, "The Africanization of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime" (2017) 18:3 J World Investment & Trade 414

Melton, Buckner F Jr, "Clio at the Bar: A Guide to Historical Method for Legists and Jurists" (1998) 83:2 Minnesota L Rev 377

Miles, Kate, "International Investment Law: Origins, Imperialism and Conceptualizing the Environment" (2010) 21:1 Colorado J Int'l Envtl L & Pol’y 1

Mishra, Astha, & Anand Mishra, "Fair and Equitable Treatment Standard in International Investment Law: An Analysis Vis-a-Vis Public International Law" (2012) 11 Kor U L Rev 107

Mogollon, Moises Montiel, “The Consent-Based Problems Surrounding the Persistent Objector Doctrine” (2022) 43 Mich J Intl L 301

Monagas, Yessika, "U.S. Property in Jeopardy: Latin American Expropriations of U.S. Corporations' Property Abroad" (2012) 34:2 Hous J Int'l L 455, online: <heinonline.org/HOL/Page?collection=journals&handle=hein.journals/hujil34&id=474&men_tab=srchresults>;

Monestier, Tanya, “When Forum Selection Clauses Meet Choice of Law Clauses” (2019) 69 American University L Rev 325

Moraes, Choer, Henrique & Felipe Hees. “Breaking the BIT Mold: Brazil's Pioneering Approach to Investment Agreements” (2018) 112 AJIL Unbound 197

Morrison, KC, “The New International Economic Order and Africa” (1984) 9:4 African Development 133

Mostafa, Ben, “The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law” (2008) 15 Australian Intl L J 268

Muchlinkski, Peter T, “The Rise and Fall of the Multilateral agreement on Investment: Where now?” (2000) 34:3 Foreign L Year in Rev 1033

Mullan, David J, "Natural Justice and Fairness--Substantive as Well as Procedural Standards for the Review of Administrative Decision-Making?" (1982) 27:2 McGill L J 250

N, Bernaz, “Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty (2021) 22 Human Rights Rev 45, DOI: <10.1007/s12142-020-00606-w>

Nourse, Victoria, “After the Reasonable Man: Getting over the Subjectivity Objectivity Question” (2008) 11 New Criminal L Rev 33, online(pdf): <scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2133&context=facpub>;

Odumusu -Ayanu, Ibironke T, “Governments, Investors and Local Communities: Analysis of A Multi-Actor Investment Contract Framework” (2014) 15 Melbourne J of Intl Law 1

Odumusu, Ibironke T, “Challenges for the (Present/) Future of Third World Approaches to International Law (2008) 10:4 Intl Community L Rev 467, DOI: <10.1163/157181208X361430>

Odumusu, Ibironke T, “The Antinomies of the (Continued) Relevance of ICSID to the Third World” (2007) 8:345 San Diego Intl L J 345 at 352 -353

Odumosu, Ibironke T, “*The Law and Politics of Engaging Resistance in Investment Dispute Settlement”* (2007) 26 Penn State Intl L Rev 251

Okafor, Obiora Chinedu, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2008) 10:4 Int'l Comm L Rev 371

Okafor, Obiora Chinedu, “Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective” (2005) 43 Osgoode Hall L J 171 at 177

Okoloise, Chairman, “Contextualizing the Corporate Human Rights Responsibility in Africa: A Social Expectation or Legal Obligation?” (2017) 1 African Human Rights YB

Okpe, Felix, “A Historical Account of the Internationalization of Invest Disputes: What the Global South should know when negotiating bilateral investment treaties” (2017) 12:2 Florida A&M U L Rev 219

Okpe, Felix O, “Endangered Element of ICSID Arbitral Practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States” (2014) 13 Rich. J. Global L. & Bus. 217, online: <scholarship.richmond.edu/global/vol13/iss2/3>

Okpe, Felix O, "Endangered Element of ICSID Arbitral practice: Investment Treaty Arbitration, Foreign Direct Investment, and the Promise of Economic Development in Host States" (2014) 13:2 Richmond J of Global L & Business 225

Parra, Antonio R*, "The Participation of African States in the Making of the ICSID Convention*" (2019) 34:2*, ICSID Rev-Foreign Investment L J* 270, DOI: <10.1093/icsidreview/siz012>;

Perrone, Nicolas M, "Local communities, extractivism and international investment law: the case of five Colombian communities" (2022) 19:6 Globalizations 837

Perrone, Nicolás M, "The 'Invisible' Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime" (2019) 113 AJIL Unbound 16.

Poncian, Japhace, "Resource nationalism and community engagement in extractive resource governance: insights from Tanzania" (2021) 48:170 Rev of African Political Economy 529

Potesia, Michele, "Legitimate Expectations in Investment Treaty law: Understanding the roots and the limits of a controversial concept" (2013) 28 ICSID Rev 88

Qumba, Mmiselo Freedom. "Assessing African Regional Investment Instruments and Investor–State Dispute Settlement" (2021) 70:1 Intl and Comp L Quarterly 197

Qumba, Mmiselo Freedom, "South Africa's move away from international investor-state dispute: a breakthrough or bad omen for investment in the developing world?" (2019) 52:1 De Jure L J 358

R, Freedman, "Third generations rights: is there room for hybrid constructs within International Human Rights Law?" (2014) 2:4 Cambridge J of Intl & Comp L, DOI: < 10.7574/cjicl.02.04.134>;

R, Shrinkhal,"Evolution of Indigenous Rights Under International Law: Analysis from TWAIL Perspective" (2019) 19:1 The Oriental Anthropologist: A Bi-Annual Intl J of the Science of Man 7, DOI: <10.1177/0972558X19835387>

Radi, Yannick, "Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox" (2012) 37:4 North Carolina J of Intl L 1108 at 1115

Rajagopal, Balakrishna, "Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy" (2006) 27 Third World Quarterly 767

Rameau, Rose, “The African Perspective: The Development of Investment Laws, the Pan-African Investment Code (PAIC), and the African Continental Free Trade Area in the ‘New Economic World Order’” (2020) 114 Proceedings of the ASIL Annual Meeting 62

Richard, Toye, “Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947-1948” (2003) 25:2 The Intl History Rev 282, online: <www.jstor.org/stable/40109320>

Roberts, Anthea, “Incremental, Systemic and Paradigmatic Reform of Investor State Arbitration” (2018) 112 Am J of Intl L 410

Roberts, Anthea, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States" (2010) 104:2 Am J Int'l L 179

Root Elihu, “The Basis of Protection to Citizens Residing Abroad” (1910) 4:3 American J of Intl L 517

Roger D, Hansen, “The political economy of North-South relations: How much change?” (1975) 29:4 International Organization 921.

Ruggie John Gerard, Caroline Ress & Rachel Davis, “Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations” (2021) 6:2 Business and Human Rights J 179

Salacuse, Jeswald W, "The Treatification of International Investment Law" (2007) 13:1 Law & Bus Rev Am 155

Santacroce, Fabio Giuseppe, “The applicability of Human Rights Law in International Investment Disputes” (2019) 34:1 ICSID Rev – Foreign Investment L J 136

Sauvant, Karl P, “Improving the distribution of FDI benefits: The need for policy-oriented research, advice and policy” (2021) 4:2 J of Intl Business and Policy 244

Scharf, Michael P, “Accelerated Formation of Customary International Law” (2014) 20:2 ILSA J of Intl & Comp L 305

Schlemmer, Engela C, “An Overview of South Africa’s Bilateral Investment Treaties and Investment Policy” (2016) 31:1 ICSID Rev- Foreign Investment L J 167;

Sclemmer-Schulte, Sabine, “Fragmentation of International Law: The Case of International Finance & Investment Law versus Human Rights Law” (2012) 25 Pac McGeorge Global Business & development L J 410

Scharf, Michael P, “Accelerated Formation of Customary International Law” (2014) 20:2 ILSA J of Intl & Comp L 305

Schwarzenberger, Georg, “Present-Day Relevance of the Jay Treaty Arbitrations (1978) 53 Notre Dame L. Rev. 715, online: <scholarship.law.nd.edu/ndlr/vol53/iss4/3>

Schwarzenberger, Georg, "The ABs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary" (1960) 9:1 J Pub L 147

Seatzu, Franciso and Paolo Vargiu, “Africanizing Bilateral Investment Treaties (BITs): Some Case Studies and Future Prospects of a Pro-Active African Approach to International Investment (2015) 30 Connecticut J of Intl L 143

Seck, Sara, “Canadian Mining Internationally and the UN Guiding Principles on Business and Human Rights (2011) 49 Canadian YB of Intl L 51

Seck, Sara, Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?” (2008) 46 Osgoode Hall L J 565

Seck, Sara L, "Home State Regulation of Environmental Human Rights Harms as Transnational Private Regulatory Governance" (2012) 13:12 German LJ 1363 at 1382

Seck, Sara L, "Home State Responsibility and Local Communities: The Case of Global Mining" (2008) 11 Yale Hum Rts & Dev LJ 177

Seck, Sara L, "Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations" (2011) 3:1 Trade L & Dev 164

Seck, Sara, “Climate Change, Corporate Social Responsibility, and the Extractive Industries” (2018) 31:3 J of Environmental L & Practice 271

Shirlow, Esmé, “Deference and Indirect Expropriation Analysis in International Investment Law: Observations on Current Approaches and Frameworks for Future Analysis,” (2014) 29:3 *ICSID Rev - Foreign Investment L J,* 595, DOI: <10.1093/icsidreview/siu012>

Solum, Lawrence B, "Natural Justice" (2006) 51 Am J Juris 65

Songwe, Vera et al, “The African Continental Free Trade Area: A Historical Moment for Development in Africa” (2021) 8:2 J of African Trade 12

Sornarajah, Muthucumaraswamy, “Disintegration and Change in the International Law on Foreign Investment” (2020) 23:*2 J of Intl Economic L* 413

Sornarajah, Muthucumaraswamy, "Mutations of Neo-Liberalism in International Investment Law" (2011) 3:1 Trade L & Development 203

Squnik, Kate M, “Making Amends: Amending the ICSID Convention to Reconcile Competing Interest in International Investment Law” (2009) 59:2 Duke L J 2009

Stevens, Donald Fithian "Agrarian Policy and Instability in Porfirian Mexico" (1982): 39.2 The Americas 153, DOI: <doi.org/10.2307/981332>

Suehrer, Juri, “The Future of FDI: Achieving the Sustainable Development Goals 2030 through Impact Investment (2019) 10:3 Global Policy 413

Talmon, Stefan, “Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion” (2015) 26:2 *European J of Intl L* 417, DOI: <10.1093/ejil/chv020>

Thomas, Van Wynen & AJ Thomas Jr, “Equality of States in International Law: Fact or Fiction?” (1951) 37:6 Virginia L Rev 791

Thong, Tezenlo, “Civilized Colonizers and Barbaric Colonized: Reclaiming Naga Identity by Demythologizing Colonial Portraits” (2012) 23:2 J of History and Anthropology 375, DOI: <10.1080/02757206.2012.697060>

Toya, John, “Assessing the G77: 50 years after UNCTAD and 40 years after NIEO” (2014) 35:10 Third World Quarterly 1759

Torres, Felix E, “Revisiting the Chorzow Factory Standard of Reparation – Its Relevance in Contemporary International Law and Practice” (2021) 90 Nordic J of Intl L 190, online: <brill.com/view/journals/nord/90/2/article-p190_190.xml?language=en#fn000006 >

Toye, Richard, “Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization” (2003) 25:2 The Intl History Rev 282

Tsakyrakis, Stavros, “Proportionality: An assault on human rights?” (2009) 7:3 *Intl J of Constitutional L* 468, DOI: <10.1093/icon/mop011>

Vadi, Valentina, "International Law and Its Histories: Methodological Risks and Opportunities" (2017) 58:2 Harv Int'l LJ 311g

Vasciannie Stephan, “The Fair and Equitable Treatment Standard in International Investment Law and Practice” The British YB of Intl Law (2000) 70:1 99 at 144

Vandevelde, Kenneth J, "A Brief History of International Investment Agreements" (2005) 12:1 U C Davis J Int'l L & Policy 157

Voon, Tania, “Good Faith in international Investment Arbitration” (2019) 30:4 European J Intl L 1458, online: <academic.oup.com/ejil/article/30/4/1458/5822856?login=true >

Wick, Diane Marie, “The Counter-Productivity of ICSID Denunciation and Proposals for Change” (2012) 11:2 J of Intl Business and L 2; Jia Liu, “Developing States Challenge ICSID” (2013) International Conference on Education, management and Social Science 149

Wortley, BA, “The Mexican Oil Dispute 1938-1946” (1957) 43 Transaction of the Grotius Society 15, online: <jstor.org/stable/743142>

Wright, R George, “Objective and Subjective Tests in the Law” (2017) 16:1 The University of New Hampshire L Rev 121 at 124 – 125, online (pdf): <scholars.unh.edu/cgi/viewcontent.cgi?article=1277&context=unh_lr>

Xiuli, Han, "The Application of the Principle of Proportionality in Tecmed v. Mexico" (2007) 6:3 Chinese J Int'l L 635

Yeini, Shelly Aviv, "The Persistent Objector Doctrine: Identifying Contradictions" (2022) 22:2 Chi J Int'l L 581

Zugliani, Niccolo, “Human Rights in International Investment Law: The 2016 Morocco-Nigeria Bilateral Investment Treaty” (2019) 68:3 Intl & Comp L Quarterly 761

SECONDARY MATERIALS: BOOKS

Abugu, Professor JEO, *Principles of corporate law in Nigeria*, (Lagos: MIJ Professional Publisher, 2014) 45

Anand RP, *New States and International Law*, 2nd ed (Gurgaon: Hope India Publications, 2008), 2

Adeleke, Fola, *International Investment Law and Policy in Africa: Exploring a Human Rights-Based Approach to Investment Regulation and Dispute Settlement* (United Kingdom: Routledge, 2018)

Alschner Wolfgang, & Elisabeth Tuerk. “The role of international investment agreements in fostering sustainable development” in Freya Baetens, ed, *Investment Law within International Law: Integrationist Perspectives*, (Cambridge: Cambridge University Press, 2013) 217

Anghie, Anthony, *Imperialism, Sovereignty, and the making of international law*, (Cambridge: Cambridge University Press, 2005)

Behn, Daniel, Ole Kristian Fauchald & Malcolm Langford. “Introduction: The Legitimacy Crisis and the Empirical Turn” in Daniel Behn, Ole Kristian Fauchald & Malcolm Langford, eds, *The*

Legitimacy of Investment Arbitration: Empirical Perspectives, Studies on International Courts, and Tribunals, ed (Cambridge: Cambridge University Press, 2022)

Benedetto, Saverio Di, *International Investment Law and the Environment*, (: Edward Elgar Publishing, 2013)

Berge, Tarald Laudal & Helge Hveem, "The International regime for investment: A history of Failed Multilateralism" in Andreas Nolke & Christian May, *Handbook of the International Political Economy of the Corporation*, (United Kingdom: Edward Elgar Publishing, 2018)

Beteta, Mario Ramon, *Petroleum and Mexico's Future*, 1st ed., (New York: Routledge 2019), DOI:<10.4324/9780429301551>

Bonnitcha, Jonathan et al, *The Political Economy of the Investment Treaty Regime*, (Oxford: Oxford University Press, 2017) 255

Brunnée, Jutta & Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (United Kingdom: Cambridge University Press, 2010)

Charles, Lipson, *Standing Guard: Protecting Foreign Capita and Twentieth Centuries*, (Berkeley: University of California Press, 1985)

Chi, Manjiao, *Integrating Sustainable Development in International Investment Law*, (London: Routledge, 2017)

Chynoweth, Paul, "Legal Research", in A Knight & L Ruddock, eds, *Advanced Research Methods in the Built Environment* (Oxford, UK: Wiley-Blackwell, 2008) 28 at 29

Cordonier, Marie – Claire et al, *Sustainable Development in World Investment Law*, ed. (Alphen aan den Rijn: Kluwer Law International, 2011)

Cotula, Lorenzo & Mika Schroder, *Community perspectives in investor-state arbitration* (United Kingdom: International Institute for Environment and Development, 2017)

d'Aspremont, Jean & Alicia Koppen, "Global reform versus regional emancipation: the principles on international investment for sustainable development in Africa" in Yenkong Ngangjoh Hodu & Makane Moise Mbengue, ed, *African Perspectives in International Investment Law*, (Manchester: Manchester University Press, 2020) 18

Dolzer, Rudolf & Christoph Schreuer, *Principles of International Investment Law*, 2nd ed., (Oxford: Oxford University Press, 2012) at 2

Dumberry, Patrick, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Netherlands: Wolters Kluwer 2013)

Fitzmaurice, Malgosia & Anneliese Quast, *Law of Treaties*, (United Kingdom: University of London Press, 2007)

Green, James A, *The Persistent Objector Rule in International Law*, (United Kingdom: Oxford University Press, 2016)

Gathii, James Thuo, "Third World Approaches to International Economic Governance" in Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens, eds, *International Law and the Third World* (New York: Routledge-Cavendish, 2008) 255 at 258

Ghai, Dharam & Jessica M Vivian, ed, *Grassroots Environmental Action: People's Participation in Sustainable Development*, (New York: Routledge, 2005);

Goldsmith, Jack L & Eric A Posner, *The limits of International Law*, (New York: Oxford University Press, 2005)

Greenman, Kathryn, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution*, (Cambridge: Cambridge University Press, 2021) 109

Harten, Gus Van, *The Trouble with Foreign Investor Protection*, (Oxford: Oxford University Press, 2020)

International Center for the Settlement of Investment Dispute, *History of the ICSID Convention – Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, (Washington: ICSID Publication, 2009) 1

Islam, Rumana, *The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration: Developing Countries in Context*, (Singapore: SpringerLink, 2018)

J, Chaisse & Choukroune S, eds, *Handbook of International Law and Policy*, (Singapore: Springer, 2020), DOI: <10.1007/978-981-13-5744-2_83-1>

Klager, Roland, *Fair and Equitable Treatment in International Investment Law*, (Cambridge: Cambridge University Press, 2011) at 25

Krauze, Enrique, *Mexico: biography of power: a history of modern Mexico 1810-1996*, (New York: Harper Collins Publishers, 1997)

Kulick, Andreas, *Global Public Interest in International Investment Law*, (Cambridge: Cambridge University Press, 2012) 225

Leonard, Thomas M, *Central America and the United States: The search for Stability*, (United States: University of Georgia University Press, 1991)

Levashova Yulia, *The right of States to regulate in their Public Interest and the right of investors to receive fair and equitable treatment* (United States: Wolters Kluwer, 2019);

Lipson, Charles, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries*, (United States: University of California Press, 1985)

Magnússon, Sigurður Gylfi , & István M. Szijártó, *What is Microhistory? : Theory and Practice*, (Canada: Routledge, 2013)

Mbengue, Makane Moise & Stefanie Schacherer, "Africa and the Rethinking of International Investment Law: About the Elaboration of the Pan-African Investment Code" in Anthea Roberts et al, eds, *Comparative International Law*, (New York: Oxford University Press, 2018) 547

Mbengue, MM & Schacherer, S, "Evolution of International Investment Agreements in Africa: Features and Challenges of Investment Law "Africanization" in Chaisse, J., Choukroune, L. & Jusoh, eds, *Handbook of International Investment Law and Policy* (Singapore: Springer, 2021) DOI: 10.1007/978-981-13-3615-7_77

McBeth, Adam, *International Economic Actors and Human Rights* (Abingdon: Routledge, 2010)

Mendelson, Maurice H, "The Formation of Customary International Law*"* in *Collected Courses of the Hague Academy of International Law*, (Leiden: Nijhoff and The Hague Academy of International Law, 1998)

Miles, Katie, *The Origin of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013).

Nedumparar, James J & Aditya Laddha, *India joining the ICSID: A new look at an old debate*, 1st ed (London: Routledge, 2021);

Onuf, N, "Constructivism: A User's Manual" in V Kubalkova, N Onuf & P Kower, eds,, *International Relations in a Constructed World* (London, ME Sharpe, 1998) 58

Onuma, Yasuki, *A Trans civilizational Perspective on International Law: Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century*, (Leiden: Martinus Nijhoff Publishers, 2010)

Osei-Afriyie, Justice, "Foreign Investment Treaties and Sovereignty" in Yenkong Ngangjoh Hodu & Makane Moise Mbengue, ed, *African Perspectives in International Investment Law*, (Manchester: Manchester University Press, 2020) 30 at 45

Paparinskis, Mārtiņš, *The International minimum standard and fair and equitable treatment*, 1st ed. (Oxford: Oxford University Press, 2013)

Prados de le Escosura, Leandro, "The Economic Consequences of Independence in Latin America" in Victor Bulmer-Thomas, John Coatsworth & Roberto Cortes Conde, eds, *The Cambridge Economic History of Latin America* (New York: Cambridge University Press, 2006) 463

R, Islam, *The Fair and Equitable Treatment (FET) Standard in International Investment Arbitration. International Law and the Global South (Perspectives from the Rest of the World)*, (Singapore: Springer, 2018)

Rajagopal, Balakrishna, *International Law from Below: Development, Social Movements and Third World Resistance* (New York: Cambridge University Press, 2003)

Reus-Smith, Christian, "Constructivism" in Scott Burchill et al, *Theories of International Relations* (New York: Pagrave MacMillan, 2005)

Salacuse, Jeswald W, *The Law of Investment Treaties*, 3rd ed. (New York: Oxford University Press, 2021)

Schacherer, Stefanie, *Sustainable Development in EU Foreign Investment Law*, (Netherlands: Brill Nijhoff, 2021)

Schill, Stephan W, "General Principles of International Law and International Investment Law" in Andrea Gattini, Attila Tanzi & Filippo Fontanelli, eds, *General Principles of Law and International Investment Arbitration*, (Brill: Nijhoff, 2018)

Schill, Stephan, *International Investment Law and Comparative Public Law*, (Oxford: Oxford University Press, 2010)

Schill Stephan W, *The Multilateralization of International Investment Law*, (New York: Cambridge University Press, 2009)

Schrijver, Nico, *The Role of International Administrative Law at International Organizations*, (Leiden: Nijhoff, 2020)

Scott, Shirley V & Orli Zahva, *Developing Countries and International Law*, (United Kingdom: Oxford University Press 2017)

Shaw, Malcolm Nathan, *International Law*, (Cambridge, Cambridge University Press, 2003)

Shotaro, Hamamoto, "Regulatory Power and Investors' Interests: Striking a Balance in Investment Treaties Concluded by Japan" in Mahdev Mohan & Chester Brown, eds, *The Asian Turn in Foreign Investment*, ed (Cambridge: Cambridge University Press, 2021) 103.

Sipiorski, Emily, *Good Faith in International Investment Arbitration*, (Oxford: Oxford University Press, 2019)

Slee, Roger, & Gordon Tait, *Ethics and Inclusive Education* (Switzerland: Springer 2022)

Sornarajah, Muthucumaraswamy, "The Case Against a Regime on International Investment Law" in Leone E Trakman & Nicola W Ranieri, eds, *Regionalism in International Investment Law*, (New York: Oxford University Press, 2013) 475

Sornarajah M, *The international law on foreign investment*, 2nd ed (New York: Cambridge University Press, 2007)

Sornarajah, M, *The International Law on Foreign Investment*, 3rd ed (New York: Cambridge University Press, 2010)

Sornarajah, M, *Resistance and Change in International Law on Foreign Investment*, (Cambridge: Cambridge University Press, 2015)

Taylor, Edward, *Primitive Culture: research into the Development of Mythology, Philosophy, Religion, Art and Custom*, (London: John Murray, 1871)

The World Bank Group, *The African Continental Free Trade Area:Economic and Distributional Effects*, (New York: World Bank Publications, 2020)

TN, Tucker, *Judge Knot: Politics and development in International Investment law,* (United Kingdom: Anthem Press)

Tudor, Ioana, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, (Oxford: Oxford University Press, 2008)

Weiler, Todd, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context*, (Leiden: Martinus Nijhodd Publishers, 2013)

SECONDARY SOURCE: BOOK REVIEW

Aboutorabifard, Haniehalsadat, "Integrating Sustainable Development in International Investment Law", Book Review of *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implication* by Manjiao Chi, (2021) 57:2 Osgoode Hall L J 519

Sattorova Dr Mavluda, Book Review of *International Investment Law and Development: Bridging the Gap* by Stephan W Schill, Christian J Tams & Ralner Hofman (Cheltenham: Edward Elgar, 2015), online (pdf): <unctad.org/system/files/official-document/diaeia2017d3a5_en.pdf>;

SECONDARY SOURCES: BLOGS

"African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents" (last visited 18 August 2022), online (blog): <tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html>

Chidede, Talkmore, "AfCFTA Phase II and III Negotiations – Update" (10 February 2021), online (blog): *tralacBlog* <tralac.org/blog/article/15090-afcfta-phase-ii-and-iii-negotiations-update.html>;

Diamond, Nicholas J & Kabir AN Duggal, "ISDS Reform and Advancing All "Generations" of Human Rights" (17 June 2020), online (blog): *Kluwer Arbitration Blog* <arbitrationblog.kluwerarbitration.com/2020/06/17/isds-reform-and-advancing-all-generations-of-human-rights/>

Eramus, Gerhard, "An Investment Protocol for the AfCFTA" (23 march 2021), online (blog): *tralacBlog* <tralac.org/blog/article/15152-an-investment-protocol-for-the-afcfta.html>

Fyock, Claiton, "International Investment Law and Constraining Narratives of 'Development': 'Economic Development' in the definition of Investment, (24 February 2020), online (blog): <hwww.afronomicslaw.org/2020/02/23/international-investment-law-and-constraining-narratives-of-development-economic-development-in-the-definition-of-investment>

Mafurutu, Rwatida, "The AfCFTA Investment Protocol: Preparations for the negotiations and expectations" (9 December, 2021), online (blog): <tralac.org/blog/article/15456-the-afcfta-investment-protocol-preparations-for-the-negotiations-and-expectations.html#:~:text=The%20AfCFTA%20envisages%2C%20eventually%2C%20a,Settlement)%20have%20made%20early%20progress.>

Mbengue, Makane, "The quest for a Pan-African Investment Code to promote sustainable development" (21 June 2016), online (blog): *Tralac* <tralac.org/news/article/9927-the-quest-for-a-pan-african-investment-code-to-promote-sustainable-development.html>

Nakagawa, Naomitsu, "How Quality Infrastructure Investment is making a difference in development" (1 June 2022), online (blog): *world bank* <blogs.worldbank.org/ppps/how-quality-infrastructure-investment-making-difference-development>

Ngobeni, Dr Tinyinko, "The Relevance of the draft Pan African Investment Code (PAIC) in Light of the Formation of the Continental Free Trade Area" (15 January 2019), online (blog): *Afronomics* <afronomicslaw.org/2019/01/11/the-relevance-of-the-draft-pan-african-investment-code-paic-in-light-of-the-formation-of-the-african-continental-free-trade-area>

Nikiema , Suzy H & Nyaguthii Maina, "Negotiating the AfCFTA Investment Protocol: An Opportunity for Africa to set its own Investment Facilitation Agenda" (3 September 2021), online: *Afronomics* <www.afronomicslaw.org/category/analysis/negotiating-afcfta-investment-protocol-opportunity-africa-set-its-own-investment>

Porterfield, Matthew C, "A distinction without a difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunal" (22 march 2013), online (blog): *Investment Treaty News* <iisd.org/itn/en/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable treatment-under-customary-international-law-by-investment-tribunals/#_ftnref13 >

Schacherer, Stefanie, "The AfCFTA Investment Protocol: An Opportunity to converge and propel the Pan African Investment Code (PAIC): Insights from the Negotiations of the PAIC, Paper delivered at the African Arbitration Association 2nd Annual International Arbitration Conference 15th – 16th April 2021, online (blog): <afaa.ngo/page-18097/10440007>

Vidyarthi, Abhisar, "Revisting India's Position to not Join the ICSID Convention" (2 August 2020), online (blog): *Kluwer Arbitration Blog* <arbitrationblog.kluwerarbitration.com/2020/08/02/revisiting-indias-position-to-not-join-the-icsid-convention/>

SECONDARY SOURCES: ONLINE

Adichie, Chimamanda Ngozi, "The dangers of a Single Story" (July 2009) at 00h:13m:04s, online (video): *YouTube* <www.youtube.com/watch?v=D9Ihs241zeg&vl=en>

African Union, "Creating One African Market" (Last visited 18 August 2022), online: <au-afcfta.org/>

African Union, News release, "Uganda Hosts the Continental Consultative Meeting for the review of the Pan African Investment Code" (30 November 2015), online: <au.int/en/pressreleases/20151130-0>

Alschner, Wolfgang & Florencia Sarmiento, "An Interview with Wolfgang Alschner on Investment Arbitration and State-Driven Reform: New Treaties, old Outcomes" (4 July 2022), online: *Investment Treaty News* <iisd.org/itn/en/2022/07/04/an-interview-with-wolfgang-alschner-on-investment-arbitration-and-state-driven-reform-new-treaties-old-outcomes-wolfgang-alschner-florencia-sarmiento/>;

Axel, Berger, "Do we really need a multilateral investment agreement?" (2013), online (pdf): *German Development Institute* <www.die-gdi.de/uploads/media/BP_9.2013.pdf>

Bárcena, Alicia, "The United Nations" (6 May 2021), online: <www.cepal.org/en/pressreleases/negotiations-framework-wto-are-new-model-governance-foreign-direct-investment-alicia>

Bernasconi-Osterwalder, Nathalie et al, "Terminating a Bilateral Investment Treaty"(2020) IISD Best Practice Series, online (pdf) : <iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf>

Brauch, Martin Dietrich, "A risky tango? Investment facilitation and the WYO Ministerial Conference in Buenos Aires" (20 December 2017), online: *IISD* <www.iisd.org/articles/policy-analysis/risky-tango-investment-facilitation-and-wto-ministerial-conference-buenos>;

Business & Human Rights Resource Center, "Binding Treaty: A brief Overview" (last visited 26 July, 2022), online: <business-humanrights.org/en/big-issues/binding-treaty/>

Cavendish, Richard, "The events leading up to the Mexican dictator's fall from power on 25 May 1911" (last visited 14 August, 2022), online: *History Today* <www.historytoday.com/archive/months-past/ousting-porfirio-d%C3%ADaz>

Cosbey, Aaron, "Can Investor-State Dispute Settlement be Good for the Environment?" (12 April 2017), online (blog): *IISD* <www.iisd.org/articles/policy-analysis/can-investor-state-dispute-settlement-be-good-environment>

Cotula, Lorenzo & Nicola M Perrone, "Reforming investor-state dispute settlement: what about third party rights?" (last visited 25 July 2022), online: <pubs.iied.org/sites/default/files/pdfs/migrate/17638IIED.pdf >

Desilvestro, Valentino, "Free Trade Deal Boosts Africa's Economic Development" (30 June 2022), online: *The World Bank* <worldbank.org/en/topic/trade/publication/free-trade-deal-boosts-africa-economic-development>

European Commission, *Report on the online consultation on investment protection and investor-state dispute settlement in Transatlantic Trade and Investment Partnership Agreement*, online: <ec.europa.eu/commission/presscorner/detail/en/MEMO_15_3202>;

European Commission, *Report: online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, online (pdf): <trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf>;

Garcia-Bolivar, Omar E, "Defining an ICSID Investment: Why Economic Development should be the core" (13 April 2012), online: *Investment Treaty News* <iisd.org/itn/en/2012/04/13/defining-an-icsid-investment-why-economic-development-should-be-the-core-element/ >

Gathii, James Thuo, "Reform and Retrenchment in International Investment Law" (13 January 2021), DOI: <10.2139/ssrn.3765169>;

General Agreement on Tariffs and Trade, Minutes of the Meeting held on 29 August 1986, online (pdf): <wto.org/gatt_docs/English/SULPDF/91230080.pdf>

Huikuri, Tuuli-Anna, "Keep, Terminate or Renegotiate? Bargaining Power and Bilateral Investment Treaties" (Paper delivered at Political Economy of International Organization Conference, 2020), online (pdf): <peio.me/wp-content/uploads/2020/02/PEIO13_paper_158_1.pdf> [unpublished];

Huizar, Richard, "The Politics of Mexico's Oil Monopoly" (last visited 17 August 2022), online: *Chicano Studies Institute*, <escholarship.org/uc/item/7797b4bq#author>

Johnson, Lise et al, "Aligning International Investment Agreements with the Sustainable Development Goals" (November 2020), online (pdf): *Columbia Center on Sustainable Investment* <ccsi.columbia.edu/sites/default/files/content/docs/publications/Briefing-Aligning-International-Investment-Agreements-with-the-Sustainable-Development-Goals.pdf>

Johnson, Lise et al, "Investor-State Dispute Settlement: What are We trying to achieve? Does ISDS get us there? (11 December 2017), online (blog): *Columbia Center on Sustainable Investment* <ccsi.columbia.edu/news/investor-state-dispute-settlement-what-are-we-trying-achieve-does-isds-get-us-there>;

Kane, Mouhamadou Madana, "The Pan-African Investment Code: a good first step, but more is needed" (2018) Columbia FDI Perspectives on Topical Foreign Investment No 217, online (pdf): <cademiccommons.columbia.edu/doi/10.7916/D8CC2GN9/download>

Kapoor, Amit & Bibek Debroy, "GDP is not a Measure of Human Well-Being" (4 October 2019) Harvard Business Rev, online: <hbr.org/2019/10/gdp-is-not-a-measure-of-human-well-being>

Kelly, Micheal T, "What Macroeconomic Conditions Lead Financial Crisis?" (2018), online (pdf): <www.systemicrisk.ac.uk/sites/default/files/images/2.%20Kiely_LSE_April2018.pdf>

Kidane, Won, "Alternatives to investor-state dispute settlement" (January 2018), online (pdf): *Global Economic Governance* <media.africaportal.org/documents/GA_Th3_DP_kidane_20180129.pdf>

Kollamparabil, Uma, "Why Developing Countries are Dumping Investment Treaties" (23 March 2016), online: *The Conversation* <theconversation.com/why-developing-countries-are-dumping-investment-treaties-56448>

Lessard, Carla, "The Multilateral Investment Court and the Public Interest" (29 June 2020), online: *iAffairs* <iaffairscanada.com/2020/the-multilateral-investment-court-and-the-public-interest-the-usefulness-of-amici-curiae-in-the-multilateral-investment-court-agenda/#_ftnref7>

Menon, Trishna & Gladwin Issac, "Developing Country Opposition to an Investment Court: Could State to state Arbitration Dispute Settlement be an alternative?" (17 February 2018), online (blog): *Kluwer Arbitration Blog* <arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/>

National Geographic, "Sep 2, 1901 CE: Big Stick Diplomacy" (last visited 5 July 2022), online: <education.nationalgeographic.org/resource/big-stick-diplomacy >

"Overview of the COMESA: COMESA's Priorities and Objectives" (last accessed 18 August 2022), online: <www.comesa.int/overview-of-comesa/>

Olaniyan, R Omotayo, "The New International Economic Order (NIEO): A Review" (1987) Nigerian Institute of International Affairs, online: <www.africaportal.org/documents/7148/The_New_International_Economic_Order.pdf >

Orleans-Lindsay, Naa Lamle, "The AfCFTA Investment Protocol: Recommended Perspectives for Country Negotiators" (Paper delivered at the AfAA 2nd Annual International Arbitration Conference, 15th-16th April, 2021), online: <afaa.ngo/page-18097/10472580>

Planet Labour, "UN: draft Treaty on corporate accountability for human rights violations still stalled" (last visited 4 July 2022), online: <planetlabor.com/en/corporate-social-responsibility/initiatives-from-the-public-authorities-and-other-stakeholders/un-draft-treaty-on-corporate-accountability-for-human-rights-violations-still-stalled/>

Poulsen, Lauge N Skovgaard & Geoffrey Gertz, "Reforming the Investment treaty Regime" (17 March, 2021), online: *Brookings* <brookings.edu/research/reforming-the-investment-treaty-regime/>

Sattorva, Mavluda, "Do developing Countries really benefit from investment treaties? The impact of international investment law on national governance" (21 December 2018), online: *investment treaty news* <www.iisd.org/itn/en/2018/12/21/do-developing-countries-really-benefit-from-investment-treaties-the-impact-of-international-investment-law-on-national-governance-mavluda-sattorova/>

Prof Dr Tietja, Christian & Prof Dr Freya Baetens, "The Impact of Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership" (2014), online: <www.eumonitor.eu/9353000/1/j4nvgs5kjg27kof_j9vvik7m1c3gyxp/vjn8exgvufya/f=/blg378683.pdf>

Public Citizen, "Termination of Bilateral Investment Treaties has not Negatively Affected Countries' Foreign Direct Investment Inflows" (16 April 2018), online: <citizen.org/article/termination-of-bilateral-investment-treaties-has-not-negatively-affected-countries-foreign-direct-investment-inflows/>

Roberts, Anthea & Zeineb Bouraoui, "UNCITRAL and ISDS Reform: Concerns about Arbitral Appointments, Incentives and Legitimacy" (6 June 2018), online: *EJIL Talk!* <ejiltalk.org/uncitral-and-isds-reforms-concerns-about-arbitral-appointments-incentives-and-legitimacy/>

Sachs, Lisa et al, "The UNCITRAL Working Group III Work Plan: Locking in a Broken system?" (4 May 2021), online (blog): *Columbia Center on Sustainable Investment* <ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system>

Schill, Stephan W, "Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward" (last visited 17 August 2022), online (pdf): <e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf

Sir Leon Brittan, "Call for European and American Leadership to open World Market for Foreign Investment" (Brussels, 21 June 1995), online: <ec.europa.eu/commission/presscorner/detail/en/SPEECH_95_126>

Sornarajah M, “An International Investment Court: Pancrea or purgatory? (2016) Columbia Center on Sustainable Investment FDI Perspectives Research Report No. 180, online: <hdl.handle.net/10419/254014>

“TTIP draft to be prepared by July: ISDS being built on both EU and US proposals” (16 May 2016), online (blog): *Investment Treaty News* <iisd.org/itn/en/2016/05/16/ttip-draft-to-be-prepared-by-july-isds-being-built-based-on-both-eu-and-u-s-proposals/>

UNCTAD, “Investor-State Dispute Settlement Cases Pass the 1000 Mark: Cases and Outcomes in 2019” (last visited 19 August 2022), online (pdf): <unctad.org/en/PublicationsLibrary/diaepcbinf2020d6.pdf>

United Nations Human Rights Guiding Principles on Business and Human Rights, “Implementing the United Nations “Protect, Respect and Remedy” Framework” (last visited 17 August 2022), online (pdf): <ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>

United Nations Human Rights Office of the High Commission, “National Action Plans on Business and human Rights” (last visited 17 August 2022), online: <ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights>

United Nations, “Take Action for the Sustainable Development Goals” (last visited 12 August 2022), online: <un.org/sustainabledevelopment/sustainable-development-goals/>

Vaughan, Adam, “Oil in Nigeria: a history of spills, fines and fights for rights” (4 August 2011) *The Guardian*, online: <theguardian.com/environment/2011/aug/04/oil-nigeria-spills-fines-fights>

Vercoe, Richard & Robert Brinkmann, “The Tale of Two Sustainabilities: Comparing Sustainability in the Global North and South to Uncover Meaning for Educators” (19 March 2012), online: *The Journal of Sustainability Education* <susted.com/wordpress/content/a-tale-of-two-sustainabilities-comparing-sustainability-in-the-global-north-and-south-to-uncover-meaning-for-educators_2012_03/>

World Bank, “Safeguards and Sustainability Policies in a Changing World: An Independent Evaluation of World Bank Group Experience” (last visited 17 August 2022), online: <openknowledge.worldbank.org/handle/10986/2571>

Xinhua, “Namibia at final stages of enacting new investment act – Minister”, *News Ghana* (24 March 2022), online: <newsghana.com.gh/namibia-at-final-stages-of-enacting-new-investment-act-minister/>

SECONDARY SOURCES: WORKING PAPER

Alschner, Wolfgang, & Skougarevskiy Dmitriy "Rule-Takers or Rule-Makers? A New Look at African Bilateral Investment Treaty Practice" (2016) World Trade Institute Working Paper No 7

Gallagher, Kevin P & Elen Shrestha, "Investment Treaty Arbitration and Developing Countries: A Re-Appraisal" (2011) Global Development and Environment Institute Working Paper No. 11-01

Gaukrodger, David, (2017) "Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law" OECD Working Papers on International Investment 2017/03, OECD Publishing, DOI: <10.1787/0a62034b-en>

Dr Hedar, Amr, "The Legal Nature of the Draft Pan-African Investment Code and its relationship with International Investment Agreements" (2017) South Center Investment Policy Brief No 9

Huesca, Robert, "The Mexican Oil Expropriation and the Ensuing Propaganda War" Pre-publication working paper of the institute of Latin American Studies University of Texas, Paper No. 88-84, online: *pdf* <lanic.utexas.edu/project/etext/llilas

Nunnenkamp, Peter & Manoj Pant, "Why the case for a Multilateral Agreement on Investment is Weak" (2000) Kiel Institute for the World Economy Kieler Diskussionsbeiträge, (2003) Kiel Institute for World Economy Working Paper No 400

OECD, Directorate for Financial and Enterprise Affairs, *Indirect Expropriation and the Right to regulate in International Investment Law*, Working Paper on International Investment 2004/04 (2004)

OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing. DOI: <10.1787/675702255435>

OECD (2004), "Indirect Expropriation" and "the Right to Regulate in International Investment Law", OECD Working Papers on International Investment, 2004/04, OECD Publishing, DOI: 10.1787/780155872321

OECD, *Investment for Sustainable Development*, OECD Element paper 2015/11-3, online (pdf): <oecd.org/dac/Post%202015%20Investment%20for%20sustainable%20development.pdf >

Radi, Yannick, The 'Human Nature' of International Investment Law' (2013) Grotius Centre Working Paper 2013/006-IEL 8

Raga, Sherillyn et al, "AfCFTA Investment Protocol: Issues and Opportunities for Kenya" (2022) ODI Policy Brief

Schill, Stephan W, International Investment Law and the Rule of law (2017) Amsterdam Center for International Law Working Paper 2017-15

Shekhar, Satwik, "Regulatory Chill: Taking Right to Regulate for a Spin" (2016) Center for WTO Studies Working Paper CWS/WP/200/27

Signe, Landry & Colette Van der Ven, "Keys to success for the AfCFTA Negotiations" (2019) Brookings Institute Policy Brief

Sornarajah M, "An International Investment Court: Pancrea or purgatory? (2016) Columbia Center on Sustainable Investment FDI Perspectives Research Report No. 180

Tobin, Jennifer & Susan Rose-Ackerman, "Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties" (2005) Center for Law, Economics and Public Policy Research Paper No 293

Zhang, Joe, "Breakthrough in business and Human Rights binding treaty Negotiation but be prepared for a bumpy road ahead" (20 December, 2021), online (blog): *Investment Treaty News* <iisd.org/itn/en/2021/12/20/breakthrough-in-business-and-human-rights-binding-treaty-negotiation-but-be-prepared-for-a-bumpy-road-ahead/>

SECONDARY SOURCES: UNPUBLISHED

JF, Gaghan, *Some legal phases of the expropriation of American oil properties in Mexico* (Doctoral dissertation, 1939, Georgetown University) [unpublished]

Odumosu, Ibironke, *ICSID, Third World Peoples And The Re-Construction of The Investment Dispute Settlement System* (PhD Dissertation, University of British Columbia, 2010) [unpublished] [Odumosu, *Third World Peoples And The Re-Construction of The Investment Dispute Settlement System*]

OTHER MATERIALS

Draft Conclusions on identification of Customary International Law with Commentaries, ILO A/73/10 (2018)

Report of the United Nations Commission on International Trade Law, UNGA 77th Sess, Supp No 17, UN Doc A/72/17 (2017) 46

The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Comments from the Government of Thailand*, 35th Sess, UN Doc A/CN.9/WG.III/WP.147 (2018)

The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Burkina Faso*, 40th Sess, UN Doc A/CN.9/WG.III/WP.199 (2020)

The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union*, 35th Sess, UN Doc A/CN.9/WG.III/WP.145 (2018)

The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the European Union*, 37th Sess, UN Doc A/CN.9/WG.III/WP.159 (2019)

The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Mali*, 39th Sess, UN Doc A/CN.9/WG.III/WP.181 (2019)

The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Note by the Secretariat*, 38th Sess, UN Doc A/CN.9/WG.III/WP.166 (2019)

The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Standing Multilateral Mechanism: Selection and Appointment of ISDS tribunal members and Related Matters*, 42nd Sess, UN Doc A/CN.9/WG.III/WP.214 (2022)

The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of Russia*, 39th Sess, UN Doc A/CN.9/WG.III/WP.188 (2020)

The United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of investor-State dispute settlement (ISDS): Submission from the Government of South Africa*, 39th Sess, UN Doc A/CN.9/WG.III/WP.176 (2019)

UNCTAD, E.73.II.D.4, 3rd Sess, UN Doc TD/180 (1972)

UNGA, 7th Sess, 510th Mtg, UN Doc A/RES/622 (1952)

UNGA, *Charter on the Economic Rights and Duties of States*, 29th Sess, UN Doc A/9631 (1975) Res 3281

UNGA, *Human Rights compactible International Investment Agreements*, 76th Sess, UN Doc A/76/238

United Nations Commission on International Trade Law, "Working Group III: Investor-State Dispute Settlement Reform" (last visited 31 July 2022), online: < uncitral.un.org/en/working_groups/3/investor-state>

United Nations Conference on Trade and Development, *The Entry into Force of Bilateral Investment Treaties (BITs)*, UNCTAD/WEB/ITE/IIA/2006/9, 2006

OTHER MATERIALS: ONLINE SOURCES

"Developing Countries" (last visited 12 August 2022) online: *WorldData* <worlddata.info/developing-countries.php#:~:text=According%20to%20the%20IMF%20definition,and%20numerous%20other%20island%20states.>

European Parliament, Plenary Sess, *Declaration: MAI*, SPEECH/98/212 (1998), online: <ec.europa.eu/commission/presscorner/detail/en/SPEECH_98_212>

"Explanatory Session on the AfCFTA Investment Protocol in Kenya" (last visited 4 July 2022), online (blog): *IISD* <iisd.org/events/explanatory-session-afcfta-investment-protocol-kenya>

"Historical Research Method" (last visited 30 January 2022), online: <schools.yrdsb.ca/markville.ss/history/honours/researchmethods.html#:~:text=

The%20purpose%20of%20historical%20research,requires%20interpretation%20of%20the%20information.>

"Humanities Research Strategies: Historical Methodologies" (last visited 30 January 2022), online: *USC* <libguides.usc.edu/humanitiesresearch/historical>

"Not so Private Negotiations" (last visited 26 February 2022), online: *history matters* <historymatters.gmu.edu/d/5170/>