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Abstract

The Pan-African Investment Code (PAIC) is the first continent-wide African model investment treaty elaborated under the auspices of the African Union. The PAIC has been drafted from the perspective of developing and least-developed countries with a view to promote sustainable development. The PAIC contains a number of Africa-specific and innovative features, which presumably makes it today a unique legal instrument. Written in a time where the international investment community is still debating the future of international investment law, this article seeks to present and contextualize this first African model investment treaty. The article highlights the most innovative features of the PAIC, such as the reformulation of traditional investment treaty provisions and the introduction of direct obligations for investors.

Keywords


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Introduction

2015 was an important year for Africa regarding the codification of the first continent-wide model investment treaty: the Pan-African Investment Code (PAIC).\(^1\) Even though this instrument is not yet officially adopted, it presents an African consensus on the shaping of international investment law. The PAIC is a legal instrument – shaped in the form of a model investment treaty – which has been drafted from the perspective of developing countries and least-developed countries focusing on sustainable development goals. The PAIC contains a number of Africa-specific and innovative features, which presumably makes it today a unique legal instrument.

This article seeks to present and contextualize the PAIC by taking a comparative international law approach.\(^2\) With regard to the PAIC, a comparative law analysis allows us to understand how African interests shape different approaches to international investment law and to see how the PAIC challenges traditional core approaches. The article compares, on the one hand, the PAIC’s provisions to traditional international investment treaty practice in order to understand to what extent the PAIC builds upon these elements. On the other hand, it compares the PAIC’s provisions to the most recent treaty practice, in particular that of Brazil and India, as well as investment chapters in comprehensive free trade agreements (FTAs), such as the Trans-Pacific Partnership (TPP) and the Comprehensive Economic and Trade Agreement (CETA) between the European Union (EU) and Canada. This will provide insights into whether Africa’s regional approach differs from current practices of other countries and regions. In addition, comparisons are made with the policy proposals of governmental and non-governmental organizations advocating for reform in the international investment law regime, including the United Nations Conference on Trade and Development (UNCTAD), the Southern Africa Development Community (SADC) and the International Institute for Sustainable Development (IISD). A comparison to the work of these

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1 The authors have been involved in the elaboration process from 2014–2015. Professor Mbengue has been the lead expert and negotiator during this period. The views of the authors do not necessarily reflect the views of the African Union or of other negotiators involved in the negotiation and drafting of the PAIC. Some of the information contained in this article is based on the experience of the authors. Documents related to the elaboration of the PAIC are not publicly available. An earlier draft of the PAIC (dated 26 March 2016) is available at <http://repository.uneca.org/handle/10855/23009> accessed 17 February 2017.

organizations has the benefit of permitting to appraise the innovative character of the PAIC.

The article is divided into five main parts. Part 1 provides an overview of the bilateral investment treaties (BITs) and other international investment agreements (IIAs) that have been concluded by African States over the last fifty years. Part 2 illustrates continental initiatives in the context of foreign investment and presents the origins of the PAIC. Part 3 addresses the important question to what extent the PAIC incorporates traditional investment standards and to what extent it breaks with them. Part 4 explores the aspects of the PAIC which are truly innovative and which reveal the question of a reshaping of IIAs. Part 5 looks at the PAIC and dispute settlement and, in particular, the controversies around investor-State arbitration.

1 BITs and Other IIAs in Africa

African countries concluded, like other countries, the large bulk of their still existing BITs mainly in the period from the mid-1990s to the early 2000s. Traditionally, BITs were concluded with capital-exporting countries mainly from Europe. Switzerland and Germany have signed the most agreements with African countries. African States hoped that establishing international rules in order to protect investments, thereby creating stability and predictability, would promote and attract investment into their economies. By January 2017, African countries had signed 881 BITs or IIAs. There are 722 agreements signed with non-African countries and 159 intra-African BITs. The content of the majority of these agreements follows the traditional approaches of treaties elaborated by capital-exporting countries.

Besides BITs, regional investment agreements have emerged within the African continent. Africa’s regional integration has been a stated priority

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4 Germany (52) and Switzerland (46). They are followed by China (36), Belgium-Luxemburg Economic Union (32), Italy (32), Netherlands (30), France (25), United Kingdom (24), Portugal (21) and Spain (19).
5 Legal security in the host country can be another factor that a foreign investor takes into account but it is not decisive see Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (2nd edn, OUP 2012) 23.
agenda for African governments since the early years of independence. Today, Africa’s regional integration is a complex web of various regional economic communities (RECs). In West Africa, there are three RECs: the West African Economic and Monetary Union (UEMOA), the Mano River Union (MRU) and the Economic Community of West African States (ECOWAS). Central Africa has two groupings: the Economic Community of Central African States (ECCAS/CEMAC) and the Economic Community of Great Lakes countries (ECGLC). In Eastern and Southern Africa six groupings co-exist: the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Inter-Governmental Authority on Development (IGAD), the Indian Ocean Commission (IOC), the Southern Africa Development Community (SADC) and the Southern African Customs Union (SACU). North Africa shares two RECs, the Arab Maghreb Union (UMA) as well as the Community of Sahel-Saharan States (CEN-SAD). As a consequence, today of the 55 African countries, 28 retain dual membership, 20 are members of three RECs, the Democratic Republic of Congo belongs to four RECs and six countries maintain singular membership.

Most of these RECs adopted legal instruments concerning the regulation of foreign investment. Several instruments have been adopted to enhance cooperation and harmonization in the area of foreign investment. In 2007, COMESA elaborated a modern investment agreement, which was intended to establish the COMESA Common Investment Area. However, the agreement has not yet entered into force since the required threshold of ratification by at least six Member States has not been met. The 2006 SADC Protocol on Finance and Investment is another text, which is in force in this region.

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8 ibid 9.
9 The following analysis is based on data from UNCTAD (n 6).
10 For instance, the 1965 CEMAC Investment Agreement, the 1982 ECGLC Investment Code or the 1990 Arab Maghreb Union Investment Agreement; ECOWAS adopted two protocols that relate indirectly to foreign investment: the 1984 ECOWAS Protocol on Community Enterprises and the 1979 ECOWAS Protocol on Movement of Persons and Establishment.
EAC also launched investment initiatives by adopting a model investment code in 2006. Hence, each African REC has at least one instrument relating directly or indirectly to investment. The picture becomes more intricate when one considers that many African States are members of two or more RECs at the same time. Whilst regional economic integration is generally perceived to benefit the economy and thus to foster foreign and domestic investment, the multiple and overlapping commitments arguably make Africa’s integration efforts in relation to investment harmonization inefficient. Yet, the trend for more regional harmonization is unbroken. In June 2015, the regions of SADC, COMESA and EAC signed the Agreement on a Tripartite Free Trade Area (TFTA). The objective of the TFTA is to promote the harmonization of trade and investment arrangements amongst these three RECs.

African RECs, by adopting their investment rules, play a prominent role in the development of international investment law. The RECs adopted investment instruments, which they consider to be more adequate in light of the specific needs of African countries. The most recent instruments elaborated by the RECs seek to combine attracting investors and achieving sustainable development objectives. The COMESA Investment Agreement is an innovative text that contains significant reform approaches, such as a provision on investor obligation. The 2006 SADC Investment Protocol states the need to


Crosato, Durmaz and Semertzì (n 3) 26.

ibid.

COMESA Investment Agreement (n 11) art 13.
inscribe foreign investments into the bigger efforts of sustainable development promotion.\textsuperscript{19} In addition to this protocol, SADC adopted a Model Treaty,\textsuperscript{20} which expresses even more clearly development concerns. The purpose of this non-binding instrument is to enhance harmonization of investment regimes in the region and to provide an effective tool for the future conclusion of IIAs by SADC Member States.\textsuperscript{21}

2 Continental Initiatives and the Elaboration of the Pan-African Investment Code (PAIC)

At the continental level, it is the African Union (AU)\textsuperscript{22} that is mandated by its Member States to enhance the political and socio-economic integration of the continent and to promote sustainable development.\textsuperscript{23} The most important integration endeavors currently undertaken by the AU are the establishment of the African Economic Community by the year 2034 as well as the Continental Free Trade Area (CFTA), which is to be finalized in 2017.\textsuperscript{24}

In the spirit of enhanced economic integration, African Ministers responsible for continental integration decided in 2008 to initiate the work on a comprehensive investment code for Africa. The declared aim of the initiative was to attract greater flows of investments into Africa and to facilitate intra-African cross-border investments. Thus, the elaboration of the Pan-African Investment Code (PAIC) had started. From the beginning, it was the intention of the AU and its Member States to elaborate a text that would address Africa-specific needs. African independent experts drafted the text over several years. The

\textsuperscript{19} SADC Protocol on Finance and Investment (n 12) art 2.2.
\textsuperscript{21} SADC Model BIT (n 20) Commentary 3.
\textsuperscript{22} The African Union (AU) is a continental organization consisting of 54 African States (with the exclusion of Morocco). The AU was founded in 2001. Its headquarters are located in Addis Ababa, Ethiopia.
groups of experts were composed of representatives coming from the different African RECs mentioned before, from academia as well as the private sector.

The process of elaboration can roughly be divided into three phases. In its first phase, the group of experts compiled African best practices in the field and elaborated a first draft. The next and decisive phase was during the year 2015, when the PAIC text was discussed at expert level. Two meetings of independent experts, all from Africa, were held in May 2015 in Tunisia and another one in September 2015 in Mauritius. Experts of AU Member States then reviewed the work of the independent experts during a continent-wide meeting in Uganda that took place in December 2015. The third phase started in the year 2016. At a ministerial meeting in Addis Ababa in March 2016, the competent African ministers approved the work of the PAIC. At the last meeting in Nairobi in November 2016, finally, governmental representatives agreed to adopt the PAIC as a non-binding model investment treaty. It is interesting to underline that this political decision has been made despite the recommendations of the independent experts that recommended the PAIC to be a binding instrument. The AU foresees the official adoption of the PAIC at the next ministerial meeting at the beginning of 2017 according to most recent information.

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

The PAIC contains a couple of innovative features, the most striking ones of which will be examined in greater detail in this Section. The PAIC reformulates traditional treaty language, adds new provisions and omits certain provisions completely. It seeks to be balanced and to address specific aspects of African development.

3.1 Preamble, Objective and Scope of the PAIC

Preambles have a primary significance as to how an IIA will be interpreted in the event of a dispute between the parties or between an investor and a State. Today, new and broader investment treaty objectives have become more and more relevant, one of which is certainly the objective of sustainable development. In the African context, sustainable development goals are

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crucial given the important economic, social and environmental challenges the continent is still facing.

The Preamble of the PAIC recognizes that the promotion of sustainable development requires investments. Yet, these investments should have positive spillover effects such as to facilitate job creation, promote technology transfer, support long-term economic growth and contribute effectively to the fight against poverty.\textsuperscript{27} The Preamble specifically refers to the right of AU Member States to regulate all aspects relating to investments within their territories with a view to promote sustainable development objectives.\textsuperscript{28} The drafters of the PAIC did not intend to disregard the protection of investors and investments, but stressed the need to achieve an overall balance of the rights and obligations among AU Member States and the investors under the PAIC.\textsuperscript{29} The Preamble emphasizes also the need to promote corruption free investment and improved laws and regulations that promote transparency and accountability in governance. The PAIC in fact seeks to promote responsible investments.

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

\textbf{The objective of this Code is to promote, facilitate and protect investments that foster the sustainable development of each Member State, and in particular the Member State where the investment is located.}\textsuperscript{30}

Once again, a clear link between investments and sustainable development is made.\textsuperscript{31} Under the PAIC, investments are only protected when they foster sustainable development in AU Member States and in particular in the territory of the host States. It is also worth noting that the PAIC not only seeks to protect investments, it seeks to first promote investments, then to facilitate investments and finally and only thirdly to protect investments. A specific provision that states the objective of the treaty is rather unusual. The Canadian and

\footnotesize{(hereafter: IPFSD). The term sustainable development is understood here as development, which relates to economic development, social development and the protection of the environment. See further also the contributions in Stephan W Schill et al. (eds), \textit{International Investment Law and Development: Bridging the Gap} (Edward Elgar 2015).}

\textsuperscript{27} PAIC (n 1) preamble, para 8.
\textsuperscript{28} ibid para 10.
\textsuperscript{29} SADC Model BIT (n 20) preamble, para 6.
\textsuperscript{30} PAIC (n 1) art 1.
\textsuperscript{31} In the same sense SADC Protocol on Finance and Investment (n 12) art 2.2.
US Model BITs for instance do not contain such a provision. However, stating the objective of the treaty in a specific provision can provide added weight to the objective, which in turn has consequences for the treaty interpretation.32

With respect to the scope of the PAIC, one aspect is important to highlight. The PAIC by comparison to other IIAs does not only stipulate obligations on States and rights for investors.33 As its Article 2 states, the PAIC ‘defines the rights and obligations of Member States as well as investors.’34 This Article introduces the very content of the PAIC and refers back to the endeavor stated in the Preamble for an overall balance of the rights and obligations among States and investors.

3.2 Definition of Investment
Since the objective of the PAIC is to attract investments that foster sustainable development, the drafting of the definition of an investment that would fall under the PAIC was highly critical.35 The drafters of the PAIC considered that protected investments should be those businesses that bring constructive economic and social benefits.36 Henceforth, the PAIC contains an enterprise-based definition stating that an investment means

an enterprise or a company..., which is established, acquired or expanded by an investor, including through the constitution, maintenance or acquisition of shares, debentures or other ownership instruments of such an enterprise...37

The assets of the enterprise are included among the covered assets of the investor in an open and indicative list of assets.38 Other countries, such as India

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32 See SADC Model BIT (n 20) Commentary 8: The inclusion of a provision stating the objective is recommended by SADC. See also ibid, art 1.
33 As will be evidenced by the further analysis of the PAIC text.
34 PAIC (n 1) art 2.2.
36 SADC Model BIT (n 20) Commentary 13.
37 PAIC (n 1) art 3.4.
38 An investment under the PAIC may possess the following assets: ‘shares, stocks, debentures and other equity instruments of the enterprise or another enterprise; a debt security of another enterprise; loans to an enterprise; movable or immovable property and other property rights such as mortgages, liens or pledges; claims to money or to any performance under contract having a financial value; copyrights, know-how, goodwill and
and Brazil, opted for similar approaches. The SADC Model BIT presents the enterprise-based definition as being the most beneficial option for sustainable development. The establishment or acquisition of an enterprise is in general more likely investments that bear long-term interest in the host State. The drafters of the PAIC followed the recommendation of SADC when deciding on the definition of an investment.

A series of investments are categorically excluded from the scope of the definition under the PAIC. Worth underlining is that the PAIC excludes portfolio investments all together. It also excludes investments in any sector that is sensitive to the host State’s development and investments that would have an adverse impact on its economy.  

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40 The SADC Model BIT contains three options for the definition of an investment: an enterprise-based definition, an asset-based definition with a closed list and an asset-based definition with an open list see SADC Model BIT (n 20) Commentary 12–13.

41 ibid, Commentary 13.

42 Most other treaties also exclude certain categories. The most widespread is the exclusion of pure commercial contract claims (CETA (n 39) art 8.1), the exclusion of loans issued by one Party to another Party as well as an order or judgment entered in a judicial or administrative action (TPP (n 39) art 9.1).

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

44 Alike Brazil-Malawi CIFA (n 39) art 2.

45 PAIC (n 1) art 4, n i–iii.
The PAIC’s investment definition refers to the full Salini test\textsuperscript{46} and requires an investment to have the following characteristics:

the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significant contribution to the host State’s economic development.\textsuperscript{47}

Today’s treaty practice is fragmented regarding the incorporation of the Salini test. The US Model BIT was the first treaty text to make reference to the test, however always by excluding the significant contribution to the host State’s economic development.\textsuperscript{48} Similar to the US Model BIT are the approaches in the TPP and CETA.\textsuperscript{49} Other treaties, such as those based on Model BITs from European countries, as well as some of Japan’s recent BITs, adopt the traditional approach of not mentioning the elements of the Salini test at all.\textsuperscript{50} The Indian Model refers, like the PAIC, to all four elements.\textsuperscript{51} By including the last characteristic of the Salini test: ‘the significant contribution to the host State’s economic development’, the drafters of the PAIC left no doubt that a covered investment under the PAIC has to have a strong relationship with the development of the host State’s economy.

\textsuperscript{46} Salini et al v Morocco, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001) para 52.
\textsuperscript{47} ibid.
\textsuperscript{51} Indian Model BIT (n 39) art 1.4.
3.3 Definition of Investor

The definition of an investor under the PAIC appears to be rather basic, stating that an investor means any national, company or enterprise of a Member State or a national, company or enterprise from any other country that has invested or has made investments in a Member State.52

However, given the enterprise-based definition of an investment under the PAIC, the crucial point here was to clearly define the notion of a legal person, i.e. an enterprise or company. In relation to legal persons, most IIAs rely essentially on three basic criteria to determine the nationality of a company: the concept of incorporation, the concept of the social seat and the concept of control.53 A treaty that defines the nationality of a legal entity solely on the basis of the place of incorporation has potentially the largest coverage.54 References to the place of incorporation are thus mostly coupled with one or more other criteria.55 Several new treaties require that the legal person in question has in addition to its place of incorporation a ‘substantial business activity’ in the home State.56 The PAIC builds on this concept and requires a substantial business activity in the Member State in which the enterprise or company is located.57 In order to clarify the content of a ‘business activity’, the PAIC provides for a case-by-case approach by indicating four circumstances that should be taken into account for the assessment of the business activity in question in order to qualify as being ‘substantial’. These criteria are the amount of investment to be brought into the host State, the number of jobs to be created, its effect on the local community, and the length of time the business has been in operation.58

3.4 Rejection of Pre-Establishment Commitments

The majority of existing IIAs only guarantee standards of treatment of foreign investment regarding the post-establishment phase, but there is a

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52 PAIC (n 1) art 4.5.
53 Dolzer and Stevens (n 25) 35.
54 UNCTAD (n 22) 91.
55 CETA (n 39) art 8.1 combines the place of incorporation with the criteria of direct or indirect control.
56 TPP (n 39) art 9.1; Indian Model BIT (n 39) art 1.2.
57 PAIC (n 1) art 3.1.
58 ibid art 4.1.
growing number of treaties that include commitments with respect to the pre-establishment phase. This is in particular the case with comprehensive FTAs.\textsuperscript{59} Recent practice shows that besides the United States and Canada, the EU also has sought to include pre-entry commitments in its treaties.\textsuperscript{60} Pre-establishment obligations are formulated by including references to MFN treatment as well as national treatment.\textsuperscript{61}

The drafters of the PAIC have been aware of current treaty practice, but considered that in the context of African countries such provisions may preclude a State from altering domestic law if circumstances so warrant in light of national sustainable development goals. To this effect, MFN and national treatment do not contain any reference to establishment, acquisition and expansion.

3.5 \textit{MFN and National Treatment}

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

3.5.1 Clarification of ‘Like Circumstances’

Relative standards of protection, such as MFN and national treatment, require a proper basis for comparison of investors or investments. Earlier treaties, such as NAFTA or US BITs, include the wording of in ‘like circumstances’ or ‘like situations’ in their respective MFN and national treatment clauses.\textsuperscript{62} However, the unqualified reference to like circumstances did not lead to consistent case law. On the contrary, the breadth of the scope of likeness led to unpredictable outcomes.\textsuperscript{63} This is why some current treaties include an additional criterion for the assessment of the concept of ‘in like circumstances’.\textsuperscript{64} As concerns the PAIC, it was the wording contained in the 2007 COMESA Investment

\begin{footnotesize}
\begin{enumerate}
\item CETA (n 39) arts 8.6 and 8.7; EU-Vietnam Free Trade Agreement (2016) arts 3 and 4, s 1.2. This is interesting to note since traditional BITs of EU Member States do not cover commitments relating to the pre-establishment phase.
\item See NAFTA (n 59) art 1103; US Model BIT (n 48) art 4; TPP (n 39) art 9.4.
\item See NAFTA (n 59) arts 1102 and 1103; US Model BIT (n 48) arts 3 and 4.
\item August Reinisch, ‘National Treatment’ in Bungenberg and others (n 35) 846, 859.
\item TPP (n 39) arts 9.4 and 9.5.
\end{enumerate}
\end{footnotesize}
Agreement that inspired the drafters. The concept of in ‘like circumstances’ under the PAIC requires an overall examination, on a case-by-case basis, of all the circumstances of an investment, such as ‘its effects on third persons and the local community or on the local, regional or national environment, the health of the populations, or on the global commons.’ Relevant circumstances may also be the sector in which the investor is active, the aim of the measure in question or the company size and other factors directly relating to the investment or investor in relation to the measure in question. The list is non-exhaustive, but it ensures that a broad view is taken rather than to question whether the investors are in the same ‘economic’ or ‘business’ sector as several arbitral tribunals did.

3.5.2 Exceptions to MFN

IIAs differ with regard to the exceptions from MFN treatment. Exceptions of regional economic integration organizations (REIOs), taxation and procedural issues are among the usual ones, but States have used a variety of other explicit derogations from MFN treatment. Whilst such exceptions are most often found in the MFN provision itself, the PAIC contains a specific

65 See COMESA Investment Agreement (n 11) art 17.2.
66 PAIC (n 1) arts 7.3 and 9.3.
67 ibid.
68 SD Myers v The Government of Canada, UNCITRAL, Partial Award (13 November 2000) para 251; Archer Daniels Midland Company and Tat & Lyle Ingredients Americas, Inc v Mexico, ICSID Case No ARB (AF)/04/5, Award (21 November 2007) para 198. Extreme approaches were taken by the tribunal in Methanex v USA taking into account only identical comparators as well as by the tribunal in Occidental v Ecuador by stating to compare all investors that are in a comparative relationship. See Methanex v United States, UNCITRAL, Award (3 August 2005) pt IV (ch B) and Occidental v Ecuador, UNCITRAL, Award (1 July 2004) paras 173 ff.
71 TPP (n 39) art 9.5-3.
article listing exceptions to the MFN clause. The PAIC provides that there is no breach of MFN treatment when an AU Member State adopts measures that are ‘designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment.’\(^\text{73}\) In addition, the PAIC precludes measures that are taken by reason of ‘national security, public interest, and public health or public morals to be considered as a less favorable treatment’\(^\text{74}\) within the meaning of the MFN provision. A further paragraph contains the classic exceptions on REIOs and taxation matters. It provides that the MFN principle does not oblige a Member State to extend to the investor of any other country the benefit of any treatment contained in an existing or future customs union, free trade area or international agreement to which the investor’s home State is not a Party, or contained in any international agreement or domestic legislation relating to taxation.\(^\text{75}\)

3.5.3 Exceptions to National Treatment

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

Firstly, the national treatment exception clause contains a similar provision as for MFN in respect to the right of a Member State to adopt measures in order to promote public welfare objective.\(^\text{76}\) Secondly, AU Member States may, in accordance with their respective domestic legislation, ‘grant preferential treatment to qualifying investments and investors in order to achieve national development objectives.’\(^\text{77}\) For instance, favorable treatment may be addressed to the internal needs of designated disadvantaged persons, groups or regions.\(^\text{78}\) Thirdly, the PAIC reserves the right of AU Member States to deny an investor the benefits of the PAIC and to grant special and differential treatment by listing two examples: where there is no substantial business activity in that State, or the investor is engaged in activities inimical to the economic interest of Member States.\(^\text{79}\) This latter clause is very similar to a typical denial of benefits

\(^{73}\) PAIC (n 1) art 8.2.
\(^{74}\) ibid art 8.3.
\(^{75}\) ibid art 8.5.
\(^{76}\) ibid art 10.2.
\(^{77}\) ibid art 10.3.
\(^{78}\) ibid art 10.7.
\(^{79}\) ibid art 10.4.
clause, which can be found in many current treaties.\footnote{TPP (n 39) art 9.14; CETA (n 39) art 8.16.} Fourthly, a categorical exclusion for the application of the national treatment principle is foreseen for subsidies or grants provided to a government or second, a State enterprise, including government-supported loans, guarantees and insurance or third, for taxation measures aimed at ensuring the effective collection of taxes, except where this results in arbitrary discrimination.\footnote{PAIC (n 1) art 10.6.} Finally, the PAIC sets out that the implementation of these exceptions to national treatment do not entitle an investor to ‘compensation for any competitive disadvantages.’\footnote{ibid art 10.8.}

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

FET appears in nearly all of the more than 3,200 IIAs.\footnote{UNCTAD, World Investment Report 2015: Reforming International Investment Governance (United Nations 2015) 106: total number of 3,271 IIAs, with 2,926 BITs and 345 ‘other’ IIAs.} It is well known that FET has been the most invoked standard in investment disputes and the majority of successful claims pursued in international arbitration are based on a violation of the FET standard.\footnote{Dolzer and Schreuer (n 5) 130.} The content of the standard has arguably been developed through arbitral practice,\footnote{For a recent conceptualization see Stephan W Schill and Marc Jacob, ‘Fair and Equitable Treatment: Content, Practice, Method’ in Bungenberg and others (n 35) 700–63.} but even if some core principles can be distilled from the case law on FET,\footnote{ibid 717.} arbitral tribunals are not obliged to follow previous decisions. For this reason, some authors argue that the standard simply remains uncertain in content.\footnote{Muthucumaraswamy Sornarajah, Resistance and Change in the International Law of Foreign Investment (CUP 2015) 247. Schreuer held that the lack of precision might be a virtue rather than a shortcoming, since in practice it would be impossible to anticipate in the abstract the range of possible types of infringements upon investor’s legal position, see Christoph Schreuer, ‘Fair and Equitable Treatment in Arbitral Practice’ (2005) 6 JWIT 365.} Moreover, in the context of sustainable development the question is raised whether the standard hinders the promotion of sustainable development.\footnote{For greater detail see Roland Kläger, ‘Fair and Equitable Treatment and Sustainable Development’ in Marie-Claire Cordonier Segger et al (eds), Sustainable Development in World Investment Law (Kluwer Law International 2011) 241–59.} The reason is that the standard is
apt to limit more than other standards the regulatory freedom of host States, including for socially and environmentally sensitive areas.\(^8\)\(^9\)

Given the current controversy about the standard, current reform approaches in particular seek to draft clearer and more predictable FET provisions.\(^9\)\(^0\) One of the striking examples is the list of FET violations contained in the CETA:

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

\(\begin{align*}
(a) & \text{ denial of justice in criminal, civil or administrative proceedings}; \\
(b) & \text{ fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings}; \\
(c) & \text{ manifest arbitrariness}; \\
(d) & \text{ targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief}; \\
(e) & \text{ abusive treatment of investors, such as coercion, duress and harassment}; \text{ or} \\
(f) & \text{ a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article}.\(^9\)\(^1\)
\end{align*}\)

This approach certainly is an example to mitigate potentials for abuse in litigation by establishing an exhaustive list of indicators.\(^9\)\(^2\) However, the FET provision of CETA also includes the concept of legitimate expectations, which

\(^{89}\) ibid 251. See also Eric De Brabandere, ‘Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties – Navigating Between Generally and Contextual Specificity’ (2017) 18 JWIT 530 (in this Special Issue).


\(^{91}\) CETA (n 39) art 8.10.2.

re-introduces uncertainty regarding its interpretation. CETA’s FET provision further reads:

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

The Indian Model BIT also seeks to further clarify the content of the FET standard. Under the Indian model, the parties shall not subject investments of investors to measures which constitute a denial of justice under customary international law, un-remedied and egregious violations of due process, or manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment. Whether these provisions prove to better guide arbitral tribunals has to be seen in future disputes. A different reform approach towards FET is to avoid any inclusion of the standard in the treaty. This latter option has been used by South Africa and Brazil and is recommended by SADC. In light of the prevailing uncertainties of interpretation, also in regard of the more precise FET provisions, the drafters of the PAIC decided not to include the FET standard.

3.7 Exceptions to the Transfer of Funds

Provisions on the transfer of funds are part of the vast majority of modern IIAs. Although they have been drafted in different ways, such provisions generally deal with three fundamental issues: the types of payment that are covered by the right to make transfers, the question of convertibility and exchange rates as well as the limitations on free transfer. The issue of free transfer of funds bears a conflict between the interests of a host State and those of a foreign investor. For the investor, the repatriation of capital, including profits, into the
home country or third country will often be the major business purpose of the investment. However, the host State seeks to administer its currency and its foreign reserves, meaning that large currency transfers into the country and out of the country need to be monitored and controlled in order to protect national policies.\textsuperscript{100}

Treaty practice shows that completely unlimited transfer of funds is rare.\textsuperscript{101} Most of the newer treaties contain limitations. The transfer of funds is typically subjected to the laws and regulations of the host State relating inter alia to bankruptcy and insolvency, to criminal or penal offences, or to ensuring compliance with orders or judgments in judicial or administrative proceedings.\textsuperscript{102} Often IIAs contain provisions to allow the host State to impose restrictions on capital movements during balance of payments difficulties.\textsuperscript{103} The PAIC contains a provision on the transfer of funds that lists in an illustrative way the types of transfers.\textsuperscript{104} In another provision, the possible exceptions to the guarantee of free transfer of funds are indicated.\textsuperscript{105} The drafters of the PAIC considered it to be relevant for the developing economies of Africa to have clearer and stronger safeguard-provisions to ensure the ability of Member States to reply to emergency situations.\textsuperscript{106}

Firstly, restrictions can be adopted provided that they are ‘in accordance with taxation as well as financial laws and regulations’ of the concerned Member State.\textsuperscript{107} Secondly, AU Member States can prevent a transfer in a non-discriminatory manner and in accordance with its laws and regulations relating to bankruptcy, insolvency or other legal proceedings to protect the rights of creditors, to criminal or administrative violations or to ensure the satisfaction of judgments in adjudicatory proceedings.\textsuperscript{108}

Thirdly, the PAIC foresees the possibility for AU Member States
to adopt or maintain measures in the event of serious balance-of-payments and external financial difficulties or threat thereof, as well as

\begin{itemize}
\item \textsuperscript{100} Dolzer and Schreuer (n 5) 212–13.
\item \textsuperscript{101} The German Model BIT contains such absolute free transfer clause, German Model BIT (n 50) art 6.
\item \textsuperscript{102} US Model BIT (n 48) art 7.4; French Model BIT (n 50) art 7.
\item \textsuperscript{103} CETA (n 39) art 8.13.3; TPP (n 39) art 9.8.4.
\item \textsuperscript{104} PAIC (n 1) art 15.
\item \textsuperscript{105} ibid art 16.
\item \textsuperscript{106} SADC Model BIT (n 20) Commentary 29.
\item \textsuperscript{107} PAIC (n 1) art 16.1.
\item \textsuperscript{108} ibid art 16.3.
\end{itemize}
in cases where, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.\textsuperscript{109}

All such measures have to ‘be made public, be temporary and be eliminated as soon as conditions permit.’\textsuperscript{110}

3.8 \textit{Performance Requirements}

Performance requirements are often termed as conditions that host States impose on multinational enterprises, requiring them to meet certain specific goals with respect to their business activities in the host State.\textsuperscript{111} An exhaustive list of what type of measures can constitute performance requirements does not exist.\textsuperscript{112} Measures can vary from ensuring a level of local content for products and services to carrying out environmental and social actions.\textsuperscript{113} The economic effects of performance requirements are controversial. Whether they create economic inefficiencies or are beneficial for the host State remains an open question.\textsuperscript{114} Looking at treaty practice, it can be seen that the traditional approach has been not to mention performance requirements in IIAs, with the exception of US BITs that have always included provisions that prohibit host States from imposing performance requirements.\textsuperscript{115}

Today, there is a growing number of IIAs that contain comprehensive clauses on the prohibition of performance requirements;\textsuperscript{116} at the same time, a number of newer treaties still do not include provision prohibiting performance requirements.\textsuperscript{117} Yet, performance requirements can be able to serve as a tool for economic development policies. For instance, the transfer of technologies

\textsuperscript{109} ibid art 16.4.
\textsuperscript{110} ibid art 16.5.
\textsuperscript{111} UNCTAD, \textit{Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries} (United Nations 2003).
\textsuperscript{114} ibid.
\textsuperscript{115} Andrew Newcombe, ‘The Americas’ in Bungenberg and others (n 35) 202, 207; US Model BIT (n 48) art 8.
\textsuperscript{116} CETA (n 39) art 8.5; EU-Vietnam FTA (n 60) art 6; TPP (n 39) art 9.10; Draft Norwegian Model BIT (n 39) art 8.
\textsuperscript{117} Indian Model BIT (n 39); Brazil-Malawi CIFA (n 39).
or the employment of local workers can help materialize beneficial spillover effects for the host State.\textsuperscript{118} The possible positive impacts for the economic and social development of the host State led the drafters of the PAIC to include a provision on performance requirements that encourages AU Member States to use them as policy measures. As such, the PAIC’s provision sets out an indicative list of measures that can be taken by a State ‘with the aim to promote domestic and local content.’\textsuperscript{119} These measures can be specific programs that support the development of local entrepreneurs;\textsuperscript{120} or enhance ‘research and development including new technologies, technology transfer, innovation and other benefits of investment.’\textsuperscript{121}

4 Towards a Reshaping and Restructuring of IIAs?

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

4.1 The PAIC and Investor Obligations

International investment law is traditionally and until today predominantly concerned with the protection of foreign investors and their investments. Most IIAs stipulate reciprocal obligations on the contracting States parties and do not impose any direct legal responsibilities on the investor under international law as regards their business conduct.\textsuperscript{122} As for the majority of traditional and current treaty practice, there is no balance between the rights and obligations of investors and those of States under international investment law. At this time, it is safe to affirm that the inclusion of direct obligations on the

\begin{itemize}
  \item[118] UNCTAD (n 26) 99.
  \item[119] PAIC (n 1) art 17.
  \item[120] ibid art 17.2(c).
  \item[121] ibid.
  \item[122] Karsten Nowrot, ‘Obligations of Investors’ in Bungenberg and others (n 35) 1154, 1155. It is important to remember that foreign investors have always had legal obligations under the national law of the host State or under the investor-State contract.
\end{itemize}
conduct of a foreign investor has not gained real recognition in investment treaty practice.

Yet, there are a few early treaties that include investor obligations, such as the Community Investment Code of the Economic Community of Great Lakes countries (ECGLC) as well as the Charter on a Regime of Multinational Industrial Enterprises of Eastern and Southern African States. More recent treaties have included, for instance, the obligation of foreign investors to comply with all applicable domestic law and measures of the host State, or to accord priority to workers coming from the concerned State provided they have the same qualifications. The International Institute for Sustainable Development (IISD) was first in adopting an alternative approach in its 2006 Model Investment Agreement. This notwithstanding, most countries remain reluctant to stipulate direct obligations for investors, although it is a legally feasible option to ensure an appropriate balance in the realm of investment treaty practice between the legal protection granted to foreign investors, on the one side, and their responsibilities towards the societies in which they operate, on the other.

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

Under the PAIC, an investor has to comply with national and international standards of corporate governance for the sector concerned. The investor is

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


125 COMESA Investment Agreement (n 11) art 13; SADC Protocol on Finance and Investment (n 12) art 10, annex 1.

126 COMESA Investment Agreement (n 11) art 16.


128 Nowrot (n 122) 1162.

129 PAIC (n 1) ch 4.
required to comply in particular with transparency and accounting standards.\textsuperscript{130} In this respect, the investor is held
to ensure the equitable treatment of all shareholders, to encourage active co-operation between corporations and stakeholders in creating wealth, jobs and the sustainability of financially sound enterprises, and to ensure that timely and accurate disclosure is made on all material matters regarding a corporation.\textsuperscript{131}

The information that has to be disclosed by an investor includes the financial situation, performance, ownership, and governance of the company, as well as risks related to environmental liabilities. An investor also has to provide information relating to human resource policies, such as programs for human resource development.\textsuperscript{132} Furthermore, the PAIC sets out socio-political obligations to which the investor is held to adhere, including for instance the respect for cultural values, the non-interference in internal political affairs as well as the non-interference in intergovernmental relations.\textsuperscript{133} In the same spirit, the investor is prohibited from influencing the appointment of persons to public office or finance political parties.\textsuperscript{134} Likewise, any act of bribery is generally prohibited under the PAIC.\textsuperscript{135}

As far as the use of natural resources is concerned, the investor is held not to exploit or use them to the detriment of the rights and interests of the host State and to respect the rights of local population as well as to avoid land grabbing practices vis-à-vis local communities. Finally, the PAIC addresses principles that should govern compliance by investors with business ethics and human rights in the implementation of their investments, such as to support and respect the protection of internationally recognized human rights, to eliminate all forms of forced and compulsory labor, including the effective abolition of child labor, or to eliminate discrimination in respect of employment and occupation.\textsuperscript{136}

\textsuperscript{130} ibid art 19.1.
\textsuperscript{131} ibid art 19.3.
\textsuperscript{132} ibid.
\textsuperscript{133} ibid art 20.1.
\textsuperscript{134} ibid art 20.2.
\textsuperscript{135} ibid art 21.
\textsuperscript{136} ibid art 24. This provision is the only provision in the chapter using non-binding and only encouraging language.
Direct obligations for investors need to be effectively enforced. Options for enforcement are, for instance, the denial of treaty protection for the investor or the possibility of a State to file counterclaims in an arbitral proceeding. The drafters of the PAIC opted for the possibility of counterclaims as will be presented here below in Part 6.

4.2 The PAIC, ‘Horizontal’ Obligations and Systemic Issues

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

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

4.2.1 Transfer of Technology

The question of transfer of technology comes up more and more often in treaty practice. Whereas developing countries seek to encourage the transfer of

137 Steffen Hindelang and Markus Krajewski, ‘Conclusion and Outlook: Whither International Investment Law?’ in Hindelang and Krajewski (n 92) 377, 381.
138 TPP (n 39) art 9.15.
139 UNCTAD (n 85) 127.
140 UNCTAD (n 26) 17.
141 PAIC (n 1) ch 5.
technology, developed countries often exclude obligations for foreign investors to do so. In order to encourage the transfer of technology, different approaches have been suggested, varying from establishing cooperation mechanisms to the inclusion of performance requirements. The PAIC contains a specific provision dedicated to the transfer of technology. This approach is until now unique in international treaty practice.

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

4.2.2 Environmental Protection

The right for a host State to adopt environmental measures has increasingly become part of modern IIA practice and most treaties contain provisions specifically addressing the relationship between investment and the environment. Common to many IIAs, are ‘non-lowering of standards’-clauses. Measures that protect or conserve the environment prominently

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142 US Model BIT (n 48) art 8.1(f) on performance requirements stating that neither party may impose or enforce to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory.

143 See SADC Model BIT (n 20) preamble, para 2; PAIC (n 1) art 17.2(c). States might even establish cooperation amongst them in order to promote technology transfer (see COMESA Investment Agreement (n 11) schedule 1, let b (iv)).

144 SADC Model BIT (n 20) art 21.2(b): ‘Notwithstanding any other provisions of this Agreement, a State Party may seek to enhance ... technology transfer ... through the use of specified requirements on investors made at the time of establishment or acquisition of the investment and during its operation.’

145 PAIC (n 1) art 29.

146 ibid art 29.2.

147 ibid art 29.3.


149 NAFTA (n 59) art 11.14.2; US Model BIT (n 48) art 12.
figure in the general exceptions of many IIAs and assure the host State’s right to regulate in this field. Yet, binding provisions on the protection of the environment in an IIA are rare or even inexistent.

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

4.2.3 Labor Issues
Like the environment, labor standards became part of modern IIA practice. Some treaties included references to non-binding codes, such as the International Labor Organization (ILO) Tripartite Declaration of Principles on Multinationals and Social Policy or the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises. When

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150 US Model BIT (n 48) art 12.3.
151 SADC Model BIT (n 20) art 14 requires investors to undertake environmental impact assessments, investments have to maintain an environmental management system consistent with recognized international environmental management standards and investors are obliged to respect international environmental standards binding on the host or home State.
152 PAIC (n 1) arts 19, 22, 30, and 37.
153 ibid art 37.1.
154 ibid arts 8.2 and 10.2. See analysis supra Section 3.5.
labor issues are addressed, a ‘non-lowering of standards’-clause is also very often used. However, the PAIC contains several more innovative aspects. It foresees a mechanism of consultation and cooperation between the host State and the foreign investor relating to labor and employment objectives. For instance, the investor may consult the host State authorities in order to keep manpower plans in harmony with national social development policies. Furthermore, the investor is obliged to comply with international conventions and existing labor policies, and, in particular, not use child labor. In the following provision, the PAIC encourages Member States to develop their human resources capacity. Such policies may include incentives to encourage employers to invest in training, capacity-building and knowledge transfer. Special attention also has to be paid to the needs of youth, women and other vulnerable groups.

4.2.4 Intellectual Property Rights and Traditional Knowledge

Intellectual property rights (IPRs) traditionally fall under the scope of application of IIAs, most obviously since IPRs are a covered investment under most IIAs. This means that IIAs provide protection of IPR as a form of foreign investment. The drafters of the PAIC also included IPRs in the list of assets that an enterprise may possess, such as copyrights, know-how, goodwill and industrial property rights. The PAIC contains a specific provision on IPRs in the chapter on ‘Investment-Related Issues’, which provides that Member

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156 US Model BIT (n 48) art 13.2; Agreement between Japan and the Republic of Iraq for the Promotion and Protection of Investment (signed 7 June 2012, entered into force 1 February 2014) art 22 <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1663> accessed 17 February 2017. The PAIC also sets out the obligation for AU Member States not to relax their domestic labor legislation as an encouragement for the establishment, maintenance or expansion of an investment in its territory.

157 PAIC (n 1) art 34.2.

158 ibid art 34.

159 ibid art 36.

160 ibid art 36.2.


163 PAIC (n 1) art 4.4(f).
States ensure the enforcement of IPRs in their territory in accordance with the rights and obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and other relevant international instruments. However, the drafters of the PAIC considered it to be crucial to reiterate the right of Member States to provide for exceptions to IPRs. Such exceptions might in particular be relevant in the context of access to pharmaceutical products and medicine.

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

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

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

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

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

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164 ibid art 25.1.
165 ibid art 25.2.
166 ibid art 25.3.
of arbitration as well as unexpected and inconsistent interpretations of IIAs by arbitral tribunals have resulted in rising criticism of the existing system.169

There are two general alternative ways discussed on how to reform ISDS: either to keep and reform it as some countries have done,170 or to abandon and replace it with national courts or with setting up an ombudsman system as some countries have done.171 The global debate is perfectly mirrored in Africa, and ISDS did not fail to be the most controversial aspect during the elaboration of the PAIC. In fact, the provisions dealing with ISDS are the only ones in the PAIC on which no agreement between the drafters could be found. It is well known that South Africa, for instance, has a clear policy against ISDS. The country recently reviewed all of its IIAs and terminated most of them. The law that will be applicable to foreign investors in South Africa is the Promotion and Protection of Investment Bill, which does not contain ISDS.172 During the PAIC experts’ meetings, South Africa, together with a couple of other countries, argued for the exclusion of ISDS.173 In fact, all SADC Member States are meanwhile opposed to ISDS as is evidenced by the amendments of August 2016 to the SADC Protocol on Finance and Investment.174 The amended version no longer contains any reference to ISDS and only provides for State-State dispute resolution.175

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

Among the countries in favor of ISDS was a consensus to shape provisions on ISDS in a manner so as to avoid the shortcomings of this mechanism and to address some of the criticism. Consequently, the ISDS provisions of the PAIC include a couple of important reform approaches. The PAIC provides that ‘dis-

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169 UNCTAD (n 85) 145.
170 Such as the establishment of a permanent tribunal in EU treaties see CETA (n 39) arts 8.18 ff and EU-Vietnam FTA (n 60) ch 8, s 3. The Indian Model BIT (n 39) art 15 limits the scope of claim, and foresees the exhaustion of local remedies.
171 Such as South Africa and Brazil. See for the ombudsman system, Brazil-Malawi CIFA (n 39) arts 4 and 13.
173 SADC recommends the exclusion of ISDS, see SADC Model BIT (n 20) art 29.
174 Peterson (n 12).
175 ibid.
Disputes arising between investors and Members States under the specific agreements that govern their relations shall be resolved under those agreements.\textsuperscript{176} In this respect it works as an 'anti-umbrella clause'.\textsuperscript{177} The PAIC further requires that the investor and the concerned Member State should initially seek to resolve the dispute within 6 months at the latest, through consultations and negotiations, which may include the use of non-binding, third-party mediation or other mechanisms.\textsuperscript{178}

Another critical question is the exhaustion of local remedies. The traditional approach of IIAs is to provide for direct access to international arbitration for a foreign investor, usually after a 'cooling-off period'.\textsuperscript{179} It was for a long time considered that in many countries an independent judiciary cannot be taken for granted and that the defending State might influence the outcome of investor-State disputes in its own courts.\textsuperscript{180} However, some authors argue that toady the situation in most countries, including African countries, has changed; consequently the exhaustion of local remedies could and should revive.\textsuperscript{181}

According to UNCTAD, the requirement of dispute resolution before the domestic courts of the host country has several advantages, and not least might foster sound and well-working legal and judicial institutions in the host States.\textsuperscript{182} SADC as well as IISD also consider this approach to be beneficial for host States, since notably the exhaustion of local remedies can prevent frivolous claims and avoid the considerable costs of international arbitration.\textsuperscript{183}

\begin{itemize}
  \item \textsuperscript{176} PAIC (n 1) art 42.1.
  \item \textsuperscript{177} Recent trends show that umbrella clauses are no longer included into IIAs, see UNCTAD (n 85) 113.
  \item \textsuperscript{178} PAIC (n 1) art 42.3.
  \item \textsuperscript{180} Dolzer and Schreuer (n 5) 235.
  \item \textsuperscript{181} See Sornarajah (n 87) 190.
  \item \textsuperscript{182} UNCTAD (n 85) 149.
  \item \textsuperscript{183} IISD Model (n 127) art 45; SADC Model BIT (n 20) art 29.4(b).
\end{itemize}
treaty practice shows that the requirement of the exhaustion of local remedies remains quite rare with the exception of the Indian Model BIT. The drafters of the PAIC decided to include the requirement for foreign investors to first exhaust local remedies in the Member State where their investment is located before a request for arbitration can be submitted. In this way, investor-State arbitration becomes a remedy of last resort under the PAIC.

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

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

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184 Indian Model BIT (n 39) art 15.1.
185 PAIC (n 1) art 42.3.
186 ibid art 42.3.
188 ICSID Convention, art 46; see also Rule 40 ICSID Arbitration Rules. Yet Article 46 of the ICSID Convention does not, by itself, vest a tribunal with competence over counterclaims, the requirements of Article 25 of the ICSID Convention as well as of the applicable investment treaty must also be satisfied. See Urbaser v Argentina, ICSID Case No ARB/07/26, Award (8 December 2016) para 117.
189 See Spyridon Roussalis v Romania, ICSID Case No ARB/06/1, Award (7 December 2011) paras 859–877 and Saluka Investments BV v The Czech Republic, UNCITRAL, Decision on Jurisdiction over the Czech Republic’s Counterclaim (7 May 2004).
Agreement followed by SADC. The PAIC provision dealing with counter-claims reads as follows:

[w]here an investor or its investment is alleged by a Member State party in a dispute settlement proceeding under this Code to have failed to comply with its obligations under this Code or other relevant rules and principles of domestic and international law, the competent body hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.

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

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

190 COMESA Investment Agreement (n 11) art 28.9: ‘A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defense, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages.’
191 SADC Model BIT (n 20) arts 19 and 29.19.
192 PAIC (n 1) art 43.1.
193 There are other ways of enforcement of investors’ obligations, such as by creating a monetary liability in domestic courts of the host State for a breach of the treaty obligations by an investor, SADC Model BIT (n 20) Commentary 39.
194 COMESA Investment Agreement (n 11) art 28.9; SADC Model BIT (n 20) art 19.2.
6 Conclusion

Over the last fifty years of international investment law practice, African countries have been perceived as ‘investment rules takers.’ This is partly due to the asymmetry in terms of economic development between African host countries and investors’ home countries.195 African economies did and still do rely heavily on international private capital commitment. In the hope to attract more foreign investment, African countries concluded numerous BITs with capital-exporting countries, usually by accepting the pre-drafted Model BITs of those countries.196

Today, however, African RECs became ‘investment rules makers’ with the adoption of modern investment treaties or model investment treaties.197 The region of COMESA and SADC elaborated instruments, which not only provide for the protection of foreign investors, but which also take duly into consideration larger policy objectives, in particular sustainable development goals. However, regionalism within Africa bears the risk of overlapping legal commitments and uncertainty concerning the applicable rules. If the different RECs in Africa develop each their own investment regime, the risk of fragmentation in Africa is high.

The PAIC is the first continent-wide model investment treaty and might therefore better ensure harmonization throughout the African continent as regards the regulation of foreign investments. Despite its non-binding nature, the PAIC will serve as a guide for AU Member States’ IIA negotiation. In addition, the PAIC will most likely have considerable impact on the investment chapter of the CFTA, which is to be negotiated in the course of 2017.

As shown in the analysis of this article, the PAIC is intended to be a balanced model treaty,198 meaning it seeks to balance between investment protection and non-investment-related public interests. The drafters of the PAIC did not underrate the need for attracting foreign capital into Africa; yet this need should not neutralize the long-term goal of sustainable development. Consequently, sustainable development plays a prominent role throughout the PAIC. As already indicated, the very objective of the PAIC is ‘to promote, facilitate and protect investments that foster the sustainable development of

195  Crosato, Durmaz and Semertzí (n 3) 30.
196  See analysis supra pt 2.
197  Crosato, Durmaz and Semertzí (n 3) 30.
198  Sornarajah (n 87) 347–65 considers balanced treaties to be the solution against current systemic criticism.
each Member State.’ Africa is one of the world’s regions that will certainly attract foreign investment in the next years because of its many and precious natural resources. What is at stake now is to regulate which type of investments and what type of investors operating in Africa should be protected under international law. The answer of the drafters of the PAIC is that is has to be investments that further the bigger interests and needs of African societies, its economies, and that do not harm the environment. Thus, foreign investments that will be made in Africa in the future shall be investments that are responsible.

In the comparative international law perspective, the PAIC is a perfect example for identifying similarities and differences between the regional African approach and other national or regional approaches regarding the design of IIAs. Countries are adopting investment treaties, which are a response to the current systemic criticism of international investment law. The drafters of the PAIC were inspired by the current international reform discussion. Thus, several of the ideas that can be found in the PAIC text are what can be called common approaches in the international discussion on reforming the investment law regime as a whole. Such ideas mainly concern the reformulation of certain treaty standards, the inclusion of societal concerns as well as the rethinking of the ISDS system. Africa, unlike Brazil, is not making a fundamental contestation of the system of IIAs. The PAIC is rather an African tuning or recalibration of an IIA.199 It reflects the development that new IIAs are no longer based on either the North American or European models, but that other regions also engage in shaping IIAs according to their level of economic development and social needs.

Some aspects in the PAIC are highly innovative. The inclusion of direct obligations of investors, for instance, or the specific exceptions to MFN and national treatment, or the complete omission of a FET standard remain very rare features of IIAs or other model investment treaties.200 With the PAIC, African countries are yet in the minority to further develop these approaches.

The elaboration of the PAIC has permitted African countries to deliberate on their vision of the future shape of IIAs and to build awareness amongst them of the broader implications of foreign investment for their sustainable

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200 With the exception of the single investor’s obligation in the COMESA Investment Agreement (n 11) art 13.
development. The PAIC thus reflects the broad consensus of all AU Member States on precise provisions over foreign investment regulation and endows Africa with a voice in the international debate on the future and reform of the international investment regime. In particular, the strong emphasis on sustainable development goals in the PAIC bears the potential for the PAIC to become a model for innovation also outside Africa.