BILATERAL TREATY REFORM AND REGIONAL DEVELOPMENT

A Review of International Investment Agreements in East Africa

BILATERAL TREATY REFORM AND REGIONAL DEVELOPMENT

A REVIEW OF INTERNATIONAL INVESTMENT AGREEMENTS IN EAST AFRICA

By

Professor Uche Ewelukwa Ofodile

Published by

© Econews Africa
Jaflo Limited | Block 3 | 106 Brookside Drive | Westlands
P. O. Box 25112-00100, Nairobi-Kenya

Contacts
Email: info@econews-africa.org
Tel: +254 (0)202473373 / +254 (0)728 279368
Website: www.econews-africa.org

Author

Prof. Uche Ewelukwa Ofodile
E. J. Ball Professor of Law at the University of Arkansas School of Law
Doctor of Juridical Science (S.J.D.), Harvard Law School

This study was made possible through the financial support of The Open Society Initiative for Eastern Africa (OSIEA). However, the views expressed therein do not necessarily reflect their official policy position.

The publication remains the sole property of Econews Africa

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form, or by any means electronic, mechanical, photocopying, recording or otherwise, without the prior express and written permission of the publishers. Any part of this publication may be freely reviewed or quoted provided the source is duly acknowledged.

Table of Contents

Acknowledgements vii
Abbreviations and Acronyms viii
Executive Summary 10
Key Findings 10

SECTION ONE: THE FRAMEWORKS AND ISSUES OF INTERNATIONAL INVESTMENT AGREEMENTS IN EAST AFRICA 1

CHAPTER 1: INTRODUCTION 1
Scope of the Study 1
Significance of the Study 2
Research Questions 3
Methodology 3
Limitations of the study 3
International Investment Agreements and Bilateral Investment Treaties 3
The Development Dimension of IIAs and the Need for Flexibility 4
Investment Policy Framework in East Africa 5
Regional Investment Treaties and Initiatives 5
Continental Investment Treaties and Policy Initiatives 7
Multilateral Treaties on Investment 9
Other Relevant International and Regional Instruments 10
Significant Regional Development Issues 13
Trade and Investment Promotion 13
Foreign Direct Investment in EAC Development 14
Overview of FDI Inflows into the EAC 16
Sustainable Development in the EAC Region 18
The Fundamental Development Principles of the EAC 19
The Economic Diplomacy of East African Investment Treatymaking 20
Findings and Recommendations 21

SECTION TWO: UNDERSTANDING INTERNATIONAL INVESTMENT AGREEMENTS IN EAST AFRICA 22

CHAPTER 2: REVIEWING BILATERAL INVESTMENT TREATIES IN THE REGION 22
The State of Bilateral Investment Treaties in East Africa 24
Substantive Issues in East African BITs 26
Definition of Investment 27
Classification of Investment Issues 31
Processes of Liberalisation 31
Investment Protection 40

Country Treaty Provision Analysis in East African BITS 48
- *Burundi* 48
- *Kenya* 51
- *Rwanda* 52
- *South Sudan* 55
- *Tanzania* 55
- *Uganda* 58

Findings and Recommendations 61

CHAPTER 3: CRITIQUEING BILATERAL INVESTMENT TREATIES IN EAST AFRICA 62
Process and Structural Issues 62
Lack of Preparation and Planning 62
Investment Promotion and Facilitation Is Not Prioritized 63
Treaty Objectives 64
Narrow Treaty Objectives 64
Treaty Content 67
Broad Treaty Scope 67
Vague Treaty Terms 68
Limited Role for States in Treaty Interpretation - 72
The Right to Regulate Is Not Affirmed 72
Corporate Social Responsibility and Investor Obligation Ignored 74
The Development Dimension is not Prioritized 75
Monitoring and Implementation Challenges 76
Exit clauses - Long Durations, Automatic Renewals and Long Survival Clauses 79
Country Treaty Provision Analysis in East African BITS 81
Burundi 81
Rwanda 84
Tanzania 85
Uganda 86

CHAPTER 4: EVOLVING BEST PRACTICES IN THE INTERNATIONAL INVESTMENT POLICY SPACE 89
Rationale for Reform 89
Evolving Best Practices in IIA Reforms 91
Broad Treaty Objectives 91
The Right to Regulate Explicitly Acknowledged 93
Investment Promotion and Facilitation Prioritized 94
Clear and Detailed Definition Section 96
Applicability and Scope of Treaty 98
National Treatment 99
Most-Favoured-Nation Treatment 102

Fair and Equitable Treatment 105
Expropriation 109
Transfer of Funds 113
Transparency 115
Performance Requirements 118
General Exceptions 120
Security Exceptions 121
Taxation Measures 122
Reference to Health, Environment, Sustainable Development 123
Corporate Social Responsibility/ Investor Obligation 124
Treaty Interpretation 126
The Development Dimension 126
Review, Monitoring and Implementation Mechanisms 128
Exit Strategies and Options 129
Findings and Recommendations 131

SECTION THREE: THE DISPUTE SETTLEMENT REGIME 132

CHAPTER 5: EAC MEMBERS AND THE INVESTOR STATE DISPRUTE SETTLEMENT SYSTEM 132
A Review of ICSID Cases Involving EAC States 133
Crisis in the ISDS System 135
Trends in ISDS Reform 137
Considerations for revisiting ISDA 145
Findings and Recommendations 149

CHAPTER 6: THE REFORM QUESTION 150
Rationale for Change 150
Nature and Degree of Change 152
Mechanics of Reform 156
Challenges of Reform 158
Findings and Recommendations 160

CHAPTER 7: SPECIAL CONSIDERATIONS IN PRIORITISING REFORM FOR BILATERAL INVESTMENT TREATIES 165
BITs Between EAC States and Other African Countries 165
BITs Between EAC States and EU Members 167
Action Needed for BITs between EAC-EU 167
Unratified BITs 170
Old-generation BITs 172
The Problems with Old-Generation BITs 173

Options for Reforming Old-generation BITs 174
Findings and Recommendations 177

SECTION FOUR: CONCLUSION 180
Findings and Recommendations 189
Appendixes 190
References 198

Acknowledgements

This report was prepared by Professor Uche Ewelukwa Ofodile, E.J. Ball Professor, University of Arkansas School of Law. Macy Nuckles, third year law student at the University of Arkansas School of Law provided very valuable research assistance. The author is extremely grateful for the peer reviewers Professor Peter Muchlinski of UNCTAD and Bart-Jaap Verbeek, Trade and Investments Specialist of the Centre for Research on Multinational Corporation (SOMO) for their very thoughtful and detailed comments on the report. The author is also very grateful for the supportive environment at the University of Arkansas School of Law without which this report might not have been possible. The opinions expressed in this report are those of the author and not those of any organization or institution that she is associated with.

The contributions of the United Nations Conference on Trade and Development (UNCTAD) to current discussions about the relationship between international investment agreements (IIAs) and sustainable development goals and objectives is acknowledged. Since about 2012, UNCTAD has championed the idea of IIA reform and has offered valuable guidance to all relevant stakeholders. UNCTAD's resources such as 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap Special issue for the Multilateral Dialogue on Investment' (2013), 'World Investment Report 2013: Towards a New Generation of Investment Policies' (2013), 'International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal' (2013), 'Investment Policy Framework for Sustainable Development' (2015), 'Investor-State Dispute Settlement: Review of Developments in 2014' (2015), and UNCTAD's Reform Package for the International Investment Regime' (2018) have become valuable tools for many governments considering reform.

Lastly, Econews would like to thank Leonard Wanyama, the Coordinator of East Africa Tax and Governance Network (EATGN) for carrying out further edits to the report.

Abbreviations and Acronyms

AfCFTA	African Continental Free Trade Area
ARIA VI	Assessing Regional Integration in Africa VI
AU	African Union
AUC	African Union Commission
BIT	Bilateral Investment Treaties
CCIA	COMESA Common Investment Area
CETA	Comprehensive Economic and Trade Agreement
CFTA	Continental Free Trade Area
CIM	Common Investment Market
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
EACJ	East Africa Court of Justice EALA East Africa Legislative Assembly
ECA	United Nations Economic Commission for Africa
EIA	Environmental Impact Assessment
FDI	Foreign Direct Investment
FIPA	Foreign Investment Promotion and Protection Agreement
FTA	Free Trade Agreement
IPA	Investment Promotion Authority
I-CID	International Advisory Centre for Investment Disputes
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ILO	International Labour Organization
ICSID	International Center for the Settlement of Investment Dispute
IPFSD	Investment Policy Framework for Sustainable Development
ISDS	Investor–State Dispute Settlement
LDC	Least-developed country
MAI	Multilateral Agreement on Investment
M&As	Mergers and Acquisitions
MNCs	Multi-National Corporations
MFN	Most-Favored-Nation
MDG	Millennium Development Goals
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement

NT	National Treatment
NGO	Non-governmental Organization
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
REC	Regional Economic Community
SADC	South African Development Community
SIA	Social Impact Assessment
SDGs	Sustainable Development Goals
TIP	Treaties with Investment Provision
TRIMs	Trade-Related Investment Measures Agreement
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

Executive Summary

This study is an investigation of the bilateral investment treaties (BITs) involving Member States of the East African Community (EAC) – the Republics of Burundi ("Burundi"), Kenya, Rwanda, South Sudan, the United Republic of Tanzania ("Tanzania"), and the Republic of Uganda ("Uganda"). The study is carried out against the backdrop of the legitimacy crisis in international investment law in general and specifically investment treaty arbitration that exposes countries to considerable political, diplomatic, legal, financial and economic risks arising out of international trade or investment agreements.
Foreign investment plays a critical role as an engine of economic growth in EAC economies. However, there is a growing realization that international investment policies can encroach on national government policy space and can undermine sustainable development goals (SGDs). Consequently, while acknowledging that investment policies should provide legal certainty and protection to investors and their investments, there is a growing consensus that ultimately investment policies should be "aimed at fostering investment, consistent with the objectives of sustainable development and inclusive growth."[1]

The study examines the provisions of the BITs involving EAC countries and analyses the extent to which these agreements are designed to advance SDGs and achieve an overall balance of rights and obligations as between EAC Members and investors. EAC economies recognize the importance of investments for the growth and development of the EAC region and the need to promote an attractive investment climate and expand investments for long-term development. However, given international and regional commitments in areas such as human rights, environmental protection, and sustainable development, it is imperative that investment policies in the EAC states provide certainty and protection to investors, respect the regulatory space of host states, and take into account broader national goals, sustainable development objectives and priorities.

Key Findings

On International Investment Agreements

- Of the two main types of international investment agreements (IIAs) – BITs and treaties with investment provisions (TIPs) – EAC countries have consistently employed BITs. However, this is likely to change in the near future. Currently under active negotiation are the investment chapters of two important mega-regional agreements, the SADC-EAC-COMESA Tripartite Free Trade Area (TFTA) Agreement and the African Continental Free Trade Area (AfCFTA) Agreement.[2]

[1] G20 Guiding Principles for Global Investment Policymaking (2016) (hereinafter "G20 Guiding Principles").
[2] On May 30, 2019, the Agreement Establishing the African Continental Free Trade Area ("AfCFTA Agreement") went into effect. Signed in Kigali, Rwanda, on 21 March 2018, the AfCFTA is a mega-regional trade agreement between member states of the African Union. Agreement

- In terms of treaty partners, historically, EAC members concluded BITs primarily with developed countries. This is changing. In the past two decades, EAC Member States have been concluding BITs with more diverse treaty partners, including other countries in Africa as well as emerging market economies in the Middle East, Latin America and Asia.
- There is very little official record to shed light on the reasons EAC economies decided to conclude BITs in the first place or the negotiation history of individual BITs that have been concluded. While some countries negotiated BITs because economic partners demanded it of them, most concluded BITs to follow a perceived trend and because of the widely held belief that such agreements can help developing countries attract FDI and can contribute to sustainable development.

On Reviewing and Critiquing Bilateral Investment Treaties

- Three EAC economies (Burundi, Kenya and Uganda) have each developed a Model BIT.[3] However, there is no indication that any of these three economies negotiate BITs on the basis of their Model BIT or that their Model BITs ever served as the starting point for any BIT negotiation.
- As between the goals of liberalization, protection, promotion and sustainable development, BITs involving EAC states are primarily protective instruments in the sense that they are designed primarily to protect investors and their investments by imposing binding obligations on host states.
- BITs involving EAC countries are moderately liberalizing in the sense that although they contain liberalizing elements, they do not feature some of the liberalizing elements found in some recent agreements.
- BITs involving EAC members are indirectly promotional and facilitating. Although almost all the BITs examined contain provisions directing contracting parties to promote and encourage investment, they do not specify how investment is to be promoted and do not contain provisions specifically designed to promote investment cooperation or FDI flows.
- There is considerable degree of conformity in the core elements and provisions of the BITs involving EAC states, but significant differences also exist.
- Excluding the BITs that have been terminated, a significant number of BITs involving EAC countries (50%) are not in force meaning that they were signed but were never ratified. What to do with the growing stock of unratified BITs is an issue the EAC economies must address.

Establishing the African Continental Free Trade Area, available at < https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area > (hereinafter "AfCFTA Agreement").

[3] Burundi Model BIT (2002); Kenya Model BIT 2003; Uganda Model BIT (2003).

- Excluding the BITs that have been terminated, a significant number of BITs involving EAC members (approximately 70.8%) can be classified as "first generation" or "old-generation" agreements in the sense that they were concluded prior to 2000 long before current debates about IIA reform gained momentum; thereby containing provisions that are broad, vague, and imprecise. These do not adequately protect the regulatory space of host states, and do not strike an appropriate balance between the right of investors and those of host states. Indeed, most first generation BITs involving EAC states contain scant exceptions, exclusions, or reservations.
- A significant number of BITs involving EAC members (about 37.5%)) are with members of the European Union (EAC-EU BITs). Significantly, EAC-EU BITs are overwhelmingly old-generation agreements and most (85.2%) are in force. Figuring out what to do with the vast stock of outdated BITs that EAC states have with EU countries is an urgent issue that EAC members States must have to address.
- Overall, most BITs involving EAC states that are in force are concerned primarily with investment/investor protection and were not necessarily designed to support sustainable development. Moreover, most of the 'in force' BITs involving EAC countries do not appropriately balance the rights and responsibilities of states vis-à-vis those of foreign investors.

On the Emerging Best Practices of Bilateral Investment Treaties

- Most of the BITs involving EAC members are not the product of extended or serious negotiations and were not developed in a transparent manner with the opportunity for all stakeholders to participate. In most cases, the BITs were not subjected to necessary impact assessments, were signed without a real appreciation of their economic, social, and legal cost, and were not informed by national, regional and continental development goals or objectives.
- In international investment law rulemaking, EAC economies are "rule takers" rather than "rule givers." In most instances, EAC economies do not negotiate BITs on the basis of any model text, they willingly sign BITs that are based almost exclusively on the model BIT of negotiating partners, and they sign the agreements without conducting a critical assessment of potential impact of such agreements on national, regional and continental development goals.

On the Dispute Settlement Regime

- Over the years, the number of Investor State Dispute Settlement (ISDS) claims initiated against EAC states has grown steadily. To date, about twenty (20) ISDS cases have been initiated against EAC states and most were initiated based on a BIT. What is more, ISDS cases involving EAC countries implicate different sectors

and industries including, water supply, sewerage, waste management and remediation activities,[4] electric power,[5] mining and quarrying,[6] agriculture, forestry and fishing,[7] service and trade,[8] and oil and gas.[9]

- The BIT framework of EAC members suffer from fragmentation, overlap and incoherence. There is a lack of consistency as between the BITs of individual EAC states and as between those BITs and national development policies and strategies. Furthermore, EAC countries are discovering that BITs are not benign policy instruments and that they can have serious economic, financial and social implications for a host state.
- Unless addressed, the problem of fragmentation and incoherence in their international investment policy framework is likely to become even more unmanageable when the Investment Protocol of the Agreement Establishing the African Continental Free Trade Area (AfCFTA) becomes operational.[10]

On Reforms

- The good news is that some EAC member appear to have begun to undertake reform action in the pursuit of sustainable development oriented IIAs. The bad news is that the present approach to reform is haphazard, inconsistent, and ultimately counterproductive. New BITs with some reform elements co-exist uneasily with old-generation agreements that are in urgent need for reform. For EAC states, the stock of old-generation BITs far outnumbers the few recent, reform-oriented agreements that have been concluded in the last few years. Moreover, while some recent BITs involving EAC countries contain some reform elements, most are still considerably out of step with model BITs developed at the regional (EAC) and continental (Africa Union) level. Although novel and reform-oriented elements are beginning to appear in some recent agreements involving EAC Member States, most appear to be driven by other contracting parties and tend to follow the model BITs of negotiating partners.
- Despite the shortcomings in their respective BITs, no EAC members has conducted or is in the process of conducting a comprehensive review of their BIT framework. This is unfortunate as only a comprehensive BIT review will help each country identify the gaps in its BIT regime, assess the true costs and benefits of concluding IIAs, and assess the best approach to reform.

[4] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22).
[5] *WalAm Energy Inc. v. Republic of Kenya* (ICSID Case No. ARB/15/7).
[6] *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda* (ICSID Case No. ARB/18/21).
[7] *EcoDevelopment in Europe AB and EcoEnergy Africa AB v. United Republic of Tanzania* (ICSID Case No. ARB/17/33).
[8] *World Duty Free* Company *v* Republic of *Kenya* (ICSID Case No. Arb/00/7).
[9] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29).
[10] The Investment Protocol of the AfCFTA is not yet finalized. Article 7 of the AFCFTA Agreement stipulates that Member States "shall enter into Phase II negotiations in the following areas: (a) intellectual property rights; (b) investment; and (c) competition policy" and that negotiations "shall … be undertaken in successive rounds." African Union Ministers of Trade have been directed to conclude the negotiations on the Protocols on Investment and other outstanding instruments and to submit the draft legal texts for adoption by January 2021. Decision on the African Continental Free Trade Area, Doc.Assembly/AU/4(XXXII), Assembly/AU/Dec.714(XXXII). 32nd Ordinary Session of the Assembly, 10- 11 February 2019, Addis Ababa, Ethiopia.

On the need to Review IIAs and BITs

- A thorough, multi-level and comprehensive review of the substantive provisions of all BITs involving EAC states is highly recommended.
- A thorough review of the ISDS provisions of all in force BITs and all known ISDS cases involving EAC countries is also highly recommended. A review of past ISDS cases involving EAC members will help countries; assess the costs and benefits of ISDS; identify existing risks and vulnerabilities; develop reform proposals; and determine how best to respond to the legitimacy crisis in international investment arbitration.
- Until the necessary reviews are carried out, it is recommended that EAC members observe a timeout and 'pause' negotiating and concluding new IIAs.
- A comprehensive, holistic, strategic, multi-level IIA reform is recommended for each EAC state and for the region. Instead of suggesting policy options, the report offers a range of options based on the evolving best practices of States.

RECOMMENDATIONS

- In line with the recommendations of the United Nations Conference on Trade and Development (UNCTAD), reform should aim at (i) safeguarding the right to regulate in the public interest while providing protection; (ii) reforming investment dispute settlement; (iii) promoting and facilitating investment; (iv) ensuring responsible investment; and (v) enhancing the systemic reliability so as to overcome inconsistencies and establish coherence in investment relationships.[11]
- Although most BITs involving EAC countries are in need of reform, some categories of BITs deserve more urgent attention than others. Altogether, four categories of BITs require the urgent attention of EAC members: (i) BITs between EAC states and other African countries; (ii) BITs between EAC countries and members of the European Union (EAC-EU BITs); (iii) unratified BITs involving EAC states; and (iv) old-generation BITs involving EAC countries. Attention to these categories of BITs will go a long way towards eliminating and/or reforming existing "high risk" agreements and promoting coherence in the BIT regime of EAC members.
- Whatever reform paths and options EAC states choose, it is important that reform is driven by some agreed guidelines. In this regard, the six guidelines for IIA reform proposed by UNCTAD merits serious consideration: (i) harness IIAs for sustainable development; (ii) focus on critical reform areas; (iii) act at all levels; (iv) sequence properly for concrete solutions; (v) ensure an inclusive and transparent reform process; (vi) strengthen the multilateral supportive structure.

[11] See generally, United Nations Conference on Trade and Development, UNCTAD's Reform Package for the International Investment Regime (2018). See also, UNCTAD, 'Investment Policy Framework for Sustainable Development' (2015) (hereinafter "IPFSD 2015').

- International cooperation is needed to help least developed countries (LDCs) establish effective, balanced, and transparent investment policies that are consistent with the objectives of sustainable development and inclusive growth. In line with the G20 Guiding Principles on Global Investment Policymaking, this report calls on the international community to proactively support IIA reform efforts in LDCs and other developing countries.
- Beyond IIA reform, international cooperation is needed to foster an enabling international economic environment that is supportive of nationally owned sustainable development strategies. Global partnership for sustainable development in line with the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, requires that the international community promote a coherent and mutually supporting world trade, monetary, and financial system. It should also substantially reduce illicit financial flows, scale up international tax cooperation, promote responsible business and investing, while strengthening the mechanisms for compliance.

Overview

This report is divided into four sections with a total of 8 Chapters. Section 1 comprises on one chapter that introduces the frameworks and issues of IIAs in East Africa. It presents the scope, significance, queries of investigation, methodology and limitations of the study. It further introduces the discussions surrounding IIAs and BITs plus the existing investment policy framework in East Africa. Lastly it examines the significant regional development issues in the region. Section 2 consists of 3 chapters delving into understanding IIAs in the East Africa. It does this by reviewing BITs in the EAC in Chapter 2, critiquing them in Chapter 3 and presenting the evolution of best practices within the international investment policy space in Chapter 4. Chapter 5, 6 and 7 are part of Section 3 which explores the dispute settlement regime by examining the EAC in relation to the ISDS system; the question on reform and the special considerations that need to be prioritised in reforming East African investment treaties. Concluding thoughts are offered in Chapter 8 while study findings and recommendations are summarised in Chapter 1,2,4,5,6,7 and 8.

SECTION ONE:
THE FRAMEWORKS AND ISSUES OF INTERNATIONAL INVESTMENT AGREEMENTS IN EAST AFRICA

CHAPTER 1: INTRODUCTION

This study is an examination into Bilateral Investment Treaties (BITs) within the framework of International Investment Agreements (IIAs) involving countries of the East African Community (EAC).[12] The research is carried out against the backdrop of a legitimacy crisis in international investment law in general, but more specific in investment treaty arbitration that exposes countries to considerable political, diplomatic, legal, financial and economic risks arising out of international trade or investment agreements. Foreign investment plays a critical role as an engine of economic growth in EAC economies. However, there is a growing realization that international investment policies such as BITs can encroach on national government policy space and can undermine sustainable development goals (SDGs).

Consequently, while acknowledging that investment policies should provide legal certainty plus protection to investors and their investments, there is a growing consensus that ultimately investment policies should be "aimed at fostering investment, consistent with objectives of inclusive growth."[13] This study examines the provisions of BITs involving EAC members and analyses the extent to which these agreements are designed to advance SDGs. This will help to understand whether current BITs help achieve an overall balance of rights and/**or** obligations between EAC states and investors. EAC economies recognise the importance of investments for the growth and development of the EAC region. They also recognise the need to promote an attractive investment climate for expanded investments aimed at long-term development. Given international and regional commitments in areas such as human rights, environmental protection, or development, it is important that investment policies in the EAC countries provide certainty and protection to investors. However, it is also imperative that there is a respect for the regulatory space of host states, that considers national or even broader development priorities.

Scope of the Study

This study aims to:

a) Analyse legal and policy frameworks for Foreign Direct Investment (FDI) in the EAC focusing on regional and international investment policy instruments;

---

[12] The EAC is a regional intergovernmental organisation made up of six partner states comprising of the Republics of Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, and the Republic of Uganda, See EAC (East African Community), *Overview of EAC*, available at: https://www.eac.int/overview-of-eac

[13] G20 Guiding Principles for Global Investment Policymaking (2016) (hereinafter "G20 Guiding Principles").

b) Identify all publicly available Investor-State Dispute Settlement (ISDS) cases involving EAC members;
c) Identify gaps and problems in the international investment policy framework of EAC states;
d) Identify cross-cutting issues plus other matters related to investment that deserve further research or future examination;
e) Propose key policy recommendations in terms of a balanced international investment policy framework for the EAC; and
f) Provide policy guidance on how EAC countries could contribute to improving the investment climate, thereby levelling the playing field for a wider range of players.

Although extremely important to current discourses, this study does not: conduct a detailed review of the ISDS or the participation of EAC members in this system;[14] assess ISDS cases involving EAC members;[15] study the domestic investment policy measures of individual EAC states; examine on-going negotiations relating to investment liberalization and protection within the context of the African Continental Free Trade Area (AfCFTA) Agreement; or interrogate double-taxation treaties involving EAC members, due to resource constraints in carrying out the research.

Significance of the Study

It is hoped that the findings of the study will contribute towards national, regional, continental and global debate about international investment policy in general and IIA reform. It is also anticipated that the findings of the study will contribute towards efforts to achieve a balanced international investment law regime in the EAC region. This study will help clarify discussions on steps that EAC states must take to better harness investment for sustainable development.

The purpose of this report is, therefore, to help improve knowledge of the normative framework of policies related to international investment in the members states of the EAC. It is also aimed at making pertinent recommendations related to investment facilitation, promotion, protection, and investor responsibilities. It focuses on studying IIAs, particularly BITs, involving EAC members with the hope that its recommendations will stimulate further public debates regarding the costs and benefits of BITs in the EAC and will inform public authorities in the region on further actions at legal, policy and implementation level. This is in order to ensure an effective international investment policy framework that is in line with national, regional and continental visions, that have SDGs at the core, in the evolution of best practices.

[14] Uche Ewelukwa Ofodile, *Africa and the System of Investor-State Dispute Settlement: To Reject or Not to Reject?* TRANSNATIONAL DISPUTE MANAGEMENT, VOL. 1 (2014).

[15] Uche Ewelukwa Ofodile, *Africa and International Arbitration: From Accommodation and Acceptance to Active Engagement* in DEALING WITH DIVERSITY IN INTERNATIONAL ARBITRATION (L. Barrington, and R. Rana eds.; Transnational Dispute Management (2015)).

Research Questions

This study addressed four key questions, namely:

a) What rights and protection do BITs involving EAC countries afford investors;
b) Are BITs involving EAC members designed with a view to adequately safeguard the domestic policy space and promote SDGs or objectives;
c) Do BITs involving EAC states strike a fair balance between investor rights and investor responsibilities; and
d) Is there need for reform, if so, what reform options should EAC countries consider?

Methodology

The study involved a desk based research in addition to an analysis of: available literature; all relevant regional instruments and initiatives that shape FDI in the EAC; relevant continental (African) investment treaties and initiatives; all IIAs treaties that EAC members have concluded; and more than 50 additional IIAs that highlight the evolving best practices on IIA reform.

Limitations of the study

The study focuses primarily on BITs that are publicly available and are in force. The first important limitation to this study is that not all BITs involving EAC countries are publicly available. Unlike most developed countries or a growing number of emerging market economies, African governments do not routinely publish their trade and investment treaties, neither do they make them accessible to the public in any way. Unfortunately, much secrecy still surrounds the trade and investment treaty framework of most countries in Africa. Another limitation to this study is the fact that the *travaux préparatoires* for all the treaties reviewed are either non-existent or are not publicly available and cannot be located. Considering that most of the BITs involving EAC states are old-generation agreements concluded prior to 2010, *travaux préparatoires* would have helped to shed important light on the subject, purpose of these agreements, the negotiation posture and strategies of EAC countries.[16]

International Investment Agreements and Bilateral Investment Treaties

According to International Institute for Sustainable Development (IISD), International Investment Agreements (IIAs) are treaties intended to protect investments of foreign entities in countries hosting the investment ("the host state").[17] This involves issues such as cross-border investments, usually for the purpose of their protection, promotion, and

[16] The *travaux préparatoires* ("preparatory works") are the official record of a negotiation. *Travaux* can play an important role in treaty interpretation. Article 32 of the Vienna Convention on the Law of Treaties (VCLT). See Vienna Convention on the Law of Treaties (entered into force 27 January 1980) (1155 U.N.T.S. 331, 8 I.L.M. 679).

[17] https://www.iisd.org/sites/default/files/publications/best_practices_bulletin_1.pdf

liberalization of markets in which forms of capital or other resources are introduced. IIAs further set out measures in place for resolution of disputes should these commitments not be met.

The United Nations Conference on Trade and Development (UNCTAD) recognises that IIAs take place at a: bilateral; regional or plurilateral; and multilateral level. This is in the form of Bilateral Investment Treaties (BITs) or Preferential Trade Agreements (PTAs). Other treaties also considered as a form of IIA are International Taxation Treaties and Double Taxation Agreements (DTAs) because of the significant impact taxation has on foreign investment. By some accounts more than 2500 IIAs now exist, a "great majority having been concluded since 1990." According to Kenneth J. Vandevelde this figure includes almost 2400 BITs as well as more than 200 trade agreements with investment provisions.[18] This position tallies with UNCTADs assessment that more than 2,300 BITs have been concluded since the early 1960s, most of them in the decade of the 1990s.[19]
Unlike PTAs which are treaties between countries that have an exclusive cooperation on economic and trade matters BITs seem to be a highly regarded form of IIAs because they offer specific guarantees for investments by entities (enterprises or individuals) from one country in the territory of another that is its treaty partner via a signed BIT. This is because of their primary focus on FDI establishment, promotion and protection from issues such as nationalization or expropriation plus the need for assurances on the free transfer of funds. It is also because BITs guarantee provisions for dispute-settlement mechanisms between investors and host States that makes BITs one of the most popular forms of IIAs.

The Development Dimension of IIAs and the Need for Flexibility

In considering current trends concerning IIAs, it is important to pay attention to their impact on development. To begin with, it is by now generally accepted that host countries can derive considerable benefits from increased FDI.[20] Thus, when concluding IIAs, developing countries face a basic challenge: how to link the goal of creating an appropriate stable, predictable and transparent FDI policy framework that enables firms to advance their corporate objectives on the one hand, with that of retaining a margin of freedom necessary to pursue their national development objectives, on the other.
A discussion on the flexibility in IIAs can be approached from four main angles, namely:

1. Objectives - IIAs often address development concerns by including in their text, usually in the preamble; a) declaratory statements referring to the promotion of development as a main objective of the agreement, b) specific ways by which to contribute to development objectives, c) a generally worded recognition of the

[18] Vandevelde, K.J., A Brief History of International Investment Agreements, U.C. Davis Journal of International Law & Policy, Vol. 12, No. 1, p. 157, 2005, http://ssrn.com/abstract=1478757
[19] UNCTAD IIA report
[20] UNCTAD, 1999a; see also the chapter on FDI and development in volume III

special needs of developing and/ or least developed country parties requiring flexibility in the operation of the obligations under the agreement.

2. Overall structure - Promotion of development can also be manifested in the very structure of IIAs. This is done through substantive provisions that balance rights and obligations within the content of an IIA. This begins with the choice's countries make about the issues they wish to include in an IIA, and those they wish to keep outside the scope of an agreement. Also, in the formulation of these substantive provisions, countries can retain some flexibility regarding the commitments they make by keeping in mind the various interactions between key issues and their applicability in provisions.
3. Modalities of application – Flexibility for development can also be exercised during the implementation stages of an IIA.
4. Resource capacity - Finally, in all this it is important to note the difficulties that many developing countries may experience in trying to apply an IIA, mainly due to lack of adequate skills and resources -financial or otherwise.

These are, therefore, some of the major considerations in the development of an investment instrument to provide for a certain flexibility in the interest of development.

Investment Policy Framework in East Africa

In order to understand the EAC investment policy framework in which BITs operate, one must understand the policy instruments in use and the pertinent development questions that have arisen within the region. In terms of relevant instruments, EAC countries operate within a regional, continental and global framework of treaties or diplomatic initiatives that somewhat overlap based on the context. Investment policy in the EAC region is then adopted and implemented against a backdrop of overarching national, regional, continental and global development goals, visions, and strategies.

Regional Investment Treaties and Initiatives

EAC countries are bound by the provisions of the EAC treaty relating to investment promotion, facilitation and protection. As members of Common Market for Eastern and Southern Africa (COMESA) and the South African Development Community (SADC), some EAC members are also bound by the provisions of the COMESA Treaty[21] and SADC Treaty.[22] Furthermore, most Regional Economic Communities (RECs) in Africa have adopted investment policy instruments. Pertinent to this study are several policy instruments as shown in Table 1.

[21] Treaty Establishing the Common Market for Eastern and Southern Africa, available at < https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012_with-zaire_final.pdf >

[22] Treaty of the South African Development community (1992), available at < https://www.sadc.int/index.php/documents-publications/sadc-treaty?&sortBy=35&pageSize=4&doc_q_0=&filterByKey=&filterByVal=&page=1>

Table 1: Regional Investment Treaties and Initiatives

TREATY	APPLICATION	NOTE
The East African Model Investment Code 2006 (EAC Investment Code)	All EAC members.[23]	In 2006, the EAC adopted its first model investment code. The EAC Investment Code is a soft law instrument and, thus, is not binding on EAC countries.
The EAC Model Investment Treaty 2016 (2016 EAC Model Investment Treaty)	All EAC members.	In 2016, acting pursuant to directives of the Sectoral Council on Trade, Industry, Finance and Investment, the EAC adopted a new model investment treaty. The 2016 EAC Model Investment Treaty is also not binding on EAC members.
The Community Investment Code of the Economic Community of the Great Lakes Countries (CEPGL)	Rwanda and Burundi.	The Community Investment Code of the Economic Community of the Great Lakes Countries was signed on 31 January 1982 and entered into force on 4 October 1987. It aims to define the guarantees, rights, obligations plus advantages of joint enterprises and Community enterprises together with the obligations of the states of the Community vis-à-vis such enterprises.
The Investment Agreement for the COMESA Common Investment Area (CCIA Agreement)	Burundi, Kenya, Rwanda, and Uganda.	The Investment Agreement for the COMESA Common Investment Area (CCIA Investment Agreement) was signed on 23 May 2007. According to Article 2, the aim of the agreement is "to establish a competitive COMESA Common Investment Area with a more liberal and transparent investment environment among countries." In 2017, a revised CCIA Investment Agreement was tabled before the COMESA policy making bodies and is yet to be formally adopted. The CCIA Investment Agreement is not in force.
The South African Development Community (SADC) Investment Protocol	Tanzania.	Launched in 2012, the SADC Model BIT Template was developed to promote harmonization of the Member States' investment policies and laws. The SADC Model BIT Template was not intended to be and is not a legally binding document. Its purpose is to "provide advice to governments that they may consider in any future negotiations they enter into relating to an investment treaty" and to "provide an educational tool for officials and may serve as the basis of training sessions for SADC government officials."[24]

[23] EAC Model Investment Treaty (May 2016), https://www.eac.int/documents/category/key-documents Retrieved May 15, 2019.
[24] "Introduction" South African Development Community Model BIT Template (2012).

Currently under negotiation is the investment chapter of the Agreement Establishing a Tripartite Free Trade Area among the COMESA, EAC and SADC (the TFTA Agreement). The COMESA-EAC-SADC Tripartite Free Trade Area was officially launched on June 10, 2015 and covers 27 member states across three RECs. All EAC countries (except South Sudan) have signed the *Sharm El Sheikh Declaration Launching the COMESA-EAC-SADC Tripartite Free Trade Area.*[25] Four EAC states – Burundi, Kenya, Tanzania, and Uganda – have signed the TFTA Agreement but only Kenya has signed and ratified the agreement. The TFTA Agreement is yet to garner the 14 ratifications it needs to enter into force.[26]

The National Strategies- Within the regional context the SDGs, national objectives, and agenda of EAC partner states are shaped by their respective medium-term national development frameworks which are characterised by their respective 'National Vision' and their corresponding 'National Development Plans or Strategies.' Each EAC countries has developed its own unique national development strategy as shown below in Table 2.

Table 2: EAC Members National Development Visions and Strategies

COUNTRY	Burundi	Kenya	Rwanda	South Sudan	Tanzania	Uganda
Development Target	Vision 2025[27]	Vision 2030[28]	Vision 2020[29]	Vision 2040[30]	Vision 2025[31]	Vision 2040[32]

Continental Investment Treaties and Policy Initiatives

The Draft Pan-African Investment Code (PAIC) - In 2016, the Draft Pan-African Investment Code ("Draft Pan-African Investment Code" or "PAIC") was released.[33] Developed within the framework of the African Union, the goal of PAIC is "to promote, facilitate and protect investments that foster the sustainable development of each member state, and in particular, the country where the investment is located."[34] PAIC defines the rights and obligations of countries as well as investors.

The PAIC is not binding. Article 2(1) states that it "shall apply as a guiding instrument to Member States as well as investors." Article 3 provides that the PAIC "does not affect

[25] Twenty four of the 27 Member States have signed the Sharm El Sheikh Declaration Launching the COMESA-EAC-SADC Tripartite Free Trade Area.
[26] The Agreement requires 14 ratifications to enter into force. To date, four countries have both signed and ratified the Agreement: Kenya, Egypt, Uganda, and South Africa.
[27] 'Vision Burundi 2025', https://www.undp.org/content/dam/burundi/docs/publications/UNDP-bi-vision-burundi-2025_complete_EN.pdf
[28] Republic of Kenya, Kenya Vision 2030, at < https://theredddesk.org/sites/default/files/vision_2030_brochure__july_2007.pdf>; See also, 'About Vision 2030, available at < https://vision2030.go.ke/about-vision-2030/ >
[29] Vision 2020, Revised 2012 Edition: http://www.minecofin.gov.rw/fileadmin/templates/documents/NDPR/Vision_2020_.pdf
[30] South Sudan Vision 2040: Towards Freedom, Equality, Justice, Peace and Prosperity for All, < https://www.southsudanhealth.info/PublicData/Library/Policy_Documents/South%20Sudan%20Vision%202040.pdf>
[31] The Tanzania Development Vision 2025, < http://www.mof.go.tz/mofdocs/overarch/vision2025.htm>
[32] Uganda Vision 2040, http://npa.go.ug/wp-content/themes/npatheme/documents/vision2040.pdf
[33] United Nations, Economic and Social Council and the African Union, Draft Pan-African Investment Code, E/ECA/COE/35/18, AU/STC/FMEPI/EXP/18(II), 26 March 2016.
[34] Id., Article 1.

rights and obligations of Member States deriving from any existing investment agreement." Although not binding, it is expected that states "shall take into account as far as possible the provisions of the PAIC when entering into any new agreement with a third country in order to avoid any conflict between their present or future obligations under the PAIC, and their obligations in other agreements."[35]

The Investment Protocol of the Africa Continental Free Trade Area (AfCTFA) Agreement - On May 30, 2019, the Agreement establishing the Africa Continental Free Trade Area (AfCFTA Agreement) entered into force.[36] Signed on 21 March 2018, the AfCFTA is a mega-regional trade agreement that creates a pan-African trade bloc that has the potential to unite 1.2 billion people and create a USD 3.4 trillion economic area. The unified AfCFTA market was launched on July 7, 2019.

Article 6 of the AfCFTA Agreement stipulates that the agreement "shall cover trade in goods, trade in services, investment, intellectual property rights and competition policy." The Investment Protocol of the AfCFTA agreement is not yet finalized, however. The AfCFTA negotiations are occurring in phases. Phase I of negotiations produced four legal instruments: the AfCFTA Agreement, the Protocol on Trade in Goods, the Protocol on Trade in Services, and the Protocol on Rules and Procedures on the Settlement of Disputes ("Protocol on the Settlement of Disputes").

Article 7 of the AfCFTA Agreement stipulates that countries "shall enter into Phase II negotiations in the following areas: (a) intellectual property rights; (b) investment; and (c) competition policy." When in force, the Protocol on Investment shall form an integral part of the AfCFTA Agreement and form part of the single undertaking. AU Ministers of Trade have been directed to conclude negotiations on outstanding instruments and submit the draft legal texts for adoption by January 2021.[37] All EAC members have signed the AfCFTA Agreement but only Kenya, Rwanda and Uganda have ratified the agreement.

The Continental Strategy – As one of the pillars of the African Union (AU) the EAC's priorities for development are shaped by the visions and goals articulated in continental instruments such as the AU 'Agenda 2063' which is the continent's strategic framework for sustainable development.[38] The vision of Agenda 2063 is that of "an integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the international arena."[39] Agenda 2063

[35] Id., Article 3(2).
[36] The 24 countries that have ratified the AfCFTA Agreement are: Ghana, Kenya, Rwanda, Niger, Chad, Congo Republic, Djibouti, Guinea, eSwatini (former Swaziland), Mali, Mauritania, Namibia, South Africa, Uganda, Ivory Coast (Côte d'Ivoire), Senegal, Togo, Egypt, Ethiopia, The Gambia, Sierra Leone, Saharawi Republic, Zimbabwe, and Burkina Faso.
[37] African Union, Decision on the African Continental Free Trade Area, Assembly/AU/Dec.714(XXXII), adopted at the 32nd Ordinary Session of the Assembly, 10- 11 February 2019, Addis Ababa, Ethiopia.
[38] Agenda 2063: The Africa We Want. https://www.un.org/en/africa/osaa/pdf/au/agenda2063.pdf
[39] Id.

encapsulates Africa's aspiration for the future. Among the 'Aspirations' of Agenda 2063 are: 'A prosperous Africa based on inclusive growth and sustainable development,' (Aspiration 1), 'An Africa of good governance, democracy, respect for human rights, justice and the rule of law' (Aspiration 3); and, 'An Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children' (Aspiration 6).

Multilateral Treaties on Investment

There is presently no comprehensive multilateral instrument on FDI. However, several multilateral treaties deal with aspects of FDI and shape the investment policy of EAC countries. All EAC economies have ratified at least one of the major multilateral instruments on investment as shown in Table 3.

Table 3: Ratification of Multilateral Treaties Relating to Investment by EAC Member States

TREATY	NOTE	Burundi	Kenya	Rwanda	South Sudan	Tanzania	Uganda
The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).	Five EAC Member States have ratified the New York Convention.	✓	✓	✓	X	✓	✓
The 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[40]	All EAC Member States have ratified the ICSID Convention.	✓	✓	✓	✓	✓	✓
The 1985 Convention Establishing the Multilateral Investment Guarantee Agency (MIGA Convention).[41]	All six EAC Member States are members of MIGA.	✓	✓	✓	✓	✓	✓

[40] International Centre for the Settlement of Investment Disputes, 'Database of ICSID Member States.' Available at: https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx

[41] Multilateral Investment Guarantee Agency, 'About Member Countries,' https://www.miga.org/member-countries

The General Agreement of Trade in Services (GATS).	The GATs is binding on the five EAC Member States that are members of the World Trade Organization.42	✓	✓	✓	X	✓	✓
Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).	The TRIPS Agreement is binding on five EAC Member States that are members of the World Trade Organization.	✓	✓	✓	X	✓	✓
The Trade-Related Investment Measures (TRIMS) Agreement (1995).	The TRIMS Agreement is binding on five EAC Member States that are members of the World Trade Organization.	✓	✓	✓	X	✓	✓
The 2014 Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention on Transparency).[43]	No EAC Member State has signed or ratified the Mauritius Convention on Transparency.	X	X	X	X	X	X

Source: Author Compilation

Other Relevant International and Regional Instruments

All EAC countries are members of the UN and the AU. As members of both organisations respectively, EAC members are bound by a host of regional and multilateral instruments in areas such as human rights, environment, and governance including as shown in Table 4.

[42] Presently, five EAC Member States are members of the World Trade Organization: Burundi, Kenya, Rwanda, Tanzania and Uganda.
[43] The treaty was adopted on December 10, 2014, by United Nations General Assembly resolution 69/116 during the sixty-ninth session of the General Assembly.

Table 4: Binding International and Regional Instruments

TREATY	APPLICATION
The African Charter on Human and Peoples' Rights	Binding on all EAC Member States except South Sudan.[44]
The International Covenant on Civil and Political Rights	Binding on all EAC Member States except South Sudan.
The International Covenant on Economic, Social and Cultural Rights	Binding on all EAC Member States except South Sudan.
The Convention on the Elimination of All forms of Discrimination Against Women	Binding on all EAC Member States
Convention on Biological Diversity	Binding on all EAC Member States
Cartagena Protocol on Biosafety	Binding on all EAC Member States except South Sudan.
The Vienna Convention for the Protection of the Ozone Layer	Binding on all EAC Member States
Montreal Protocol on Substances that Deplete the Ozone Layer	Binding on all EAC Member States.

A host of other "soft law" instruments also shape the actions of EAC members and need to be reflected in the investment policy of member states. Soft law instruments relevant to the investment policy include:

- Universal Declaration on Human Rights (1948);
- UN Code of Conduct on Transnational Corporations (1983);
- UN Guiding Principles on Business and Human Rights (2011);
- ILO Tripartite Declaration on Multinational Enterprises (2011);
- World Bank Investment Guidelines (1992);
- UN Resolution General Assembly Resolution 3201 (S-VI): New International Economic Order (1974);
- UN General Assembly Resolution 3281 (XXIX): Charter of Economic Rights and Duties of State (1974);
- UN General Assembly Resolution 1803 (XVII): Permanent Sovereignty over Natural Resources (1972); and
- G20 Guiding Principles for Global Investment Policymaking (2016).

The above-listed policy instruments are important because they provide useful context against which states must develop their investment policies. It is increasingly recognized that although economic agreements create economic opportunities for states, they frequently affect the domestic policy space of governments. Increasingly, therefore,

[44] Burundi ratified the African Charter on Human and Peoples' Rights in 1989, Kenya in 1992, Rwanda in 1983, Tanzania in 1984, and Uganda in 1986.

states are urged to maintain adequate policy space in the trade and investment agreements that they conclude. According to the *UN Guiding Principles on Business and Human Rights*: "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts" (Principle 9). In the *G20 Guiding Principles on Global Investment Policymaking*, G20 Trade Ministers "reaffirm the right to regulate investment for legitimate public policy purposes."[45] Furthermore, G20 Trade Ministers declare that "investment policies and other policies that impact on investment should be coherent at both the national and international levels and aimed at fostering investment, consistent with the objectives of sustainable development and inclusive growth."[46]

The Global Strategy- The EAC's priorities for development are anchored in multilateral instruments that collectively lay a solid foundation for sustainable development including the outcomes of the Third International Conference on Financing for Development,[47] (FfD) and the 2030 Agenda for Sustainable Development.[48] In the Addis Ababa Action Agenda adopted following the Third International FfD Conference, the Heads of State, Government and other High Representatives declared that their goal "is to end poverty and hunger and to achieve sustainable development in its three dimensions through promoting inclusive economic growth, protecting the environment and promoting social inclusion."[49]

They also agreed to "promote peaceful and inclusive societies and advance fully towards an equitable global economic system in which no country or person is left behind, enabling decent work and productive livelihoods for all, while preserving the planet for our children and future generations."[50] The vision espoused in the 2030 Agenda for Sustainable Development is that of a world in which "every country enjoys sustained, inclusive and sustainable economic growth"[51] and "consumption and production patterns and use of all natural resources - from air to land, from rivers, lakes and aquifers to oceans and seas - are sustainable."[52]

In the 2030 Agenda for Sustainable Development, UN member states reaffirmed that "each country has a primary responsibility for its own economic and social development." While noting that "public finance, both domestic and international, will play a vital role in

[45] *G20 Guiding Principles on Global Investment Policymaking*, para. VI, available at: https://www.oecd.org/investment/g20-agrees-principles-for-global-investment-policymaking.htm

[46] Id., para. V.

[47] Resolution adopted by the General Assembly on 27 July 2015: Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda) (A/RES/69/313). https://undocs.org/A/RES/69/313

[48] United Nations, Transforming Our World: The 2030 Agenda for Sustainable Development, A/Res/70/1, available at < https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf > (hereinafter "The 2030 Agenda for Sustainable Development").

[49] Id., para. 1.

[50] Id., para. 1.

[51] Id., para. 9.

[52] Id.

providing essential services and public goods and in catalysing other sources of finance", the UN acknowledged "the role of the diverse private sector, ranging from micro-enterprises to cooperatives to multinationals, … civil society organizations and philanthropic organizations in the implementation of the new Agenda."[53]

EAC members have consistently supported the outcomes of all other major UN conferences and summits that affirm the goals of sustainable development. These include: *The World Summit on Sustainable Development*, the *World Summit for Social Development*, the *Fourth United Nations Conference on the Least Developed Countries*, the *Third International Conference on Small Island Developing States*, *The Second United Nations Conference on Landlocked Developing Countries*, and the *Third UN World Conference on Disaster Risk Reduction*.

Significant Regional Development Issues

In relation to the important development questions of the time the EAC is concerned with the promotion of trade and investment; attraction of FDI; attainment of sustainable development and observance of the fundamental principles for regional integration.

Trade and Investment Promotion

Over the years investment promotion has become an important policy objective of the EAC. Among other objectives for its establishment under *The Treaty for the Establishment of the East African Community* (EAC Treaty),[54] this regional body, seeks "to develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields … for their mutual benefit."[55]

Further, to encourage industrial development, Article 80 of the EAC Treaty provides that EAC members shall take measures to inter alia "harmonise and rationalise investment incentives including those relating to taxation of industries particularly those that use local materials and labour with a view to promoting the Community as a single investment area."[56]This is not surprising considering that experts increasingly agree that investment builds and upgrades industries, connects domestic producers to international markets, supports the transfer of technology, drives essential innovations plus encouraging competitiveness.[57] Therefore, today, as attention turns to the role of IIAs in sustainable economic development together with the impact of FDI on human rights and the environment, policymaking on investment issues is experiencing a major paradigm shift.

---

[53] Id., para. 44.

[54] The Treaty for the Establishment of the East African Community (1999), Article 5(1). http://www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_Africa_Community_2006_1999.pdf

[55] As set forth in the EAC Treaty this is pursued through Co-operation in Investment and Industrial Development' as one of the areas of co-operation. See Chapter 12 (Article 79-80).

[56] Read Article 80(1)(f).

[57] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2018* (2018).

Domestically, investment policymaking is facing numerous challenges. Several critical questions are increasingly being asked including, how can: policies ensure promotion of inclusive growth and sustainable development for all; economies diversify to attract FDI in key sectors of the economy; investment policies ensure that human rights are not negatively impacted; corporate responsibility plus accountability be promoted; and policies be developed through a transparent, inclusive and participatory process. Conversely, on the international level, regions such as the EAC are asking questions on how they can: engage new partners in Asia, Latin America and the Middle East; preserve appropriate policy space for host states in IIAs; ensure that IIAs appropriately balance the rights and responsibilities of states vis-à-vis those of investors; ensure policy coherence; and address perceived deficiencies in IIAs.

Foreign Direct Investment in EAC Development

Upon their independence in the 1960s, many African countries embraced the idea that FDI was essential for their survival and that BITs were needed to attract foreign investment. Without fully assessing the impact of FDI on their development, and, given few alternatives sources of foreign financing, many countries in Africa have since independence encouraged FDI. While there were some FDI skeptics holding out in the region through the 1960s and 1970s, in the past three decades, skepticism has gradually given way to active encouragement of FDI. Also, over this period multinational corporations (MNCs), that "used to be seen as the emblem of dependency have now become some form of saviors in development."[58]

According to the World Bank, for many developing countries, FDI has become the largest source of external finance, surpassing official development assistance, remittances, or portfolio investment flows.[59] The United Nations Millennial Declaration explicitly calls for increased FDI to Africa as one of the ways to address the challenges of poverty eradication and sustainable development.[60] Also, many experts have come to believe that there are many benefits associated with FDI including; capital for development, technological know-how, access to foreign markets, and job creation. This is because FDI can play an important role "in upgrading growth and adding value to domestic firms, in filling the investment void in [fragile and conflict-affected situations], and more generally, in increasing competitiveness and stability".[61]

However, opponents of FDI are not so convinced. To critics, the effects of FDI are limited and, in some cases, are detrimental. They argue that developing countries are not always

---

[58] RODRIK, D. *The new global economy and developing countries: making openness work*. London: ODC, 1999.

[59] World Bank Group, Global Investment Competitiveness Report 2017/2018: Foreign Investor Perspectives and Policy Implications (2018).

[60] United Nations Millennium Declaration, General Assembly resolution 55/2 of 8 September 2000, para. 28.

[61] Anabel Gonzales, Christine Zhenwei Qiang and Peter Kesek, 'Overview' in 2017/2018 Global Investment Competitiveness Report (2018), p. 1.

able to attract FDI to the sectors where it is needed most, and that FDI has the potential to crowd out local competition, resulting in enclave production with limited linkages, entrenching or exacerbating divisions in the local polity, and engendering a "race to the bottom" in labor, human rights, or environment standards.[62] In each of the development strategies of EAC members, FDI features very prominently. The importance of FDI is emphasized in regional policy instruments such as the EAC Treaty and the 'EAC Vision 2050' which is the regional vision for socio-economic transformation and development.[63] Although EAC countries actively court FDI, many questions are still left unanswered.
For example, do MNCs encourage domestic investments or do they displace local producers by crowding them out of investment opportunities? Are domestic firms benefitting from the presence of MNCs in EAC economies? Are EAC states getting the most out of FDI? Are EAC economies maximizing the development impact of FDI? These questions and more are becoming increasingly important thereby demanding answers. All FDIs are not created equal – there are "good" and "bad" FDIs.[64] Given that there are different types of FDIs, each with different potential social, economic, and environmental effects, international investment policies must be developed in an open and transparent manner through the result of serious deliberation.

Given the importance of private investment in Africa, investment protection is widely acknowledged to be an important policy objective for all EAC economies. In Article 127 of the EAC Treaty (Creation of an Enabling Environment for the Private Sector and the Civil Society), EAC Partner States agree "to provide an enabling environment for the private sector and the civil society to take full advantage of the Community." EAC members therefore specifically undertake to improve the business environment through the promotion of conducive investment codes, the protection of property rights, other incentives and the proper regulation of the private sector.

Meanwhile, four members of the EAC (Burundi, Kenya, Rwanda, and Uganda) are also members of the COMESA, a free trade area with 21 African countries. One of the aims and objectives of COMESA is to "to co-operate in the creation of an enabling environment for foreign, cross border and domestic investment including the joint promotion of research and adaptation of science and technology for development."[65] EAC states have over the years developed regimes for investment promotion, liberalization, facilitation, and protection. All six EAC countries have established investment promotion agencies and have taken steps to strengthen these agencies. EAC

[62] AGOSIN, M. R.; MACHADO, R. FDI in developing countries: does it crowd in domestic investment. *Oxford Development Studies*, v. 33, n. 2, p. 149-162, 2005.
[63] East African Community, East African Community Vision 2050 (2015) (hereinafter 'EAC Vision 2050').
[64] Echandi, R., J. Krajcovicova, and C. Z. W. Qiang. 2015. "The Impact of Investment Policy in a Changing Global Economy: A Review of the Literature." Policy Research Working Paper 7437, World Bank, Washington, DC
[65] Treaty Establishing the Common Market for Eastern and Southern Africa, Article 3(c) ("COMESA Treaty").

countries are also actively establishing special economic zones (SEZs).[66] Most importantly, EAC states have concluded numerous treaties aimed at protecting foreign investors. Since the 1960s, EAC states have, in varying degrees, concluded BITs that afford foreign investors considerable rights and protection.

Table 5: EAC Members Investment Agencies

Country	Investment Promotion Authority
Burundi	The Burundi Investment Promotion Authority67
Kenya	The Kenya Investment Authority [68]
Rwanda	Rwanda Development Board[69]
Tanzania	The Tanzania Investment Centre [70]
Uganda	Uganda Investment Authority[71]
South Sudan	Southern Sudan Investment Authority72

Source: Author Compilation

Overview of FDI Inflows into the EAC

The EAC region boasts a combined Gross Domestic Product (GDP) of about USD 172 Billion.[73] Nonetheless, private capital flows to Africa in the form of FDI are growing. In 2018, FDI flows to Africa rose to USD 46 Billion (up from USD 41 Billion in 2017).[74] Although in the past much of the FDI flow to Africa was concentrated in the raw materials sector, the current wave of FDI flow to the region involves firms from more countries and targeting a lot more sectors. Eastern Africa[75] is reportedly the fastest-growing region on the continent. In 2018, FDI flows to Eastern Africa stood at USD 9 Billion. However, the FDI flow to the region is not evenly spread. The biggest FDI recipient is Ethiopia which is not an EAC member state. Of the USD 9 Billion FDI flows to the wider Eastern Africa region in 2018, USD 3.3 Billion went to Ethiopia alone. Of the USD 7.6 Billion that went to Eastern Africa in 2017, nearly half (USD 3.6 Billion) went to Ethiopia.[76] Measured by the value of inflow, none of the top five host economies in Africa is an EAC country. [77]

---

[66] See Kenya – The Special Economic Zones Act, 2015 (Kenya); Uganda – *Free Zones Act*, *2014* (No. 5 of *2014*); Rwanda – The SEZ Law N°05/2011 of 21/03/2011; Tanzania – The Export Processing Zone Act, No.11 of 2002 (EPZA); Burundi – The Legislative Decree 1/3. The latest amendments to the Act were adopted in 2001 with the law 1/015 and in 2002 with the Ministerial Order 750/649.

[67] http://www.comesaria.org/site/en/burundi-investment-promotion-agency-api.52.html

[68] http://invest.go.ke/.

[69] https://rdb.rw/

[70] http://www.tic.co.tz/

[71] https://www.ugandainvest.go.ug/

[72] The Southern Sudan Investment Authority (SSIA) is a corporate body established under the Investment Promotion Act 2009 to promote investment in South Sudan.

[73] Id.

[74] United Nations Conference on Trade and Development, World Investment Report 2019 (2019).

[75] Define Eastern Africa can also be defined as the Greater Horn of Eastern Africa Region comprising the part of the Great Lakes and Horn of Africa which includes Burundi, DR Congo, Eritrea, Ethiopia, Kenya, Puntland, Rwanda, Somalia, Somaliland, Sudan, Tanzania, and Uganda.

[76] United Nations Conference on Trade and Development, World Investment Report 2018 (2018).

[77] In 2017, the top five host economies in Africa were: Egypt (USD7.4bn), Ethiopia (USD3.6bn), Nigeria (USD3.5bn), Morocco ($2.7bn), and Ghana ($3.3bn).

Table 6: EAC Members FDI In-Flows by Economy, 2012-2018 (USD Millions)

Country	2012	2013	2014	2015	2016	2017	2018
Burundi	1	7	47	7	0.1	0.3	1
Kenya	1,380	1,119	821	620	681	1.275	1.6
Rwanda	255	258	459	380	342	356	398
South Sudan	1.61	-793	44	-71	-17	80	191
Tanzania	1 800	2 087	1 416	1 561	864	938	1.1
Uganda	1,205	1,096	1,059	738	626	803	1.3

Source: World Investment Report 2019

The increase in FDI flows to Africa in 2018 was primarily due to the continuation of resource-seeking investments, and slowly expanding diversified investment in a few economies, according to UNCTAD.[78] Kenya, Tanzania, and Uganda, all saw increases in FDI in flow in 2018. In 2018, FDI flows to Kenya increased by 27% to USD 1.6 Billion and "were received in diverse industries including manufacturing, chemicals, hospitality, and oil and gas."[79] FDI flows to Tanzania increased by 18% in 2018 to USD 1.1 Billion. In 2018, FDI flows to Uganda rose by 67% to reach USD1.3 Billion, a historic high for the country.[80] According to UNCTAD, investments in the oil and gas sector accounts for much of the increased investment flow to Uganda in 2018. In Uganda, "the development of the country's oil fields, led by a consortium made up of Total (France), CNOOC (China) and Tullow Oil (United Kingdom), is gaining momentum."[81] It is predicted that "plans to ramp up investment in upstream and downstream oil facilities could drive FDI flows to Uganda significantly higher in the next few years."[82] according to UNCTAD.[83]

Table No. 3: EAC Member States: FDI Outflow by Economy, 2012–2017 (Millions of dollars)

Table 7: EAC Members FDI Outflow by Economy, 2012-2017 (USD Millions)

Country	2012	2013	2014	2015	2016	2017
Burundi	-	-	-	0.2	-	-
Kenya	-	199	75	242	157	257
Rwanda	-	14	2	-	16	18
South Sudan	-	-	-	-	-	-
Tanzania	-	-	-	-	-	-
Uganda	46	-47	27	0.3	0.2	0.3

Source: World Investment Report 2019

FDI flows to Africa is increasingly diversified in terms of both sectors and countries of origin. MNCs from emerging market economies are becoming increasingly very active in the continent. However, despite the increased role of emerging market multinationals in

[78] UNCTAD, World Investment Report 2019 (2019), p 3.
[79] Id., p. 37.
[80] Id.
[81] Id.
[82] Id.
[83] Id. p. 37-38.

Africa, investors from developed economies remain the top investors in the continent. Between 2011 and 2016, the top ten investors in Africa were: (1) United States (U.S.); (2) United Kingdom ("U.K."); (3) France; (4) China; (5) South Africa; (6) Italy; (7) Singapore; (8) India; (9) Hong Kong, China; (10) Switzerland. In 2017, the US remained the largest investor on the continent with growth in FDI projects, while Western Europe's FDI projects in the continent rose by 17 percent. Significantly, in 2017, Asia-Pacific investment in Africa fell by 13%. Intra-regional investment also fell by 12%. EAC countries are not alone when it comes to efforts by states to attract and maintain FDI. Indeed, many countries, particularly LDCs, face intense pressure on their investment policies because of increased global competition for FDI.

According to the World Investment Report 2019, FDI to LDCs "will remain concentrated in larger FDI recipients and in a few sectors."[84] What is more, landlocked developing countries (LLDC) consistently struggle to attract diversified FDI in a sustained manner.[85] The pressure on states to attract investment is likely to intensify given decline in global FDI flows. In 2018, global FDI flows fell by 13% to USD1.3 Trillion.[86] Although FDI flows to Africa rose by 11% to USD46 Billion, many of the larger recipient countries in the region saw declines in their FDI inflows. As in prior years, in 2018, countries in Africa attracted significantly less FDI as compared to countries in Asia (USD 512 Billion in 2018) or Latin America and the Caribbean (USD 151 Billion in 2018). China attracted more FDI in 2018 (USD 139 Billion) than the all the countries in Africa put together.

Table 8: FDI Inflows, by Region, 2012-2017 (USD Millions)

Region	2013	2014	2015	2016	2017	2018
Africa	50 075	53906	56 874	46482	41 390	$46
Asia	415 405	459 982	514 424	473 325	492 713	$512
Latin America and the Caribbean	184 392	161 205	155 912	135 349	155 405	$147

Source: World Investment Report 2019

Sustainable Development in the EAC Region

Sustainable development is an important policy objective for EAC countries; therefore, it is emphasized in regional and continental policy instruments. Article 5(3) of the EAC Treaty stipulates that the Community shall ensure *inter alia* "the attainment of sustainable growth and development of the Partner States by the promotion of a more balanced and harmonious development of the Partner States", "the promotion of sustainable utilisation of the natural resources of the Partner States, and the taking of measures that would effectively protect the natural environment of the Partner States."
Also, "the mainstreaming of gender in all its endeavours and the enhancement of the role of women in cultural, social, political, economic and technological development", and

[84] Id., p. 69.
[85] Id., p. 75.
[86] Id., p. ix.

"the enhancement and strengthening of partnerships with the private sector and civil society in order to achieve sustainable socio-economic and political development."[87] The SDGs are therefore also important to the EAC as seen in its Vision 2050 that explicitly addresses the importance of sustainable use of natural resources and environment management. According to EAC Vision 2050:

> The sustainable use of natural resources in the region will seek to be inclusive, transparent and effective to contribute to common solutions related to global challenges. The Vision 2050 will recognize that effective governance at the local, national and regional levels is critical for advancing sustainable development. The strengthening and reform of the institutional framework at the regional level, will respond to emerging sustainable development needs.[88]

With a view to encourage sustainable development, the EAC Vision 2050 addresses several cross-cutting issues including, 'Good Governance,' 'Peace and Security,' and "Gender and Women Empowerment.'[89] Vision 2050 aims to make the community – "... become a globally competitive upper-middle income region with a high quality of life for its population based on the principles of inclusiveness and accountability". This touches on some important principles that, if applied, can advance sustainable development goals in the region.

The Fundamental Development Principles of the EAC

The fundamental principles of the EAC bloc are spelt out in the EAC Treaty. Article 6[90] of the EAC Treaty provides the central values that shall govern achievement of objectives within the community by the members. This shall include inter alia: (i) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; (ii) equitable distribution of benefits; and (iii) co-operation for mutual benefit.

Article 7[91] of the EAC Treaty includes consideration for: (i) people-centred and market-driven co-operation; (ii) subsidiarity with emphasis on multi-level participation and the involvement of a wide range of stake- holders in the process of integration; (iii) the equitable distribution of benefits accruing or to be derived from the operations of the community and measures to address economic imbalances that may arise from such operations; and (iv) complementarity. Furthermore, pursuant to Article 7(2) of the EAC Treaty, EAC states undertake to abide by the principles of good governance, including

[87] The EAC Treaty, Article 5.
[88] EAC Vision 2050, supra note 25, p. 87.
[89] Id., Chapter 9 (Cross-Cutting Issues).
[90] On the 'Fundamental Principles of the Community'
[91] On the 'Operational Principles of the Community'

adherence to democracy, rule of law, social justice and maintenance of universally accepted standards of human rights.

The Economic Diplomacy of East African Investment Treaty making

Trade and investment initiatives are therefore important for the growth and sustainable development of the EAC region. Attracting financing for development is an imperative for EAC economies. Among the vision for regional integration and development in Africa is the vision to strengthen the regional market, create wealth in Africa plus enhance competitiveness. This is achieved through increased production, trade and investment flows into African countries. Today, EAC economies must contend with a global FDI landscape that is not only highly competitive and dynamic but is increasingly shaped by geopolitical uncertainty and digitization.[92]

EAC economies must also contend with the imperatives of sustainable development as developed in multilateral, continental, regional and national policy documents. Finally, commitments to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights mean that economic and fiscal policies cannot be developed in isolation but must be developed with a view to ensuring policy coherence. What is clearly needed is a multi-faceted and nuanced international investment policy framework – one that helps countries create an environment conducive to the development of a vibrant and dynamic private sector, respects the right of sovereign states to regulate in the public interest, promotes sustainable development objectives, and helps states achieve an overall balance of the rights and obligations between states and investors.

Increasingly, policy makers are realizing that issues such as human rights, environment, social development, corporate social responsibility and investor liability, which were once believed to be outside the framework of investment policymaking, cannot be ignored but must be integrated into their investment policy framework. How to enhance the development dimension of their investment policy instruments should therefore be very much on the minds of policy makers in the EAC region. Policy makers must routinely consider and address the interaction between national and international investment policymaking; international investment policy instruments and domestic policies on such issues as labour, social issues, taxation, health and environmental protection, land rights; and international investment policy and other bodies of international law affecting investment.

[92] EY, TURNING TIDES (EY Attractiveness Program: Africa, October 2018), p. 33.

Findings and Recommendations

Importance of Trade and Investment

1. Trade and Investments are important for the growth and development of Africa. Policy makers have repeatedly affirmed the desire of states in Africa to promote an attractive investment climate and expand trade and investments for long-term development.
2. Regional and continental instruments emphasize the role played by investment and the private sector in productive capacity, increased economic growth and sustainable development, and the need to create a conducive environment for investment.
3. Given the essential role of investment in promoting sustainable development, it is important that EAC economies create and maintain favourable conditions for the investments and that they foster a transparent and friendly investment environment for investments. It is equally important that investors are adequately protected and are guaranteed access to effective mechanisms for the prevention and settlement of disputes.

Importance of Other Values

1. Creating an enabling environment for investment is but one of the principles driving policy and planning in Africa. The EAC was established to *inter alia* ensure "the attainment of sustainable growth and development of the Partner States by the promotion of a more balanced and harmonious development of the Partner States,"[93] ensure "the promotion of sustainable utilisation of the natural resources … and the taking of measures that would effectively protect the natural environment of the Partner States."[94]
2. Among the fundamental principles of the EAC are the principles of good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.[95]
3. Given broader continental, regional and national goals and vision, investment treaties must not only be designed to promote and protect foreign investment but must also be designed to advance other strategic objectives including the goals of sustainable development.[96]

---

[93] EAC Treaty, Article 5(3)(a).
[94] EAC Treaty, Article 5(3)(c).
[95] EAC Treaty, Article 6.
[96] See e.g. Ministry of Trade and Industry: Rwanda Private Sector Development Strategy (2013-2018);

SECTION TWO:
UNDERSTANDING INTERNATIONAL INVESTMENT AGREEMENTS IN EAST AFRICA

CHAPTER 2: REVIEWING BILATERAL INVESTMENT TREATIES IN THE REGION

According to the Legal Information Institute[97] Bilateral investment treaties (BITs) are a form of international agreements that form the foundational "terms and conditions for private investment by nationals and companies of one state in another state. The first generation of these treaties were Friendship, Commerce and Navigation Treaties (FCNs), which required the host state to treat foreign investments on the same level as investments from any other state, including in some instances treatment that was as favourable as the host nation treated its own investments. FCNs also established the terms of trade and shipping between the parties, and the rights of foreigners to conduct business and own property in the host state." [98] The current form of these FCNs more popularly referred as BITs are a second generation that provide "actionable standards of conduct that [apply] to governments in their treatment of investors from other states," in relation to: fair and equitable treatment (often meaning national treatment or most favoured nation [MFN] treatment); protection from expropriation; free transfer of means; full protection and security.

[97] Cornell Law School, https://www.law.cornell.edu/wex/bilateral_investment_treaty
[98] Id.

Table 9: Characteristics of BITs

1. The definition of investment is broad and open ended so that it can accommodate new forms of foreign investment; it includes tangible and intangible assets and generally applies to existing as well as new investments;
2. The entry and establishment of investment is encouraged, although it is typically subject to national laws and regulations (most BITs do not grant a right of establishment);
3. Investment promotion is weak and is based mainly on the creation of a favourable investment climate for investment through the conclusion of a BIT;
4. Most treaties provide for fair and equitable treatment, often qualified by more specific standards, such as those prohibiting arbitrary or discriminatory measures or prescribing a duty to observe commitments concerning investment;
5. Most treaties specify that when various agreements apply to an investment, the most favourable provisions amongst them apply;
6. Most treaties now grant national treatment, the principle also being often subject to qualifications (to consider the different characteristics between national and foreign firms) and exceptions (relating mainly to specific industries or economic activities, or to policy measures such as incentives and taxation);
7. A guarantee of Most Favoured Nation (MFN) treatment, subject to some standardized exceptions, is virtually universal;
8. Virtually all BITs subject the right of the host country to expropriate to the condition that it should be for a public purpose, non-discriminatory, in accordance with due process and accompanied by compensation, while the standards for determining compensation are often described in terms that could result in similar outcomes;
9. A guarantee of the free transfer of payments related to an investment is common to virtually all BITs, although it is often qualified by exceptions applicable to periods when foreign currency reserves are at low levels;
10. A State-to-State dispute-settlement provision is also virtually universal;
11. An investor-to-State dispute-settlement provision has become a standard practice, with a growing number of BITs providing the investor with a choice of mechanisms. In addition, some BITs include one or several of the following:
12. A requirement that the host country should ensure that investors have access to information on national laws;
13. A prohibition on the imposition of performance requirements, such as local content, export conditions and employment requirements, as a condition for the entry or operation of an investment;
14. A commitment to permit or facilitate the entry and sojourn of foreign personnel in connection with the establishment and operation of an investment;
15. A guarantee of national and MFN treatment on entry and establishment.

However, there are also several issues that are generally not addressed in BITs but are nevertheless relevant for investment relations, particularly in relation to sustainable development, as seen in Table 10.

Table 10: Other Relevant Issues Concerning International Investment in relation to Sustainable Development

1. Obligations regarding progressive liberalization;	2. Avoidance of illicit payments;
3. The treatment of foreign investment during privatization;	4. Protection against violations of intellectual property rights;
5. Control of restrictive business practices;	6. Labour standards;
7. Private management practices that restrain investment and trade;	8. Provisions concerning the transfer of technology;
9. Consumer protection;	10. Specific commitments by home countries to promote investments;
11. Environmental protection;	12. Social responsibilities of foreign investors in host countries;
13. Taxation of foreign affiliates;	14. Obligations of subnational authorities.

The State of Bilateral Investment Treaties in East Africa

In each of the EAC countries BITs forms part of a broader trade and investment policy agenda directed at increasing investment flows, and ultimately contributing to development of each state and the region. In general, EAC members have concluded, ratified, and/or acceded to numerous treaties that have investment promotion and protection as their overriding purpose. Relevant treaties have been developed bilaterally, regionally, and at continental plus multilateral levels. Thus, in addition to several other regional, continental, and multilateral investment policy instruments shaping investment policy in the region, EAC countries have the respective BITs to their name, as seen in Table 11.

Table 11: IIAs and BITs involving EAC states

Member States	Total Number of Other Treaties with Investment Provision	Total Number of BITs
Burundi	9	10
Kenya	7	19
Rwanda	11	10
South Sudan	1	1
Tanzania	8	20
Uganda	8	17

Source: Author Compilation.[99]

In total, EAC members have concluded 77 BITs of which 36 are in force and 36 are signed but not ratified, and five have been terminated as seen in Table 12. On average all EAC states have concluded between 1 and 13 BITs (Table 20,21,22,24,25, and 28). Since the 1960s when EAC economies concluded their first BITs, the BIT landscape of EAC countries has grown increasingly complex. EAC members have concluded BITs with developed economies, with emerging market economies, with other African countries,

[99] Based on information available at UNCTAD, International Investment Navigators https://investmentpolicy.unctad.org/international-investment-agreements/by-economy

and with one another. Tanzania launched its BIT programme in 1965, Uganda in 1966, Rwanda in 1967, Kenya in 1970, Burundi in 1984 and South Sudan in 2017.[100]

Table 12: BITs involving EAC countries

Member States	Total	BITs (In force)	BITs (Signed but not ratified)	BITs (Terminated)	Countries
Burundi[101]	10	6	4	0	Belgium-Luxembourg Economic Union (BLEU), Comoros, Egypt, Germany, Kenya, Mauritius, Netherlands, Turkey, UAE, and United Kingdom.
Kenya[102]	19	11	7	1	Burundi, China, Finland, France, Germany, Iran, Italy, Japan, Republic of Korea, Kuwait, Libya, Mauritius, Netherlands, Qatar, Slovakia, Switzerland, Turkey, UAE, and the UK.
Rwanda[103]	10[104]	4	7	0	Belgium-Luxembourg Economic Union, Germany, Korea, Mauritius, Morocco, South Africa, Turkey, UAE, and the United States of America.[105]
South Sudan[106]	1	0	1	0	Morocco
Tanzania[107]	20	10	8	2[108]	Canada, China, Denmark, Egypt, Finland, Germany, Italy, Jordan, Korea, Kuwait, Mauritius, Netherlands, Oman, South Africa, Sweden, Switzerland, Turkey, United Kingdom, and Zimbabwe.
Uganda[109]	17	6	9	2[110]	Belgium-Luxembourg Economic Union, China, Cuba, Denmark, Egypt, Eritrea, France, Germany, Italy, Netherlands,

[100] The first BIT by an EAC Member State, the Tanzania-Germany BIT, was concluded on January 30, 1965, this was followed by the Tanzania-Switzerland BIT (May 3, 1965), the Uganda-Germany BIT (Nov. 29, 1966), the Rwanda-Germany BIT (May 18, 1967) and the Kenya-The Netherlands BIT (Sept. 11, 1970).

[101] Burundi gained its independence from Belgium on 1 July 1962, concluded its first BIT in 1984 (with Germany) and concluded its most recent BIT in 2017 (with both Turkey and the United Arab Emirates (UAE)).

[102] Kenya attained independence from United Kingdom (UK) on 1 June 1963, concluded its first BIT in 1970 (with the Netherlands) and concluded its most recent BIT in 2016 (with Japan).

[103] Rwanda attained independence from Belgium on 1 July 1962, concluded its first BIT in 1967 (with Germany) and concluded its most recent BIT in 2017 (with the UAE).

[104] Of the 10 BITs, two of which are with Belgium-Luxembourg Economic Union.

[105] Uche Ewelukwa Ofodile, *The U.S.-Rwanda Bilateral Investment Treaty: Any Cause for Celebration?* AFRICA LAW TODAY (2015). Available at: https://www.americanbar.org/content/dam/aba/uncategorized/international_law/uche_ewelukwa_ofodile_us.authcheckdam.pdf

[106] South Sudan gained independence from the Republic of the Sudan on 9 July 2011. In 2017 South Sudan concluded its first BIT, with Morocco.

[107] Tanzania gained independence from the UK on 9 December 1961, concluded its first BIT in 1965 (with Germany), and concluded its most recent BITs in 2013 (with Canada, China and Kuwait respectively).

[108] Tanzania-Switzerland BIT (1965) and Tanzania-Netherlands BIT (2004).

[109] Uganda gained independence from the UK on 9 October 1962, concluded its first BIT in 1966 (with Germany), and concluded its most recent BIT 2017 (with the UAE).

[110] Uganda-Italy BIT (1997) and Uganda-Netherlands BIT (1970).

					Nigeria, South Africa, Switzerland, United Arab Emirates, United Kingdom, and Zimbabwe.
Total	77[111]	36[112]	36	5	

Source: Author compilation[113]

An examination of BITs involving EAC states reveals that: the rate of ratifying BITs has increased over the years but is beginning to slow down. EAC countries concluded four BITs in the 1960s, three in the 1970s, three in the 1980s, twelve in the 1990s, thirty-four between 2000 and 2010, and twenty-one since 2010. Only one intra-EAC BIT exists and this is the Kenya-Burundi BIT, which was concluded on April 1, 2009, and entered into force the same day. EAC states have concluded BITs with other African States. In all, there are 16 BITs between EAC members and other countries in Africa. Meanwhile, a significant number of BITs involving EAC countries are with developed economies in general and members of the European Union (EU) in particular. Gradually, EAC members are concluding more BITs with countries from emerging markets. This reflects the growing influence of these economies in global trade, finance and investment of African countries. This is a marked difference from the earlier BITs involving EAC states that were mostly signed with developed nations. Recent BITs are therefore reflecting the increasing diversification of Africa's economic partnerships which is a noticeable shift in the kind of economic associations that EAC members are choosing to conclude BITs with today.

For example, Turkey has concluded BITs with Burundi, Kenya, Rwanda, and Tanzania. China has concluded BITs Kenya, Tanzania, and Uganda. The UAE has also concluded BITs with Rwanda, Kenya, and Uganda. This is further noted in observing that: Rwanda's first BIT was with Germany (in 1969), while currently its recent BITs are with Morocco (2016), UAE (2017) and Qatar (2018); Uganda's first BIT was with Germany (in 1966), whereas presently the newest BIT is with the UAE (2017); South Sudan's only BIT is with Morocco was concluded in 2017; lastly, Tanzania's first BIT was with Germany (in 1965) and Tanzania's most recent BITs were are with Canada (2013), China (2013), and Kuwait (2013).

Substantive Issues in East African BITs

In order to understand the key issues that are tackled within East African BITs it is important to examine the definition of investment and the classification of investment issues that are captured in the treaties. Examining the meaning of investment will help in

[111] The number is 77 and not 78 to account for the Burundi-Kenya BIT which was counted towards the total number of each country's BIT.
[112] The number is 36 and not 37 to account for the Burundi-Kenya BIT for the Burundi-Kenya BIT which was counted towards the total number of each country's BIT.
[113] Information available at UNCTAD, International Investment Navigators https://investmentpolicy.unctad.org/international-investment-agreements/by-economy

comprehending the fluid nature of international investment in relation to trends in existing BIT provisions. On the other hand, exploring the classification of investment issues helps in understanding the overlapping interrelationships concerned with: a) Processes of liberalisation i.e. “a process which, in its application to FDI, involves the gradual decrease or elimination of measures and restrictions on the admission and operations of firms especially foreign ones, the application of positive standards of treatment with a view towards the elimination of discrimination against foreign enterprises, and the implementation of measures and policies seeking to promote the proper functioning of markets.”[114], and b) Investment protection i.e. “provisions that concern the protection of foreign investments after they have been made against Government measures damaging to them”[115] that form part of the content within BITs.

Definition of Investment

How ‘investment’ is defined in IIAs is very important. First, how investment is defined in a country’s IIAs affects discussions about whether or not a country’s international investment policy framework is focused on investments that have the potential to generate development benefits.[116] Second, the definition of investment in an IIA can enhance or undermine the overall effort to ensure a balance of rights and obligations as between foreign investors and a host state i.e. how investment is defined determines the content and scope of other rights and obligations in an IIA. Finally, the investor-state arbitration system rests on the premise that there are foreign investments in need of protection. Consequently, how investment is defined has implications for the provisions of an IIA relating to investor-state arbitration as it defines the assets that qualify for protection under the agreement.[117]

In sum, the definition of investment in an IIA provides a great opportunity for states to: (i) lay out their conception of what constitutes foreign investment, (ii) safeguard their regulatory space and, (iii) determine the types of assets that would be the subject of protection of the IIA. As the forms of foreign investment have grown and have become more diverse, it is becoming very important that IIAs are very clear about what types of investment are protected and what types are not protected. UNCTAD warns that while “there is an increasing array of foreign-owned assets that have economic value and thus may be regarded as foreign investment”, not all are necessarily designed and structured to contribute to sustainable development of a host nation.[118] Depending on how investment is defined, a BIT’s protection may be limited to FDI or may extend to other types of investments, such as portfolio investment. Most BITs involving EAC states adopt an open-ended, asset-based definition of investment, and thus protect a wide

[114] UNCTAD, 1994, ch. VII*
[115] Id.
[116] UNCTAD, Scope and Definition (A Sequel): UNCTAD Series on Issues in International Investment Agreement II (New York and Geneva, United Nations, 2011), p. 1-3.
[117] Id., at 6.
[118] Id., at 9.

range of investment-related activities.[119] For example, in the Germany-Burundi BIT (1980), investment is defined investment as follows:

ARTICLE 1

For the purpose of the present Treaty

1. The term "investments" shall comprise **every kind of asset**, in particular:

(a) Movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges;

(b) Shares of companies and other kinds of interest;

(c) Claims to money which has been used to create an economic value or claims to any performance having an economic value;

(d) Copyrights, industrial property rights, technical processes, trademarks, trade-names, know-how and goodwill;

(e) Business concessions under public law, including concessions to search for, extract and exploit natural resources; any alteration of the form in which assets are invested shall not affect their classification as investment.[120]

An enterprise definition of investment is not common in BITs involving EAC countries but is nevertheless found in a few BITs. Article 1 of the Canada-Tanzania BIT is an example and provides as follows:

Canada-Tanzania BIT
ARTICLE 1

Investment means:

(a) an enterprise;

(b) shares, stocks and other forms of equity participation in an enterprise;

(c) bonds, debentures, and other debt instruments of an enterprise;

(d) a loan to an enterprise;

(e) notwithstanding subparagraphs (c) and (d) above, a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Party in whose territory the financial institution is located;

(f) an interest in an enterprise that entitles the owner to a share in income or profits of the enterprise;

(g) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution;

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory;

(i) intellectual property rights; and

[119] See e.g., Uganda-China BIT, Article 1 (defining investment to mean "every kind of property."); Uganda-Denmark BIT, Article 1; Uganda-France BIT, Article 1).

[120] Emphasis added.

(j) any other tangible or intangible, moveable or immovable, property and related property rights acquired in the expectation of or used for the purpose of economic benefit or other business purpose.

An open-ended asset-based definition of investment, unless qualified, may impose excessive strain on the regulatory space of a host state and may expose such a state to potential claims from unsuspected quarters.[121] UNCTAD has noted that the traditional, broad asset-based definition "risks the possibility that transactions that were not thought to be investments at the time the agreement was entered into might nonetheless become covered as a result of an open-ended nature of the definition."[122] Open-ended or vague definition of investment creates uncertainty and allows arbitral tribunals wide discretion. In the absence of clear benchmarks as to what is an investment, arbitral tribunals have reached different conclusions on the issue.

In some BITs, particularly more recent BITs, attempt is made to clarify the characteristics of investment and to limit IIA protection to qualifying investments.[123] For example, in Article 1(a) of Japan-Kenya BIT (2016), Contracting Parties clarify that the term investment means "every kind of asset owned or controlled, directly or indirectly, by an investor **and has characteristics of an investment such as commitment of capital or other resources, the expectation of gain or profit, or assumption of risk**…."[124] According to Article 1 of the Tanzania-Turkey BIT (2011) investment means "every kind of asset, connected with business activities, **acquired for the purpose of establishing lasting economic relations in the territory of a Contracting Party in conformity with its laws and regulations**, and shall include in particular, but not exclusively …"[125]

All EAC members have ratified the ICSID Convention. Article 25 (1) of the ICSID Convention states that "the jurisdiction of the Centre shall extend to any legal dispute **arising directly out of an investment**, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."[126] However, the ICSID Convention does not define investment. For claims brought under the ICSID Convention, debate has arisen as to whether the meaning of "investment" should be determined exclusively and strictly as set forth in an applicable the BIT or by Article 25 of the ICSID Convention.[127] In the landmark case of *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco* (*Salini v Morocco*), an arbitral

[121] UNCTAD, Scope and Definition (A Sequel): UNCTAD Series on Issues in International Investment Agreement II (New York and Geneva, United Nations, 2011); *Goetz v. Burundi*, ICSID Case No. ARB/95/3 (involving an investment arbitration claim by six individual Belgian shareholders in a Burundian company).
[122] Id., at 9.
[123] See e.g. Rwanda-United States of America BIT (2008), Article 1. See infra Chapter 6.
[124] Emphasis added.
[125] Emphasis added.
[126] Emphasis added.
[127] *Hassan Awdi, Enterprise Business Consultants, Inc. and Alpha El Corporation v. Romania, ICSID Case No. ARB/10/13 (holding that* the meaning of "investment" should be determined exclusively and strictly as set out in the applicable BIT.).

tribunal offered a definition of "investment" within the meaning of Article 25 of the ICSID Convention that continues to shape international investment arbitration today.[128]

The tribunal ruled that an investment within the ICSID Convention is to be defined by reference to four specific criteria: (i) contributions; (ii) a certain duration of performance of the contract; (iii) a participation in the risks of the transaction; and (iv) the contribution to the economic development of the host state of the investment.[129] The tribunal also ruled that the requirement of an investment under Article 25(1) is an objective one and must be met regardless of any specific definition of an investment under an applicable investment treaty.[130] As noted, in some recent BITs, contracting parties are careful to clarify what *is* an investment and what *is not* an investment by providing an exhaustive list of the elements that must be present for an asset to qualify as an investment.[131] For example, in the Tanzania-China BIT, the Contracting Parties stipulate that "an investment has the following characteristics: the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." In the Tanzania-Canada BIT, the Contracting Parties make clear that claims to money that arise solely from "commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party," do not constitute an investment. In Article 1(1) of the Burundi-Turkey BIT, investment is defined as follows:

ARTICLE 1(1)

The term "investment" means every kind of asset, connected with business activities, acquired for the purpose of establishing lasting economic relations in the territory of a Contracting Party in conformity with its laws and regulations, and that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of regular gain or profit, the assumption of risk, contribution to economic development, or a certain duration, and shall include in particular, but not exclusively:....

The EAC Model Investment Treaty also specifies what does not count as investment. Article 2 of the EAC Model Investment Treaty provides as follows:

"For greater certainty, Investment does not include:

Debt securities issued by a government or loans to a government

Portfolio investments

) Claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in subparagraphs (a) through (g) above.

---

[128] *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No ARB/00/4 Decision on Jurisdiction (16 July 2001).

[129] Id., para. 52.

[130] Id., para. 52.

[131] See e.g. Rwanda-UAE BIT (2017).

Classification of Investment Issues

Beyond the definition investment, BITs also seek to address the overlapping elements of investment issues that foreign entities must contend with. This includes standard substantive rights, by EAC states, to investors such as: (i) national treatment; (ii) most-favoured-nation treatment (MFN); (iii) absolute standard of treatment, i.e. 'fair and equitable treatment' (FET), 'full protection and security' (FPS), and protection against unreasonable or discriminatory measures; (iv) limits on expropriation; (v) free and unrestricted transfers of capital and returns; and (vi) compensation for losses. Also, some but not all BITs also address several other issues such as: (a) performance requirements; (b) entry and sojourn of personnel; (c) senior management and/or boards; (d) subrogation; (f) umbrella clauses; and (g) transparency.

In addition to the protection provisions, most BITs involving EAC countries contain provisions relating to the settlement of investment disputes. All BITs involving EAC states provide for State-to-State arbitration and most provide for Investor-State arbitration. The principal government measures against which investors seek protection are expropriations, nationalizations, and other major cases of deprivation of property and infringement of property rights. To this end, BITs involving EAC members do a very good job of conferring standard rights and guarantees to foreign investors and their investments.[132]

Processes of Liberalisation

In categorising investment issues, the first group is concerned with the liberalisation question consisting of three principal elements: (a) the removal of restrictive, and thereby market distorting, Government measures; (b) the application of certain positive standards of treatment, primarily directed at the elimination of discrimination against foreign investors; and (c) measures intended to ensure the proper operation of markets. This is in relation to standards of treatment, entry and establishment, treatment after admission, and measures that ensure the proper operation of markets.

Standards of Treatment

- National Treatment - The national treatment standard has been defined as "a principle whereby a host country extends to foreign investors treatment that is at least as favourable as the treatment that it accords to national investors in like circumstances."[133] Essentially, the national treatment standard seeks to ensure a degree of competitive equality between national and foreign investors.[134] National treatment standard is found in almost all the BITs reviewed.[135] In many of the BITs

[132] UNCTAD, International Investment Agreements: Key Issues, Vol. 1 (New York and Geneva, United Nations, 2004), p. 2-3.
[133] UNCTAD, National Treatment (New York and Geneva, United Nations, 1999), p. 1
[134] Id.
[135] The Kenya-Netherlands BIT does not provide national treatment protection.

examined, the national treatment standard is not limited or qualified, and contracting states do not carve out exceptions to the national treatment obligation.

Table 13: NT Obligation in BITs Involving EAC Countries

TREATY	PROVISIONS
Uganda-Germany BIT	Article 10 states, "[e]ither Contracting Party shall grant national treatment within the framework of the present treaty in consideration of the fact that national treatment in like matters is also granted by the other Contracting Party."
Kenya-UK BIT (1990)	Article 3(1) provides: "[n]either Contracting Party shall in its territory, subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State."
Germany-Burundi BIT (1980)	Article 3 (1) provides that "[n]either Contracting Party shall subject investments in its territory owned or controlled by nationals or companies of the other Contracting Party to treatment less favourable than it accords to investments of its own nationals or companies or to investments of nationals or companies of any third State."

In the Denmark-Uganda BIT (2001), national treatment, most-favoured-treatment and fair and equitable treatment are addressed in the same clause with potential to create interpretive nightmares for the contracting parties, investors and prospective arbitral tribunals. Article 3 provides:

> ARTICLE 3
> Treatment of Investments
> 1. Each Contracting Party shall in its territory accord to investments made by investors of the other Contracting Party fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third state whichever is the more favourable from the point of view of the investor.
> 2. Each Contracting Party shall in its territory accord investors of the other Contracting Party. as regards their management, maintenance, use, enjoyment or disposal of their investment, fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third State, whichever of these standards is the more favourable from the point of view of the investor.

In a growing number of recent BITs, the national treatment standard is limited to 'like circumstances' and states are introducing exceptions to the national treatment requirement.

- Most-Favoured-Nation (MFN) Treatment - The MFN treatment "ensures that a host country extends to the covered foreign investor and its investments, as applicable,

treatment that is no less favourable than that which it accords to foreign investors of any third country."[136] In the context of foreign investment, the MFN standard ensures an equality of competitive conditions between foreign investors of different nationalities seeking to set up an investment or operating that investment in a host country.[137] The MFN treatment is a standard feature of most BITs involving EAC states.

Table 14: MFN Treatment Provisions in BITs involving BITs Members

TREATY	PROVISIONS
Kenya-Burundi BIT	Article 4 provides that "[e]ach Contracting Party shall accord to investments of investors of the other Contracting Party, treatment which shall not be less favourable than that accorded either to investments of its own or investments of investors of any third State."
UK-Tanzania BIT	Article 3(2) stipulates, "[n]either Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State."

In a few BITs, the MFN standard is limited to specific subject matters, for example, taxes and fees.[138] The Uganda-Netherlands BIT (2000) guarantees investors a general MFN treatment as well as MFN treatment as regards taxes, fees and other charges. Article 3(2) provides that "each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned." Article 4(1) further provides, "With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall accord to investors of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favourable than that accorded to its own investors or to those of any third State who are in the same circumstances, whichever is more favourable to the investors concerned."
In some recent BITs involving EAC countries, the MFN standard is limited to 'like circumstances.'[139] Also, in some recent instances, an attempt is made to carve out robust exceptions to the MFN obligation.[140] However, in most BITs, only the standard regional economic integration organization (REIO) exceptions and exception relating to double-

[136] UNCTAD, Most Favoured Nation (New York and Geneva, United Nations, 2010), p. 13.
[137] Id., at 14.
[138] The MFN treatment in Kenya-Netherlands BIT is limited to issues relating to taxes, fees and other charges. Article 5 of the Kenya-Netherlands BIT states: "With respect to the payment of taxes, fees or charges and to the enjoyment of fiscal deductions and exemptions, each Contracting Party shall endeavour to accord in its territory to nationals of the other Contracting Party engaged in any economic activity the same treatment as it accords to nationals of third countries."
[139] E.g. Kenya-Japan BIT; Kenya-Korea BIT; Tanzania-Canada BIT; Uganda-UAE BIT.
[140] Rwanda-Korea BIT, Article 3(4)(excluding from the scope of the NT and MFN treatment, (a) government procurement; (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance; and (c) taxation measures.).

taxation treaties can be found.[141] Broad and/or vague MFN clauses can pose a major challenge for a host state because investors can use them to borrow more beneficial, substantive and procedural provisions from other BITs signed by the same State.[142] In *White Industries Australia Limited v. India*, the claimant, (an Australian investor), successfully relied on the MFN clause in the India-Australia BIT to import a more favourable substantive provision from the India-Kuwait BIT into the India-Australia BIT.[143] MFN clauses that allow investors to "cherry-pick" the most beneficial provisions in every IIA binding on a host state essentially subverts the carefully negotiated balance of each agreement that the state has concluded.

- Absolute Standard of Treatment - Almost all the BITs reviewed guarantee investors absolute standard of treatment that includes three elements, namely: a) Fair and Equitable Treatment (FET), b) Full Protection and Security (FPS), and c) non-impairment.[144] These guarantees are considered "absolute" and "non-contingent" because they are not dependent on how a host state treats its own investors or investors of third states. While in some BITs, attempt is made to limit the scope of the absolute guarantees, in many others no such attempt is evident.[145]

For example, in the Kenya-Switzerland BIT (2006) Article 4 states "Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security· in the territory of the other Contracting Party." This resembles the Uganda-Switzerland BIT (1971) in whose Article 4 also states "Either Contracting Party shall ensure within its territory fair and equitable treatment to the investments by nationals or companies of the other Contracting Party, in accordance with international law." Also, in the Uganda-Germany BIT (1966), Article 1 states "Each Contracting Party shall in its territory promote as far as possible the Investment of capital by nationals or companies of the other Contracting Party and admit such Investments in accordance with its laws and regulations in force at the time of such. approval. Each Contracting Party shall in any case accord such investments fair and equitable treatment."

The FET provision is one of the most frequently litigated provision in a BIT. There are many problems associated with the FET standard. First, in most BITs involving EAC states, the FET provision is vague, ill-defined, and unqualified and, thus, exposes host states to considerable legal risk and liability. In the case of *Siag v. Egypt*, the arbitral tribunal observed that the FET standard was troublesome because "its precise ambit is not easily articulated".[146] Second, in many ISDS cases including those involving African States, arbitral tribunals have concluded that the legitimate expectations of an investor is a factor that will be considered in determining whether the FET standard has been

[141] E.g. Kenya-Germany BIT; Kenya-U.K. BIT; Uganda-UK BIT.
[142] UNCTAD, MOST-FAVORED NATION (2010), supra note 130, p. 13.
[143] *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011, <https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>
[144] The Turkey-Egypt BIT does not appear to guarantee investors absolute standards of treatment.
[145] Uganda-France BIT, Article 3 (stating that the FET treatment shall be "in accordance with the principles of International Law….").
[146] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* [*Saig v. Egypt*], ICSID Case No ARB/05/15, para 450.

violated.[147] For example, in *Unión Fenosa Gas v. Egypt*, the arbitral tribunal held that the FET standard prohibits, *inter alia*, "conduct by the host State which is unjust, arbitrary, unfair, discriminatory or in violation of due process, including conduct that frustrates an investor's 'legitimate expectations'."[148]

Third, the FET standard imposes positive obligations on a host state meaning that a violation can be found even when a host country has not overtly interfered with an investment. In *Biwater v. Tanzania*, the arbitral tribunal addressed whether Tanzania breached Article 2 of the Tanzania-U.K. BIT (1994) by failing to accord FET to an investment.[149] Article 2(2) of the Tanzania-U.K. BIT provides that '[i]nvestments of nationals or companies of each Contracting Party shall **at all times be accorded fair and equitable treatment** … in the territory of the other Contracting Party'.[150] In finding a violation of the FET standard, the *Biwater* tribunal observed that the FET standard encompasses notions of fairness, transparency, candour, and due process. Given the potentially broad scope of the FET standard, in some recent BITs involving EAC economies, contracting parties are taking pain to clarify the meaning and scope of the FET provision.[151]

Entry and Establishment

In BITs, one principal category of issues addressed concerns whether investments and investors will be admitted, and on what terms it shall be so. Understandably, most countries wish to exercise a measure of control over the admission of foreign investments into their territory. Over the years, two broad approaches have emerged: the "post-establishment model", and the "pre-establishment model."

For BITs that follow the post-establishment model, entry and establishment of foreign investment into a country is in accordance with domestic law and regulation and no provision is made for national treatment or MFN treatment in matters of entry and establishment. Under the post-establishment framework, a host state typically retains autonomy over the kind and volume of investment it wants to admit. With the pre-establishment model, all discrimination in matters of admission are eliminated and national treatment and MFN treatment are provided in matters of entry and establishment. Under the pre-establishment framework, a host state typically gives up the right to impose approval requirements or sectoral caps for FDI and the right to accord more favourable treatment to infant industries, or impose performance requirements on foreign entities.

[147] Id., para 450. See also, *Bernhard von Pezold and Others v. Republic of Zimbabwe,* ICSID Case No ARB/10/15 [*von Pezold and others v. Zimbabwe*], para 547.

[148] See *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt,* ICSID Case No ARB/14/4.

[149] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.

[150] Emphasis added.

[151] See e.g., Kenya-Japan BIT, Kenya-Korea BIT, and Tanzania-China BIT.

Most BITs involving EAC states adopt the post-establishment model. In other words, most of the BITs examined do not prohibit FDI, do not impose restrictions on entry, and generally adopt a favourable approach to FDI. However, the BITs typically provide that foreign investments are to be admitted in accordance with local laws and regulations and limit national treatment obligation only to the post-establishment phase.

Table 15: Post-Establishment Provisions in BITs Involving EAC members

TREATY	PROVISIONS
Kenya-Japan BIT (2016), Article 2(2).	Each Contracting Party shall, subject to its applicable laws and regulations, including those with regard to foreign ownership and control, admit investment of investors of the other Contracting Party.
Kenya-United Kingdom BIT (1999), Article 2(1).	Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.
Rwanda-UAE BIT (2017), Article 3(1).	Each Contracting Party shall as far as possible encourage and create favourable conditions for investors of the other Contracting Party to make investments in its territory and shall admit such investments in accordance with its laws and regulations.
France-Uganda BIT, Article 2	Each Contracting Party shall promote, encourage and admit on its territory and in its maritime area, in accordance with its legislation and with the provisions of this Agreement, investments made by nationals or companies of the other Contracting Party.

A few BITs involving EAC countries adopt the pre-establishment model and incorporate the pre-establishment obligation expressly in the national treatment clause. The Canada-Tanzania BIT (2013) and Rwanda-United States BIT (2008) are good examples.[152] Article 4(1) and 4(2) of the Canada-Tanzania BIT provides as follows:

> ARTICLE 4
> National Treatment
>
> 1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors **with respect to the establishment**, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
> 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of its own investors **with respect to the establishment**, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.[153]

[152] EAC BITs involving Canada adopt a pre-establishment model. Consequently, national treatment is guaranteed with respect to "establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory." (Article 4(1)).
[153] Emphasis added. See also Rwanda-USA BIT (2008), Article 3(1) and 3(2).

Umbrella Clauses

These are a form of treatment after admission. In BITs, umbrella clauses seek to ensure that each party to the treaty will respect contracts and specific undertakings towards nationals of the other Party.[154] There is no "standard" umbrella clause and formulations vary considerably. However, an umbrella clause typically imposes a requirement on each contracting state to observe all investment obligations entered with investors from the other Contracting State Party. Umbrella clauses are found in many BITs including BITs involving EAC members as shown in Table 16. For example:

Table 16: Umbrella Clause Provisions in BITs involving EAC Countries

TREATY	PROVISIONS
Burundi-Germany BIT, Article 8(2).	"Each Contracting Party shall observe any other obligation that it may have entered into with regard to investments in its territory by agreement with nationals or companies of the other Contracting Party."
• Burundi-UK BIT, Article 2(2); • Uganda-UK BIT, Article 2(2); • Kenya-UK BIT, Article 2(2).	"Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."
• Kenya-Finland BIT, Article 12(2) ; • Tanzania-Finland BIT, Article 13(2).	"Each Contracting Party shall observe any other obligation it may have with regard to a specific investment of an investor of the other Contracting Party."
Uganda-Netherlands BIT, Article 3(4)	"Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."
Tanzania-Switzerland BIT	"Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party."
Tanzania-Sweden BIT, Article 2(4).	"Each Contracting Party shall observe any obligation it has entered into with an investor of the other Contracting Party with regard to his investment."

Umbrella clauses are very controversial and the issue of how they are to be interpreted has plagued arbitral tribunals for years.[155] The significance of an umbrella clause in a BIT is that "the international arbitration tribunal constituted under the BIT … would thereby

[154] Anthony C. Sinclair, The Origins of the Umbrella Clause in the International Law of Investment Protection, 20 ARB. INT'L 411,413- 18 (2004).

[155] Société Général de Surveillance S. A. v. Pakistan, Decision of the Tribunal on Objections to Jurisdiction, ICSID (W. Bank) Case No. ARB/01/13 (2003), available athttp://www.worldbank.org/ics id/cases/SGS-decision.pdf.; Société Général de Surveillance S. A. v. Philippines, Decision of the Tribunal on Objections to Jurisdiction, ICSID (W. Bank) Case No. ARB/02/6 (2004), reprinted in 19 MEALEY'S INT'L. ARB. REP. 6 (2004).

have jurisdiction over breach-of-contract claims since a breach of the investment contract is also a breach of the umbrella clause. Critically, this means that the investor can now seek redress of a breach of any investment contract between it and a Contracting State through international arbitration under the BIT."[156] In essence, umbrella clauses can have the effect of elevating contract breaches into breaches of international law.[157]

Some BITs involving EAC states do not contain an umbrella clause. Furthermore, in some recent BITs, contracting states clarify that a breach of an investment contract does not constitute a breach of the BIT. For example, Article 2(1) of the Rwanda-UAE BIT (2017) states that "a breach of a contract signed between the investor and the other Contracting Party not be considered a breach of this Agreement." An umbrella clause is found in the Uganda Model BIT (Article 10) but not in the Kenya Model BIT.

Performance Requirements

Host states use performance requirements (PRs) to try to influence the behaviour of foreign investors and to secure specific benefits for their economies.[158] There are many types of PRs. Common examples of PRs are export requirements, exclusive supplier requirements, trade balancing requirements, restrictions on domestic sales tied to export performance, local content requirements, and technology transfer requirements.[159] In general, "the role of such requirements is to address some form of market or policy failure related, for example, to the presence of positive or negative externalities, information asymmetries and/or sluggishness on the part of the TNC in responding to opportunities prevailing in the market."[160]

There are many reasons why a government may wish to impose PRs. According to UNCTAD, specific objectives for imposing performance requirements include *inter alia* : (i) strengthening the industrial base and increasing domestic value added; (ii) generation of employment opportunities; (iii) linkage promotion; (iv) export generation and performance; (v) trade balancing; (vi) regional development promotion; (vii) technology transfer; and (ix) various non-economic objectives, such as political independence and distribution of political power.[161] There are many ways to design the provision on PRs. Sometimes, PRs are designed as conditions for obtaining a government authorisation to invest in a particular sector and sometimes PRs appear as conditions that must be met to

---

[156] Wong, Jarrod, Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes (August 29, 2008). George Mason Law Review, Vol. 14, 2006.

[157] Wong, Jarrod, Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes (August 29, 2008). George Mason Law Review, Vol. 14, 2006; see Stanimir A. Alexandrov, Breaches of Contract and Breaches of Treaty --The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan and SGS v. Philippines, 5 J. WORLD INVESTMENT & TRADE 555, 555 (2004).

[158] UNCTAD, Foreign Direct Investment and Performance Requirements: New Evidence From Selected Countries (New York and Geneva, United Nations, 2003). https://unctad.org/en/Docs/iteiia20037_en.pdf ; Suzy H. Nikièma, Performance Requirements in Investment Treaties Best Practices Series - December 2014.

[159] Id.

[160] Id., p. 6.

[161] Id., p. 7.

secure a government advantage or incentive.[162] Whatever their formulations, investors generally do not favour PRs. To critics, PRs "can distort investment decisions by imposing conditions on investors that are not related to market considerations."[163]

The use of PRs is explicitly prohibited in some BITs involving EAC countries particularly BITs involving Canada, the United States, and Japan. For example, Article 7 of the Japan-Kenya BIT (2016) is titled 'Prohibition of Performance Requirements' and Article 7(1) stipulates that "[n]either Contracting Party shall impose or enforce on an investor of the other Contracting Party, as a condition for investment activities in its Area, export requirements, export-import balancing requirements or requirements regarding the amount of foreign exchange inflows associated with investments of the investor, except in accordance with applicable regional and international laws and obligations." Article 9 (1) of the Tanzania-Canada BIT stipulates:

> ARTICLE 9 - Performance Requirements
>
> 1. A Party may not impose the following requirements in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
>
> (a) to export a given level or percentage of a good or service;
>
> (b) to achieve a given level or percentage of domestic content;
>
> (c) to purchase, use or accord a preference to a good produced or service provided in its territory, or to purchase a good or service from a person in its territory;
>
> (d) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with that investment;
>
> (e) to restrict sales of a good or service in its territory that the investment produces or provides by relating those sales to the volume or value of its exports or foreign exchange earnings;
>
> (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory; or
>
> (g) to supply exclusively from the territory of the Party a good that the investment produces or a service it provides to a specific regional market or to the world market.

BITs involving EAC states that restrict the use of PRs are at odds with the provisions of the Pan-African Investment Code. Rather than restrict the use of PRs, Article 17 of the Pan-African Investment Code encourages the use of PRs. The EAC Model Investment Treaty is silent on the issue of PRs and neither prohibits nor encourages its use.

[162] Id.

[163] OECD, Performance Requirements (Note by the Chairman), DAFFE/MAI(96)4, 15 January 1996, http://www1.oecd.org/daf/mai/pdf/ng/ng964e.pdf

Significantly, Article 7 of Kenya's Model BIT discourages the use of PRs and is clearly inconsistent with the provision of the Pan-African Investment Code.[164]

Investment Protection

The second group in the categorisation of investment issues, "covers international rules and principles designed to protect the interests of foreign investors against host Government actions unduly detrimental to
their interests."[165] This is mainly regarding issues such as a) takings of property b) other issues of investment protection, c) transfer of funds and related issues and d) settlement of disputes.

Protection Against Expropriation **-** Provisions on expropriation are very important in investment treaties. According to UNCTAD, "[t]he principal measures against which investors seek protection are expropriations, nationalizations and other major cases of deprivation of property and infringement of property rights of investors."[166] Under customary international law, states have the sovereign right to take property held by nationals or aliens through nationalization or expropriation for economic, political, social or other reasons.[167] Not every expropriation triggers the international responsibility of a state because under customary international law, a distinction is made between lawful and unlawful expropriation. To be considered lawful, customary international law and treaty law require that property be taken for a public purpose, on a non-discriminatory basis, and against compensation.[168] Provisions on expropriation are found in all the BITs involving EAC members but their precise formulation varies considerably. To be considered lawful, most of the BITs require that such an undertaking meet three, or sometimes four, conditions.
Most BITs require that to be lawful, a taking must, (a) be for a public purpose; (b) be on a non-discriminatory basis; (c) be accompanied by compensation; and (d) be in accordance with due process of law.[169] Considerable difference in the language of the expropriation clause of the BITs can be observed as shown in Table 17.

[164] Kenya Model BIT, Article 7 ("Within the context of its national economic policies and goals, each Party shall endeavour to avoid imposing on the investments of investors of the other Party conditions, which require the export of goods produced, or purchase of goods or services locally.").
[165] UNCTAD Pdf…
[166] International Investment Agreements: Key Issues, supra note 126, p. 32.
[167] UNCTAD, Expropriation (New York and Geneva, United Nations, 2012), p. 1.
[168] Id.
[169] Uganda-Germany BIT, Article 3 (requiring that expropriation be "for the public benefit and against compensation."); Uganda-Netherlands BIT, Article 6 (requiring that expropriation be in the public interest, under due process, on a non-discriminatory basis, and against "just and fair compensation."); Uganda-U.K. BIT, Article 5 (imposing three requirements: public purpose, non-discriminatory basis, and compensation.).

Table 17: Protection Against Expropriation Provisions in BITs involving EAC States

TREATY	PROVISIONS
France-Uganda BIT (2003), Article 5(2)	"Neither Contracting Party shall take any measures of expropriation or nationalization or any other measures having the effect of dispossession, direct or indirect, of nationals or companies of the other Contracting Party of their investments on its territory and in its maritime area, except in the public interest and provided that these measures are neither discriminatory nor contrary to a specific commitment."
Denmark-Uganda BIT (2001), Article 5(1)	"Investments of investors of each Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for expropriations made for public use or in the interest of defence, public safety, public order, public morality or public health, on a basis of non-discrimination, carried out under due process of law, and against prompt, adequate and effective compensation."
UK-Uganda BIT (1998), Article 5(1)	"Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation."

In most of the BITs examined, contracting states do not provide enough clarity on the issue of compensation. Broad and vague treaty language on expropriation leave arbitral tribunals with considerable discretion and may result in interpretations that go well beyond the intention of the contracting states. Wide variations in treaty text can also be observed with respect to the issue of the compensation payable to investors in the event of an expropriation. While some treaties call for 'just and fair compensation', others require 'compensation' or 'prompt and adequate compensation.' As seen in Table 18.

Table 18: Provisions on Compensation in BITs involving EAC Members

TREATY	PROVISIONS
Uganda-Netherland BIT	Just and fair compensation
Uganda-Switzerland BIT	Reasonable, adequate, and effective compensation
Uganda-U.K. BIT; Uganda-Denmark BIT; Tanzania-Canada BIT	Prompt, adequate, and effective compensation[170]
Tanzania-China BIT	Compensation
Uganda-France BIT	Prompt and adequate compensation
Turkey-Kenya BIT	Prompt, adequate, effective and full compensation

In sum, in most BITs involving EAC members, the expropriation provision is broadly worded. Although most BITs cover both direct and indirect expropriation these concepts are rarely defined with clarity. Furthermore, in most of the older BITs, contracting states do not carve out any exceptions.[171] For example, Article 5(1) of the Uganda-Denmark BIT provides that "[i]nvestments of investors of each Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party." Article 9 of the Uganda-France BIT prohibits "measures of expropriation or nationalization or any other measures having the effect of dispossession, direct or indirect" except in the public interest and provided these measures are neither discriminatory nor contrary to a specific commitment. In some recent BITs involving EAC states, attempt is made to define 'indirect expropriation' and to carve out some general and specific exceptions to host state's obligation relating to indirect expropriation.[172]

Transparency Obligations - In investment treaties transparency "denotes a state of affairs in which the participants in the investment process are able to obtain sufficient information from each other in order to make informed decisions, meet obligations and deliver commitments." [173] Transparency provisions typically appear as an obligation on a host country and not as obligations or requirements on investors or home country. The aim of transparency provisions is "to enhance the predictability and stability of the investment relationship and to provide a check against circumvention and evasion of obligations, by resort to covert or indirect means."[174] Transparency provisions vary in terms of the obligations imposed on host countries, the degree of intrusiveness on national policies, and the modalities that host countries may employ in order to provide the desired information.

[170] See also, Tanzania-Denmark BIT, Article 5; Tanzania-Finland BIT, Article 5.
.[171] Uganda-France BIT, Article 5; Tanzania-Denmark BIT, Article 5.
[172] See infra Chapter6. Tanzania-Canada BIT; Kenya-Japan BIT; Kenya-Korea BIT, Rwanda – USA BIT (Annex).
[173] UNCTAD, Transparency (New York and Geneva, United Nations, 2004), at p. 3.
[174] UNCTAD, International Investment Agreements: Key Issues (Vol. 1) ((New York and Geneva, United Nations, 2004) at p. 282.

Transparency provisions are not very common in BITs involving EAC countries and are more frequently found in BITs between EAC states and countries like Canada, the United States, Turkey, Korea, and Japan. Article 9 of the Kenya Model BIT (2003) is titled 'Transparency' and provides "Each Contracting Party shall make public all laws, regulations, administrative practices and procedures that pertain to or affect investments." In almost all the BITs reviewed, the transparency provision imposes obligation on the contracting parties and not on the investors.[175] For example, Article 8 of the Korea-Kenya BIT provides: "Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which may affect the operation of this Agreement." Article12 of the Tanzania-Canada BIT also provides:

ARTICLE 12 – Transparency

1. Each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are published or otherwise made available in a timely manner so as to enable interested persons and the other Party to become acquainted with them.
2. Each Party shall if required by its laws and regulations:
   (a) publish in advance any such measure that it proposes to adopt; and
   (b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.
3. Upon request by a Party, information shall be exchanged on the measures of the other Party that may have an impact on covered investments.

Transfer of Funds - Transfer provisions constitute one of the core provisions in IIAs.[176] Investors need assurance that they will be able to enjoy the financial benefits of a successful investment. Consequently, transfer provisions typically "set forth a host country's obligation to allow free flow of all investment related transactions, guaranteeing the transfer, conversion and liquidation of any form of capital, proceeds, payments, profits and others, without restrains."[177] A good transfer provision will define the nature of transfers covered, the nature of the obligation of a host state, and any permissible exceptions and derogations. Most of the BITs examined guarantee investors the right to transfer capital and returns out of the host state in absolute terms.[178] For example, Article 4 of the Uganda-Germany BIT provides, "[w]ith respect to investments either Contracting Party shall guarantee to nationals or companies of the other Contracting Party the free transfer of the capital, of the returns from it and, in the event of liquidation, of the proceeds from such liquidation."

[175] See e.g. Japan-Kenya BIT (2016), Article 8; Korea-Kenya BIT (2014), Article 8.
[176] UNCTAD, INTERNATIONAL INVESTMENT AGREEMENTS: KEY ISSUES (VOLUME 1)(New York and Geneva, United Nations, 2004), p. 257
[177] Id.
[178] See e.g. Turkey-Tanzania BIT Article 8.

Some BITs offer an expansive and open-ended list of what is transferable and these generally include (a) profits, dividends, interests and other legitimate income; (b) proceeds obtained from the total or partial or liquidation of investments; (c) payments pursuant to a loan agreement in connection with investments; (d) royalties; (e) payments of technical assistance service fees, or management fees; (f) payments in connection with contracting projects; as well as, (g) earnings of nationals of the other Contracting Party.[179] For instance, Article 6 of the Korea-Kenya BIT (2014) provides that "[e]ach Contracting Party shall guarantee to an investor of the other Contracting Party the free transfer of all payments relating to an investment into and out of its territory" and offers an open-ended list of the types of transfers that are permissible.

An unqualified right to investors to transfer funds into and out of a host state can have serious impact on the state's capital account and balance of payments. Most of the old-generation BITs examined do not limit the scope of the general obligation undertaken by the host country or provide exceptions and qualifications to this general obligation.[180] Article 4 of the Tanzania-Germany BIT (1965) provides that "[e]ither Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the transfer of the capital, of the returns from it and, in the event of liquidation, of the proceeds from such liquidation." Article 6 of the UK-Kenya BIT provides thus:

ARTICLE 6

Repatriation of Investment and Returns

Each Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the unrestricted transfer of their investments and returns. Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Transfers shall be made at the rate of exchange applicable on the date of transfer, unless otherwise agreed.

In some BITs, mostly recent agreements, contracting states limit the right of transfer by stipulating that the exercise of this right shall be subject to the fulfilment of tax obligations,[181] in accordance with domestic legislation,[182] or subject to a limited 'balance of payment (BOP)' exceptions.[183] Furthermore, more recent agreements contain more robust exceptions and derogations to the transfer provision as seen in Table 19.[184]

[179] Uganda-Denmark BIT, Article 7.
[180] Uganda-Germany BIT, Article 4; Tanzania-Denmark BIT, Article 7.
[181] Uganda-Tanzania BIT, Article 7(5).
[182] Uganda-Denmark BIT, Article 7(4); Uganda-China BIT, Article 7(5).
[183] Uganda-France BIT, Article 6.
[184] Tanzania-Canada BIT; Tanzania-Canada BIT, Article 11(3) and (5); Tanzania-China BIT, Article 8(3) and (4).

Table 19: Transfer of Funds Provisions in BITs Involving EAC States

BIT	PROVISIONS
Uganda-BLEU	ARTICLE 6 Transfers 1. Each Contracting Party shall grant to investors of the other Contracting Party the free transfer of all payments relating to an investment, without undue delay, including more particularly: a) amounts necessary for establishing, maintaining or expanding the investment; b) amounts necessary for payments under a contract, including amounts necessary for repayment of loans, royalties and other payments resulting from licences, franchises, concessions and other similar rights, as well as salaries of expatriate personnel; c) the invested capital or proceeds from the sale or liquidation of all or any part of an investment; d) compensation paid pursuant to Article 5. 2. The nationals of each Contracting Party who have been authorized to work in the territory of the other Contracting Party in connection with an investment shall also be permitted to transfer an appropriate portion of their earnings to their country of origin. 3. Transfers shall be made in a freely convertible currency .... 4. The guarantees referred to in this Article shall at least be equal to those granted to the investors of the most-favoured nation.
Kenya-Netherlands	ARTICLE 8 1) The Contracting Parties recognise the principle of freedom of transfer of: (a) the net profits, interests, dividends, royalties and other current income, accruing from any approved economic activity to nationals of the other Contracting Party; (b) the proceeds of the total or partial liquidation of any approved investment made by nationals of the other Contracting Party; (c) an appropriate portion of the earnings of nationals of the other Contracting Party who are authorised to work in its territory; (d) funds in repayment of loans which the Contracting Parties have recognised as approved investments to the country of residence of these nationals and in the currency thereof. 2) Any authorisation to such transfer shall be issued, and any such transfer shall be carried out, without undue restriction or delay, and subject to the relevant laws and rules in force in the territory of the Contracting Party concerned.
Uganda-UK	ARTICLE 6 Repatriation of investment and Returns Each Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the unrestricted transfer of their investments and returns. Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Unless otherwise agreed by the investor, transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

Dispute Settlement - Ordinarily, Investor-State disputes are subject to the jurisdiction of the host State's courts. In the event of a dispute between an investor and a host State, an investor can generally seek redress before the local courts of a host State. However, foreign investors are not always keen to pursue claims in the local courts of a host State

and have frequently insisted on alternative means of dispute settlement. In the late 1960s, BIT practice evolved to provide for a special dispute settlement procedure that is not centred around litigation in the domestic courts of host States but rather, around international commercial arbitration mechanisms. Today, most BITs involving EAC members contain provisions on dispute settlement and address two types of disputes: inter-state (or State-to-State) disputes, and disputes between a host State and an investor.

Presently, four in force EAC BITs do not provide for ISDS: Tanzania-Germany BIT (1965), Kenya-Netherlands BIT (1970), Burundi-Germany BIT (1984), and Uganda-Germany BIT (1966). The Netherlands-Uganda BIT (1970) also did not provide for ISDS but this treaty has since been terminated. In the absence of a robust *travaux preparatoire* for each of these agreements it is difficult to know the reason why the ISDS was omitted from these two agreements. Article 10 of the Burundi-Germany BIT Provides for State-State arbitration, Article 10(6) provides:

ARTICLE 10(6)

If both Contracting Parties are members of the Convention of 18 March 1965 on the settlement of investment disputes between States and nationals of other States, the arbitral tribunal provided for above may in consideration of the provisions of article 27, paragraph 1, of the said Convention not be appealed to in so far as agreement has been reached between the national or company of one Contracting Party and the other Contracting Party under article 25 of the Convention. This shall not affect the possibility of appealing to such arbitral tribunal in the event that a decision of the Arbitral Tribunal established under the said Convention is not complied with (article 27) or in the case of an assignment under a law or pursuant to a legal transaction as provided for in article 6 of the present Treaty.

The Germany-Tanzania BIT (1965) and the Germany-Uganda BIT (1966) provides for State-to-State arbitration in their Article 11 but are both silent on Investor-State arbitration. In the absence of a *travaux preparatoire* to explain the decision of the Contracting Parties to omit the ISDS, one can speculate that at the time the treaties were concluded, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States was still a novelty and Germany had not yet warmed up to the system created under the convention. Germany ratified the ICSID Convention on April 18, 1969. The Netherland-Kenya BIT (1970) provides for State-to-State Arbitration (Article 16). Regarding, Investor-State arbitration, the agreement does not exclude ISDS completely and appears to make some provision for it. Article 11 of the Netherland-Kenya BIT provides:

ARTICLE 11

The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall give sympathetic consideration to a request on the part of such national to submit for conciliation or arbitration, to the Centre established by the Convention of Washington of 18 March 1965, any dispute that may arise in connection with the investment.

The novelty of the ICSID system in the late 1960s explains the omission of an ISDS mechanism from some of the first-generation BITs involving EAC states.[185] The text of the ICSID Convention was approved on 18 March 1965, and the convention entered into force on October 14, 1966. Indeed, the first BIT to include an ISDS mechanism, the Netherlands-Indonesia BIT, was only signed on July 7, 1967 and entered into force July 17, 1971. Although not the first BIT to include an ISDS, the Italy-Chad BIT (1969) was the first BIT with an ISDS to enter into force.[186]

As noted, most BITs involving EAC members provide for ISDS. To start with, most of the BITs provide that disputes have to be settled by friendly negotiation. Further, the BITs usually provide that if a dispute is not settled within three (or sometimes six) months from the time it appeared, an investor has the choice and discretion to submit the dispute to either the national jurisdiction of the host state or international arbitration. Most of the BITs also embody the prior and irrevocable approval of contracting parties to international arbitration and provide that arbitral awards are final and binding for the litigating parties. In most of the old-generation BITs, the ISDS provision tend to be brief and to address only a limited number of issues such as who can submit a dispute to arbitration, the types of disputes that may be submitted to arbitration, and conditions that may need to be satisfied before a dispute can be submitted to arbitration. For example, Article 8 of the Uganda-U.K. BIT provides:

ARTICLE 8

Reference to International Centre for Settlement of Investment Disputes

(1) Each Contracting Party **hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as "the Centre") for settlement** by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965, **any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.**

(2) A company which is incorporated or constituted under the law in force in the

[185] The Netherlands signed the ICSID Convention on 25 May 1966 and ratified it on 14 September 1966.

[186] Although concluded later than the Netherland-Indonesia BIT (on June 11, 1969), it entered into force the same day, more than a year before the Netherland-Indonesia BIT (1967) entered into force.

territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.

Regarding the actual arbitration, Article 8 of the Uganda-U.K. BIT provides that either party may institute arbitral proceedings and limits the use of diplomatic channels. Article 8 (3) and 8(4) provide as follows:

ARTICLE 8

Reference to International Centre for Settlement of Investment Disputes

....

3) If any such dispute should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose. The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of the proceedings or enforcement of an award the fact that the national or company which is the other party to the dispute has received in pursuance of an insurance contract an indemnity in respect of some or all of his or its losses.

(4) Neither Contracting Party shall pursue through the diplomatic channel any dispute referred to the Centre unless:

(a) the Secretary-General of the Centre, or a conciliation commission or an arbitral tribunal constituted by it, decides that the dispute is not within the jurisdiction of the Centre; or

(b) the other Contracting Party should fail to abide by or to comply with any award rendered by an arbitral tribunal.

As with most old-generation BITs, Article 8 of the Uganda-U.K. BIT does not address a host of issues pertinent to investment arbitration including cost of arbitration, frivolous claims, inconsistent awards, absence of appeal facility, third party participation, or transparency.

Country Treaty Provision Analysis in East African BITS

- *Burundi* **-** Burundi has five in force BITs: Burundi-BLEU BIT (1989), Burundi-Germany BIT (1984), Burundi-Kenya BIT (2009), Burundi-Mauritius BIT (2001), and Burundi-Netherlands BIT (2007).

Table 20: Bilateral Investment Treaties in Burundi

Partners	Date of Signature	Date of ratification	Status
BLEU (Belgium-Luxembourg-Economic Union)	13/04/1989	12/09/1993	In force
Comoros	18/05/2001	--	Signed♦
Egypt	13/05/2012	--	Signed (not in force)
Germany	10/09/1984	09/12/1987	In force
Kenya	01/04/2009	01/04/2009	In force
Mauritius	18/05/2001	22/11/2009	In force
Netherlands	24/05/2007	01/08/2009	In force
Turkey	14/06/2017	--	Signed (not in force)
United Arab Emirates	06/02/2017	--	Signed (not in force)
United Kingdom	13/09/1990	13/09/1990	In force

Source: UN conference on Trade and Development[187]

All Burundi's in force BITs offer a broad definition of investment defining it to comprise "every kind of asset."[188] According to Article 1 of the Burundi-Germany BIT (1984), 'The term "investments" shall comprise every kind of asset, in particular ....' Article 1 of the Burundi-UK provides as follows:

ARTICLE 1

(a) "investment" means every kind of asset and in particular, though not exclusively, includes:
(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
(ii) shares in and stock and debentures of a company and any other form of participation in a company;
(iii) claims to money or to any performance under contract having a financial value; (iv) intellectual property rights, goodwill, technical processes and know-how;
) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

Burundi's BITs afford investors both NT treatment and MFN treatment. The NT and MFN treatment in most of the BITs examined are not limited to "like circumstances." A combined NT and MFN provision appears in Article 3 of the Burundi-UK BIT which provides:

♦ A status of "Signed" signifies the BIT is not in force.

[187] Burundi Bilateral Investment Treaties. https://investmentpolicy.unctad.org/international-investment-agreements/countries/32/burundi

[188] Art. 1, Burundi-Kenya BIT; Article 1 Burundi-UK BIT, and Article 1, Burundi-Germany BIT.

ARTICLE 3

National Treatment and Most-favoured-nation Provisions

(I) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State.

(2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State

Burundi's BITs do not generally provide for broad exceptions to treaty obligations. A few BITs provide very narrow exception to the NT and MFN obligation. In respect only to the NT and MFN Obligation, Article 7 of the Burundi-UK BIT Provides:

ARTICLE 7

Exceptions

The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the nationals or companies of either Contracting Party or of any third State shall not be construed so as to oblige one Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from (a) any existing or future customs union or similar international agreement to which either of the Contracting Parties is or may become a party, or (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

Regarding absolute standards of treatment, the FET standard is found in the Burundi-Kenya BIT[189] and the Burundi-UK[190] BIT but not in the Burundi-Germany BIT. Article 3(3) of the Burundi-Kenya BIT declares that "Investments and Returns of investors … shall at all times be accorded fair and equitable treatment." The FPS clause is found in the three BITs examined but the precise formulations differ. The Burundi-Kenya BIT declares that, "Investments … shall be accorded **whole and sufficient protection** and security."[191] In the Burundi-Germany BIT, Contracting States agree that investors "shall enjoy **full protection as well as security**" in the territory of the other Contracting Party.[192]

All the BITs reviewed address both direct and indirect expropriation. There are some inconsistencies in the text of Burundi's BITs. For example, the Burundi-Kenya BIT

[189] Burundi-Kenya BIT, article 3(3).

[190] Burundi-UK BIT, Article 2(2).

[191] Emphasis added.

[192] Burundi-Germany BIT, Article 4. Emphasis added.

guarantee investors, whose property is expropriated, "prompt and full compensation."[193] By contrast, under the Burundi-UK BIT, investors whose property is expropriated are guaranteed "prompt, adequate and effective compensation" and under the Burundi-Germany BIT, such investors are guaranteed "compensation." Meanwhile, all but one of Burundi's BITs provide for Investor-State arbitration. The Burundi-Germany BIT (1984) but does not provide for investor-State arbitration but appears to leave room for investor-State arbitration.

- *Kenya* - Kenya has concluded 19 BITs of which only 10 are in force. Kenya concluded its first BIT in 1970 (with Netherlands) and concluded its most recent BIT in 2016 (with Japan). The most recent BIT to enter into force did so on May 5, 2017 but was concluded July 8, 2014.

Table 21: Bilateral Investment Treaties in Kenya

Partners	Date of Signature	Date of ratification	Status
Burundi	01/04/2009	01/04/2009	In force
China	16/07/2001	--	Signed (not in force)
Finland	01/09/2008	02/10/2009	In force
France	04/12/2007	26/05/2009	In force
Germany	03/05/1996	07/12/2000	In force
Islamic Republic of Iran	24/04/2009	--	Signed (not in force)
Italy	06/09/1996	04/08/1999	Terminated
Japan	28/08/2016	14/09/2017	In force
Republic of Korea	08/07/2014	03/05/2017	In force
Kuwait	12/11/2013	22/04/2015	In force
Libya	05/06/2007	--	Signed (not in force)
Mauritius	07/05/2012	--	Signed (not in force)
Netherlands	11/09/1970	11/06/1979	In force
Qatar	13/04/2014	--	Signed (not in force)
Slovakia	14/12/2011	--	Signed (not in force)
Switzerland	14/11/2006	10/07/2009	In force
Turkey	08/04/2014	--	Signed (not in force)
United Arab Emirate	23/11/2014	--	Signed (not in force)
United Kingdom	13/09/1999	13/09/1999	In force

Source: UN conference on Trade and Development[194]

Kenya's BITs provide most of the basic investor protections found in traditional BITs including NT, MFN, FET, FPS, and limits on expropriation, compensation for loss, and the right to free transfer of capital and returns. Although Kenya developed a Model BIT in 2003, the Kenya Government does not appear to negotiate on the basis of its Model BIT judging from the major differences in some of the BITs involving Kenya.

---

[193] Burundi-Germany BIT, Art. 5(1).
[194] Kenya Bilateral Investment Treaties, https://investmentpolicyhubold.unctad.org/IIA/CountryBits/108#iiaInnerMenu

Inconsistency characterizes Kenya's BITs. For example, performance requirements are prohibited in a few BITs (e.g. BIT with Japan, Kuwait, and Korea) but not in many other BITs (e.g. BIT with U.K., Sweden, Germany and Finland). Transparency requirement is found in some BITs (e.g. Kenya-Japan BIT, Kenya-Korea BIT, and Kenya-Kuwait BIT) but not in other BITs (e.g. Kenya-UK BIT and Kenya-Germany BIT). In Article 8(1) of Kenya-Japan BIT, each Contracting Party commits to "promptly publish, or otherwise make publicly available, the laws, regulations, administrative procedures and administrative rulings and judicial decisions of general application as well as international agreements which pertain to or affect the implementation and operation of the Agreement."
Unique to Kenya-Japan BIT are Article 5 ("General Treatment and Improvement of Investment Environment") and Article 6 ("Access to the Courts of Justice") which are not found in other BITs involving Kenya. In addition to the fair and equitable treatment, Article 5(3) states:

> ARTICLE 5
>
> (3) Each Contracting Party shall take appropriate measures to further improve investment environment in its Area for the benefit of investors of the other Contracting Party and their investments. In this regard, each Contracting Party shall endeavour to create and maintain favourable conditions for the investors of the other Contracting Party and their investments with respect to investment activities as well as the establishment, acquisition and expansion of investments.

Regarding Access to Courts of Justice, Article 6 states:

> ARTICLE 6
>
> Access to the Courts of Justice
>
> Each Contracting Party shall in its Area accord to investors of the other Contracting Party treatment no less favourable than the treatment which it accords in like circumstances to its own investors or to investors of a non-Contracting Party with respect to access to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction, both in pursuit and in defense of such investors' rights.

The Kenya-Netherlands BIT is unique in two aspects. It is the only 'in force' Kenya-BIT that does not provide for investor-State arbitration. It is also the only 'in force' Kenya BIT that does not provide the 'full protection and security" guarantee.

- *Rwanda* **-** Rwanda has concluded 10 BITs in total of which only four are in force (the BITs with Germany, Korea, the United States of America, and the Belgium-

Luxembourg Economic Union). All four of Rwanda's in force BITs were concluded prior to 2010.

Table 22: Bilateral Investment Treaties in Rwanda

Partners	Date of Signature	Date of Ratification	Status
BLEU (Belgium-Luxembourg-Economic Union)	02/11/1983	01/08/1995	In force
BLEU (Belgium-Luxembourg-Economic Union)	16/04/2007	--	Signed (not in force)
Germany	18/05/1967	28/02/1969	In force
Korea, Republic of	29/05/2009	16/02/2013	In force
Mauritius	30/07/2001	--	Signed (not in force)
Morocco	19/10/2016	--	Signed (not in force)
South Africa	19/10/2000	--	Signed (not in force)
Turkey	03/11/2016	--	Signed (not in force)
United Arab Emirate	01/11/2017	--	Signed (not in force)
United States of America	19/02/2008	01/01/2012	In force

Source: UN conference on Trade and Development[195]

Rwanda's BITs accord post-establishment rights to investors.[196] Article 2 of the Rwanda-BLEU BIT provides, "Each Contracting Party shall admit to its territory in accordance with its law, investments by individuals or corporations under private law of the other Contracting Party and shall encourage such investments." Rwanda's BITs adopt the open-ended asset-based definition of investment.[197] Only the Rwanda-BLEU BIT departs from this model. According to Article 1(3) of the Rwanda-BLEU:

---

[195] Rwanda, https://investmentpolicy.unctad.org/international-investment-agreements/countries/176/rwanda

[196] See Rwanda-Korea BIT, Article 2 (1).

[197] Rwanda-Korea BIT, Article 1 (""investment" means every kind of asset in the territory of one Contracting Party, owned or controlled directly or indirectly, by an investor of the other Contracting Party, provided that the investment has been made in accordance with the laws and regulations of the former Contracting Party"). See also Rwanda-USA BIT, Article 1 ("investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.)

ARTICLE 3

3. The term "investments" shall mean any direct or indirect medium or long term contribution of movable or immovable property intended for the development of an economic activity acknowledged to be in the national interest at the time the contribution is made under the laws of the State in whose territory such contributions are made.

The following shall more particularly be considered investments within the meaning of this Convention:
(a) Movable property and any other right in rem, such as mortgages, securities and security interests;
(b) Bonds, shares and company shares as well as any other kinds of interest in companies;
(c) Claims and rights to any benefits having economic value;
(d) Copyrights, industrial rights, technical processes, trademarks and business assets;
(e) Business concessions under public law or by contract, including concessions in respect of agricultural research and the extraction or exploitation of natural resources.

Rwanda's BITs grant standard rights and guarantees to foreign investors including NT, MFN, FET, and limits on expropriation.[198] A wide variation in the language of Rwanda's BITs can be observed. For example, the Rwanda-Korea BIT provides investors and investment full protection and security in accordance with customary international law (Article 2(2)). By contrast, the Rwanda-BLEU BIT provides, "In accordance with prevailing laws and regulations, such investments shall be safeguarded and protected at all times" (Article 3(2)). The expropriation clause in Rwanda's BITs also differ:

Table 23: Expropriation Clauses in Rwanda BITs

TREATY	PROVISIONS
Rwanda-Korea BIT, Article 5(1).	"Investments of an investor of one Contracting Party shall not be nationalized, expropriated (hereinafter referred to as "direct expropriation") or otherwise subjected to any other actions having an effect equivalent to nationalization or expropriation (hereinafter referred to as "indirect expropriation") in the territory of the other Contracting Party…."
Rwanda-BLEU BIT, Article 4(1).	"Each Contracting Party undertakes to refrain from any expropriatory or restrictive measure in respect of property against investments situated in its territory."
Rwanda-USA BIT, Article 6(1).	Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation")."

[198] Rwanda-BLEU BIT provides the MFN treatment but not the NT standard.

Rwanda has not carried out a review of its BIT and does not appear to be retreating from international investment rulemaking. Although Rwanda is still negotiating and concluding BITs, it is not ratifying as many BITs as in the past. Of Rwanda's seven unratified BITs, three were concluded after 2010: Rwanda-Morocco BIT (2016), Rwanda-UAE BIT (2017), and Rwanda-Qatar BIT (2018). Rwanda has not developed a Model BIT and appears to embrace whatever template a treaty partners introduces. For example, the Rwanda-USA BIT is modelled after the 2004 United States Model BIT and is very different from Rwanda-Morocco BIT (2016), the Rwanda-UAE BIT (2017), and the Rwanda-Qatar BIT (2018).

- *South Sudan* **-** South Sudan has concluded only one BIT, with Morocco. The South Sudan-Morocco BIT was concluded on February 1, 2017. The agreement is not publicly available and is not in force.
-

Table 24: Bilateral Investment Treaties in South Sudan

Party	Date of Signature	Date of ratification	Status
Morocco	01/0	--	Signed (not in force)

- *Tanzania* **-** Tanzania has concluded twenty BITs. Tanzania concluded its first BIT in January 1965 (with Germany) and concluded its most recent BITs in 2013 (with Canada, China, and Kuwait respectively). The most recent BIT for Tanzania to enter into force was the Tanzania-China BIT which entered into force on April 17, 2014. Of the 20 BITs that Tanzania has concluded, 10 are in force and two have been terminated.[199] Of the Tanzania's 10 in force BITs, nine can be classified as "old-generation" agreements having been concluded prior to 2010. Tanzania has not developed a model BIT and does not appear to negotiate investment treaties based on any model agreement.

Table 25: Bilateral Investment Treaties in Tanzania

Other Party	Date of Signature	Date of ratification	Status
Canada	17/05/2013	09/12/2013	In force
China	24/03/2013	17/04/2014	In force
Denmark	22/04/1999	21/10/2005	In force
Egypt	30/04/1997	--	Signed (not in force)
Finland	19/06/2001	30/10/2002	In force
Germany	30/01/1965	12/07/1968	In force
Italy	21/08/2001	25/04/2003	In force
Jordan	08/10/2009	--	Signed (not in force)
Korea, Republic of	18/12/1998	--	Signed (not in force)
Kuwait	17/11/2013	--	Signed (not in force)
Mauritius	04/05/2009	02/03/2013	In force

[199] Switzerland-Tanzania BIT (1965) was concluded on May 3, 1965, and entered into force on September 16, 1965. The Netherland-Tanzania BIT was signed on July 31, 2001, and entered into force on April 1, 2004; the termination became effective on April 1, 2019. Tanzania has since concluded a new BIT with Switzerland. The Switzerland-Tanzania BIT (2004) was signed on April 8, 2004, and entered into force on April 6, 2006.

Netherlands	31/07/2001	01/04/2004	Terminated
Oman	16/10/2012	--	Signed (not in force)
South Africa	22/09/2005	--	Signed (not in force)
Sweden	01/09/1999	01/03/2002	In force
Switzerland	03/05/1965	16/09/1965	Terminated
Switzerland	08/04/2004	06/04/2006	In force
Turkey	11/03/2011	--	Signed (not in force)
United Kingdom	07/01/1994	02/08/1996	In force
Zimbabwe	03/07/2003	--	Signed (not in force)

Source: Source: UN conference on Trade and Development[200]

Broad asset-based definition of investment characterizes most BITs involving Tanzania.[201] Tanzania's BITs provide most of standard rights and guarantees found in traditional BITs. Tanzania's BITs adopt the "admission" model and only guarantees investors post-establishment rights.[202] However, the pre-establishment model is found in Tanzania's BIT with Canada. Almost all in force BITs involving Tanzania provide for national treatment, MFN treatment, and FET.[203] In addition to standards rights and guarantees, the Tanzania-Canada BIT addresses a number of issues that are not addressed in other BITs involving Tanzania such as Senior Management, Board of Directors and Entry of Personnel (Article 8), Performance Requirements (Article 9), and Transparency (Article 12).

There are considerable differences in Tanzania's BIT. This is evident in the formulation of the FET standard as demonstrated by the following provisions:

Table 26: FET Standards in Tanzania BITs

TREATY	PROVISIONS
Tanzania-Switzerland BIT, Article 4(1)	"Investments and returns of Investors of each Contracting Party shall at all times be accorded fair and equitable treatment"
Tanzania-Italy BIT, Article 2(2)	Each Contracting Party shall create and maintain in its territory a legal system guaranteeing that investments of nationals or companies of the other Contracting Party shall at all time, be accorded fair and equitable treatment."
Tanzania-China BIT, Article 5(1)	Each Contracting Party shall ensure that it accords to investors of the other Contracting Party and associated investments in its territory fair and equitable treatment and full protection and security.

[200] Tanzania, https://investmentpolicy.unctad.org/international-investment-agreements/countries/222/tanzania-united-republic-of

[201] China-Mauritius BIT, Article 1 ("investment" means every kind of asset admissible under the relevant laws and regulations of the Contracting Party in whose territory the respective business undertaking is made…."); Tanzania-China BIT, Article 1 ("The term "investment" means any kind of asset that has the characteristics of an investment, invested by an investor of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter.").

[202] See e.g. Tanzania-China BIT, Article 2(1); Tanzania-Mauritius BIT, Article 3(1).

[203] National treatment and MFN treatment do not appear in Tanzania-Denmark BIT.

The full protection and security guarantees are found in most BITs involving Tanzania, but their wording vary.[204] For example:

Table 27: Provisions on Full Protection and Security Guarantees in Tanzania BITs

TREATY	PROVISIONS
Tanzania-Italy BIT, Article 2(2).[205]	"Each Contracting Party shall create and maintain in its territory a legal system guaranteeing that investments of nationals or companies of the other Contracting Party shall all time be accorded fair and equitable treatment and shall enjoy full protection and security as accorded to the residents in its territory."
Article 3(1), Second Sentence, Tanzania-Netherlands BIT.[206]	"Each Contracting Party shall accord … such investments non-discriminatory physical security and protection."
Tanzania-Sweden BIT, Article 2(4).[207]	Investments made in accordance with the laws and regulations of host state "shall enjoy the full protection of this Agreement and in no case shall a Contracting Party award treatment less favourable than that required by international law."

In most Tanzania's BITs, investors are guaranteed the right to free transfer of their investments into and out of the host state. In some BITs, there is an additional requirement for the host State to pay interest in cases where a delay is caused by a host state. For example, Article 7(4) of the Tanzania-Finland BIT states, "[i]n case of a delay in transfer caused by the host Contracting Party, the transfer shall also include interest at a commercial rate established on a market basis for the currency in question from the date on which the transfer was requested until the date of actual transfer and shall be borne by the host Contracting Party."

Policy space is found in Tanzania-Canada BIT but not in most of the other BITs that Tanzania has concluded.[208] Found in Tanzania-Canada BIT, and not in most of the other in force BITs involving Tanzania, are provisions relating to: (i) Taxation Measures (Article 14),[209] Health, Safety, Labour and Environmental Measures (Article 15);[210] Reservations and Exceptions (Article 16); and General Exceptions (Article 17). Also unique to Tanzania-Canada BIT are several annexes comprising addressing "Reservations for Existing Measures and Liberalization Commitments (Annex 1), Reservations for Future Measures (Annex 2) and Exclusions from Dispute Settlement (Annex III). In the preamble to Tanzania-China BIT (2013), Contracting Parties expressed a desire to "[e]ncourage investors to respect corporate social responsibilities" and a desire "to intensify the

[204] The full protection and security standard are not found in Tanzania-Mauritius BIT.
[205] Emphasis added.
[206] Emphasis added.
[207] Emphasis added.
[208] Tanzania-Finland BIT, Preamble ("AGREEING that these objectives can be achieved without relaxing health. safety and environmental measures of general application.").
[209] Tanzania-Netherlands BIT (Article 4 titled "Taxes and Fiscal Matters" does not remove taxation measures from the purview of the BIT but provides for national treatment and Most-Favored Nation treatment in respect to taxes, fees, charges and fiscal deductions and exemptions).
[210] Tanzania-China BIT, Article 10.

cooperation between both States, to promote healthy, stable and sustainable economic development, and to improve the standard of living of nationals." The Tanzania-China BIT also provides some regulatory space for Contracting Parties through Article 10 which provides:

> ARTICLE 10
>
> HEALTH, SAFETY AND ENVIRONMENTAL MEASURES
>
> 1. The Contracting Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Contracting Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.
> 2. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining environmental measures necessary to protect human, animal or plant life or health.

The investor-State arbitration is a common feature of almost all Tanzania's BIT. However, the Tanzania-Germany BIT does not provide for investment arbitration.

- *Uganda* **-** Uganda has concluded 17 BITs. Uganda concluded its first BIT in 1966 (with Germany) and concluded its most recent BIT in 2017 (with UAE). The latest BIT involving Uganda to enter into force is the Uganda-Denmark BIT which entered into force on October 19, 2005. Of the 18 BITs involving Uganda, one has been terminated and six are in force. All of Uganda's in force BITs are with European nations (Denmark, Germany, Switzerland, Netherlands, U.K. and France) and all were concluded before 2010. Uganda developed a model BIT in 2003 but does not appear to conclude BITs in the basis of its Model BIT.

Table 28: Bilateral Investment Treaties in Uganda

Party	Date of Signature	Date of ratification	Status
BLEU (Belgium-Luxembourg-Economic Union)	01/02/2005	--	Signed (not in force)
China	27/05/2004	--	Signed (not in force)
Cuba	01/01/2002	--	Signed (not in force)
Denmark	26/11/2001	19/10/2005	In force
Egypt	04/11/1995	--	Signed (not in force)
Eritrea	30/06/2001	--	Signed (not in

			force)
France	03/01/2003	20/12/2004	In force
Germany	29/11/1966	19/08/1968	In force
Italy	12/12/1997	24/09/1999	Terminated
Netherlands	30/05/2000	01/01/2003	In force
Netherlands	24/04/1970	--	Terminated
Nigeria	15/01/2003	--	Signed (not in force)
South Africa	08/05/2000	--	Signed (not in force)
Switzerland	23/08/1971	08/05/1972	In force
United Arab Emirate	01/11/2017	--	Signed (not in force)
United Kingdom	24/04/1998	24/04/1998	In force
Zimbabwe	01/07/2003	--	Signed (not in force)

Source: UN conference on Trade and Development[211]

Uganda's BITs provide most of the substantive rights found in traditional BITs, including NT, MFN, FET, FPS, non-impairment obligation, limits on direct and indirect expropriation, compensation for losses, transfer of capital "without delay," and subrogation. The Uganda-Denmark BIT (2001) does not offer national treatment and only offers limited MFN treatment; the MFN standard applies only to the FET obligation:

Uganda-Denmark BIT
ARTILCE 3
Treatment of Investments

1. Each Contracting Party shall in its territory accord to investments made by investors of the other Contracting Party fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third state. whichever is the more favourable from the point of view of the investor.
2. Each Contracting Party shall in its territory accord investors of the other Contracting Party. as regards their management, maintenance, use, enjoyment or disposal of their investment, fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third State, whichever of these standards is the more favourable from the point of view of the investor.

The NT and MFN provision in Uganda-France BIT is unique in the sense that they explicitly apply to the maritime areas within the jurisdiction of the Contracting Parties:

[211] Uganda, https://investmentpolicy.unctad.org/international-investment-agreements/countries/218/uganda

ARTICLE 4

National treatment and most favoured nation treatment

Each Contracting Party shall apply on its territory and in its maritime area to the nationals and companies of the other Party, with respect to their investments and activities related to the investments, a treatment not less favourable than that granted to its nationals or companies, or the treatment granted to the nationals or companies of the Most-Favoured Nation, if the latter is more favourable. In this respect, nationals authorized to work on the territory and in the maritime area of one Contracting Party shall enjoy the material facilities relevant to the exercise of their professional activities.

The FET standard in the Uganda-France BIT is also somewhat unique in the sense that it extends to a Contracting States maritime area and lists several actions that may be deemed de jure or de facto impediments of the FET obligation:

ARTICLE 3

Fair and equitable treatment

Either Contracting Party shall extend fair and equitable treatment in accordance with the principles of International Law to investments made by nationals and companies of the other Contracting Party on its territory or in its maritime area, and shall ensure that the exercise of the right thus recognized shall not be hindered by law or in practice. In particular though not exclusively, shall be considered as de jure or de facto impediments to fair and equitable treatment any restriction to free movement, purchase and sale of goods and services, as well as any other measures that have a similar effect.

There are wide variations in the provisions of Uganda's BITs. For example, some BITs guarantee "Protection" (e.g. Uganda-Denmark BIT), others guarantee "full physical security and protection" (e.g. Uganda-Netherland BIT) and "full and complete protection and safety on the territory and in the maritime area of the other Contracting Party" (Uganda-France BIT). Under the Uganda-Switzerland BIT, each Contracting Party is obliged to "protect within its territory investments by nations or companies of the other Contracting Party." All Uganda's in force BITs provide for State-to-State arbitration as well as ISDS, except the Uganda-Germany BIT which does not provide for ISDS.

Findings and Recommendations

The Bilateral Investment Treaties Landscape of EAC Economies

1. A significant number of EAC BITs are 'first generation' BITs and suffer shortcomings characteristic of traditional BITs in the sense that they focus solely on investment protection and were never designed to further broader objectives.
2. BITs involving EAC countries are designed primarily as investor protection instruments. All the BITs reviewed in this study are asymmetrical in the sense that they accord rights to investors and do not impose corresponding obligations on investors or afford rights to host states. BITs involving EAC states pursue two main foreign investment agenda albeit in varying degrees: investment protection and investment liberalization. Although the BITs all claim to pursue the objectives of investment promotion and facilitation, these objectives are not prioritized in most of the agreements reviewed.
3. The BITs are moderately liberalizing in the sense that they contain certain basics on opening economies but do not contain many of the key elements found in some recent IIAs. Overall, as between the goals of liberalization, protection, promotion and sustainable development, BITs involving EAC countries are primarily protective instruments in the sense that they are designed to protect investors and their investments by imposing binding obligations on host states.
4. BITs involving EAC members exhibit a lot of similarities but also considerable differences. * The BITs are similar in terms of their broad definition of investment, weak provisions on investment promotion and facilitation, and the substantive rights and protection that they offer investors. In addition, in almost all the BITs examined, the protection provisions are supplemented by provisions addressing the settlement of dispute.
5. Typically, the BITs provide for State-to-State dispute settlement as well as Investor-to-State dispute settlement. The BITs examined are also similar in terms of the range of issues that are not addressed; most of the BITs examined do not address issues such as consumer protection, corruption, corporate social responsibility, illicit payments, or the control of restrictive business practices. Despite their similarities, BITs involving EAC members are not created equal and considerable variations exist even as between the BITs concluded by the same country.
6. Although investment processes involve host and home countries plus the investors, historically, only host countries have been addressed in IIAs. BITs involving EAC states have largely followed this trend and do not impose direct obligations on the home states of investors. This is unfortunate. The issue of home country obligation is particularly important in the EAC context because all EAC countries are net importers of FDI and home country measures can have a major impact on the magnitude plus quality of FDI flows to the region.
7. The BITs are therefore indirectly promotional and facilitating. Although all the BITs direct contracting states to promote and encourage investment, they do not specify how investment is to be promoted, do not contain provisions that proactively promote investment flows, and do not establish institutional mechanisms to make that happen. Overall, a majority of EAC's in force BITs are old-generation treaties in urgent need of reform.

CHAPTER 3: CRITIQUEING BILATERAL INVESTMENT TREATIES IN EAST AFRICA

IIAs play a very important role in the economic policies of many countries in Africa but expose most countries in the region to considerable legal and financial risks. Consequently, it is important that states routinely review their international investment policies in general – especially their IIAs. Major economies are known to periodically review their IIAs and to revise their model investment treaty. Given their actual and potential impact, it is important that countries in Africa periodically review their international investment policy. BITs involving EAC countries must also be evaluated against the backdrop of the legitimacy crisis in the international investment law regime, significant changes in the international investment landscape, and the imperatives of sustainable development. [212] Essentially, the international investment law regime is at a crossroads and many countries are revaluating their participation in it.[213] While some countries (e.g. South Africa, India, and Indonesia) appear to be disengaging from the international investment law regime by terminating their BITs, others are revamping and reforming their IIAs.[214]

A review of the BITs involving EAC members reveals many shortcomings, in terms of the process by which the BITs came into existence, the content of the BITs, the provisions made in the agreements to ensure that they are reviewed periodically, and the mechanisms that are in place to ensure that the treaties are implemented once they are signed. Regarding their content, the BITs, particularly those concluded prior to 2010, fall short in five important respects: promoting and facilitating investments, enhancing systemic consistency, safeguarding the right to regulate, ensuring responsible investment and reforming investment dispute settlement. The BITs involving EAC states also appear to be inconsistent with the EAC Model Investment Treaty in many important respects.

Process and Structural Issues

Lack of Preparation and Planning - This study did not unearth the *travaux preparatoires* connected to any of the BITs examined. There is little evidence to suggest that before concluding their respective BITs, the EAC countries carefully evaluated the costs and benefits of the agreements they were concluding.[215] In most cases the public, the legislative branch, and other relevant stakeholders were left in the dark about treaty negotiations. In this regard, the BITs were not the product of extended or serious

[212] Susan D. Franck, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, 73 Fordham L. Rev. 1521 (2005).
[213] Omar Garcia-Bolivar, International Law of Foreign Investments at a Crossroads: The Need for Reform (2008); See also José Alvarez "The Once and Future Foreign Investment Regime," in Looking to the Future: Essays on International Law in Honor of W. Michael Reisman (Mahnoush Arsanjani, Jacob Katz Cogan, Robert D. Sloane and Siegried Wiessner, eds., Martinus Nijhoff, 2010).
[214] Price, D. (2016). Indonesia's bold strategy on bilateral investment treaties: Seeking an equitable climate for investment? Asian Journal of International Law, 7(1). See also L.U. Hamza, Bilateral Investment Treaties (BITs) in Indonesia: A Paradigm Shift, Issues and Challenges, 21 (1) Journal of Legal, Ethical and Regulatory Issues (2018). See also World Investment Report 2019, pp. 99-114.
[215] UNCTAD, UNCTAD'S Reform Package for the International Investment Regime (United Nations, New York and Geneva, 2018), p. 73.

negotiations but were concluded at the behest of a visiting head of state. None of the BITs examined were subjected to any impact assessment and most were signed without a real appreciation of their economic, social, political and legal impact. Overall, the negotiations of most BITs involving EAC states were not informed by clear policies nor were they the product of serious thought and planning.

Investment Promotion and Facilitation Is Not Prioritized - Despite the acknowledged need to mobilize investment for sustainable development and the growing interest in investment facilitation in investment rule making, investment promotion and facilitation is not prioritized in most of the BITs examined. BITs involving EAC members prioritize investor protection and do not generally contain robust provisions on investment facilitation provisions. Most of the agreements do not address inward and outward investment promotion provisions nor do they include joint and regional investment provisions. The problem is evident in old-generation agreements as well as in more recent treaties.

For example, in the Tanzania-Germany BIT (1965) Pursuant to Article 2 of, each Contracting Party, "shall in its territory promote as far as possible, the investment of capital by nationals or companies of the other Contracting Party and admit such investments in accordance with its legislation." Article 3 of the Tanzania-Canada BIT (2013) is titled "Promotion of Investment" and simply states "Each Party shall encourage the creation of favourable conditions for investors of the other Party to make investments in its territory." Article 3(1) of Tanzania-Mauritius BIT also simply states, "Each Contracting Party shall, subject to its general policy in the field of foreign investment encourage the making of investments in its territory by investors of the other Contracting Party." The Kenya Model BIT and Uganda Model BIT are not any better when it comes to investment promotion and facilitation.

Table 29: Provisions on Investment Promotion in Rwanda, Uganda, and Kenya BIT

TREATY	PROVISIONS
Rwanda-BLEU BIT (1983)	ARTICLE 2. Promotion of Investment Each Contracting Party shall admit to its territory in accordance with its law investments by individuals or corporations under private law of the other Contracting Party, and shall encourage such investments.
Uganda-Denmark BIT (2001)	ARTICLE 2 Promotion and Protection of Investments 1. Each Contracting Party shall admit investments by investors of the other Contracting Party in accordance with its legislation and administrative practice and encourage such investments, including the establishment of representative offices.
Kenya Model BIT	ARTICLE 2 Promotion and encouragement of investments

	1. Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of investors of the other Contracting Party....

The Kenya-Netherlands BIT (1970) addresses investment promotion to a greater extent than most of the other BITs examined. Under the Kenya-Netherlands BIT, Contracting States commit to "facilitate the intensification of commercial relations between their respective countries," "further the co-operation between the companies, associations, foundations and other organisations of any kind or subsidiary bodies thereof, which are connected with their economic life, and all their nationals engaged in economic activities, in order to develop their national resources" (Article 3).
Contracting States also agree "to promote the development of international shipping services for mutual benefit" (Article 4). The Uganda-Netherland BIT also introduces a rare element as far as investment promotion is concerned; it calls for the establishment of a Mixed Commission charged with promoting and facilitating investments. Article XIII of the Uganda-Netherland BIT provides as follows:

ARTICLE XIII

1. The Contracting Parties agree to establish a Mixed Commission. Composed of representatives appointed by them.
2. The Mixed Commission shall meet at the request of one of the Contracting Parties to discuss any matters pertaining to the implementation of this Agreement and to consider means of promoting their economic co-operation.
3. The Mixed Commission shall therefore keep under review the development of the economic relations between the two countries, both in bilateral and multilateral contexts. It shall moreover make recommendations to the respective Governments in cases where the objectives of this Agreement might be furthered, and a fuller measure of economic co-operation might be obtained.

Efforts are underway to encourage states to take investment promotion more seriously. For example, in 2016, UNCTAD launched the Global Action Menu for Investment Facilitation. A growing number of recent BITs boast more robust facilitation-related clauses and investment promotion and facilitation are clearly articulated as treaty objectives (*infra* chapter 6).[216]

Treaty Objectives

Narrow Treaty Objectives - In a treaty, the preamble usually sets out the treaty objectives and provides an opportunity for Contracting Parties to shape the meaning and

[216] SADC Model BIT, Article 23.

scope of treaty terms and obligations. Under customary international law and the Vienna Convention on the Law of Treaties, preambles do not create rights and obligations for contracting Parties but can influence how a treaty is interpreted. Contracting Parties typically use the preamble to articulate important treaty objectives and to provide guidance for future application and interpretation of the treaty. Indeed, the texts of preambles "are often the result of hard bargaining."[217] The preambles of many of the BITs reviewed do not articulate objectives beyond investment protection; the problem is particularly acute in older treaties.

Table 30: Treaty Objectives in in EAC States BIT Preambles

TREATY	PROVISIONS
Kenya-Kuwait BIT	The Government of the Republic of Kenya and the Government of the State of Kuwait (hereinafter referred to as the "Contracting Parties"); DESIRING to create favourable conditions for the development of economic cooperation between them and in particular for investments by investors of one Contracting Party in the territory of the other Contracting Party; RECOGNIZING that the promotion and reciprocal protection of such investments will be conducive to the stimulation of business initiative and to the increase of prosperity in both Contracting Parties; HAVE AGREED as follows: ….
Tanzania-Sweden BIT	The Government of the United Republic of Tanzania and the Government of the Kingdom of Sweden, Desiring to intensify economic co-operation to the mutual benefit of both countries and to maintain fair and equitable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party, Recognizing that the promotion and reciprocal protection of such investments favour the expansion of the economic relations between the two Contracting Parties and stimulate investment initiatives·, Have agreed as follows:
Rwanda-BLEU BIT	The Government of the Kingdom of Belgium, acting both on its own behalf and on behalf of the Grand Duchy of Luxembourg, under existing agreements, and The Government of the Rwandese Republic, Desiring to create favourable conditions for greater economic co-operation between them and, in particular, for investments by nationals of either Contracting Party in the territory of the other Contracting Party; Recognizing that the reciprocal encouragement and protection of such investments may stimulate private economic initiatives and increase economic prosperity in the territories of the Contracting Parties; Have agreed as follows:

[217] UNCTAD, International Investment Agreement: Key Issues, supra note 126, p. 37.

The problem of narrow treaty objective is not limited to individual EAC BITs but is also evident in the Model BITs of Kenya and Uganda. Consider the preamble to Kenya's Model BIT which provides:

> AGREEMENT ON ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS BETWEEN THE REPUBLIC OF KENYA AND ___________________*
>
> ....
>
> Desiring to strengthen their traditional ties of friendship and to extend and intensify the economic relations between them particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party
>
> Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable,
>
> Have agreed as follows;

It must be noted that some of the more recent BITs involving states articulate broader objectives than the older agreements. In some recent BITs involving EAC countries, attempts are made to articulate objectives other than investment protection such as the objectives of sustainable development and protection of labour rights.[218] In the Tanzania-China BIT "sustainable economic development" and "improving the standard of living of nationals" appear as treaty objectives. This also is observed in the Rwanda-UAE BIT (2017); Rwanda-Turkey BIT (2016). However, not all recent BITs espouse broad treaty objectives. The preamble to the Rwanda-Morocco BIT (2016) recites:

> RWANDA-MOROCCO BIT (2016)
>
> -Desiring to intensify the economic cooperation to the mutual benefit of both Contracting Parties;
>
> -Intending to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party;
>
> -Recognizing that the reciprocal promotion and protection of investments under this Agreement shall be conducive to the stimulation of individual business and increase prosperity in both Contracting Parties.

[218] Infra Chapter 6.

The EAC Model Investment Treaty also spells out a much broader objective than traditional BITs. Article 1 of the EAC Model Investment Treaty provides:

> ARTICLE 1
>
> The main objective of this Treaty is to promote, facilitate, protect and increase investments between investors of one State Party into the territory of the other State Party that supports: employment generation, increased production and productivity, technology and skills transfer for local value addition, synergies with local firms and ultimately contribute to poverty reduction in the host State in a sustainable way.

Treaty Content

Broad Treaty Scope - In treaty drafting, contracting states can use the "Scope and Coverage" clause to carefully define the extent of their obligations and to delineate the circumstances in which the treaty will not apply. In carefully drafted BITs, contracting states clarify whether or not the agreement applies to all sectors of the economy and to all levels of governments including sub-national units. Contracting parties also use the "Scope and Coverage" clause to exclude specific issues such as taxation, government procurement, and subsidies from the scope of their agreement. In most of the BITs examined, contracting parties did not limit the scope of the treaty in any meaningful way. In most agreements, the "Scope and Coverage" clause addresses the issue of non-retroactivity and nothing more.[219] Consider the following examples in Table 31:

Table 31: Scope and Coverage Clauses in BITs involving EAC states

TREATY	PROVISIONS
Tanzania-Mauritius BIT (2009), Article 2(1)	This Agreement shall apply to all investments, whether made before or after its entry into force, but shall not apply to any dispute concerning investment which arose, or any claim concerning investment which was settled before its entry into force.
Korea-Tanzania BIT (1988), Article 11	The Agreement shall apply to all investments, whether made before or after its entry into force, but shall not apply to any dispute concerning investments which was settled before its entry into force.
Turkey-Burundi (2017), Article 2	This Agreement shall apply to investments in the territory of one Contracting Party, made in accordance with its national laws and regulations, by investors of the other Contracting Party, whether prior to, or after the entry into force of the present Agreement. However, this Agreement shall not apply to any disputes that have arisen before its entry into force.
Kenya-Burundi BIT (2009), Article 2	This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, accepted

[219] Kenya-Korea BIT, Article 13(1) ("This Agreement applies to the existing investment at the date of the entry into force of this Agreement, as well as to the investment made or acquired after this date"). Some BITs do not contain even a retroactivity clause (e.g. Uganda-U.K. BIT).

	as such in accordance with its laws and regulations, whether made before or after the coming into force of this Agreement, but shall not apply to any dispute concerning an investment that arose or any claim that was settled before entry into force.
The Netherlands-Kenya BIT (1970), Article 7	Each Contracting Party shall ensure fair and equitable treatment to the investments, goods, rights and interests of nationals of the other Contracting Party....

As already noted, increasingly, states are careful to define and delineate the scope of their BITs.[220] The India-Belarus BIT (2018) offers a good example. Article 2 is titled 'Scope and General Provisions.' In particular, Article 2(4) provides as follows:

> 2.4 This Treaty **shall not apply to**:
> (i) any measure by a local government;
> (ii) any law or measure regarding taxation, including measures taken to enforce taxation obligations. For greater certainty, it is clarified that where the State in which investment is made, decides that conduct alleged to be a breach of its obligations under this Treaty is a subject matter of taxation, such decision of that State, whether before or after the commencement of arbitral proceedings, shall be non- justiciable and it shall not be open to any arbitration tribunal to review such decision;
> (iii) the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the national law and international obligations of the Party concerned;
> (iv) government procurement by a Party;
> (v) subsidies or grants provided by a Party;
> (vi) services supplied in exercise of governmental authority by the relevant body or authority of a Party. For the purposes of this provision, a service supplied in exercise of governmental authority means any service which is not supplied on a commercial basis.

Vague Treaty Terms - In most of the BITs examined, the obligation imposed on contracting parties are vaguely worded and are ill-defined. The definition section in most of the BITs is unsatisfactory as only a few terms, typically "investment," "investor," "national," and "territory" are defined.[221] In almost all the BITs reviewed, absolute guarantees such as fair and equitable treatment and full protection and security are not defined at all and their scope nor are their limited in any meaningful way.

The concept of indirect expropriation is also not defined or circumscribed in most of the BITs examined. Treaty provisions that are broad and lack clarity can expose a host state to considerable legal risks and liabilities and leave arbitral tribunals with wide discretion as regards treaty interpretation. UNCTAD rightly notes that "questions of interpretation

[220] See infra, Chapter 6.
[221] Some EAC BITs boast fairly extensive definition sections. See e.g. Rwanda-USA BIT and Tanzania-Canada BIT.

typically arise where the applicable treaty does not provide enough details on the matter at issue and leaves a wider margin of discretion to tribunals."[222]

Lack of clarity as to the meaning and scope of the FET standard is a problem for EAC members because the FET clause is invoked in most of the investment arbitration cases involving these countries.[223] In *Biwater Gauff* (*Tanzania*) Ltd. *v. United Republic of Tanzania* (Biwater v. Tanzania*)* and many other ISDS cases, arbitral tribunals interpreted the FET standard expansively and made legitimate expectations an integral part of the FET standard. In *Biwater v. Tanzania*, the tribunal had to construe and apply the provisions of Article 2 (2) of the Tanzania–U.K. BIT (1994) which provides that "[i]nvestments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment ... in the territory of the other Contracting Party". On the question whether the FET standard in the Tanzania–U.K. BIT was autonomous standard or whether it should be interpreted in line with customary international law minimum standard, the tribunal noted the fact that the FET standard is worded differently in many BITs. According to the tribunal:

> In the Arbitral Tribunal's view ... caution must be exercised in any generalised statement about the nature of the 'fair and equitable treatment' standard, since this standard finds different expression in different treaties. For example, some treaties ... simply refer to 'fair and equitable treatment'. Others include express language treating this standard as an element of the general rules of international law (e.g. the French model treaty), or list this standard alongside the rules of international law.[224]

Given the lack of clarity in the text of the applicable BIT, the tribunal in *Biwater v. Tanzania* interpreted the FET standard very broadly. The tribunal held that the FET standard encompasses notions of fairness, transparency, candor, and due process.[225] Specifically, the tribunal cited with approval, *Waste Management v. Mexico (No. 2)*[226] where the said tribunal stated:

> Taken together, the ... cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard, it is relevant that the

[222] UNCTAD, "Review of ISDS Decisions in 2018: Selected IIA Reform Issues," *IIA Issues Note No*. 4 (July 2019).
[223] See e.g. *Biwater Gauff* (*Tanzania*) Ltd. *v. United Republic of Tanzania*, ICSID Case No. ARB/05/22. See also *Joseph Houben v. Republic of Burundi* (ICSID Case No. ARB/13/7).
[224] Id., para 590.
[225] Id., para 597.
[226] Id. para 597.

treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[227]

Lack of clarity regarding the expropriation clause in BITs involving EAC states is also a matter of grave concern. Indirect expropriation has been alleged in many arbitral claims involving EAC countries. What is more, in many ISDS cases involving EAC members, tribunals found that indirect expropriation had occurred.[228] Most BITs involving EAC states do not define 'indirect expropriation' or circumscribe the standard in any meaningful way. Consider the following examples in Table 32:

Table 32: Expropriation Clauses in BITs involving EAC States

TREATY	PROVISIONS
Burundi-U.K. BIT, Article 5(1)	Investments of nationals or companies of either Contracting Party **shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation** (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation.
Germany-Burundi BIT, Article 4(2)[229]	Investment by nationals or companies of either Contracting **Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization** in the territory of the other Contracting Party except for the public benefit and against compensation.
Germany-Kenya BIT, Article 4(2)	Investments by nationals or companies of either Contracting Party shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against compensation.

[227] *Waste Management*, *Inc*. *v*. *United Mexican* States ("Number *2*"), ICSID Case *No* ARB(AF)/00/3, para 98.

[228] Indirect expropriation were alleged and found in the following cases: Antoine Goetz and others v. Republic of Burundi (ICSID Case No. ARB/95/3); *Biwater Gauff* (*Tanzania*) Ltd. *v*. *United Republic of Tanzania*, ICSID Case No. ARB/05/22; Joseph Houben v. Republic of Burundi (ICSID Case No. ARB/13/7).

[229] Although the Germany-Burundi BIT defines "Expropriation" the definition does provide meaningful guidance on what does or does not constitute indirect expropriation. According to Ad *article* 4, Expropriation "shall mean any taking away or restricting tantamount to the taking away of any property right which in itself or in conjunction with other rights constitutes an investment."

The expropriation clause in the Netherlands-Kenya BIT is unique for its brevity on every issue relating to expropriation.

ARTICLE 9

Any measures of nationalisation or expropriation, taken by either of the Contracting Parties affecting the investments, goods, rights or interests of their respective nationals in the territory of each other, shall be followed by payment of adequate compensation, transferable to the extent necessary to make it effective, within a reasonable time and in accordance with generally recognised rules of international law.

The problem, of course, is that the expropriation clause in most of the BITs examined do not provide guidance to prospective tribunals and do no address most of the questions that arbitral tribunals are frequently called upon to address. For example, is a formal measure of expropriation required for indirect expropriation to occur? Is the transfer of legal title in an investment a necessary ingredient in a cause of action for indirect expropriation? Can a regulatory measure by a host state or changes in regulation constitute indirect expropriation? Is economic loss or damage an essential element in a cause of action for indirect expropriation? In some recent agreements, attempt is made to clarify the scope of host states obligation relating to expropriation. For instance, in Article 5(3) of the Kenya-Kuwait (2014) provides as follows:

For the purposes of this Agreement, the term "expropriation" shall also include any interventions or regulatory measures by a Contracting Party that have a de facto expropriatory effect, in that effect results in depriving the investor in fact from his ownership, control or substantial benefits over his investment or which may result in loss or damage to the economic value of the investment, such as the freezing or blocking of the investment, compulsory sale of all or part of the investment, or other comparable measures.

The expropriation clause in the Rwanda-U.S.A. BIT (2008) which is based on the U.S. Model BIT (2004) also clarifies and circumscribes the host state's obligation regarding expropriation. Annex B of the Rwanda-USA BIT provides as follows:

Annex B
Expropriation

The Parties confirm their shared understanding that:

1. Article 6(1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest

in an investment.

3. Article 6(1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 6(1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

Limited Role for States in Treaty Interpretation - In treaty making, treaty partners use numerous tools (unilateral as well as multilateral) to influence the use and interpretation of treaties. Options for influencing the use and interpretation of treaties are many and generally include: (a) use of clear and unambiguous treaty terms; (b) clear and extensive definition of key terms and phrases; (c) provisions allowing contracting parties to engage in authoritative interpretations of treaty terms.[230]

For many of the BITs involving EAC countries, not only are treaty terms vague and ill-defined, but no provision is made for contracting parties to advance their own shared understanding of the meaning and scope of treaty terms once the treaties are in force. In short, when negotiating BITs, EAC members do not always take pains to shape the meaning and scope of treaty terms and do not create opportunities for their on-going interpretive role in the BITs they have concluded. In some recent agreements, a noticeable effort is made to address this problem.

For example, Article 19 of the Rwanda-UAE BIT (2017) is titled 'Joint Interpretation' and provides that an arbitral tribunal established under the treaty shall, on its own initiative or upon a request of either party to an investor-State dispute, request a joint interpretation by the Contracting Parties of any provision of the Agreement.[231] Article 19(2) provides that a joint interpretation of the Contracting Parties received no later than ninety (90) days starting from receipt by the Contracting Parties of the request for such joint interpretation by an arbitral tribunal shall be binding on said arbitral tribunal. Furthermore, pursuant to Article 19(3), "any joint interpretation of the Contracting Parties regarding this Agreement shall be made public and be binding on all arbitral tribunals established under Article 14 of this Agreement after the publication of any such joint interpretation."

The Right to Regulate Is Not Affirmed - BITs are asymmetrical instruments in that they establish rights for investors and do not impose corresponding obligation on investors. By establishing broad protection for investors, BITs "inevitably place limits on contracting parties' sovereignty in domestic policymaking."[232] The issue is not whether

[230] Gordon, K. and J. Pohl (2015), "Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World", OECD Working Papers on International Investment, 2015/02, at p. 5.
[231] Rwanda-UAE BIT (2017), Article 19(1).
[232] UNCTAD's Reform Package, supra note 206, p. 22.

BITs limit the freedom of action of states that are party to them; in varying degrees most treaties limit the freedom of action of states that are party to them. The issue is whether BITs are designed to advance sustainable development in host States and whether they are designed with sufficient flexibility to allow host States to regulate in the public interest. As UNCTAD put it:

> [W]hen concluding IIAs, developing countries face a basic challenge: how to link the goal of creating an appropriate stable, predictable and transparent FDI policy framework that enables firms to advance their corporate objectives on the one hand, with that of retaining a margin of freedom necessary to pursue their national development objectives, on the other. These objectives are by no means contradictory. A concept that can help link them is "flexibility", which, ... can be defined as the ability of IIAs to adapt to the particular conditions prevailing in developing countries and to the realities of the economic asymmetries between these countries and developed countries."[233]

Most in force BITs involving EAC states are designed as investment protection instruments and most do not strike an appropriate balance between investment protection and domestic regulatory space.[234] Specifically, most of the BITs reviewed: (i) do not explicitly acknowledge the right of states to regulate in the public interest;[235] and (ii) do not contain provisions to ensure that countries retain their right to regulate in the public interest and to implement necessary economic and financial policies.

First, the scope of the many of the old-generation agreements involving EAC countries are quite broad and cover most policy areas. Second, most of the old-generation agreements *do not* contain a 'general exceptions' clause. Third, most of the old-generation agreements do not provide for 'carve-outs' from specific treaty obligations. Some of the recent BITs that EAC States have concluded contain reform features, directed at striking an appropriate balance between investment protection and regulatory space.[236]

However, there are three problems with the present landscape. First, there is a lack of consistency in the BIT practice of EAC members when it comes to striking a balance between the goal of investment protection and the goal of preserving domestic regulatory space. Second, even the BITs that address the right to regulate often do not address this issue in a robust manner and most are out of step with evolving best practices. Finally, although some recent BITs involving EAC states contain reform features, most of the recent BITs involving EAC countries have not been ratified and are not in force. The result is a major anomaly in the existing stock of BITs involving EAC

[233] International Investment Agreements, Key Issues, supra note 126, p. 37.
[234] See e.g. Tanzania-U.K. BIT; Kenya-U.K. BIT;
[235] The right to regulate is mentioned in a number of EAC BITs including Tanzania-China BIT; Rwanda-UAE BIT; Kenya-Japan BIT.
[236] See e.g. Kenya-Japan BIT ("Security Exception,", "Prudential Measures," "Safeguard Measures.").

members – *most of the BITs that are in force are outdated and are in urgent need of reform, and most of the BITs that contain reform features are actually not in force*.

Corporate Social Responsibility and Investor Obligation Ignored - Most BITs involving EAC states do not address investor obligation or corporate social responsibility explicitly or directly. Most of the BITs do not mention corporate social responsibility or investor obligation and do not incorporate regional or international corporate social responsibility standards. Only one BIT mentions 'corporate social responsibility' and this is the Tanzania-China BIT (2013). In the preamble to Tanzania-China BIT, Contracting States express interest in "encouraging investors to respect corporate social responsibility." Some BITs address corporate social responsibility indirectly through the so called 'Not Lowering of Standards' clause. Article 10(1) of the Tanzania-China BIT (2013) provides:

ARTICLE 10

HEALTH, SAFETY AND ENVIRONMENTAL MEASURES

1. The Contracting Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Contracting Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.

The absence of corporate social responsibility clauses from BITs involving EAC countries is at odds with regional plus continental standards and with evolving best practices. Article 10 of the EAC Model Investment Treaty is titled "Compliance with Domestic Law" and provides that "investors and investments shall comply with all laws, regulations, administrative guidelines and policies of the host State." Article 11 of the EAC Model Investment Treaty addresses corruption and imposes a duty on investors to not engage in bribery or corruption. Article 11 provides:

ARTICLE 11:

Obligation against Corruption

11.1 Investors and their investments in the Host State shall not, either prior to, or after the establishment of an Investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of the Host State as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage.

11.2 Investors and their Investments shall not make illegal contributions to candidates for public office or to political parties or to other political organizations. Any political

contributions and disclosures of those contributions must fully comply with the Host State's Law.
11.3 Investors and their Investments shall not be complicit in any act described in this Article, including inciting, aiding, abetting, conspiring to commit, or authorizing such acts.

Other topics addressed in the EAC Model Investment Treaty include, 'Provision of Information' (Article 12); 'Investor Liability' (Article 13); and 'Transparency of Contracts and Payments' (Article 14). Article 13 of the EAC Model Investment Treaty provides as follows:

ARTICLE 13
Investor Liability

13.1. Investors and Investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State.

13.2. Home States shall ensure that their legal systems and rules allow for, or do not prevent, or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investors in relation to their Investments in the territory of the Host State.

Corporate social responsibility is also addressed extensively in the Pan African Investment Code. Chapter 4 of the Pan African Investment Code is titled "Investor Obligation." It addresses a number of important topics including, Framework for Corporate Governance (Article 19), Socio-political Obligations (Article 20), Bribery (Article 21), Corporate Social Responsibility (Article 22), Obligations as to the use of Natural Resources (Article 23), and Business Ethics and Human Rights (Article 24).

The Development Dimension is not Prioritized - Most BITs involving EAC members do not address development issues explicitly or in a coherent fashion and most are devoid of any of the mechanisms used to promote the development dimension in investment treaties. First, most of the BITs examined do not distinguish between developed and developing countries and do not allow for special and differential treatment of the latter. Second, most BITs involving EAC states do not address issues of concern to developing countries such as consumer protection, avoidance of illicit payments, labor standards, or transfer of technology. Third, most old-generation BITs involving EAC countries do not include clauses generally considered to be the most common device for promoting development of developing countries in BITs.[237]

[237] International Investment Agreement: Key Issues, p. 37.

To the extent that BITs involving EAC members address development issues, these issues are only addressed in the preambles. In some BITs, preambular paragraphs refer to the promotion of development as one of main objectives of the agreement. In some recent BITs involving EAC states, more specific references to labour, human rights, environment, and sustainable development can be found. For example, the preamble to the Rwanda-UAE BIT (2017) provides:

> The Republic of Rwanda and the United Arab Emirates (hereinafter the "Contracting Parties");
>
> Desiring to promote greater economic co-operation between them, with respect to investments made by investors of one Contracting Party in the territory of the other Contracting Party for the mutual benefit of both Contracting Parties;
>
> Recognizing the important contribution investment can make to the **sustainable development** of the Contracting Parties, increase of productive capacity, the **transfer of technology**,
>
> Seeking to promote, encourage and increase investment opportunities that enhance **sustainable development** within the territories of the Contracting Parties;
>
> Seeking **an overall balance of the rights and obligations** among the Contracting Parties, the investors, and the investments under this Agreement;
>
> Agreeing that a stable framework for investments will maximize effective utilization of economic resources and improve living standards;
>
> ....
>
> Have agreed as follows: ....[238]

Monitoring and Implementation Challenges

Most of the BITs involving EAC countries that are actually in force lack provisions that encourage periodic review and consultation.[239] Most of the treaties examined: (i) do not provide for treaty review; (ii) do not provide for periodic consultation between contracting parties; (iii) do not provide the mandate for joint interpretation by contracting parties; and (iv) do not establish intergovernmental institutional mechanisms to deal with follow-up and monitoring. While some BITs make provision for consultation

[238] Rwanda-UAE BIT (2017), preamble. Emphasis added.
[239] See e.g. Tanzania-Korea BIT and Kenya-U.K. BIT.

and periodic treaty review, most do not create or envision the creation of joint committees.[240]

Investment treaties impose significant political, economic, and social costs on capital-importing countries. Successful implementation and periodic review of the provisions of a state's IIAs can help the state reduce legal risks and liabilities, identify aspects of its IIAs that are problematic, and possibly, take corrective measures. Furthermore, many investment treaties renew automatically and, unless terminated, can remain valid for very long periods of time. Consequently, it is important that states have the capacity to regularly monitor their IIAs to identify which agreements are nearing their initial term and thus, call for review and possibly action. The task of monitoring, reviewing and implementing an IIA is considerably easier when the agreement contains explicit provisions that encourage and/or mandate periodic review and periodic consultation between contracting parties. Some IIAs provide for consultation and periodic reviews and leave it up to contracting parties to determine the modalities for such consultations and reviews.

A growing number of IIAs contain more detailed provisions on consultation and reviews and provide direction on how such reviews are to be carried out. In a growing number of IIAs, contracting parties establish a joint committee that is typically tasked with treaty monitoring and implementation. The Morocco-Nigeria BIT offers a good example. In Article 4 of the Morocco-Nigeria BIT, Contracting Parties established a joint committee that is tasked with a host of responsibilities including, the task of monitoring the implementation and execution of the agreement. Article 4 provides as follows:

ARTICLE 4
INSTITUTIONAL GOVERNANCE

1) For the purpose of this agreement, the Parties hereby establish a Joint Committee for the administration of this Agreement (hereinafter referred to as "Joint Committee").
2) The Joint Committee shall be composed of representatives as designated by both Parties.
3) The Joint Committee shall meet at such times, in such places and through such means as the Parties may agree. Meetings shall be held, whenever it is necessary, with alternating Chair between the Parties.
4) The joint Committee shall have the following responsibilities:
a) Monitor the implementation and execution of this Agreement;
b) Debate and share opportunities for the expansion of mutual Investment;
c) Request and welcome the participation of the private sector and civil society, when applicable, on specific issues related to the work of the Joint Committee; and
d) Seek to resolve any issues or disputes concerning Parties' investment in an amicable manner. ....

[240] Some EAC BITs provide for consultation. Kenya's BIT with Burundi, Japan, Korea, Kuwait, Netherlands have a provision on 'consultation.' Tanzania's BIT with Canada, China, Denmark, Finland and Netherlands addresses consultation. Rwanda's BIT with the United States addresses consultation. Uganda's BITs with Denmark and Netherlands provides for consultation.

Some recent BITs involving EAC states contain provisions on periodic review and/or consultation and some do not. Furthermore, even when a BIT provides for consultation and/or review, oftentimes these issues are not addressed with sufficient clarity. Article 22(4) of the Rwanda-USA BIT (2008) merely provides that "**[o]n the request** of either Party, the Parties shall consult promptly to discuss any matters relating to the interpretation or application of this Treaty or to the realization of the objectives of this Treaty." A comparison of Article 23 of Rwanda-UAE BIT (2017) and Article 36 of the India-Belarus BIT (2016) reveals major shortcomings in the Rwanda-UAE BIT on the subject.

Table 33: Provisions for Consultation and Review in EAC States BITs

TREATY	PROVISION
Rwanda-UAE BIT	ARTICLE 23 Consultations The Contracting Parties shall, on the request of either, hold consultations on any matter relating to the implementation or application of this Agreement at a place and a time to be agreed upon through diplomatic channels.
Belarus-India BIT (2016)	Article 36 Consultations and Periodic Review 36.1 Either Party may request, and the other Party shall promptly agree to, consultations in good faith on any issue regarding the interpretation, application, implementation, execution or any other matter including, but not limited to: (i) reviewing the implementation of this Treaty; (ii) reviewing the interpretation or application of this Treaty; (iii) exchanging legal information; and (iv) subject to Article 30, addressing disputes arising under Chapter IV of this Treaty or any other disputes arising out of investment. 36.2 Further to consultations under this Article, the Parties may take any action as they may jointly decide, including making and adopting rules supplementing the applicable arbitral rules under Chapter IV or Chapter V of this Treaty, issuing binding interpretations of this Treaty, and adopting joint measures in order to improve the effectiveness of this Treaty. 36.3 The representatives of the Parties shall meet every five years after the entry into force of this Treaty to consult and review the operation and effectiveness of this Treaty as may be necessary.

EAC countries are yet to adopt a consistent approach to issues relating to consultation, periodic reviews and implementation mechanism. It would appear that whether a BIT contains provisions on periodic review and/or consultation depends more on other

contracting parties than on EAC members. In the case of Rwanda, the Rwanda-USA BIT (2008) and the Rwanda-UAE BIT (2017) provide for consultation but not the Rwanda-Turkey BIT (2016) or the Morocco-Rwanda Turkey BIT (2016). Significantly, the EAC Model Investment Treaty addresses periodic review in Article 20. Article 20 provides as follows:

> ARTICLE 20: Periodic Review of this Treaty
>
> 20.1 The State Parties shall meet every five years after the entry into force of this Treaty to review its operation and effectiveness, including the levels of investment between the Parties.
>
> 20.2 The State Parties may adopt joint measures including regular consultations in order to improve the effectiveness of this Treaty.

Exit clauses - Long Durations, Automatic Renewals and Long Survival Clauses

In investment treaties, exit clauses have political, policy and economic implications for a host State and can unduly constrain the domestic regulatory space. Long initial duration, and long survival clauses, poses real challenges for host states and can make it extremely difficult for a state to get out of a bad treaty. BITs involving EAC states are of relatively long initial durations, renew automatically, cannot be terminated during their initial term, and boast relatively long survival clauses (Table 34 and 35).

Table 34: Exits Clauses in Uganda's 'In Force' BIT

Contracting State	Duration	Survival Clause	Automatic Renewal
Denmark	10	10	✓
France	20	20	✓
Germany	10	20	✓
Netherlands	10	15	✓
Switzerland	5	10	✓
United Kingdom	10	20	✓

Source: Author Compilation[241]

Table 35: Exit Clauses in Kenya's 'In Force' BIT

Treaty Party	Duration	Survival Clause	Automatic Renewal
Burundi	10	10	✓
Finland	20	20	✓
France	10	20	✓
Germany	10	15	✓
Japan	10	10	✓
Korea	10	10	✓
Kuwait	20	20	✓
Netherlands	5	5	
Switzerland	10	10	✓
United Kingdom	10	20	✓

Source: Author Compilation[242]

[241] Information available at: https://investmentpolicyhubold.unctad.org/IIA/IiasByCountry#iiaInnerMenu

Generally, 10-year initial duration appears to be the norm for most EAC BITs. At least three BITs examined have a twenty-year initial duration (Kenya-Finland BIT; Kenya-Kuwait BIT; and Uganda-France BIT). On the other hand, at least three BITs have a 5-year initial duration (Kenya-Netherlands BIT; Rwanda-BLEU BIT; and Uganda-Switzerland BIT). Meanwhile, automatic renewal is the norm in most of the treaties examined. In other words, the BITs renew automatically unless a contracting party gives a written notice of its intention to terminate. For example, Article 27(2) of Rwanda-Korea BIT provides, "[t]his Agreement shall remain in force for a period of ten (10) years and shall remain in force thereafter indefinitely unless either Contracting Party notifies the other Contracting Party in writing one year in advance of its intention to terminate this Agreement."[243] Article 18(2) of the Kenya-Netherlands BIT stipulates,

> "The present Agreement shall enter into force on the date of exchange of the instruments of ratification and shall remain in force for a period of five years and, unless notice of termination shall have been given by either Contracting Party at least six months before the expiry of such five year term, shall thereafter remain in force for another period of five years, and so on for consecutive periods of five years, subject to termination on the expiry of any current five year period by six month notice as aforesaid.[244]

After their initial term, some BITs involving EAC countries renew for additional fixed duration and others do not. For example, Article 14 (2) of the Tanzania-Netherlands BIT stipulates, "unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement **shall be extended tacitly for periods of ten years**, whereby each Contracting Party reserves the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity."[245] The survival clause specifies the duration a treaty will remain in force for existing investments following termination. In BITs involving EAC members, the survival clause vary and generally range from five years to twenty years. At least twelve BITs have a 20-year survival clause, and five BITs have a 15-year survival clause. The Tanzania-Netherlands BIT has a 15 years initial duration and a 15 years survival period.

---

[242] Information available at: https://investmentpolicyhubold.unctad.org/IIA/IiasByCountry#iiaInnerMenu
[243] Emphasis added.
[244] Emphasis added.
[245] Emphasis added.

Tanzania-Netherlands BIT (2001)

Tanzania-Netherlands BIT was signed on 31 January 2001 and entered into force on April 1, 2004. Pursuant to Article 14(1), upon entry into force the agreement shall remain in force for a period of fifteen years. Pursuant to Article 14(2), unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the "Agreement shall be extended tacitly for periods of ten years." Pursuant to Article 14(3), in respect of investments made before the date of the termination of the Agreement, the provisions of the agreement "shall continue to be effective for a further period of fifteen years from that date."

On 30 September 2018, the Government of Tanzania notified the Government of the Netherlands of its intention to terminate the BIT. Tanzania's termination became effective on 1 April 2019.

Although now expired, in respect of investments made prior to April 1, 2019, because of the fifteen year survival clause, the BIT will remain in effect until 1 April, 2034.

As noted, very long survival clauses can have the effect of constraining domestic policy space. To limit legal exposure, some countries are now moving in the direction of shorter survival clauses. India has effectively moved from a 15-year survival period to a 5-year survival period.[246] Countries are also moving towards BITs that can be terminated at any time. Although the India-Belarus BIT has an initial duration of 10 years, Article 38.2. provides that the treaty "may be terminated any time after its entry into force if either Party gives to the other Party a prior notice in writing twelve (12) months in advance stating its intention to terminate the Treaty."[247]

Country Treaty Provision Analysis in East African BITS

Burundi -Burundi's BITs do not achieve an overall balance of the rights and obligations between the state and the investors. This is not to suggest that Burundi's BITs do not safeguard regulatory space at all. Burundi's BITs all adopt the admission model and thus leave considerable room for Burundi to adopt public interest regulations. Article 2 of the Burundi-Germany BIT provides that "Each Contracting Party shall in its territory promote so far as possible investments by nationals or companies of the other Contracting Party and admit such investments in accordance with its legislation." When measured against recent BITs, Burundi's BITs fall short in many respects and lack many of the reform features designed to preserve regulatory space.

[246] India-Belarus BIT, Article 38.3 ("In respect of investments made prior to the date when the termination of this Treaty becomes effective, the provisions of this Treaty shall remain in force for a period of five (5) years.").
[247] Emphasis added.

Table 36: Regulatory Space in Burundi's In Force BITs

Treaty Party	General Exception	Security Exception	No Lowering of Standards Clause in Treaty Text	Prudential Measures	Safeguard Measures	Limits on Indirect Expropriation Obligation
Germany	X	X	X	X	X	X
Kenya	X	X	X	X	X	X
United Kingdom	X	X	X	X	X	X
Turkey	Yes	Yes	X	Yes[248]	No	Yes

Source: Author Compilation[249]

Burundi-Turkey BIT (2017) represents a departure from the rest of the BITs involving Burundi. Compared to Burundi's other BITs, the Burundi-Turley BIT provides for general exceptions (Article 5), security exception (Article 5), and protects a host State's non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives (Article 6(2)). The Burundi-Turkey BIT also places limits on the right of investors to repatriate funds with Article 8(3) providing that "[w]here, in exceptional circumstances, payments and capital movements cause or threaten to cause serious balance of payments difficulties, each Contracting Party may temporarily restrict transfers, provided that such restrictions are imposed on a non-discriminatory and in good faith basis."

It is important to note that Burundi-Turkey BIT is not an indication that Burundi has become more aggressive in its BIT negotiations. The Burundi-Turkey BIT is based off of Turkey's Model BIT and is very similar with other recent BITs involving Turkey – an indication that even in its BIT negotiation with an emerging economy, Burundi remains the rule-taker rather than the rule-giver. Significantly, under the Burundi-Turkey BIT, some exclusions and exemptions are available to Turkey but not to Burundi. For example, Article 4(d) provides that the provisions of the agreement relating to FET, NT and MFN, "shall not oblige **the Republic of Turkey** to accord investments of investors of the other Contracting Party the same treatment that it accords to investments of its own investors with regard to acquisition of land, real estates, and real rights thereof."[250]

Kenya - Some BITs involving Kenya (e.g. Kenya-Korea BIT) contain provisions designed to preserve domestic policy space and some do not (e.g. Kenya-UK BIT). However, the Kenya-Korea BIT does not address some reform features found in other BITs. Thus, the Kenya-Korea BIT has a "Denial of Benefits" clause (Article 14), a "Security Exception" clause (Article 15), and also imposes limits on transfer of capital and returns (Article 6(3) and (4)), but does not have a "General Exception" clause or a "Safeguard Measures" clause. Unlike the Kenya-Korea BIT, the Kenya-Japan BIT addresses Security Exception

[248] Burundi-Turkey BIT allows a balance of payment exception to the right of investors to transfer capital into and out of the host State.
[249] Information available at: https://investmentpolicyhubold.unctad.org/IIA/IiasByCountry#iiaInnerMenu
[250] Emphasis added.

(Article 16), Safeguard Measures (Art. 17), Prudential Measures (Article 18), Intellectual Property Rights (Article 19), and Taxation (Article 20).

Table 37: Regulatory Space in Kenya's In Force BITs

Treaty Party	General Exception	Security Exception	No Lowering of Standards in Treaty Text	Prudential Measures	Safeguard Measures	Limits on Indirect Expropriation
Burundi	X	X	X	X	X	X
Finland	✓	✓ [251]	X[252]	X	X	X
Germany	X	X	X	X	X	X
Japan	X	✓	✓ [253]	✓	✓	✓
Korea	X	✓	X	X	X	X
Kuwait	X	X	X	X	X	X
Netherlands	X	X	X	X	X	X
Switzerland	X	X	X	X	X	X
UK	X	X	X	X	X	X

Source: Author Compilation[254]

When EAC States use exceptions in their BITs, they do so inconsistently. For example, in the Article 5(3) of Kenya-Switzerland BIT, Contracting Parties clarified that the application of the provision on transfer of capital and returns "does not affect the obligation of an investor to comply with the tax laws and regulations of each Contracting Party. In Article 8(2) of the Kenya-Netherlands BIT, the right to transfer capital and returns is "subject to the relevant laws and rules in force in the territory of the Contracting Party concerned." On the other hand, in the Kenya-UK BIT, the right to transfer capital and returns is not qualified at all. Some BITs contain exception clauses that on closer examination are not as robust as the GATT Article XX-type clauses found in recent IIAs. Article 14 of the Kenya-Finland BIT is titled "General Derogations' but only allows very narrow exceptions. Article 14 of the Kenya-Finland BIT provides:

> ARTICLE 14
> GENERAL DEROGATIONS
> I. Nothing in this Agreement shall be construed as preventing a Contracting Party from taking any action necessary for the protection of its essential security interests in time of war or armed conflict, or other emergency in international relations.
> 2. Provided, that the measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination by a Contracting Party, or a disguised investment restriction, nothing in this Agreement shall be construed as preventing the Contracting Parties from taking any measure necessary for the maintenance of public order.

[251] Treaty language is narrowly worded and out of step with evolving best practices.
[252] A 'No Lowering of Standards' clause appears in the preamble ("Agreeing that these objectives can be achieved without relaxing health, safety and environmental measures of general application.").
[253] A 'No Lowering of Standards" also appears in the preamble to Kenya-Japan BIT.
[254] Information available at: https://investmentpolicyhubold.unctad.org/IIA/IiasByCountry#iiaInnerMenu

The Kenya-UK BIT offers yet another example. Article 7 of the Kenya-UK BIT is titled 'Exceptions' but is not designed to function as a GATT Article XX-type exception as it only permits the traditional exception to NT and MFN obligation.

> ARTICLE 7
> Exceptions
>
> The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the nationals or companies of either Contracting Party or of any third State shall not be constructed so as to oblige one Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from:
> (a) any existing or future customs union or similar international agreement to which either of the Contracting Parties is or may become a party; or
> (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

Rwanda - As regards striking appropriate balance as between protecting investors and preserving domestic regulatory space, Rwanda's approach is very inconsistent. In some BIT, attempt is made to respect domestic regulatory space and in others no such attempt is evident.[255] The Rwanda-USA BIT (2008) contains broader obligations on Contracting States but also affords more policy space to Contracting States than the Rwanda-BLEU BIT (1983). Found in the Rwanda-USA BIT but not in the Rwanda-BLEU agreement are the following provisions:

- Clarification of the Scope of the FET standard (Article 5)
- Exceptions and exclusions to right to transfer capital (Article 7)
- Investment and Environment (Article 12)
- Investment and Labour (Article 13)
- Denial of Benefits (Article 17)
- Essential Security (Article 18)
- Disclosure of Information (Article 19)
- Financial services (Article 20)
- Taxation (Article 21)
- Annexes clarifying treaty provisions such as the provision on expropriation
- Schedules clarifying scope of covered obligations

It must be noted that although the Rwanda-USA BIT arguably affords more policy space to Contracting Parties than the Rwanda-BLEU BIT, measured against evolving best practices, it falls short in some important respects. For example, the Rwanda-USA BIT does not have a general exceptions clause and does not impose any direct obligation on

[255] See e.g. Rwanda-Korea BIT, Article 3(4) (the national treatment and MFN treatment do not apply to government procurement, government subsidies and grants, or taxation measures); Article 8(3) (exceptions to the transfer obligation); Article 15 (security exception).

investors. It also does not have an explicit 'right to regulate' clause found in the Rwanda-UAE BIT (2017), a recent agreement that is not yet in force.[256] Article 9(1) of the Rwanda-UAE BIT provides as follows:

> ARTICLE 9
>
> Right to Regulate
>
> Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in accordance with the applicable public health, security, environmental and labour law of the Contracting Party, such measures should not be applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or investors.

Table 38: Regulatory Space in Rwanda's In Force BITs

Treaty Party	General Exception	Security Exception	No Lowering of Standards in Treaty Text	Prudential Measures	Safeguard Measures	Limits on Expropriation
BLEU	X	X	X	X	X	X
Korea	X	✓	X[257]	X	X	X[258]
USA	X	✓	✓	✓		✓

Source: Author Compilation[259]

Tanzania - As with Rwanda's BITs, Tanzania's BITs are varied and inconsistent with one another on the issue of striking an appropriate balance between protecting investors and preserving domestic policy space. Considerable policy space is found in some BITs (e.g. Tanzania-Canada BIT) but not in many other BITs involving Tanzania. Addressed in Tanzania-Canada BIT but not in many other BITs involving Tanzania are issues such as 'Health, Safety and Environmental Measures' (Article 15), Reservations and Exceptions (Article 16), General Exceptions (Article 17), and Denial of Benefits (Article 18). In addition, in the Tanzania-Canada BIT, Annex I ("Reservations for Future Measures and Liberalization"), Annex II ("Reservations for Future Measures"), and Annex III ("Exclusion from Dispute Settlement") all demonstrate effort to strike an appropriate balance as between the rights of investors and those of the host States.

---

[256] It must be noted that the Rwanda-UAE BIT does not have some of the provisions found in the Rwanda-USA BIT that are designed to preserve domestic regulatory space.

[257] Rwanda-Korea BIT, Preamble ("desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment and the promotion of consumer protection and internationally recognized labour rights").

[258] Exception for non-discriminatory regulatory actions designed and applied to protect legitimate welfare objectives. Article 5(4).

[259] Information available at: https://investmentpolicyhubold.unctad.org/IIA/IiasByCountry#iiaInnerMenu

Table 39: Regulatory Space in Tanzania's In Force BITs

Treaty Party	General Exception	Security Exception	No Lowering of Standards in Treaty Text	Safeguard Measures	Limits on Indirect Expropriation
Canada	✓	✓	✓	X	✓
China	✓ (limited)[260]	X	✓	X	✓
Denmark	X	X	X	X	X
Finland	X	X	X	X	X
Germany	X	X	X	X	X
Italy	X	X	X	X	X
Netherlands	X	X	X	X	X
Sweden	X	X	X	X	X
Switzerland	X	X	X	X	X
U.K.	X	X	X	X	X

Source: Author Compilation[261]

Article 4 of the Finland-Tanzania BIT is titled 'Exception' but is not designed to function as a general exception's clause. Article 4 provides as follows:

ARTICLE 4

EXCEPTIONS

The provisions of this Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors and investments by investors of the other Contracting Party the benefit of any treatment, preference or privilege by virtue of any existing or future;

(a) free trade area, customs union, common market, economic and monetary union or other similar regional economic integration agreement, including regional labour market agreements; to which one of the Contracting Parties is or may become a party, or

(b) agreement for the avoidance of double taxation or other international agreement relating wholly or mainly to taxation, or

(c) multilateral agreement relating wholly or mainly to investments.

Uganda - Uganda's BITs do not achieve an overall balance of the rights and obligations between countries and the investors. Some of the deficiencies in Uganda's BITs could be explained by the fact that most of the country's in force BITs are outdated. Uganda's most recent in force BIT is the France-Uganda BIT which was concluded in 2003 and entered into force in 2004. The France-Uganda BIT is only six pages and provides little or

[260] The Tanzania-China BIT (2013) provides an exception for environmental measures. Article 10(2) provides as follows: "Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international investment, nothing in this Agreement shall be construed to prevent a Contracting Party **from adopting or maintaining environmental measures necessary to protect human, animal or plant life or health**." Emphasis added.

[261] Information available at: https://investmentpolicyhubold.unctad.org/IIA/IiasByCountry#iiaInnerMenu

no flexibility that can enable contracting Parties regulate in the public interest. The provisions of the agreement relating to MFN and NT do not apply to tax matters.[262] Contracting Parties are obliged to extend fair and equitable treatment "in accordance with the principles of International Law to investments."[263] Perhaps, most important, Article 2 commits each Contracting Party to admit investment "in accordance with its legislation."

The BLEU-Uganda BIT was concluded in 2005 and is not yet in force and is not any better than the France-Uganda BIT. The FET obligation is not defined and is not circumscribed in any way.[264] The NT and MFN obligations do not apply to matters of taxation in the territory of either Contracting Party. The agreement does not provide a general exceptions clause or a security exception clause. Regarding the obligation to provide security and protection, the agreement provides that **"[e]xcept for measures required to maintain public order**, such investments shall enjoy continuous protection and security, i.e. excluding any unjustified or discriminatory measure which could hinder, either in law or in practice, the management, maintenance, use, possession or liquidation thereof.[265]

Table 40: Regulatory Space in Uganda's In Force BITs

Treaty Party	General Exceptions	Security Exception	No Lowering of Standards in Treaty Text	Prudential Measures	Safeguard Measures	Limits on Expropriation
Denmark	X	X	X	X	X	X
France	X	X	X	X	X	X
Germany	X	X	X	X	X	X
Netherlands	X	X	X	X	X	X
Switzerland	X	X	X	X	X	X
UK	X	X	X	X	X	X

Source: Author Compilation[266]

As with most old-generation agreements involving EAC members, some BITs involving Uganda contain 'exception' clauses, but these clauses only apply to the NT and MFN obligations and only offer very limited policy space to host States. For example, Article 4 of the Uganda-Denmark BIT (2001) is titled "Exceptions" but does not offer the GATT Article XX-type exception. The exception in Article 4 is the standard REIO exception and the standard exception for international agreements relating to taxation and domestic

[262] France-Uganda BIT (2003), Article 4.
[263] Id., Article 5.
[264] BLEU-Uganda BIT (2005), Article 3(1).
[265] Id., Article 3(2).
[266] Information available at: https://investmentpolicyhubold.unctad.org/IIA/IiasByCountry#iiaInnerMenu

legislation relating wholly or mainly to taxation. Article 4 of the Uganda-Denmark BIT provides as follows:

> ARTICLE 4
>
> Exceptions
>
> The provisions of this Agreement relative to the granting of treatment not less favourable than that accorded to the investors of each Contracting Party or of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:
>
> a) membership of any existing or future Regional Economic Integration Organisation or customs union of which one of the Contracting Parties is or may become a party, or
> b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

Without built-in flexibility in Uganda's BITs, the only option for Uganda is to ensure that only the "right" types of investment are admitted into the country. This is possible because most BITs involving Uganda are post-establishment BITs meaning that investment protection is only available to investors and investment admitted into Uganda in accordance with domestic law. For example, Article 2(1) of the BLEU-Uganda BIT provides that "[e]ach Contracting Party shall allow investments by investors of the other Contracting Party in accordance with its laws …."

CHAPTER 4: EVOLVING BEST PRACTICES IN THE INTERNATIONAL INVESTMENT POLICY SPACE

In the midst of a treaty illegitimacy crisis, that is, the massive exposure counties to significant political, diplomatic, legal, financial and economic risks arising out of international trade or investment agreements due to significant changes in the investment landscape that affect the international law regime, plus the imperatives of sustainable development: what is the rationale for reform; and what are the evolving best practices for states as far as IIA reform is concerned?

The last decade has witnessed significant shifts in investment policymaking in the direction of more attention to safeguarding the regulatory space of host States and striking an appropriate balance as between the rights and obligations of foreign investors and those of host states. In Africa, discussions about investment policy reform are increasingly around five broad themes: 'predictability,' 'sustainable development,' 'the right to regulate,', 'policy coherence,' 'balance of rights and obligations'. All five themes are recognized in regional and continental policy instruments. One of the general objectives of the AfCFTA is to "promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties."[267]

In the preamble to the agreement establishing the AfCFTA, states acknowledge "the need to establish clear, transparent, predictable and mutually-advantageous rules" and the need to "resolve the challenges of multiple and overlapping trade regimes to achieve policy coherence, including relations with third parties." Furthermore, in the preamble, member states, "REAFFIRM the right of State Parties to regulate within their territories and the State Parties' flexibility to achieve legitimate policy objectives in areas including public health, safety, environment, public morals and the promotion and protection of cultural diversity." In IIAs, treaty texts matter a great deal. Cases such as Cortec Mining v. Kenya (2018) and Biwater v. Tanzania (2008) demonstrate that how an IIA is crafted can affect domestic regulatory action, inject uncertainty in the investment climate of a country, and affect how arbitral future tribunals interpret plus apply the IIA to real cases.[268]

Rationale for Reform

Widespread concern that IIAs have the potential to constrain regulatory action and expose countries to considerable legal risks, is prompting a growing number of countries to engage in multi-year BIT review processes and to engage in meaningful reform of their IIAs. Several factors are prompting countries to review their international investment agreement framework and engage in reform directed in part at safeguarding

---

[267] Agreement Establishing the African Continental Free Trade Area, Article 3(f).

[268] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22. See also *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya,* ICSID Case No. ARB/15/29.

regulatory space in old and new IIAs. First, the imperatives of sustainable development and the realization that the ultimate goal of FDI is to contribute to sustainable development is driving reform efforts in many countries. In developing the Pan-African Investment Code, African Union members took into account the United Nations Sustainable Development Goals (SDGs) and UNCTAD's Investment Policy Framework for Sustainable Development. Sustainable development concerns also pervade the EAC Model Investment Treaty. The third, fourth, and fifth preambular statement in the EAC Model Investment Treaty reads:

> **Recognizing** the important contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human development and human rights particularly in light of EAC Partner States commitments to international conventions in that respect[.]
> **Seeking to promote, facilitate, encourage, protect and increase** investment opportunities that enhance sustainable development within the territories of the State Parties;
> **Understanding** that sustainable development requires the fulfillment of the economic, social and environmental pillars that are embedded within the concept[.]

Second, regional and continental visions and goals are also driving reform efforts in many parts of the world and are prompting states to reassert their right to regulate in the public interest. In Africa, key regional and continental policy instruments all affirm the right of states to regulate in the public interest. In the preamble to the Agreement Establishing the AfCFTA, participating States "reaffirm the right of State Parties to regulate within their territories and the State Parties' flexibility to achieve legitimate policy objectives in areas including public health, safety, environment, and public morals." In the preamble to the Pan-African Investment Code, members of the African Union "RECOGNIZ[E] their right to regulate all the aspects relating to investments within their territories with a view to meeting national policy objectives and to promoting sustainable development objectives." Article 15 of the EAC Model Investment Treaty is titled 'The Right of States to Regulate.' Article 15(1) declares that "[T]he Host State shall have the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development and social and economic policy objectives."
Third, the need for policy coherence is also driving reform efforts. Increasingly, states are acknowledging their commitments and obligations under other international and regional treaties and the need for coherence in international, regional and domestic policy making. In the preamble to the Agreement Establishing the AfCFTA, participating states "recognize the importance of international security, democracy, human rights, gender equality, and the rule of law for the development of international trade and

economic cooperation." In the EU-Singapore IPA, Contracting Parties reaffirmed their commitment to the Charter of the United Nations and had regard to the principles articulated in the Universal Declaration of Human Rights.[269]

Finally, the past decade has seen global movements for rules to regulate the activities of businesses in the global marketplace.[270] The result has been an uptick in the number of legal, *albeit* soft law instruments that address corporate social responsibility and other issues at the intersection of business and human rights.[271] Increasingly, regional and continental instruments in Africa reaffirm to need to achieve a balance of rights and obligations as between investors and host States.[272]

Evolving Best Practices in IIA Reforms

A review of recent IIAs and other international investment policy instruments suggests that states: (i) are attempting to limit their exposure to legal risks and liabilities; (ii) are introducing more flexibility into their IIAs, and are taking steps to preserve domestic regulatory space using a multiplicity of tools; and (iii) are taking more control of the definition and scope of treaty terms. Overall, sustainable development goals appear to be driving current reform efforts and are prompting more states to be proactive and creative in investment treaty negotiation and design. In the effort to achieve an overall balance of the rights and obligations as between investors and state, every clause in a BIT can serve as a valuable entry point. Based on the evolving practice of states, flexibility can be introduced into an investment treaty and regulatory space can be preserved using a wide variety of tools including, provision of broader treaty objectives, clearer definition of treaty terms, appropriate use of exceptions, reservations and exclusions, reform of the ISDS provision in investment treaties, and careful attention to the exit clauses.

Broad Treaty Objectives - Contracting states can introduce flexibility into their BIT framework by articulating objectives beyond investment protection. Treaty objectives can be spelt out in the preamble as well as in a separate article in the treaty.[273] Although preambles do not directly create rights and obligations, under Article 31(2) of the Vienna Convention on the Law of Treaties, preambles are considered part of a treaty for purposes of interpretation. In a growing number of IIAs, treaty parties articulate the

[269] See also EU-Canada Comprehensive and Economic Trade Agreement (Contracting parties, "REAFFIRM[ED] their strong attachment to democracy and to fundamental rights as laid down in the Universal Declaration of Human Rights.").

[270] UNCTAD's Reform Package, at p. 66 (observing that "The last decade has seen the development of CSR standards as a unique dimension of "soft law" that is rapidly evolving.").

[271] The United Nations Guiding Principles on Business and Human Rights (2011). See also, E.g. The OECD Guidelines For Multinational Enterprises (2011 Edition). Available at < https://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm>.

[272] EAC Model Investment Treaty, Preamble ("**Seeking** an overall balance of the rights and obligations among the State Parties, the investors, and the investments under this Treaty;" and "**Agreeing** that the objectives of this Treaty can be achieved without compromising public interest such as health, safety and environmental measures.")

[273] In Article 4 of the Canada-Benin BIT (Guiding Principles), contracting States agreed that each "shall ensure the promotion of investments … as well as the protection of those investments and investors in its territory, consistent with the provisions of the guiding principles of this Chapter, including national treatment, most favoured nation treatment, minimum standard of treatment, compensation for losses, compensation for expropriation, transparency, subrogation and corporate social responsibility."

goals of sustainable development and explicitly reaffirm the right of host States to regulate in the public interest.

Table 41: Preambles with Broad Treaty Objectives in BITs

TREATY	PROVISION
EAC Model Investment Treaty	Understanding that sustainable development requires the fulfilment of the economic, social and environmental pillars that are embedded within the concept.
	Seeking an overall balance of the rights and obligations among the State Parties, the investors, and the investments under this Treaty.
	Agreeing that the objectives of this Treaty can be achieved without compromising public interest such as health, safety and environmental measures.
Tanzania-Canada BIT	Desiring to intensify economic co-operation and promote sustainable development for the mutual benefit of both countries and to create and maintain favourable conditions for investments by investors of one Party in the territory of the other Party.

The main objective of the SADC Model BIT "is to encourage and increase investments [between investors of one State Party into the territory of the other State Party] that support the sustainable development of each Party, and in particular the Host State where an investment is to be located" (Article 1). In the preamble to the Comprehensive and Economic Trade Agreement (CETA), a trade deal between the EU and Canada, Contracting parties: "RECOGNIS[ED] the importance of international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation;" "RECOGNIS[ED] that … the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity;" and "REAFFIRM[ED] their commitment to promote sustainable development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions." In the preamble to the Morocco-Nigeria BIT, Contracting Parties also announce fairly broad treaty objectives.

Morocco-Nigeria BIT

PREAMBLE

The Government of the Kingdom of Morocco; and the Government of the Federal Republic of Nigeria hereinafter referred to as the "Parties"

DESIRING to strengthen the bonds of friendship and cooperation between the State Parties;

RECOGNIZING the important contribution investment can make to the sustainable development of the state parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development;

SEEKING to promote, encourage and increase investment opportunities that enhance sustainable development within the territories of the state parties;
UNDERSTANDING that sustainable development requires the fulfillment of the economic, social and environmental pillars that are embedded within the concept;
REAFFIRMING the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives and taking into account any asymmetries with respect to the measures in place, the particular need of developing countries to exercise this right;
SEEKING an overall balance of the rights and obligations among the State Parties, the investors, and the investments under this Agreement;
HAVE AGREED as follows:....

The Right to Regulate Explicitly Acknowledged - In a growing number of recent IIAs, contracting parties explicitly acknowledge their right to regulate. In some IIAs the right to regulate is affirmed in the preamble, but in others IIAs this right is acknowledged in the treaty text. For example:

Table 42: Treaty Provisions on Right to Regulate Acknowledged in BITs

TREATY	PROVISIONS
Australia-Hong Kong (2019).	"RECOGNISING their right to regulate and resolving to preserve their flexibility to set legislative and regulatory priorities, safeguard public welfare and protect legitimate public welfare objectives.
Australia-Uruguay BIT (2019).	"RECOGNISING their inherent right to regulate and resolving to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals."
India-Belarus BIT (2018).	"Reaffirming the right of Parties to regulate investments in their territory in accordance with their law and policy objectives."
SADC Model BIT (2012).	"Reaffirming the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives, and—taking into account any asymmetries with respect to the measures in place—the particular need of developing countries to exercise this right."
EU-Singapore IPA (2018).	REAFFIRMING each Party's right to adopt and enforce measures necessary to pursue legitimate policy objectives such as social, environmental, security, public health and safety, promotion and protection of cultural diversity.

A statement reaffirming the right of states to regulate in the public interest need not be limited to the preambles of IIAs. In some recent instruments, the right to regulate appears in the preamble as well as in the text of the instruments. The EAC Model Investment Treaty, the Morocco-Nigeria BIT, and the EU-Singapore IPA are good

examples.[274] In the EAC Model BIT, the right to regulate appears in the preamble as well as in Article 15 of the instrument.

EAC Model Investment Treaty (2016)

ARTICLE 15. Right of States to Regulate

15.1 The Host State shall have the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development and social and economic policy objectives.

15.2 Except where the rights of a Host State are expressly stated as an exception to the obligations of this Treaty, a Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of Investors and Investments and Host States, as set out in this Treaty.

15.3 For greater certainty, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Treaty.

Morocco-Nigeria BIT

ARTCILE 23

RIGHT OF STATE TO REGULATE

1) In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.
2) Except where the rights of Host State are expressly stated as an exception to the obligation of this Agreement, a Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of Investors and Investments and Host States, as set out in the Agreement.
3) For greater certainly, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement.

Investment Promotion and Facilitation Prioritized - In a growing number of IIAs, contracting parties are taking investment promotion and facilitation more seriously and are inserting detailed provisions on how their obligations relating to investment promotion and facilitation are to be achieved. In the Morocco-Nigerian BIT, investment promotion is mentioned as a treaty objective and Contracting Parties established an institutional mechanism with mandate amongst other things to promote and facilitate investment. Article 2 of the Morocco-Nigeria BIT provides:

[274] See EU-Singapore IPA, Article 2.2 (1).

Morocco-Nigeria BIT
ARTICLE 2
Objectives of the Agreement

The objective of this Agreement is to promote and protect co-operation between the Parties in order to facilitate and encourage mutual investment. This objective shall be achieved through institutional governance as defined in this Agreement, by the establishment of an agenda on investment co-operation and facilitation, and by the development of mechanisms for risk mitigation, prevention and resolution of disputes, among other instruments mutually agreed by the parties.

In Article 4 of the Morocco-Nigeria BIT, Contracting Parties establish a Joint Committee for the administration of the Agreement. Among the responsibilities of the Joint Committee is the task of debating and sharing opportunities for the expansion of mutual investment. Article 5 is titled 'Exchange of Investment Information' and commits Contracting Parties to exchange information concerning investment and provide pertinent information when requested. Article 5 provides as follows:

ARTICLE 5
EXCHANGE OF INVESTMENT INFORMATION
1) The Parties shall exchange information concerning investment, particularly through the Joint Committee. Whenever possible, the information shall, reveal, in advance, useful data on procedures and special requirements for investment, business opportunities and expectations for major parties projects.
2) For this purpose, the Party shall provide, when requested, with clarity and respect for the level of protection granted, information, related, in particular, to the following items:
a) Regulatory conditions for investment.
b) Specific incentives and legal landmarks that may affect investment;
c) Public policies and legal landmarks that may affect investment;
d) Legal framework for investment, including legislation on the establishment of companies and joint ventures;
e) Related international treaties.
f) Trade procedures and tax regimes;
g) Statistical information on the market for goods and services;
h) Available infrastructure and public services;
i) Social and labor requirements;
j) Information on specific economic sectors or segments previously identified by the Parties; and
k) State and Local government's projects and understandings on investment.
3) The Parties shall also discuss initiatives to strengthen the role of investors in Public-Private Partnerships (PPPs), especially though greater transparency and early access to regulatory information.

Since 2015, Brazil has concluded five investment treaties – dubbed Cooperation and Investment Facilitation Agreements – with countries in Africa: Mozambique (30 March 2015),[275] Angola (1 April 2015),276 Malawi (25 June 2015), Ethiopia (11 April 2018), and Morocco (13 June 2019). All five agreements which are based on Brazil's model BIT focus primarily on cooperation and investment facilitation although they accord some rights to foreign investors. In each agreement Contracting Parties establish a Joint Committee of government representatives that is responsible for inter alia investment-facilitation and for monitoring the implementation of the agreement. For example, Article 2 of the Brazil-Ethiopia BIT provides:

> The objective of this Agreement is to promote cooperation between the Contracting Parties in order to facilitate and encourage mutual investment, through the establishment of an institutional framework for the management of an agenda for further; investment cooperation and facilitation, as well as through mechanisms for risk mitigation and prevention of disputes, among other instruments mutually agreed on by the Contracting Parties.[277]

Under Article 4 of the Brazil-Malawi BIT, the Joint Committee is tasked with: (i) monitoring the implementation and execution of this Agreement; (ii) discussing and sharing opportunities for the expansion of mutual investment; (iii) coordinating the implementation of the mutually agreed cooperation and facilitation agendas; (iv) consulting the private sector and civil society, when applicable, on their views on specific issues related to the work of the Joint Committee; and (v) resolving any issues or disputes concerning Parties' investment in an amicable manner. Article 7 of the Brazil-Malawi BIT is titled 'Agenda for Further Investment Cooperation and Facilitation' and mandates the Joint Committee to "develop and discuss an Agenda for further Cooperation and Facilitation on relevant topics for the promotion and enhancement of bilateral investment."[278] Topics that can be addressed by the Joint Committee are listed in Annex I (Agenda for Further Investment Cooperation and Facilitation) and include: payment and transfers; visas; technical and environmental regulations; and cooperation on regulation and institutional exchange.

Clear and Detailed Definition Section - States introduce uncertainty and instability in their treaty regime, expose themselves to unnecessary legal risks, constrain their domestic policy space, and cede their interpretive role to future arbitral tribunals when they fail to define ambiguous terms and phrases in their treaty agreements. As UNCTAD

[275] Cooperation and Facilitation Investment Agreement between Brazil and Mozambique, available at http://investmentpolicyhub.unctad.org/IIA/country/27/treaty/3566 (in Portuguese).
[276] Cooperation and Facilitation Investment Agreement between Angola and Brazil, available at http://investmentpolicyhub.unctad.org/IIA/country/27/treaty/3565 (in Portuguese).
[277] Emphasis added.
[278] Brazil-Malawi CFIA, Article 7(1).

explains, "[i]n legal instruments, definitions are not neutral and objective descriptions of concepts; they form part of an instrument's normative content. They determine the object to which an instrument's rules apply and thereby interact intimately with the scope and purpose of the instrument."[279]

In recent IIAs, states are defining more terms and are fine-tuning prior definitions. Argentina-Japan BIT (2018), Canada-Mali BIT, Rwanda-USA BIT and India-Belarus BIT are some examples of investment agreements with fairly extensive definition section. States are moving away from an open-ended asset-based definition of investments to definitions that are more circumscribed. In the India-Belarus BIT (2018) and the Morocco-Nigeria BIT (2016), Contracting States not only define what investment *is* but also clarified what investment *is not* and include factors that should be used to determine whether an asset is an investment. Article 1 of the Morocco-Nigeria BIT provides as follows:

> "Investment" Investment means an enterprise within the territory of one State established, acquired, expanded or operated, in good faith, by an investor of the other State in accordance with law of the Party in whose territory the investment is made taken together with the asset of the enterprise which contribute sustainable development of that Party and has the characteristics of an investment involving a commitment of capital or other similar resources, pending profit, risk-taking and certain duration. An enterprise will possess the following assets:
> ....
> For greater certainty, Investment does not include:
> a) Debt securities issued by a government or loans to a government
> b) Portfolio investments.
> c) Claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of another party ....
> d) letters of bank credit; and
> e) claims to money with maturities less than three years[.]

The Morocco-Nigeria BIT underscores the fact that when it comes to defining key terms in a BIT, contracting parties can be creative and need not resort to copying and pasting outdated definitions from old-generation IIAs. Regarding the definition of investment, options for states include: (i) a shift from an open-ended asset-based definition to an open-ended 'enterprise based' definition of investment; (ii) a closed enterprise-based definition of investment; (iii) a closed asset-based definition of investment; (iv) providing an exhaustive list of the elements that constitute the core characteristics of an

[279] UNCTAD, Trends in International Investment Agreements: An Overview; UNCTAD Series on issues in international investment agreements (UNITED NATIONS New York and Geneva, 1999), p. 55.

investment;280 and a list of what types of asset do not count as investment.[281] Article 2 of the EAC Model Investment Treaty defines investment as follows:

> **Investment** means an enterprise within the territory of one State Party established, acquired or expanded by an investor of the other State Party, including through the constitution, maintenance or acquisition of a juridical person or the acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise is established or acquired in accordance with the laws of the Host State; and [registered][approved][recognized] in accordance with the legal requirements of the Host State]. An enterprise may possess assets such as:
> ....

Applicability and Scope of Treaty - In recent IIAs, states are taking proactive steps to limit the scope of their agreements by careful delineation and outright circumscribing of issues to explicitly exclude certain sectors. In a growing number of IIAs, states exclude from treaty scope issues such as government procurement,[282] government subsidies or grants[283] and taxation measures.[284]

For example, in Article 2 of the India-Belarus BIT, Contracting Parties clarify that the treaty does not apply to any measure by a local government, any law or measure regarding taxation, the issuance of compulsory licenses granted in relation to intellectual property rights, government procurement by a Party, subsidies or grants provided by a Party, or services supplied in exercise of governmental authority by the relevant body or authority of a Party. A comparison of the Article 2 of the Rwanda-UAE BIT (2017) and Article 2 of the EU-Singapore IPA (2018) is very useful as it highlights the value for a host state of carefully limiting and delineating the scope of an investment treaty; in one agreement, care is taken to exclude sensitive issues from the treaty scope and in the other, no such attempt is made.

[280] India-Belarus BIT, Article 1 (providing a list of assets of an enterprise that do not qualify as investment.); Rwanda-UAE BIT, Article 1 ("In order to qualify as an investment for the purposes of this Agreement, an asset must have the characteristics of an investment, including certain duration, commitment of capital or other resources, the expectations of gain or profit, and the assumption of risk.").

[281] Rwanda-UAE BIT, Article 1; EAC Model Investment Treaty (a clarification that investment does not include inter alia debt securities issued by a government or loans to a government or Portfolio investments.).

[282] Australia-Indonesia CEPA, Article 14.2 (3)

[283] Australia-Indonesia CEPA, Article 14.2 (3); EU-Singapore IPA, Article 2.2(3) and (4); Singapore-Kazakhstan BIT, Article 2(3)(a).

[284] Singapore-Kazakhstan BIT, Article 2(3)(b).

Table 43: Treaty Provisions on Applicability and Scope in BITS

TREATY	PROVISION
Rwanda-UAE (2017)	ARTICLE 2 Scope of application 1. This Agreement shall apply to investments in the territory of one Contracting Party**, made in accordance with its national laws and regulations**, by investors of the other Contracting Party, whether prior to, or after the entry into force of the present Agreement. However, this Agreement shall not apply to any disputes that have arisen before its entry into force. 2. A breach of a contract signed between the investor and the other Contracting Party shall not be considered a breach of this Agreement.[285]
EU-Singapore IPA (2018)	ARTICLE 2.1 Scope 1. This Chapter shall apply to covered investors and covered investments **made in accordance with the applicable law**, whether such investments were made before or after the entry into force of this Agreement. 2. Notwithstanding any other provision in this Agreement, Article 2.3 (National Treatment) shall not apply to subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance. 3. Article 2.3 (National Treatment) shall not apply to: (a) the procurement by governmental agencies of goods and services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of goods or the supply of services for commercial sale; or (b) audio-visual services; (c) activities performed in the exercise of governmental authority within the respective territories of the Parties. For the purposes of this Agreement, an activity performed in the exercise of governmental authority means any activity, except an activity which is supplied on a commercial basis or in competition with one or more suppliers.[286]

Article 3 of the EAC Model Investment Treaty is titled 'Scope and Coverage' and Article 3(4) provides that "Each Party shall admit the entry of investment made by Investors of the other Party **pursuant to its applicable laws and regulations and in line with their national development and social goals.**[287]

National Treatment - The national treatment obligation can greatly limit domestic regulatory action even when it is not extended to investors and investments during the pre-establishment phase and applies only in the post-establishment phase. Based on

[285] Emphasis added.
[286] Emphasis added.
[287] Emphasis added.

evolving treaty practice, there are now many options for drafting the national treatment standard in order to protect the regulatory space of a host State.

First, the NT obligation can be drafted to explicitly require a comparison of investors/investments that are "in like circumstances."[288] In some IIAs, 'like circumstances' requirement is followed by a statement that whether treatment is accorded in like circumstances would depend on a totality of the circumstances.[289] In the Argentina-Japan BIT (2018) Contracting Parties clarified that "whether treatment is accorded in 'like circumstances'... depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investments or investors on the basis of legitimate public welfare objectives."[290] Second*,* in some BITs, states clarify whether or not the NT obligation is binding on local governments.[291] For example, in Article 14.4.(3) of Australia-Indonesia CEPA (2018), Contracting Parties clarified that with respect to a regional level government, the national treatment expected is "treatment no less favorable than the most favorable treatment accorded in like circumstances by that regional level government to investors, and to investments of investors, of the Party of which it forms a part."

Third, in some agreements, contracting parties are permitted to list non-conforming measures that are excluded from the national treatment standard.[292] In the EU-Singapore IPA, Contracting Parties clarified that the national treatment standard shall not apply to government procurement, audio-visual services, or "activities performed in the exercise of governmental authority, within the respective territories of the Parties."[293] Fourth, in some agreements, contracting parties reserve the right to identify the sensitive sectors of economy and/ or other related activities that would be limited or excluded from the scope of the NT obligation.[294] Fifth, some IIAs include a sentence subjecting the national treatment protection to national legislations, governmental policies and guidelines. Under Article 4(1) of Singapore-Kazakhstan BIT, each Contracting Party shall accord national treatment "*unless otherwise provided in its national legislation, governmental policies and guidelines.*"[295]

Finally, in a growing number of investment treaties, a GATT Article XX-type exception clause that is specifically designed for the NT requirement can be found; Article 4 of the Singapore-Kazakhstan BIT and Article 2.3 (3) of the EU-Singapore IPA are good examples.[296] The options for improving the national treatment clause are not mutually

[288] Australia-Indonesia CEPA, Article 14.4 (1) and (2); SADC Model BIT, Article 4; EAC draft Model Investment Treaty, Article 4.1. Rwanda-Morocco BIT, Article 3(1) ("Each Contracting Party shall accord in its territory to investments of the other Contracting Party treatment which is not less favourable than that it accords, in like circumstances, to investments of its own investors or to investments of any third State, whichever is more favourable to the investor concerned."
[289] Argentina-Japan BIT, Article 2(3); EAC draft Model Investment Treaty, Article 4.2.
[290] Argentina-Japan BIT, Article 2(3).
[291] Australia-Indonesia CEPA, Article 14.4 (3).
[292] Argentina-Japan, Article 7 (providing a list of measures to which the NT and MFN standard do not apply); EAC draft Model Investment Treaty, Article 4.3.
[293] EU-Singapore IPA, Article 2.1 (3).
[294] Singapore-Kazakhstan BIT, Article 4(2).
[295] Emphasis added.
[296] EU-Singapore IPA, Article 2.3 (3).

exclusive and can be combined. Several of the options listed above are embodied in Article 4 of the EAC Model Investment Treaty. Article 4 provides *inter alia*:

EAC Model Investment Treaty

ARTICLE 4. National Treatment

4.1 Subject to paragraphs 4.3 - 4.5, each State Party shall accord to Investors and their Investments treatment no less favourable than the treatment it accords, **in like circumstances**, to its own investors and their investments.
4.2 For greater certainty, references to “like circumstances” in paragraph 4.1 **requires an overall examination on a case-by-case basis of all the circumstances of an Investment** including, inter alia:
a. its effects on third persons and the local community;
b. its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
c. the sector the Investor is in;
d. the aim of the measure concerned;
e. the regulatory process generally applied in relation to the measure concerned; and
f. other factors directly relating to the Investment or Investor in relation to the measure concerned.
....
4.3 Non-conforming measures and excluded sectors:
a. This Article shall not apply to future measures or to sectors and activities set out in the Schedules to this Treaty.
....
4.4 Exception for formalities
Nothing in this Article shall be construed to prevent a State Party from adopting or maintaining a measure that prescribes special formalities in connection with the Investments of Investors, such as a requirement that their Investments be legally constituted under the laws or regulations of the State Party, provided that such formalities do not materially impair the protections afforded by a State Party to Investors of the other State Party and their Investments pursuant to this Treaty.
....

Although some recent BITs involving EAC countries contain some reform elements, this reformist approach is not applied consistently. The Rwanda-UAE BIT (2017) is a recent agreement with some reform elements and yet its NT clause (embodied in one sentence) is very poorly drafted compared to the national treatment provision in the Morocco-Nigeria BIT (2016) as far as preserving domestic regulatory space is concerned.

Table 44: National Treatment Provisions of EAC States BITs

TREATY	PROVISIONS
Rwanda-UAE BIT (2017)	ARTICLE 5 National treatment Subject to its laws and regulations, each Party shall accord to investors of the other Party and their investments treatment no less favourable than that it accords, in like circumstances, to its own investors and their investments with respect to the expansion, management, conduct, operation and sale or other disposition of investments in its territory.
Morocco-Nigeria BIT (2016)	ARTICLE 6 NATIONAL TREATMENT AND THE MOST FAVOURED NATION PROVISIONS .... 2) Each Party shall allow investors of the other Party to invest and contract business in conditions no less favourable than that accorded, in like circumstances, to investments of its own investors in accordance with its laws and regulations. 3) For greater certainty, references to "like circumstances" in paragraph 2 requires an overall examination on a case-by-case basis of all the circumstances of an investment including, but not limited to: a) its effects on third persons and the local community; b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment; c) the sector in which the investor is in; d) the aim of the measure concerned; f) the regulatory process generally applied in relation to the measure concerned; The examination referred to in this paragraph shall not be limited to or be biased toward anyone factor. .... 5) The treatment granted under 1, 2, 3 and 4 of this article shall not be construed as to preclude national security, public security or public order....

Most-Favoured-Nation Treatment - As already noted, unless carefully drafted, MFN clauses provide a license for investors to cherry-pick the most advantageous clauses from different IIAs that a host State has concluded. Studies show that when investors invoke the MFN clause it is usually "to access more investor-friendly provisions concluded by the host State with third countries."[297] Indeed, investors frequently rely on the MFN clause to avoid dispute resolution requirements imposed by an applicable IIA.[298] For a country that concludes IIAs on the basis of a model agreement, cherry-picking by investors does not pose a major problem because of the uniformity in the country's IIAs. By contrast, when the stock of a country's IIAs consists of varied and inconsistent BITs,

[297] UNCTAD Reform Package, supra note 206, p 33.
[298] Id.

cherry-picking by investors can create considerable difficulties and challenges for such a country.

Given the challenges that the MFN standard can pose for a host State, states are injecting some creativity into how the MFN clause is crafted. There are at least four different options that countries interested in reforming the MFN standard in their IIAs can consider: (i) specify that the MFN does not apply to substantive and/or ISDS-related elements contained in other agreements, existing or future;[299] (ii) carve out specific sectors, industries and/or policy measures from the ambit of the MFN clause; (iii) clarify that the MFN obligation requires a comparison of investors/investments that are "in like circumstances";[300] and/or (iv) omit the MFN standard.301 Regarding exceptions and exclusions, countries are allowing more exclusions to the MFN treatment and are excluding matters relating to: the acquisition of land property,[302] subsidies,[303] government procurement,[304] and any treatment accorded by a contracting party to investors of a non-contracting party and to their investments on the basis of reciprocity.[305]

What is evident is that countries are not afraid to deviate from the norm. Excluded from the MFN treatment in the Japan-UAE BIT are "any preferential treatment resulting from the memberships to any bilateral or multilateral international agreement involving protection of new varieties of plants, aviation, fishery or maritime matters"[306] and "any measure relating to investments in public law enforcement and correctional services, and in social services such as income security or insurance, social security or insurance, social welfare, primary and secondary education, public training, health and child care."[307] Article 5 (3) of the EAC Model Investment Treaty provides that the MFN treatment "does not include dispute settlement procedures provided for in other treaties, including those provided for in other investment treaties." Furthermore, Article 5(3) clarifies that "substantive obligations in other treaties, including other investment treaties, do not in themselves constitute "treatment", and thus cannot give rise to a breach of [the MFN] article."

The MFN provision in Article 7 and Article 8 of the Pan-African Investment Code is also carefully drafted with a view to providing sufficient flexibility for host States. Article 7 provides some clarity regarding the meaning and scope of the MFN standard and article 8 offers some exceptions to the MFN standard. Article 7 provides as follows:

[299] Australia-Indonesia CEPA, Article 14.5(3) (excluding ISDS from the MFN obligation); Singapore-Kazakhstan BIT, Article 5(4); Argentina-Japan BIT, Article 3(3)(stating that the MFN standard does not encompass international dispute settlement procedure); Japan-UAE BIT, Article 4(6)(excluding ISDS from the scope of the MFN clause.

[300] Australia-Indonesia CEPA, Article 14.5(1) and (2). See also Argentina-Japan BIT, Article 3(2).

[301] India-Belarus BIT (2018); South Africa, The Protection of *Investment* Act 22 of *2015.*

[302] Japan-UAE BIT, Article 4(3)(a)(i).

[303] Japan-UAE BIT, Article 4(3)(a)(ii).

[304] Japan-UAE BIT, Article 4(3)(a)(iii).

[305] Japan-UAE BIT, Article 4(3)(b).

[306] Japan-UAE BIT, Article 4(3)(c).

[307] Japan-UAE BIT, Article 4(3)(d).

Pan-African Investment Code

ARTICLE 7

Most-Favored-Nation Treatment

1. ....

2. Each Member State shall accord to investments made by investors of another Member State treatment no less favorable than it accords, in like circumstances, to investments made by investors of any other Member State or of a third country....

In addition to the "like circumstance" qualification, the concept of "in like circumstances" requires an overall examination, on a case by case basis, of all the circumstances of an investment.

3. The concept of "in like circumstances" requires an overall examination, on a case by case basis, of all the circumstances of an investment, including, among others:

(a) Its effects on third persons and the local community;

(b) Its effects on the local, regional or national environment, the health of the populations, or on the global commons;

(c) The sector in which the investor is active;

(d) The aim of the measure in question;

(e) The regulatory process generally applied in relation to a measure in question;

(f) Company size, and

(g) Other factors directly relating to the investment or investor in relation to the measure in question.

The Pan-African Investment Code

ARTICLE 8

Exceptions to Most-Favored-Nation Treatment

1. Member States may adopt measures that derogate from the Most-Favored-Nation principle.
2. Any regulatory measure taken by a Member State that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute a breach of the Most-Favored-Nation principle.

Some BITs involving EAC members contain exceptions to the MFN obligation, but most do not. Pursuant to Article 4(c), the MFN treatment in the Burundi-Turkey BIT "does not include treatment accorded to investors of a non-contracting Party and their investments by provisions concerning the settlement of investment disputes provided for in the Agreement or in other international agreements concluded between a Party and a non-contracting Party."[308] In BIT negotiations, EAC states do not appear to draw useful lessons from their earlier treaties, from the treaties of countries, or from regional

[308] Burundi-Turkey BIT, Article 4(c).

and continental policy instruments. For example, most of the carve-outs and exceptions to the MFN obligation in the Rwanda-USA BIT (2008) are absent from some of the recent treaties involving Rwanda such as the Rwanda-UAE BIT (2017) and the Rwanda-Morocco BIT (2016). Excluded from the MFN obligation in the Rwanda-USA BIT but not from recent treaties involving Rwanda are:

- Any existing non-conforming measure that is maintained by a Party at the central level of government, a regional level of government, or a local level of government.[309]
- Any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule;[310]
- Any measure covered by an exception to, or derogation from, the obligations under Article 3 or 4 of the TRIPS Agreement, as specifically provided in those Articles and in Article 5 of the TRIPS Agreement;[311]
- Government procurement;[312] and
- Subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.[313]

Fair and Equitable Treatment - The FET standard "is at the core of today's debate on IIA reform."[314] As previously noted, most of the ISDS cases involving EAC members involve a claim of violation of the FET standard.315 Given its broad ambit, it is important that in IIA negotiation and design, EAC states careful attention to the FET clause. In drafting the FET clause, the goal should be to minimize ambiguity, provide clarity as to meaning and scope, and, if possible, circumscribe the FET obligation and introduce sufficient flexibility for domestic policy action. Cases such as *Biwater v Tanzania*,[316] *Unión Fenosa Gas v. Egypt*,[317] *Parkerings v. Lithuania*,[318] *Waste Management v. Mexico (No. 2)*,[319] and *Saig v. Egypt*,[320] all underscore the fact that unless drafted carefully and circumscribed, the FET clause can turn into an all-encompassing provision.

A review of recent IIAs by a wide variety of states suggests that when it comes to clarifying and circumscribing the FET obligations, there are many options that states can choose from. These include: (i) qualifying the FET standard by reference to the minimum standard of treatment under customary international law;[321] (ii) clarifying the FET

---

[309] Rwanda-USA BIT, Article 14(1)(a).
[310] Id., Article 14(2).
[311] Id., Article 14(4).
[312] Id., Article 14(5)(a).
[313] Id., Article 14(5)(b).
[314] UNCTAD's Reform Package, supra note 206, p. 35.
[315] See e.g. *Standard Chartered Bank v. United Republic of Tanzania* (ICSID Case No. ARB/10/12).
[316] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22)
[317] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt,* ICSID Case No ARB/14/4
[318] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No ARB/05/8.
[319] *Waste Management*, *Inc*. *v*. *United Mexican* States ("Number *2*"), ICSID Case *No* ARB(AF)/00/3
[320] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* [*Saig v. Egypt*], ICSID Case No ARB/05/15.
[321] Japan-UAE BIT, Article 5(1) and (2); SADC Model BIT, Article 5.

standard with an open-ended list of covered State obligations;[322] (iii) clarifying or replacing the general FET standard with an exhaustive "closed list" of the protection to be accorded investors;[323] (iv) omitting the FET standard;[324] and (v) clarifying that the mere fact that a Party takes or fails to take an action that may be inconsistent with an investors expectations does not constitute a breach of the fair and equitable treatment obligation.[325]

Although a growing number of countries are daring to deviate from the norm when it comes to designing the FET clause, by far the most common practice today is to qualify the FET standard by reference to the minimum standard of treatment under customary international law.[326] The EAC Model Investment Treaty does not use the term 'fair and equitable treatment.' However, Article 6 is titled 'Treatment of investors and investments' and offers an exhaustive "closed list" of the protection to be accorded investors.[327]

EAC Model Investment Treaty

ARTICLE 6: Treatment of investors and investments

6.1 The State Parties shall ensure that their administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural [justice][due process] to investors of the other State Party or their investments taking into consideration the level of development of the State Party.

6.2. Investors or their Investments, as required by the circumstances, shall be notified in a timely manner of administrative or judicial proceedings directly affecting the Investment(s), unless, due to exceptional circumstances, such notice is contrary to domestic law.

6.3 Administrative decision-making processes shall include the right of administrative review, appeal of decisions, commensurate with the level of development and available resources at the disposal of State Parties.

6.4 The Investor or Investment shall have access to government-held information in a timely fashion and in accordance with domestic law, and subject to the limitations on access to information under the applicable domestic law.

6.5 State Parties will progressively strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes in accordance with their respective domestic laws and regulations.

6.6 A determination that there has been a breach of another provision of this Treaty, or of a

[322] Argentina-Japan BIT, Article 4(2)(a)(" 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.").

[323] EU-Singapore IPA, Article 2.4 (2); SADC Model BIT, Article 5 (Option 2).

[324] See India-Belarus BIT (2018).

[325] See e.g. Australia-Indonesia CEPA, Article 14.7(4).

[326] See e.g. Argentina-Japan BIT, Article 4(12).

[327] According to the commentary to Article 6, "The language in this article adopts a more restricted formulation which is less likely to lead to expansive interpretations, unlike the traditional FET provisions common to many BITs. It changes the focus from investor rights to governance standards and narrows the scope and coverage of FET."

separate international agreement, does not establish that there has been a breach of this Article.

It is entirely possible, in a single IIA, for contracting parties to use more than one option.[328] Thus, in the Australia-Indonesia Comprehensive Economic Partnership Agreement (2019), Contracting States clarify that FET "requires each party to not deny justice in any legal or administrative proceedings,"[329] and that the concepts of FET "do not require treatment in addition to or beyond that which is required under customary international law minimum standard of treatment, and do not create additional substantive rights."[330]

Furthermore, Contracting Parties explicitly acknowledged that "the mere fact that a Party takes or fails to take an action that may be inconsistent with an investors expectations do not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result." The Morocco-Nigeria BIT (2016) offers a unique example in the sense that not only did Contracting Parties link the FET standard to customary international law minimum standard of treatment of aliens, they also included their shared understanding of the meaning and scope of 'customary international law.' Article 7(4) of the Morocco-Nigeria BIT provides:

ARTICLE 7

MINIMUM STANDARD OF TREATMENT

....

4. For greater clarity, the Parties confirm their shared understanding that 'customary international Law' generally and as specifically referred in this Agreement results from a general and consistent practice of States that they follow from a sense of legal obligation. The Parties also confirm that the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interest of aliens.

Very few IIAs omit the FET standard altogether; the Rwanda-Morocco BIT (2016) is an example. The more common practice is for states to avoid using the term 'fair and equitable treatment' and to replace the FET obligation with more precise formulation of minimum standard of treatment due to investors. Brazil's recent investment agreements avoid the term 'fair and equitable treatment.' In the Brazil-UAE BIT (2019), Contracting Parties are explicit and clear about their intention to exclude the FET treatment and provide in Article 4:

[328] See e.g. Article 3 of Singapore-Kazakhstan BIT.

[329] Australia-Indonesia CEPA, Article 14.7(2).

[330] Australia-Indonesia CEPA, Article 14.7(c) (footnote omitted).

ARTICLE 4
Treatment

1. Each Party shall treat investors of the other Party and their investments according to its applicable rules and regulations and in conformity with this Agreement.
2. Based on the applicable rules of international law as recognized by each of the Parties and their respective national law, no Party shall subject investors of the other Party and their investments to measures which constitute:
(i) Denial of access to justice in any judicial or administrative proceedings;
(ii) Breach of due process;
(iii) Targeted discrimination, such as gender, race, religious or political beliefs;
(iv) Manifestly abusive treatment, such as coercion, duress and harassment; or
(v) Discrimination against investments of investors of the other Party in law enforcement and the provision of public security.
3. For greater certainty, the standards of "fair and equitable treatment" and "full protection and security" are not covered by this Agreement and shall not be used as interpretative standards in investment dispute settlement procedures.[331]

In the India-Belarus BIT, the term 'fair and equitable treatment' is absent and is replaced by a clause that is arguably more specific about the exact obligation of Contracting States. Article 3.1 of the India-Belarus BIT stipulates:

3.1 No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through:
(i) Denial of justice in any judicial or administrative proceedings; or
(ii) fundamental breach of due process; or
(iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or
(iv) manifestly abusive treatment, such as coercion, duress and harassment.

When it comes to redesigning the FET standard, states appear to be willing to think outside the box and to come up with creative options. In some recent IIAs, contracting parties even include a clause that provides for the review, upon request, of the content of the obligation to provide FET.[332] In at least one agreement, contracting parties provided a list of factors that should be taken into account in determining if the FET standard has been violated.[333] For example, Article 2.4(3) of the EU-Singapore IPA (2019) provides:

[331] Emphasis added.
[332] EU-Singapore IPA, Article 2.4 (4).
[333] EU-Singapore BIT, Article 2.4. (3).

> In determining whether the fair and equitable treatment obligation … has been breached, a Tribunal may take into account, where applicable, whether a Party made specific or unambiguous representations to an investor so as to induce the investment, that created legitimate expectations of a covered investor and which were reasonably relied upon by the covered investor, but that the Party subsequently frustrated.

Expropriation - Expropriation raises significant issues in international investment law.[334] Investors need assurance that their property is protected. However, unless carefully drafted, the expropriation clause in an IIA can expose a host State to considerable legal risks and liabilities. As previously noted, in many cases involving African States, claimants successfully asserted claims of direct and indirect expropriation.[335] The problem with the expropriation clause in many old-generation BITs involving EAC States is that they are vague and are not circumscribed in any meaningful way. Although the expropriation provision of most IIAs cover both direct and indirect expropriation, these terms are rarely, if ever, defined in most IIAs. Furthermore, it is not always clear whether non-discriminatory public interest regulations that do not involve actual physical taking of property, constitute indirect expropriation.[336]

Experts recognize that "[d]rafting a provision that adequately addresses the issues of the protection of the foreign investor and the ability of a host state to govern its economy can be a challenge."[337] In regard to expropriation clauses, a number of options are emerging that can allow states strike a more appropriate balance between the goals of protecting investments and those of preserving domestic regulatory space.[338] Options include: (i) omitting a reference to indirect expropriation in the IIA; (ii) providing a clear definition of indirect expropriation; (iii) establishing the standard that must be met for indirect expropriation to be found; (iv) clarifying the types of measures that *do not* constitute indirect expropriation; (v) providing targeted exceptions to the expropriation obligation; and (vi) providing direction to prospective tribunal on how to construe and apply the expropriation provision.

First, in some recent IIAs, contracting parties omit any reference to indirect expropriation and sometimes clarify that the treaty only applies to direct expropriation. Indirect expropriation is excluded from Brazil's recent BITs including Brazil-Ethiopia BIT (2018) and Brazil-Malawi BIT (2015). Article 7 of the Brazil-Ethiopia BIT imposes limits on the right of contracting parties to directly nationalize or expropriate investments of investors. In article 7(5) it reads that "[f]or greater certainty, this Article only provides for direct expropriation, where an investment is nationalized or otherwise directly

[334] UNCTAD, EXPROPRIATION UNCTAD Series on Issues in International Investment Agreements II (UNITED NATIONS New York and Geneva, 2012).

[335] See e.g. *Antoine Goetz et consorts **v.** République du Burundi*, ICSID Case No. ARB/95/3. *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt* ICSID Case No. ARB/05/15; *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15; *Bernardus Henricus Funnekotter and others v. Zimbabwe*, ICSID Case No. ARB/05/6.

[336] *Biwater Gauff* (*Tanzania*) Ltd. *v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.

[337] UNCTAD, International Investment Agreements: Key Issues (Volume II), supra note 126, p. 235.

[338] UNCTAD Reform Package, supra note 206, p. 38.

expropriated through formal transfer of title or ownership rights, **and does not cover indirect expropriation**."[339] The practice of excluding indirect expropriation from the coverage of an IIA is found in only a few IIAs and carries the risk of sending wrong signals to investors. UNCTAD warns that "expressly excluding indirect expropriation from the coverage of an IIA [340]may be perceived as considerably reducing the protective value of the IIA."[341]

Second, in some IIAs, attempt is made to define both direct and indirect expropriation. For example, in the India-Belarus BIT (2018), Contracting Parties clarify that expropriation may be direct or indirect, that direct expropriation "occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure," and that indirect expropriation "occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially or permanently deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure."[342] In Article 8(2)(a) of the Morocco-Nigeria BIT (2016), Contracting Parties clarify that "indirect expropriation results from a series of measures of a Party having an equivalent effect of direct expropriation without formal transfer of title or outright seizure."

Third, in a growing number of IIAs, contracting parties set out the criteria that must be met in order for indirect expropriation to be found.[343] Pursuant to Article 10(2) of the Kenya-Japan BIT, the determination of whether a measure or a series of measures by a Contracting Party have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, and evidence that includes: (i) "permanent and complete or near complete deprivation of the value of investment;"(ii) "permanent and complete or near complete deprivation of the investor's right of management and control over the investment;" or (iii) "an appropriation of the investment by the Contracting Party which results in transfer of the complete or near complete value of that investment to that Contracting Party, an agency of that Contracting Party or to a third party."[344]

Fourth, in a growing number of IIAs, states clarify which types of measures *do not* constitute indirect expropriation and explicitly exclude from the scope of the expropriation provision, non-discriminatory regulatory measures.[345] Article 6(2) of the Rwanda-Turkey BIT (2016) provides that "Non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation." The language of Article 5.5. of the

[339] Emphasis added.
[340] See e.g. Argentina-Japan BIT, Article 11(2).
[341] UNCTAD Reform Package, supra note 206, p. 38.
[342] India-Belarus BIT, Article 5(3).
[343] See e.g. India-Belarus BIT, Article 5.3 (b); Argentina-Japan BIT, Article 11(3); Uganda-UAE BIT, Article 8(8).
[344] This option is found in Kenya-Japan BIT but not in many other BITs involving Kenya. The appearance of this option in Kenya-Japan BIT was driven by Japan and is a feature found in many other IIAs involving Japan.
[345] EAC Model Investment Treaty, Article 7.6 and 7.7.; SADC Model BIT, Article 6.6 and 6.7.; Argentina-Japan BIT, Article 11(3)(b) ("Non-discriminatory regulatory actions by a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.")

India-Belarus BIT (2018) provides that "[n]on-discriminatory regulatory measures by a **Party or measures or awards by judicial bodies of a Party** that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation under this Article.[346] Article 7.7. of the EAC Model Investment Treaty provides that "[a] non-discriminatory measure of a State Party that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, *does not* constitute an indirect expropriation under this Treaty."

Fifth*,* some IIAs provide targeted exceptions such as the compulsory license exception.[347] Article 11(8) of the Argentina-Japan BIT, provides: "This Article *shall not apply* to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the TRIPS Agreement." Article7.5 of the EAC Model Investment Treaty provides:

> This Article shall not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property.[348]

Sixth, in a growing number of IIAs, contracting parties create special regimes for different types of expropriation. In some IIAs, measures of expropriation relating to land are addressed differently.[349] Sovereign assets and sovereign wealth funds enjoy some protection under the Uganda-UAE BIT. Article 8 of the Uganda-UAE BIT provides that notwithstanding the provisions of the article on expropriation "sovereign assets and sovereign wealth funds shall not be subject to nationalization, exploration, sequestration, blocking or freezing by a Contracting Party nor shall be subject to any of these measures directly or indirectly by a request of a third party."[350] Seventh, in some IIAs, contracting parties provide direction to prospective tribunal on how to construe and apply the expropriation provision. For example, Article 5(6) of the India-Belarus BIT states, "while considering an alleged breach of this Article, Tribunal shall take account of whether the investor or, as appropriate, the locally established enterprise, pursued action for remedies before domestic courts or tribunals prior to initiating a claim under this Treaty."

[346] Emphasis added.
[347] EAC Model Investment Treaty, Article 7.5; SADC Model BIT, Article 6.5.
[348] Emphasis added.b
[349] Singapore-Kazakhstan BIT, Article 6(3)(stating that "any measure of expropriation relating to land shall be for a purpose and upon payment of compensation in accordance with the applicable national legislation of the expropriating Party").
[350] Rwanda-UAE BIT, Article 8(7).

Eight, some recent agreements and Model BITs are also addressing more explicitly the issue of the compensation due upon expropriation either to clarify what the standard for compensation is or to list factors that should be taken into account in calculating the right compensation. The EAC Model Investment Treaty offers a very extensive provision on compensation due upon expropriation. The standard for compensation in the EAC Model Investment treaty is "just and adequate compensation". Article 7.2 clarifies how 'just and adequate compensation' is to be assessed and provides a list of factors that can be taken into account in determining whether compensation is just and adequate. The EAC Model Investment Treaty also addresses, in Article 7.4., the problem of burdensome arbitral awards.

EAC Model Investment Treaty (2016)
ARTICLE 7: Expropriation

....

7.4. Awards that are significantly burdensome on a Host State may be paid over a period as agreed by the parties to the arbitration, subject to interest at the rate established by agreement of the parties to the arbitration or by an arbitral tribunal failing such agreement.

EAC Model Investment Treaty (2016)
ARTICLE 7: Expropriation

....

7.2 Just and adequate compensation shall normally be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation") and shall not reflect any change in value occurring because the intended expropriation had become known earlier. In no event shall the valuation date be moved to any future date. The computation of the fair market value of the property shall exclude any consequential or exemplary losses or speculative or windfall profits claimed by the Investor, including those relating to moral damages or loss of goodwill. However, where appropriate, the assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard for all relevant circumstances and taking account of:

a. current and past use of the Investment, including the history of its acquisition and purpose;
b. the duration of the Investment and previous profits made by the Investment;
c. compensation or insurance payouts received by the Investor or Investment from other sources;
d. the value of property that remains subject to the Investor or
e. options available to the Investor or Investment to mitigate its losses, including reasonable efforts made by the Investor or Investor towards such mitigation, if any;
f. conduct of the Investor that contributed to its damage;
g. any obligation the Investor or its Investment is relieved of due to the expropriation,
h. liabilities owed in the Host State to the government as a result of the Investment's

activities,

i. any harm or damage that the Investor or its Investment has caused to the environment or local community that have not been remedied by the Investor or the Investment, and

j. any other relevant considerations regarding the need to balance the public interest and the interests of the Investment.

Transfer of Funds - The scope of a transfer provision is determined by the types of transfers covered, the nature of obligation imposed on a host State and the permissible exceptions and derogations allowed. The design of a transfer provision should be taken seriously for at least two reasons.[351] First, unlike the national treatment or most-favored-nation obligation, the transfer obligation is of an absolute nature. Second, the transfer provision has enormous economic significance and implication particularly for most developing countries. There are several options for states desiring to clarify and circumscribe the transfer provision in their IIAs.

First, in many IIAs, the right to transfer funds is made subject to domestic law. Article 10(1) of the Rwanda-UAE BIT provides that "**[i]n accordance with its laws and regulations** in force in the territory of the Contracting Party, each Contracting Party shall ensure that all payments relating to an investment in its territory of an investor of the other Contracting Party may be freely transferred into and out of its territory without undue delay."[352] Article 11(1) of the Morocco-Nigeria BIT provides that "[e]ach Party shall in accordance with legal system and its international obligations, allow the free transfer of funds related to an investment …." Second, in a growing number of IIAs, the right to transfer funds is subject to the investor satisfying tax obligations under a host State's law.[353] Article 11 of the Morocco-Nigeria BIT is titled "Transfers". In Article 11(4) Contracting Parties clarify that "[i]t is understood that this Agreement does not prevent a Party from requiring, prior to transfers relating to an investment, from investors to fulfil their tax obligations related to the investment in question."

Third, a growing number of IIAs contain a temporary safeguard exception to allow host States to impose restrictions on transfers in response to balance-of-payments crisis and external financial difficulties, or other types of economic crisis.[354] Some BITs involving EAC countries provide for this exception but many others do not.[355] Under Article 6(4) of Kenya-Korea BIT (2014) a Contracting Party may adopt or maintain measures inconsistent with its transfer obligations "in the event of serious balance-of-payments and external financial difficulties or threat thereof" or "in cases where, in exceptional

[351] UNCTAD, International Investment Agreements: Key Issues (Volume II), supra note 126, p. 257 (noting that "the features of provisions dealing with the transfer of funds are the subject of considerable scrutiny when an international investment agreement … is negotiated or interpreted.").

[352] Emphasis added.

[353] Turkey-Kenya BIT, Article 7(1) ("Upon fulfillment of all tax obligations, each Contracting Party shall permit in good faith all transfers, related to an investment, to be made freely and without delay into and out of its territory.").

[354] EU-Singapore IPA, Article 2.7 (4); SADC Model BIT, Article 8.4.

[355] Turkey-Kenya BIT, Article 7(3)(" Where, in exceptional circumstances, payments and capital movements cause or threaten to cause serious balance of payments difficulties, each Contracting Party may temporarily restrict transfers, provided that such restrictions are not discriminatory.").

circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies." Article 8(3) of the Burundi-Turkey BIT (2017) provides that "[w]here, in exceptional circumstances, payments and capital movements cause or threaten to cause serious balance of payments difficulties, each Contracting Party may temporarily restrict transfers, provided that such restrictions are imposed on a non-discriminatory and in good faith basis."

Finally, increasingly States are inserting a clause in their IIAs that allow a host State to delay or prevent a transfer, through the equitable, non-discriminatory and good faith application of its measures and law.[356] This is followed by a closed list of the fields of law that are exempted. The list varies from treaty to treaty. A growing number of treaties exempt laws and measures relating to: (a) bankruptcy, insolvency or the protection of the rights of creditors; (b) issuing, trading, or dealing in securities; (c) criminal or penal offenses; (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or (e) ensuring compliance with orders or judgments in judicatory proceedings.[357] Some BITs offer a more extensive list of applicable laws and exempt laws relating to taxation,[358] social security, public retirement or compulsory savings scheme,[359] and severance entitlement of employees.[360] A few recent BITs involving EAC states provide for this exception.[361]

Pan-African Investment Code
ARTICLE 16
Exceptions to the transfer of funds

1. A Member State shall apply restrictions on international transfers of funds and payments for current transactions relating to investments made in its territory in accordance with its taxation as well as financial laws and regulations.
2. Exceptions to the transfer of funds are permitted under the following conditions:
    (a) Capital can only be transferred after a period of five years after full operation of the investment in a Member State unless its national legislation provides for more favorable treatment; or
    (b) Proceeds of the investment can be transferred one year after the investment entered the territory of a Member State unless its national legislation provides for more favorable treatment.
3. A Member State may prevent a transfer in a non-discriminatory manner and in accordance with its laws relating to:
    (a) Bankruptcy, insolvency or other legal proceedings to protect the rights of creditors;
    (b) Criminal or administrative violations; or

[356] SADC Model BIT, article 8.3.
[357] Kenya-Korea BIT, Article 6(3); Singapore-Kazakhstan BIT, article 8(3)(a)-(f); Japan-UAE BIT, Article 15(3)(a)-(d).
[358] Australia-Indonesia CEPA, Article 14.9 (f); EU-Singapore IPA, Article 2.7 (g).
[359] Australia-Indonesia CEPA, Art. 14.9 (g); EU-Singapore IPA, Article 2.7 (f); Singapore-Kazakhstan BIT, Article 8(3)(f); SADC Model BIT, Article 8.3.
[360] Australia-Indonesia CEPA, Art. 14.9 (h); SADC Model BIT, Article 8.3.
[361] See e.g. Rwanda-Turkey BIT (2017), Article 8(4).

(c) Ensuring the satisfaction of judgments in adjudicatory proceedings.

4. A Member State may adopt or maintain measures not conforming with its obligations relating to cross-border capital transactions:

(a) In the event of serious balance-of-payments and external financial difficulties or threat thereof; or

(b) In cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.

5. Measures shall be made public, be temporary and be eliminated as soon as conditions permit.

EAC Model Investment Treaty

ARTICLE 9. Transfers

....

9.3 Notwithstanding paragraphs 9.1 and 9.2, a State Party may prevent or delay a transfer through the non-discriminatory application of its law and regulations relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;
(b) issuing, trading or dealing in securities, futures, options or derivatives;
(c) criminal or penal offences and the recovery of the proceeds of crime;
(d) financial reporting or record keeping of transactions when necessary to assist law enforcement or financial regulatory authorities;
(e) in case of non- fulfillment of contractual obligations between the investor and the host country investment authority;
(f) ensuring compliance with orders or judgments in judicial or administrative proceedings;
(g) tax obligations;
(h) social security, public retirement or compulsory savings schemes;
(i) severance entitlements of employees;
(j) the formalities required to register and satisfy the Central Bank and other relevant authorities of a State Party;
(k) in cases of balance of payments instability;
(l) in the promotion of technology transfer and food security.

Transparency - Broadly worded transparency provisions can be intrusive and can threaten vital State interests.[362] Depending on the breadth, the transparency provision in a BIT can impose significant financial and administrative burden on poor countries. To effectively delimit the transparency provision on BITs, attention must be paid to a number of issues. First, attention should be paid to the types of information that a host

[362] UNCTAD, Transparency: UNCTAD Series on Issues in International Investment Agreements II (New York and Geneva, United Nations, 2012).

State is required to make public. Second, serious attention should be paid to the mechanisms to be used to implement the transparency obligation.[363] Third, whether a transparency obligation will be voluntary or mandatory, and whether or not it will be *ad hoc* or be part of a continuing and repeated process should be addressed.

EAC countries must carefully consider how to safeguard their right to regulate even within the provisions on transparency. Based on evolving best practices of states, several options are possible: (i) omit the transparency provision from an IIA;[364] (ii) limit the scope of the transparency provision in terms of information required, implementation mechanisms, and time-limits;[365] (iii) design a transparency provision to impose obligation on Contracting States as well as on foreign investors;[366] and (iv) craft specific safeguards and exceptions to the transparency obligation. A survey of the transparency clause of IIAs suggests that there are wide variations in terms of the subject matter that a host State is obliged to disclose. For example, in the Singapore-Sri-Lanka BIT (2018), the transparency obligation only applies to international agreements.[367] Contracting Parties also have the freedom to provide for exceptions on a number of grounds including, national security, law enforcement, and privacy concerns.

Table 45: Treaty Provisions on Transparency

TREATY	PROVISIONS
Kenya-Korea BIT	ARTICLE 8(3) Transparency Nothing in this Agreement requires a Contracting Party to furnish or allow access to: (a) information relating to the financial affairs and accounts of individual customers of particular investors or investments; or (b) any confidential or proprietary information, including information concerning particular investors or investments, the disclosure of which would impede law enforcement or be contrary to its laws protecting confidentiality or prejudice the legitimate commercial interests of a particular enterprise.

[363] At least four types of mechanisms can be used: (a) consultation and information exchange; (b) routine publication of relevant information; (c) commitment to promptly respond to requests for information; and (d) commitment to promptly notify treaty partner of specific measures. See UNCTAD, International Investment Agreements: Key Issues (Volume 1I) p. 284 (2004).

[364] Transparency provision absent from the Singapore-Kazakhstan BIT (2018) although found in many BITs involving Singapore.

[365] Some transparency provisions are limited to laws (e.g. Australia-Uruguay BIT 2018, Article 6). However, in some IIAs, the transparency provision goes beyond laws and extends to regulations, administrative procedures, administrative rulings and, where possible, judicial decisions of general application, as well as international agreements which pertain to or affect the implementation and operation of this Agreement. See Argentina-Japan BIT, Article 8.

[366] While some transparency provisions focus only on Contracting Parties, others cast a wider net and extend obligation to investors. See Draft EAC Model Investment Agreement, Article 14 (Transparency of Contracts and Payments) and Article 17 (Transparency of Information by State Parties). Found in Kenya-Korea BIT but not in Kenya-Japan BIT, is a provision that “Nothing in this Agreement shall prevent one Contracting Party from requiring an investor of the other Contracting Party, or its investment, to provide routine information concerning that investment solely for informative or statistical purposes.” See Kenya-Korea BIT, Article 8(3).

[367] See Singapore-Sri Lanka IIA, Article 10.22 (“To the extent possible, each Party shall ensure that international agreements pertaining to or affecting investors or investment activities to which a Party is a signatory shall be promptly published or otherwise made available in such a manner as to enable interested persons or parties to become acquainted with them.”)

Kenya-Japan BIT	ARTICLE 8(3) Transparency .... 3. Paragraphs 1 and 2 shall not be construed so as to oblige either Contracting Party to disclose confidential information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice privacy or legitimate commercial interests.
India-Belarus BIT	ARTICLE 10 Transparency .... 10.4 Nothing in this Treaty shall require a Party to furnish or allow access to confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular juridical persons, public or private

The EAC Model Investment Treaty takes a unique approach to transparency by imposing transparency obligations on host States and investors alike. Regarding the transparency obligation of investors, Article 12 is titled 'Provision of Information' and requires investors to provide information on corporate history and practices of the Investor and prohibits them from providing false or misleading information to a host State.

EAC Model Investment Treaty
ARTICLE 12: Provision of Information

12.1 An investor shall provide information to Host State on the investment in question and the corporate history and practices of the Investor. Investors and Investments must comply with the requirements of the Law of the Host State to disclose true and complete information regarding their activities, structure, financial situation, performance, relationships with affiliates, ownership, governance, or other matters.
12.2 The Host State shall have the right to timely and accurate information in this regard. An Investor shall not commit fraud or provide false or misleading information provided in accordance with this Article.
12.3 A material breach of paragraph 12.2 by an Investor or an Investment is deemed to constitute a breach of the domestic law of the Host State concerning the establishment, acquisition, management, operation and disposition of Investments.
12.4 The Host State Party may make such information available to the public in the location where the Investment is to be located, subject to other applicable law and the redaction of confidential business information. The State Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the Investor or the Investment.
12.5 Where required, Investors must also disclose the source and channel of their funds in the Home State or Host State by submitting appropriate documentary evidence

establishing the legitimacy of such funds. This disclosure, if requested, shall include any changes in the form or ownership of the enterprise or other entity located in the Home State and the Host State.

12.6 The Investment shall maintain true and complete copies of the records, books of account and current financial statements for the Investment that may be necessary to compute and substantiate compensation for any alleged breach of this Treaty or Host and Home State Laws, including: (i) Governance structures; (ii) records documenting the Investment, its shareholders, directors and employees.

12.7 Nothing in this Article shall be construed to prevent a State Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its domestic law or in connection with disputes between the Investor and the State regarding the Investment.

The transparency obligation of host states are addressed extensively in Article 6 and Article 17 of the EAC Model Investment Treaty. For example, Article 6(5) provides that "State Parties will progressively strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes in accordance with their respective domestic laws and regulations." Article 17 provides:

ARTICLE 17: Transparency of Information by State Parties

17.1 Each State Party shall promptly publish, or otherwise make publicly available, its laws and regulations of general application as well as international agreements that may affect the Investments of Investors of the other State Party.

17.2 Each State Party shall endeavour to promptly publish, or otherwise make publicly available, its policies and administrative guidelines or procedures that may affect investment under this Treaty.

17.3 Nothing in this Treaty shall require a State Party to furnish or allow access to any confidential or proprietary information, including information concerning particular Investors or Investments, the disclosure of which would impede law enforcement or be contrary to its domestic laws protecting confidentiality.

....

Performance Requirements - Restriction on the use of performance requirements is appearing in a growing number of IIAs. Given the potential impact of restrictions on the use of performance requirements on the regulatory space of a host state and the development goals and objectives of the EAC region as a whole, the best strategy for EAC members might be to resist the introduction of restrictions on the use of performance requirement in future agreements.

If resistance proves unsuccessful, the next best option would be to ensure that the performance requirement obligation is clearly defined and appropriately circumscribed. Overall, regarding the performance requirement obligations, options for countries

include: (i) excluding performance requirement provisions from IIAs; (ii) introducing exceptions and carve-outs to the performance requirement obligations; and (iii) introduce clauses that encourage the use of performance requirements rather than limit their use. Both the Pan-African Investment Code and the EAC Model Investment Treaty encourage the use of performance requirements. Article 16 of the EAC Model Investment Treaty is titled 'Right to Pursue Development Goals.' Article 16.2(b) provides that a State Party may:

> seek to enhance productive capacity, increase employment, increase human resource capacity and training, research and development including of new technologies, technology transfer, innovation, and other benefits of investment **through the use of specified requirements on investors made at the time of the establishment or acquisition of the investment and applied during its operation**.[368]

Article 16.5 of the further provides that the host state "may develop national policies to guide investors in developing human capacity of the labour force" and that such policy "**may include incentives to encourage employers to invest** in training, capacity building and knowledge transfer, paying particular attention to the special needs for youth, women and other vulnerable groups."[369] The Pan-African Investment Code encourages the use of performance requirements. Article 17(2) of the Pan-African Investment Code provides that "Member States may introduce performance requirements to promote domestic investments and local content."

> Pan-African Investment Code
>
> ARTICLE 17
>
> Performance Requirements
>
> 1. Member States may support the development of local, regional and continental industries that provide, inter alia, up-stream and down-stream linkages and have a favorable impact on attracting investments and generating increased employment in Member States.
> 2. Member States may introduce performance requirements to promote domestic investments and local content. Measures covered by this paragraph include, inter alia:
>
> (a) Measures to grant preferential treatment to any enterprise so qualifying under the domestic law of a Member State in order to achieve national or sub-national regional development goals;
> (b) Measures to support the development of local entrepreneurs;
> (c) Measures to enhance productive capacity, increase employment, increase human resource capacity and training, research and development including of new technologies, technology transfer, innovation and other benefits of investment through the use of specified requirements on investors;
> (d) Measures to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the adoption of this Code.

[368] Emphasis added.
[369] Emphasis added.

General Exceptions - To ensure that IIAs do not unduly restrict regulatory space, increasingly states are including in their IIAs a general exception clause modelled on Article XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade in Services (GATs). The inclusion of general exception clauses in IIAs is a fairly recent phenomenon and is typically found in recent agreements. Article XX GATT-like general exceptions can be found in IIAs involving Canada,[370] India[371] and a host of others.[372] The quality and scope of a general exception clause varies from one BIT to another. Increasingly, Contracting Parties include very robust general exception clauses in their IIAs.[373] The Article 18 of the EAC Model Investment Treaty provides for general exceptions in broad terms. Article 18 provides:

ARTICLE: 18 Exceptions

18.1 Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination pursuant to Articles on National Treatment and Most Favoured Nation, nothing in this Treaty shall be construed to oblige a State Party to pay compensation for adopting or enforcing measures taken in good faith and designed and applied to:

a. Protect public morals and safety;
b. Protect human, animal or plant life or health;
c. Conserve of living or non-living exhaustible natural resources; and
d. Protect the environment.

18.2 For greater certainty, nothing in this Treaty shall be construed to oblige a State Party to pay compensation if it adopts or maintains reasonable measures for prudential reasons, such as:

a) the protection of investors, depositors, financial market participants, policyholders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;
b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and
c) ensuring the integrity and stability of a State Party's financial system.

18.3 Nothing in this Treaty shall apply to taxation measures, subject to the continued application of Article 7 on Expropriation.

18.4 The necessity or appropriateness of the measure will be judged by the State invoking the measure.

---

370 Canada's Model BIT, 'Foreign Investment Promotion Agreement,' was released in 2003, contains general exceptions. See AGREEMENT BETWEEN CANADA AND -------------------------- FOR THE PROMOTION AND PROTECTION OF INVESTMENTS, Article 10, available at < https://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf >. A majority of Canada's BITs contain general exception clauses.

371 India-Belarus BIT.

372 Argentina-Japan BIT, Article 15 ("General Exception"); Singapore-Kazakhstan BIT, Article 19; Australia-Uruguay BIT, Article 15(1); Australia-Hong Kong, Article 18.

373 See e.g. India-Belarus BIT, Article 32.

18.5 The exceptional measures must be applied in a non-arbitrary manner and not be disguised as investment protectionism.
18.6 Nothing in this Treaty shall apply to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a State Party's obligations under Article 9 Transfers.
18.7 Nothing in this Treaty shall apply to a State Party's measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its national security interests.
18.8 Nothing in this Treaty requires a State Party to furnish or allow access to any information, the disclosure of which it determines to be contrary to its national security interests.
18.9 In the event of force Majeure, each party will be excused from liability if some unforeseen event beyond the control of that party prevents it from performing its obligations under the Treaty. The affected party may request for re-negotiation of the Treaty if the continued performance of one party's **contractual duties has become excessively onerous due to an unforeseen event beyond the control of that party.**

A general exceptions provision does not give carte blanch to a government to introduce every possible measure imaginable. The precise phrasing of a general exceptions' clause will determine its scope and how it will be interpreted by an arbitral panel. As much as possible, it is important that contracting parties provide guidance on how the clause should be interpreted in the event of an investor-State arbitration.[374] In some IIAs, contracting parties clarify that the necessity or appropriateness of a measure will be determined solely by the State invoking the measure. BITs involving EAC states are inconsistent when it comes to use of general exceptions clauses. Recent BITs such as the Turkey-Kenya BIT (2014), Rwanda-Turkey BIT (2016) and Burundi (Turkey BIT (2016) contain general exception clauses. However, most old-generation BITs involving EAC countries do not contain general exception clauses.

Security Exceptions[375] - An increasing number of IIAs provide policy space to enable host States to protect their essential security interests. Sometimes security exceptions exist as standalone provisions and sometimes they are combined with the general exception clause.[376] Article XI of the Argentina-US BIT (1991) provides, "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential

[374] India-Belarus BIT, Article 32.1 ("In considering whether a measure is necessary, the Tribunal shall take into account whether there was no less restrictive alternative measure reasonably available to a Party.").
[375] Argentina-Japan BIT, Article 16 (Security Measures); Singapore-Kazakhstan BIT, Article 20.
[376] See e.g. Canada-Guinea BIT, article 18(4) and Canada-Cameroon BIT (Article 17(4).

security interests." The security exception in the India-Belarus BIT (2018) is quite extensive; Article 33 provides:

> ARTICLE 33
> Security Exceptions
>
> 33.1 Nothing in this Treaty shall be construed:
> (i) to require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
> (ii) to prevent a Party from taking any action which it considers necessary for the protection of its essential security interests including but not limited to:
> a) action relating to fissionable and fusionable materials or the materials from which they are derived;
> b) action taken in time of war or other emergency in domestic or international relations;
> c) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
> d) action taken so as to protect critical public infrastructure including communication, power and water infrastructures from deliberate attempts intended to disable or degrade such infrastructure;
> e) any policy, requirement or measure including, without limitation, a requirement obtaining (or denying) any security clearance to any company, personnel or equipment; or
> (iii) to prevent a Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Some BITs involving EAC members contain a security exception clause and many do not. Whether a BIT involving an EAC states has a security exception clause is not determined by the negotiation posture of EAC countries but on the model BITs of the countries they are negotiating with. For example, a security exception is found on most recent BITs involving Turkey and thus can be found in Rwanda-Turkey BIT (2016),

Taxation Measures - Taxation has far-reaching implications for foreign investors, host States, and host communities. It is necessary that countries pay careful attention to taxation issues in their IIAs and in other bilateral and multilateral arrangements. Although tax provisions "do not typically form a principal part of IIAs,"[377] more and more IIAs now include a separate provision on taxation measures.[378] It is increasingly common to exclude taxation matters from the scope of IIAs. [379] The CCIA Agreement does not apply to taxation matters except as it has been explicitly provided for in the treaty.[380]

---

[377] UNCTAD, INTERNATIONAL INVESTMENT AGREEMENTS: KEY ISSUES (VOLUME II) p. 203.
[378] Argentina-Japan BIT, Article 19; Japan-UAE BIT, Article 22; Singapore-Kazakhstan BIT, Article 21.
[379] CCIA Agreement, Article 23.
[380] CCIA Agreement, Art. 23.

Article 18.3 of the EAC Model Investment Treaty stipulates, "Nothing in this Treaty shall apply to taxation measures, subject to the continued application of Article 7 on Expropriation. Article 21 of the Rwanda-US BIT addresses taxation. For the most part, the Rwanda-US BIT does not impose obligations on Contracting Parties with respect to taxation measures. Article 21(1) provides that "Except as provided in this Article, nothing in Section A shall impose obligations with respect to taxation measures." Subject to some detailed exceptions, Articles 3 (National Treatment), Article 4 (MFN), Article 6 (Expropriation and Compensation) and Article 8 (Performance Requirements) apply to taxation measures.

Reference to Health, Environment, Sustainable Development - In the past, references to health, environment, or sustainable development in IIAs were rare. Today, reference to health, safety, and environmental measures are found in a growing number of investment agreements but the approach of States varies widely.

Options include: (i) a general, hortatory provision in the preamble; (ii) a 'No Lowering of Standards' clause in the Treaty text;[381] (iii) a specific carve-out in the treaty for environmental measures and for multilateral environmental agreements that a Contracting State has ratified; (iv) a side-agreement on environment/labour/sustainable development;[382] and (v) a specific environmental exception to the MFN and/or NT treatment. Article 3(4) of the EAC Model Investment Treaty provides that "Each Party shall admit the entry of investment made by Investors of the other Party **pursuant to its applicable laws and regulations** and **in line with their national development and social goals.**"[383] Common in a growing number of recent BITs, including BITs involving EAC members is a general, hortatory statement in the preamble that addresses health, labour, environmental and or sustainable development. For example:

Table 46: Treaty Provisions Referring to Health, Environment, and Sustainable Development

TREATY	PROVISIONS
Kenya-Korea BIT (Preamble).	Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment and the promotion of consumer protection and internationally recognized labour rights
Argentina-Japan BIT (Preamble)	Recognising that these objectives can be achieved without relaxing health, safety and environmental measures of general application.
Israel-Japan BIT (Preamble).	Recognizing that these objectives can be achieved without relaxing health, safety and environmental measures of general application.

[381] Argentina-Japan BIT, Article 22 (Health, Safety and Environmental Measures and Labour Standards); Japan-UAE BIT, Article 26.
[382] The United States–Mexico–Canada Agreement (USMCA), which replaces the former NAFTA, contains a chapter on the environment (Chapter 24).
[383] EAC Model BIT, Article 3(4).

In some IIAs, environmental and labour provisions appear in the text of the treaty. Article 15 of the Canada-Benin BIT is titled 'Health, Safety and Environmental Measures' and provides:

> ARTICLE 15
>
> Health, Safety and Environmental Measures
>
> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Contracting Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, those measures to encourage the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Contracting Party considers that the other Contracting Party has offered such an encouragement, it may request consultations with the other Contracting Party and the two Contracting Parties shall consult with a view to avoiding the encouragement.

In the Japan-UAE BIT, Contracting Parties excluded from the MFN treatment "any preferential treatment resulting from the memberships to any bilateral or multilateral international agreements involving protection of new varieties of plants, aviation, fishery or maritime matters."[384]

Corporate Social Responsibility/ Investor Obligation - Most IIAs today are asymmetrical in that they set out obligations only for States and not for investors. Indeed, the universe of international investment law and human rights are almost completely disconnected. Some would argue that there is a fundamental tension between the notion of CSR and the international investment law.[385] In a growing number of recent IIAs, particularly agreement concluded since 2010, contracting parties impose obligations on investors. A majority of CSR standard found in IIAs are directed at Contracting States and not at investors. Examples can be found in Canada-Benin BIT (Article 16) and Canada-Cameroon BIT (Article 15). Article 16 of the Canada-Benin BIT provides:

> ARTICLE 16
>
> Corporate Social Responsibility
>
> Each Contracting Party **should encourage enterprises** operating within its territory or subject to its jurisdiction **to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies**, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.

[384] Article 4(3)(c) and (d).

[385] Ying Zhu, Corporate Social Responsibility and International Investment Law: Tension and Reconciliation (2014).

In a growing number of recent BITs, Contracting Parties are imposing CSR obligations directly on investors. In the Morocco-Nigeria BIT, several articles impose CSR obligations directly on investors including, Article 14 (Impact Assessment), Article 17 (Anti-corruption), Article 18 (Post-Establishment Obligations), Article 19 (Corporate Governance and Practices), Article 10 (Investor Liability) and Article 24 (Corporate Social Responsibility).

Morocco-Nigeria BIT
ARTICLE 24
CORPORATE SOCIAL RESPONSIBIUTY

1) In addition to the obligation to comply with all applicable laws and regulations of the Host State and the obligations in this Agreement, and in accordance with the size, capacities and nature of an investments, and taking into account the development plans and priorities of the Host State and the Sustainable Development Goals of the United Nations, investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices.
2) Investors should apply the LO Tripartite Declaration on Multinational Investments and Social Policy as well as specific or sectorial standards of responsible practice where these exist. 3) Where standards of corporate social responsibility increase, investors should strive to apply and achieve the higher level standards.

Article 17(4) of the Morocco-Nigeria BIT provides that "a breach by an investor or an investment is deemed to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment." Article 17(5) provides that Contracting Parties can, consistent with their applicable law, prosecute and where convicted penalize persons that have breached the applicable law implementing the obligations relating to corporate responsibility.[386]

Nigeria-Morrocco BIT
ARTICLE 14
Impact Assessment

1) Investors or the investment shall comply with environmental assessment screening and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host state for such an investment or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question.
2) Investors or the investment shall conduct a social impact assessment of the potential investment. The Parties shall adopt standards for this purpose at the meeting of the Joint Committee.

[386] Morocco-Nigeria BIT, Article 17(5).

Treaty Interpretation - To influence how treaty terms are understood and interpreted, States deploy a variety of means. As part of the effort to recalibrate their IIAs, more and more States are attempting to influence present and future interpretation of treaty terms.[387] Increasingly, the goal of States is to be proactive about providing appropriate guidance for the use and interpretation of investment treaties by all treaty users, and especially by prospective arbitrators.[388]

First, States are providing clearer definition of treaty terms and are defining more terms. Second, in a growing number of IIAs, treaty obligations are clarified, and their scope carefully defined. Third, States are choosing to have a greater say in how treaty terms are defined in the event of a dispute and are according greater role to themselves in the treaty interpretation process. Article 24 of the India-Belarus BIT (Joint Interpretations), stipulates that "Interpretations of specific provisions and decisions on application of this Treaty issued subsequently by the Parties in accordance with this Treaty shall be binding on tribunals established under this Treaty upon issuance of such interpretations or decisions."

The Development Dimension - In the past, IIAs focused almost exclusively on investment protection and addressed only a limited number of issues. Today, the agenda of IIAs is expanding and is evolving. Increasingly IIAs address a host of issues not traditionally found in investment agreements such as prudential measures,[389] balance of payments,[390] denial of benefits,[391] temporary safeguards,[392] intellectual property rights (IPRs),[393] rule of law, consumer protection, and corruption.

Addressed in the Pan-African Investment Code but not in most of the BITs involving EAC states are issues such as: Competition Law and Policy (Article 28); Transfer of Technology (Article 29); Environment and Technologies (Article 30); Human Resource Development (Article 36); Taxation (Article 39); and Consumer Protection (Article 40). According to Article 29(1) of the Pan-African Investment Code, "Member States shall put in place policies for the purpose of promoting and encouraging the transfer and acquisition of appropriate technology."

The draft EAC Model Investment Treaty addresses 'Right to Pursue Development Goals' (Article 16). The Netherlands Model Investment Agreement addresses a host of issues not traditionally found in BITs including, Rule of Law (Article 5) and Sustainable Development (Article 6).[394] The EAC Model Investment Treaty also addresses the development dimension extensively. Article 16 is titled 'Right to Pursue Development Goals' and empowers a host State to support the development of local entrepreneurs,

---

[387] Gordon, K. and J. Pohl (2015), "Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World", OECD Working Papers on International Investment, 2015/02, OECD Publishing.

[388] Id.

[389] Argentina-Japan BIT, Article 20 (Prudential Measures); Japan-UAE BIT, Article 20; Australia-Hong Kong, Article 21.

[390] CCIA Agreement, Article 25.

[391] Argentina-Japan BIT, Article 23; Singapore-Kazakhstan BIT, Article 18.

[392] Japan-UAE BIT, Article 19; CCIA Agreement, Article 24.

[393] Japan-UAE BIT, Article 21.

[394] Argentina-Japan BIT, Article 9 (Measures against Corruption).

enhance local productive capacity and address historically-based economic disparities suffered by identifiable ethnic or cultural groups.

> EAC Model Investment Treaty
>
> ARTICLE 16: Right to Pursue Development Goals
>
> 16.1 Notwithstanding any other provision of this Treaty, a State Party may grant preferential treatment in accordance with their domestic legislation to any enterprise so qualifying under the domestic law in order to achieve national or sub-national regional development goals.
>
> 16.2 Notwithstanding any other provision of this Treaty, a State Party may
>
> (a) support the development of local entrepreneurs, and
>
> ....
>
> 16.3 Notwithstanding any other provision of this Treaty, a State Party may take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Treaty.
>
> 16.4 With regard to environment, state parties shall not encourage investment by relaxing or waiving from domestic environmental legislation, and shall ensure that its laws and regulations provide for environmental protection and are implemented through domestic adequate laws and regulations. Likewise, investors shall, in performing their activities, protect the environment and where the activity causes damages to the environment, they shall restore it to the extent appropriate and feasible. Investors are encouraged to develop and apply adequate new green technologies for this purpose.
>
> 16.5 Host states may develop national policies to guide investors in developing human capacity of the labour force. Such policy may include incentives to encourage employers to invest in training, capacity building and knowledge transfer, paying particular attention to the special needs for youth, women and other vulnerable groups.
>
> ....

Found in Turkey-Kenya BIT (2014) but not in Burundi-Turkey BIT (2017) and Rwanda-Turkey BIT (2016) is a provision that allows a host state to provide incentive to infant industries. Article 3(c) of the Turkey-Rwanda BIT provides:

> Each Contracting Party may, in accordance with its laws and regulations, grant incentives, treatment, preferences or privileges through special policies or measures to its own investors only for the purpose of promoting small and medium sized enterprises and infant industries in its territory, subject to the condition that these shall not significantly affect the investments and activities of the investors of the other Contracting Party.

The evolution in the agenda of IIAs is not without controversy. Consequently, what to include in a given treaty requires careful consideration and will likely be a matter of intense negotiation between contracting parties. It is possible that in order to accept more progressive topics in an IIA, a treaty partner may insist on broader protection for investors and on more liberalization features in an IIA.

Review, Monitoring and Implementation Mechanisms - States are beginning to take treaty monitoring and treaty implementation very seriously. In a growing number of IIAs, contracting parties provide for periodic reviews and establish joint committees tasked with a variety of functions relating to treaty implementation.[395] For example, the EAC Model Investment Agreement provides for periodic review. Article 20.1 stipulates that "The State Parties shall meet every five years after the entry into force of this Treaty to review its operation and effectiveness, including the levels of investment between the Parties." Article 20.2. goes on to state that "[t]he State Parties may adopt joint measures including regular consultations in order to improve the effectiveness of this Treaty."

As previously noted, joint committees are appearing in a growing number of IIAs.[396] A joint committee can be tasked with a variety of functions pertaining to treaty implementation and can be empowered to make recommendations to contracting parties.[397] Tasks that contracting parties may wish to assign to a joint committee include:

- Engaging in investment promotion activities,
- Ensuring that the agreement operates smoothly,
- Monitoring and reviewing the implementation and application of the treaty,
- Considering and recommending possible amendments to the treaty,
- Reviewing the general functioning of the dispute settlement section,
- Seeking to resolve problems which may arise in areas covered by the agreement, and
- Exchanging information on investment-related matters.[398]

Pursuant to article 3 of the Brazil-Malawi BIT (2015), Contracting Parties established a Joint Committee, composed of government representatives of both parties, for the administration of the agreement. In Article 3(5), the Contracting Parties also reserved the right to establish ad hoc working groups which shall meet jointly or separately from the Joint Committee.

> Morocco-Nigeria BIT (2016)
> ARTICLE 4
> INSTITUTIONAL GOVERNANCE
>
> 1) For the purpose of this agreement, the Parties hereby establish a Joint Committee for the administration of this Agreement (hereinafter referred to as "Joint Committee").
> 2) The Joint Committee shall be composed of representatives as designated by both Parties.
> ....
> 4) The joint Committee shall have the following responsibilities:
> a) Monitor the implementation and execution of this Agreement;
> b) Debate and share opportunities for the expansion of mutual Investment;

[395] Argentina-Japan BIT, Article 30; EU-Singapore IPA, Article 4.1; Australia-Indonesia, Article 18.8.
[396] Brazil-UAE BIT, Article 18 (Joint Committee for the Administration of the Agreement).
[397] Argentina-Japan BIT, Article 30(2).
[398] See Nigeria-Morocco BIT, Article 4.

c) Request and welcome the participation of the private sector and civil society, when applicable, on specific issues related to the work of the Joint Committee; and

d) Seek to resolve any issues or disputes concerning Parties' investment in an amicable manner.

....

Brazil-Malawi BIT

ARTICLE 3

Joint Committee for the Administration of the Agreement

1. For the purpose of this Agreement, the Parties hereby establish a Joint Committee for the administration of this Agreement (hereinafter referred as "Joint Committee").

....

4. The Joint Committee shall have the following functions and responsibilities:

a) Monitor the implementation and execution of this Agreement;

b) Discuss and share opportunities for the expansion of mutual investment;

c) Coordinate the implementation of the mutually agreed cooperation and facilitation agendas;

d) Consult the private sector and civil society, when applicable, on their views on specific issues related to the work of the Joint Committee; and

e) Resolve any issues or disputes concerning Parties' investment in an amicable manner.

.....

Exit Strategies and Options - Issues relating to how long a treaty lasts, how and when a country can exit a treaty, and how long a treaty remains in effect after termination can constrain regulatory space if they are not handled with care. Increasingly, states are willing to deviate from standard IIA practice and are introducing new and innovative features into the exit clauses of their IIAs.

First, in some recent IIAs, states are opting to shorter initial terms. The draft EAC Model Investment Treaty opts for a 10-year initial duration (Article 28.1.).[399] The Australia-Uruguay BIT (2018) stipulates a 15-year initial duration and a 15-year survival period.[400] *Second*, some countries are moving away from IIAs that renew automatically to the ones that terminate but contracting parties retain the right to renew. For example, Article 27(2) of Brazil-Ethiopia BIT states, that "[t]his Agreement shall remain in force for a period of ten (10) years and shall lapse thereafter unless the Contracting Parties expressly agree in writing that it shall be renewed for additional ten (10)-year period."

Third, shorter survival clauses are beginning to appear in more and more IIAs.[401] A five-year survival clause is the norm in most recent BITs involving Brazil and is also found in

[399] EAC Model Investment Treaty, Article 28.1 (opting for a 10-year initial duration).

[400] Australia-Uruguay BIT, Article 17(1) and (3).

[401] EAC Model Investment Treaty, Article 28.4 (opting for a 10-year survival clause).

the Rwanda-Morocco BIT (2016).[402] For example, Article 27(4) of Brazil-Ethiopia BIT stipulates that, "[i]n respect of investments made prior to the termination of this Agreement, the provisions of this Agreement shall continue in effect for a period of five (5) years from the date of termination." The India-Belarus BIT (2018) also provides for a five-year survival period.[403] Fourth, in some agreements, contracting states have the right to terminate at any time and not just at the end of the initial duration. 'Any time termination' clause can be found in Brazil-UAE BIT, Brazil-Ethiopia BIT, the Brazil-Malawi BIT, and other recent IIAs involving Brazil.[404]

Fifth, some countries are dispensing with the idea of an initial fixed duration. In effect, the IIA is valid indefinitely but can be terminated at any time; the EU-Singapore IPA is an example.[405] Article 4.16 (1) of the EU-Singapore IPA states that "This Agreement shall be valid indefinitely." However, Article 4.16 (2) goes on to provide that "[e]ither the EU Party or Singapore may notify in writing the other Party of its intention to terminate this Agreement. The EU-Singapore IPA provides for a twenty-year survival period. Finally, although rare, some BITs do not provide for a survival period. The Morocco-Nigeria BIT does not appear to provide for a survival period. Article 32 of the Morocco-Nigeria BIT provides that "[t]his Agreement shall remain in force for a period of ten (10) years and may be renewed for a further period as may be agreed by the parties." Article 34 goes on to provide as follows:

ARTICLE 34

TERMINATION

At any time, either of the parties' may terminate this Agreement by providing written notice of termination to the other party. The termination shall take effect on a date the parties agree on, or, if the parries are unable to reach an agreement, 6 months after the date on which the termination notice is delivered.

Table 47: Treaty Provisions with Exist Clauses

TREATY	PROVISIONS
Kenya-Finland BIT (2008)	ARTICLE 17 Entry into force, duration and termination 1. The Contracting Parties shall notify each other when their constitutional requirements for the entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the thirtieth day following the date of receipt of the last notification. 2. This Agreement **shall remain in force for a period of twenty (20) years and shall thereafter remain in force on the same terms until** either Contracting

[402] Rwanda-Morocco BIT (2016), Article 11 (4).
[403] India-Belarus BIT, Article 38.3. (opting for a 5-year survival clause).
[404] Brazil-UAE BIT, Article 18.5 ("This Agreement may be terminated any time after its entry into force if either Party gives to the other Party a prior notice in writing twelve (12) months in advance stating its intention to terminate the Agreement). Emphasis added.
[405] EU-Singapore IPA, Article 4.16 (stating that the agreement "shall be valid indefinitely", but either party may notify the other in writing of the intention to terminate. Also, the agreement has a (20) twenty-year survival clause).

	Party notifies the other in writing of its intention to terminate the Agreement in twelve (12) months.[406] ...
Brazil-Ethiopia BIT (2018)	Entry into force, duration and termination 1... 2. This Agreement **shall remain in force for a period of ten (10) years and shall lapse thereafter** unless the Contracting Parties expressly agree in writing that it shall be renewed for additional ten (10)-year períod. 3... 4.Any Contracting Party **may terminate this Agreement, at <u>any time</u>**, by giving at least twelve (12) months prior written notice to the other Contracting Party.[407]

Findings and Recommendations

- International investment rulemaking is experiencing a level of dynamism that has not been seen in a long time. A study of evolving IIA practice of states suggests that a growing number of States are daring to deviate from standard practice and are crafting IIAs that they believe best advances their development goals and objectives. What is evident is that:
  - More and more countries are reviewing and reforming their IIAs and are not afraid to adopt and adapt available policy options.
  - Countries are also getting bolder in the IIA design and are willing to depart from established models.
  - More and more countries are taking IIA negotiation very seriously and are investing resources towards strengthening their knowledge of IIAs and their capacity to negotiate IIAs that are advance their own interests.
  - There are now many options available for countries interested in reforming their IIAS.
- In the final analysis, for many countries the question is not whether reform is necessary but what level of reform is needed and whether there is enough political will to engage in meaningful reform. Increasingly, countries are introducing innovative elements in their IIAs. While most of the innovative features are necessary, some may not be necessary and may already be addressed under customary international law

[406] Emphasis added.
[407] Emphasis added.

SECTION THREE: THE DISPUTE SETTLEMENT REGIME

CHAPTER 5: EAC MEMBERS AND THE INVESTOR STATE DISPRUTE SETTLEMENT SYSTEM

Investor-State dispute settlement (ISDS) is at the very core of the international investment law regime. Found in most BITs and IIAs, the ISDS allows investors to bypass domestic dispute resolution processes and to bring claims directly against states before an international tribunal. Under international law, dispute settlement is a state-to-state process. By allowing non-state entities to trigger the extra mechanism in IIAs and bring claims directly against states, the ISDS essentially elevates private entities to the status of subjects of international law. The rationale for the ISDS was this:

> By creating a system for the settlement of disputes between investors and host governments, countries had sought to create a neutral forum that offers the possibility of a fair hearing before a tribunal unencumbered by domestic political considerations. In addition to serving as a de-politicized forum for resolving disputes, international arbitration was expected to offer other advantages such as potentially swifter, cheaper, and more flexible than other dispute settlement mechanisms. In addition, arbitral awards are readily enforceable in most jurisdictions under international treaties.[408]

EAC countries concluded their first BITs in the late 1960s and 1970s, and in the early days did not experience ISDS claims. Well into the 1980s, the ISDS mechanism in the BITs involving EAC states lay dormant and were rarely used. The 1990s brought changes in terms of the willingness of investors to initiate investment arbitration claims against EAC countries. Today, EAC countries are not new to the ISDS system. All EAC members have been involved in at least one known investor-state arbitration case. The most recent investment arbitration case against an EAC country was registered on 31 May 2019 and involves Tanzania.[409]

With the growing number of ISDS claims against EAC states, the time is ripe for countries in the region to thoroughly review their involvement in ISDS. EAC members must assess the costs and benefits of involvement in the global system of international arbitration and evaluate their participation in such a regime. In the last decade, the actual functioning of ISDS has come under intense scrutiny and has led to growing calls for systemic reform. For countries like South Africa,[410] India,[411] and Australia,[412] ISDS claims

---

[408] UNCTAD, Investor-state dispute settlement: A sequel - UNCTAD Series on Issues in International Investment Agreements II (UNCTAD/DIAE/IA/2013/2), p. 13.

[409] *Richard N. Westbury, Paul D. Hinks and Symbion Power Tanzania Limited v. United Republic of Tanzania* (ICSID Case No. ARB/19/17).

[410] *Piero Foresti, Laura de Carli and others v Republic of South Africa* (ICSID Case No ARB(AF)/07/1) Award, 3 August 2010.

[411] *White Industries Australia Limited v. The Republic of India*, Final Award, November 30, 2011; Vodafone v. India, United Nations Commission on International Trade Law (UNCTITRAL, Notice of Arbitration (not public), 17 April 2014 <http://italaw.com/ cases/2544> accessed on 7 March 2015. ;

and experience with investment arbitration have provided the impetus for policy makers in those countries to review continued participation in the system and therefore explore reform options. Consequently, EAC countries can draw useful lessons from the experience of these countries that have reviewed their involvement in ISDS and taken steps to address perceived concerns about the system.

Exposure to ISDS system cannot be treated as strictly a BIT issue and must be addressed in a holistic and comprehensive manner. BITs are not the only source of consent to arbitration in cases involving EAC states. In general, domestic legislation and investment contracts collectively account for a good size of ISDS claims initiated against African contries. According to a 2016 report by the International Center for the Settlement of Investment Disputes (ICSID), of the 131 ICSID cases involving African state parties as of 2016, about 40% were based on investment contracts between host states and investors, and another 16% were based on consent in the domestic law of host states.[413] Overall, compared to most other regions of the world, contact-based cases appear to account for a much larger share of cases involving African States than BITs.[414]

A Review of ICSID Cases Involving EAC States

Judging by the growing number of ISDS cases involving EAC countries and the types of issues implicated in these cases, EAC members have reason to pay serious attention to on-going debates about ISDS reform in order to consider reforming relevant portions of their IIAs. A survey of ISDS cases involving EAC states reveals that:

- In total, EAC countries have been involved in at least twenty (20) known ISDS cases.
- Since 1995 when the first known ISDS case was initiated against an EAC member, the number of ISDS cases involving EAC economies has grown steadily.
- Of the 20 known cases involving EAC states, most were based on the ISDS provision in a BIT and only a handful were based on investment contracts[415] and on the domestic law of host states.[416]

See Prabhash Ranjan, (2012), "The White Industries Arbitration: Implications for India's Investment Treaty Programme" (2012) 2 (3) Investment Treaty News, 13; Manu Sanan, (2012), "The White Industries Award: Shades of Grey" (2012) 13(4) Journal of World Investment and Trade, p. 661.

[412] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12

[413] International Center for the Settlement of Investment Dispute, 'The ICSID Caseload –Statistics: Special Focus–Africa (April 2016)', p. 11.

[414] Paul-Jean Le Cannu, 'Foundation and Innovation: The Participation of African States in the ICSID Dispute Resolution System' (2018) Vol 33, No 2, ICSID Rev., p. 456–500

[415] For ISDS cases that were based on investment contracts, see e.g.: *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8; *World Duty Free* Company *v* Republic of *Kenya*, ICSID Case No. Arb/00/7; and *Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited v. Republic of Uganda* (ICSID Case No. ARB/13/25).

[416] See. e. g. *Sudapet Company Limited v. Republic of South Sudan* (ICSID Case No. ARB/12/26)

Table 48: Known ISDS (ICSID) Cases Agaisnt EAC Countries from 2015 -2019

1995

- *Antoine Goetz and others v. Republic of Burundi (ICSID Case No. ARB/95/3)*

1998

- *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited, ICSID Case No. ARB/98/8*

2000

- *World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7*

2001

- *Antoine Goetz and others v. Republic of Burundi (II) (ICSID Case No. ARB/01/2)*

2005

- *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22*

2010

- *Olyana Holdings LLC. v. Republic of Rwanda, ICSID Case No. ARB/10/10*
- *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited, ICSID Case No. ARB/10/20*

2012

- *Sudapet Company Limited v. Republic of South Sudan (ICSID Case No. ARB/12/26)*

2013

- *Joseph Houben v. Republic of Burundi (ICSID Case No. ARB/13/7)*

2014

- *Tariq Bashir and SA Interpétrol Burundi v. Republic of Burundi (ICSID Case No. ARB/14/31)*

2015

- *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya (ICSID Case No. ARB/15/29)*
- *Total E&P Uganda BV v. Republic of Uganda (ICSID Case No. ARB/15/11)*
- *WalAm Energy Inc. v. Republic of Kenya (ICSID Case No. ARB/15/7)*

2017

- *EcoDevelopment in Europe AB, EcoEnergy Africa AB v. United Republic of Tanzania (ICSID Case No. ARB/17/33).*
- 2018
- Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda (ICSID Case No. ARB/18/21)
- Sunlodges Ltd (BVI) and Sunlodges (T) Limited v. The United Republic of Tanzania (PCA Case No. 2018-09)
- 2019
- Ayoub-Farid Michel Saab v. United Republic of Tanzania (ICSID Case No. ARB/19/8)
- Richard N. Westbury, Paul D. Hinks and Symbion Power Tanzania Limited v. United Republic of Tanzania (ICSID Case No. ARB/19/17)

Source: Author Compilation.[417]

[417] Information available on the ICSID Database, Advanced Search, available at, https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx

- Among EAC countries, Tanzania is the respondent with the largest number of cases followed by Burundi, Uganda, Kenya, Rwanda, and South Sudan.
- In 2019 alone, two cases were initiated again an EAC member – Tanzania. *Ayoub-Farid Michel Saab v. United Republic of Tanzania* was registered on 16 April 2019, and *Richard N. Westbury, Paul D. Hinks and Symbion Power Tanzania Limited v. United Republic of Tanzania* was initiated on 31 May 2019.
- ICSID cases involving EAC states implicate different sectors and industries including, water supply, sewerage, waste management and remediation activities;[418] electric power;[419] mining and quarrying;[420] agriculture, forestry and fishing;[421] service and trade;[422] oil and gas.[423]
- In a case involving Tanzania, an ICSID tribunal became the first ever to rule that it can exercise the power, pursuant to Article 51 of the ICSID Convention, to reconsider its earlier decision on jurisdiction and liability.[424]
- In a case involving Burundi, an ICSID tribunal became the first on treaty based ISDS proceedings to consider and affirm jurisdiction over a counterclaim lodged by a respondent state against the investor.[425]

Crisis in the ISDS System

Investor-State dispute settlement is at the very heart of the international investment law regime and is also at the center of the present crisis in international investment law. In an IIA, an ISDS provision allows foreign investors to bypass the limitations of customary international law and to bring claims directly against a host state before an international tribunal. Increasingly, investors are triggering ISDS provisions in BITs and are bringing claims against host States. In the last two decades the number of treaty based ISDS claims has grown significantly. According to UNCTAD, "[b]y the end of 2018, about 600 ISDS cases had been concluded."[426] In 2018 alone, arbitral tribunals delivered 50 substantive decisions in ISDS cases, according to UNCTAD.[427] African States are not immune to investment arbitration claims by foreign investors and more and more African States are becoming respondents in ISDS cases, some for the first time.

To proponents, the case for ISDS is particularly strong. ISDS provides an additional avenue of legal redress to foreign investors and makes it possible for covered investors to enforce the substantive IIA obligations.[428] In view of the fact that some countries have weak legal systems and an inefficient and corrupt judiciary, ISDS allows foreign investors

---

[418] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22).
[419] *WalAm Energy Inc. v. Republic of Kenya* (ICSID Case No. ARB/15/7).
[420] *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda* (ICSID Case No. ARB/18/21).
[421] *EcoDevelopment in Europe AB and EcoEnergy Africa AB v. United Republic of Tanzania* (ICSID Case No. ARB/17/33).
[422] *World Duty Free Company v Republic of Kenya* (ICSID Case No. Arb/00/7).
[423] *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29).
[424] *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited* (TANESCO) (ARB/10/20, Award, 12 September 2016).
[425] *Antoine Goetz and others v. Republic of Burundi* (ICSID Case No. ARB/95/3).
[426] UNCTAD, "Review of ISDS Decisions in 2018: Selected IIA Reform Issues," IIA Issues Note, No. 4, July 2019.
[427] Id.
[428] UNCTAD' Reform Package, supra note 206, p. 48.

to avoid the domestic courts of host states. ISDS ensures that investment treaty claims are adjudicated by qualified and neutral tribunals.[429] Despite its potential benefit to host States, the system of ISDS has come under intense scrutiny.[430] Many governments, including those in Africa, are now reassessing their continued participation in the system.[431] [432] Criticisms of the ISDS system are many and include:

- Concern that ISDS by giving exclusive rights to foreign investors essentially discriminates against domestic investors and communities;
- Perceived lack of transparency and accountability in the ISDS system;
- Perceived pro-investment bias of investment arbitral tribunals;
- The absence of an appeal mechanism;[433]
- Concerns that the ISDS "threatens domestic sovereignty and weakens the rule of law by giving corporations special legal rights, allowing them to ignore domestic courts";[434]
- General concern that ISDS cases threaten democracy because they subject countries to extrajudicial private arbitration by anonymous arbitrators;
- Concerns that arbitral tribunals can impinge on the powers and jurisdiction of domestic courts;[435]
- Concern that while investors can bring claims against states, states generally do not have corresponding right to bring claims against investors or to file counterclaims;[436]
- The heavy cost of investment arbitration on poor countries.[437] According to UNCTAD, on average successful claimants were awarded about $522 million, corresponding to about 40 per cent of the amount claimed.[438]
- Concern that ISDS allows investors to challenge a broad range of governmental measures including those related to alleged breaches of investment contracts, direct and indirect expropriation, revocation of licenses and even changes to domestic regulatory frameworks.

---

[429] Id.

[430] Stephan W. Schill, Reforming Investor-State Dispute Settlement (ISDS) Conceptual Framework and Options for the Way Forward (2015); Gus Van Harten, Investment Treaty Arbitration and Public Law (2007).

[431] See Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?,* 9 CHI J. INT'L L 471, 476–78 (2009).

[432] Reform of Investor-State Dispute Settlement: In Search of a Roadmap Special issue for the Multilateral Dialogue on Investment [IIA Issues Note, No. 2, 2013] (UNCTAD/WEB/DIAE/PCB/2013/4), 24 May 2013.

[433] Eun Young Park, Appellate Review in Investor State Arbitration in Reshaping the Investor-State Dispute Settlement 443-454 (Jean E Kalicki et al. eds., 2015).

[434] < https://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf>; *Antoine Goetz and others v. Republic of Burundi* (ICSID Case No. ARB/95/3); Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26.

[435] *Puma Energy Holdings (Luxembourg) SARL v the Republic of Benin*, SCC Case No. SCC EA 2017/092.

[436] See generally Ana Vohryzek-Griest, State Counterclaims in Investor–State Disputes: A History of 30 Years of Failure, 15 Int'l Law: Revista Colombiana de Derecho Internacional 83 (2009).

[437] See *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt,* ICSID Case No ARB/14/4 [*Unión Fenosa Gas v. Egypt*] (US $2,013,071,000 awarded in damages. This amount does not include interest or legal costs); See Wena Hotels Ltd. v Egypt (ICSID Case No. ARB/98/4) (interest of US$ 11,431,386 (A US$8,061,897 award plus interest of US$11,431,386 at the rate of 9%, compounded quarterly). See also, Bernadus Henricus Funnekotter and others v Republic of Zimbabwe (ICSID Case No. ARB/05/6 (Approximately US12 million awarded plus interest awarded). *American Manufacturing and Trading v Zaire*, ICSID Case No ARB/93/1 (US$9 million awarded plus interest at 7.5% per annum in default of payment).

[438] UNCTAD, "Special Update on Investor-State Dispute Settlement: Facts and Figures," [IIA Issue Note, No. 3, 2017] (UNCTAD/DIAE/PCB/2017/7).

The interaction between IIAs and human rights is a growing concern for many. International human rights bodies have repeatedly expressed their concerns regarding the functioning of the ISDS system. For example, in a March 7, 2019, letter to the UNCITRAL Working Group III on Investor-State Dispute Settlement (ISDS), seven independent human rights experts appointed and mandated by the United Nations Human Rights Council, expressed their concerns that IIAs and their ISDS mechanism "have often proved to be incompatible with international human rights law and the rule of law" and called attention to the risk that IIAs and ISDS pose to the regulatory space required by States to comply with their international human rights obligations as well as to achieve the SDGs. According to the said letter:

> **The inherently asymmetric nature of the ISDS system, lack of investors' human rights obligations, exorbitant costs associated with the ISDS proceedings and extremely high amount of arbitral awards are some of the elements that lead to undue restrictions of States' fiscal space and undermine their ability to regulate economic activities and to realize economic, social, cultural and environmental rights. The ISDS system can also negatively impact affected communities' right to seek effective remedies against investors for project-related human rights abuses.** In a number of cases, the ISDS mechanism, or a mere threat of using the ISDS mechanism, has caused regulatory chill and discouraged States from undertaking measures aimed at protection and promotion of human rights.[439]

The interaction between IIAs and human rights is also addressed in the United Nations Guiding Principles on Business and Human Rights (UNGPs) which the Human Rights Council unanimously endorsed in June 2011.[440] Principle 9 of the UNGPs states that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts."

Trends in ISDS Reform

In their BIT provisions relating to ISDS, most EAC members adopted a minimalist approach in the sense that the provisions typically allow for a broad range of ISDS claims, contain few procedural specifications, and leave almost every aspect of the procedure to be determined by the selected rules of arbitration or by the arbitrators.[441] This minimalist approach is found even in some recent BITs involving EAC states. Although concluded in 2016, the Morocco-Rwanda BIT (2016) adopts a very minimalist approach to the ISDS provision. ISDS issues appear in one article of the agreement – Article 8. Article 8 (1) stipulates that "any dispute between one Contracting Party and an investor of the other Contracting Party concerning an alleged violation of one or more provisions of this Agreement in respect of an investment shall be settled, if possible,

---

[439] OL ARM 1/2019, 7 March 2019, available at < https://www.ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf > internal references omitted (hereinafter UN Human Rights Experts – Letter of March 7, 2019). Emphasis added.

[440] (A/HRC/RES/17/31).

[441] UNCTAD, Investor-state dispute settlement: A sequel - UNCTAD Series on Issues in International Investment Agreements II, p. 16.

amicably through consultations and negotiations between the parties to the dispute." Article 8(2) provides that if the dispute cannot be settled within six months from the date of settlement request, the dispute shall be submitted at the choice of the investor to domestic or international arbitration.

Article 8(3) requires that "neither of the Contracting Parties involved in a dispute may raise an objection at any step of the arbitration proceedings or enforcement of an arbitration sentence because of the investor, who is the opposing party in the dispute had received an indemnity covering wholly or partially of his losses under an insurance policy. Article 8(4) stipulates that "the Arbitral Tribunal shall decide on the basis of the national laws of the Contracting Party which is party to the dispute, in whose territory the investment is made including the rules of conflict of laws the provisions of this Agreement and the rules and the universally accepted principles of the international law." Lastly, article 5 provides that "arbitral decisions shall be final and binding on either party to the dispute" and that "Each Contracting Party commits to enforce these decisions in accordance with its national laws and regulations. Unlike many recent agreements, the Morocco-Rwanda BIT does not address most of the complex and thorny issues implicated in ISDS. Issues such as dispute prevention, conditions for submission of a claim to arbitration, applicable arbitral rules, selection of investment arbitrators, counter claims, conflict of interest of arbitrators, submissions by non-disputing third parties, transparency, and awards. Significantly, most of the issues not addressed in Morocco-Rwanda BIT (2016) are addressed in Rwanda-UAE BIT (2017).

In contrast to the minimalist approach, a growing number of countries are adopting a more detailed approach when drafting the ISDS provision and leave very little to the discretion of arbitrators. This new approach "features a more circumscribed scope for ISDS claims and more detailed procedural rules with a view to setting out clear conditions of investors' access to ISDS and in the interests of a more effective, predictable, legitimate and cost-effective process."[442] Furthermore, under this approach, "a number of new elements are addressed by the treaty itself, as opposed to being left to 'outside' arbitration rules or to interpretation by the arbitral tribunal."[443] EAC countries must consider ISDS-specific reform elements in addition to reform of substantive provisions. As part of broader IIA reform, States are introducing and implementing numerous reform elements. Indeed, "[n]early all IIAs concluded in 2018 contain at least one, and most contain several, mapped ISDS reform elements."[444] Overall, four broad options have emerged: (i) fix the existing ISDS mechanism; (ii) abolish the ISDS system and replace it with something else; (iii) add new elements to existing ISDS mechanisms; and (iv) resort to ISDS on a case-by-case basis.

Fix Existing ISDS Mechanism - With a view to crafting an ISDS regime tailored to their interests, many countries are pro-actively addressing perceived shortcomings in the ISDS

[442] Id., p. 16
[443] Id.
[444] UNCTAD, IIA Issues Note (Issue 1, 2019). https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d3_en.pdf

system by: (i) limiting investors' access to ISDS; (ii) using filters to channel sensitive cases; (iii) introducing local litigation requirements as a precondition for ISDS; and (iv) improving the arbitral process.[445]

- *Improving arbitral Process* - The goal of fixing the existing system is to preserve the basic structure and main features of ISDS while reforming the way arbitration proceedings are conducted. Regarding improving arbitral process, recent IIAs are increasingly addressing a host of issues including:
    - Conditions for Submission of a Claim to Arbitration;[446]
    - Security of Cost;[447]
    - Consolidation;[448]
    - Scope of Arbitration;[449]
    - Selection of Arbitrators;[450]
    - Conduct of the Arbitration;[451]
    - Consolidation of Proceedings;[452]
    - Transparency of Arbitral Proceedings[453] (in a growing number of BITs, all documents relating to arbitration are made available to the public.[454] Procedural and substantive oral hearings are also increasingly made accessible to the public.);[455]
    - Third Party Funding;[456]
    - Amicus Curiae Submissions;[457]
    - Expert Reports;[458]
    - Code of Conduct of Arbitrators;[459] and
    - Governing Law.[460]

- *Limiting Investor Access* - To stem the proliferation of ISDS proceedings and reduce the risk to states of significant financial liabilities, countries are inserting clauses directed at limiting investor access to ISDS.

This can be achieved through the introduction of exhaustion of local remedies requirement, imposition of time-limits for initiating claims, Article 42(2) of the Draft Pan-African Investment Code provides that "If consultations fail, [a] dispute may be resolved

[445] UNCTAD's Reform Package, at p. 48.
[446] EAC Model Investment Treaty, Article 23.4.
[447] Australia-Indonesia CEPA, Article 14.28.
[448] Australia-Indonesia CEPA, Article 14:29.
[449] EAC Model Investment Treaty, Article 23.9.
[450] EAC Model Investment Treaty, Article 23.10; Argentina-Japan BIT, Article 26.
[451] Australia-Indonesia CEPA, Article 14:30; Argentina-Japan BIT, Article 27.
[452] EAC Model Investment Treaty, Article 23.18; Argentina-Japan BIT, Article 28; SADC Model BIT, Article 29.18.
[453] [453] EAC Model Investment Treaty, Article 23.17; Australia-Indonesia CEPA, Article14: 31; EU-Singapore IPA, Article 3.16.
[454] EAC Model Investment Treaty, Article 23.17; CCIA Agreement, Article 28(5).
[455] EAC Model Investment Treaty, Article 23.17; CCIA Agreement, Art. 28(6).
[456] Australia-Indonesia CEPA, Article 14:32.
[457] [457] EAC Model Investment Treaty, Article 23.15; SADC Model BIT, Article 29.15.
[458] SADC Model BIT, Article 29.15.
[459] Australia-Indonesia CEPA, Annex 14-A; EU-Singapore IPA, Article 3:11 ("Ethics"). Rwanda –UAE BIT.
[460] Article 31 of the CCIA Agreement ("Governing Law in Disputes"), stipulates, "When a claim is submitted to an arbitral tribunal, it shall be decided in accordance with this Agreement, the COMESA Treaty, national law of the host state, and the general principles of international law.

through arbitration, **subject to the applicable laws of the host State and/or the mutual agreement of the disputing parties, and subject to exhaustion of local remedies**." Article 26(5) of the Rwanda-UAE BIT (2017) stipulates that '[i]f the dispute cannot be resolved within six (6) months from the date of the written request for consultations and negotiations, the investor may, *after the exhaustion of local remedies, or the domestic court of host states*, resort to international arbitration mechanisms.'[461] Under the EAC Model Investment Treaty, a number of conditions that must be met before a claim can be submitted to arbitration including: a six months cooling off period; exhaustion of local remedies; and an investor consent in writing to arbitration.

EAC Model Investment Treaty

ARTICLE 23: Investor-State Dispute Settlement

23.4 Conditions for Submission of a Claim to Arbitration

(i) An Investor may submit a claim to arbitration pursuant to this Treaty, provided that:

a) six months have elapsed since the Notice of Intent was filed with the State Party and no solution has been reached;

b) the Investor or Investment, as appropriate,

i. has first submitted a claim before the domestic courts of the Host State for the purpose of pursuing local remedies, after the exhaustion of any administrative remedies, relating to the measure underlying the claim under this Treaty, and a resolution has not been reached within a reasonable period of time from its submission to a local court of the Host State; or

ii. the Investor demonstrates to a tribunal established under this Treaty that there are no reasonably available legal remedies capable of providing effective remedies of the dispute concerning the underlying measure, or the legal remedies provide no reasonable possibility of such remedies in a reasonable period of time.

c) The Investor has provided a clear and unequivocal waiver of any right to pursue and/or to continue any claim relating to the measures underlying the claim made pursuant to this Treaty, on behalf of both the Investor and the Investment, before local courts in the Host State or in any other dispute settlement forum.

d) No more than three years have elapsed from the date on which the Investor first acquired, or should have first acquired, knowledge of the breach alleged in the Notice of Arbitration and knowledge that the Investor has incurred loss or damage, or one year from the conclusion of the request for local remedies initiated in the domestic courts.

e) The Investor consents in writing to arbitration in accordance with the procedures set out in this Treaty.

[461] Emphasis added.

A review of the existing stock of BIT involving EAC members reveals that most of the old generation do not contain reform features. Although some recent agreements contain one or more reform features, most of the recent BITs are not in force and are unenforceable.[462]

- *Abolish and Replace* **-** Although still far from the norm, in a growing number of IIAs, contracting parties choose to eliminate the ISDS and replace it with other mechanisms such as State-State dispute settlement, a standing international investment court, or the domestic dispute settlement mechanism.

ISDS is absent in all recent IIAs involving Brazil. Brazil's recent IIAs only provide for State-State dispute settlement mechanisms.[463] With a view to abolishing the ISDS system or at least limiting their exposure to international claims before arbitral tribunals, some countries have terminated their BITs, withdrawn from the ICSID Convention, or both. For example:

- South Africa has terminated some of its BITs, particularly old generation agreements with mostly European nations;[464]
- In 2012, Bolivia took steps to terminate some of its BITs;[465]
- In 2008, Ecuador, terminated at least eight of its BITs;[466]
- In May 2007, Bolivia denounced the ICSID Convention and became the first state in history to do so.[467]
- On July 6, 2009, Ecuador denounced the ICSID Convention[468].
- In 2012, Venezuela also denounced the ICSID Convention.[469]
- In 2014, Indonesia terminated a significant number of its BITs.[470]

Instead of ad hoc ISDS, the EU has proposed a more formalised quasi-court system.[471] In essence a standing ISDS tribunal, the investment court system (ICS) is found in a growing number of IIAs involving the EU such as the EU-Singapore Investor Protection Agreement (2018), the EU-Japan Economic Partnership Agreement (2018), and the

---

[462] See e.g. Rwanda-UAE BIT (addressing a host of issues including *inter alia* "Ethical Duties of Members of the Arbitral Tribunal and Any of Their Assistants" Article 18).

[463] See e.g., Brazil-Malawi BIT (2015), Brazil-Ethiopia BIT (2018), Brazil-Mozambique BIT (2015), and Brazil-Angola BIT (2015).

[464] Lendi Kolver, "SA proceeds with termination of bilateral investment treaties," Engineering News (21 October 2013) http://www.engineeringnews.co.za/article/sa-proceeds-with-termination-of-bilateral-investment-treaties-2013-10-21

[465] United States, Federal Register, "Notice of Termination of United States-Bolivia Bilateral Investment Treaty," 23 May 2012 https://www.federalregister.gov/articles/2012/05/23/2012-12494/notice-of-termination-of-united-states-bolivia-bilateral-investment-treaty.

[466] Global Arbitration Review, "Ecuador terminates BITs with eight LatAm states," 5 November 2008 http://globalarbitrationreview.com/news/article/14919/ecuador-terminates-bits-eight-latam-states/ .

[467] ICSID, "Bolivia Submits a Notice under Article 71 of the ICSID Convention," ICSID News Release (16 May 2007) https://icsid.worldbank.org/ICSID/FrontSe rvlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement3

[468] ICSID, "Ecuador Submits a Notice under Article 71 of the ICSID Convention," ICSID News Release (9 July 2009) https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announ cement20

[469] International Centre for the Settlement of Investment Disputes (ICSID), "Venezuela Submits a Notice under Article 71 of the ICSID Convention," ICSID News Release (26 January 2012) https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announ cements&pageName=Announcement100

[470] Ben Bland and Shawn Donnan, "Indonesia to terminate more than 60 bilateral investment treaties," Financial Times (26 March 2014), http://www.ft.com/cms/s/0/3755c1b2b4e2-11e3-af92-00144feabdc0.html#axzz35Qatebp7.

[471] European Commission, A Future Multilateral Investment Court, MEMO/16/4350 (Dec. 13, 2016), http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm [https:// perma.cc/9FTL-4923] (archived Oct. 21, 2017); The Multilateral Investment Court Project, EUR.COMM. (Dec. 21, 2016), http://trade. ec.europa.eu/doclib/press/index.cfm?id=1608 [https://perma.cc/B8BQ-KMYX]; See also Belen Olmos Giupponi, Recent Developments in the EU Investment Policy: Towards an Investment World Court?, 26 J. ARB. STUD. 175, 210 (2016).

Canada-EU Comprehensive Economic Trade Agreement (2016). The ICS still gives foreign investors the opportunity to invoke the jurisdiction of an international arbitration tribunal and to claim and obtain compensation in the event of a treaty breach.

Although welcomed in some quarters, the investment court model is generating a lot of criticisms from scholars and civil society groups.[472] Critics consider the investment court system to be a mere re-branding of the old ISDS system, worry that it does not limit egregious claims, and doubt that it resolves most of the problems with the present system.[473] Questions are being raised about the effectiveness and practicability of an investment court system and the impact of such a system on domestic policy space.[474] UNCTAD takes the position that "[a] standing investment court would be an institutional public good serving the interests of investors, States and other stakeholders. The court would address most of the problems outlined above: it would go a long way to ensure the legitimacy and transparency of the system, facilitate consistency and curacy of decisions and ensure independence and impartiality of adjudicators."[475] Proponents of the ICS argue that the system will produce substantial benefits in terms of rule of law, consistency, and predictability. Critics are not convinced, however.[476]

- *Introduce New Elements in ISDS* - Instead of completely abolishing ISDS, in a growing number of IIAs, contracting parties are simply introducing new elements such as dispute prevention mechanisms,[477] alternative dispute resolution (ADR) processes, and appeal facility. In a growing number of IIAs, contracting parties are actively encouraging ADR not just through the customary "cooling off" period but in more robust ways.

Dispute prevention is addressed extensively in Article 26 of the Morocco-Nigeria BIT (2016). Article 3.4. of the EU-Singapore IPA is titled "Mediation and Alternative Dispute Resolution," and is directed at encouraging ADR. The Australia-Indonesia CEPA has a section on "Consultations" (Article 14:2) and "Conciliation" (Article 14:3). Article 12 of the Rwanda–UAE BIT is titled "Mediation and Conciliation."

---

[472] Gus van Harten, "Key flaws in the European Commission's proposals for foreign investor protection in TTIP", 18 November 2015, p.1, http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=2692122

[473] Pia Eberhardt, Investment Court System (ICS): The Wolf in Sheep's Clothing: The EU's Great Corporate Privilege Rebrand (Public Service International. 2016); Cecilia Olivet, Natacha Cingotti, Pia Eberhardt, Nelly Grotefendt, Scott Sinclair, Investment Court System Put to Test: New EU Proposal Will Perpetuate Investors' Attack on Health and Environment (Transnational Institute. 2016).

[474] Public Citizen, "Tens of Thousands of U.S. Firms Would Obtain New Powers to Launch Investor-State Attacks against European Policies via CETA and TTIP", 2014, p.1, https://www.citizen.org/documents/EU-ISDS-liability.pdf

[475] See U.N. Conference on Trade and Development, Reform of the Investor-state Dispute Settlement: In Search of a Roadmap, 9 (June 2013)).

[476] Jason Webb Yackee, Controlling the International Investment Law Agency, 53 HARV. INT'L L.J. 391, 434 (2012) ("A World Investment Court, unless carefully designed as more of a political than a judicial organ, would risk further consolidating the law-making functions of IIL experts while diminishing the ability of states to control system outcomes."). Stephen W. Schill, The Sixth Path: Reforming Investment Law from Within, in RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 621, 632-33 (J. E. Kalicki & A. Joubin-Bret 2015

[477] Part III of the Brazil-Ethiopia BIT is titled "Institutional Governance and Dispute Prevention."

Morocco-Nigeria BIT (2016)
ARTICLE 26
DISPUTES PREVENTION

1) Before initiating an eventual arbitration procedure, any dispute between the Parties shall be assessed through consultations and negotiations by the Joint Committee.
2) A Party may submit a specific question of interest of an investor to the Joint Committee;
....
d) The procedure for dialogue and bilateral consultation ends by the initiative of any Party upon presentation of summarized report in the subsequent Joint Committee meeting, that shall include:
- Identification of the Party;
- Identification of the Investors;
- Description of the measure under consultation; and
- Position of the Parties concerning the measure.
3) The Joint Committee shall, whenever possible, call for special meetings to review the submitted matters.
4) The meeting of the Joint Committee and all documentation, as well as steps taken in the context of the mechanism established in this Article, shall remain confidential, except for the submitted reports.

In place of *ad hoc* arbitration with *ad hoc* Annulment Committee with limited mandate to review of arbitral awards,[478] the idea of a standing appeal mechanism is gaining acceptance and is now found in a growing number of IIAs.[479] In the EU-Canada FTA (CETA), Contracting Parties opted for a standing ISDS tribunal and an appellate facility. Pursuant to Article 8:28 (2) of CETA, the Appellate Tribunal can modify or reverse an award based on: (a) errors in application or interpretation of the applicable law; (b) manifest errors in appreciation of the facts, including the appreciation of relevant domestic law; (c) the grounds set out in Article 52(1)(a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b)." The Rwanda-USA BIT (Annex D) contemplates the possibility of a 'Bilateral Appellate Mechanism" and states that "[w]ithin three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards ...." The EU has proposed *inter alia* the creation of a permanent "Investment Court System," which would include a Tribunal of First Instance and a permanent Appeals Tribunal.[480]

Regional policy instruments in Africa do not make provision for appeal mechanisms but appear to welcome them. Article 23.20 of the EAC Model Investment Treaty stipulates

[478] See e.g. Article 52 and 53 of the ICSID Convention.
[479] EU-Singapore IPA, Article 3.10 (Appeal Tribunal). According to Article 3.10(1), "A Permanent Appeal Tribunal is hereby established to hear appeals from provisional awards issued by the Tribunal."
[480] European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (19 Sep. 2015); European Commission Draft Text TTIP – Investment (16 Sep. 2015), at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (last accessed 18 May 2018).

that "within three months of the date of entry into force of this Treaty, the Parties may establish an appellate body or similar mechanism to review awards rendered by tribunals under this Chapter." Article 23.20 further provides:

> If a separate, multilateral or bilateral agreement enters into force between the State Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the State Parties shall strive to reach an agreement that would have such appellate body review awards rendered under this Treaty in arbitrations commenced after the multilateral agreement enters into force between the State Parties.[481]

- *ISDS on a Case-by-Case Basis* **-**In 2011, Australian Government decided that it would no longer include provisions on ISDS in bilateral and regional trade agreements.[482] Today, Australia adopts a case-by-case approach to ISDS.

While some of Australia's IIAs provide for ISDS, others do not.[483] A case-by-case approach to ISDS provides maximum flexibility for a host State and allows a country to assess the true costs and benefit of each IIA that it concludes. A case-by-case approach makes sense for countries that have the willingness and capacity to carry out a thorough cost-benefits assessment of each IIA they conclude and can make individualized determination of their strategic interests in respect of every prospective treaty party.

- *The Cost of Unreformed ISDS* - Unreformed ISDS remains the norm in many old-generation investment agreements. The problem with unreformed BITs is that their ISDS provision can be triggered long after the agreements have been terminated.

The Tanzania-Netherlands BIT was signed on 31 July 2001 and entered into force on April 1, 2004. On August 31, 2018, Tanzania tendered notice of its intention to terminate the BIT and the termination became effective on April 30, 2019. Although terminated, on May 16, 2019, a Dutch investor filed an ISDS claim based on same agreement. The Tanzania-Netherlands BIT has a 15-year survival clause in respect to investments made prior to April 1, 2019, meaning that investors can continue to initiate claims under the Tanzania-Netherlands BIT until March 31, 2034. On May 31, 2019, relying on the United Kingdom-Tanzania BIT (1994), British investors and investment – Richard N. Westbury, Paul D. Hinks and Symbion Power Tanzania Limited – registered a claim with the ICSID against Tanzania.[484] Unfortunately for Tanzania, the ISDS provision in both the United Kingdom-Tanzania BIT (1994) and the Tanzania-Netherlands BIT (2001) are fairly outdated and lack most of the reform elements discussed in this chapter.

- *Abolish ISDS* **-** A country can 'exit' from the system of international investment arbitration. This can be achieved if the country: (i) terminates existing IIAs with ISDS; (ii) ceases to conclude new IIAs that provide for ISDS; and (iii) ensures that neither

---

[481] See also SADC Model BIT, Article 29.20.

[482] Department of Foreign Affairs and Trade (DFAT). 2011. "Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity" http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html#investor-state

[483] Australia's IIAs that provide for ISDS include, Australia-Indonesia CEPA (2019); Australia-Uruguay BIT (2019); the Australia-Hong Kong Investment Agreement (2019); and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018). Australia's IIAs that do not provide for ISDS include Australia-Japan EPA (2014) and 2011 Protocol on Investment to the New Zealand – Australia Closer Economic Relations Trade Agreement. There is no ISDS in Australia's agreement with Malaysia and the United States.

[484] Richard N. Westbury, Paul D. Hinks and Symbion Power Tanzania Limited v. United Republic of Tanzania (ICSID Case No. ARB/19/17).

domestic law nor investment contracts provide alternative basis for international investment arbitration.

South African has taken the approach on 'no ISDS'. Following a multi-year review of the country's BITs, in 2010, the South African Government decided not to renew any of South Africa's existing BITs and to terminate those BITs that were approaching the end of their initial term.[485] In 2018, South Africa's *Protection of Investment Act, 2015 (Act No. 22 of 2015)* entered into force. Significantly, *Act No. 22 of 2015* makes no provision for international investment arbitration and only provides for dispute settlement in domestic courts and State-to-State arbitration.[486] Article 13(4) of *Act No. 22 of 2015* stipulates that an investor "is not precluded from approaching any competent court, independent tribunal or statutory body within the Republic for the resolution of a dispute relating to an investment".[487] Conditioned on exhausting domestic remedies, the South African Government "may consent to international arbitration" in respect of investments covered by the Act but 'such arbitration will be conducted between [South Africa] and the home state of the applicable investor'.[488]

It must be noted that most regional and continental policy instruments in Africa do not abolish ISDS altogether but rather adopt a reformist approach. The COMESA Investment Agreement provides for ISDS (Article 28-31) but also introduces some improvement. The SADC Model BIT investor-State arbitration (Article 29) and also introduces reform elements into the ISDS section. The EAC Model Investment Treaty also provides for ISDS, although the preferred option is to omit ISDS altogether. A 'special note' in Article 23 of the EAC Model Investment Treaty:

> **SPECIAL NOTE: the preferred option is not to include investor-State dispute settlement. Several States are opting out or looking at opting out of investor-State mechanisms, including Australia, South Africa and others.**
>
> **However, if EAC decides to negotiate and include this, the text below may provide guidance for this purpose.**[489]

The EAC Model Investment Treaty includes a number of reform elements including, Counterclaims by State Parties (Article 21), Mediation (Article 23.3), Avoidance of Conflict of Interest of Arbitrators (Article 23.13), Transparency of Proceedings (article 27.17), and Consolidation of Arbitrations (article 23.18).

Considerations for revisiting ISDA

The past two decades has witnessed a steady rise in the number of ISDS claims initiated against EAC states. ISDS and even the threat of arbitration has the potential to chill regulatory action and prompt EAC countries to make concessions that they would

---

[485] South Africa has terminated at least ten of the country's BITs including BITs with Austria, Denmark, France, the United Kingdom, the Netherlands, Switzerland, Germany, Sweden, Argentina, Belgo-Luxembourg Economic Union, and Spain. See UNCTAD, Investment Policy Hub – South Africa < https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa > accessed 10 August 2019.

[486] *See* 'Act No. 22 of 2015: Protection of Investment Act, 2015' < https://www.thedti.gov.za/business_regulation/acts/Investment_Act_22of2015.pdf> accessed 1 August 2019. (Hereinafter 'Protection of Investment Act, 2015').

[487] *Id.*, Article 13(4).

[488] *Id.*, Article 13(5).

[489] EAC Model Investment Treaty, Article 23.

otherwise not make. Given the potential effect of ISDS on domestic regulatory space, the financial and economic implications of ISDS for countries in Africa, and other concerns about the functioning of ISDS, it is imperative that EAC members review their involvement in ISDS and review the provisions of their BITs that make ISDS possible. Strangely, despite considerable talk about an international investment law regime in crisis, very few countries in Africa have actually taken steps to review their BIT framework and practice.[490]

The major question is whether countries should look to reform or not to. For states considering revisiting their approach to ISDS, a few points are worth remembering:

1. First, neither customary international law nor treaty, mandates ISDS save what a state voluntarily accepts. What international law requires is that foreign investors have access to fair and effective dispute settlement mechanism. As reiterated in the G20 Guiding Principles for Global Investment Policymaking:

> Investment policies should provide legal certainty and strong protection to investors and investments, tangible and intangible, including access to effective mechanisms for the prevention and settlement of disputes, as well as to enforcement procedures. Dispute settlement procedures should be fair, open and transparent, with appropriate safeguards to prevent abuse.

2. Second, given that neither customary international law nor treaty law mandates ISDS, options for ISDS reform should be weighed carefully and decisions made based on what is in the best interest of each country. This thereby means considering shifting and changing economic or political interests. Across the globe, governments are reforming their IIAs based on their calculation of what is in their country's best interest. In the case of Australia, the Government of Australia noted that, "Australia has negotiated ISDS provisions over the past three decades *to provide protection for Australian companies investing abroad*,"[491] and that today, the Australian Government, "considers ISDS provisions in FTAs *on a case-by-case basis in light of the national interest*."[492]
3. Third, BITs provide the legal basis for a majority of known investor-state arbitration. In 2016, of the 131 ICSID cases involving an African State Party, 44 percent (44%) were based on consent found in BITs negotiated by the States. Africa is not unique in this regard. According to UNCTAD, about 80 percent of investment arbitration in 2017 were brought under BITs.[493]

---

[490] Mercedes Alvaro, 'Ecuador Plans to Audit Bilateral Investment Treaties' (11 March 2013) WALL ST. J. <http://online.wsj.com/article/BT-CO-20130311-708469.html>.

[491] Australian Government (Department of Foreign Affairs and Trade), *Investor-State Dispute Settlement (ISDS)*, https://dfat.gov.au/trade/investment/Pages/investor-state-dispute-settlement.aspx. Emphasis added.

[492] Id. Emphasis added.

[493] UNCTAD, IIA Issue Note, Issue 2, June 2018.

4. Fourth, based on available information, no business from an EAC Member State has made use of ISDS provisions in applicable BITs. Moreover, investors from EAC states are not likely to feature as claimants in ISDS cases anytime soon.[494] Although claims by developing-country investors are on the rise, developed-country investors have brought most of the known ISDS cases to date.[495] Nevertheless, African investors are beginning to use the ISDS system.[496] *AngloGold Ashanti* (*Ghana*) *Limited v. Republic of Ghana*, involved a claim by a South African mining company AngloGold Ashanti (AngloGold) against Ghana over the withdrawal of military protection for a gold mine.[497] *Oded Besserglik v. Republic of Mozambique* involves a claim by a South African investor against Mozambique relying on the provisions of the Mozambique-South Africa BIT (1997). Mauritian investors are the claimants in the case of *LTME Mauritius Limited and Madamobil Holdings Mauritius Limited v. Republic of Madagascar*.
5. Fifth, given the growing number of BITs that EAC countries are concluding with emerging market economies like China, Turkey, and UAE, EAC members can expect a rise in ISDS claims from investors from other developing countries. Although developed-country investors brought most of the known ISDS cases, developing-country investors are becoming active in the ISDS mechanism. According to UNCTAD, in 2017, investors from Turkey were the most active claimants from developing countries, with four cases filed.[498]
6. Sixth, whether there is a positive correlation between ISDS provisions and investment flows, has not been established conclusively. Indeed in a 2010 report, the Australia's Productivity Commission concluded that "[t]here is … evidence that committing to ISDS provisions *does not* influence foreign investment flows into a country."[499] In effect, "even if a country believes it is attracting an insufficient level of foreign investment, introducing ISDS provisions is unlikely to change the situation, once other factors influencing investment are taken into account."[500]
7. Seventh, only a holistic and comprehensive approach to reform will do. As already noted, BITs provide only one of multiple pathways to ISDS. Studies show that compared to other regions of the world, "contract-based [ICSID] cases account for a much larger share of cases involving African States", and that consent founded on a domestic legislation provides bases for consent in many other cases.[501] Consequently, countries must address the ISDS provision in their IIAs at the same

---

[494] UNCTAD, Recent Trends in IIAs and ISDS, IIA Issues Note No. 1, February 2015.
[495] UNCTAD, INVESTOR–STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2017, IIA Issues Note No. 2, June 2018. Between 1987 and 2017, the most frequent home states were United States, Netherlands, United Kingdom, Germany, Canada, France, Spain, Luxembourg, Italy, Turkey, Switzerland, Cyprus.
[496] See e.g. *LTME Mauritius Limited and Madamobil Holdings Mauritius Limited v. Republic of Madagascar*, ICSID Case No ARB/17/28; *Oded Besserglik v. Republic of Mozambique*, ICSID Case No ARB(AF)/14/2; *Sudapet Company Limited v. Republic of South Sudan*, ICSID Case No ARB/12/26.
[497] *AngloGold Ashanti* (*Ghana*) *Limited v*. Republic of *Ghana*, ICSID Case No ARB/16/15.
[498] UNCTAD, INVESTOR–STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2017, IIA Issues Note No. 2, June 2018.
[499] Productivity Commission. 2010. Bilateral and Regional Trade Agreements: Research Report, p. 269. https://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf
[500] Id.
[501] Le Cannu, 'Foundation and Innovation' *supra* note 399, p. 478.

time that they address domestic legislation and investment contracts that provide basis for consent to ISDS. A comprehensive reform requires that countries not only pay attention to ISDS provisions in their IIAs but also to other clauses as well. Risks associated with ISDS can be minimized through careful drafting of IIAs that concisely define terms such as 'investment', 'indirect expropriation', 'full protection and security,' and 'fair and equitable treatment.' Experience shows that "definitions that insufficiently constrain the scope of ISDS claims may give rise to future cases that partner countries cannot reasonably foresee at the time an agreement is made."[502]

8. Eight, the backlash against ISDS is not limited to the global South. Increasingly U.N. human rights experts are voicing their concerns. In their March 7, 2019, seven independent human rights experts called for "systemic structural changes to the architecture of ISDS."[503] "While addressing the procedural concerns … would contribute to improving the efficacy of the ISDS system, it would not remedy the power imbalance between investors and States, which is so deeply entrenched in the architecture of the ISDS system," the U.N human rights experts noted in their letter.

It is therefore important that EAC states individually review the ISDS provisions in their BITs and decide which reform option(s) is best for them. Until such reviews are completed, EAC economies are advised to hold off on concluding new investment treaties with ISDS provisions. Whether to legislate to ban ISDS from all future trade and investment agreements, is an option that some governments are considering and EAC economies may wish to consider. In place of ISDS, some experts have proposed market-based solutions such as insurance from the Multilateral Investment Guarantee Agency (MIGA) as well as other types of public and private political risk insurance. As the Australian Productivity Commission notes, "such market-based solutions can serve to mitigate risks faced by investors, allowing investment to be based on underlying market conditions."[504]

Unilateral reform must go hand in hand with regional/continental reform and multilateral reform. Beyond the reform of individual BITs, EAC countries must participate in on-going multilateral level discussions about ISDS reform such as the UNCITRAL Working Group III on Investor-State Dispute Settlement (ISDS) Reform. Failure to participate in multilateral level discussion is risky for developing countries in general and countries in Africa in particular as they could be stuck with proposals that are limited in scope and nature and can only offer superficial solutions to symptoms of the fundamental flaws in the ISDS system.[505]

---

[502] [502] Productivity Commission. 2010. Bilateral and Regional Trade Agreements: Research Report, p. 274. https://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf
[503] https://www.ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf
[504] Productivity Commission. 2010. Bilateral and Regional Trade Agreements: Research Report, p. 270. https://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf
[505] https://www.ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf

Findings and Recommendations

1. The growing number of ISDS cases involving EAC economies, the adverse decisions emanating from various arbitral tribunals, and the widespread controversies over the ISDS mechanism should be a concern for EAC economies and should prompt them to each carry out a comprehensive review of their BITs.
2. A thorough review of the ISDS provisions of all in force BITs is recommended. Most old-generation agreements involving EAC Member State renew automatically and some renew for additional fixed durations thus making treaty difficult. Article 14(2) of the Tanzania-Netherland BIT provides "Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of ten years." Had Tanzania failed to tender its termination notice on September 30, 2018, the agreement would have extended automatically for another ten years and would have remained valid until April 1, 2029.
3. A thorough and comprehensive review of all ISDS cases involving EAC states is highly recommended. A review of past ISDS cases involving EAC states will help countries assess the costs and benefits of ISDS, identify existing risks and vulnerabilities, develop reform proposals, and determine how best to respond to the legitimacy crisis in investment arbitration. IIAs can impose costs on host States even when they do not result in an arbitral award.[506]

[506] Simmons, B.A. (2014). Bargaining over BITs, arbitrating awards: The regime for protection and promotion of international investment. World Politics, 66(1), 15.

CHAPTER 6: THE REFORM QUESTION

For most countries, the question is no longer whether or not to engage in IIA reform, but about the substance of such reform, as well as the process and mechanisms of any reform.[507] Most experts conclude that "maintaining the status quo is hardly an option given today's criticism of the existing system."[508] Although the arguments for reform may be evident and convincing, EAC members must come to their own individual conclusion about whether to engage in meaningful reform of their IIAs.

Depending on their individual development plan and strategies, their domestic investment policies, their current role as host country of investment, their potential future role as home county of investment, and their prior experiences with ISDS, countries may come to different conclusions about whether or not to engage in serious IIA reform. A decision to reform cannot be taken lightly and has immediate consequences for countries and for stakeholders. A decision to reform is likely to require countries to: (a) pause IIA negotiations until reform is complete; (b) exit some existing agreements, particularly those that are nearing their initial term; (c) pay very close attention to their unratified BITs, particularly those that are outdated; and (d) map out a coherent and meaningful strategy for the way forward. Countries like India, Indonesia and South Africa that have made commitments to reform their BIT framework have each had to take concrete action towards reform.[509]

Rationale for Change

There are many reasons why EAC economies must consider reviewing and possibly revamping their investment treaty program.

1. First, most countries in Africa concluded and are still concluding BITs without serious consideration of their benefits and associated costs. Most countries in Africa conclude BITs without carefully evaluating the possible negative externalities of BITs on developmental goals and regulatory space.[510]
2. Second, there is a growing realization that IIAs are not benign instruments and that they have serious policy and economic consequences for host States and host communities.[511] The growing number of ISDS claims against EAC states is reason enough for these countries to review their engagement with the ISDS system in particular and the international investment law system more generally.

[507] UNCTAD's Reform Package, *supra* note 206, at p. 7.
[508] Id.
[509] "Govt to review bilateral treaties to avoid legal battle with telcos," The Indian Express, April 13, 2012. The Jakarta Post, "Revamping bilateral treaties", 7 July 2014. See also Oegroseno, A.H. (2014). Indonesia's bilateral investment treaties: Modernizing for the 21st century. RSIS Commentaries for Global, International, Southeast Asia and ASEAN, 14.
[510] Department of Trade and Industry South Africa, BILATERAL INVESTMENT TREATY POLICY FRAMEWORK REVIEW: GOVERNMENT POSITION PAPER 2009 ("In several instances, it was pointed out that the conclusion of the BITs were historical … and that no policy documentation informing the rationale for the conclusion of such BITs could be found…. There seems to have been no legal or economic analysis of the risk associated with the conclusion of BITs").
[511] Id. ("BITs extend far into developing countries' policy space, imposing damaging binding investment rules with far-reaching consequences for sustainable development.").

3. Third, the asymmetrical nature of traditional IIAs is a major concern for most developing countries. Although IIAs could potentially lead to increased FDI, they are not designed to address many of the issues of concern to developing countries. Following a review of South Africa's BITs, South Africa's Department of Trade and Industry concluded that:

> Major issues of concern for developing countries are not being addressed in the BIT negotiating processes.... New investment rules in BITs prevent developing country governments from requiring foreign companies to transfer technology, train local workers, or source inputs locally. Under such conditions, investment fails to encourage or enhance sustainable development.[512]

4. Fourth, reform aimed at balancing the rights and obligations of foreign investors vis-à-vis those of host States is extremely important. Presently, except for *jus cogens* norms, international law does not impose direct obligations on businesses including corporations.[513] Although the last two decades has seen increased efforts towards addressing corporate impunity, existing initiatives are still at the level of soft international law.[514] Today, how to address human rights and environmental concerns within the context of IIAs is generating a lot of scholarship and debates.[515]
5. Fifth, there is widespread consensus on the need for systemic reform of the global IIA system. Capital-exporting countries are also acknowledging the need for reform and are revamping their IIAs. Intergovernmental organizations are also urging reform. In 2012, UNCTAD made a plea for "a new generation" of BITs.[516] According to UNCTAD, "A shared view has emerged on the necessity to ensure that the international investment treaty regime works for all stakeholders."[517] UN human rights experts are also calling for systemic and structural reform. In their March 7 letter, U.N. human rights experts stated:

---

[512] Department of Trade and Industry South Africa, BILATERAL INVESTMENT TREATY POLICY FRAMEWORK REVIEW: GOVERNMENT POSITION PAPER 2009

[513] Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility," 111 Yale LJ 443 (2001), p. 512; Jordan J. Paust, "Human Rights Responsibilities of Private Corporations," 35 Vanderbilt JTL 801 (2002), pp. 817–19. P.T. Muchlinski, "*Human rights and multinationals: is there a problem?", International Affairs,* I (2001).

[514] David Kinley & Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law," 44(4) Virginia JIL 931 (2004)

[515] Howard Mann, "International Investment Agreements, Business and Human Rights: Key Issues and Opportunities," IISD (February 2008), p. 9; Adefolake Adeyeye, "Corporate Responsibility in International Law: Which Way to Go?," 11 SYBIL 141-161 (2007), p. 148; Luke Eric Peterson, "Human Rights and Bilateral Investment Treaties. Mapping the Role of Human Rights Law within Investor-State Arbitration," Rights & Democracy Report (Montreal 2009), p. 15.

[516] UNCTAD. (2012). *World investment report 2012: Towards a new generation of investment policies*, pp. 84, 90.

[517] UNCTAD's Reform Package, supra note 206, p 7.

> "We believe what is necessary is a fundamental, systemic change, which entails moving towards a fairer and more transparent multilateral system, which duly takes into account the rights and obligations of investors and States in line with all applicable international laws and standards concerning human rights, labour rights and environmental rights. A special attention should be paid to differentiated and disproportional negative impact of IIAs and the ISDS mechanism on women as well as on indigenous peoples, particularly in relation to resource extraction in or near indigenous peoples' territories.[518]

6. Sixth, the need to achieve policy coherence offers another justification for reform for EAC countries. All EAC members have ratified the African Charter on Human and Peoples' Rights and some of the major human rights and environmental treaties. All EAC states actively support the UN's agenda for corporate social responsibility including the UN Guiding Principles. Given their other commitments under various regional and international human rights and environmental treaties, EAC countries have an obligation to ensure that their obligations under various international investment treaties are consistent with their other international obligations.

The UN Guiding Principles on Business and Human Rights calls attention to the potential impact of trade and investment on domestic policy space and the need for governments to ensure policy coherence. As already noted, recently, several UN human rights experts lamented that IIAs "have often proved to be incompatible with international human rights law and the rule of law."[519]

7. Seventh, across the globe many countries are already embarking on reform. A review of current treaty practice suggests that states are becoming very creative as far as design of IIAs is concerned. A growing number of countries are also reviewing and revising their Model BIT. On October 19, 2018, the Dutch government adopted Netherland's new model BIT. After a multi-year BIT review, India revamped its IIA regime.[520] In 2016, India released a new Model BIT.[521] Indonesia is also on path to revamping and modernizing its BIT.[522]

Nature and Degree of Change

For States that are considering a comprehensive reform of their BITs, three broad options have emerged: (1) abandon the international investment law system; (2)

---

[518] UN Human Rights Experts – Letter of March 7, 2019, supra n. 424.

[519] UN Human Rights Experts – Letter of March 7, 2019, supra n. 424.

[520] Singh, K and Ilge, B (15 July 2016) *India overhauls its investment treaty regime*. FINANCIAL TIMES. See http://tinyurl.com/zv5dyv4

[521] See Model Text for the Indian Bilateral Investment Treaty 2016, http://www.dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf [hereinafter 2016 Indian Model BIT].

[522] The Jakarta Post, "Revamping bilateral treaties", 7 July 2014; cogitAsia, "Indonesia's Foreign Policy under Jokowi: A Giant Comes Knocking", 13 January 2015.http://cogitasia.com/indonesiasforeign- policy-under-jokowi-a-giant-comes-knocking/; Rob Palmer, BIT by BIT: Indonesia's Moves Away from Bilateral Investment Treaties Continues, Ashurst: International Arbitration Update, 1 July 2015, available at < https://www.ashurst.com/en/news-and-insights/legal-updates/bit-by-bit-indonesias-move-away-from-bilateral-investment-treaties-continues/ >

abandon the international investment law system and replace it with a domestic framework that offers investors more or less similar protections; or (3) engage in unilateral, regional, and multilateral reform of existing system.

- Abandon the IIA Regime - A complete abandonment of the international investment law system involves terminating all existing IIAs, denouncing relevant multilateral instruments, and limiting exposure to ISDS in investment contracts and domestic legislation. Complete abandonment of the international investment law regime is certainly possible and within the sovereign right of each states but is likely to be resisted by foreign investors and by many capital-exporting nations. Whether a country can completely abandon the IIA regime without any repercussions may depend on the quality and strength of the country's domestic institutions.

For a country that lacks a sound regulatory environment, an abrupt and complete abandonment of the existing system may not be feasible. Instead of completely abandoning the system, a country could consider less drastic alternatives such as: (a) adjusting the level of protection offered to foreign investors in investment treaties; (b) safeguarding regulatory space in future IIAs; and (c) addressing the shortcomings in existing agreements.

- Abandon and Replace - Some countries are experimenting with a development-based approach to IIAs (IIAs that do not have investment protection as their sole or primary objective but seek to accomplish broader objectives). While some are seeking to rebalance investor rights and regulatory space, others are seeking to promote investment cooperation and facilitation alongside investment protection.

In Africa, South Africa is the only country that has attempted a comprehensive review of its BIT and one of the very few countries in the region to take concrete steps towards reform.[523] Following a multi-year review process, the South African Government introduced major changes to South Africa's international investment policy framework. First, the government decided to terminate some of the country's 'first generation' BITs. Second, the government decided to refrain from concluding new BITs in future, unless warranted by compelling economic and political reasons. Third, the government developed a domestic legal framework that codifies some standard BIT provisions into domestic law essentially offering investors some of the protections found in traditional IIAs.

South Africa's approach has been to move away from IIAs and to opt for an investment protection framework that is grounded in domestic law rather than treaty. The Protection of Investment Act, 2015, narrows the definition of investment and investor, limits the scope of the full protection and security guarantee, eliminates the fair and equitable treatment standard, explicitly acknowledges the government's right to regulate in the public interest, and eliminates international investment arbitration. To ensure

[523] South Africa, Department of Trade and Industry, Update on the Review of Bilateral Investment Treaties in South Africa, (Pretoria: Report to Cabinet, 15 February 2013).

policy coherence, the South African government decided not to renew some of the country's old-generation BITs and not to conclude new BITs except for compelling economic and political reasons. South Africa has not concluded a BIT since 2009.[524] Out of about 50 BITs that South Africa has negotiated since 1994, at least ten have been terminated.

Brazil has historically resisted standard IIAs and, for a long time, operated outside the mainstream investment regime. In 2015, Brazil developed a new model investment agreement that moves away from the dominant paradigm of investment protection to a paradigm of investment cooperation and facilitation. Brazil's model IIA, dubbed *Cooperation and Investment Facilitation Agreement* ("CIFA"), includes some investment protection guarantees, but emphasizes investment facilitation and promotion. To date, Brazil has concluded agreements with five countries in Africa: Malawi (2015), Angola (2015), Mozambique (2015), Ethiopia (2018) and Morocco (2019).

South Africa – The Protection of Investment Act, 2015

- ✓ No open-ended asset-based definition of investment (Article 2).
- ✓ No fair and equitable treatment guarantee but 'fair administrative treatment' guaranteed.
- ✓ No provision for international investor-State arbitration (Article 13).
- ✓ Broad exception to the national treatment obligation (Article 8).
- ✓ The government's 'right to regulate' explicitly acknowledged (Article 12).
- ✓ Reaffirmation of the supremacy of the South African Constitution (Article 3 and 4).
- ✓ A confirmation that the Bill of Rights in the Constitution applies to "all investors and their investment." (Article 4)

Source: Author Compilation

Brazil's recent BITs contain many of the guarantees and protections found in traditional IIAs such as the national treatment protection,525 the most-favored-nation guarantee,[526] protection against unlawful direct expropriation,[527] compensation for losses,[528] and freedom to transfer funds related to an investment.[529] However, the new agreements represent a marked departure from traditional IIAs in several respects.

First, the agreement emphasizes investment promotion and facilitation in addition to investment protection. Second, the agreements do not guarantee absolute standard of treatment such as 'fair and equitable' treatment or full protection and security. Third, the agreements explicitly address corporate social responsibility and impose some obligations directly on investors. Fourth, the agreements adopt a radical approach to

[524] The last South African BIT to be signed and to enter into force was the South-Africa – Zimbabwe BIT which was signed November 25, 2009, and entered into force September 15, 2010.
[525] Brazil-Ethiopia CIFA, Article 5. Brazil-Malawi CIFA, Article 10(2).
[526] Brazil-Ethiopia CIFA, Article 6. Brazil-Malawi CIFA, Article 10(3).
[527] Brazil-Malawi CIFA, Article 8; Brazil-Ethiopia CIFA, Article 7.
[528] Brazil-Ethiopia CIFA, Article 7. Brazil-Malawi CIFA, Article 8(2)
[529] Brazil-Malawi CIFA, Article 12; Brazil-Ethiopia CIFA, Article 10.

investor-State dispute settlement (ISDS); the agreements omit ISDS entirely. Investors are explicitly excluded from arbitration. Article 13(6) of the Brazil-Malawi CFIA provides that "[i]f the dispute cannot be resolved, the Parties **to the exclusion of the investors may resort to arbitration mechanisms between States….**"[530] Instead of investor-State arbitration, the agreements prioritizes risk mitigation and dispute prevention.

BRAZIL'S COOPERATION AND INVESTMENT FACILITATION AGREEMENT

- ✓ Treaty title references investment 'cooperation' and 'facilitation' but not protection.
- ✓ Addresses direct expropriation but not indirect expropriation.
- ✓ Explicit provisions on corporate social responsibility.
- ✓ State-State dispute settlement. No ISDS provision. Investors explicitly excluded from arbitral processes.
- ✓ Strong emphasis on dispute prevention.
- ✓ Strong emphasis on institutional governance.

Source: Author Compilation

- Reform - Many countries are choosing to stay within the traditional paradigm and to reform their IIAs. India has terminated more than twenty-five (25) of its BITs and has adopted a new Model BIT.[531] Although staying within the traditional paradigm, India appears to be committed to redesigning its IIAs. The Indian Model BIT omits two standard elements in traditional BITs – the MFN treatment and the FET standard.

The MFN clause is completely excluded from India's model BIT – a move seen as a direct response to the arbitral award in *White Industries v. Republic of India*. In that case, White Industries Australia Limited relied on the MFN clause in the India-Australia BIT to import more favourable rights from the India-Kuwait BIT. By excluding the MFN clause, India hopes to prevent 'treaty shopping' by investors. The fair and equitable treatment standard does not appear in the Indian Model BIT. Instead of the FET standard, India's Model BIT contains a provision entitled 'Treatment of Investments'.[532]

The Indian Model BIT also limits the treaty scope by carving out government procurement from the treaty and preserving regulatory space through a broad general exception clause. Although the Indian Government retains ISDS in its investment agreement, access to investment arbitration is more limited under the new framework. Article 15 of the India-Belarus BIT is titled "Conditions Precedent to Submission of a Claim to Arbitration" and requires that domestic remedy be exhausted before an Investor submits a claim to arbitration.

[530] Brazil-Malawi CIFA, Article 13(6). Emphasis added.
[531] E.g. the India-Australia BIT entered into force on 4 May 2000 and was unilaterally terminated by India on 23 March 2017.
[532] Whether FET standard is omitted from India's Model BIT or simply replaced is a matter of some debate.

India-Belarus BIT
ARTICLE 15
Conditions Precedent to Submission of a Claim to Arbitration

15 .1 In respect of a claim that the Defending Party has breached an obligation under Chapter 11, other than an obligation under Article 9 or 10, a disputing investor must first submit its claim before the relevant domestic courts or administrative bodies of the Defending Party for the purpose of pursuing domestic remedies in respect of the same measure or similar factual matters for which a breach of this Treaty is claimed. Such claim before the relevant domestic courts or administrative bodies of the Defending Party must be submitted within two (2) year(s) from the date on which the investor first acquired, or should have first acquired, knowledge of the measure in question and knowledge that the investment, or the investor with respect to its investment, had incurred loss or damage as a result.

For greater certainty, in demonstrating compliance with the obligation to exhaust local remedies, the investor shall not assert that the obligation to exhaust local remedies does not apply or has been met on the basis that the claim under this Treaty is by a different party or in respect of a different cause of action.

Mechanics of Reform

It is important that EAC economies reform their respective BIT programme. As ready noted, for most countries, the question is no longer whether reform is necessary but the nature and degree of reform that is needed. Should EAC countries decide to engage in meaningful reform, and how to reform?

1. First, reform should be methodical and complete. UNCTAD suggests a phased and comprehensive approach to reform. Under the phased approach, Phase 1 would focus on the substance of IIAs and address five policy important priority areas for reform.[533] Phase 2 of IIA reform calls attention to the risk that old-generation IIAs pose for host States and forces countries to consider how to modernize their old agreements. The focus of Phase 3 of IIA is on policy coherence and compels states to consider how to improve coherence, consistency and interaction between different levels and types of policymaking.
2. Second, reform should be gradual and incremental.[534] Countries would need to prioritize the sequencing of reform. Some countries may choose to start with key

[533] Regarding Phase 1 of IIA reform, UNCTAD has identified five priority areas are:

> "(i) safeguarding the right to regulate in the public interest while providing protection; (ii) reforming investment dispute settlement to address the legitimacy crisis of the current system; (iii) promoting and facilitating investment; (iv) ensuring responsible investment to maximize the positive impact of foreign investment and minimize its potential negative effects; and (v) enhancing the systemic consistency of the IIA regime so as to overcome the gaps, overlaps and inconsistencies of the current system and establish coherence in investment relationships….

UNCTAD's Reform Package, supra note 206, p 19.

[534] UNCTAD's Reform Package, supra note 206, p 19.

clauses in their IIAs, others may choose to focus primarily on the ISDS provisions in their IIA, and yet others may wish to start with reform of domestic legal framework and work their way up.

3. Third, for each country reform should target *all* IIAs and not just a select few or the most recent agreements. For EAC states, all IIAs would include BITs with developed economies, BITs with emerging market economies, and BITs with other African countries. Unlike North-South economic arrangements that are frequently assumed to be carry-overs from colonial arrangements of yester years, South-South arrangements are typically framed as cooperation alliances that rest firmly on the principles of South-South Cooperation.

The problem, however, is that the core principles that have historically informed the South-South Cooperation agenda – the principles of ownership, independence, equality and equity, non-interference in domestic affairs, mutuality of benefit, mutual respect, partnership, solidarity and collective self-reliance – are rarely reflected in the BITs that African countries have with one another or with other developing countries.

4. Fourth, reform should be guided by some agreed guidelines. With the goal of harnessing IIAs for sustainable development, countries may wish to consider the six guidelines for IIA reform guide that UNCTAD has proposed: (i) harness IIAs for sustainable development; (ii) focus on critical reform areas; (iii) act at all levels; (iv) sequence properly for concrete solutions; (v) ensure an inclusive and transparent reform process; and (vi) strengthen the multilateral supportive structure.[535] Countries should also review the visions and principles embedded in regional and continental documents such as the Africa Union Agenda 2063.
5. Fifth, for reform to be meaningful, it should be undertaken at multiple levels: national, bilateral, regional and multilateral. National-level reform action is the best place to start. Countries will need to carry out a national review of their BITs and identify areas where reform is needed. Ideally, countries should also conduct impact and risk assessment of their IIAs.

Following the national reviews, countries must consider developing a national IIA action plan. An IIA action plan is useless, unless implemented. For each country, the end game may be the development of a new model IIA, the unilateral termination of IIAs, domestic reforms such as harmonization of IIAs and domestic law, improved institution and increased awareness.

Holistic/Comprehensive Reform

1. Target all IIAs, future agreements as well as old-generation IIAs.
2. Target all treaty partners, developed as well as developing.
3. Target all IIA provisions, substantive as well as procedural.
4. Target all levels of government: domestic, bilateral, regional and multilateral.

[535] UNCTAD's Reform Package, supra note 206, p. 22.

Challenges of Reform

Successful review and reform of a country's IIA is a complicated, costly, challenging exercise. The challenges of reform are many and include strategic challenges (finding the right balance), systemic challenges (addressing inconsistency problems), coordination challenges, capacity challenges, and the particular challenges of weak economies.[536]

- Striking the Right Balance - In IIA reform, a state must find the right balance as between stability and flexibility and as between investment protection and broader public interest and sustainable development objectives. UNCTAD warns that taken too far, reform can deprive a country's IIA regime of one of its core fundamental purpose, which is investment protection.[537]

Moreover, a reform option that may be appropriate for a developed economy with a strong legal and regulatory system may not necessarily be appropriate for a least developed country with a weak and highly inefficient system. Ultimately, determining which reform options are right for a country requires a careful and fact-based analysis and input from stakeholders.

- Addressing Incoherence and Inconsistency - Lack of consistency is one of the major problems in the BIT framework of EAC countries. Presently, BITs involving EAC members are not synchronized at four critical levels of policymaking: national, bilateral, regional and multilateral levels.

The problem of overlap and fragmentation is likely to get worse when the Investment Protocol of the AfCFTA Agreement becomes operational. It is therefore very important that reform effort in the EAC bloc address the gaps, overlaps and fragmentation in the existing framework. It is also imperative that the problem of overlaps and fragmentation are addressed during the negotiation of the Investment Protocol of the AfCFTA.

- Coordination Challenges - Successful and comprehensive IIA reform requires action at multiple levels and requires that countries take numerous actions and engage with different treaty partners. Consequently, it is important that each country prioritize its reform action, implement reform action in measured incremental steps and ensure that all reform actions taken are well coordinated.[538]

Effective coordination may require that a government establish an inter-agency task force tasked with managing reform efforts. To ensure effective coordination of reform, the South African government elevated all decision-making in respect of BITs to an Inter-Ministerial Committee.[539]

- Capacity Challenges - Capacity constraints is a problem for poor countries and could make it extremely difficult for these countries to understand the full ramification of the commitments that they have made under the different BITs or to

[536] Id., p 8-9.
[537] Id.
[538] Id.
[539] Xavier Carim, "Update on the Review of Bilateral Investment Treaties in South Africa,"15 February, 2013, available at < https://www.thedti.gov.za/parliament/2013/bit's_in_sa.pdf >

engage in meaningful reform of these agreements. Given the number of agreements involved and the significant difference in the wordings and details of the agreements, expertise is needed to effectively review and revise the existing stock of BITs.

UNCTAD has rightly observed that "[t]he complexity of IIA negotiations and their likely impact on domestic policies calls for more capacity-building in developing countries, in particular least developed countries (LDCs)."[540] Lack of capacity limits the ability of countries to modernize their IIAs and negatively affects their bargaining power as regards future IIAs. UNCTAD warns that 'without an in-depth knowledge of international investment law and pertinent arbitral decisions, countries risk concluding IIAs that do not properly reflect their interests and objectives' and 'risk entering into commitments that they cannot implement at either the national or subnational levels or that inadvertently (and unnecessarily) limit the pursuit of government policies'.[541]

It is important that EAC states build their capacity in *inter alia*: (i) negotiating IIAs that effectively balance the goals of investment protection and those of sustainable development; (ii) litigating investor-State arbitration cases; (iii) understanding and appreciating the commitments they have taken on under their respective BITs; and (iv) equally understanding and appreciating the legal implications of their regulatory actions in terms of potential exposure to arbitral claims.

- Challenges Unique to Governance-weak Economies - There is no one-size-fits-all approach to reform. What works for one country may not necessarily work for another country. South Africa's approach to IIA reform may not necessarily work for some other countries in Africa. A country that has weak laws and institutions may find it harder to "exit" the system than a country that already offers protection to investors in line with the standards of the Organization for Economic Cooperation and Development. A survey of the legal and regulatory landscape of EAC economies reveals countries at different levels in terms of the quality and strength of institutions and the stability of business environment.

There is good news as well as bad news according to the World Bank's *Doing Business 2019*.[542] The good news is that two EAC economies (Rwanda and Kenya) are among the top ten economies with the most notable improvements and one-third of all business regulatory reforms recorded by *Doing Business 2019,* were in the economies of Sub-Saharan Africa. The bad news is that "large gaps exist between the performance of Sub-Saharan Africa and OECD high-income economies" and that "Sub-Saharan economies score significantly lower than the most efficient economies in all areas." The bad news also is that some of the worst performing countries are part of the EAC bloc.

[540] *Id.*

[541] *Id.*

[542] *Doing Business 2019* captured regulatory reform between June 2, 2017 and May 1, 2018. See World Bank, DOING BUSINESS 2019: TRAINING FOR REFORM (2019).

Table 49: EAC Economies - Ease of Doing Business, 2018 and 2019

Economy	Rank: 2019	Rank: 2018
Burundi	168/190	164
Kenya	61/190	80
Rwanda	29/190	41
South Sudan	185/190	187
Tanzania	144/190	137
Uganda	127/190	122

Source: Ease of Doing Business 2019

Given wide disparity in the quality and strength of the regulatory framework of EAC states, what works for one country may not necessarily work for another. The policy options that are right for Rwanda, a country that ranks #29 the *Doing Business Report* 2019 and has shown consistent improvements through the years, may not necessarily be appropriate for Burundi, a country that is one of the worst performing countries in the world. With its poor performance on the Doing Business rankings, and reports that suggest that its judicial system "seems largely discredited," completely abolishing the ISDS may not be the best option for Burundi at this time.[543]

Findings and Recommendations

The relationship between BITs and FDIs are ambiguous at best. The relationship between investment agreements and FDI inflows has not been established conclusively and remains a matter of considerable debate. Nevertheless, IIAs can play a positive role in a country's attractiveness Countries with weak institutions and poor regulatory climate have a much greater need to use investment treaties to bolster their image as jurisdictions that offer stability and certainty. It is imperative that EAC States engage in comprehensive reform of their BITs. Reform is needed at the national, bilateral, regional and multilateral levels. To be meaningful, reform must be comprehensive and must implicate existing BITs as well as investment agreements that are currently under active negotiation. It is equally imperative that EAC countries consider a new framework for international investment that not only supports national, regional and continental development vision and strategies but is also consistent with their obligation under various human rights and environmental instruments.

[543]A 2015 report by SEATINI notes that Burundi's judicial system "seems largely discredited." See SEATINI, INVESTMENT POLICIES OF EAC PARTNER STATES: LINKAGES WITH NATIONAL DEVELOPMENT PLANS, HUMAN RIGHTS, GENDER AND ENVIRONMENT SUSTAINABILITY (2015).

CHALLENGE	POINTS FOR CONSIDERATION
Getting the Necessary Political Commitment	1. IIA reform requires political will and commitment at the highest levels. It is important that political leaders in EAC States commit publicly to revamping their respective BIT program. Commitment is needed to carry out a meaningful review of existing agreements, to engage in meaningful reform, and to implement reform actions once they are decided. 2. It is recommended that EAC leaders commit publicly to investment policies that foster and protect investors and investors, respects the right of Governments to regulate in the public interest, ensures responsible investments, and are generally consistent with the objectives of sustainable development and inclusive growth. African leaders are often quick to reaffirm their commitment to investment liberalization but are not as quick to affirm their commitment to transparent, balanced, sustainable, development-oriented investment policies. This is unfortunate.[544] Across the globe, political leaders are committing publicly to reform their respective IIAs.[545] In a 2011 trade policy statement, the Julia Gillard government pledged that it "has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products…."[546]
Finding the Right Balance	1. One challenge to successful IIA reform is finding the right balance. It is important that a reform does not deprive a state's IIA regime of one of its primary purposes, which is the purpose of protecting investment.[547] 2. In their investment treaties, EAC economies should seek to achieve an overall balance of the rights and obligations as between host States and investors and take into account the needs of all stakeholders. 3. It is imperative that EAC Member States seek to create an enabling environment for investment at the same time that they seek to protect the right of host States to regulate in the public interest. In the preamble to the Pan-African Investment Code, Member States of the African Union "RECOGNIZ[E] the right of Member States to regulate all the aspects relating to investments within their territories with a view to meeting national policy objectives and to promote sustainable development objectives." 4. There is no one-size-fits-all approach to IIA reform and such an

[544] UNCTAD, Investment Policy Framework for Sustainable Development, UNCTAD/DIAE/ PCB/2012/5, Geneva, 2012, available at http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf

[545] For example, during his administration, President Obama promise that: "With regards to provisions in several FTAs that give foreign investors the right to sue governments directly in foreign tribunals, I will ensure that foreign investor rights are strictly limited and will fully exempt any law or regulation written to protect public safety or promote the public interest. And I will never agree to granting foreign investors any rights in the U.S. greater than those of Americans."

[546] Gillard Government Trade Policy Statement, "Trading Our Way to More Jobs and Prosperity", April 2011, p 14, http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobsand-prosperity.pdf

[547] UNCTAD's Reform Package, at p. 8.

	approach, even if it existed, will not work in the EAC region. In reforming their BIT program, countries must acknowledge weaknesses in their domestic legal and regulatory framework. Countries with weak institutions and less predictable regulatory environment are in a particularly difficult position.
Finding Voice in Future BIT Negotiations	1. EAC economies must strengthen their 'voice' in future IIA negotiations. Although there appears to be a positive relationship between economic power and consistency across a country's IIA, what a country lacks in economic power it can make up through coherent investment policy, clear negotiation strategy, careful treaty planning, and strong in-house expertise. 2. To strengthen their voice in IIA negotiations, EAC states can consider developing and using Model BITs. A Model BIT provides an opportunity for countries to codify their position on key issues and can help a country to enter negotiations prepared. Although Burundi, Kenya and Uganda, have developed their individual Model BITs, these instruments are outdated and must be updated. 3. Instead of each country developing its own model BIT, EAC economies should consider adopting, adapting and using existing Model BITs developed at the regional level such as the Pan-African Investment Code and the SADC Model Investment Treaty. 4. It is also recommended that EAC economies find their voice in broader global policy debates about the future of the international investment law regime. For example, on-going debate about the merits and demerits of an international investment court require the full attention and input of EAC States.
Achieving Coherence	1. Inconsistency, fragmentation and incoherence marks the BIT landscape of EAC economies. Presently, EAC BITs are not completely grounded in domestic, regional and continental development visions, policies and strategies. Regional policy instruments such as the Pan-Africa Investment Code and the COMESA Investment Treaty co-exist with a growing number of intra-African BITs and IIAs and have not replaced these agreements. Thus far, EAC economies have largely ignored the provision of Article 3(2) of the Pan-African Investment Code which provides, "Member States may agree that this Code replaces the intra-African bilateral investment treaties (BITs) or investment chapters in intra-African trade agreements after a period of time determined by the Member States." 2. In regards to new agreements with third States, it is recommended that EAC States take into account Article 3(3) of the Pan-African Investment Code which stipulates that "Member States and Regional Economic Communities (RECs) shall take into account as far as possible the provisions of this Code when entering into any new agreement with a third country in order to avoid any conflict between its present or future obligations under this Code and its

	obligations in the other agreement." 3. It is recommended that in the negotiations for the investment chapters of the TFTA Agreement and the AfCFTA Agreement, EAC Member States should raise and bring to the forefront the problem of fragmentation and inconsistency in the IIA regime of African States and offer concrete proposals on the way forward. 4. Investment treaties are not the only pathway to ISDS. In the past, ISDS claims have been brought against EAC state on the basis of investment contracts and domestic law. Should countries decide to exit the ISDS system or to reform the ISDS provisions of their BITs, it is important that they ensure coherence between their BIT obligations, domestic laws and policies between their BIT obligations and the investment contracts they conclude with individual investors, and between their BIT obligations and their obligations under multilateral treaties such as the ICSID Convention.
Transparency and Broad Public Participation	1. Transparency, broad stakeholder engagement, and accountability in a country's IIA regime are highly desirable and should guide reform action in the EAC region. According to the G20 Guiding Principles for Global Investment Policymaking, "regulation relating to investment should be developed in a transparent manner with the opportunity for all stakeholders to participate and embedded in an institutional framework based on the rule of law." 2. Parliament, the general public and relevant stakeholders, should be involved in reform efforts and kept fully abreast of future developments in this area. Before Cabinet adopted India's Model BIT in December 2015, a draft version was widely circulated for public comments[548] and was vetted by the Law Reform Commission of India.[549] 3. It is recommended that the legislative branch in EAC Member States, as far as constitutionally possible, take more active role in investment treaty negotiations. In established democracies, parliamentary oversight of trade and investment agreements is not at all unusual and is expected. The EU Parliament is actively involved in the EU's investment treaty efforts. 4. The level and quality of parliamentary involvement and oversight of investment treaty making varies from country to country but may include briefing on plans to enter into any treaty negotiation, periodic briefing about on-going treaty negotiations, access to all confidential documents relating to treaty negotiations, and parliamentary scrutiny of draft treaty texts. 5. It is recommended that EAC economies revisit their apparent

[548] Draft Model Text for the Indian Bilateral Investment Treaty, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf.

[549] Government of India, Law Commission of India, Report No 260, Analysis of the Draft Model Indian Bilateral Investment (August 2015), http://lawcommissionofindia.nic.in/reports/Report260.pdf

	decision not to ratify the multilateral instruments designed to enhance transparency in the ISDS system such as the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014); to date, no EAC Member State has signed or ratified the convention.
Capacity	1. Capacity constraints can affect the level and quality of IIA reform and must be proactively addressed. Successful IIA reform requires considerable financial and technical resources. 2. It is recommended that EAC Member States assess their capacity to engage in necessary reform and identify their capacity-building needs. 3. Five of Six EAC Member States are classified as least developed countries and may need help with IIA reform.[550] It is recommended that countries that lack the necessary expertise seek help from appropriate quarters including from organizations such as UNCTAD and UNICITRAL.

[550] United Nations, List of Least Developed Countries (as of December 2018), available at < file:///C:/Users/Uche/Documents/EAC/ldc_list.pdf>

CHAPTER 7: SPECIAL CONSIDERATIONS IN PRIORITISING REFORM FOR BILATERAL INVESTMENT TREATIES

For reforms to be effective, they must be comprehensive and exhaustive. Although no investment agreement should be left out, some categories of EAC BITs deserve more attention than others. Altogether, four categories of BITs desire the special, and perhaps urgent, attention of EAC members: (i) BITs between EAC states and other African countries; (ii) BITs between EAC economies and EU countries (EAC-EU BITs); (iii) unratified BITs; and (iv) old-generation BITs. Attention to these categories of BITs will go a long way towards improving the coherence in the investment policy framework of EAC economies and eliminating and/or reforming existing "high risk" agreements.

BITs Between EAC States and Other African Countries

Only one intra-EAC BIT exists; the Burundi-Kenya BIT was signed in 2009 and entered into force. However, EAC economies have concluded many BITs with other African States. Between them, EAC members have concluded 18 BITs with other African States. Rwanda has concluded 4 BITs with African State Parties, Kenya 3, South Sudan 1, Tanzania 4, and Uganda 5.

Table 50: EAC-Africa BITs

EAC Member State	African State Involved	Date of Signature	In force Treaties
Burundi	Comoros	18/5/2001	No
	Mauritius	18/5/2001	✓
	Egypt	13/5/2012	No
Kenya	Libya	5/6/2007	No
	Mauritius	7/5/2012	No
Rwanda	South Africa	19/10/2000	No
	Mauritius	30/7/2009	No
	Morocco	19/10/2016	No
South Sudan	Morocco	01/02/2017	No
Tanzania	Egypt	30/4/1997	No
	Zimbabwe	3/7/2003	No
	South Africa	22/9/2005	No
	Mauritius	4/5/2009	✓
Uganda	Egypt	4/11/1995	No
	South Africa	8/5/2000	No
	Eritrea	30/6/2001	No
	Nigeria	15/1/2003	No
	Zimbabwe	1/7/2003	No

Source: Author Compilation[551]

[551] Information available on: https://investmentpolicy.unctad.org/international-investment-agreements/by-economy

Of the 18 BITs concluded with other African States, only two (11 percent) are in force.[552] Of the 18 BITs with African State Parties, 15 were concluded prior to 2010 and can be considered "old-generation" agreements and only three were concluded after 2010: Kenya-Mauritius BIT (2012), Rwanda-Morocco BIT (2016), and South-Sudan-Morocco BIT (2017). To avoid further fragmentation and inconsistency in the investment policy framework of EAC States, it is important that questions are raised and addressed about existing agreements as well as future agreements.[553] Regarding EAC-Africa BITs, three questions arise. First, what should be done with the vast network of existing agreements, most of which are unratified and outdated?

Second, in the light of ongoing negotiations on the investment chapters of the COMESA-EAC-SADC TFTA Agreement and the Africa Continental Free Trade Area Agreement, what will be the fate of existing EAC-Africa BITs once these negotiations are successfully concluded?

Third, if and when the investment chapters of the COMESA-EAC-SADC Tripartite FTA Agreement and the Africa Continental Free Trade Area Agreement are in place, will EAC states retain the right to conclude individual investment agreements, and what principles would guide future action in this regard? The good news is that most EAC-Africa BITs are unratified and do implicate complex termination clauses or extensive stabilization clauses. The bad news is that most EAC-Africa BITs are old-generation agreements and are not exactly designed to advance continental developmental goals and vision.

It is recommended that EAC countries formally abandon all unratified EAC-Africa BITs. Considering that 89 percent of EAC-Africa BITs are not in force and that most of the BITs are old-generation agreements, abandonment would be the easiest course of action. One option would be to replace the abandoned treaties with new agreements. Another option would be to completely abandon existing bilateral arrangements and to foster new arrangements based on the emerging mega-regional treaties in the continent.

It is recommended that the two EAC-Africa BITs that are in force – the Tanzania-Mauritius BIT (2009) and the Burundi-Mauritius BIT (2001) – are terminated and replaced. The two agreements require separate treatment, however. The Burundi-Mauritius BIT was concluded on 18 May 2001 and entered into force on November 22, 2009. Pursuant to Article 13(3), the Burundi-Mauritius BIT has a ten-year initial duration which expired on November 22, 2019.

The Tanzania-Mauritius BIT is not about to expire. The Tanzania-Mauritius BIT Tanzania-Mauritius agreement was concluded on 4 May 2009 and entered into force 2 March 2013. Pursuant to Article 12(3) of the agreement shall remain in force for a period of ten years and shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination of this

[552] Burundi-Mauritius (2001). Tanzania-Mauritius BIT (2009). The Burundi-Kenya BIT (2009) is also in force.

[553] On December 30, 2018, Australia and Mexico agreed to terminate the Australia-Mexico BIT (2007), subject to transitional arrangements, upon entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) as between Australia and Mexico. On January 14, 2019, Australia and Vietnam agreed to terminate the Australia-Vietnam BIT (1991), subject to transitional arrangements, upon entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) as between Australia and Vietnam.

Agreement to the other Contracting Party. In effect, the Tanzania-Mauritius BIT must remain in force until March 2, 2023. Consequently, it is recommended that the Tanzania-Mauritius BIT be reviewed and possibly upgraded.

BITs Between EAC States and EU Members

A significant proportion of the BITs involving EAC members are with Western nations in general and EU states in particular. Owing to Africa's colonial history and the climates in the immediate aftermath of decolonization, the very first BITs that EAC Member State concluded were with Western nations.

Tanzania-Germany BIT was concluded January 30, 1965, followed by Tanzania-Switzerland (May 3, 1965), Uganda-Germany (November 29, 1966), Rwanda-Germany (May 18, 1967), and Kenya-The Netherlands (September 11, 1970). Most EAC-EU BITs are old-generation agreements and should be reviewed and possibly upgraded and/or abandoned. In total:

- Twenty-seven (27) BITs involving EAC countries are with EU members (**Annex 1**).
- Most of the EAC BITs involving EU members are old-generation agreements with some dating back to the 1960s and 1970s (**Annex 5**).
- Unlike EAC-Africa BITs, a majority of the EAC BITs involving EU members are binding and in force (**Annex 2**).
- Out of 27 BITs that EAC states have concluded with EU members, 23 are in force; only two are not in force; and only two have been terminated.
- Most of the EAC-EU BITs that are in force are past their initial term.
- Of the 27 BITs between EAC states and EU members, 26 were concluded prior to 2010. In other words, since 2010, EAC countries have concluded only one BIT with an EC Member State. The Kenya-Slovakia BIT was concluded in 2011 and is yet to enter into force.
- By June 30, 2019, most of the EAC-EU would have reached a stage where they could be unilaterally terminated immediately by one of the Contracting Parties.

Action Needed for BITs between EAC-EU

EAC states must give careful consideration to the network of BITs that they currently have with EU countries. Whether to terminate existing BITs and replace them with new ones and the modalities for such engagement, are issues that must be addressed. Europe is the main user of a significant number of BITs involving EAC members and ISDS claims from EU states account for a good number of cases against EAC countries. The supranational legal system of the EU and the changes ushered in by the Treaty of Lisbon Amending the Treaty on European Union (Lisbon Treaty) necessarily complicates the question of what to do with existing EAC-EU BITs but also highlights the urgent need for

reform.[554] The Lisbon Treaty, an international agreement between EU members, entered into effect on December 1, 2009, and introduced significant changes to the principal sources of EU law, namely, the Treaty establishing the European Economic Community ("EC Treaty" or "Treaty of Rome")[555] and the Treaty on European Union ("EU Treaty" or "The Maastricht Treaty").[556]

In accordance with Article 3(1)(e) of the Treaty on the Functioning of the European Union ('TFEU'), the European Union has exclusive competence with respect to the common commercial policy. The Lisbon Treaty transferred competence over FDI from the Member States to the EU by bringing it under the ambit of the EU's Common Commercial Policy ("CCP"). The Lisbon Treaty has effect for intra-EU BITs as well as for BITs between the EU and third States. For BITs between the EU and third States, at least two questions arise. First, what is the status, under EU law, of BITs that existed before the entry into force of the Lisbon Treaty? In other words, what is the fate of existing BITs between EU members and third States and can those agreements be amended or upgraded? Second, can individual EU countries negotiate and conclude BITs with third States and on what condition?

According to EU Regulation 1219/2012 and various pronouncements of the European Commission, BITs signed before December 1, 2009, remain binding on the Member States under public international law and will be progressively replaced by agreements of the EU relating to the same subject matter. Regarding whether EU members can conclude new BITs, essentially, EU has the primary competence to conclude new BITs with third States. However, individual EU members can continue to conclude BITs with third States only if so empowered by the EU, in accordance with Article 2(1) TFEU. Under the current framework, a Member State desiring to conclude a new BIT with a third State or to renegotiate an old agreement has to notify the EU authorities in writing of its intention at least five months before formal negotiations are to commence and must obtain EU authorization before commencing any negotiation. EU supervision of the negotiation process is required. Furthermore, before signing a bilateral investment agreement, the Member State concerned shall notify the EU Commission of the outcome of negotiations and shall transmit the text of such an agreement to the EU Commission.

Upon notification the EU Commission is mandated to make an assessment as to whether the negotiated BIT conflicts with the requirements of Article 9 (1) and (2). If the EU Commission finds that the negotiations have resulted in a BIT which fulfils the requirements of Article 9(1) and (2), only then can it authorise the Member State to sign and conclude such an agreement (Article 11, para. 4). There is, however, no evidence that the EU Commission is blocking EU members from negotiating treaties bilaterally.

---

[554] See generally Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 3, 2007, 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty]. see also Dr. Simon Duke, The Lisbon Treaty and External Relations, Bulletin of the European Institute of Public Administrations No. 2008/01, 13 ("[T]he Lisbon Treaty holds enormous potential for a more coherent Union on the international stage). See Marc Bungenberg Going Global? The EU Common Commercial Policy After Lisbon in EUROPEAN YEARBOOK OF INTERNATIONAL LAW 124 (C. Herrmann & J.P. Terhechte eds., 2009).

[555] See Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3 [hereinafter EC Treaty]

[556] See Treaty on European Union (EU), 7 February 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253 [hereinafter EU Treaty]. Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT

What then is the fate of EAC-EU BITs under the Lisbon Treaty framework?

1. First, existing EAC-EU BITs remain valid under EU law and can be terminated pursuant to the provision of the relevant agreements.
2. Second, considering that most EAC-EU BITs are old-generation agreements in urgent need of reform, it is recommended that EAC countries consider terminating those agreements whose initial duration have expired.
3. Third, EAC members may choose to negotiate new agreements with individual EU members but this would require EU authorization and supervision. Moreover, any resulting treaty must be approved by the EU Commission.[557]
4. Fourth, EAC states may choose to negotiate new BITs directly with the EU instead of negotiating with individual EU members.[558]

The EU has concluded several trade/investment agreements with third states including, Canada-EU Comprehensive Economic and Trade Agreement (2016) and EU-Singapore Investment Protection Agreement (2018).[559] The EU is currently negotiating IIAs with a number of countries, including China.[560]

Should EAC states decide to conclude new IIAs and to engage directly with the EU, they must understand that the EU has so far shown a preference for comprehensive trade and investment agreements instead of stand-alone BITs.[561] The new agreements introduce enhanced rules on investment protection at the same time that they explicitly guarantee the right of governments to regulate in the interest of their citizens.[562] EAC states should assess the costs, benefits and full implication of any possible investment treaty with the EU and critically assess their capacity to negotiate such a treaty. For example, once concluded and ratified, an investment agreement with the EU will extend treaty benefits to investors in all twenty-eight Member States of the European Union. It is important that EAC states study and understand the EU's evolving position on IIA reform in general and ISDS in particular.

In the last few years, the EU has introduced some unique reform features into its IIAs. For example, the EU has moved away from the system of investor-State arbitration and is replacing it with the investment court system. Therefore, the effect of the competence shift triggered by the Lisbon Treaty is profound and affects both intra-EU BITs and BITs between EU countries and third States. Going forward, third States must critically assess their existing arrangements with individual EU members and determine the best way

[557] A few EU Member States have continued to negotiate and conclude individual BITs. France concluded a BIT with Colombia in 2014. Greece concluded BITs with Kuwait and the United Arab Emirate in 2014.

[558] European Commission, Negotiations and Agreements. Retrieved from http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/

[559] European Commission. *Overview of FTAs and Other Trade Agreements (Updated May 2019).* Retrieved from http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

[560] European Commission, Overview of FTA and Other Trade Negotiations (Updated May 2019), http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf. See also European Commission, Report on Implementation of EU Free Trade Agreements 1 January 2017 - 31 December 2017, available at < http://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157468.pdf>

[561] The EU-Singapore Investment Protection Agreement was signed October 15, 2018 and has not entered into force. The EU – Japan Economic Partnership Agreement was signed on July 17, 2018, and entered into force on February 1, 2019. The EU is currently negotiating IIAs with a number of countries including Vietnam, Mexico, New Zealand, and Australia.

[562] European Commission – Press Release, European Commission Proposes Signature and Conclusion of EU-Canada Trade Deal, 5 July 2016. Available at < http://europa.eu/rapid/press-release_IP-16-2371_en.htm>

forward. The good news is that like many countries around the world, the EU has expressed some dissatisfaction with the existing IIA regime and is open to reforming the system.

The good news also is that the European Parliament is very much in support of reform and is also pushing for sustainable development oriented IIAs. For example, in its resolution of October 2013, on the EU-China negotiations for a bilateral investment treaty, the European Parliament among others "stressed that the agreement must oblige Chinese investors in the EU to comply with European social standards and social dialogue arrangements."[563] The European Parliament also, "underlined the need for the EU-China bilateral investment agreement to deliver on both sustainable growth and job creation, and to foster synergies and positive spill-over effects with other regional trade and investment agreements to which the EU or China is a party,"[564] and "called on the Commission to complement its impact assessment by also assessing the impact of the EU-China investment agreement on human rights."[565]

Unratified BITs

Unratified BITs make up a significant proportion of the BIT stock of EAC states. Of the 72 BITs involving EAC countries that are still active (not terminated), 50 per cent (36) are unratified (**Annex 2**). Most of the unratified BITs involving EAC states are with African States and other developing countries. Although unratified BITs are not binding under international law, they do trigger some obligations. First, pursuant to Article 18 of the Vienna Convention on the Law of Treaties, "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty … until it shall have made its intention clear not to become a party to the treaty."

Second, unratified treaties become problematic if they apply provisionally. Pursuant to Article 25 of the VCLT, a treaty or a part of a treaty is applied provisionally pending its entry into force if the treaty itself so provides or the negotiating States have so agreed. The provisional application of a treaty, or a part of a treaty with respect to a State, shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty. An unratified, old-generated agreement is a source of potential risk for a host State because it can be ratified at any time without proper vetting and without broad stakeholder engagement. It is not unknown for African States to ratify an agreement years after the agreement was signed.[566] Three to five years gaps between when a BIT was signed and when it entered into force are not uncommon.

The Equatorial Guinea - Russian Federation BIT (2011) was signed on June 6, 2011, and entered into effect on March 3, 2016. The Korea, Republic of - Rwanda BIT (2009) was

[563] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0411+0+DOC+XML+V0//EN at para. 34.
[564] Id., para. 35.
[565] Id. para. 36.
[566] Countries in Africa are not unique in this respect. Kazakhstan - Slovakia BIT (2007) was signed on November 21, 2007, and only entered into force on June 29, 2016.

signed in 2009, and entered into effect on February 16, 2013. The Madagascar - Switzerland BIT (2008) was signed on November 19, 2008, and entered into effect more than six years later on May 7, 2008. The Mauritania – Spain BIT (2008) was concluded on July 24, 2008, and only entered into force on March 7, 2016.Ordinarily, an extended gap between the time a treaty is concluded and the time it enters into force may not present any problem for the Contracting States.

However, in the context of international investment treaties, ratifying an IIA so many years after the agreement was initially concluded is a very risky for any government.

1. First, many of EAC's unratified IIAs are old-generation agreements in urgent need for reform.
2. Second, ratifying old-generation agreements with all their shortcomings will exacerbate the fragmentation and incoherence in the investment policy framework of EAC members.
3. Third, given an IIA's initial fixed duration and survival period, ratifying an old-generation agreement will lock Contracting Parties into bad agreements and expose them to considerable legal risk for many years to come.

It is recommended that EAC States abandon most of their unratified BITs. Also, it is suggested that all unratified BITs concluded prior to 2010 be abandoned. For unratified BITs concluded after 2010, a case-by-case approach is suggested. Unratified BITs concluded after 2010 should be reviewed and their quality carefully assessed. Although some recent BITs involving EAC states contain reform features, many do not. Moreover, even recent BITs with reform elements still have considerable shortcomings. For example, although concluded in 2016, the Rwanda-Morocco BIT lacks most of the reform elements discussed in this report. A comparison of the preamble to the Rwanda-Morocco BIT (2016) and the Morocco-Nigeria BIT (2016) buttresses this fact.

Table 51: Preamble Comparison of BITs

TREATY	PROVISIONS
Rwanda-Morocco BIT (2016) Preamble	The Government of the Republic of Rwanda and the Government of the Kingdom of Morocco (hereinafter referred to as the Contracting Parties); -Desiring to intensify the economic cooperation to the mutual benefit of both Contracting Parties; -Intending to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party; -Recognizing that the reciprocal promotion and protection of investments under this Agreement shall be conducive to the stimulation of individual business and increase prosperity in both Contracting Parties; Have agreed as follows:

Morocco-Nigeria BIT (2016) Preamble	The Government of the Kingdom of Morocco; and the Government of the Federal Republic of Nigeria hereinafter referred to as the "Parties" DESIRING to strengthen the bonds of friendship and cooperation between the State Parties; RECOGNIZING the important contribution investment can make to the sustainable development of the state parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development; SEEKING to promote, encourage and increase investment opportunities that enhance sustainable development within the territories of the state parties; UNDERSTANDING that sustainable development requires the fulfillment of the economic, social and environmental pillars that are embedded within the concept; REAFFIRMING the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives and taking into account any asymmetries with respect to the measures in place, the particular need of developing countries to exercise this right; SEEKING an overall balance of the rights and obligations among the State Parties, the investors, and the investments under this Agreement; HAVE AGREED as follows:

Old-generation BITs

A considerable number of BITs involving EAC countries were concluded before the year 2010. Not counting the BITs that have been terminated, 70.8 percent of the BITs concluded by EAC members (51 BITs in all) were concluded prior to 2010 and can be classified as old-generation agreements.

Burundi and Rwanda both have 7 old-generation BITs, followed by Kenya (10), Uganda (14) and Tanzania (14). The situation of Uganda is particularly staggering; 14 of Uganda's 15 BITs were concluded prior to 2010. Overall, except for Kenya-Slovakia BIT (2011), all the BITs between EAC states and EU members were concluded prior to 2010. Although EAC countries have concluded some recent treaties that contain reform elements, most of the recent BITs that EAC states have concluded have not entered into force. Overall, EAC states have more old-generation BITs in force than BITs with reform features.[567]

[567] UNCTAD's Reform Package, at p. 73.

The Problems with Old-Generation BITs

Old-generation IIAs pose considerable problem for States and have the potential to undermine broader sustainable development objectives. There are at least four problems with old-generation IIAs. First, most old-generation BITs were negotiated at a time when the spotlight was not on investor responsibility, on sustainable development, human rights and environmental protection. Further, international investment policy did not emphasize the need to appropriately balance the rights of investors vis-à-vis those of host States. Old-generation BITs contain few exceptions and safeguards, do not address the right of States to regulate in the public interest, contain vague and broadly worded substantive provisions, and are almost always completely silent on investor obligation.

Table 52: ISDS, EAC States and Old Generation BITs

ISDS	Instrument Invoked by Year of Signature
Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi (ICSID Case No. ARB/01/2)	BLEU (Belgium-Luxembourg Economic Union) – Burundi BIT (1989)
Antoine Goetz and others v. Republic of Burundi (II) (ICSID Case No. ARB/01/2)	BLEU (Belgium-Luxembourg Economic Union) – Burundi BIT (1989)
Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22	Tanzania – United Kingdom BIT (1994)
Standard Chartered Bank v. The United Republic of Tanzania, ICSID Case No. ARB/10/12	Tanzania – United Kingdom BIT (1994)
Joseph Houben v. Republic of Burundi (ICSID Case No. ARB/13/7)	BLEU (Belgium-Luxembourg Economic Union) – Burundi BIT (1989)
Tariq Bashir and SA Interpétrol Burundi v. Republic of Burundi (ICSID Case No. ARB/14/31)	BLEU (Belgium-Luxembourg Economic Union) – Burundi BIT (1989)
Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya (ICSID Case No. ARB/15/29)	Kenya – United Kingdom BIT (1999)
Total E&P Uganda BV v. Republic of Uganda (ICSID Case No. ARB/15/11)	Netherlands – Uganda BIT (2000)
Agro EcoEnergy Tanzania Limited, Bagamoyo EcoEnergy Limited, EcoDevelopment in Europe AB, EcoEnergy Africa AB v. United Republic of Tanzania (ICSID Case No. ARB/17/33)	Sweden – Tanzania BIT (1999)
Sunlodges Ltd (BVI) and Sunlodges (T) Limited v. The United Republic of Tanzania (PCA Case No. 2018-09)	Italy – United Republic of Tanzania BIT (2001)
Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda (ICSID Case No. ARB/18/21)	Rwanda – United States of America BIT (2008)
Ayoub-Farid Michel Saab v. United Republic of Tanzania (ICSID	Tanzania – Netherlands BIT

Case No. ARB/19/8)	(2001)
EcoDevelopment in Europe AB, EcoEnergy Africa AB v. United Republic of Tanzania (ICSID Case No. ARB/17/33).	Sweden – United Republic of Tanzania BIT (1999)
Richard N. Westbury, Paul D. Hinks and Symbion Power Tanzania Limited v. United Republic of Tanzania (ICSID Case No. ARB/19/17)	Tanzania – United Kingdom BIT (1994)

Source: Author Compilation[568]

Second, old-generation investment agreements expose host States to considerable legal risks and liabilities and are frequently the basis for investment arbitration. As UNCTAD aptly notes, "old treaties bite." A considerable number of known ISDS cases involving EAC members are based on BITs that were concluded prior to 2010. Third, many old-generation agreements are riddled with ambiguities, create interpretive problems for Contracting States, and make implementation extremely difficult. A review of ISDS cases involving EAC states suggest that frequently, vague BIT provisions and limited safeguards in the agreements are some of the reasons why liability is found. Fourth, old-generation BITs "create overlaps and fragmentation in treaty relationships as well as interaction challenges within the IIA network, and between IIAs and other areas of international policymaking."[569] Old-generation agreements can totally undermine the carefully-negotiated balance in more recent agreements due to the operation and effect of unqualified MFN clauses.

Options for Reforming Old-generation BITs

Given the risks and challenges associated with old-generation IIAs, it is recommended that EAC economies review and reform these agreements. Fortunately, several options for dealing with old-generation IIAs are beginning to emerge. Regarding old-generation IIAs, UNCTAD has proposed ten policy options including:

1. Withdrawing from multilateral treaties 2. Terminating existing old treaties 3. Abandoning unratified old treaties 4. Engaging multilaterally 5. Joint treaty interpretation	6. Amending treaty provisions 7. Replacing outdated treaties 8. Consolidating the IIA network 9. Managing relationships between coexisting treaties 10. Referencing global standards.

[568] Information Available at: https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx
[569] UNCTAD's Reform Package, at p. 73.

Of the ten policy options proposed, the quickest, easiest, most manageable and most cost-effective for EAC countries are likely to be terminating existing old treaties and abandoning unratified old treaties. States considering terminating old agreements must pay attention to the termination clause and survival clause of their respective agreements and abide by them. Joint treaty interpretations are generally aimed at clarifying ambiguous treaty terms and clauses and can help reduce uncertainty in a country's IIA regime. Some countries are already engaging or attempting to engage in joint interpretation of some provisions in their IIAs.

For example, in 2016, India proposed a "Joint Interpretative Statement" to twenty-five (25) countries and sought to clarify the meaning and scope of ambiguous terms such as "investor," "investment," and "fair and equitable treatment."[570] Although joint interpretation can be less time-consuming than treaty amendment or treaty renegotiation, it has its drawbacks and may not be the best option for EAC members. First, most old-generation BITs involving EAC states do not provide for joint interpretation by contracting parties.

Second, joint interpretation requires the active cooperation of treaty partners and this cooperation may not always be forthcoming as India's experience demonstrates. Out of the twenty-five (25) countries that India invited to engage in joint interpretation, only one country (Bangladesh) has concluded and signed a binding Joint Interpretative Statement with India. Third, joint interpretation is designed to address isolated interpretative problems in a treaty and may not be the best option for addressing interpretative problems in multiple treaties. Between them, EAC countries have about fifty-one (51) old-generation BITs to contend with and joint-interpretation as the pathway to reforming these treaties is likely to prove costly, cumbersome, and inefficient. Fourth, only few countries have engaged in joint interpretation and fewer have done so satisfactorily. Consequently, EAC members may have hard time finding countries to learn from.

Given the number of old-generation BITs involved and the numerous interpretative challenges that each agreement presents, the best approach to old-generation agreements involving EAC states may be to terminate treaties whose initial term have expired or to plan to terminate those treaties that are nearing expiration. For all other treaties that have not expired and are not nearing expiration, joint interpretation could be considered on a case-by-case basis. Should EAC countries wish to consider joint interpretation, it is important that they review the costs and benefits of joint interpretation, consider other possible alternatives, and assess their capacity and capability to engage in meaningful and successful joint interpretations. It is also important that they consider the most cost-effective way to achieve joint interpretation. One option (the Indian approach) may be to propose the same joint interpretative statement to multiple countries. India proposed the joint interpretative statement to twenty-five countries.

[570] See India's Consolidated Interpretive Statement (February 8, 2016).

Instead of or in addition to joint interpretation, EAC members may wish to consider treaty replacement. A growing number of countries are already doing this. For example, Australia and Uruguay signed a new BIT (Australia-Uruguay BIT) on April 5, 2019. Both countries have agreed that when the new agreement enters into force it will replace an older agreement – the 2002 Agreement between Australia and Uruguay on the Promotion and Protection of Investments.[571] Treaty replacement is not very common and has its own unique challenges. Negotiating a new treaty has cost implications for developing countries and requires the active cooperation of treaty partners. Should EAC states wish to consider treaty replacement as an option, it is important that they assess the costs and benefits of this option and seriously assess their capacity to engage in serious treaty negotiate. Needless to say, treaty replacement is only useful if it produces an agreement that is an improvement over the agreement that it replaced.

Regarding old-generation IIAs, the reform options available to states are not mutually exclusive. Consequently, a country could consider a combination of several reform options. However, experts warn that "some combinations of reform options may result in a treaty regime that is largely deprived of its traditional investment protection rationale or may result in a complete exit from the IIA regime."[572] In the final analysis, a decision about reform option requires "a careful and fact-based cost-benefit analysis."[573]

[571] http://www.austlii.edu.au/au/other/dfat/treaties/2003/10.html

[572] UNCTAD Reform at 77.

[573] Id. at 76

Findings and Recommendations

To ensure coherence in their international investment policy, address gaps in their stock of BITs, and reduce their exposure to considerable legal risks and ISDS claims, EAC states must (i) review their BITs; (ii) critically assess the costs and benefits of their IIAs; and (iii) address glaring problems in most of their BITs. Although a holistic and comprehensive reform requires that EAC countries pay attention to all BITs, some agreements deserve more urgent attention. It is advised that EAC members pay attention to four categories of BITs: (i) BITs between EAC states and other African countries; (ii) BITs between EAC economies and EU members (EAC-EU BITs); (iii) unratified BITs; and (iv) old-generation BITs.

A Time to Review BITs in the EAC

1. It is time for each EAC state to rethink its BIT programme and for the EAC bloc to evaluate its broader IIA strategy. One of the goals of a comprehensive review is to assess the true costs and benefits of international investment regime for each EAC economy and for the region as a whole. Another goal is for each State to take stock and identify the gaps and problems in its BIT regime.
2. The review should address all BITs paying particular attention to four categories of investment treaties: old-generation BITs, unratified BITs, EAC-EU BITs, as well as EAC-Africa BITs. In force BITs that have expired or about to expire deserve urgent attention. It is important that each BIT is reviewed in terms of coverage, content (both the substantive aspects and the procedural aspects), partners, benefits and costs.
3. The Model BITs of Kenya, Burundi and Uganda are outdated and fall short in many important respects. It is recommended that these three model BITs be completely abandoned and, if necessary, replaced.
4. Although fairly recent, the draft EAC Model BIT (2016) falls short in some important respects and should be reviewed, and perhaps, updated. As part of the review process, the EAC Model BIT (2016) should be put up for wide public comments and suggestions.
5. Until the necessary reviews are carried out, it is recommended that EAC economies observe a timeout and 'pause' negotiating and concluding any new BITs.
6. No specific reform path is recommended in this report. A successful and comprehensive BIT review should prompt each EAC state to make some strategic choices. Each country must address at least four specific issues: (i) whether or not to have IIAs; (ii) whether or not to disengage from existing IIAs; (iii) whether or not to engage in IIA reform; and (iv) how to reform and the degree of reform.[574] Studies show, and this report demonstrates. that on these very important policy issues, countries are coming to vastly different conclusions.
7. Although no specific reform path is recommended, inaction is not an option. Action is urgently needed on multiple fronts particularly the ISDS provisions of old-generation agreements. With some of their BITs boasting 20-year initial duration and 20-year survival periods, it will be a very long time before some EAC States are free from the

[574] UNCTAD's Reform Package, at p. 18-19.

effects of some of the treaties they have concluded. Even if all old-generation BITs are terminated today, the effect of some of these agreements will be felt for a long time to come, some until 2039.

8. Although no specific reform path is recommended, what each EAC economy urgently needs is an international investment policy regime that is transparent, effective, coherent, balanced, and oriented towards sustainable development.[575]

A New Generation of BITs

9. Should EAC Member States decide to continue to keep their existing BITs and to conclude new investment treaties, it is recommended that they move towards a new generation of investment treaties, ones that are oriented towards sustainable development and strike an appropriate balance as between investment protection and respecting regulatory space, and as between investor protection and investor obligation.
10. Reform should be methodical, strategic, and comprehensive. A phased approach to reform is recommended. Phase 1 should concern the substance of the BITs and should address the five policy priority areas identified in this report.[576] Phase 2 of the reform should address the existing stock of old-generation IIAs. Finally, Phase 3 of IIA should focus on improving coherence, consistency and interaction between different levels and types of policymaking.
11. Reform should be holistic, multi-level, and comprehensive. Reform should target all BITs – BITs between EAC economies and developed countries, BITs between EAC economies and emerging market economies, BITs between EAC economies and other African States, old-generation BITs as well as more recent agreements.
12. Reform should be guided by agreed guidelines. In this regard, the six guidelines for IIA reform proposed by UNCTAD merits serious consideration: (i) harness IIAs for sustainable development; (ii) focus on critical reform areas; (iii) act at all levels; (iv) sequence properly for concrete solutions; (v) ensure an inclusive and transparent reform process; (vi) strengthen the multilateral supportive structure.[577]
13. With any reform, national-level reform action should be the starting point. It is recommended that each EAC economy carry out a comprehensive national review of its BITs, identify areas where reform is needed, prioritize reform actions and plans, and act.
14. It is recommended that following the national review of their respective IIAs, each country should develop a national IIA action plan as part of a larger trade, investment and development agenda. A national IIA strategy should address a host of issues including; whether to conclude IIAs in the future, the design criteria of future IIAs, and the approaches for IIA reform.
15. A regional IIA action plan is also urgently needed. Given the gradual shift in Africa from BITs to regional IIAs, it is important that international investment policies of the emerging mega-regional framework are clear and consistent with evolving best

---

[575] See The Draft Joint ACP-UNCTAD Guiding Principles for Investment Policy Making. See also, the G20 Guiding Principles for Global Investment Policymaking.

[576] UNCTAD's Reform Package, at p. 7 ("IIA reform should aim at (i) safeguarding the right to regulate in the public interest while providing protection; (ii) reforming investment dispute settlement to address the legitimacy crisis of the current system; (iii) promoting and facilitating investment; (iv) ensuring responsible investment to maximize the positive impact of foreign investment and minimize its potential negative effects; and (v) enhancing the systemic consistency of the IIA regime so as to overcome the gaps, overlaps and inconsistencies of the current system and establish coherence in investment relationships.").

[577] UNCTAD's Reform Package, at p. 22.

practices.

16. It is recommended that EAC institutions, in particular the East African Legislative Assembly, become more engaged in IIA rulemaking and implementation. It is also recommended that the role of regional bodies in international investment rulemaking is addressed in the investment chapters of the TFTA Agreement and AfCFTA Agreement.
17. Should EAC economies decide to continue to conclude new investment treaties, it is recommended that they only conclude 'smart IIAs' and that they only negotiate new agreements on the basis of clearly defined and transparent negotiation strategies. Across the globe, although countries are continuing to use IIAs as a tool for international investment policy making, they are becoming savvy, strategic and smart about the IIAs that they conclude.

SECTION FOUR:
CONCLUSION

CHAPTER 8: PATHWAYS IN TREATY REFORM

This report offers an assessment of the BITs involving states of the EAC that are publicly available and are in force. The relevant BITs were assessed against the backdrop of the present crisis in the international investment law regime and reform efforts already underway in many jurisdictions around the globe. The report offers an overview of BITs involving EAC countries that are in force and highlights the short comings in the BIT regime of EAC economies. The report is intended to serve as a wake-up call to EAC economies: about the changing context and dynamics of investment policy making, the need for a thorough and very comprehensive review of their respective BITs, and of the need to engage in a comprehensive, holistic, multi-level reform of their respective BIT regime. Considering that IIA reform "has entered the mainstream of international investment policy making," the question is no longer whether EAC members should engage in reform, but the nature, extent and modalities of the reform.[578] For each EAC member state and for the EAC region as a whole, the goal ultimately should be an international investment treaty regime that advances the goals of sustainable development and works for all stakeholders.

In designing their international investment policy, EAC states adopted liberal investment policies aimed at attracting investment and promoting export-oriented economies.[579] With a particular focus on attracting foreign investment, EAC countries slowly and steadily jumped into the IIA bandwagon, many without any serious assessment of the costs and benefits of IIAs. The first IIA concluded by an EAC Member State was concluded in January 1965. What was a trickle in the 1960s turned into a floodgate in the 1990s and the 2000s. BITs proliferated the EAC in the 1990s and 2000s in the wake of liberalization pressure. Today, although the rate at which EAC members are concluding BITs has slowed down considerably, EAC economies are not necessarily shying away from international investment agreements nor are they exiting from ISDS. The last time Burundi concluded a BIT was on 14 June 2017, Kenya on 28 August 2016,[580] Rwanda on 1 November 2017, [581] South Sudan on 1 February 2017, Tanzania on 17 November 2013 and Uganda on 11 November 2017.[582] However, the rate of entry into force of these agreements has decelerated. Since 2010, only eight BITs involving EAC economies have entered into force. The last time a BIT involving Uganda entered into force was on 1

[578] UNCTAD Reform Package, supra note 206, p. 7.

[579] See e.g. United Republic of Tanzania (URT) (1996), "The National Investment Promotion Policy", President's Office Planning Commission, Dar es Salaam, Tanzania; United Republic of Tanzania (URT) (1997), "Tanzania Investment Act 1997", Dar es Salaam, Tanzania; Uganda Investment Authority, Uganda Investment Code, 1991 (Amended 2000) UNCTAD (1993).

[580] Kenya-Japan BIT (2016).

[581] Rwanda-UAE BIT (2017).

[582] Uganda-UAE BIT (2017).

January 2005; Burundi on 22 November 2009; and Rwanda on 16 February 2013.[583] South Sudan's only BIT (with Morocco) is not yet in force.

An examination of the existing BITs involving EAC countries presents a disturbing picture in the sense that:

- More than half of the BITs involving EAC members are old-generation agreements in urgent need of reform.
- Most old-generation BITs involving EAC states are in force and have ISDS mechanisms that can be triggered at any time.
- Although some recent BITs involving EAC countries contain reform features, most of these recent BITs have not been ratified and are not in force[584].
- Most BITs involving EAC members provide for ISDS and thus expose EAC economies to considerable legal risks.
- With some BITs boasting 20-year survival periods, EAC economies are likely to feel the impact of their unreformed BITs for many years to come. For example, although the termination of the Tanzania-Netherlands BIT became effective on 1 April 2019, Tanzania remains vulnerable and investors that rely on this treaty as a basis for investment arbitration for the next fifteen-years, until 31 March 2034.
- Since 1995 when the first publicly known ISDS case was initiated against an EAC state, the number of known ISDS cases involving EAC States has grown steadily.
- BITs involving EAC states are not completely grounded in domestic, regional, and continental development goals and strategies.
- The BIT framework of each EAC countries is fragmented and incoherent. Overall, EAC economies have done a poor job ensuring coherence between their BIT obligations and domestic policies and ensuring coherence between their BIT obligations and their other international obligations.

In international investment law rulemaking, EAC economies are "rule takers" rather than "rule givers." In most instances, EAC economies do not negotiate BITs based on any model text, do not subject negotiating text through rounds of thoughtful review and revisions, and they willingly sign BITs that are based almost exclusively on the model BIT of negotiating partners. EAC countries are rule takers when they are negotiating with developed countries as well as when they are negotiating with developing countries. Where reform elements appear in recent agreements involving an EAC states, those elements are not the result of hard bargaining on the part of EAC members but rather are introduced by negotiating partners.

The Rwanda-United States of America BIT (2008) is based wholly on the US 2004 Model BIT.[585] Similarly, Canada's BITs with African nations, including EAC states, are based

---

[583] The last time a BIT involving Kenya entered into force was on September 14, 2017. The last time a BIT involving Tanzania entered into force was on April 7, 2014.

[584] See e.g. Rwanda-UAE BIT (2017).

[585] TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF [Country] CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT. <https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf>.

almost exclusively on Canada's Model BIT.[586] All the recent BITs that Canada concluded with countries in Africa (BITs signed between 2010 and 2019) are based on Canada's Model Foreign Investment Protection and Promotion Agreement ("FIPA").[587] A similar trend can be observed in BITs between EAC countries and emerging market economies such as China and Turkey.[588] In their BITs with Turkey, EAC members appear to be 'rule takers'. Thus, all four BITs that Turkey has concluded with EAC states – Turkey-Tanzania BIT (2011), Turkey-Kenya BIT (2014), Turkey-Rwanda BIT (2016) and Turkey-Burundi BIT (2017) – contain very similar wordings and exhibit considerable similarities to one another and to other recent BITs that Turkey has concluded with other countries in Africa.[589]

A comparison of the BITs that EAC countries have concluded with Turkey underscores the fact that in investment policymaking, EAC members are comfortable following the lead of negotiating partners, that they rarely subject each BIT that they sign to meaningful review, and that they do not seek to ensure that each BIT is tailored to their individual needs and strategic interest. A comparison of two recent BITs that EAC states have concluded with Turkey – Rwanda-Turkey BIT (2016) and Turkey-Burundi BIT (2017), reveals that almost every text in the two agreements are identical and are patterned after Turkey's most recent Model BIT.

Table 53: Rwanda-Turkey BIT and Turkey Burundi BIT Compared

Rwanda-Turkey BIT (2016)	**Turkey-Burundi BIT (2017)**
Article 1 (Definitions)	Article 1 (Definitions)
Article 2 (Scope of Application)	Article 2 (Scope of Application)
Article 3 (Promotion and Protection of Investments)	Article 3 (Promotion and Protection of Investments)
Article 4 (Treatment of Investments)	Article 4 (Treatment of Investments)
Article 5 (General Exceptions)	Article 5 (General Exceptions)
Article 6 (Expropriation and Compensation)	Article 6 (Expropriation and Compensation)
Article 7 (Compensation for Losses)	Article 7 (Compensation for Losses)
Article 8 (Repatriation and Transfer)	Article 8 (Repatriation and Transfer)
Article 9 (Subrogation)	Article 9 (Subrogation)
Article 10 (Settlement of Disputes between One Contracting Party and Investors of the Other Contracting Party)	Article 10 (Settlement of Disputes between One Contracting Party and Investors of the Other Contracting Party)
Article 11 (Denial of Benefits)	Article 11 (Denial of Benefits)

---

[586] Between 2010 and 2019, Canada concluded BITs with nine African states: Benin (January 2013), United Republic of Tanzania (May 2013), Cameroon (March 2014), Nigeria (May 2014), Senegal (November 2014), Mali (November 2014), Cote d'Ivoire (November 2014), Burkina Faso (April 2015) and Guinea (May 2015). All the BITs are based on Canada's 2004 Model BIT. See AGREEMENT BETWEEN CANADA AND ------------------------- FOR THE PROMOTION AND PROTECTION OF INVESTMENTS, < https://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf >

[587] UNCTAD, International Investment Agreement Navigator – Canada < https://investmentpolicy.unctad.org/international-investment-agreements/countries/35/canada >

[588] See Uche Ewelukwa Ofodile, 'Emerging Market Economies and International Investment Law: Turkey-Africa Bilateral Investment Treaties' (2019) Vol. 52 No 3 Vanderbilt Journal of Transnational Law.

[589] UNCTAD, International Investment Agreement Navigator – Turkey, < https://investmentpolicy.unctad.org/international-investment-agreements/countries/214/turkey >

Article 12 (Settlement of Disputes between The Contracting Parties)	Article 12 (Settlement of Disputes between The Contracting Parties)
Article 13 (Transparency)	Article 13 (Service of Documents)
Article 14 (Entry into Force, Duration, Amendment and Termination)	Article 14 (Entry into Force)

The similarity between the Rwanda-Turkey BIT (2016) and Turkey-Burundi BIT (2017) go well beyond the titles and sub-titles of their respective articles; almost every article has identical texts.[590] A comparison of the provision on expropriation in both agreements buttresses this fact.

Table 54: Rwanda-Turkey BIT and Burundi-Turkey BIT Compared

Rwanda-Turkey BIT (2016)	Turkey-Burundi BIT (2017)
ARTICLE 7 Compensation for Losses I. Investors of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war, insurrection, civil disturbance or other similar events shall be accorded by such other Contracting Party treatment no less favourable than that accorded to its own investors or to investors of any third State, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses. 2. Without prejudice to paragraph (1) of this Article, investors of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from: (a) requisitioning of their property by its forces or authorities; or (b) destruction of their property by its forces or authorities, which was not caused in combat action or was not required by the necessity of the situation; shall be accorded restitution or compensation	ARTICLE 7 Compensation for Losses I. Investors of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war, insurrection, civil disturbance or other similar events shall be accorded by such other Contracting Party treatment no less favorable than that accorded to its own investors or to investors of any third State, whichever is the most favorable treatment, as regards any measures it adopts in relation to such losses. 2. Without prejudice to paragraph I, investors of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from: (a) requisitioning of their property by its forces or authorities; or (b) destruction of their property by its forces or authorities, which was not caused in combat action or was not required by the necessity of the situation;

[590] There are a few exceptions of course. The expropriation clause in both agreements are almost identical. However, Article 6(4) of the Rwanda-Turkey BIT is absent from the Turkey-Burundi BIT.

which in either case shall be prompt, adequate and effective. Resulting payments shall be freely convertible.	shall be accorded restitution or compensation which in either case shall be prompt, adequate and effective. Resulting payments shall be freely convertible.

A comparison of the Morocco-Nigeria BIT (2016) and the Rwanda-Morocco BIT (2016) is also very revealing. Although concluded the same year, the two agreements are very different in the sense that most of flexibility and innovative features found in the Morocco-Nigeria BIT are absent from the Rwanda-Morocco BIT. Admittedly, the Rwanda-Morocco BIT (signed October 19, 2016) is earlier in time than the Morocco-Nigeria BIT (signed December 3, 2016). Nevertheless, the shortcomings in the Rwanda-Morocco BIT compared to the Morocco-Nigeria BIT raise troubling questions about the secrecy and total lack of transparency that surrounds BIT negotiations in much of Africa and the reluctance of African policy makers to learn from one another and develop. Arguably, if the draft of the Morocco-Nigeria BIT were publicly available, that might have provided relevant context and background for Rwandan negotiators.

Table 55: A Comparison of Three BTs Involving Nigeria

PROVISION	Morocco-Nigeria BIT (2016)	Rwanda-Morocco BIT (2016)
FET Standard	✓	X[591]
Expropriation Standard	✓	✓
MFN Treatment	✓	✓
National Treatment	✓	✓
ISDS	✓	✓
Compulsory License Exception to Expropriation	✓	X
Some Limits on Indirect Expropriation	✓	X
Right of State to Regulate Explicitly Affirmed	✓	X[592]
Access to Investor's Information	✓	X
Temporary Safeguard Measures	✓	X
Investment & Environment	✓	X
Corporate Governance	✓	X
Impact Assessment	✓	X
Investor Liability	✓	X
Anti-Corruption	✓	X
CSR Clauses	✓	X
Survival Clause	None	10 years
Status	Signed. Not Ratified	Signed. Not Ratified

Source: Author Compilation[593]

[591] The Morocco-Rwanda BIT does not provide the FET standard but does provide the 'full protection and security' standard.
[592] Article 2(5), ".Measures that have to be taken by either Contracting Party for reasons of public security, public order, public health or protection of environment shall not be deemed treatment "less favourable within the meaning of this Article.").
[593] information available at UNCTAD, Investment Policy Hub – Nigeria. https://investmentpolicy.unctad.org/international-investment-agreements/countries/153/nigeria

Why the Rwanda-Morocco BIT lacks many of the safeguards and flexibility found in the Morocco-Nigeria BIT is a question that is worth examining but is beyond the scope of this study. For EAC countries and for the EAC bloc, reform is imperative for several reasons. The risk of investment arbitration is real and the number of ISDS cases against EAC members is growing. ISDS cases have the potential to drag on for years, thus increasing the financial burden on states.

In 2018, an arbitral tribunal declined jurisdiction (in toto) to hear a claim against Kenya in the case of *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*. However, on March 19, 2019, Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited filed a request for annulment of the 2018 decision; annulment proceedings in the case is pending. It must be noted that EAC states have never been successful in getting an arbitral award annulled. On August 2, 2018, Tanzania Electricity Supply Company (Tanesco), a state-owned electric supply company, lost its bid to get an arbitral Award annulled. In the case of *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited* (ICSID Case No. ARB/10/20), an *ad hoc* Committee rejected in its entirety Tanesco's application for annulment of the $148.4 million award to the Standard Chartered Bank (Hong Kong) Limited (Standard Bank) for a breach of power contract.

EAC countries must therefore assess the costs and benefits of ISDS. The costs include, the prospect of 'regulatory chill', harm to domestic investors arising from bias in favour of foreign investment, the social and economic costs of ISDS, as well as costs arising from the flawed processes of arbitration. Regarding regulatory chill, the Australian Productivity Commission aptly noted:

> … IIAs and their investment provisions are intended to bind the actions of the governments that are party to an agreement from undertaking actions that might otherwise be prejudicial to foreign investors. However, **ISDS provisions can further restrict a government's ability to undertake welfare-enhancing reforms at a later date, a problem known as 'regulatory chill'**. Such 'chilling' occurs because the investment clauses that provide protection against 'indirect expropriation' and 'fair and equitable treatment' …. These protections and minimum standards of treatment are extended to foreign investors but often not afforded to domestic investors, and can involve such government actions as changes to environmental legislation, taxation arrangements or licensing schemes. **'Chilling' occurs when governments choose not to undertake regulatory action (as opposed to directly expropriating property) for fear of triggering arbitration claims or paying compensation.**[594]

The lesson learned from various ISDS claims initiated against EAC economies and other countries in Africa and around the world is that IIAs are not benign policy instruments and that IIA disciplines have the potential to impact governmental policies on a wide

[594] Productivity Commission. 2010. Bilateral and Regional Trade Agreements: Research Report, p. 271, https://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf. Emphasis added.

range of issues including taxation,[595] water policy,[596] health policy,[597] environmental protection,[598] natural resource management and monetary policy.[599] In short, governments around the world are learning that IIAs are far-reaching in scope and have serious implications for domestic policymaking and policy coordination. Although EAC economies have won some ISDS cases, they have lost many others.[600] In the last few years, Tanzania has received some adverse arbitral decisions, lost an attempt to annul an arbitral award and has some pending ISDS cases.[601] The most recent investment arbitration claim against Tanzania was initiated on April 16, 2019, just days after the Tanzania-Netherlands BIT terminated.[602]

In the absence of clear customary international law rules on investment protection or a comprehensive multilateral legal framework governing foreign investment, IIAs will remain important for the foreseeable future. However, across the globe, policy makers are acknowledging the need for systematic reform of the global IIA regime. According to UNCTAD, "Since 2012, over 150 countries have undertaken at least one reform action in the pursuit of sustainable development-oriented IIAs, and most new treaties contain key reform elements as set out in UNCTAD's Road Map."[603] Not surprising, the dominant question today is not about whether to reform, but about the substance of such reform, as well as the process and mechanisms of reform.[604]

The jury is still out on whether or not there is a positive correlation between BITs and FDI inflow.[605] Irrespective of whether international investment agreements stimulate FDI, investors appear to welcome IIAs as they are perceived to enhance predictability and to contribute to better investment climate.[606] As UNCTAD notes, "IIAs can help improve countries' regulatory and institutional frameworks, including by adding an international dimension to them and by promoting the rule of law and enhancing good governance."[607] Ultimately, whether or not a state decides to have IIAs or to disengage from IIAs will depend on a number of factors, including calculations about the costs and benefits of IIAs, a country's role as an importer or exporter of capital or both, a country's development goals and strategies, honest assessment of the relative strength of

[595] *Occidental Exploration & Production Co. v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, (Jul. 1, 2004).
[596] *Biwater Gauff Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, (Jul. 24, 2008).
[597] *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, (Dec. 17, 2015).
[598] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000); Methanex Corporation v. United States of America, NAFTA-UNCITRAL, Award, (Aug. 3, 2005).
[599] *CMS Gas Transmission Co v. Argentina*, ICISD Case No ARB/01/8, Award, (May 12, 2005).
[600] For example, Kenya prevailed in the case of Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya (ICSID Case No. ARB/15/29).
[601] See e.g. *Standard Chartered* Bank (Hong Kong) Limited *v. Tanzania* Electric Supply Company Limited, ICSID Case No. ARB/10/20.
[602] *Ayoub-Farid Michel Saab v. United Republic of Tanzania* (ICSID Case No. ARB/19/8).
[603] UNCTAD Reform Package, supra note 206, p. 7.
[604] Id.
[605] Salacuse, J. & Nicholas, S. (2005). Do bits really work? An evaluation of bilateral investment treaties and their grand bargain. Harvard International Law Journal, 1(46), 90; Egger, P. & Michael, P. (2004). The impact of bilateral investment treaties on foreign direct investment. Journal of Comparative Economics, 32(4), 789.
[606] Tobin, J. & Susan, R.A. (2005). Foreign direct investment and the business environment in developing countries: The impact of bilateral investment treaties. Yale Law & Economics Research Paper, 293.
[607] UNCTAD's Reform Package, p. 16.

domestic governance systems, prior experience with ISDS, and any perceived need to reassure investors that a country is 'open for business.'

This is a critical time for EAC economies to take a fresh approach to their BITs. A comprehensive and multi-level BIT review is imperative and is highly recommended. Given the long-term political, economic and developmental implications of investment treaties for host States, host communities and foreign investors, to do nothing is not an option.[608] Only a comprehensive review of existing BITs will enable countries to appreciate the costs and benefits of existing treaties and to identify areas of potential legal risks and liabilities.[609] A comprehensive BIT review will also provide opportunity for countries to assess the costs and benefits of continued participation in the international investment law regime. Finally, a comprehensive BIT review can help countries develop new negotiation strategies and adopt a holistic and coherent approach to their international investment policies. As of 2015, at least 45 countries and four regional integration organizations were revising or had revised their model agreement.[610]

Although it is imperative that EAC economies rethink their BIT programs, no specific reform path or reform option is recommended in this report. The reason is simple. There is no one-size-fits-all approach to IIA reform. Rather than recommend specific reform path and reform option, this report presents EAC States with a range of reform options to consider. The specific reform path and option(s) a country chooses should be the result of a careful fact-based analysis of costs and benefits, broad-based discussions involving all relevant stakeholders, and should be driven by a fundamental commitment towards a sustainable development-oriented investment treaty regime.

In varying degrees EAC members are already engaging in modest IIA reform. Since 2012, most EAC states (Kenya, Tanzania, Rwanda, and Burundi), have undertaken at least one reform action usually in the context of new BITs.[611] There are several problems with the present approach to IIA reform in the EAC region. First, so far reform actions have been haphazard, uncoordinated and incoherent. Second, presently, reform actions in the EAC appear to be driven by treaty partners and are not the result of a comprehensive review of existing agreements or the product of meaningful engagement with relevant stakeholders. Third, reform actions in the EAC bloc have only implicated new agreements and have left the old-generation BITs unaffected. Considering that most recent BITs involving EAC states are not actually in force, reform action in the EAC region has done nothing to reduce the exposure of states to potential ISDS claims.

IIAs are complex instruments. Although, historically IIAs served primarily to encourage FDI and protect foreign investors and their investment, the context of international investment has changed and is changing. BITs are taking on new significance as

---

[608] Uche Ewelukwa Ofodile, *South-South Trade and Investment: The Good, the Bad and the Ugly – African Perspectives*, 20(2) MINNESOTA JOURNAL OF INTERNATIONAL LAW 513-587 (2011).

[609] Uche Ewelukwa Ofodile, *India-Africa Trade and Investment: Ten Critical Questions Africans Should be Asking Their Leaders*, AILA Blog, April 15, 2016. http://blogaila.com/2016/04/15/india-africa-trade-and-investment-ten-critical-questions-africans-should-be-asking-their-leaders-by-dr-uche-ewelukwa-ofodile-sjd-harvard/

[610] UNCTAD, 'Recent trends in IIAs and ISDS', 25-27 February 2015, available at https://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf

[611] See e.g. 2017 Burundi-Turkey BIT, Article 5 ("General Exception"); 2016 Kenya-Japan BIT, Article 17 ("Safeguard Measures"); 2017 Rwanda-United Arab Emirate BIT, Article 9 ("Right to Regulate"); 2013 Tanzania-China BIT, Article 10 ("Health, Safety and Environmental Measures.").

economic, political, diplomatic and development instruments. IIA reviews and reforms call for serious consideration. India and South Africa each conducted a multi-year review process involving key stakeholders before deciding on their respective reform paths. The U.S.-China BIT has gone through twenty-four (24) rounds of negotiation as of June 2016. United States and India announced the launch of BIT negotiations in 2009; after eleven years of sporadic, unproductive talks the two economies do not appear to be closer to concluding an agreement.

EAC states must consider whether concluding new investment treaties will advance their broader economic and international interests and must clearly articulate what these interests are. For developed capital-exporting economies, IIAs present an opportunity to increase market access, encourage regulatory reform in host states, address investment barriers in host states, and encourage investment liberalization. For capital-importing countries, the benefits of IIAs are not altogether too clear. IIAs can certainly signal a country's relevance and competitiveness as an investment destination. IIAs can also serve as a commitment to domestic reform of foreign investment frameworks. However, the assumption that BITs foster increased bilateral FDIs has been questioned in many quarters, and most studies have found no correlation or weak correlation between the existence of BITs and FDI inflows.[612]

Should EAC states decide that negotiating new treaties is in their best interest, negotiations should be transparent and should only be carried out on the basis of clearly articulated objectives and well-defined negotiation strategies. Given the rising popularity of comprehensive trade and investment agreements, stand-alone BITs may increasingly become a thing of the past. Consequently, EAC states must carefully assess whether comprehensive IIAs are in their individual and collective best interests, and whether they have the capacity and resources to negotiate and implement such treaties. Furthermore, given a noticeable upscaling trend in IIAs, EAC economies must assess the costs and benefits of enforceable high-standard IIAs prior to entering into any negotiation.

Civil society organizations have a role to play in debates about IIA reform. In countries such as Indonesia, India, the United States and the EU, civil society organizations have played and continue to play a major role both in putting the spotlight on the problems with the international investment law regime as it stands and in urging meaningful reform.[613] In the EAC region, civil society organizations are beginning to take active interest in economic and development issues. Civil society groups can demand that EAC governments review their existing BIT programme.

---

[612] See "Do Bilateral Investment Treaties Attract FDI Flows to Developing Economies?" in United Nations Conference on Trade and Development, "Trade and Development Report, 2014," United Nations, 2014, at 159; See generally, Emma Aisbett, "Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation," CUDARE Working Paper No. 1032, March 14, 2007; Mary Hallward-Driemeier, "Do Bilateral Investment Treaties Attract Foreign Investment? Only a Bit…and They Could Bite," World Bank Policy Research Working Paper 3121, Aug. 2003; Jason Webb Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence," Virginia Journal of International Law, 51:2, 2011; Eric Neumayer and Laura Spess, "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?" World Development, 3:1, May 1, 2005; World Bank Policy Research Working Paper 3121, Aug. 2003.

[613] An open letter to the Indian Prime Minister on India-US BIT http://www.madhyam.org.in/admin/tender/August_7_Letter_to_PM%20(1).html accessed on 26 August 2014. Letter written by many civil society organisations to the Indian Prime Minister expressing concerns about India's BITs http://donttradeourlivesaway.files.wordpress.com/2012/06/civil-society-letter-on-us-india-bit.pdf accessed on 2 July 2014.

Investment treaty reform is a complex, daunting, challenging and difficult task. However, the good news is that more and more countries are engaging in reform and that there are a growing number of reform options and modalities that EAC economies can adopt and adapt. Across the globe, countries are pausing, reflecting and revising their investment treaties. There are now many options available to countries seeking to alter their positioning vis-à-vis investment treaty law. The good news also is that there appears to be a large degree of consensus amongst EAC Members States on the core elements of investment protection, the imperatives of sustainable development and the need for a new generation for investment treaties. The bad news is that EAC economies, like most least developed countries, probably lack the capacity to engage in meaningful reform. It has been noted that "capacity challenges make it hard for smaller countries, particularly least developed countries…., to address the deficiencies of first-generation IIAs and enhance overall policy coherence."[614] International cooperation including capacity building in the East African Community is needed if countries are to engage in meaningful and sustained reform.

Findings and Recommendations

Long-term Goals and Strategies

1. It is recommended that EAC Member States adopt laws that mandate economic and social impact assessment of all future trade and investment agreements.
2. It is recommended that EAC economies redouble their efforts to develop strong domestic legal systems suitable for protecting all investors and to develop options (e.g. political risk insurance) for domestic companies to protect their investments in overseas markets without the need for ISDS provisions.
3. A strong governance and legal system that is predictable and creates a safe and secure environment for domestic and foreign investors would be in the long-term best interest of EAC economies. As UNCTAD rightly notes, "IIAs cannot substitute for sound domestic policies and regulatory and institutional frameworks. IIAs alone cannot turn a weak domestic investment climate into a strong one, and, like other treaties, they cannot guarantee market outcomes in the form of inflows of foreign investment." It is recommended that EAC states strengthen their effort to improve democratic institutions and consolidate rule of law reform efforts in their respective jurisdiction.
4. It is recommended that EAC Member States participate in on-going discussions about ISDS reform at the multilateral level such as UNCITRAL Working Group III on Investor-State Dispute Settlement (ISDS) Reform. EAC economies should also actively participate in related processes such as the Intergovernmental Working Group on creating a binding instrument on multinational enterprise and other businesses with regards to human rights.

[614] UNCTAD's Reform Package, supra note 206. 9.

Appendixes

Appendix 1

EAC-EU Bilateral Investment Treaties

EAC Member State	EU Contracting State	Year of Signature	Year of Ratification	Status
Burundi	Germany	1984	1987	In force
	BLEU	1989	1993	In force
	United Kingdom	1990	1990	In force
	The Netherlands	2001	2009	In force
Kenya	The Netherlands	1970	1979	In force
	Germany	1996	2000	In force
	Italy	1996	1999	Terminated
	United Kingdom	1999	1999	In force
	France	2007	2009	In force
	Finland	2008	2009	In force
	Slovakia	2011	---	Not in force
Rwanda	Germany	1967	1968	In force
	BLEU	1983	1985	In force
Tanzania	Germany	1965	1968	In force
	United Kingdom	1994	1996	In force
	Denmark	1999	2005	In force
	Sweden	1999	2002	In force
	Finland	2001	2002	In force
	Italy	2001	2003	In force
	The Netherlands	2001	2004	In force
Uganda	Germany	1966	1968	In force
	Italy	1997	1999	Terminated
	United Kingdom	1998	1998	In force
	The Netherlands	2000	2003	In force
	Denmark	2001	2005	In force
	France	2003	2004	In force
	BLEU	2005	---	Not in force

Source: Author Compilation[615]

[615] information available on: https://investmentpolicy.unctad.org/international-investment-agreements/by-economy

Annex 2

EAC States: Total Unratified Bilateral Investment Treaties

EAC Party	Other Party	Date of Signature
Kenya	China	16/07/2001
	Iran, Islamic Republic of	24/02/2009
	Libya	05/06/2007
	Mauritius	07/05/2012
	Qatar	13/04/2014
	Slovakia	14/12/2011
	Turkey	08/04/2014
Rwanda	BLEU (Belgium-Luxembourg-Economic Union)	16/04/2007
	Mauritius	30/07/2001
	Morocco	19/10/2016
	Qatar	15/11/2018
	South Africa	19/10/2000
	Turkey	03/11/2016
	United Arab Emirate	01/11/2017
Tanzania	Egypt	30/04/1997
	Jordan	08/10/2009
	Korea, Republic of	18/12/1998
	Kuwait	17/11/2013
	Oman	16/10/2012
	South Africa	22/09/2005
	Turkey	11/03/2011
	Zimbabwe	03/07/2003
Uganda	BLEU (Belgium-Luxembourg-Economic Union)	01/02/2005
	China	27/05/2004
	Cuba	01/01/2002
	Egypt	04/11/1995
	Eritrea	30/06/2001
	Nigeria	15/01/2003
	South Africa	08/05/2000
	United Arab Emirate	01/11/2017
	Zimbabwe	01/07/2003
South Sudan	Morocco	01/02/2017
Burundi	Comoros	18/05/2001
	Egypt	13/05/2012
	Turkey	14/06/2017
	United Arab Emirate	06/02/2017

Annex 3: EAC States: Old-generation Bilateral Investment Treaties (Total)

EAC Member State	EU Contracting State	Year of Signature	Year of Ratification
Burundi	Comoros	2001	--
	Germany	1984	1987
	BLEU	1989	1993
	Kenya	2009	2009
	Mauritius	2001	2009
	United Kingdom	1990	1990
	The Netherlands	2001	2009
Kenya	The Netherlands	1970	1979
	Burundi	2009	2009
	China	2001	--
	Germany	1996	2000
	United Kingdom	1999	1999
	France	2007	2009
	Finland	2008	2009
	Iran	2009	--
	Libya	2007	--
	Switzerland	2006	2009
Rwanda	Germany	1967	1968
	BLEU	1983	1985
	BLEU	2007	--
	Korea	2009	2013
	Mauritius	2001	--
	South Africa	2000	--
	U.S.A.	2008	--
Tanzania	Germany	1965	1968
	United Kingdom	1994	1996
	Denmark	1999	2005
	Sweden	1999	2002
	Finland	2001	2002
	Italy	2001	2003
	The Netherlands	2001	2004
	Egypt	1997	--
	Jordan	2009	--
	Korea	1998	--
	Mauritius	2009	--
	South Africa	2005	--
	Switzerland	2004	2006
	Zimbabwe	2003	--
Uganda	Germany	1966	1968
	United Kingdom	1998	1998
	The Netherlands	2000	2003

	Denmark	2001	2005
	France	2003	2004
	BLEU	2005	--
	China	2004	--
	Cuba	2002	--
	Egypt	1995	--
	Eritrea	2001	--
	Nigeria	2003	--
	South Africa	2000	--
	Switzerland	1971	1972
	Zimbabwe	2003	--

Source: Author Compilation[616]

Annex 4

EAC States: Old-Generation Bilateral Investment Treaties (Intra-African Agreements)[617]

EAC Member State	African State Involved	Year of Signature	Year of Ratification
Burundi	Comoros	2001	--
	Mauritius	2001	2009
	Kenya	2009	2009
Kenya	Libya	2007	--
Rwanda	South Africa	2000	--
	Mauritius	2001	--
Tanzania	Egypt	1997	--
	Zimbabwe	2003	--
	South Africa	2005	--
	Mauritius	2009	--
Uganda	Egypt	1995	--
	South Africa	2000	--
	Eritrea	2001	--
	Nigeria	2003	--
	Zimbabwe	2003	--

Source: Author Compilation[618]

[616] Information Available at: https://investmentpolicy.unctad.org/international-investment-agreements/by-economy
[617] Including Kenya-Burundi BIT (2009).
[618] Information Available at: https://investmentpolicy.unctad.org/international-investment-agreements/by-economy

Annex 5

Old-Generation Bilateral Investment Treaties (European Union State Parties)

EAC Member State	EU Contracting State	Year of Signature	Year of Ratification
Burundi	Germany	1984	1987
	BLEU	1989	1993
	United Kingdom	1990	1990
	The Netherlands	2001	2009
Kenya	The Netherlands	1970	1979
	Germany	1996	2000
	United Kingdom	1999	1999
	France	2007	2009
	Finland	2008	2009
	Slovakia	2011	X
Rwanda	Germany	1967	1968
	BLEU	1983	1985
Tanzania	Germany	1965	1968
	United Kingdom	1994	1996
	Denmark	1999	2005
	Sweden	1999	2002
	Finland	2001	2002
	Italy	2001	2003
	The Netherlands	2001	2004
Uganda	Germany	1966	1968
	United Kingdom	1998	1998
	The Netherlands	2000	2003
	Denmark	2001	2005
	France	2003	2004
	BLEU	2005	X

Source: Author Compilation[619]

[619] Information Available at: https://investmentpolicy.unctad.org/international-investment-agreements/by-economy

Annex 6

Exist Clauses in EAC Bilateral Investment Treaties

Exit Clause in Burundi's 'In Force' BIT

Treaty Party	Duration	Survival Clause	Automatic Renewal
BLEU	10	10	✓
Germany	10	20	✓
Kenya	10	10	✓
Mauritius	10	10	✓
Netherlands	10	15	✓
United Kingdom	10	20	✓

Exit Clause in Kenya's 'In Force' BIT

Treaty Party	Duration	Survival Clause	Automatic Renewal
Burundi	10	10	✓
Finland	20	20	✓
France	10	20	✓
Germany	10	15	✓
Japan	10	10	✓
Korea	10	10	✓
Kuwait	20	20	✓
Netherlands	5	5	✓
Switzerland	10	10	✓
United Kingdom	10	20	✓

Exist Clause in Rwanda's BIT

Treaty Party	Duration	Survival Clause	Automatic Renewal
BLEU	5	5	✓
Germany	10	10	✓
Korea	10	10	✓
United States	xxx	xxxx	✓

Exit Clause in Tanzania's 'In Force' BIT

Contracting Parties	Duration	Survival Clause	Automatic Renewal
Canada	10	15	✓
China	10	10	✓
Denmark	10	10	✓
Finland	10	15	✓
Germany	10	20	✓
Italy	10	20	✓
Mauritius	10	10	✓
Netherlands	15	15	✓
Sweden	10	15	✓
Switzerland	10	10	✓
UK	10	20	✓

Exit Clause in Uganda's 'In Force' BIT

Contracting State	Duration	Survival Clause	Automatic Renewal
Denmark	10	10	✓
France	20	20	✓
Germany	10	20	✓
Netherlands	10	15	✓
Switzerland	5	10	✓
United Kingdom	10	20	✓

Annex 7
Known ISDS (ICSID) Cases Against EAC Member States: 2015-2019

1995

- *Antoine Goetz and others v. Republic of Burundi* (ICSID Case No. ARB/95/3)

1998

- *Tanzania Electric* Supply *Company Limited v. Independent Power Tanzania Limited*, ICSID Case No. ARB/98/8

2000

- *World Duty Free Company* v *Republic of Kenya*, ICSID Case No. Arb/00/7

2001

- *Antoine Goetz and others v. Republic of Burundi* (II) (ICSID Case No. ARB/01/2)

2005

- *Biwater Gauff (*Tanzania*) Ltd.* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22

2010

- *Olyana Holdings LLC. v. Republic of Rwanda, ICSID Case No. ARB/10/10*
- *Standard Chartered Bank (Hong Kong) Limited* v. *Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20

2012

- *Sudapet Company Limited v. Republic of South Sudan* (ICSID Case No. ARB/12/26)

2013

- *Joseph Houben v. Republic of Burundi* (ICSID Case No. ARB/13/7)

2014

- *Tariq Bashir and SA Interpétrol Burundi v. Republic of Burundi* (ICSID Case No. ARB/14/31)

2015

- *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29)
- *Total E&P Uganda BV v. Republic of Uganda* (ICSID Case No. ARB/15/11)
- *WalAm Energy Inc. v. Republic of Kenya* (ICSID Case No. ARB/15/7)

2017

- *EcoDevelopment in Europe AB, EcoEnergy Africa AB v. United Republic of Tanzania* (ICSID Case No. ARB/17/33).

2018

- *Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda* (ICSID Case No. ARB/18/21)
- *Sunlodges Ltd (BVI) and Sunlodges (T) Limited v. The United Republic of Tanzania* (PCA Case No. 2018-09)

2019

- *Ayoub-Farid Michel Saab v. United Republic of Tanzania* (ICSID Case No. ARB/19/8)
- *Richard N. Westbury, Paul D. Hinks and Symbion Power Tanzania Limited v. United Republic of Tanzania* (ICSID Case No. ARB/19/17)

References

Emma Aisbett, “Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation,” CUDARE Working Paper No. 1032, March 14, 2007.

José Alvarez “The Once and Future Foreign Investment Regime,” in Looking to the Future: Essays on International Law in Honor of W. Michael Reisman (Mahnoush Arsanjani, Jacob Katz Cogan, Robert D. Sloane and Siegried Wiessner, eds., Martinus Nijhoff, 2010).

Charles N. Brower & Stephan W. Schill, Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?, 9 Chi J. Int’l L 471, 476–78 (2009).

Department of Trade and Industry South Africa, BILATERAL INVESTMENT TREATY POLICY FRAMEWORK REVIEW: GOVERNMENT POSITION PAPER 2009

Susan D. Franck, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, 73 Fordham L. Rev. 1521 (2005).

Omar Garcia-Bolivar, *International Law of Foreign Investments at a Crossroads: The Need for Reform* (2008).

Mary Hallward-Driemeier, “Do Bilateral Investment Treaties Attract Foreign Investment? Only a Bit...and They Could Bite,” World Bank Policy Research Working Paper 3121, Aug. 2003.

Egger, P. & Michael, P. (2004). The impact of bilateral investment treaties on foreign direct investment. Journal of Comparative Economics, 32(4), 789.

Michele Potesta, Bilateral Investment Treaties and the European Union. Recent Developments in Arbitration and Before the ECJ, 8 LAW AND PRACTICE OF INTL. COURTS AND TRIBUNALS 225 (2009).

Gordon, K. and J. Pohl (2015), “Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World”, OECD Working Papers on International Investment, 2015/02.

Price, D. (2016). Indonesia’s bold strategy on bilateral investment treaties: Seeking an equitable climate for investment? Asian Journal of International Law, 7(1).

See also Bilateral Investment Treaties (BITs) in Indonesia: A Paradigm Shift, Issues and Challenges, 21 (1) Journal of Legal, Ethical and Regulatory Issues (2018).

Uche Ewelukwa Ofodile

India-Africa Trade and Investment: Ten Critical Questions Africans Should be Asking Their Leaders, AILA Blog, April 15, 2016. http://blogaila.com/2016/04/15/india-africa-trade-and-investment-ten-critical-questions-africans-should-be-asking-their-leaders-by-dr-uche-ewelukwa-ofodile-sjd-harvard/

Rwanda's New Investment Law: An Overview, AILA Blog, March 4, 2016. http://blogaila.com/2016/03/04/rwandas-new-investment-law-an-overview-by-dr-uche-ewelukwa-ofodile-sjd-harvard/

Africa and International Arbitration: From Accommodation and Acceptance to Active Engagement in DEALING WITH DIVERSITY IN INTERNATIONAL ARBITRATION (L. Barrington, and R. Rana eds.; Transnational Dispute Management (2015)).

Africa and the System of Investor-State Dispute Settlement: To Reject or Not to Reject? TRANSNATIONAL DISPUTE MANAGEMENT, VOL. 1 (2014).

India-Africa Trade and Investment: Ten Critical Questions Africans Should be Asking Their Leaders, AILA Blog, April 15, 2016. http://blogaila.com/2016/04/15/india-africa-trade-and-investment-ten-critical-questions-africans-should-be-asking-their-leaders-by-dr-uche-ewelukwa-ofodile-sjd-harvard/

Rwanda's New Investment Law: An Overview, AILA Blog, March 4, 2016. http://blogaila.com/2016/03/04/rwandas-new-investment-law-an-overview-by-dr-uche-ewelukwa-ofodile-sjd-harvard/

China-Africa Bilateral Investment Treaties: A Critique, 35(1) MICHIGAN JOURNAL OF INTERNATIONAL LAW 131 (2013)

South-South Trade and Investment: The Good, the Bad and the Ugly – African Perspectives, 20(2) MINNESOTA JOURNAL OF INTERNATIONAL LAW 513-587 (2011).

The U.S.-Rwanda Bilateral Investment Treaty: A Cause for Celebration? AFRICA LAW TODAY (Fall 2011).

Trade, Empires and Subjects: China-Africa Trade: A New Fair Trade Arrangement or The Third *Scramble for Africa?* 41(2) VANDERBILT JOURNAL OF TRANSNATIONAL LAW

South-South Trade and Investment: The Good, the Bad and the Ugly – African Perspectives, 20(2) MINNESOTA JOURNAL OF INTERNATIONAL LAW 513-587 (2011).

Oegroseno, A.H. (2014). Indonesia's bilateral investment treaties: Modernizing for the 21st century. RSIS Commentaries for Global, International, Southeast Asia and ASEAN, 14.

Ministry of Labour, Rwanda; Law n° 13/2009 of 27 May 2009 Regulating Labour in Rwanda Ministry of Trade and Industry: Revised Rwanda National Exports Strategy (NES II) – 2014

Ministry of Trade and Industry: Rwanda Private Sector Development Strategy (2013-2018)

Ministry of Trade and Industry: The Rwanda Trade Policy (2010)

Rwanda Development Board (RDB): "Annex to Law n° 06/2015 of 28/03/2015 relating to investment promotion and facilitation"

Rwanda Development Board (RDB): "Law n° 06/2015 of 28/03/2015 relating to investment promotion and facilitation in Rwanda"

Rwanda Development Board (RDB): "Special Economic Zone Policy, 2010"

Salacuse, J. & Nicholas, S. (2005). Do bits really work? An evaluation of bilateral investment treaties and their grand bargain. Harvard International Law Journal, 1(46), 90.

Simmons, B.A. (2014). Bargaining over BITs, arbitrating awards: The regime for protection and promotion of international investment. World Politics, 66(1), 15.

Uganda Investment Authority, Uganda Investment Code, 1991 (Amended 2000) UNCTAD (1993)

UNCTAD

UNCTAD (2015). Investment Policy Framework for Sustainable Development. New York and Geneva: United Nations.

UNCTAD (2018). Reform Package for the International Investment Regime. New York and Geneva: United Nations.

UNCTAD (2004). Transparency.

UNCTAD, INTERNATIONAL INVESTMENT AGREEMENTS: KEY ISSUES (Vol. 1) (2004)

WIR12. World Investment Report 2012: Towards a New Generation of Investment Policies. New York and Geneva: United Nations.

WIR13. World Investment Report 2013: Global Value Chains: Investment and Trade for Development. New York and Geneva: United Nations.

WIR15. World Investment Report 2015: Reforming International Investment Governance. New York and Geneva: United Nations.

WIR17. World Investment Report 2017: Investment and the Digital Economy. New York and Geneva: United Nations.

WIR18. World Investment Report 2018: Investment and New Industrial Policies. New York and Geneva: United Nations.

WIR93. World Investment Report 1993: Transaction corporations and integrated international production. New York and Geneva. United Nations.

Tobin, J. & Susan, R.A. (2005). Foreign direct investment and the business environment in developing countries: The impact of bilateral investment treaties. Yale Law & Economics Research Paper, 293.

"Do Bilateral Investment Treaties Attract FDI Flows to Developing Economies?" in United Nations Conference on Trade and Development, "Trade and Development Report, 2014," United Nations, 2014.

United Republic of Tanzania (URT) (1997), "Tanzania Investment Act 1997", Dar es Salaam, Tanzania

United Republic of Tanzania (URT) (1996), "The National Investment Promotion Policy", President's Office Planning Commission, Dar es Salaam, Tanzania.

Ana Vohryzek-Griest, State Counterclaims in Investor–State Disputes: A History of 30 Years of Failure, 15 Int'l Law: Revista Colombiana de Derecho Internacional 83 (2009).

Jason Webb Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence," Virginia Journal of International Law, 51:2, 2011.

World Bank, Doing Business 2019: Training for Reform (2019).

Ying Zhu Corporate Social Responsibility and International Investment Law: Tension and Reconciliation (2014).

Eric Neumayer and Laura Spess, "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?" World Development, 3:1, May 1, 2005.

Multilateral and Regional Treaties

The African Charter on Human and Peoples' Rights
The African Continental Free Trade Area Agreement
Cartagena Protocol on Biosafety
The Convention on Biological Diversity
The Treaty Establishing the Common Market for Eastern and Southern Africa
The Convention on the Elimination of All forms of Discrimination Against Women
The Convention on the Recognition and Enforcement of Foreign Arbitral Award.
The Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
The Convention Establishing the Multilateral Investment Guarantee Agency.
The Convention on Transparency in Treaty-based Investor-State Arbitration.
The General Agreement of Trade in Services.
The International Covenant on Civil and Political Rights.
The International Covenant on Economic, Social and Cultural Rights.
The Treaty for the Establishment of the East African Community.
The Vienna Convention for the Protection of the Ozone Layer .
Montreal Protocol on Substances that Deplete the Ozone Layer.
The Trade-Related Investment Measures Agreement.
Agreement on Trade related Aspects of Intellectual Property Rights (TRIPS).

Soft Law Instruments

EAC Model Investment Treaty (May 2016)
South African Development Community Model BIT Template (2012).
Draft Pan-African Investment Code, E/ECA/COE/35/18, AU/STC/FMEPI/ EXP/18(II), 26 March 2016.

Cases Referenced

Ayoub-Farid Michel Saab v. United Republic of Tanzania (ICSID Case No. ARB/19/8)

Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda (ICSID Case No. ARB/18/21).

Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15.
Bernardus Henricus Funnekotter and others v. Zimbabwe, ICSID Case No. ARB/05/6.
Biwater Gauff (*Tanzania*) Ltd. *v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.
Chemtura Corp. v. Government of Canada, UNCITRAL, Award, 2 August 2010
Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya (ICSID Case No. ARB/15/29).

CMS Gas Transmission Co v. Argentina, ICISD Case No ARB/01/8, Award, (May 12, 2005).

EcoDevelopment in Europe AB and EcoEnergy Africa AB v. United Republic of Tanzania (ICSID Case No. ARB/17/33).

Eureko BV v. Republic of Poland, Ad Hoc Arbitration, Partial Award, 19 August 2005.
Antoine Goetz and others v. Republic of Burundi (ICSID Case No. ARB/95/3).
Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

Methanex Corporation v. United States of America, NAFTA-UNCITRAL, Award, (Aug. 3, 2005).

Telenor Mobile Communications AS v. The Republic of Hungary, ICSID Case No. ARB/04/15.
Richard N. Westbury, Paul D. Hinks and Symbion Power Tanzania Limited v. United Republic of Tanzania (ICSID Case No. ARB/19/17).

Occidental Exploration & Production Co. v. Republic of Ecuador, LCIA Case No. UN3467, Final Award, (Jul. 1, 2004).

Piero Foresti, Laura de Carli and others v Republic of South Africa (ICSID Case No ARB(AF)/07/1) Award, 3 August 2010.

Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12

Puma Energy Holdings (Luxembourg) SARL v the Republic of Benin, SCC Case No. SCC EA 2017/092.

Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (TANESCO) (ARB/10/20, Award, 12 September 2016).

WalAm Energy Inc. v. Republic of Kenya (ICSID Case No. ARB/15/7).

Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt ICSID Case No. ARB/05/15.
Wena Hotels Ltd. v Egypt (ICSID Case No. ARB/98/4).
World Duty Free Company *v* Republic of *Kenya* (ICSID Case No. Arb/00/7).

White Industries v. India, Final Award, November 30, 2011.