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**INTERNATIONAL INVESTMENT REGIME REFORM: INTEGRATING SUSTAINABLE
DEVELOPMENT INTO UGANDA’S BILATERAL INVESTMENT TREATY SYSTEM –
A NEW MODEL BIT.**

BY

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Declaration

I declare that this thesis, which I hereby submit for the degree Doctor Legum (LLD), at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.

Student signature:



Supervisor signature:

Co-supervisor signature:

Acknowledgements

This thesis is dedicated to my role model, my beloved mother, Ms Rebecca Nabweteme, who walked every step of this journey with me, inspiring, encouraging and being my beacon of hope. Thank you for being my research partner, my sounding board, my therapist and constant support, bearing the weight of this journey alongside me.

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This achievement is as much yours as it is mine.

Abstract

This thesis critically analyses Uganda's bilateral investment treaty (BIT) system to determine its compatibility with sustainable development imperatives and proposes a new model BIT that aligns with Uganda's evolving development priorities. Recognising the country's reliance on foreign direct investment (FDI) for economic growth, this study interrogates the extent to which Uganda's current BITs—many of which were concluded during earlier policymaking eras—expose the country to legal, economic, and regulatory risks. These include susceptibility to investor–state dispute settlement (ISDS) claims, constraints on the host state's right to regulate, and a lack of provisions promoting environmental, social, and developmental objectives.

Through doctrinal and comparative legal analysis, the study traces the historical evolution of international investment law (IIL), critiques the limitations of Uganda's domestic and treaty-based FDI frameworks, and identifies substantive and structural weaknesses in Uganda's in-force and model BITs. The analysis also considers international reform efforts and best practices from new-generation investment agreements, including the AfCFTA Protocol on Investment, the Investment Facilitation for Development (IFD) Agreement, and the SADC and EAC Model BITs. Particular attention is paid to the South African BIT reform experience as a comparator for Uganda's reform journey.

The study finds that Uganda's BIT system is outdated, overly protective of investors, and poorly aligned with its sustainable development goals (SDGs). It recommends terminating unratified and problematic BITs, renegotiating existing ones, and adopting a new model BIT that balances investor protection with Uganda's regulatory autonomy and sustainable development objectives. To this end, a draft model BIT is proposed as an annex to guide future treaty negotiations and reform Uganda's investment regime in line with contemporary global standards and regional aspirations.

Table of Contents

1.	INTRODUCTION AND BACKGROUND	15
1.1.	RESEARCH PROBLEM	22
1.2.	RESEARCH QUESTION	26
1.3.	RESEARCH OBJECTIVES	ERROR! BOOKMARK NOT DEFINED.
1.4.	RESEARCH METHODOLOGY	28
1.5.	CHAPTER OUTLINE.....	29
2.	HISTORICAL ORIGINS OF INTRNATIONAAL INVESTMENT LAW, SURROUNDING ISSUES AND SUSTAINABLE DEVELOPMENT IN INTERNATIONAL INVESTMENT LAW	31
2.1.	EVOLUTION OF INTERNATIONAL INVESTMENT LAW	33
2.1.1.	COLONIAL ERA (1600 – 1944)	33
2.1.2.	POST-COLONIAL ERA (1945 - 1958)	43
2.1.3.	IIA POLICYMAKING ERAS	47
2.2.	ISSUES WITH THE CURRENT IIA REGIME	71
2.2.1.	INVESTOR-STATE DISPUTE SETTLEMENT	73
2.2.2.	BALANCE BETWEEN THE RIGHTS AND OBLIGATIONS OF INVESTORS AND HOST-COUNTRIES AND THE RIGHT TO REGULATE	85
2.2.3.	THE DEVELOPMENT DIMENSION OF IIAS.....	94
2.3.	INTEGRATING SUSTAINABLE DEVELOPMENT INTO INTERNATIONAL INVESTMENT LAW	99
2.3.1.	THE EVOLUTION OF THE NOTION OF SUSTAINABLE DEVELOPMENT	99
2.3.2.	THE INTEGRATION OF SUSTAINABLE DEVELOPMENT IN INTERNATIONAL INVESTMENT LAW	105
2.4.	CONCLUSION.....	109
3.	ANALYSIS OF UGANDA’S FOREIGN DIRECT INVESTMENT REGIME.....	113
3.1.	HISTORICAL OVERVIEW OF UGANDA’S FDI REGIME IN THE POST-INDEPENDENCE ERA	115
3.1.1.	SIR EDWARD MUTESA II ERA (1963 – 1966)	116
3.1.2.	MILTON OBOTE (I) ERA (1966 - 1971)	118
3.1.3.	IDI AMIN ERA (1971 – 1979)	119
3.1.4.	MILTON OBOTE (II) ERA (1980 - 1985)	121
3.1.5.	YOWERI KAGUTA MUSEVENI ERA (1986 – TO DATE)	123
3.2.	BRIEF OVERVIEW FDI INFLOW PERFORMANCE	127
3.3.	THE IMPORTANCE OF FDI IN UGANDA	130
3.4.	UGANDA’S LEGAL, INSTITUTIONAL AND PROCEDURAL FDI REGIME	132
3.4.1.	PRIMARY DOMESTIC LAWS AND POLICIES AFFECTING INVESTMENT IN UGANDA.....	135
3.4.2.	INVESTMENT-RELATED INSTRUMENTS AFFECTING FDI IN UGANDA.....	154
3.4.3.	TREATIES WITH INVESTMENT PROVISIONS AFFECTING FDI IN UGANDA	171
3.5.	CONCLUSION.....	202
4.	ANALYSIS OF UGANDA’S BILATERAL INVESTMENT TREATY-SYSTEM	205
4.1.	GENERAL PROVISIONS OF BILATERAL INVESTMENT TREATIES	206
4.1.1.	PREAMBLE.....	208

4.1.2.	SCOPE AND DEFINITION	213
4.1.3.	STANDARDS OF TREATMENT	227
4.1.4.	EXPROPRIATION OR NATIONALISATION AND COMPENSATION	255
4.1.5.	TRANSFER OF FUNDS	263
4.2.	DISPUTE SETTLEMENT	268
4.3.	DURATION, TERMINATION AND SUNSET CLAUSES.....	272
4.4.	SUSTAINABLE DEVELOPMENT PROVISIONS.....	278
4.5.	CONCLUSION	279

5. REFORM OPTIONS TO INTEGRATE SUSTAINABLE DEVELOPMENT INTO UGANDA’S BILATERAL INVESTMENT TREATIES 281

5.1.	REFORM STRATEGIES: INTEGRATING SUSTAINABLE DEVELOPMENT INTO UGANDA’S BILATERAL INVESTMENT TREATY SYSTEM	282
5.1.1.	TERMINATION OF OLD-BITs: A CASE OF SOUTH AFRICA	283
5.1.2.	INTEGRATING SUSTAINABLE DEVELOPMENT PROVISIONS IN A NEW UGANDAN MODEL BIT	291
5.2.	SUSTAINABLE DEVELOPMENT-RELATED ISSUES	348
5.3.	CONCLUSION	353

6. CONCLUSIONS AND RECOMMENDATIONS 358

6.1.	KEY FINDINGS.....	359
6.2.	REFORM RECOMMENDATIONS.....	375
6.2.1.	UGANDA DOMESTIC FDI REGIME	377
6.2.2.	UGANDA BILATERAL INVESTMENT SYSTEM.....	379
6.3.	FINAL REMARKS.....	391

ANNEX I: TREATY BETWEEN THE REPUBLIC OF UGANDA AND _____ FOR THE PROMOTION AND PROTECTION OF INVESTMENTS.....392

BIBLIOGRAPHY:.....441

Abbreviations and Acronyms

1972 Decree	Uganda Cancellation of Entry Permits and Certificates of Residence Decree of 1972
ACA	Uganda Arbitration and Conciliation Act of 2000
AfAA	African Arbitration Association
AFCFTA	African Continental Free Trade Area
Agenda 2030	United Nations (UN) 'Transforming our World: The 2030 Agenda for Sustainable Development' 2015, A/RES/70/1
Agenda 2063	Agenda 2063 – The Africa We Want, 2015
ASEAN	Association of Southeast Asian Nations
ATI	African Trade Insurance
AU	African Union
BBBEE	Broad-Based Black Economic Empowerment
BIT	Bilateral investment treaty
Brundtland Report	United Nations Report of the World Commission on Environment and Development: Our Common Future, 1987
CAR	Central African Republic
CETA	Comprehensive Economic and Trade Agreement
CCIA Agreement	The Investment Agreement for the COMESA Common Investment Area, 2007
CCJ	COMESA Court of Justice

CIDS	Geneva Center for International Dispute Settlement
CIL	Customary investment law
CNOOC	Chinese National Offshore Oil Corporation
COMESA	Common Market for Eastern and Southern Africa
Commonwealth Guide	Commonwealth Guide for Developing Country Negotiators
DCF	Discounted cash flow
Doha Declaration	Doha Declaration on Financing for Development: Outcome Document of the Follow-Up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, Doha, Qatar, 29 November – 2 December 2008
DRC	Democratic Republic of Congo
DSU	Dispute Settlement Understanding
DTI	South Africa Department of Trade and Industry
DTT	Double taxation treaty
EAC	East African Community
EC	European Commission
ECT	Energy Charter Treaty
EIA	Environmental impact assessment
ESIA	Environmental and social impact assessment
ESG	Environment, social and governance

EU	European Union
FAO	Food and Agriculture Organisation
FCCG	Federal Constitutional Court of Germany
FCTC	Framework Convention on Tobacco Control
FET	Fair and equitable treatment
FDI	Foreign direct investment
FIP Act	Uganda Foreign Investments Protection Act of 1964
FPS	Full protection and security
FTA	Free trade agreement
GATT	General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)
HDSA	Historically Disadvantaged South Africans
IAT	International arbitration tribunal
IBA	International Bar Association
ICA – 91	Uganda Investment Code Act, Cap 92 of 1991
ICA – 19	Uganda Investment Code Act of 2019
ICSID Convention	Convention on the settlement of investment disputes between States and nationals of other States, 1965

IFD Agreement	‘Joint Ministerial Declaration on the Investment Facilitation for Development Agreement’ Ministerial Conference, Thirteenth Session, Abud-Dhabi 26-29 February 2024, 25 February 2024 (WT/MIN(24)/17)
IIA	International investment agreement
IISD	International Institute for Sustainable Development
IPA	Investment promotion agency
IPFSD	Investment policy framework for sustainable development
ISDS	Investor-State dispute settlement
ITO	International Trade Organization
KCCA	Kampala Capital City Authority
LDC	Least developed country
MDG	Millenium development goal
MFN	Most-favoured-nation treatment
MIC	Multilateral investment court
MIGA	Multilateral Investment Guarantee Agency
MNC	Multinational corporation
MST	Minimum standard of treatment
MSME	Micro, medium and small-sized enterprises
Monterrey Consensus	Monterrey Consensus of the International Conference on Financing for Development, Report of the International

	Conference on Financing for Development, 22 March 2002, UN Doc. A/CONF.198/11
NAFTA	North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) 32 ILM 289 (1993).
New York Convention	United Nations Convention on the recognition and enforcement of foreign arbitral awards, 1958
NDP	National development plan
NIEO	New international economic order
NIP	Uganda National Investment Policy of 2018
NPA	National Planning Authority
NT	National treatment
ODA	Official development assistance
OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Co-operation
OIC Investment Agreement	Agreement on Promotion, Protection and guarantee of Investments amongst the Member States of the Organization of the Islamic Conference, 1981
Old-BIT 2010	Old generation bilateral investment treaty concluded before 2010
Old-IIA	Old generation international investment agreement concluded before 2010
OSC	One Stop Centre

P&ID	Process and Industrial Developments Ltd
PIA	South Africa Protection of Investment Act of 2015
Protocol on Investment	Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment, January 2023, STC/Legal/Exp
PTIA	Preferential trade and investment agreement
PwC	PricewaterhouseCoopers
PPP Act	Uganda Public Private Partnerships (PPP) Act of 2015
RBC	Responsible business conduct
REC	Regional economic community
RIA	Regional investment agreement
RTA	Regional trade agreement
SACU	Southern African Customs Union
SACU Agreement	Southern African Customs Union Agreement, 2002
SADC	Southern African Development Community
SDG	Sustainable development goal
SEATINI	The Southern and Eastern Africa Trade Information and Negotiations Institute
SOE	State owned enterprise
SSDS	State-State dispute settlement
TIP	Treaty with investment provisions

TGN	<i>Transpotadora de Gas del Norte</i>
TRIMs Agreement	Agreement on Trade-Related Investment Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 (1994).
TRIPs Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994)
TUO	Tullow Uganda Operations
UAE	United Arab Emirates
UFZ Act	Uganda Free Zone Act of 2014
UIA	Uganda Investment Authority
ULII	Uganda Legal Information Institute
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCTAD	United Nations Conference for Trade and Development
UNCTE	United Nations Conference on Trade and Employment
UNCITRAL	United Nations Commission on International Trade Law
URA	Uganda Revenue Authority
URSB	Uganda Registration Services Bureau

US	United States of America
USD	United States Dollar
USMCA	United States-Mexico-Canada Agreement, 2018
UGX	Ugandan Shilling
WIR	World investment report
WHO	World Health Organization
WTO	World Trade Organization
WWI	World War I
WWII	World War II

Chapter One: Introduction and background

1. Introduction

Over the years, African countries, the majority of which are least developed countries (LDCs), have increasingly relied on foreign direct investment (FDI) to jumpstart, improve and sustain their rapid economic growth and development.¹ FDI can be defined as:²

the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of such assets.

In such countries, FDI has overtaken portfolio investments, remittances and official development assistance (ODA) to become the largest and most constant source of finance for several reasons.³ Firstly, as a source of capital, funds from FDI inflows often supplement savings, partially filling the economic gap caused by the lack of sufficient savings and resources in those countries.⁴

Secondly, FDI has the potential to contribute to a country's social-economic growth and development through the transfer of managerial skills, best practices, the creation of new job opportunities, related industries and infrastructure.⁵ Thirdly, it enables the world-wide allocation of technology,⁶ which together with technical spill overs, can lead to an increase in factor productivity and efficiency in the utilisation of resources.⁷

¹ SI Ajayi, 'FDI and Economic Development in Africa' (2006) Paper for presentation at the ADB/AERC International Conference on Accelerating Africa's Development Five years into the Twenty-First Century, Tunis, Tunisia November 22 – 24, 2006 2 available at <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Knowledge/09484246-EN-FDI-AND-ECONOMIC-GROWTH.PDF> (accessed 10 December 2022).

² M Sornarajah *The International Law on Foreign Investment* (2017) 11.

³ United Nations Conference on Trade and Development (UNCTAD) *World Investment Report (WIR) 2017: Investment and the Digital Economy: Key Messages and Overview* (2017) X.

⁴ MB Obwona 'Determinants of Foreign Direct Investment and their Impact on Economic Growth in Uganda', (1998) *Les Cahiers du SISERA* 1; HS Kehal *Foreign Investment in Developing Countries* (2004) 1.

⁵ LW Mouyal *International Investment Law and the Right to Regulate: A Human Rights Perspective* (2016) 7.

⁶ Ajayi (2006) 2.

⁷ Ajayi (2006) 2; E Neumayer & L Spess 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2005) 33 *World Development* 1568; OECD *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs – Overview* (2002) 5.

Lastly, beyond just the economic benefits, FDI can enhance social and environmental conditions in a developing host-country by providing 'cleaner' or 'green' technologies, which can result in more socially responsible corporate policies.⁸ As such, FDI is vital to the development strategies of African countries, prompting them to make significant efforts to attract it into their territories.

Historically, developing countries have used three methods to compete for and attract FDI inflows:⁹ First, some have liberalised their trade and investment environments, by joining multilateral organisations like the World Trade Organization (WTO) and regional economic communities (RECs) like the Common Market for Eastern and Southern Africa (COMESA), which enforce binding agreements and protocols, including those related to investment.¹⁰

Secondly, they have implemented domestic legal frameworks and national investment policies.¹¹ Lastly, they have concluded a plethora of international investment agreements (IIAs) to attract FDI inflows.¹² Therefore, FDI regime is generally governed by domestic legal frameworks, national investment policies and IIAs, including plurilateral, regional, bilateral investment treaties (BITs) and treaties with investment provisions (TIPs).

Foreign direct investment is also regulated through contracts between the foreign investor and the host-country; customary international law (CIL); double taxation treaties (DTTs) and international tax agreements;¹³ and even soft laws.¹⁴ While not all countries have specific

⁸ OECD *FDI for Development* (2002) 5.

⁹ Ajayi (2006) 2.

¹⁰ For example, the Agreement on Trade-Related Investment Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 (TRIMs Agreement) and the Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) (TRIPs Agreement); TJ Moss, V Ramachandran & MK Shah 'Is Africa's skepticism of foreign capital justified? Evidence from East African Firm Survey Data' (2004) 41 *Center for Global Development*, Working Paper 1; OECD *FDI for Development* (2002) 5.

¹¹ TJ Moss *et al* (2004) 1.

¹² TJ Moss *et al* (2004) 1.

¹³ TJ Moss *et al* (2004) 1.

¹⁴ Some of these laws have included multilateral and regional declarations that affect investment directly or indirectly but are not binding on Member States e.g. the UN Millennium Development Goals (MGDs) or the 2030 Sustainable Development Goals (SDGs).

domestic laws or national policies on cross-border investment, most have entered into at least one IIA.¹⁵

International investment agreements, which are the primary focus of this study, are regarded as the cornerstone of modern international investment law (IIL) and constitute one of the principal instruments for the enhancement of the rule of law in investor-State relations.¹⁶ According to the United Nations Conference on Trade and Development (UNCTAD), there are about 3 291 IIAs to date, 460 of which are TIPs and 2 831 are BITs.¹⁷

Treaties with investment provisions are economic agreements which consist of investment-related provisions and typically come in the form of multilateral, preferential, plurilateral or regional trade and investment agreements.¹⁸ They are usually concluded between more than two countries and until recently,¹⁹ tended to cover other legal sectors including tax, trade, finance, health, labour and environmental issues.²⁰

Bilateral investment treaties are also economic agreements, which can be defined as risk-mitigating instruments between two countries that provide investors with credible commitments that their assets will not be expropriated, discriminated against, or otherwise

¹⁵ K Singh & B Ilge (eds) *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* (2016) 30.

¹⁶ M Chi *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications* (2018) 2.

¹⁷ UNCTAD *WIR 2024: Investment facilitation and digital government* (2024) 21.

¹⁸ UNCTAD 'Investment Policy Hub' available at <http://www.investmentpolicy.unctad.org/international-investment-agreements/by-country-grouping> (accessed 12 December 2022); CJ Bailey & F Jones, 'A Guide to International Investment Agreements' (25 January 2017) available at <https://www.bilaterals.org/?a-guide-to-international> (accessed 10 December 2022).

¹⁹ The Investment Facilitation for Development (IFD) Agreement and the Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (AfCFTA Protocol on Investment) are respectively plurilateral and regional treaties that exclusively cover foreign investment issues.

²⁰ See for example, Energy Charter Treaty 2080 UNTS 100, 10 ICSID Rev – *Foreign Investment L J* 258 (1994); Agreement between the United States of America, the United Mexican States, and Canada (USMCA), 7 January 2020; Treaty for the Establishment of the East African Community (1999) (EAC Treaty); the AfCFTA Protocol on Investment (2023).

maltreated post-establishment.²¹ Some BITs even protect foreign investors before they physically establish an investment in a host country (pre-establishment).²²

Initially, foreign investment was governed by CIL, however, the rise in investment disputes post-World War II (WWII), exposed CIL's limitations and the inadequacy of home-country diplomatic protection, eventually prompting the creation of BITs.²³ IIAs are concluded in specific historic, economic and social contexts, in response to the then existing need and challenges.²⁴ Although this study will analyse different types of IIAs, emphasis will predominantly be on BITs.

Bilateral investment treaties have evolved across four distinct policymaking phases: the Infancy era (1959–1964), the Dichotomy era (1965–1989), the Proliferation era (1990–2007), and the Re-orientation era (2008–present). Over time, it became evident that BITs concluded prior to 2010—commonly referred to as “old-generation BITs”, carried unintended consequences that host states had not foreseen during their negotiation. Key concerns have emerged around the limited consideration of development objectives, the imbalance between investor rights and host state obligations, the investor-state dispute settlement (ISDS) mechanism and the increasing complexity and fragmentation of the IIA regime.²⁵

²¹ SLN Poulsen ‘The importance of BITs for foreign direct investment and political risk insurance: Revisiting the evidence’ (2012) *Yearbook on International Investment Law and Policy* 2009/2010 540; CJ Bailey & F Jones A Guide to International Investment Agreements’ 25 January 2017 available at <https://www.bilaterals.org/?a-guide-to-international> (accessed 10 December 2022).

²² ‘Investment treaties and sustainable development: Investment liberalisation’ *International Institute for Environment and Development Briefing* May 2014 available at <https://www.iied.org/sites/default/files/pdfs/migrate/17239IIED.pdf> (accessed 16 July 2024).

²³ UNCTAD *WIR 2015: Reforming International Investment Governance* (2015) 122.

²⁴ UNCTAD *WIR* (2015) 121.

²⁵ UNCTAD ‘Reform of the IIA Regime: Four paths of action and a way forward’ 3 *IIA Issues Note* June 2024, 1.

Some cases have also shown that FDI does not always lead to the economic development it promises.²⁶ Some argue that BITs may actually reduce FDI to high-risk countries,²⁷ while others argue that BITs seldom influence the amount of FDI inflows received in developing countries especially since countries like Brazil and India have managed to attract a considerable amount of FDI inflows despite signing relatively few BITs.²⁸

Old-BITs may also restrict a host-country's right to regulate in the public interest and undermine their ability to develop in a sustainable manner.²⁹ Some authors have opined that the FDI so attracted by old-BITs can give rise to environmental, labour, health and human rights concerns, which also have devastating consequences for the host-country's public and its overall (sustainable) development imperatives.³⁰

The investor-State dispute settlement mechanism has also become highly contested among scholars and IIA reformists.³¹ The broad and vaguely worded provisions of older BITs enable investors to challenge core domestic policy considerations like environmental, tax, affirmative action and public health policies.³² Additionally, these treaties also tend to expose countries

²⁶ OECD *FDI for Development* (2002) 3; SW Schill, CJ Tams & R Hofmann (eds) *International investment law and development: Bridging the gap* (2015) 40 – 42; As a counter-narrative, Brazil never ratified any treaty, yet over the past 20 years, it has been among the top developing country FDI recipients – JA VanDuzer, P Simons & G Mayeda *Integrating sustainable development into international investment agreements: A guide for developing country negotiators* (2013) 1; SE Rolland & DM Tubek 'Legal Innovation in Investment Law: Rhetoric and Practice in Emerging Economies' (2018) 32 *University of Pennsylvania Journal of International Law* 358; O de Schutter, J Swinnen & J Wouters (eds) *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (2013) 4; JW Salacuse & NP Sullivan 'Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain' (2005) 67 *Harvard International Law Journal* 46.

²⁷ WY Jason 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2008) 42 *Law & Society Review* 4 (2008) 806.

²⁸ 'India and Brazil conclude negotiations of Bilateral Investment Treaty' *Herbert, Smith, Freehills* 5 December 2016) available at <https://hsfnotes.com/arbitration/2016/12/05/india-and-brazil-conclude-negotiations-of-bilateral-investment-treaty/> (accessed 12 December 2017).

²⁹ T Gazzini 'Bilateral investment treaties and sustainable development' (2014) 15 *The Journal of World Investment and Trade* 929; UNCTAD *WIR 2012: Towards a New Generation of Investment Policies* (2012) 84 – 105; E Chalamish 'The future of bilateral investment treaties: A de facto multilateral agreement' (2009) 34 *Brooklyn Journal of International Law* (2009) 309; UNCTAD *WIR 2014: Investing in the SDGs: An Action Plan* (2014) 126.

³⁰ UNCTAD *WIR* (2014) 126.

³¹ UNCTAD *WIR* (2015); UNCTAD 'Reform of the IIA Regime' (2014) 3 *IIA Issues Note* 1.

³² UNCTAD *WIR* (2014) 126; See for example, *Total E&P Uganda BV v Republic of Uganda* (ICSID Case No. ARB/15/11), which arise out of an allegedly unlawful tax levied by the Government of Uganda (GOU), *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No. 2012-12), which arose out of Australia's intention to implement plain packaging policies on tobacco products and *Piero Foresti, Laura de Carli and others v Republic of South Africa* (ICSID Case No. ARB(AF)/07/1), which arouse out of the alleged extinction of certain old order mineral rights held by the claimants by the entry into force of South Africa's Mineral and

to ISDS cases since State obligations under these BITs are often only enforced by a foreign investor through ISDS mechanisms.

Arbitrators have also been extremely creative in interpreting IIA provisions,³³ particularly regarding expropriation, the most-favoured nation (MFN) principle and fair and equitable treatment (FET) provisions,³⁴ generating a number of controversial decisions, often adversely affecting host-countries concerned, especially developing ones.³⁵ ISDS cases are also costly and can result in significant awards to foreign investors, undermining a host-country's ability to pursue sustainable development goals (SDGs).³⁶

As such, countries are increasingly questioning the legitimacy of their IIA regimes and opting to revise and reform them.³⁷ The concept of sustainable development, although highly contested,³⁸ can generally be understood as a kind of 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'³⁹ This definition not only captures the economic dimension of IIAs, but the social and environmental ones as well.⁴⁰

Recent global IIA reform trends therefore aim to promote sustainable development rather than merely protecting investments.⁴¹ Reform options include amending treaty provisions;

Petroleum Resources Development Act of 2002, and the introduction of compulsory equity divestiture requirements with respect to the investors' shares in certain operating companies.

³³ PS Subedi *International Investment Law: Reconciling Policy and Principle* (2016) 3; UNCTAD *WIR* (2015) 124.

³⁴ Subedi (2016) 3; UNCTAD *WIR* (2015) 124.

³⁵ M Sornarajah 'Developing countries in the investment treaty system: A law for need or a law for greed?' in Schill *et al* (2015) 48 – 50.

³⁶ S Miller & GN Hicks 'Investor-State Dispute Settlement: A Reality Check,' (2015) *Centre for Strategic & International Studies* 2; C Aaron 'International Investment Agreements and Sustainable Development: Achieving the Millennium Development Goals' (2005) *International Institute for Sustainable Development (IISD) and International Development Research Centre* 1.

³⁷ T Gazzini, 'Bilateral investment treaties and sustainable development' (2014) 15 *Journal of World Investment and Trade* 929; UNCTAD *WIR* (2012) 84 – 105.

³⁸ Van Duzer *et al* (2013) 19.

³⁹ United Nations 'Report of the World Commission on Environment and Development: Our Common Future' (Brundtland Report) (1987) para 27.

⁴⁰ Chi (2018) 9.

⁴¹ 18 new IIAs were concluded in 2017 – UNCTAD *WIR 2018: Investment and new industrial policies* (2018) XIII; UNCTAD *WIR 2019: Special economic zones* (2019) XII; UNCTAD *WIR 2020: International production beyond the pandemic* (2020) XII; UNCTAD *WIR 2021: Investing in Sustainable Recovery* (2021) 123; UNCTAD *WIR 2012: Towards a new generation of investment policies* (2012); South Africa adopted the Protection of Investment Act (PIA) in 2015 which now regulates both foreign and domestic investment; In 2019, Uganda replaced its 'old' Investment Code Act 1990 with a new Investment Code Act 2019 that regulates both foreign and

replacing ‘outdated’ treaties; engaging multilaterally; abandoning unratified old treaties; terminating existing old treaties; and withdrawing from multilateral mechanisms like the International Centre for Settlement of Investment Disputes Convention (ICSID Convention).⁴²

International organisations, like the United Nations Commission on International Trade Law (UNCITRAL), UNCTAD and the Commonwealth Secretariat have also supported these reform efforts by publishing development frameworks to guide governments on how to go about reforming their IIA regimes.⁴³ The current trend of IIA policy-making reform is thereby characterised by the inclusion of the sustainable development objectives in the FDI regime.⁴⁴

Uganda has signed 14 BITs since its independence in 1962, five of which are in force, while nine are unratified and therefore not in force. Its in-force BITs, concluded between the Infancy and Proliferation eras, are old-BITs. It is on this basis that this study seeks to analyse Uganda’s current BIT system (including its Model BIT). It contends that Uganda’s current BIT system is outdated and needs to be reformed.

The thesis seeks to analyse the provisions of Uganda’s in-force and 2003 Model BIT to find whether they subject the country to the risks identified from old-BITs. This study assumes that as an LDC, there is still value in Uganda having these treaties. As such, the study also proposes a new sustainable development-oriented Model BIT, which will form the basis of future BIT negotiations with the country.

domestic investment in the country. Unlike the ZA Act however, the Ugandan Investment Code does not contain anything on pursuing sustainable development objectives.

⁴² UNCTAD *UNCTAD’s reform package for the international investment regime* (2018) 8.

⁴³ United Nations Commission on International Trade Law (UNCITRAL) formed the Working Group III (ISDS Reform) in order to deal with challenges of the current investor-State arbitration – UNCITRAL ‘Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November – 1 December 2017) available at https://uncitral.un.org/en/working_groups/3/investor-state (accessed 20 April 2021); The Commonwealth Secretariat published the Integrating sustainable development into international investment agreements: A guide for developing country negotiators in 2013; and UNCTAD’s Investment policy framework for Sustainable development (2015).

⁴⁴ UNCTAD ‘Reform of the IIA regime’ (2014) 1.

1.1. Research problem

As an LDC, Uganda relies heavily on FDI for economic growth and development, due to low domestic revenue, savings, ODA and private-sector investment capacity.⁴⁵ To attract FDI, the Ugandan government has liberalised its investment climate by entering into various international and regional economic agreements and implementing laws and policies to promote investment.⁴⁶

These efforts have restored investor and donor confidence, which had been severely affected by the political and civil unrest that followed the country's independence in 1964 through to the late 1980s.⁴⁷ Under the current President Museveni, the country is relatively stable⁴⁸ and as of 2023, has become one of Africa's top five LDC FDI recipients,⁴⁹ with inflows reaching USD 2.8 billion.⁵⁰

In Uganda, FDI is regulated by domestic investment laws, policies and IIAs. The ICA – 19,⁵¹ which regulates both domestic and foreign investments in Uganda, replaced the outdated 1991 Act (ICA – 91).⁵² The new Act expanded the Uganda Investment Authority (UIA)'s powers to streamline investment activities⁵³ and aligned it with the Constitution of Uganda.⁵⁴

⁴⁵ J Ssali 'An Analysis of Foreign Direct Investment Regulation in the Petroleum Sector in Uganda' unpublished LLM thesis, University of Pretoria 2014 10; RKS Wakyereza 'The Impact of Foreign Direct Investment on Economic Growth, Employment and Poverty Reduction in Uganda' unpublished MBA thesis, Victoria University, 2017 24.

⁴⁶ Ssali (2014) 10; Some of these include the African Union (AU), AfCFTA, WTO, East African Community (EAC) and COMESA. Some national investment include the Uganda Investment Code Act 2019 (ICA-19).

⁴⁷ Former President Idi Amin Dada in accordance with the Immigration (Cancellation of Entry Permits and Certificates of Residence) Decree 1972 (1972 Decree) expelled Asians from Uganda and proceeded to expropriate their businesses, homes etc - Foreign economic interests were eliminated and some 70,000 residents of Asian and European descent were expelled from Uganda.

⁴⁸ UNCTAD *Investment Policy Review – Uganda* (2000) 1.

⁴⁹ P Madden, 'Figure of the Week: Foreign Direct Investment in Africa' *Africa in Focus* 9 Wednesday 9 October 2019 available at <https://www.brookings.edu/blog/Africa-in-focus/2019/10/09/figure-of-the-week-foreign-direct-investment-in-africa/> (accessed 10 Jan 2020); 'Addis, Kampala outshine Nairobi with Sh450bn regional FDI deals,' *Business Hub* 27 January 2020 available at <http://businessdailyafrica.com/datahub/3815418-5432236-lqvukb1z/index.html> (accessed 20 February 2020); UNCATD *WIR* (2024) 16, 18, .

⁵⁰ UNCTAD *WIR* (2024) 159; This has mainly been due to investments in the oil and gas, manufacturing and hospitality sectors - UNCTAD *WIR* (2019) 32, 68 & 213; UNCTAD *WIR 2013: Global Value Chains: Investment and Trade for Development* (2013) 214.

⁵¹ Uganda Investment Code Act of 2019 – (ICA – 19).

⁵² Uganda Investment Code Act of 1991, Cap 92 (ICA – 91).

⁵³ Uganda ICA-19 (2019) short title.

⁵⁴ Uganda ICA-19 (2019) short title.

Notably, the ICA – 19 is not a self-contained regulatory scheme and is supported by other domestic laws, which directly or indirectly affect investments in Uganda.⁵⁵

Additionally, Uganda's draft National Investment Policy (Uganda NIP)⁵⁶ aims to, *inter alia*, strengthen the investment legal and regulatory regime and enhance the efficiency and effectiveness of the investment function to boost the effect of investment on inclusive growth and sustainable development.⁵⁷ Investment is also influenced by several development frameworks including the AU's Agenda 2063 and United Nations (UN) Agenda 2030.⁵⁸

Moreover, Uganda has concluded various IIAs in order to attract FDI inflows and promote development,⁵⁹ including the WTO's Agreement on Trade-Related Investment Measures (TRIMs Agreement)⁶⁰ and the Agreement on Promotion, Protection and guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (OIC Investment Agreement).⁶¹

In recent years, additional efforts to regulate FDI exclusively, have been made at the regional and multilateral levels. In Africa, for example, the Protocol to the Agreement Establishing the African Continental Free Trade Area (AfCFTA) on Investment (Protocol on Investment or the Protocol) was adopted on 19 February 2023.⁶² It aims to enhance intra-African investment by

⁵⁵ Other laws that directly or indirectly regulate FDI in Uganda also include; the Capital Markets Authority Act of 2015; the Employment Act of 2006; Companies Act of 2012; the Uganda Free Zone (UFZ) Act of 2014; the Public Private Partnerships (PPP) Act of 2015; the Petroleum and Minerals Legal & Regulatory Framework; and the Financial Sector and Regulatory framework.

⁵⁶ Uganda draft National Investment Policy of 2018 (Uganda NIP).

⁵⁷ Uganda NIP (2018) 9.

⁵⁸ African Union (AU), 'Agenda 2063 – The Africa We Want'; United Nations (UN), 'Transforming our World: The 2030 Agenda for Sustainable Development', A/RES/70/1 available at <https://sdgs.un.org/2030agenda> (accessed 18 June 2024).

⁵⁹ M Odongo 'Foreign Direct Investment and Economic Growth in Uganda' Master of Arts Thesis, University of Malawi, 2012 10.

⁶⁰ TRIMs Agreement (1994).

⁶¹ The Agreement on Promotion, Protection and guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (OIC Investment Agreement), 1981.

⁶² 'AfCFTA Protocol on Investment: Fact sheet' *Tralac* 5 October 2023 available at <https://www.tralac.org/resources/infographic/16152-afcfta-protocol-on-investment-factsheet.html#:~:text=The%20AfCFTA%20Protocol%20on%20Investment,2023%20in%20Addis%20Ababa%2C%20Ethiopia>. (accessed 16 July 2024); *Tralac* 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' (2019) available at <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html> (accesses 23 October 2019); 'Uganda deposits its instruments of ratification of the Agreement on the AfCFTA' *Tralac* 29 November 2018 available at <https://www.tralac.org/news/article/13750-uganda-deposits-its-instrument-of-ratification-of-the-agreement-on-the-afcfta.html> (accessed 8 December 2023).

establishing a framework that emphasises sustainable development, and balanced and transparent legal structures and interests of relevant stakeholders.⁶³

The AfCFTA Protocol on Investment also seeks to provide a legal framework for preventing, managing and settling investment disputes and encourages the transfer of technology within Africa.⁶⁴ Upon implementation, the Protocol requires Member States to terminate any existing intra-African BITs within five years, including survival clauses and prohibits them from concluding new ones.⁶⁵

Member States are also required to review and revise regional investment agreements (RIAs) within five to ten years, considering the Protocol's requirements in negotiations with Third Parties.⁶⁶ The Protocol is a crucial consideration for the review of Uganda's BIT system and any revisions or reforms should be in line with its sustainable development goals (SDGs) and overarching obligations.

Uganda also took part in the negotiation of the WTO's Investment Facilitation for Development (IFD) Agreement, a plurilateral agreement, which was finalised in February 2024 and is only binding on those WTO Members that choose to join it.⁶⁷ Although it is yet to enter into force, it aims to improve transparency, streamline administrative procedures and promote international cooperation to facilitate FDI, especially to developing and least-developed countries.⁶⁸

Notably, Uganda has also signed 17 BITs over the years.⁶⁹ Of these, only five are in force, nine are unratified and therefore not in force and three were terminated.⁷⁰ It is worth noting that these BITs were concluded in the dichotomy and proliferation eras and are therefore

⁶³ AfCFTA Protocol on Investment (2023) art 2(a) – (c).

⁶⁴ AfCFTA Protocol on Investment (2023) art 2(d) – (e).

⁶⁵ AfCFTA Protocol on Investment (2023) art 49(1) – (2).

⁶⁶ AfCFTA Protocol on Investment (2023) art 49(3) – (4).

⁶⁷ Joint Ministerial Declaration on the Investment Facilitation for Development (IFD) Agreement, 27 February 2024, Annex 4, WT/MIN(24)/17.

⁶⁸ IFD Agreement (2024) art 1.

⁶⁹ UNCTAD 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/218/uganda> (accessed 10 July 2022).

⁷⁰ UNCTAD, 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/218/uganda> (accessed 10 July 2022).

considered as old-BITs. Unsurprisingly, they face criticisms for prioritising investor protection over local community and environmental interests.⁷¹

For example, the 2000 Netherlands – Uganda BIT, terminated in 2017, was found to unduly favour multinational corporations (MNCs) after it was used to institute a claim against Uganda in the *Total E&P v Uganda* case.⁷² Several stakeholders opined that the replacement of the Dutch BIT should not grant foreign investors with privileges beyond the common rules and regulations of Uganda’s domestic legal system.⁷³

It was recommended that the next BIT should balance the rights and obligations of investors, the Government of Uganda and local communities.⁷⁴ Stakeholders indicated that Uganda’s future BITs should no longer focus only on the protection of investors⁷⁵ and that their overarching goal should be to protect Uganda’s local communities and the environment, ensuring that investments contribute to inclusive and sustainable development.⁷⁶

Nonetheless, Uganda’s other in-force BITs with Germany, Switzerland, the United Kingdom (UK), Denmark, France and its Model BIT, harbour the same problems and challenges as those found in Uganda’s now terminated BIT with the Netherlands. They also contain broad, vague wording that exposes the country to the same risks associated with old-IIAs/ BITs, including ISDS cases and regulation limitations, and do not promote sustainable development objectives.⁷⁷

Uganda’s overall BIT system perpetuates overlaps, inconsistencies and interaction challenges within its IIA network and between IIAs and other areas of international policymaking, such as labour, environmental, human rights and health issues.⁷⁸ The ambiguity of Uganda’s vague

⁷¹ Both ENDS *Annual report 2017* (2017) 14.

⁷² Netherlands – Uganda BIT (2000); *Total E&P v Uganda* (ICSID Case No. ARB/15/11).

⁷³ Both ENDS *Annual report 2017* (2017) 15.

⁷⁴ Both ENDS *Annual report 2017* (2017) 15.

⁷⁵ Both ENDS *Annual report 2017* (2017) 15.

⁷⁶ Both ENDS *Annual report 2017* (2017) 15.

⁷⁷ UNCTAD, ‘Investment Policy Hub’ available at <https://investmentpolicy.unctad.org/country-navigator/226/uganda> (accessed 10 October 2022); UNCTAD *WIR:2015 XXV*; UNCTAD ‘Reform of the IIA Regime: Four Paths of Action and a Way Forward’, (June 2014) 3 *IIA Issues Note* 1.

⁷⁸ UNCTAD *WIR* (2017) 129.

and broadly worded old-BIT provisions can have adverse and devastating effects on Uganda's economy and undermine the application of its domestic laws.⁷⁹

As Uganda continues to attract more FDI, it will likely face more ISDS cases in future, pursuant to these old-BITs. Fortunately, all these BITs have reached a stage where they can be unilaterally terminated or terminated by mutual agreement.⁸⁰ This thesis argues that Uganda should abandon its unratified BITs, terminate the existing in-force BITs and renegotiate them on the basis of a new model treaty with sustainable development-oriented provisions.

The question, therefore, is how can Uganda reform its overall BIT system and create a new model BIT that reflects its changed economic strategies and integrates inclusive and sustainable development objectives? The solution to this impasse lies in a further study of other national, bilateral and regional IIA reforms, which will aid in determining how Uganda can improve its overall BIT system.

A further analysis of the impact of new IIAs like the AfCFTA Protocol on Investment and IFD Agreement, development frameworks like Agenda 2030 and 2063 and international investment guidelines on IIA policymaking reform, will also assist in this process. These experiences shall substantiate this research and justify the need for Uganda's BIT system reform.

1.2. Research question and objectives

This thesis seeks to interrogate how Uganda can reform its BIT system to better align with its sustainable development objectives, in light of the shortcomings of its current treaties and global trends in IIA reform. The overarching research question guiding this study is:

1.2.1. Main Research Question:

How can Uganda reform its current bilateral investment treaty system to align more effectively with inclusive and sustainable development imperatives, while preserving its ability

⁷⁹ *Total E&P v Uganda* (ICSID Case No. ARB/15/11).

⁸⁰ Vienna Convention on the Law of Treaties, 1965 (Vienna Convention) 1155 *UN Treaty Series* 331.

to attract and regulate foreign direct investment (FDI) in line with national interests and international obligations?

1.2.1.1. Research sub-questions and objectives

To comprehensively answer this overarching question, the study is structured around the following sub-questions, each of which directly corresponds to a specific research objective:

- 1) **Sub-Question 1:** What are the historical and systemic foundations of the international investment treaty regime and how have they influenced the treatment of sustainable development within IIAs?
 - *Linked to Objective (a):* Investigate the historical background of BITs, the emerging challenges within the current IIA regime and the evolution of the sustainable development concept, including its integration into IIAs.
- 2) **Sub-Question 2:** What are the key features of Uganda's domestic legal and institutional investment framework and how does it interact with regional, plurilateral and multilateral instruments influencing investment?
 - *Linked to Objective (b):* Examine Uganda's overall FDI regime, including its key national investment laws and policies, as well as relevant regional, plurilateral and multilateral agreements impacting investment.
- 3) **Sub-Question 3:** To what extent do Uganda's existing in-force BITs and Model BIT constrain the state's regulatory autonomy and its ability to pursue sustainable development?
 - *Linked to Objective (c):* Analyse Uganda's in-force BITs and Model BIT to evaluate their effect on Uganda's ability to pursue sustainable development and regulatory goals, identifying areas for improvement.
- 4) **Sub-Question 4:** What reform options are available for Uganda to restructure its BIT system in a manner that promotes balanced investor-host state relations and advances SDGs?

- *Linked to Objective (d)*: Explore potential reforms and propose modifications to Uganda's BIT system and Model BIT to better align with sustainable development objectives.

5) **Sub-Question 5**: What legal and institutional design features should a new Ugandan Model BIT contain to ensure it integrates sustainable development principles while maintaining its attractiveness to foreign investors?

- *Linked to Objective (e)*: Develop a new Model BIT that consistently promotes SDGs while balancing the rights and obligations of both foreign investors and Uganda.

1.3. Research methodology

This research primarily adopts a comprehensive desktop study approach, involving the review and analysis of relevant literature, selected IIAs and case law. The study will focus on examining key IIA provisions, domestic investment laws and policies, ISDS cases and international guidelines on IIA reform. It will also draw from legal literature such as textbooks, reports and journal articles as well as News sources, working papers and academic dissertations.

Specifically, the research will analyse Uganda's legal investment framework, including the Constitution of Uganda and the Investment Code Act of 2019 (ICA-19), which regulate both foreign and domestic investments. Uganda's NIP will also be examined to understand the country's evolving economic strategies and goals in relation to investment and sustainable development.

A critical analysis will be conducted on the provisions of Uganda's in-force BITs and Model BIT, focusing on core substantive IIA elements such as preambles, scope, full protection and security (FPS), most-favoured-nation (MFN) treatment, national treatment (NT), expropriation and compensation, transfer of funds, dispute settlement mechanisms, duration, termination and sunset clauses.

These provisions are not exhaustive, as the treaties contain additional clauses binding Uganda. The research will also explore Uganda's key TIPs, including the COMESA and EAC treaties, the COMESA Common Investment Agreement (CCIA), the AfCFTA Protocol on

Investment and the recently drafted Investment Facilitation for Development (IFD) Agreement, to assess their impact on Uganda's investment regime.

Additionally, the study will analyse relevant international instruments, such as the New York Convention, the ICSID Convention and the TRIMS Agreement. Toolkits and guidelines developed by international organisations like the Commonwealth Secretariat and UNCTAD will be consulted to guide the reform of Uganda's IIA regime toward sustainable development objectives.

Innovative 'new' IIAs, such as the AfCFTA Protocol on Investment, EAC Model Investment Treaty and the Southern African Development Community (SADC) Model BIT template, will serve as key resources for proposing reforms to Uganda's Model BIT in line with SDGs. International declarations, including the 2030 Agenda for Sustainable Development and Agenda 2063, will also be considered to ensure consistency with SDGs.

A comparative analysis of South Africa's IIA reform is included, given its significant strides in aligning its investment regime with sustainable development imperatives. South Africa, like Uganda, faced a controversial ISDS case,⁸¹ prompting a reconsideration of its BITs. After reviewing its IIA regime, South Africa terminated outdated BITs and introduced a new domestic legal framework prioritising balanced investor protection and the state's right to regulate in the public interest.

This comparative study offers valuable lessons for Uganda in reforming its IIA regime to better align with sustainable development. Primary sources for the research will include national, regional and international legal decisions, while secondary sources will consist of scholarly journal articles, academic books, reports, and reviews on IIAs and sustainable development. Empirical data collection methods will not be employed in this study.

1.4. Chapter outline

- Chapter One introduces the research, outlining the background, research problem, methodology and provides a brief overview of the subsequent chapters.

⁸¹ *Foresti v South Africa* (ICSID Case No. ARB(AF)/07/1).

- Chapter Two explores the historical development of IIL focusing on the Colonial and Post-colonial eras as well as four distinct policymaking eras of IIAs. It also addresses the challenges of the current IIA regime and traces the origins of the sustainable development concept, explaining its integration into IIL.
- Chapter Three provides an analysis of Uganda's FDI regime, reviewing national laws and policies such as the Constitution of Uganda, the ICA – 19), and the 2018 Uganda NIP. It also examines specific TIPs such as the EAC and COMESA treaties, the COMESA Common Investment Area (CCIA) Agreement, the AfCFTA Protocol on Investment, the IFD Agreement, and other investment-related instruments like the New York Convention, the ICSID Convention and the TRIMs Agreement.
- Chapter Four critically examines the core provisions of Uganda's five in-force BITs and Model BIT, including preambles, scope of application, full protection and security (FPS), most-favoured-nation (MFN), national treatment (NT), expropriation, compensation, transfer of funds and dispute settlement and duration, termination, and sunset clauses. It identifies problematic provisions and potential issues, helping to shape a reform approach.
- Chapter Five focuses on guiding policymakers in reforming Uganda's BIT system by utilising international developments and reforms in IIAs. It offers recommendations for creating a new Model BIT and includes a comparative analysis of South Africa's IIA reforms, regional initiatives (such as the EAC and SADC model treaties) and international guidelines for aligning IIAs with sustainable development objectives. Key instruments like the AfCFTA Protocol on Investment and the IFD Agreement, among others, are reviewed to highlight best practices.
- Chapter Six concludes the study, summarising the findings and offering recommendations to address the main research question.
- Additionally, Annex I contains a draft Model BIT (including its Annexes A, B and C), intended as a template for Uganda's future investment treaties with non-African countries. This model balances investor protection with the host-country's regulatory rights and prioritises sustainable development.

Chapter Two: Historical origins of international investment law, surrounding issues and sustainable development in international investment law

2. Introduction

In order to understand the rationale and mechanisms for reforming Uganda's bilateral investment treaty (BIT) system to incorporate sustainable development objectives, it is crucial to examine the historical context of international investment agreement (IIA) policymaking, the current challenges within the IIA framework and the progression of the sustainable development concept within modern IIAs.

For over two centuries, the regulation of foreign investment has been a contentious issue.¹ The scholar Oscar Schacter noted that, apart from the use of force (gun-boat diplomacy), no public international law issue has provoked as much debate as compensation for expropriated foreign property.² Historically, host-countries regulated foreign investment through their domestic laws,³ but European colonial powers shifted this dynamic by asserting their legal superiority over non-European territories, eventually leading to colonialism.⁴

In the 19th Century, Latin American countries, upon gaining independence,⁵ challenged the superior treatment of foreign investors, advocating for equal protection regulated by domestic laws and the right to expropriate foreign property with adequate compensation.⁶

¹ T Allee & C Peinhardt 'Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions' (2010) 54 *International Studies Quarterly* 1; Sornarajah *The international law on foreign investment* (2021) 1.

² Allee & Peinhardt (2010) 1.

³ M Chi *Integrating sustainable development in international investment law: Normative, incompatibility and governance implications* (2017) 14.

⁴ SP Subedi *International investment laws: Reconciling policy and principle* (2020) 28 - 29; M Sornarajah *The international law on foreign investment* (2017) 42; MJ van Ittersum *Profit and principle: Hugo Grotius, natural rights theories and the rise of Dutch power in the East Indies 1595 - 1615* (2006).

⁵ Subedi (2020) 29; RH Bates, JH Coatsworth & JG Williamson, 'Lost decades: Post independence performance in Latin America and Africa' (2007) 67 *Journal of Economic History* 917.

⁶ Subedi (2020) 28 – 30; JW Salacuse *The Law of Investment Treaties* (2021) 85 – 6.

Developed countries, however, pushed for the international minimum standard of treatment (MST), over domestic laws.⁷

The international MST governed the treatment of aliens and provided for a minimum set of principles which countries, regardless of their domestic legislation and practices, had to respect when dealing with foreign nationals and their properties.⁸ By the mid-1900s, MST was widely accepted as part of customary international law (CIL), though not by some developing countries.⁹

After World War II (WWII), investment disputes exposed the inadequacies of diplomatic protection and CIL in protecting foreign investments,¹⁰ prompting the then Organisation for European Economic Co-operation (OEEC) to draft the Havana Charter, which aimed to establish multilateral rules on investment and, *inter alia*, encourage capital flow for productive investment to developing countries.¹¹

Upon the failure of the Havana Charter, developed countries looked for alternative methods to regulate foreign investment, especially in developing countries, which led to the creation of BITs. Since then, BITs have played a pivotal role in providing legal protection to foreign investors and their investments.¹² There are currently 3,291 IIAs, 460 of which are treaties with investment provisions (TIPs) and 2,831 are BITs.¹³

In recent years, old-generation IIAs (old-IIAs), which are those concluded before 2010 have faced criticisms¹⁴ due to investor-centric provisions, lack of emphasis on sustainable

⁷ Subedi (2020) 30.

⁸ OECD 'Fair and Equitable Treatment Standard in International Investment Law' (2004) *OECD Working Papers on International Investment* available at <http://dx.doi.org/10.1787/675702255435> (accessed 3 February 2019).

⁹ KJ Vandeveld 'A brief history of international trade agreements' (2005) 12 *University of California at Davis journal of International Law and Policy* 159; A Guzman 'Why LDCs sign treaties that hurt them: Explaining the popularity of bilateral investment treaties' (1998) 38 *Virginia journal of International Law* 641; T Ginsburg 'International substitutes for domestic institutions: Bilateral investment treaties and governance' (2006) 25 *International Review of Law and Economics*.

¹⁰ UNCTAD *WIR 2015: Reforming international investment governance* (2015) 121.

¹¹ UNCTAD *WIR* (2015) 121 – 122; UN Conference on Trade and Employment, Final Act and related documents (Havana Charter) E/CONF.2/78 (1948) art 1(2).

¹² UNCTAD *Bilateral Investment Treaties in the Mid-1990s* (1998) 2 – 5; JE Alvarez & KP Sauvant with KG Ahmed & GP Vizcaino *The evolving international investment regime: Expectations, realities and options* (2011) XXXI.

¹³ UNCTAD *WIR 2024: Investment facilitation and digital government* (2024) 21.

¹⁴ UNCTAD *WIR 2017: Investment and the digital economy* (2017) 127 – 128; UNCTAD *UNCTAD's reform package for the international investment regime* (2018) 16.

development, restraint on a host-country's right to regulate and susceptibility to inconsistent interpretations in investor-State dispute settlement (ISDS) cases.¹⁵ Moreover, recent crises and persistent global challenges have driven the re-evaluation and reform of the IIA regime, highlighting the need for IIAs to address sustainable development and global economic issues.

16

This chapter explores the historical development of IIAs, especially BITs, their economic and social impacts and the prevailing demands and issues that have contributed to the current IIA reform trends. It also examines the evolution of the sustainable development concept and how it has come to play an important role in the ongoing transformation of international investment law (IIL).

2.1. Evolution of international investment law

2.1.1. Colonial Era (1600 – 1944)

Since time immemorial, cross-border trade and investment has been conducted worldwide.¹⁷ While foreign investment in Europe has a well-documented history, similar activities also existed in Asia, the Middle East, Africa and other regions across the world,¹⁸ each with their own set of regulatory laws.¹⁹ The modern system of international law, based on national sovereignty, began with the Peace of Westphalia in 1648.²⁰

This Peace introduced principles safeguarding foreign property as highlighted by the Treaty of Münster,²¹ which mandated the return of property seized during war and upheld the

¹⁵ F Adeleke *International investment law and policy in Africa: Exploring a human rights based approach to investment regulation and dispute settlement* (2017) 1; UNCTAD WIR 2014: *Investing in the SDGs: An Action Plan* (2014) 126; Sornarajah *The International law on foreign investment* (2021) 2; UNCTAD WIR (2017) 127 – 128; UNCTAD *Most-Favoured Nation Treatment* (2010) 3; UNCTAD WIR (2014) 126; UNCTAD 'Reform of the IIA Regime: Four paths of action and a way forward' (2014) 3 IIA Issues Note 1.

¹⁶ UNCTAD WIR 2012: *Towards a new generation of investment policies* (2012) 99; UNCTAD WIR 2021: *Investing in sustainable recovery* (2021) 143 – 178; UNCTAD WIR 2022: *International tax reforms and sustainable investment* (2022) 54 – 57, 73 – 74; UNCTAD WIR (2014) 126 – 130; UNCTAD *Reform package* (2018) 10.

¹⁷ Subedi (2016) 22.

¹⁸ Sornarajah (2021) 27.

¹⁹ Sornarajah (2021) 27.

²⁰ KJ Vandeveld *Bilateral investment treaties: History, policy and interpretation* (2010) 23.

²¹ Treaty of Münster (1648) art 24; Vandeveld (2010) 20; R Lesaffer & E-J Broers 'Private property in the Dutch-Spanish Peace Treaty of Munster (30 January 1648),' (2007) 2 *Tilburg University Legal Studies Working Paper*.

principle of sovereignty and equality of all countries.²² Vitoria and Grotius, who supported this view, reasoned that a foreign trader had to be treated the same as a local one because of natural law and equality, meaning aliens were subject to the domestic laws of a host-country without discrimination.²³

However, this perspective served as a moral validation for colonial looting.²⁴ As European powers started to colonise non-European countries, they insisted on applying their home laws, viewing local ones as inferior.²⁵ Vattel extended this view, adding that a foreigner's citizenship extended to their property,²⁶ making any mistreatment of foreign investments an injury to the investor's home-country.²⁷

This perspective formed the basis of the principle of diplomatic protection,²⁸ where an injury to a country's citizen, was considered an injury to the home-country, for which it could claim compensation.²⁹ Vattel's and Grotius' views clearly intended to serve the interests of those countries that were able to conduct trade overseas.³⁰ The implied result became that

²² Vandeveld (2010) 20; Lesaffer & Broers (2007); A Anghie 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 *Third World Quarterly* 740.

²³ F de Vitoria *De Indis III* (1532) 5; Sornarajah (2021) 27 & fn 101.

²⁴ Sornarajah (2021) 27 and fn 101; Subedi (2016) 22.

²⁵ Sornarajah (2021) 27 and fn 101; Subedi (2016) 22.

²⁶ Emmerich de Vattel was the Saxon Minister at Bern and cabinet member at Dresden, Switzerland; E de Vattel *Law of Nations or the Principles of Natural Law in Four Books* (1758) trans J Chitty (1833) Book II, Chapter 8, paras 104 – 108.

²⁷ Vattel (1758) paras 104 – 108.

²⁸ AP Newcombe & L Paradell *Law and Practice of Investment Treaties: Standards of Treatment* (2009) 4; The Permanent Court of International Justice (PCIJ) confirmed this principle in its *Mavrommatis Palestine Concessions* (1924) PCIJ, Series A, No. 2, 12. It provided that 'diplomatic protection' was 'an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels.'

²⁹ Article 1 of the Articles on Diplomatic Protection provide that 'diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility' – adopted by the International Law Commission (ILC) at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10); FJ Garcia, C Lindita, G Apurv & H Kirrin 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) 18 *Journal of International Economic Law* 865.

³⁰ Sornarajah (2021) 27.

European assets could not be expropriated or nationalised through the domestic laws of non-European territories.³¹

This perspective bestowed superior external standards on Europeans, which were seemingly higher than the national standards of host- 'non-European' territories.³² It was the espousal of such views that enabled the entry of Europeans into Africa, Asia and Latin America and subsequently led to their colonisation.³³

During this period, two public international law principles subsequently came into existence: territorial sovereignty, which maintained that each country had a right to exercise authority over the people and activities within its territory;³⁴ and nationality, which concerned how a country's nationals were treated in other countries.³⁵ By the 19th Century, capital-exporting countries insisted on the latter principle, which developed into the international MST, to which most Europeans felt entitled.³⁶

Eventually, any measures causing uncompensated injury to a foreign (predominantly European) person or their property, was considered a breach of the international MST.³⁷ Notably, this kind of treatment was expected by developed countries from developing or colonised territories, while foreign investment among developed countries was regulated by customary rules on State responsibility and the treatment of aliens, which fell under CIL.³⁸

After its independence from Great Britain, the US started concluding FCNs with predominantly other European countries.³⁹ Its first model FCN was approved by Congress in 1776,⁴⁰ leading to the conclusion of the first ever FCN with France in 1778.⁴¹ This treaty

³¹ Subedi (2016) 22; SD Sutton 'Emilio Augustin Maffezini v Kingdom of Spain and the ICSID Secretary-General's Screening Power' (2005) 21 *Arbitration International* 119; TL Jennifer & BL Marc 'A BIT is Better Than A Lot: Bilateral Investment Treaties and Preferential Trade Agreements,' (2010) 1 *World Politics* 1 – 42, 4.

³² Subedi (2016) 22; Sornarajah (2021) 27.

³³ van Ittersum (2006); Sornarajah (2021) 28.

³⁴ UNCTAD *International investment agreements: Key issues* (2004) 6; Sornarajah (2021) 41 – 42.

³⁵ UNCTAD *IAs: Key issues* (2004) 6; Sornarajah (2021) 27 - 28.

³⁶ UNCTAD *IAs: Key issues* (2004) 6; Sornarajah (2021) 27 - 28.

³⁷ UNCTAD *IAs: Key issues* (2004) 6; Sornarajah (2021) 27 - 28.

³⁸ Chi (2018) 14.

³⁹ Vandevelde (2010) 21; KJ Vandevelde *U.S. International Investment Agreements* (2009) 19.

⁴⁰ Vandevelde (2010) 21.

⁴¹ Salacuse (2021) 103.

established bilateral trade on a most-favoured nation (MFN) basis and contained provisions on the protection of vessels, passengers and cargo.⁴²

Early FCNs, however, lacked specific provisions on the protection of (foreign) property,⁴³ but over time, countries began to enter into comprehensive arbitration treaties and occasionally integrating arbitration clauses into their FCNs.⁴⁴ Some FCNs also contained provisions on non-discriminatory treatment with regards to specific types of intellectual property⁴⁵ and protections for the transfer of funds.⁴⁶

Nonetheless, early FCNs, which were those FCNs concluded before WWII, did not significantly improve foreign investment between the US and Europe, as the latter favoured the investments between themselves and their respective colonial territories.⁴⁷ Unsurprisingly, the majority of investment that flowed during this time occurred in the colonial context and with the advent of globalisation, there was a significant increase in investment flows.⁴⁸

From the 19th to the early 20th Century, developed countries did not systematically attempt to control international private capital transactions (or FDI), as portfolio investment was far more important.⁴⁹ Portfolio investments are primarily financial in nature and focus on returns from securities, while FDI has more direct involvement and control in business operations with the goal of long-term interest in a host-country's economic activities.⁵⁰

⁴² Salacuse (2021) 103; Salacuse (1990) 656.

⁴³ Salacuse (2021) 103; Salacuse (1990) 656.

⁴⁴ Some examples include the Arbitration Convention of Belgium-Spain, (23 January 1905) 198 Consolidated Treaty Series 1; Arbitration Convention of Spain-Norway and Sweden (23 January 1905) 198 Consolidated Treaty Series 3; and the Arbitration Convention of Great Britain-Netherlands (15 February 1905) 198 Consolidated Treaty Series 121; Between 1799 – 1804, more than 500 arbitral awards were given under FCNs - M Janis *An Introduction to International Law* (1988) 92; Vandevelde (2010) 26.

⁴⁵ Treaty of Friendship and Commerce between Great Britain and Serbia (1880) 156 *Consolidated Treaty Series* 231 art V; Treaty of Commerce and Navigation between Great Britain and Cuba (1905) 198 art XVI 265.

⁴⁶ Some examples include Article II of the Treaty of Commerce, United States-Serbia (14 October 1881) 22; Salacuse (2021) 108.

⁴⁷ Salacuse (2021) 104.

⁴⁸ Sornarajah (2021) 28; Vandevelde (2010) 24.

⁴⁹ UNCTAD *IAs: Key issues* (2004) 5; KH O'Rourke 'Globalization and inequality: Historical trends' (2007) 8339 *NBER Working Paper* 47; Vandevelde (2010) 26-9; TL Berge & H Hveem 'The international regime for investment: A history of failed multilateralism (2019) 3.

⁵⁰ SA Yamin, P Cova & R Harrison, 'Foreign direct investment versus portfolio investment: A global games approach' (2004) *University of Wisconsin – Whitewater Working Paper* 05-03, 1.

As this study will later show, Latin American countries were particularly notorious for their bond defaults in the 19th Century, which are a form of portfolio investment. Inefficient global communications prevalent during that time made FDI simply impossible.⁵¹ Towards the end of the 19th Century, however, FDI became increasingly more important,⁵² partly due to improved communication mechanisms like the invention of the telegram in 1837 and the development of general incorporation laws in Western Europe and the US, allowing investors to collect capital in corporations.⁵³

Nonetheless, the principle of nationality also allowed those parts of the world that had survived colonialism, like China and Japan, to assert their independence and subject foreign investors to their domestic laws.⁵⁴ As such, Europeans took to using a blend of diplomacy and force to ensure that these sovereign territories did not interfere with their citizen's investments adversely.⁵⁵

In Africa, Ethiopia, which had managed to evade colonialism after defeating Italy at the battle of Adowa in 1896, also retained its sovereignty over foreign investments in its territory.⁵⁶ The rest of Africa, however, was subjugated under colonial rule after the so-called 'Scramble for Africa' enabled European Powers to divide the Continent into political partitions at the Berlin Conference of 1884 - 1885.⁵⁷

Colonialism thus led to the transformation of the international economy, especially international trade and investment.⁵⁸ At that point, developed countries had embraced the principle of nationality, which asserted that their foreign assets could not be expropriated without compensation.⁵⁹ The system of diplomatic relations, recognition of international organisations and treaties and CIL therefore essentially took on modern contours.⁶⁰

⁵¹ Vandevelde (2010) 26.

⁵² UNCTAD IIAs: *Key issues* (2004) 6.

⁵³ UNCTAD IIAs: *Key issues* (2004) 6; Berge & Hveem (2019) 3.

⁵⁴ JR Crawford *Brownlie's principles of public international law* (2012) 4.

⁵⁵ Sornarajah (2021) 27.

⁵⁶ Crawford (2012) 5.

⁵⁷ N Driffield & Y Lin 'Foreign Direct Investment to Africa: Is There a Colonial Legacy?' (2020) 60 *Management International Review* 8.

⁵⁸ Vandevelde (2010) 20.

⁵⁹ Vandevelde (2010) 30.

⁶⁰ Crawford (2012) 5.

Europeans imposed their political and military power on colonies to control their governments and legal systems.⁶¹ The use of diplomacy and brute force also removed the need for commercial and investment treaties, like FCNs, in colonies.⁶² It is this history of colonialism, the calculated use of force and the manipulation of legal doctrines to acquire commercial benefits that drove the construction of IIL.⁶³

Latin America was the first colonised bloc to begin liberalisation efforts at the beginning of the 19th Century.⁶⁴ In so doing, they challenged the principle of nationality and using European laws to regulate foreign investments in their territories.⁶⁵ In 1863, the famed Augustine jurist, Carlos Calvo, argued that foreign investors were not entitled to any greater protection than that which was afforded to domestic investors.⁶⁶

Calvo asserted that disputes arising from foreign investments (in Latin American territories), were subject to the exclusive jurisdiction of domestic courts.⁶⁷ His views later became known as the Calvo Doctrine,⁶⁸ which eventually found their way into several Latin American Investor-State concession contracts, laws and constitutions.⁶⁹ Essentially, this Doctrine re-established the principle of territorial sovereignty, which had been prevalent prior to colonisation, subjecting foreign investors to the domestic laws of the host-country.⁷⁰

Meanwhile, powerful countries continued to use force to protect their investments in developing countries.⁷¹ They would send small contingents of warships to moor off the coasts

⁶¹ Salacuse (2021) 101; Subedi (2016) 24; The Roosevelt Corollary to the Monroe Doctrine for example, specifically allowed American troops to use force in order to collect debts owed to American citizens; Garcia *et al* (2015) 865 available at <https://academic.oup.com/jiel/article/18/4/861/2357932> (accessed 04 January 2021); P-M Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law', in P-M Dupuy, E-U Petersmann & F Francioni (eds) *Human Rights in International Investment Law and Arbitration* (2009).

⁶² A Rappaport *A History of American Diplomacy* (1975) 223-9; Subedi (2016) 24; Sornarajah (2021) 29.

⁶³ K Miles *The origins of international investment law: Europe, environment, and the safeguarding of capital* (2013) 32; Newcombe & Paradell (2009) 11.

⁶⁴ The other colonised groups of countries included Asia and Africa - Subedi (2016) 23 – 24; DR Shea *The Calvo clause: A problem of InterAmerican and international law and diplomacy* (1955) 17 – 20.

⁶⁵ Subedi (2016) 24.

⁶⁶ Subedi (2016) 24.

⁶⁷ Vandevelde (2010) 31 – 32; MR Garcia-Mora 'The Calvo Clause in Latin American Constitutions and International Law' (1950) 33 *Marquette Law Review* 205.

⁶⁸ LM Summers 'The Calvo Clause' (1933) 19 *Virginia Law Review* 460.

⁶⁹ Subedi (2016) 29 – 30.

⁷⁰ Anghie (2006) 740.

⁷¹ Newcombe & Paradell (2009) 9.

of host-countries until reparations were paid.⁷² In 1902, for instance, Germany, Italy and the United Kingdom (UK) sent warships to the Venezuelan coast to demand reparations for losses sustained by their citizens when Venezuela defaulted on its sovereign debt.⁷³

In response to these actions, the-then Foreign Minister of Argentina, Luis Drago, argued that armed intervention to collect public debts was a violation of international law.⁷⁴ His perspectives were formalised into the Drago Doctrine, which, though more limited in scope than the Calvo Doctrine, prohibited the coercive gathering of government debts.⁷⁵ This doctrine also referenced the Calvo Doctrine,⁷⁶ which condemned both diplomatic and military intervention as valid means for enforcing individual claims as well.⁷⁷

On 18 October 1907, the Convention on the Peaceful Resolution of International Disputes (Hague Convention), was adopted.⁷⁸ It provided for the settlement of disputes between States by peaceful means, created the potential for State-State arbitration in investment disputes and enabled an investor to approach their home-country to initiate a claim against the host-country.⁷⁹ It also formed the basis of State-State dispute settlement (SSDS).

Over time, domestic laws and CIL proved to be inadequate at regulating foreign investment, particularly in newly independent countries, whose governments were eager to assert their political power.⁸⁰ At the national level, countries had the sovereign power to revise, abolish and promulgate national laws, which could and sometimes did have profound impacts on foreign investors and their investments.⁸¹ National laws could also be used to expropriate or

⁷² Influential individuals and corporations especially in Europe were known to convince their governments to carry-out these tactics on their behalf – Subedi (2016) 27 – 28.

⁷³ Subedi (2016) 12; Newcombe & Paradell (2009) 9.

⁷⁴ EM Borchard 'Limitations on Coercive Protection' (1927) 21 *American Journal of International Law* 303; LM Drago 'State loans in their relation to international policy' (1907) 1 *American Journal of International Law* 692.

⁷⁵ LM Drago & HE Nettles 'The Drago Doctrine in international law and politics' (1928) 8 *The Hispanic American Historical Review* 208.

⁷⁶ AS Hershey 'The Calvo and Drago Doctrines' (1907) *Indiana University School of Law* 26.

⁷⁷ Calvo does not distinguish between armed and diplomatic or pacific intervention except as a matter of form. He condemns the latter as well as the former - Hershey (1907) 26-7.

⁷⁸ The Convention for the Settlement of International Disputes (1907).

⁷⁹ Subedi (2016) 27.

⁸⁰ Sornarajah (2021) 30-1

⁸¹ Chi (2017) 14; Garcia *et al* (2015) 865.

nationalise properties, making it difficult for investors to successfully challenge them in domestic courts.⁸²

At the international level, when an investment dispute arose, a foreign investor could not institute an action directly against the host-country and instead, had to petition their home-country to espouse a claim on their behalf.⁸³ The decision whether to engage with a host-country rested solely on the rules relating to international claims, which determined whether the applicant was eligible for diplomatic protection.⁸⁴

Moreover, the investor could not invoke diplomatic protection if the host-country had provisions for the exhaustion of local remedies, for instance, the use of domestic courts and the investor had not complied with them.⁸⁵ In the event that a foreign investor was successful in convincing their home-country to engage in diplomatic relations, they were still unable to represent themselves in any resulting exchange between the home and host-countries.⁸⁶

The host-country's interest in the dispute thereby often outweighed that of the foreign investor,⁸⁷ and the question of whether or not the home-country represented its citizen, was a political rather than an economical one.⁸⁸ The inadequacies of CIL and domestic law therefore emphasised the unequal relationship between foreign investors and the host-country, particularly that these laws favoured host-countries over foreign investors.⁸⁹

Fortunately, not many expropriations occurred until after 1914, when World War I (WWI) broke out,⁹⁰ leading to the collapse of the international investment regime as it was known.⁹¹

⁸² Chi (2017) 15; MW Sheffer 'Bilateral Investment Treaties: A Friend or foe to human rights?' (2011) 39 *Denver Journal of International Law and Policy* 485.

⁸³ Garcia *et al* (2015) 865; JW Salacuse & NP Sullivan 'Do bits really work?: an evaluation of bilateral investment treaties and their grand bargain' in KP Sauvant & LE Sachs (eds) *The effect of treaties on foreign direct investment: bilateral investment treaties, double taxation treaties, and investment flows* (2009) 111 – 112.

⁸⁴ Newcombe & Paradell (2009) 6.

⁸⁵ Newcombe & Paradell (2009) 6.

⁸⁶ Garcia *et al* (2015) 865; Newcombe & Paradell (2009) 6.

⁸⁷ Garcia *et al* (2015) 865; Salacuse (2005) 9; Sornarajah (2021) 27.

⁸⁸ Garcia *et al.* (2015) 865; Salacuse (2005) 9.

⁸⁹ Sornarajah (2021) 27;

⁹⁰ Vandevelde (2010) 34.

⁹¹ Vandevelde (2010) 34.

Compounding the challenges, the beginning of the Russian Revolution in 1917 before WWI ended, further curtailed the right to access and adversely affecting the principle of security.⁹²

Throughout the Revolution, the Soviet Union repudiated several of its foreign debts, and nationalised and expropriated foreign investments,⁹³ resulting in a large number of claims for loss of property, the most that the world had seen at the time.⁹⁴ Over the years, more countries begun to contest the principle of nationality, especially as generalised measures affecting foreign investment became more common.⁹⁵

One such example was Mexico, which, in 1938, contested the US's right to claim compensation for the agricultural lands that it had expropriated from American citizens from the 1920s.⁹⁶ Mexico asserted that countries had vigorously maintained:⁹⁷

... the principle of equality between nationals and foreigners, considering that the foreigner who voluntarily moves to a country ... in search of a personal benefit, accepts in advance, together with the advantages which he is going to enjoy, the risks to which he may find himself exposed. It would be unjust that he should aspire to a privileged position safe from any risk, but availing himself, on the other hand, of the effort of the nationals which must be to the benefit of the collectivity (sic).

Mexico also asserted that compensation had to be in accordance with its domestic laws and that foreign nationals were only entitled to the same treatment as Mexican citizens, thus aligning themselves with the principles of the Calvo Doctrine and essentially, the principle of territorial sovereignty.⁹⁸ Relying on Article 9 of the 1933 Convention on the Rights and Duties

⁹² Vandevelde (2010) 37.

⁹³ C Lipson *Standing guard: Protecting foreign capital in the nineteenth and twentieth Centuries* (1985) 67; Vandevelde (2010) 39.

⁹⁴ Vandevelde (2010) 38-9.

⁹⁵ UNCTAD *IAs: Key issues* (2004) 6.

⁹⁶ EM Borchard 'The 'minimum standard' of the treatment of aliens' (1939) 33 *Proceedings of the American Society of International Law at Its Annual Meeting, 1921 – 1969* 51; OECD *International Investment law: A changing landscape – A companion volume to international investment perspectives* (2005) fn 1, 44; E Neumayer & L Spess 'Do bilateral investment treaties increase foreign direct investment to developing countries?' (2005) 33 *World Development* 1569.

⁹⁷ This was contended by Mr. Cruchaga Ossa of Chile during the meeting of the Committee of Experts for the Codification of International Law at Lima – Borchard (1939) 51-2.

⁹⁸ S Lester & B Mercurio (eds) *Bilateral and regional trade agreements: Commentary, analysis and case studies* (2009) 217; Neumayer & Spess (2005) 1569; Vandevelde (2010) 40.

of States signed at Montevideo (Montevideo Convention), the then-Mexican Minister of foreign affairs justified his views by confirming that the Convention provides that:⁹⁹

The jurisdiction of States within the limits of national territory applies to all the inhabitants. Nationals and foreigners are under the same protection of the law and the national authorities and the foreigners may not claim rights other or more extensive than those of the nationals.

In his response to the Mexican Government, the-then Secretary General of the US, Cordell Hull argued that international law required adequate, prompt and effective payment for properties that had been seized by host-countries.¹⁰⁰ This concept of adequate compensation against expropriation became known as the Hull Rule.¹⁰¹

In the likely event that domestic laws were considered inferior or failed to meet the standards of justice and equality, the international MST would then apply to foreign investors.¹⁰² The assertion was that international law provided for the international MST and that all countries had to accept it by bringing their national laws up to this standard.¹⁰³ In his determination of what was meant by the 'international minimum standard', Elihu Root, an American international lawyer, reasoned that:¹⁰⁴

If any country's system of law does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.

By the mid-1900s, most developed countries had accepted this standard for the treatment of foreigners, but some developing countries had not.¹⁰⁵ Even in instances where it was

⁹⁹ Convention on the Rights and Duties of States (Montevideo Convention) (1933) art 9; Borchard (1939) 51.

¹⁰⁰ Lester & Mercurio (2009) 217; Neumayer & Spess (2005) 1569; A Guzman 'Why LDCs sign treaties that hurt them: Explaining the popularity of bilateral investment treaties' (1998) 38 *Virginia Journal of International Law* 641.

¹⁰¹ The Hull Rule precluded governments from expropriating private property without providing 'prompt, adequate and effective payment – Cordell Hull's note to the Mexican Minister of Foreign Affairs during dispute over land expropriations – Reprinted in GH Hackworth *Digest of International Law* (1942) 228; Z Elkins, AT Guzman & BA Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000,' (2006) 4 *International Organization* 813.

¹⁰² Subedi (2016) 22.

¹⁰³ Subedi (2016) 25; KJ Vandeveld 'A Brief History of International Trade Agreements,' (2005) 12 *University of California at Davis journal of International Law and Policy* 159.

¹⁰⁴ E Root 'The Basis of Protection to Citizens Residing Abroad' (1910) 4 *AJIL* 521-2; Borchard (1939) 61.

¹⁰⁵ Vandeveld (2005) 159; Guzman (1998) 641; T Ginsburg 'International substitutes for domestic institutions: Bilateral investment treaties and governance' (2006) 25 *International Review of Law and Economics*.

accepted, some countries argued that the content of the international MST was vague and hard to enforce, especially with regards to the payment of compensation.¹⁰⁶ Additionally, CIL neither prescribed a method for calculating compensation,¹⁰⁷ nor offered clear guidance on the right of investors to make monetary transfers.¹⁰⁸

The Russian Revolution was followed by the Great Depression from 1929 to 1939, which further deepened the economic distress from WWI.¹⁰⁹ As the Depression came to an end, WWII broke out in 1939, resulting in Germany and Japan losing all of their foreign investments including their colonies.¹¹⁰ The international investment regime was further shaped by the spread of communism to Eastern Europe and China after WWII.¹¹¹

Like the Soviets had done during the Russian Revolution of 1917, these countries also nationalised and expropriated several foreign investments, all while maintaining the view that compensation for those expropriated properties was not owed.¹¹²

2.1.2. Post-colonial Era (1945 - 1958)

Although the decolonisation period generally began after WWII, most African countries remained subjected to colonial rule until the late 1950s or the 1960s.¹¹³ Simultaneously, capital-exporting (developed) countries faced several disputes stemming from WWII, which further highlighted the inadequacies of CIL and diplomatic protection that had been prevalent during the colonial era.¹¹⁴

Consequently, efforts seeking alternative methods that would attempt to strike a balance between the investor and the host-country emerged, resulting in a move towards IIA policymaking.¹¹⁵ This was first evidenced by the attempt to create multilateral investment

¹⁰⁶ Elkins *et al* (2006) 813.

¹⁰⁷ P Ranjan *India and Bilateral Investment Treaties; Refusal, Acceptance, Backlash* (2019) 2.

¹⁰⁸ Ranjan (2019) 2.

¹⁰⁹ World Bank Policy Research Report: Globalization, growth, and poverty (2002) 27.

¹¹⁰ Vandevelde (2010) 41.

¹¹¹ Vandevelde (2010) 44.

¹¹² Vandevelde (2010) 37, 44; Sornarajah (2021) 3.

¹¹³ 'African Independence dates' available at https://african-volunteer.net/african_independence.html (accessed 12 November 2023).

¹¹⁴ UNCTAD *WIR* (2015) 121; Chi (2018) 14; Garcia *et al* (2015) 865-70.

¹¹⁵ UNCTAD *WIR* (2015) 121.

rules in the form of the Havana Charter of 1948, which had been designed to establish an International Trade Organization (ITO).¹¹⁶

As the notion of trade liberalisation took hold of the developed world, as evidenced by the conclusion of the General Agreement on Tariffs and Trade in 1947 (GATT 1947),¹¹⁷ the Charter aimed to create a liberal regime for not only international trade, as the GATT did, but also investment.¹¹⁸ The GATT did not create multilateral commitments on investments however.¹¹⁹ Therefore, the Charter, *inter alia*, aimed to:¹²⁰

... foster and assist industrial and general economic development, particularly of those countries which are still in the early stages of industrial development, and to encourage the international flow of capital for productive investment.

The Charter was eventually abandoned,¹²¹ partly because developed and developing countries disagreed on the interpretation of CIL and the content of an international MST for foreign investors.¹²² Developed countries also realised that the Havana Charter's investment provisions hardly created an effective international investment regime¹²³ and reverted back to using FCNs to regulate foreign investment particularly with the US.¹²⁴

A further 23 'new' FCNs were concluded between 1946 and 1966,¹²⁵ driven by the significant expansion in foreign investment by the US, Europe and Japan after WWII,¹²⁶ as well as advancements in communication technologies.¹²⁷ Originally created to facilitate shipping and trade,¹²⁸ these FCNs evolved from commercial instruments to cover a wider range of areas

¹¹⁶ Havana Charter (1948); UNCTAD *IAs: Key issues* (2004) 6; UNCTAD WIR (2015) 122.

¹¹⁷ General Agreement on Tariffs and Trade (GATT) 1947 61 Stat. A-11, 55 U.N.T.S. 188.

¹¹⁸ Vandevelde (2005) 162; UNCTAD *IAs: Key issues* (2004) 6.

¹¹⁹ Vandevelde (2005) 162.

¹²⁰ Havana Charter (1948) art 1(2).

¹²¹ UNCTAD WIR (2015) 122; UNCTAD *IAs: Key issues* (2004) 6.

¹²² UNCTAD WIR (2015) 122; Vandevelde (2005) 162; Newcombe & Paradell (2009) 19-20.

¹²³ Salacuse (2021) 106; UNCTAD *IAs: Key issues* (2004) 6.

¹²⁴ The issues being talked about here include the fact that the GATT 1947 did not address international investment, the failure of the Havana Charter and the inadequacies of CIL and diplomatic protection in protecting foreign investment; Vandevelde (2005) 162.

¹²⁵ Vandevelde (2005) 162; Ranjan (2019) 2; Vandevelde (2010) 21.

¹²⁶ Salacuse (2021) 106.

¹²⁷ UNCTAD *IAs: Key issues* (2004) 6.

¹²⁸ R Dolzer & M Stevens *Bilateral Investment Treaties* (1995) 10; Vandevelde (2010) 21.

including investment, navigation, human rights and even consular matters by the 20th Century.¹²⁹

The new FCNs assured trade partners and investors of certain MST backed, this time, with the possibility of SSDS usually before the International Court of Justice (ICJ), which old FCNs did not contain.¹³⁰ They did not create a private right of action that could be pursued outside of a host-country's domestic courts,¹³¹ but did encourage the settlement of private issues through commercial arbitration as evidenced by the inclusion of judicial enforcement of arbitration awards clauses.¹³²

Another distinction between the new and older FCNs was in the inclusion of principles, like those on access, which allowed investors to reside and trade in the other Partner's territory,¹³³ non-discrimination in the form of MFN treatment, with respect to taxes and fees; and national treatment (NT).¹³⁴ New FCNs also contained principles on security that applied to the protection of private property belonging to foreign investors which had already been established in the host-country.¹³⁵

Even with the return of FCNs, there remained a gap in foreign investment regulation, particularly in Africa. It is arguable whether the fact that Ethiopia was not colonised played a role in it being one of the few African countries to sign FCNs with the US.¹³⁶ The 1903 FCN with Ethiopia, while guaranteeing 'security of those engaged in business and of their property,' was a significantly abridged version compared to treaties with European countries and included provisions dealing with consular rights.¹³⁷

¹²⁹ Coyle (2013) 312–15.

¹³⁰ Alvarex *et al* (2011) XXXI.

¹³¹ Garcia *et al* (2015) 866

¹³² Salacuse (2021) 107.

¹³³ Vandevelde (2010) 21

¹³⁴ Vandevelde (2010) 22.

¹³⁵ Vandevelde (2010) 22; Dolzer & Stevens (1995) 10; Salacuse (2021) 107-8.

¹³⁶ US – Ethiopia FCN (1903); Treaty of Amity and Economic Relations between the United States of America and Ethiopia (1951); Salacuse (2021) 104.

¹³⁷ Salacuse (2021) 103; HJ Walker 'Modern treaties of friendship, commerce and navigation' (1958) *Minnesota law review* 4; KJ Vandevelde *Bilateral investment treaties: History, policy and interpretation* (2010) 23; Vandevelde (2009) 26.

The general view was that FCNs were typically between developed countries. The issue of regulating foreign investment in African countries was still far removed, given that colonial laws and methods of enforcement still applied to several African colonies, even after WWII.¹³⁸ In the mid-1900s however, these countries also joined the global trend of decolonisation and by the late 1960s, the majority of African countries had obtained independence.¹³⁹

The more liberated African countries became, the more eager Western countries were to find a solution to regulate foreign investment in developing countries.¹⁴⁰ Newly independent African governments also realised that the broad spectrum of close political, economic and cultural cooperation envisaged by FCNs was better suited for countries of comparable economic stature.¹⁴¹ They asserted that key FCN features like the unrestricted right to entry and the unqualified rate of NT, were incompatible with their new political realities.¹⁴²

Consequently, FCNs could not be used in all African countries as new governments were sceptical of FDI benefits,¹⁴³ making them reluctant to provide guarantees that would protect US investments in their territories.¹⁴⁴ Moreover, newly independent countries sought to eliminate the political and economic influence of their former colonisers and assert the powers of their own laws.¹⁴⁵

Meanwhile, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) was adopted on 10 June 1958.¹⁴⁶ It related to the recognition and enforcement of foreign arbitral awards and the referral by a court, to arbitration.¹⁴⁷ This Convention would later play a significant role in future IIAs, particularly with regards to the ISDS mechanism.

¹³⁸ Salacuse (2021) 104.

¹³⁹ Japan African Network 'African Countries' Independence Days' available at <http://www.japanafrikanet.com/directory/presidents/africanindependence.html> (accessed 01 Jan 2021).

¹⁴⁰ Alvarez *et al* (2011) 3.

¹⁴¹ Dolzer & Stevens (1995) 11.

¹⁴² Dolzer & Stevens (1995) 11.

¹⁴³ Salacuse (2021) 108.

¹⁴⁴ Salacuse (2021) 108.

¹⁴⁵ Garcia *et al* (2015)

¹⁴⁶ UNCTAD *WIR* (2015) 121.

¹⁴⁷ 'New York Arbitration Convention' available at <https://www.newyorkconvention.org/> (accessed 02 January 2021).

Other efforts made towards the regulation of foreign investment included the drafting of the International Convention for Mutual Protection of Private Property Rights in Foreign Countries and the Treaty Establishing the European Economic Community (EEC Treaty) in 1957.¹⁴⁸ The EEC Treaty regulated certain aspects of investment including freedom of establishment and movement of capital among European countries.¹⁴⁹

Overall however, the mistrust of the FDI regime, primarily among developing countries, resulted in a loss of momentum for concluding FCNs, as continued sovereign changes caused developed countries to pursue alternative means to regulate and protect foreign investments, particularly in developing countries and former colonies.¹⁵⁰ Some scholars have even argued that the IIA regime emerged specifically because of decolonisation efforts.¹⁵¹

2.1.3. IIA policymaking eras

The most notable effort to regulate foreign investment exclusively, came with the conclusion of the first ever BIT between Germany and Pakistan in 1959.¹⁵² IIL has since undergone a remarkable transformation and BITs have been the fundamental tool for effecting that change.¹⁵³ A BIT is typically an investment agreement between two countries, which establishes the terms and conditions for foreign investments by nationals or companies of one country in the jurisdiction of another.¹⁵⁴

BITs have evolved tremendously since the first one was signed. These changes have usually been affected by the circumstances prevalent in the times of their negotiation. They are products of the times in which they were negotiated and are concluded in specific historic, economic and social contexts, in response to the then-existing needs and challenges.¹⁵⁵

¹⁴⁸ Treaty Establishing the European Economic Community, 25 March 1957, 298 UNTS 11; UNCTAD *WIR* (2015) 121; Salacuse (2021) 109.

¹⁴⁹ UNCTAD *WIR* (2015) 121; Salacuse (2021) 109.

¹⁵⁰ Alvarez *et al* (2011) 3.

¹⁵¹ Alvarez *et al* (2011) 3.

¹⁵² Treaty for the Promotion and Protection of Investments, Pak-F.R.G. Nov 25, 1959, 457 U.N.T.S. 23; Salacuse (1990) 656.

¹⁵³ Salacuse & Sullivan (2005) 67.

¹⁵⁴ Elkins *et al* (2006) 812.

¹⁵⁵ UNCTAD *WIR* (2015) 121.

Accordingly, the history of IIA policymaking can be divided into four distinct eras: the Infancy, Dichotomy, Proliferation and Re-orientation eras.¹⁵⁶

The first BIT between Germany and Pakistan marked the beginning of the Infancy Era and a movement led by developed, capital-exporting countries to regulate FDI in developing, capital-importing countries.¹⁵⁷ Early BITs although similar in structure to FCNs, focused exclusively on foreign investment¹⁵⁸ and aimed to provide legal protection to investors, reduce non-commercial risks and encourage FDI by offering a stable and predictable regulatory framework.¹⁵⁹

During the Dichotomy Era, there was a clear distinction between developed (North) and developing (South) countries, as the former were the main initiators of BITs with the latter.¹⁶⁰ Developed countries sought to protect their citizens' investments abroad, while developing countries were initially sceptical of FDI, viewing it as a potential threat to national sovereignty.¹⁶¹ Over time, however, partly influenced by the economic success of countries like China, many developing countries began to embrace BITs, hoping to attract FDI and stimulate economic growth.¹⁶²

In the Proliferation Era between 1990 and 2007, BITs became the most widely used form of IIA, driven by an increased demand for external capital in developing countries, pressure from international organisations like the World Bank and the Organisation for Economic Co-operation and Development (OECD) and the need to provide investment insurance.¹⁶³ The distinction between developed and developing countries also became less pronounced as more developing countries concluded BITs among each other (South-South).¹⁶⁴

¹⁵⁶ UNCTAD *WIR* (2015) 121-5.

¹⁵⁷ Elkins *et al* (2006) 812; Salacuse (1990) 661; Salacuse (2021) 110-3; UNCTAD *BITs in the Mid-1990s* (1998) 8.

¹⁵⁸ Vandevelde (2010) 1; 58-9; Sornarajah (2017) 206; E Denza & S Brooks 'Investment Protection Treaties: The United Kingdom Experience' (1987) 36 *ICLQ* 912.

¹⁵⁹ UNCTAD *BITs in the Mid-1990s* (1998) 2-5.

¹⁶⁰ Perera (2000) 607.

¹⁶¹ Elkins *et al* (2006) 812; Salacuse (1990) 661; Alvarez *et al* (2011) 127; Salacuse (2021) 10, 24, 56, 68, 134.

¹⁶² Sornarajah (2021) 225-6.

¹⁶³ R Adlung & M Molinuevo 'Bilateralism in services trade: Is there fire behind the (BIT) smoke?' (2008) *World Trade Institute* 2; Alvarez *et al* (2011) 23; Sornarajah (2021) 209.

¹⁶⁴ Investment Policy Hub available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> (accessed 10 May 2023).

In the current Re-orientation Era, for example, several factors, including the 2008 financial crisis, the rise in ISDS cases, concerns about the constraints IIAs place on public regulation and the general lack of sustainable development objectives in IIAs, has prompted a re-evaluation of the IIA regime on a global scale. Countries are now rethinking their approach to IIAs in line with their changing economic and developmental needs.

The evolution of IIAs reflects the changing global economic landscape and the shifting priorities of both developed and developing countries. This section will therefore examine the eras of IIA policymaking in more detail to understand the different economic and social objectives that impacted their formation. This section will also examine the prevailing issues surrounding the current IIA regime.

2.1.3.1. Infancy Era (1959 – 1964)

The infancy era of IIA policymaking began around the time the first BIT was signed in 1959.¹⁶⁵ Up until this moment, FDI had been primarily regulated by CIL.¹⁶⁶ However, the emergence of major investment disputes between foreign investors and their host-countries after WWII, exposed the significant limitations of CIL and the system of diplomatic protection, especially with the prevailing use of force in the event of investment breaches.¹⁶⁷

Additionally, on-going decolonisation efforts across Africa and Asia resulted in developed countries urgently seeking alternative methods to regulate FDI in former colonies, the majority of which were developing countries.¹⁶⁸ This need was exacerbated by the failure of several multilateral efforts to conclude investment rules as shown by the proposed Havana Charter, which was designed to establish an ITO in 1948.¹⁶⁹

The Charter's failure was attributed to disagreements among developed, developing and socialist countries on the interpretation of CIL and the content of an international MST for foreign investors.¹⁷⁰ Upon realizing that developing countries were opposed to a multilateral

¹⁶⁵ UNCTAD *WIR* (2015) 121.

¹⁶⁶ UNCTAD *WIR* (2015) 121.

¹⁶⁷ UNCTAD *WIR* (2015) 122.

¹⁶⁸ UE Ofodile 'Africa-China Bilateral Investment Treaties; A Critique' (2013) 35 *Michigan Journal of International Law* 138 – 9; Sauvant & Sachs (2009) 3, 13 – 35.

¹⁶⁹ UNCTAD *WIR* (2015) 122; Alvarez *et al* (2011) 32.

¹⁷⁰ UNCTAD *WIR* (2015) 122.

framework on investment, Germany took the initiative and concluded the first ever BIT with Pakistan on 25 November 1959.¹⁷¹

Although the Pakistan BIT was the first to be signed, it is the second BIT that Germany signed with the Dominican Republic on 19 December 1959 that came into force first, on 3 June 1960.¹⁷² The BIT with Pakistan only came into force two years later on 28 April 1962.¹⁷³ Having lost all of its foreign investments as a result of its defeat in WWII,¹⁷⁴ Germany had suffered severe economic implications.¹⁷⁵ It not only sought investments to reconstruct its economy, but also concluded treaties to govern and protect its future investments abroad.¹⁷⁶

Henceforth, BITs became the main instrument governing FDI between countries at different levels of economic development (developed and developing countries).¹⁷⁷ Since signing the first BIT, Germany has gone on to sign more than 130 BITs, primarily with developing countries, and has become the highest signatory of BITs to date.¹⁷⁸ Although structurally similar to FCNs, Germany's earliest BITs dealt exclusively with FDI¹⁷⁹ and addressed the scope of protections by defining protected investment and investors.¹⁸⁰

Simultaneously, in 1959, a draft Convention on Investment Abroad (Abs-Shawcross Draft) was produced under the leadership of Dr Hermann Abs and Lord Shawcross.¹⁸¹ It was a European-led private initiative aimed at protecting their citizens' properties in other participating Parties' territories.¹⁸² Although the Convention never opened for signature,¹⁸³ it contained

¹⁷¹ Prabhash (2019) 2; UNCTAD 'The Entry into Force of Bilateral Investment Treaties' (2006) 3 *IIA Monitor* UNCTAD/WEB/ITE/IIA/2006/9, 3 available at https://unctad.org/en/Docs/webiteia20069_en.pdf (accessed on 10 June 2019).

¹⁷² Vandevelde (2010) 58; UNCTAD *BITs in the Mid-1990s* (1998) 8.

¹⁷³ Prabhash (2019) 2; UNCTAD 'The Entry into Force of BITs' (2006) 3.

¹⁷⁴ Prabhash (2019) 2; Neumayer & Spess (2005) 1569.

¹⁷⁵ Sornarajah (2021) 223 – 4; Salacuse (2021) 110.

¹⁷⁶ Prabhash (2019) 2; Sornarajah (2021) 223-4; Salacuse (2021) 110.

¹⁷⁷ UNCTAD *WIR* (2015) 122.

¹⁷⁸ UNCTAD 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/78/germany> (accessed 10 May 2023); Salacuse (2021) 2.

¹⁷⁹ Vandevelde (2010) 1, 58-9.

¹⁸⁰ A de Mestral & C Lévesque *Improving International Investment Agreements* (2013) 16.

¹⁸¹ Draft Convention On Investments Abroad (Abs-Shawcross Draft Convention) (1959) available at <https://www.international-arbitration-attorney.com/wp-content/uploads/137-volume-5.pdf> (accessed 10 January 2023); UNCTAD *International Investment Agreements: Key issues – Vol 1* (2004) UNCTAD/ITE/IIT/2004/10, 211.

¹⁸² Abs-Shawcross Draft (1959) art I.

¹⁸³ UNCTAD *WIR* (2015) 122.

ambitious provisions such as those relating to MFN treatment,¹⁸⁴ expropriation and compensation.¹⁸⁵ These provisions would later become foundational elements for drafting first-generation and future BITs.¹⁸⁶

Earlier BITs also included provisions on fair and equitable treatment (FET), full protection and security (FPS), national treatment (NT) and dispute settlement in the form of SSDS, until 1968 when Indonesia and Netherlands¹⁸⁷ concluded the first ever known BIT with an ISDS provision.¹⁸⁸ SSDS was usually held before the ICJ, with the consent of both parties or where the parties were not in agreement, an arbitration tribunal upon the request of either Party.¹⁸⁹

The New York Convention had been concluded a year prior to the conclusion of the first BIT.¹⁹⁰ This meant that any decisions reached by IATs had to be complied with, as signatories had agreed to recognise and enforce foreign arbitral awards resulting from ISDS cases.¹⁹¹ After Germany's first two BITs, other European countries started initiating BIT programs of their own with developing countries.¹⁹²

Switzerland, for example, concluded its first BIT in 1961,¹⁹³ France in 1963,¹⁹⁴ the Netherlands in 1963¹⁹⁵ and the Belgium-Luxembourg Economic Union (BLEU) in 1964¹⁹⁶ – all with Tunisia, while Italy concluded its first BIT with Guinea in 1964.¹⁹⁷ Overall, about 33 BITs were concluded between 1959 – 1964, primarily involving Germany (18) and Switzerland (10), with

¹⁸⁴ Abs-Shawcross Draft (1959) art VI.

¹⁸⁵ Abs-Shawcross Draft (1959) art III.

¹⁸⁶ UNCTAD *WIR* (2015) 122.

¹⁸⁷ Indonesia – Netherlands BIT (1968).

¹⁸⁸ UNCTAD *WIR* (2015) 122.

¹⁸⁹ de Mestral & Lévesque, *Improving IIAs* (2013) 17.

¹⁹⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (1958).

¹⁹¹ New York Convention (1958) available at <https://www.newyorkconvention.org/> (accessed 19 July 2021).

¹⁹² Vandevelde (2010) 1-2., 59-60.

¹⁹³ *Traité entre la Confédération Suisse et la République Tunisienne relatif à la protection et à l'encouragement des investissements de capitaux* (1961).

¹⁹⁴ *Le Gouvernement de la République Française et le Gouvernement de la République Tunisienne sur les Relations Économiques et la Protection des Investissements* (1963).

¹⁹⁵ Netherlands and Tunisia: Convention concerning the encouragement of capital investment and the protection of property (with exchange of letters), No. 7558 - Signed at Tunis, on 23 May 1963.

¹⁹⁶ Belgo-Luxembourg Economic Union and Tunisia Convention concerning the encouragement of capital investment and the protection of property (with exchange of letters), No. 8190 - Signed at Tunis, on 15 July 1964.

¹⁹⁷ UNCTAD 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search> (accessed 02 March 2023); Vandevelde (2010) 59-60.

developing countries commonly in Africa, sometimes Asia and occasionally in Latin America.¹⁹⁸

Notably, between 1959 – 1964, over 25 African nations had gained independence, with 17 of those doing so in 1960.¹⁹⁹ Moreover, a good number of those countries concluded their first BIT within two years of gaining independence.²⁰⁰ Meanwhile, Latin American countries remained more reserved in concluding BITs because of the Calvo Doctrine, with only two countries concluding BITs in that period.²⁰¹

As was seen above, the Calvo Doctrine, to which many Latin American countries adhered, provided that the jurisdiction in international investment disputes lay with the host-country, and not the home-country of the foreign investor.²⁰² As such, BIT-signing remained relatively modest in this era, as developing countries, particularly those in Latin America, remained sceptical of BITs as a threat to national sovereignty.²⁰³

Having recently acquired independence and sovereignty of their territories with less colonial power influence, developing countries generally sought to subject multinational corporations (MNCs) and foreign investors to their own domestic laws and regulations.²⁰⁴ Moreover, Western European countries typically prepared the model negotiation texts, which were then used as a basis for negotiation with potential treaty partners.²⁰⁵

¹⁹⁸ Vandevelde (2010) 1-2; UNCTAD *BITs in the Mid-1990s* (1998) 8; UNCTAD 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search> (accessed 02 March 2023); Prabhas (2019) 2.

¹⁹⁹ Benin, Congo Brazzaville, Côte d'Ivoire, Democratic Republic of Congo (DRC), Cameroon, Senegal, Togo, Mali, Madagascar, Niger, Somalia, Burkina Faso, Chad, Central African Republic (CAR), Gabon, Nigeria and Mauritania all gained their independence in 1960 – A Boddy-Evans, 'African Countries' Independence Dates' *ThoughtCo*. 17 July 2024 available at <https://www.thoughtco.com/chronological-list-of-african-independence-4070467> (accessed 7 August 2024).

²⁰⁰ Cameroon – Germany (1962); Cameroon – Switzerland (1963); Senegal – Switzerland (1962); Senegal – Germany (1964); Togo – Germany (1961); Togo – Switzerland (1964); Madagascar – Germany (1962); Madagascar – Switzerland (1964); Niger – Switzerland (1962); Niger – Germany (1964); Côte d'Ivoire – Switzerland (1962); and Congo Brazzaville – Switzerland (1965) - UNCTAD 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search> (accessed 02 March 2023).

²⁰¹ UNCTAD *BITs in the Mid-1990s* (1998) 8.

²⁰² Garcia-Mora (1950) 205.

²⁰³ UNCTAD *WIR* (2015) 122.

²⁰⁴ Garcia *et al* (2015); UNCTAD *WIR* (2015) 123.

²⁰⁵ Vandevelde (2010) 2.

Therefore, rather than formulate their own BITs, the developing countries that signed these agreements were usually on the submissive (or receiving) end of the negotiation and accepted the terms as they came from developed countries, without much input regarding the substantive formulation of the BIT.²⁰⁶ This fuelled the scepticism surrounding the conclusion of BITs during this time.²⁰⁷

As this study will later show, this oversight and scarce participation in the formulation of BITs would go on to become one of the main challenges of the IIA regime to date.²⁰⁸ Overall however, BITs concluded in the Infancy Era aimed to rectify the rules on the deficiencies of CIL and gun-boat diplomacy so that the ambiguities over the protection of foreign investment under international law could be addressed.²⁰⁹

These treaties focused mainly on investor protection against expropriation and nationalisation, as these were the most obvious and anticipated political risks in developing, formerly colonised countries during that time, as newly sovereign countries sought to assert control over their natural resources and economic sectors without influence from their former colonisers.²¹⁰

2.1.3.2. Dichotomy Era (1965 – 1989)

As mentioned above, the Abs-Shawcross Draft was tabled before the OEEC – now the OECD – for consideration.²¹¹ Although it was never adopted, the OEEC would later adopt a similar version called the Draft Convention on the Protection of Foreign Property (1967 OECD

²⁰⁶ South Africa Department of Trade and Industry (DTI) 'Bilateral investment treaty policy framework review' (2009) *Government position paper* 5.

²⁰⁷ Salacuse (2021) 108.

²⁰⁸ DTI 'BIT policy framework review' (2009) 5.

²⁰⁹ Prabhash (2019) 2; UNCTAD *WIR* 2015 121.

²¹⁰ UNCTAD *WIR* (2015) 122.

²¹¹ Draft Convention On Investments Abroad (Abs-Shawcross Draft Convention) available at <https://www.international-arbitration-attorney.com/wp-content/uploads/137-volume-5.pdf> (accessed 10 January 2023); I Seidl-Hohenveldern 'The Abs-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the round table' (1961) 10 *Journal of Public Law* 101 – 2.

Draft),²¹² which was considered as an incentive for the conclusion of many BITs in the 1960s.²¹³

Its substantive provisions served as a main model for BITs going forward.²¹⁴ As a matter of fact, although no BITs contained ISDS provisions at this time, the 1967 OECD Draft provisions already provided for the settlement of disputes in IATs.²¹⁵ In the Dichotomy Era, African countries were the most actively involved developing region in concluding BITs.²¹⁶ This coincided with the continent's decolonisation efforts, which accelerated in the 1960s, giving the negotiation of BITs a new impetus by the 1970s.²¹⁷

BITs therefore gave former colonial powers a 'legitimate' way to protect their investments in former colonies, given that nationalisation and expropriation of investments had become a reasonably anticipated occurrence in newly independent countries.²¹⁸ In fact, half the expropriations during the 1960s and 70s happened in Africa.²¹⁹ Zambia, Uganda and Sudan, for example, each expropriated more than 30 foreign investments in the 1970s.²²⁰

In 1968, the first ISDS provision was inserted into the Indonesia – Netherlands BIT.²²¹ ISDS provisions allowed foreign investors to institute unilateral claims against a host-country before an IAT.²²² The following year, the Chad – Italy BIT was concluded, which appears to have been the first BIT to provide for ISDS with unqualified State consent.²²³ 'Unqualified state consent' refers to the state's unconditional agreement to allow ISDS procedures.²²⁴

²¹² Resolution of the Council on the draft Convention on the Protection of Foreign Property adopted on 12 October 1967 available at <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0084> (accessed 10 May 2021).

²¹³ Abs-Shawcross Draft Convention available at <https://www.international-arbitration-attorney.com/wp-content/uploads/137-volume-5.pdf> (accessed 10 January 2023); UNCTAD *WIR* (2015) 122.

²¹⁴ Draft Convention on the Protection of Foreign Property (1967).

²¹⁵ OECD Draft (1967) art 7.

²¹⁶ UNCTAD *BITs in the Mid-1990s* (1998) 16.

²¹⁷ UNCTAD *WIR* (2015) 122.

²¹⁸ Vandevelde (2010) 51.

²¹⁹ Vandevelde (2010) 51.

²²⁰ Vandevelde (2010) 51.

²²¹ Indonesia – Netherlands (1968) art 11; UNCTAD *WIR* (2015) 122.

²²² J Schwarzer 'Investor-State dispute settlement: An anachronism whose time has gone' investment Policy Brief *South Centre* 12 December 2018 1 available at https://www.southcentre.int/wp-content/uploads/2018/12/IPB12-Investor-State-Dispute-Settlement-An-Anachronism-Whose-Time-Has-Gone_EN.pdf (accessed 10 October 2024).

²²³ Chad – Italy BIT (1969); De Mestral & Lévesque (2013) 17.

²²⁴ De Mestral & Lévesque (2013) 17.

Henceforth, the number of BITs to incorporate ISDS provisions steadily increased, until it became a standard practice in IIA drafting.²²⁵ In effect, ISDS provisions in BITs combined substantive investment protection and promotion obligations, with binding investor-State consent.²²⁶ The first ISDS case, *AAPL v Sri Lanka*,²²⁷ was initiated in 1987 under the Sri Lanka – UK BIT (1980).²²⁸

In the *AAPL* case,²²⁹ AAPL (the investor), claimed that their investment had been destroyed during a military operation conducted by Sri Lankan Security forces.²³⁰ Arbitrators found that Sri Lanka had breached CIL rules by neglecting its duty to take pre-cautionary measures regarding a security force operation against the rebel group, Tigers of Tamil.²³¹ The investor, who had claimed USD 8 million, would later be awarded USD 0.46 million.²³²

Developing countries were concurrently actively engaged in attacking the Hull Rule, which stipulated that in the event of expropriation, the host government was required to provide ‘prompt, adequate and effective’ compensation to the investor.²³³ These countries claimed the right to determine how investors were treated and the compensation that would apply if that treatment was sufficiently harmful.²³⁴

This opposition reached its peak with the adoption of several UN declarations and resolutions that collectively seemed to jeopardise the investment interests of developed capital-exporting countries.²³⁵ Key declarations from this period included the 1962 Resolution on the Permanent Sovereignty over Natural Resources (Resolution 1803),²³⁶ the 1973 Resolution on

²²⁵ UNCTAD *WIR* (2015) 122.

²²⁶ De Mestral & Lévesque (2013) 17.

²²⁷ *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka* (ICSID Case No. ARB/87/3).

²²⁸ UNCTAD *WIR* (2015) 122.

²²⁹ *AAPL v Sri Lanka* (ICSID Case No. ARB/87/3).

²³⁰ UNCTAD ‘Investment Policy Hub’ available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1/aapl-v-sri-lanka> (accessed 20 March 2021).

²³¹ ‘Frequent Standards of Protection: Full Protection and Security’ (FPS) available at <http://idsblog.com/tag/ids/> (accessed 20 March 2021).

²³² UNCTAD ‘Investment Policy Hub’ available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1/aapl-v-sri-lanka> (accessed 20 March 2021).

²³³ Z Elkins, AT Guzman & B Simmons ‘Competing for Capital: The diffusion of bilateral investment treaties, 1960-2000’ (2007) 21 *University of St. Gallen Law School Working Paper no. 2007-21*, 4; Ofodile (2013) 140.

²³⁴ Guzman (1998) 641; Elkins *et al* (2007) 4.

²³⁵ Ofodile (2013) 140; Guzman (1998) 641; Elkins *et al* (2007) 4.

²³⁶ Resolution on the Permanent Sovereignty over Natural Resources (Resolution 1803) G.A. Res 1803 (XVII), U.N. GAOR, 17th Session, Supp No. 17 at 15, U.N. Doc A/5217 at 15 (December 14, 1962).

the Permanent Sovereignty over Natural Resources (Resolution 3171),²³⁷ the 1974 Charter of Economic Rights and Duties of States (Resolution 3281)²³⁸ and the 1974 General Assembly resolution, which declared a New International Economic Order (NIEO) in the same year.²³⁹

The NIEO emphasised the control of MNCs by host-countries and was promoted by developing countries in various international *fora*. It also aimed to avoid extreme nationalism and return to the liberalisation principles that existed before WWI.²⁴⁰ Despite being opposed to the Hull Rule, developing countries went on to sign a plethora of BITs that contained obligations similar to those of the Hull Rule.²⁴¹

Many BITs to date require host-countries to provide 'prompt, adequate and effective' compensation for the expropriation of foreign investments, much like the Hull Rule did.²⁴² It therefore appears that developing countries were against certain principles and standards when they were put forward as general international law norms, but were prepared to accept them as *lex specialis* in BITs to attract FDI.²⁴³

The need for developing countries to attract FDI during the Dichotomy Era was driven by several factors, including the end of the Cold War and the effects of decolonisation. These circumstances led to tight budgets, a debt crisis and a significant decline in official development assistance (ODA) from the developed countries, on which developing, formerly colonised countries had heavily depended.²⁴⁴

In the 1970s, an increasing number of developed countries like Austria, Israel and the UK, also begun their BIT programmes with developing countries like Haiti, Jordan, Mali, Kenya,

²³⁷ Resolution on the Permanent Sovereignty over Natural Resources (Resolution 3171) G.A. Res 3171 (XXVIII), U.N. GAOR, 28th Session, Supp No. 30 at 52, U.N. Doc A/9030 at 3 (December 17, 1973).

²³⁸ Charter of Economic Rights and Duties of States (Resolution 3281) G.A. Res 29/3281, pmbl, art 1, U.N. Doc A/Res/29/3281 (12 December 1974).

²³⁹ General Assembly resolution, which declared a New International Economic Order (NIEO) G.A. Res 3201 (S-VI), U.N. GAOR, 6th Special Session, Supp No. 1 at 3, U.N. Doc A/9559 at 3 (1 May 1974).

²⁴⁰ Vandeveld (2010) 41.

²⁴¹ UNCTAD *BITs in the Mid-1990s* (1998) 8; de Mestral & Lévesque (2013) 17; Guzman (1998) 642; Neumayer & Spess (2005) 1570.

²⁴² For example, German – Uganda BIT (1966) art 3(2); Uganda - UK BIT (1998) art 5(1); Denmark – Uganda BIT (2001) art 5(1); OECD *International Investment law: A changing landscape* (2005) fn 1, 44.

²⁴³ UNCTAD *Bilateral Investment Treaties in the Mid-1990s* (1998) 9.

²⁴⁴ Neumayer & Spess (2005) 1568; UNCTAD *BITs in the Mid-1990s* (1998) 9.

Singapore and Yemen and concluded their first BITs.²⁴⁵ Non-Western countries who had themselves become capital-exporting countries, like Kuwait²⁴⁶ and Japan²⁴⁷ also begun to negotiate BITs with developing countries.

By the early 1980s, about 150 BITs had been signed between European and primarily African countries.²⁴⁸ Encouraged by the experience of western European countries, the US launched its own BIT negotiating program with developing countries in 1981.²⁴⁹ After agreeing that parties could take necessary measures to deal with extraordinary national security threats, the US enforced eight BITs with Senegal,²⁵⁰ Zaire,²⁵¹ Morocco,²⁵² Turkey,²⁵³ Cameroon,²⁵⁴ Bangladesh,²⁵⁵ Grenada²⁵⁶ and Egypt.²⁵⁷

Although the majority of BITs concluded during this era were North-South, there were some developing countries that concluded BITs with each other (South-South), like the Tunisia–Togo BIT (1987).²⁵⁸ Moreover, countries which had not concluded many BITs until the Dichotomy Era like China²⁵⁹ and Ghana, also begun doing so in order to attract FDI into their territories.

²⁴⁵ UNCTAD *BITs in the Mid-1990s* 1990s (1998) 9.

²⁴⁶ For example Kuwait signed BITs with Tunisia (1973), Morocco (1980) and Pakistan (1983); see <https://investmentpolicy.unctad.org/> (accessed 12 October 2020); Salacuse (1990) 658.

²⁴⁷ Japan signed BITs with Egypt (1977), Sri Lanka (1982) and China (1989)

²⁴⁸ Salacuse (1990) 657.

²⁴⁹ Salacuse (1990) 657.

²⁵⁰ Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Dec. 6, 1983, United States – Senegal, S. TREATY DOC No. 99 – 15, 99th Con, 2nd Session (1986).

²⁵¹ Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Aug 3, 1984, United States – Zaire, S. TREATY DOC No. 99 – 17, 99th Con, 2nd Session (1986).

²⁵² Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, July 22, 1985, United States – Morocco, S. TREATY DOC No. 99 – 18, 99th Con, 2nd Session (1986).

²⁵³ Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Dec. 3, 1985, United States – Turkey, S. TREATY DOC No. 99 – 19, 99th Con, 2nd Session (1986).

²⁵⁴ Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Feb. 26, 1986, United States – Cameroon, S. TREATY DOC No. 99 – 22, 99th Con, 2nd Session (1986).

²⁵⁵ Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Mar 12, 1986, United States – Bangladesh, S. TREATY DOC No. 98 – 23, 99th Con, 2nd Session (1986).

²⁵⁶ Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, May 2, 1986, United States – Grenada, S. TREATY DOC No. 99 – 25, 99th Con, 2nd Session (1986).

²⁵⁷ Treaty Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Mar 11, 1985, United States – Egypt, S. TREATY DOC No. 99 – 24, 99th Con, 2nd Session (1986); JW Salacuse (1990) 658.

²⁵⁸ *Entre le Gouvernement de la Tunisie et le Gouvernement de la République Togolaise Relatif à la Promotion et la Protection Réciproques des Investissements* (1987).

²⁵⁹ China signed its first BIT in 1982 – UNCTAD ‘Investment policy Hub’ available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china> (accessed 10 July 2022).

Towards the end of this era, the Multilateral Investment Guarantee Agency (MIGA) was established in 1988. It complemented public and private sources of investment insurance against non-commercial risks in developing countries.²⁶⁰ Part of the MIGA's activities included encouraging investment flows through the facilitation of agreements, such as BITs, among its members on the promotion and protection of investments.²⁶¹

Moreover, the total number of BITs signed in the world jumped from 167 in the 1970s, to 386 towards the end of the 1980s.²⁶² The Dichotomy Era was therefore characterised by the prevalence of North-South BITs, the changing mindset of developing countries towards FDI and the signing of BITs, the inclusion of ISDS provisions in BITs and the emergence of the notion that signing BITs led to increased FDI inflows, which promoted development.²⁶³

2.1.3.3. *Proliferation Era (1990 - 2007)*

In addition to the effects of the end of the Cold War and decolonisation, which had resulted in tight budgets, the debt crisis and an overall decline in ODA from the developed world to developing countries, the fall of the Berlin Wall in 1989 and the dissolution of the Soviet Union in 1991 caused a shift in geopolitics, where political confrontation and economic separation transformed into political cooperation and economic integration.²⁶⁴

The move towards market economies in the formerly socialist countries of Central and Eastern Europe also led to a widespread recognition of private sector development as a promising path towards economic growth and development.²⁶⁵ Reductions in foreign aid and ODA placed renewed emphasis on the need to create favourable conditions to attract private investment in developing countries.²⁶⁶

Ultimately, limited access to foreign capital caused these countries to recognise the potential of FDI as a source of, *inter alia*, economic growth, new technologies and access to markets.²⁶⁷

²⁶⁰ MIGA 'History' available at <https://www.miga.org/history> (accessed 10 July 2022).

²⁶¹ MIGA Convention (1985) art 23; UNCTAD *BITs in the Mid-1990s* (1998) 8.

²⁶² UNCTAD *BITs in the Mid-1990s* (1998) 9.

²⁶³ Alvarez *et al* (2011) 23.

²⁶⁴ UNCTAD *WIR* (2015) 123; Prabhash (2019) 3; Neumayer & Spess (2005) 1568.

²⁶⁵ UNCTAD *BITs in the Mid-1990s* (1998) 17

²⁶⁶ UNCTAD *BITs in the Mid-1990s* (1998) 17

²⁶⁷ UNCTAD *BITs in the Mid-1990s* (1998) 17; Neumayer & Spess (2005) 1568.

Concurrently, marketing efforts by international organisations, including the World Bank, UNCTAD and OECD aggressively promoted the idea that BITs were essential tools for developing countries to attract new levels of investment.²⁶⁸

Recognising the importance of FDI, accompanied by the pressure from the developed world, developing countries started to compete for FDI amongst themselves by liberalising their investment environments.²⁶⁹ They adopted domestic legal frameworks on investment and embarked on ambitious efforts to conclude BITs,²⁷⁰ thus skyrocketing BITs from 386 in 1989,²⁷¹ to 2,573 by the end of 2007.²⁷²

This made BITs the most utilised form of IIA. To put this into perspective, 2,497 BITs were signed during this period, which ultimately defined the era.²⁷³ The number of BITs concluded between developing countries (South-South) also increased from three in the 1960s, to about 159 by 1996.²⁷⁴ By December 2006, 680 South-South BITs had been concluded and accounted for 27% of all BITs concluded up until that point.²⁷⁵

Furthermore, 225 TIPs were signed during the Proliferation Era, a significant increase from the previous Dichotomy and Infant eras.²⁷⁶ Among those concluded were the North American Free Trade Agreement (NAFTA) in 1992,²⁷⁷ which evolved into the US-Mexico-Canada

²⁶⁸ Alvarez *et al* (2011) 23.

²⁶⁹ Neumayer & Spess (2005) 1568; UNCTAD *BITs in the Mid-1990s* (1998) 15.

²⁷⁰ Neumayer & Spess (2005) 1568; UNCTAD *BITs in the Mid-1990s* (1998) 15.

²⁷¹ UNCTAD *BITs in the Mid-1990s* (1998) 9.

²⁷² UNCTAD *WIR 2007: Transnational Corporations, Extractive Industries and Development* (2007) 16.

²⁷³ UNCTAD 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search> (accessed 01 March 2023).

²⁷⁴ UNCTAD *BITs in the Mid-1990s* (1998) 15.

²⁷⁵ UNCTAD *WIR* (2007) 17.

²⁷⁶ UNCTAD 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search> (accessed 01 March 2023).

²⁷⁷ NAFTA is a free trade agreement (FTA) between Canada, Mexico and US, which came into force on 1 January 1994, had the effect of immediately lifting tariffs on most of the goods produced by the member States; North American Free Trade Agreement (1994).

Agreement (USMCA) in 2020²⁷⁸ and the Energy Charter Treaty (ECT) in 1994, which came into force in 1998.²⁷⁹ To date, the NAFTA and the ECT have been cited in ISDS cases.²⁸⁰

Nearly a year after the ECT was signed, on 1 January 1995, the World Trade Organization (WTO) was created marking the biggest reform of international trade since WWII.²⁸¹ Whereas the WTO's GATT mainly dealt with trade in goods, other WTO Agreements covered broader areas, including those relating to foreign investment like, *inter alia*, the Agreement on Trade-Related Investment Measures (TRIMs Agreement).²⁸²

As will be shown later in this study, the TRIMs Agreement, which was negotiated during the Uruguay Round, only applies to measures that affect trade in goods²⁸³ and recognises that certain investment measures can have trade-restrictive and distorting effects.²⁸⁴ Although the WTO's agreements contain provisions which could affect FDI, they primarily focus on trade in goods and services and do not address foreign investment comprehensively.

When the WTO and its predecessor, the GATT were established, investment was not a major issue. As a result, it was not comprehensively addressed in the WTO agreements. This omission in the international trade framework prompted OECD countries to initiate negotiations for a MAI at the Annual Meeting of the OECD at Ministerial level in May 1995.²⁸⁵

²⁷⁸ The Agreement between the United States of America, Canada and the United Mexican States (USMCA), came into force on 1 July 2020 – <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (accessed 10 December 2022).

²⁷⁹ The Energy Charter Treaty' available at <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/> (accessed 09 July 2021).

²⁸⁰ UNCTAD 'Facts on investor-State arbitrations in 2021: With a special focus on tax-related ISDS cases' *IIA Issues Note* June 2022, 1 – 4; UNCTAD 'Investor-State dispute settlement cases: Facts and figures 2020' *IIA Issues Note* September 2021, 1 – 3.

²⁸¹ 'History of the Multilateral Trading System' available at https://www.wto.org/english/thewto_e/history_e/history_e.htm (accessed 09 July 2021).

²⁸² Other WTO Agreements with investment provisions include Annex 1C, Trade-Related Aspects of Intellectual Property Rights (TRIPS) – Article 70(4); and Annex 1B, General Agreement on Trade in Services (GATS) – Article XVI:2(f).

²⁸³ TRIMs Agreement (1994) art 1.

²⁸⁴ TRIMs Agreement (1994) preamble.

²⁸⁵ 'Multilateral Agreement on Investment' available at <https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> (accessed 12 July 2021); Ofodile (2013) 140.

It was envisioned as a robust and comprehensive framework for FDI, which aimed to extend the scope of existing liberalisation by providing legal protection for foreign investors.²⁸⁶

While it contained high standards for the liberalisation of investment regimes, with dispute settlement procedures open to non-OECD countries,²⁸⁷ due to disagreements among participating countries over the content and scope of the agreement, the MAI was never adopted.²⁸⁸ Some countries believed that the proposed agreement favoured the interests of developed countries and MNCs over those of developing countries, while others argued that the agreement did not go far enough in protecting the rights of investors.²⁸⁹

Moreover, it was OECD Members that had to persuade non-OECD ‘developing’ countries, to sign the MAI, despite the fact that the latter group of countries were unrepresented during its negotiation.²⁹⁰ This was surprising given the fact that the reason for adopting the MAI in the first place, would have been to improve market access and investment protection in developing countries, as opposed to developed OECD Member countries.²⁹¹

As a result, the MAI was heavily criticised by civil society organisations, which were unsettled by the lack of transparency during the negotiations.²⁹² Such omissions created suspicion around the negotiations and concerns on the impact the Agreement would have on developing countries.²⁹³ As this study will later show, there have been recent attempts to

²⁸⁶ WH Witherell ‘The OECD Multilateral Agreement of Investment’ available at https://unctad.org/system/files/official-document/iteiitv4n2a2_en.pdf (accessed 11 November 2023); UNCTAD *Lessons from the MAI* (1999) 5.

²⁸⁷ OECD ‘Multilateral Agreement on Investment’ available at <https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> (accessed 12 July 2021); OECD, ‘Multilateral Agreement on Investment’ available at <https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> (accessed 12 December 2022).

²⁸⁸ UNCTAD *Lessons from the MAI* (1999) 11-3; OECD ‘Multilateral Agreement on Investment Draft Negotiating Text as of April 1998’ (1998) available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2813/download> (accessed 10 July 2024); Alvarez *et al* (2011) 23.

²⁸⁹ UNCTAD *Lessons from the MAI* (1999) 18.

²⁹⁰ PT Muchlinski ‘The Rise and Fall of the Multilateral Agreement on Investment: Where Now’ (2000) 34 *International Lawyer* 1039.

²⁹¹ Muchlinski (2000) 1039.

²⁹² Muchlinski (2000) 1039; UNCTAD *Lessons from the MAI* (1999) 24.

²⁹³ UNCTAD *Lessons from the MAI* (1999) 24-5.

agree on an Investment Facilitation for Development (IFD) Agreement in the WTO.²⁹⁴ It generally aims:²⁹⁵

... to improve the transparency of measures, streamline administrative procedures, adopt other investment facilitation measures and promote international cooperation, as a means of facilitating the flow of foreign direct investment between the Parties, particularly to developing and least-developed country Parties, with the aim of fostering sustainable development.

While the MAI aimed to establish a comprehensive, binding framework for FDI with high standards for investment liberalization and protection, and was primarily driven by OECD developed countries,²⁹⁶ the IFD Agreement is a plurilateral Agreement and is open to those WTO Members who wish to join it.²⁹⁷ It focuses on improving investment facilitation by enhancing transparency, predictability and efficiency, particularly in developing countries.²⁹⁸

Furthermore, unlike the MAI, the IFD Agreement has had more than 120 participating WTO Member States, including more than 85 developing countries, 25 of which are least-developed countries (LDCs) adding more emphasis to its inclusive and transparency objective.²⁹⁹ It also emphasizes sustainable investment and best practices in investment facilitation without imposing uniform standards and binding commitments.³⁰⁰

The Proliferation Era also witnessed African countries become pioneers at entering regional trade agreements (RTAs), often as a result of their membership in regional economic communities (RECs). Many of these agreements contained investment rules that were binding on Member States. For example, having existed from 1967 – 1977, the East African

²⁹⁴ WTO 'Investment Facilitation for Development Agreement' available at https://www.wto.org/english/tratop_e/invfac_public_e/factsheet_ifd.pdf (accessed 5 August 2024).

²⁹⁵ WTO 'Joint Ministerial Declaration on the Investment Facilitation for Development Agreement' Ministerial Conference, Thirteenth Session, Abud-Dhabi 26-29 February 2024, 25 February 2024 (WT/MIN(24)/17) (IFD Agreement) art 1.

²⁹⁶ OECD 'Multilateral Agreement on Investment' available at <https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> (accessed 12 July 2021); OECD, 'Multilateral Agreement on Investment' available at <https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> (accessed 12 December 2022).

²⁹⁷ WTO 'Investment Facilitation for Development Agreement' available at https://www.wto.org/english/tratop_e/invfac_public_e/factsheet_ifd.pdf (accessed 5 August 2024).

²⁹⁸ WTO 'Investment Facilitation for Development Agreement' available at https://www.wto.org/english/tratop_e/invfac_public_e/factsheet_ifd.pdf (accessed 5 August 2024).

²⁹⁹ IFD Agreement (2024) preamble, arts 1, 6 & 38.2.

³⁰⁰ IFD Agreement (2024) preamble, arts 37.4, 38.3 & 39.4.

Community (EAC), then comprising of Kenya, Tanzania and Uganda, was revived in 1999.³⁰¹ The EAC now consists of seven Member States, also including Burundi, the Democratic Republic of Congo (DRC), Rwanda and South Sudan.³⁰²

Another significant REC that re-emerged on the African continent during this era was the Southern African Customs Union (SACU), which currently consists of the governments of Botswana, Lesotho, Namibia, South Africa and Eswatini.³⁰³ The initial SACU, which dates back to 1889 and then again from 1910 – 1969, and from 1969 – 2000, was revamped in 2002 when the 2002 SACU Agreement was concluded.³⁰⁴ It contains investment provisions that are binding on Member States and aims, *inter alia*.³⁰⁵

(d) to substantially increase investment opportunities in the Common Customs Area; [...]

(f) to promote the integration of Member States into the global economy through enhanced trade and investment.

Additionally, more than 90 South-South TIPs were concluded during this era, including the Association of Southeast Asian Nations (ASEAN) agreements for the establishment of free trade and investment areas with China (2002), India (2003) and the Republic of Korea (2005); the free trade agreement (FTA) between Panama and Singapore (2006) and the FTA between China and Pakistan (2006). Overall, TIPs nearly doubled in the five years leading up to 2006.³⁰⁶

Towards the end of the Proliferation Era, there were about 2,608 BITs, which continued to grow in number and complexity.³⁰⁷ The role of developing countries in IIA policymaking also grew significantly, amounting to 76% of all BITs and 81% of all other IIAs.³⁰⁸ Developing

³⁰¹ Burundi and Rwanda joined the EAC on 18 June 2007, South Sudan on 5 September 2016 and DRC on 11 July 2022 – EAC ‘History of EAC’ available at <https://www.eac.int/eac-history> (accessed 09 July 2021).

³⁰² Burundi and Rwanda joined the EAC on 18 June 2007, South Sudan on 5 September 2016 and DRC on 11 July 2022 – EAC ‘History of EAC’ available at <https://www.eac.int/eac-history> (accessed 09 July 2021).

³⁰³ ‘SACU’ available at <https://www.sacu.int/show.php?id=565> (accessed 10 May 2023).

³⁰⁴ ‘About SACU’ available at <https://www.sacu.int/show.php?id=394> (accessed 10 May 2023).

³⁰⁵ Southern African Customs Union (SACU) Agreement (2002) art 2(d) & (f).

³⁰⁶ UNCTAD *WIR 2008: Transnational corporations and the infrastructure challenge* (2008) 14.

³⁰⁷ UNCTAD *WIR* (2007) 16.

³⁰⁸ UNCTAD *WIR* (2007) 17.

countries like China and Egypt became among the top 10 signatories of BITs,³⁰⁹ with China concluding the second highest number of BITs (145) to date, after Germany (155).³¹⁰

Although the Proliferation Era was characterised by the ambitious conclusion and explosive use of BITs, this momentum begun to fade with the onset of the 2007/8 financial crisis, triggered by the collapse of the US housing market.³¹¹ There was also a significant increase in ISDS cases, which went from just one in 1987, to 288 by the end of 2007.³¹² By that time, ISDS cases had been lodged against 73 governments, 45 of which were developing countries.³¹³

The increase in ISDS cases posed challenges of capacity and content for developing countries, especially because they were often the respondents.³¹⁴ Capacity challenges arose from the lack of resources to participate in IIA development fully and effectively, which often increased in scope, complexity and diversity.³¹⁵ Content challenges included policy coherence, balancing private and public interest and strengthening the development dimension in IIAs.³¹⁶

Increased ISDS cases also provoked debate over the implications of IIAs, especially BITs.³¹⁷ On the one hand, improved protection for foreign investors can come at some cost to the host-country to the extent that it can restrict a government's ability to regulate in the public's interest.³¹⁸ On the other hand, some investors might argue that BITs do not offer the protection they were meant to, as some ISDS cases have been dismissed or resulted in investors receiving far less compensation than expected.³¹⁹

Whichever side of the debate one falls, there is no doubt that most countries have realised that concluding IIAs, especially BITs, can have significant implications for the host-country –

³⁰⁹ UNCTAD *WIR* (2007) 17.

³¹⁰ UNCTAD 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/78/germany?type=bits> (accessed 10 January 2023).

³¹¹ VV Acharya & M Richardson *Restoring Financial Stability: How to Repair a Failed System* (2009) 4.

³¹² The Dichotomy Era also saw the initiation of the first ISDS case in 1987, which was brought under the Sri Lanka – United Kingdom BIT (1980) – see investment policy hub available at <https://investmentpolicy.unctad.org/investment-dispute-settlement> (accessed 10 January 2023).

³¹³ UNCTAD *WIR* (2008) 16.

³¹⁴ UNCTAD *WIR* (2007) 18.

³¹⁵ UNCTAD *WIR* (2007) 18.

³¹⁶ UNCTAD *WIR* (2007) 18.

³¹⁷ UNCTAD *WIR* (2008) XXV.

³¹⁸ UNCTAD *WIR* (2008) XXV.

³¹⁹ UNCTAD *WIR* (2008) XXV.

something that developing country governments might not have anticipated when they entered into these agreements in the first place.³²⁰ Rising concerns of the IIA regime and the ISDS mechanism have therefore contributed to recent IIA reforms across the globe.

Towards the end of 2007, 10 out of the 44 BITs that were signed replaced earlier treaties, bringing the number of renegotiated BITs to 121.³²¹ This number has continued to rise well into the current re-orientation era, as more BITs become eligible for termination or renegotiation. There has also been an increase in the number of countries that have started revising their model BITs to reflect new concerns related to economic, environmental and social issues and the host-country's right to regulate.³²²

Countries became more conscious of these issues after the adoption of the Millennium Development Goals (MDGs) in 2000,³²³ which were a set of eight goals established by the UN with the aim of eradicating extreme poverty and promoting sustainable development worldwide by 2015.³²⁴ The goals were considered a significant milestone in global development efforts, as they provided a framework for international cooperation and action towards common goals.³²⁵

While the MDGs did not directly change IIL, they helped to shape the global discourse around development and sustainability, which in turn influenced the way countries and organizations approached investment and development initiatives. As a result, recent agreements have marked a step towards a better balancing of the rights of foreign investors, on the one hand, and respect for legitimate public concerns on the other.³²⁶

³²⁰ UNCTAD *WIR* (2008) XXV.

³²¹ UNCTAD *WIR* (2008) 15.

³²² UNCTAD *Reform package* (2018) 74-7.

³²³ Resolution adopted by the General Assembly, United Nations Millennium Declaration, 18 September 2000, A/RES/55/2.

³²⁴ The goals were: 1) Eradicate extreme poverty and hunger; 2) Achieve universal primary education; 3) Promote gender equality and empower women; 4) Reduce child mortality; 5) Improve maternal health; 6) Combat HIV/AIDS, malaria, and other diseases; 7) Ensure environmental sustainability; and 8) Develop a global partnership for development - Resolution adopted by the General Assembly, United Nations Millennium Declaration, 18 September 2000, A/RES/55/2; '2013: MDG Acceleration and beyond 2015' available at <https://www.un.org/millenniumgoals/bkqd.shtml> (accessed 10 January 2023).

³²⁵ '2013: MDG Acceleration and beyond 2015' available at <https://www.un.org/millenniumgoals/bkqd.shtml> (accessed 10 January 2023).

³²⁶ UNCTAD *WIR* (2008) 15.

The Proliferation Era was therefore marked by a substantial surge in the adoption of TIPs and BITs, reflecting a global trend of increasing economic integration and investment flows. These agreements proliferated across both South-South and north-South partnerships, signalling a broad commitment to fostering cross-border investments. On the African continent, there was a notable rise in RECs, which introduced binding treaties that further facilitated and regulated investment activities across borders.

The Proliferation Era was also characterised by a dramatic increase in ISDS cases, with the majority being instituted by foreign investors from developed countries against developing countries. This spike in disputes highlighted the shortcomings of BITs and the growing concerns about their risks. As a result, this era not only underscored the global enthusiasm for investment protection but also revealed the complexities and challenges that come with it, which has led to a significant increase in BIT terminations, revisions and reforms.

2.1.3.4. Re-orientation Era (2008 – to date)

The Re-orientation Era has been marked by distinct challenges that have significantly impacted on FDI inflows, affecting how countries approach their IIA regimes. The era kicked off at the height of the 2008 global financial crisis, which affected several economies and had severe effects on FDI flows.³²⁷ Between 2007 – 2008, global FDI inflows fell by 14 per cent, from USD 1,979 billion to USD 1,697 billion.³²⁸

Despite these challenges, countries continued to engage in the negotiation and conclusion of IIAs, with 2011 witnessing 48 new IIAs signed and 100 others under negotiation in just the first five months.³²⁹ However, by 2012, the number of BITs concluded annually had started to decline.³³⁰ A little over a decade after the financial crisis, FDI activity was again impacted by the COVID-19 pandemic in 2019-2020.³³¹

³²⁷ UNCTAD *WIR 2019: Transnational corporations* (2009) III, XVII.

³²⁸ UNCTAD *WIR* (2009) XIX.

³²⁹ UNCTAD *WIR 2011: Non-equity modes of international production and development* (2011) XVI

³³⁰ UNCTAD *WIR 2012: Towards a new generation of investment policies* (2012) 75.

³³¹ UNCTAD *WIR 2021: Investing in sustainable recovery* (2021) 2.

The pandemic led to worldwide lockdowns, social distancing and foreign entry bans,³³² which in turn delayed, postponed or cancelled several investment projects, resulting in a significant decline in global FDI.³³³ Between 2019 and 2020, global FDI fell by 35 per cent from USD 1.5 trillion in 2019 to USD 1 trillion in 2020,³³⁴ a decline that was 20 per cent lower than in 2009, after the financial crisis.³³⁵

As the world recovered from the impact of the pandemic on FDI flows, the Russia - Ukraine war ensued in 2022.³³⁶ This war has had profound and widespread effects on international investment in economic development and achievement of the Sustainable Development Goals (SDGs) across all nations.³³⁷ Global FDI in 2022 and beyond has been influenced by the security and humanitarian crises, macroeconomic shocks triggered by the conflict, rising energy and food prices and heightened investor uncertainty.³³⁸

While the first ever ISDS case in 1987, *AAPL v Sri Lanka*,³³⁹ revolved around an investment that was damaged during a military action by Sri Lankan Security forces,³⁴⁰ relatively few ISDS cases have since been instituted for breach of security and protection obligations resulting from war.³⁴¹ However, the ongoing Russia-Ukraine war has refocused attention on previous and potential ISDS cases involving armed conflicts.³⁴²

Figure I: Global FDI flows between 2008 - 2023

³³² UNCTAD *WIR* (2021) 2.

³³³ UNCTAD *WIR* (2021) 42.

³³⁴ UNCTAD *WIR* (2021) 42.

³³⁵ UNCTAD *WIR* (2021) X, 2.

³³⁶ UNCTAD *WIR 2022: International tax reforms and sustainable investment* (2022) 2.

³³⁷ UNCTAD *WIR* (2022) 3.

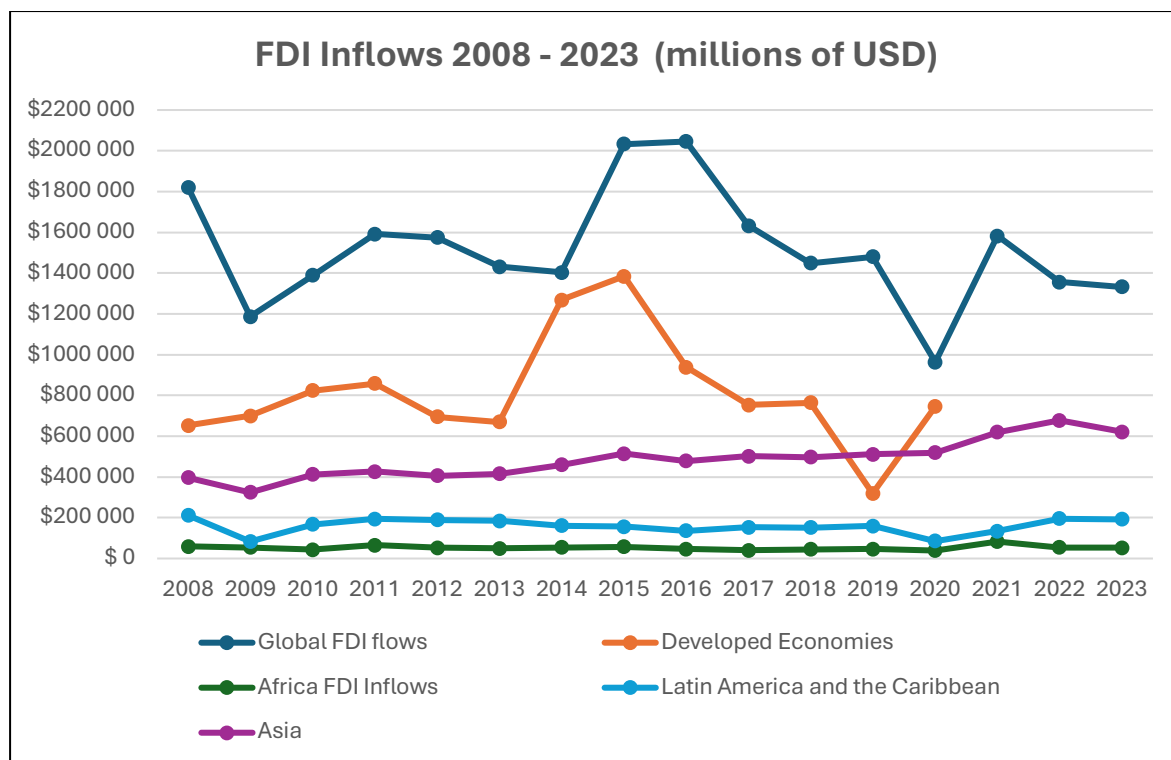
³³⁸ UNCTAD *WIR* (2022) 2.

³³⁹ *Asian Agricultural Products Ltd. v Republic of Sri Lanka (AAPL v Sri Lanka)* (ICSID Case No. ARB/87/3).

³⁴⁰ UNCTAD 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1/aapl-v-sri-lanka> (accessed 20 March 2021).

³⁴¹ This is not to say that such cases have not been instituted in recent years. In *Cengiz v Libya*, for example, the host-country actions and omissions during Libya's civil war were found to have resulted in the destruction of the investor's construction sites - *Cengiz İnşaat Sanayi ve Ticaret A.S. v Libya* (ICC Case No. 21537/ZF/AYZ); UNCTAD 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/776/cengiz-v-libya> (accessed 10 May 2023).

³⁴² UNCTAD *WIR* (2022) XII.



Source: UNCTAD World Investment Reports from 2016 – 2024

Although countries generally continue to adopt investment policies that further liberalise and facilitate foreign investment, there have been several other developments that have shaped the evolution of IIAs to date. Global dissatisfaction towards the IIA regime and the ISDS mechanism carried over from the Proliferation Era into the Re-orientation one. Many countries have continued to terminate, revise, re-negotiate and reform their IIA regimes.³⁴³

Since 2012, 424 IIAs have been terminated (415 BITs and 9 TIPs), by mutual consent, unilaterally, expiration or replacement by a new treaty.³⁴⁴ Right at the beginning of the re-orientation era (2008), the Czech Republic initiated a process of terminating 23 BITs concluded with European countries to eliminate overlapping rules governing intra-EU investment flows.³⁴⁵

In the same year, Ecuador announced that it would terminate nine of its BITs and terminated an additional two BITs with the US and Canada in 2009.³⁴⁶ India has been particularly active,

³⁴³ UNCTAD WIR (2024) 21-2 & 25.

³⁴⁴ UNCTAD WIR (2024) fn 8

³⁴⁵ UNCTAD WIR (2009) 32; UNCTAD WIR (2010) 86

³⁴⁶ UNCTAD WIR 2010: *Investing in a low-carbon economy* (2010) 85; UNCTAD WIR (2009) 32.

terminating its BITs with Venezuela in 2013, Germany in 2016 and seven additional BITs in 2019.³⁴⁷ El Salvador also denounced one BIT with Nicaragua, as Venezuela denounced its BIT with the Netherlands.³⁴⁸

In Africa, South Africa terminated its BITs with several European countries, including Belgium, Luxembourg and Spain in 2018, while Tanzania and Uganda terminated their BITs with the Netherlands in 2019 and 2017 respectively.³⁴⁹ Developed countries like Australia also terminated three BITs, Italy two and Poland 17 in 2019.³⁵⁰ More BIT terminations will be expected in the coming years.

European Union (EU) Member States, for instance, agreed to terminate intra-EU BITs. This decision was reached following the *Achmea* case judgement of the Court of Justice of the EU (CJEU).³⁵¹ The CJEU held that the investor-State arbitration provisions in the 1991 Netherlands-Slovakia BIT impaired its exclusive jurisdiction to interpret EU law.³⁵² It found that the BIT's provisions undermined the EU's principle of autonomy, thus making them inconsistent with EU law.³⁵³

The court's decision resulted in the Termination of the Intra-EU BITs Agreement,³⁵⁴ which entered into force on 29 August 2020.³⁵⁵ Annex A of the Agreement contains a list of intra-EU BITs currently in force that will be terminated, along with their sunset clauses, when the Agreement comes into force for the relevant member States.³⁵⁶ Annex B lists 11 already

³⁴⁷ UNCTAD *WIR* (2021) 123, UNCTAD *WIR* (2020) 107.

³⁴⁸ UNCTAD *WIR* (2009) 32.

³⁴⁹ JT Gathii 'Understanding Tanzania's Termination of Its BIT with the Netherlands in Context' *Afronomics Law* 1 April 2019 available at <https://www.afronomicslaw.org/2019/04/01/understanding-tanzanias-termination-of-its-bit-with-the-netherlands-in-context> (accessed 1 February 2023); 'Both ENDS Annual report 2017 (2017) 14-5.

³⁵⁰ UNCTAD *WIR* (2021) 123; *Slovakische Republik (Slovak Republic) v Achmea BV* (Case C-284/16) ECLI:EU:C:2018:158 available at <http://curia.europa.eu/juris/celex.jsf?celex=62016CJ0284&lang1=en&type=TEXT&ancre>. (accessed 1 February 2023).

³⁵¹ *Slovakische Republik (Slovak Republic) v Achmea BV* (Case C-284/16) ECLI:EU:C:2018:158.

³⁵² *Slovak Republic v Achmea* (Case 284/16) ECLI:EU:C:2018:158 paras 19, 21, 20, 34 & 35.

³⁵³ *Slovak Republic v Achmea* (Case 284/16) ECLI:EU:C:2018:158 paras 11 & 13.

³⁵⁴ Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (2020) EU - SN/4656/2019/INIT.

³⁵⁵ *Slovak Republic v Achmea* (Case 284/16) EU:C:2018:158 available at <https://curia.europa.eu/juris/liste.jsf?num=C-284/16> (accessed 01 March 2021); Agreement for the termination of BITs between the Member States of the EU - SN/4656/2019/INIT.

³⁵⁶ UNCTAD *WIR* 2020: *International production beyond the pandemic* (2020) 108; Agreement for the termination of BITs between the Member States of the EU (2020) Annex A.

terminated intra-EU BITs whose sunset clauses will cease to produce legal effect when the agreement enters into force for the relevant Member States.³⁵⁷

Similarly, once the AfCFTA Protocol on investment has been ratified by 22 Member States and enters into force, the relevant Member States will have to terminate all their intra-African BITs, along with their sunset clauses, within five years.³⁵⁸ Evidently, the momentum that led countries to conclude BITs, particularly in the Proliferation Era, has died down.³⁵⁹ In fact, since 2017, the number of annual IIA terminations has exceeded newly concluded ones.³⁶⁰

There have also been countries that have opted to renegotiate their old-BITs/ IIAs. Czech Republic, for example, renegotiated their old-BITs to align them with EU law.³⁶¹ In Africa, Uganda announced its intention to renegotiate its BIT with the Netherlands after they mutually terminated the previous one in 2017.³⁶² Furthermore, the conclusion of South–South IIAs has continued into the Re-orientation Era. More than 550 such IIAs were concluded between 2008 and 2022, with 420 of those being BITs.³⁶³

There have also been several denunciations of international arbitration forums, like the ICSID Convention. Three countries opted to withdraw from the ICSID Convention in accordance with Articles 71 and 72 of the Convention - thus removing investor's right to institute a claim through its tribunal. Bolivia, denounced the Convention in 2007, Ecuador in 2009 and Venezuela in 2012.³⁶⁴

Ironically, regional and international investment treaty making has gradually moved to centre stage and is intensifying.³⁶⁵ As previously mentioned, African AfCFTA Member States have

³⁵⁷ Agreement for the termination of BITs between the Member States of the EU (2020) Annex B.

³⁵⁸ AfCFTA Protocol on Investment (2023) art 49(1); Y Ayele, M Belete & DW te Velde 'The AfCFTA Protocol on Investment: issues and potential impacts' (2023) *Supporting Investment and Trade in Africa* 1.

³⁵⁹ UNCTAD *WIR* (2012) 84.

³⁶⁰ UNCTAD *WIR* (2023) XV.

³⁶¹ UNCTAD *WIR* (2010) 86.

³⁶² Uganda – Netherlands BIT (2000).

³⁶³ UNCTAD 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search> (accessed 01 March 2023).

³⁶⁴ 'Denunciation of ICSID Convention' available from <https://jusmundi.com/en/document/publication/en-denunciation-of-icsid-convention#:~:text=The%20ICSID%20Convention%20has%20so,11%20and%20Venezuela%2C%20in%202012.> (accessed 1 February 2023).

³⁶⁵ UNCTAD *WIR* (2012) 84.

adopted the AfCFTA Protocol on Investment, while the WTO Member States have developed a plurilateral IFD Agreement. In Northern America, NAFTA was replaced with the USMCA,³⁶⁶ which entered into force on 1 July 2020.³⁶⁷

The USMCA was created to modernise and update NAFTA, which had been in effect since 1994.³⁶⁸ It includes several changes to the original agreement, including new provisions on digital trade,³⁶⁹ intellectual property,³⁷⁰ labour³⁷¹ and environmental standards,³⁷² which impact on foreign investment. There have also been increasing efforts to conclude new-generation IIAs (new-IIAs) with innovative provisions that promote sustainable development objectives.³⁷³

Nevertheless, old-IIAs continue to dominate the majority of FDI stock in developing and least-developed countries.³⁷⁴ This has been problematic especially since the majority of ISDS cases have been brought under such treaties, leading to a growing discontent for the overall old-IIA regime.³⁷⁵ The following section examines some of the main issues surrounding the IIA regime and why they are contributing to the current investment reform trends.

2.2. Issues with the current IIA regime

The current IIA regime is in crisis and widespread criticisms have forced countries to reconsider, review and reform their existing old-IIAs.³⁷⁶ Investment policymaking has recently reached a turning-point, bearing witness to fewer BIT conclusions, contrasting sharply with the earlier Proliferation Era.³⁷⁷ Initially driven by developed countries to protect their

³⁶⁶ Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexico States, and Canada signed on 30 November 2018 (USMCA).

³⁶⁷ Chapter 14 of the USMCA deals with investment.

³⁶⁸ USMCA (2020) preamble.

³⁶⁹ USMCA (2020) chpt 19.

³⁷⁰ USMCA (2020) chpt 20.

³⁷¹ USMCA (2020) chpt 23.

³⁷² USMCA (2020) chpt 24.

³⁷³ UNCTAD *WIR* (2024) 21-5.

³⁷⁴ UNCTAD *WIR* (2024) 21-5; UNCTAD *WIR* (2023) XV.

³⁷⁵ UNCTAD 'Trends in the investment treaty regime and a reform toolbox for the energy transition' *IIA Issues Note* August 2023, 1; UNCTAD *WIR* (2012) 86.

³⁷⁶ UNCTAD *WIR* (2008) 15; C Jones & W Rao 'Sticky BITs' (2020) 61 *Harvard International Law Journal* 357.

³⁷⁷ For instance, nearly 2,497 BITs were concluded during the proliferation era, averaging about 138 BITs a year, for almost two decades. By contrast, only about 541 BITs have been signed between 2008 and 2021, averaging about 38 BITs a year for 14 years – UNCTAD 'Investment Policy Hub' available at

investments abroad, many early BITs were signed by developing countries hoping to attract FDI inflows and support economic development.³⁷⁸

However, many of these old-BITs were self-serving to European capital-exporters and did not encompass the developmental needs of their developing-country counterparts.³⁷⁹ Moreover, they were concluded at a time when developing country negotiators might not have had the skill or capacity to fully understand and appreciate the implications or consequences of signing them.

The unprecedented increase of ISDS cases has resulted in countries coming face to face with the repercussions of concluding old-IIAs.³⁸⁰ Many old-IIAs contain vague provisions that are susceptible to broad interpretations and expose host-countries to ISDS claims.³⁸¹ While most ISDS cases have targeted developing countries, even developed ones have faced claims under these 'old' agreements.³⁸²

Evidently, several shortcomings of the current IIA regime have come to light, including issues surrounding the ISDS mechanism, the balance of rights and obligations between investors and host-countries, the right to regulate, the systematic complexity of the IIA regime and the development dimension of IIAs.³⁸³ Moreover, it has become clear that BITs do not always lead to increased FDI inflows or contribute positively to the development of host-countries.³⁸⁴

<https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search> (accessed 01 March 2023).

³⁷⁸ Alvarez *et al* (2011) XXXI-II.

³⁷⁹ Alvarez *et al* (2011) XXXIII.

³⁸⁰ UNCTAD 'Investor-State dispute settlement cases: Facts and figures 2020' (2021) 4 *IIA Issues Note* 1, 3.

³⁸¹ For example, *Vattenfall v Germany* (ICSID Case No. ARB/12/12) and *Philip Morris v Australia* (UNCITRAL, PCA Case No. 2012-12).

³⁸² Sornarajah (2017) 206; T Chidede 'Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol' *Tralac* 11 December 2018 available at <https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html#:~:text=The%20AfCFTA%20Investment%20Protocol%20could%20include%20ISDS%20through%20consultation%2C%20mediation,agreement%20of%20the%20disputing%20parties>. (accessed on 10 May 2022); To date, African countries have been the respondent in 130 reported ISDS cases – UNCTAD 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/investment-dispute-settlement> (accessed on 10 May 2022); In on Africa IOA 'Africa and bilateral investment treaties: To 'BIT' or not?' (2014) available at <https://www.polity.org.za/article/africa-and-bilateral-investment-treaties-to-bit-or-not-2014-07-23> (accessed 4 September 2023).

³⁸³ UNCTAD *WIR* (2014) XXV.

³⁸⁴ WY Jason 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2008) 42 *Law & Society Review* 806.

Even in the event that FDI inflow is achieved, those investments might not necessarily contribute to the development of the host-country and can sometimes even be detrimental to it.³⁸⁵ The following section examines some of the key issues that have arisen from the current IIA regime and prompted IIA reform at national, regional and international levels – in detail.

2.2.1. Investor-State dispute settlement

The first ISDS provision was incorporated into the Indonesia–Netherlands BIT in 1968 and its inclusion has since become a standard practice in IIA policymaking.³⁸⁶ The ISDS regime was designed to depoliticise investment disputes and effectively eliminate the possibility of such disagreements escalating into conflicts between countries.³⁸⁷ It allows investors to bypass domestic courts and approach IATs directly when an investment dispute arises.³⁸⁸

The ISDS system typically consists of binding rules, like those found in IIAs, non-binding rules, like those found in arbitral practices and participants, which include investors, host-countries, third parties and arbitrators.³⁸⁹ Over the years, the number of ISDS cases initiated under old-IIAs have increased.³⁹⁰ About 290 known ISDS cases were initiated between 1989 and 2007 (the Proliferation Era)³⁹¹ but by the end of 2023, that number had increased to 1,332.³⁹²

The growing number of cases can be attributed to various factors, including the growing number of IIAs, increased awareness of ISDS among investors and their lawyers, and the rise

³⁸⁵ E Chalamish, 'The future of bilateral investment treaties: A de facto multilateral agreement' (2009) 34 *Brooklyn Journal of International Law* 307; Jason (2008) 62; OECD *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs – Overview* (2002) 3; UNCTAD *WIR* (2014) 126.

³⁸⁶ Agreement on Economic Cooperation (with protocol and exchanges of letters dated on 17 June 1968), Signed at Djakarta on 7 July 1968, No. 11386, art 22(1) – 'Any dispute between the Contracting Parties concerning the interpretation or application of the present agreement which is not settled in any other way, shall be submitted, at the request of any party to the dispute, to an arbitral tribunal composed of three members. Each party shall appoint one arbitrator and the two arbitrators thus appointed shall together appoint a third arbitrator who is not a national of either party;' UNCTAD *WIR* (2015) 122.

³⁸⁷ UNCITRAL *Report of Working Group III: Investor-State Dispute Settlement Reform, 'Possible reform of investor-State dispute settlement (ISDS)'* Thirty-fourth session, Vienna 27 November – 1 December 2017 (2017) 3; UNCTAD 'Reform of investor-State dispute settlement: In search of a roadmap' *IIA Issues Note* June 2013 2.

³⁸⁸ S Li & W Shen 'Legitimacy crisis and the ISDS reform in a political economy context' (2022) 15 *Journal of East Asia and International Law* 32.

³⁸⁹ Li & Shen (2022) 32.

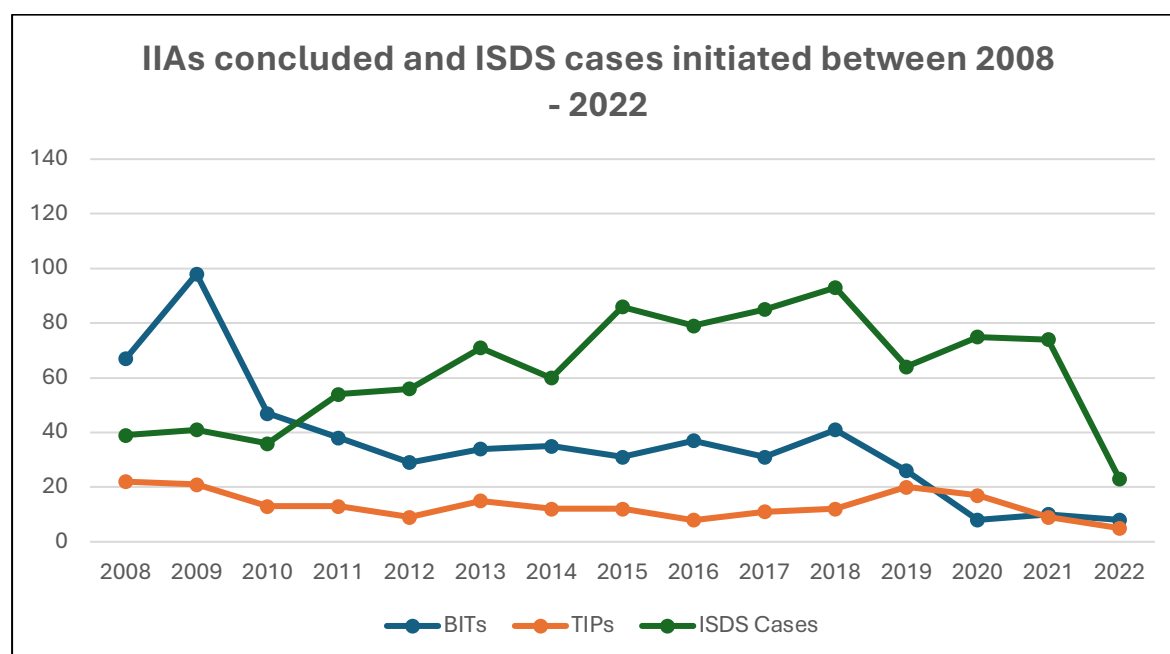
³⁹⁰ UNCTAD *WIR* (2024) 29.

³⁹¹ UNCTAD 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/investment-dispute-settlement> (accessed 01 March 2021).

³⁹² UNCTAD *WIR* (2024) 29.

of FDI flows.³⁹³ **Figure II** below shows the number of BITs and TIPs that have been concluded and the number of ISDS cases initiated in the re-orientation era.

Figure II: Number of BITs and TIPs concluded between 2008 - 2022



Source: UNCTAD Investment Policy Hub – International Investment Agreements Navigator

The growing number of ISDS cases reflects how investors respond to host-government's reassertion of their right to regulate and steer the economy, as implemented through national regulatory changes.³⁹⁴ Investors have also challenged core public policies that negatively affect their investments,³⁹⁵ igniting debates concerning the legitimacy of the ISDS regime and global calls for reform.³⁹⁶

Historically, IIAs have tended to contain broad formulations on substantive investment protection provisions, opening the door to a wide range of interpretations and uncertainties

³⁹³ UNCTAD *WIR* (2012) 86; UNCTAD *WIR* (2009) 34.

³⁹⁴ UNCTAD *WIR* (2012) 86.

³⁹⁵ UNCTAD *WIR* (2012) 86; see *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), *Vattenfall AB and others v Federal Republic of Germany* (ICSID Case No. ARB/12/12) and *Philip Morris Asia Limited v The Commonwealth of Australia* (UNCITRAL, PCA Case No. 2012-12) in this regard.

³⁹⁶ UNCTAD *International Investment Agreements: Reform Accelerator* (2020) 2; M Waibel, A Kaushal, K-HL Chung & C Balchin (eds) *The Backlash against Investment Arbitration: Perceptions and Reality* (2010) XXXVII.

regarding the extent of these protections.³⁹⁷ Therefore, although the proliferation of ISDS cases under IIAs signifies the importance of the ISDS mechanism, it has also revealed a number of problems with it.³⁹⁸

Deficiencies in the current ISDS regime include those relating to cost and time of arbitration procedures, the independence and impartiality of arbitrators, inconsistent arbitral awards, treaty shopping, legitimacy and transparency and lack of an appeal mechanism.³⁹⁹ Others include questions of a level playing field between domestic and foreign investors, whether BITs increase FDI and live up to their promise, inadequate representation of developing countries in arbitration panels, alleged bias by major IAT forums and subordination of public interests to commercial ones.⁴⁰⁰

To date, virtually all ISDS cases have been filed pursuant to old-IIAs.⁴⁰¹ This is particularly concerning for developing countries as they are the majority signatories of these treaties, particularly regarding BITs and the majority respondents to these cases, which are primarily instituted by investors from developed countries.⁴⁰² Furthermore, as these countries attract greater FDI, they appear to become more prone to encountering more ISDS cases in future.⁴⁰³

Typically, arbitration is meant to be a speedy and low-cost dispute settlement option.⁴⁰⁴ The cost and time of arbitration procedures can result from the complexity of the case itself, the fragmented nature of ISDS provisions and the open-ended nature of legal issues in the

³⁹⁷ JK Pohl, K Mashigo & A Nohen 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey' (2012) 2 *OECD Working Papers on International Investment* available at https://www.oecd.org/investment/investment-policy/WP-2012_2.pdf. (accessed 10 October 2023).

³⁹⁸ UNCTAD 'Reform of investor-State dispute settlement: In search of a roadmap' *IIA Issues Note* June 2013, 1.

³⁹⁹ UNCITRAL *Settlement of commercial disputes: Investor-State Dispute Settlement Framework - Comments from International Intergovernmental Organizations* (2017) A/CN.9/918/Add.7, OECD contribution, 4 – 5; UNCTAD, 'Reform of investor-State dispute settlement: In search of a roadmap' *IIA Issues Note* June 2013, 1; Waibel *et al* (2010) XXXIX; D Gaukrodger & K Gordon 'Investor-State dispute settlement: A scoping paper for the investment policy community' (2012) 3 *OECD Working Papers on International Investment* 17 – 58.

⁴⁰⁰ Waibel *et al* (2010) XXXIX.

⁴⁰¹ UNCTAD IIA reform accelerator (2020) 2.

⁴⁰² UNCTAD *WIR* (2009) 34.

⁴⁰³ UNCTAD *WIR* (2009) 34.

⁴⁰⁴ UNCITRAL Working Group III ISDS reform 'Possible reform of investor-State dispute settlement (ISDS)' (A/CN.9/WG.III/WP.142) 6.

dispute.⁴⁰⁵ However, ISDS cases can be extremely costly, particularly to developing countries, who may struggle to meet the resources required to defend such cases.⁴⁰⁶

Additionally, countries might face scrutiny for utilising public funds to defend ISDS cases, mainly because IATs seldom order the claimant investor to pay the winning respondent country's costs.⁴⁰⁷ Moreover, for many developing countries, especially those in Africa, merely responding to an ISDS claim is very expensive and can encroach on the national budget.

For instance, excluding damages, the Philippines reportedly spent over USD 50 million in defending the *Fraport v Philippines* case.⁴⁰⁸ This money could have been used for the development of other essential service sectors, including schools, hospitals and roads.⁴⁰⁹ Additionally, ISDS cases can result in exorbitant awards for damages, which can be detrimental on weaker economies.⁴¹⁰

Argentina, for example, faced over 50 arbitrations that resulted in several billions of dollars being awarded to foreign investors.⁴¹¹ This happened despite the fact that, at a time, the country was recovering from its 2001 -2002 economic crisis and could not possibly afford to pay those monies to foreign investors.⁴¹² Furthermore, virtually all these cases were instituted

⁴⁰⁵ UNCITRAL Working Group III Investor-State dispute settlement reform (A/CN.9/WG.III/WP.142) 6; International Bar Association (IBA) *Consistency, efficiency and transparency in investment treaty arbitration report* (2018) 4.

⁴⁰⁶ UNCITRAL Working Group III ISDS reform (A/CN.9/WG.III/WP.142) 6.

⁴⁰⁷ UNCITRAL Working Group III ISDS reform (A/CN.9/WG.III/WP.142) 6 – 7.

⁴⁰⁸ *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines* (ICSID Case No. ARB/03/25), Award (16 August 2007); M Sornarajah 'Developing countries in the investment treaty system: A law for need or a law for greed?' in SW Schill, CJ Tams & R Hofmann (eds) *International investment law and development: Bridging the gap* (2015) 44.

⁴⁰⁹ GC Cabacungan 'House to probe Huge Lawyers' Fees in NAIA 3 Case' *Philippine Daily Inquirer* 28 March 2011 available at <http://newsinfo.inquirer.net/breakingnews/metro/view/20110328-328066/House-to-probe-huge-lawyers-fees-in-NAIA-3-case> (accesses 10 January 2023).

⁴¹⁰ Schill *et al* (2015) 44.

⁴¹¹ Schill *et al* (2015) 44.

⁴¹² Schill *et al* (2015) 44.

by developed country-investors.⁴¹³ By 2009, about 18 ISDS cases had been instituted against Argentina under the 1991 Argentina–US BIT alone, which, ironically, is still in force.⁴¹⁴

Ecuador was also ordered to pay USD 2,3 billion to the US gas company, Occidental.⁴¹⁵ In fact, the initial amount claimed by the investors was lower than the amount that would eventually be awarded to the investor.⁴¹⁶ The overall settlement of *the Occidental* case represented 59 per cent of Ecuador’s annual budget on education and 135 per cent of its annual healthcare budget.⁴¹⁷

The Occidental cases resulted in various investment policy reforms, as Ecuador terminated its existing BITs and denounced the ICSID Convention in 2009.⁴¹⁸ In 2021, however, Ecuador became the first country to re-join the Convention after its withdrawal more than a decade ago.⁴¹⁹ Other examples of large arbitral awards against developing countries have included *Tethyan Cooper v Pakistan*,⁴²⁰ where the arbitral tribunal awarded the investor USD 4 billion, *ConocoPhillips v Venezuela*,⁴²¹ where USD 8,4 billion was awarded to the investor and *Unión Fenosa Gas (UFG) v Egypt*,⁴²² where the Egyptian Government paid USD 2 billion (including costs) after four years of arbitration, to the Spanish investor.⁴²³

⁴¹³ To date, over 62 cases have been instituted against Argentina, the majority of which were initiated by developed countries investors from, *inter alia*, the US (20), the United Kingdom (UK) (6), Spain (9) and France (8) – with Chile (3) being the only developing country to have initiated an investment claim against the country, to date - UNCTAD ‘Investment Policy Hub’ available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/8/argentina> (accessed 10 March 2023).

⁴¹⁴ UNCTAD WIR (2009) 34; UNCTAD ‘Investment Policy Hub’ available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/8/argentina> (accessed 10 March 2023).

⁴¹⁵ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador (II)* (ICSID Case No. ARB/06/11) (*Occidental v Ecuador II*); *Occidental Exploration and Production Company v Republic of Ecuador (I)* (LCIA Case No. UN3467) (*Occidental v Ecuador I*).

⁴¹⁶ *Occidental v Ecuador II* (ICSID Case No. ARB/06/11).

⁴¹⁷ Schill *et al* (2015).

⁴¹⁸ UNCTAD WIR (2009) 32; UNCTAD WIR (2010) 85, 87 and 89.

⁴¹⁹ ‘Ecuador ratifies the ICSID Convention’ ICSID 04 August 2021 available at <https://icsid.worldbank.org/news-and-events/news-releases/ecuador-ratifies-icsid-convention> (accessed 20 October 2023).

⁴²⁰ *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1).

⁴²¹ *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30).

⁴²² *Unión Fenosa Gas, S.A. v Arab Republic of Egypt* (ICSID Case No. ARB/14/4).

⁴²³ *Unión Fenosa Gas, S.A. v Arab Republic of Egypt* (ICSID Case No. ARB/14/4); O Abimbola ‘The regulatory chill’ available at <https://africasacountry.com/2020/11/the-regulatory-chill> accessed 01 March 2021).

Evidently, ISDS cases can result in damages ranging from the tens of millions to billions of US dollars,⁴²⁴ which can be detrimental to a host-country's bottom line and substantially affect the very economic development that these treaties claim to promote.⁴²⁵ These amounts could significantly overshadow the total amount of the investment subject to arbitration, leading to negative FDI and a reversal of the economic benefits expected from FDI on a developing country's economy.

The second issue with the current ISDS regime concerns the actual arbitrators themselves and their independence and impartiality in these cases.⁴²⁶ Typically, arbitral tribunals are composed of three arbitrators who are appointed by each disputing party, though methods to appoint a chair may vary.⁴²⁷ Party-appointment is meant to confer legitimacy to the arbitration procedure by ensuring that the arbitrators so appointed are experienced, reputable, competent and impartial, thereby enhancing the parties' confidence in the process.⁴²⁸

In recent years, however, the party-appointment mechanism has come under severe scrutiny. It is argued that there is lack of sufficient guarantee of independence and impartiality of arbitrators.⁴²⁹ The emergence of a 'club' of individuals who serve as counsel in one case and arbitrators in another has given rise to questions of impartiality.⁴³⁰ Moreover, parties to ISDS cases have been known to nominate arbitrators who are likely to support their position, leading to the conclusion that such arbitrators cannot be depoliticised.⁴³¹

⁴²⁴ Incidentally, such awards are a great example of the negative and often reverse economic effects of FDI on developing countries' economy - *Occidental v Ecuador (II)* (ICSID Case No. ARB/06/11).

⁴²⁵ C Aaron 'International Investment Agreements and Sustainable Development: Achieving the Millennium Development Goals' (2005) *International Institute for Sustainable Development (IISD) and International Development Research Centre* 1.

⁴²⁶ IBA Report (2018) 4.

⁴²⁷ UNCITRAL Working Group III ISDS reform (A/CN.9/WG.III/WP.142) 9.

⁴²⁸ UNCITRAL Working Group III ISDS reform (A/CN.9/WG.III/WP.142) 9.

⁴²⁹ UNCITRAL 'Settlement of commercial disputes: Investor-State Dispute Settlement Framework - Comments from International Intergovernmental Organizations' (2017) A/CN.9/918/Add.7, OECD contribution, 4 – 5; UNCTAD, 'Reform of investor-State dispute settlement: In search of a roadmap' (2013) *IIA Issues Note* 1; Waibel *et al* (2010) XXXIX; D Gaukrodger & K Gordon 'Investor-State dispute settlement: A scoping paper for the investment policy community' (2012) 3 *OECD Working Papers on International Investment* 17 – 58.

⁴³⁰ UNCTAD *WIR* (2012) 87 – 88; UNCITRAL Working Group III ISDS reform (A/CN.9/WG.III/WP.142) 9.

⁴³¹ UNCTAD *WIR* (2012) 87 – 88; Schill *et al* (2015) 52; UNCITRAL Working Group III ISDS reform (A/CN.9/WG.III/WP.142) 9; G Kaufmann-Kohler & M Potestà 'Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment

Additionally, arbitrators are often perceived as less attuned to public interest issues than publicly appointed judges.⁴³² Unlike judges who hold public offices, arbitrators may have only a limited connection to the States whose laws they are interpreting.⁴³³ This raises concerns about the appropriateness of private individuals having the authority to assess the legality of decisions or regulations passed by democratically elected officials, which some find unacceptable.⁴³⁴ In contrast, foreign investors would have no say in the composition of judges presiding in domestic courts and domestic rules could override BIT provisions.⁴³⁵

The third issue with the ISDS regime concerns inconsistent arbitral awards.⁴³⁶ Old-IIAs typically contain vague and broadly worded substantive provisions, with even fewer exceptions or safeguards.⁴³⁷ The broad and vague nature of old-IIAs, together with a lack of procedural specifications, leaves virtually all procedural aspects ‘to be determined by the selected rules of arbitration or by the arbitrators, in exercise of their discretion.’⁴³⁸

This generates unanticipated, and at times inconsistent arbitral interpretations of core IIA obligations and at times, even contradictory awards.⁴³⁹ For instance, arbitrators have used the MFN clause to broaden jurisdiction in the investor’s favour.⁴⁴⁰ This is problematic because typically, a tribunal first has to have jurisdiction in order to pronounce on the effect of an MFN

tribunal or an appeal mechanism? Analysis and Roadmap’ (2015) *CIDS – Geneva Center for International Dispute Settlement* para 21.

⁴³² UNCITRAL Working Group III ISDS reform (A/CN.9/WG.III/WP.142) 9; Kaufmann-Kohler & Potestà (2015) para, 21; IBA Report (2018) 4.

⁴³³ Kaufmann-Kohler & M Potestà (2015) para, 21.

⁴³⁴ Kaufmann-Kohler & M Potestà (2015) para, 21.

⁴³⁵ Neumayer & Spess (2005) *World Development* 1571.

⁴³⁶ J Arato, C Brown & F Ortino ‘Parsing and managing inconsistency in ISDS’ (2020) *Academic Forum on ISDS Concept Paper 2020/1* 2; IBA Report (2018) 3-4, 6-7.

⁴³⁷ UNCTAD *IIA reform accelerator* (2020) 2; UNCTAD *WIR* (2017)

⁴³⁸ UNCTAD Investor-State dispute settlement (2014) 16.

⁴³⁹ UNCTAD *WIR* (2017) 128-9; Alvarez *et al* (2011) 60, 63-4; *Enron Corporation and Ponderosa v Argentina, LP v Argentine Republic* (ICSID Case No ARB/01/3) award of 22 May 2007, the ICSID Tribunal awarded investors USD 106 million; Subedi (2016) 3; UNCTAD *IIA reform accelerator* (2020) 2; UNCTAD *WIR* (2017); UNCTAD *WIR* (2015) 124; SD Franck ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham Law Review* 1521; K Tienhara *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (2009) 262; SA Spears ‘The Quest for Policy Space in a New Generation of International Investment Agreements’ (2010) 13 *Journal of International Economic Law* 1037 – 45; J Harrison ‘The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties’ (2012) 13 *Journal of World Investment and Trade* 929; T-H Cheng ‘Power, authority and international investment law’ (2005) 20 *American University International Law Review*, 516.

⁴⁴⁰ Kaufmann-Kohler & Potestà (2015) para, 22.

clause, not use it to establish jurisdiction.⁴⁴¹ This would be the equivalent of putting the horse before the cart. This is even more problematic considering that there are no remedial mechanisms for such inconsistencies.⁴⁴²

In *Maffezini v Spain*, for example, the Tribunal held that the MFN provision in the Spain–Argentina BIT allowed the investor to benefit from a more favourable ISDS provision in the Spain–Chile BIT.⁴⁴³ In *Palma v Bulgaria*, however, the Tribunal refused to extend the MFN provision in the Cyprus–Bulgaria BIT to other ISDS provisions in BITs entered into with Bulgaria and other countries.⁴⁴⁴

Furthermore, there is a lack of predictability as to the kinds of State measures that might violate specific IIA provisions.⁴⁴⁵ In *CME v Czech Republic*, for example, CME, a Dutch company, claimed that the Czech Republic had violated the Netherlands–Czech Republic BIT by indirectly expropriating its investment in the TV station, Nova.⁴⁴⁶ CME claimed that the actions, which resulted in the termination of key contracts, effectively devalued its investment.⁴⁴⁷

The Tribunal ruled in favour of CME finding that Czech Republic had indeed breached the BIT.⁴⁴⁸ In *Ronald Lauder v Czech Republic*, the investor and owner of CME, Ronald, brought a similar claim under the US–Czech Republic BIT, alleging that the Czech Republic had violated the treaty by allowing the destruction of his investment in TV Nova.⁴⁴⁹ In this case, however, the Tribunal reached a different conclusion, ruling that the Czech Republic had not breached the BIT and found no evidence of indirect expropriation or unfair treatment.⁴⁵⁰

⁴⁴¹ Schill *et al* (2015) 49.

⁴⁴² UNCITRAL Working Group III ISDS reform (A/CN.9/WG.III/WP.142) 8.

⁴⁴³ *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID Case No. ARB/97/7).

⁴⁴⁴ *Plama Consortium Limited v Republic of Bulgaria* (ICSID Case No. ARB/03/24).

⁴⁴⁵ UNCTAD *WIR* (2017) 128-129; Alvarez *et al* (2011) 60, 63-4.

⁴⁴⁶ *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award (13 September 2001) paras 21 – 2 & UNCITRAL, Final Award (14 March 2003) paras 19-20.

⁴⁴⁷ *CME v Czech Republic* UNCITRAL Partial Award (2001) paras 21 – 4 & Final Award (2003) paras 19 – 20.

⁴⁴⁸ *CME v Czech Republic* UNCITRAL Final Award (2003) paras 220 – 22, 448, 650 & Partial Award (2001) para 427 – 38.

⁴⁴⁹ *Ronald Lauder v Czech Republic*, UNCITRAL, Final Award (3 September 2001) paras 9-11, 43-152.

⁴⁵⁰ *Ronald Lauder v Czech Republic* UNCITRAL, paras 201 – 4.

The conflicting outcomes of these two cases raised significant concerns within the ISDS system, particularly about the consistency and predictability of arbitral decisions.⁴⁵¹ In one case (CME), the Czech Republic was found liable and ordered to pay significant damages, while in the other (Lauder), the Czech Republic was found not to have violated the BIT, leading to a dismissal of the case. This discrepancy highlighted issues related to the coherence of arbitral rulings when different tribunals address the same facts under different treaties.⁴⁵²

Moreover, inconsistencies are likely to persist given that there is no doctrine of *stare decisis* or precedent.⁴⁵³ This means that arbitrators are not bound by previous decisions of other IATs.⁴⁵⁴ Unfortunately, the impact is only felt and realised when arbitrations are brought against the particular country.⁴⁵⁵ For developing countries, 'the law, which was agreed to under the investment treaties, has been expanded by arbitrators beyond its original basis.'⁴⁵⁶

The fourth issue related to the 'obvious frauds and malpractices', of arbitrators, which have 'been overlooked in order to uphold jurisdiction of foreign investors.'⁴⁵⁷ In *Tokelés v Ukraine*, for instance, arbitrators defined the term 'investor' based on 'corporate nationality' and held that the assets, which originally belonged to Ukraine, could be taken into another treaty country and then brought back as protected investments.⁴⁵⁸ This conclusion subverted the purpose of the investment treaty to promote economic development through the injection of fresh funds.⁴⁵⁹

Arbitrators have also been known to manipulate investment treaties through a practice using what has now become known as 'treaty shopping'.⁴⁶⁰ This occurs when a corporation inserts a subsidiary into its corporate structure, enabling it to exploit the favourable protections

⁴⁵¹ Arato *et al* (2020) 2 fn 2.

⁴⁵² Arato *et al* (2020) 2 fn 2; IBA Report (2018) 15.

⁴⁵³ Arato *et al* (2020) 2; IBA Report (2018) 14-15.

⁴⁵⁴ UNCITRAL Working Group III ISDS reform (A/CN.9/WG.III/WP.142) 8.

⁴⁵⁵ Schill *et al* (2015) 49 – 50; Sornarajah (2017) 206.

⁴⁵⁶ Schill *et al* (2015) 48; UNCTAD *WIR* (2012) 88.

Schill *et al* (2015) 48; UNCTAD *WIR* (2012) 88.

⁴⁵⁸ *Tokelés v Ukraine* (ICSID Case No. ARB/02/18).

⁴⁵⁹ *Tokelés v Ukraine* (ICSID Case No. ARB/02/18), Decision on Jurisdiction (29 April 2004).

⁴⁶⁰ J Baumgartner *Treaty shopping in international investment law* (2016) 8; *Maffezini v Spain* (ICSID Case No. ARB/97/7) Decision on Objections to Jurisdiction (25 January 2000) para 63.

provided under a different treaty with the host-country.⁴⁶¹ This enables the investor to achieve jurisdiction, even if the original investment did not originate from that subsidiary.⁴⁶²

Essentially, it involves the strategic selection of a particular IIA in order to obtain benefits and protections that may not be available under the investor's home-country treaty with the host-country. For instance, in *ConocoPhillips v Venezuela*,⁴⁶³ jurisdiction was assumed under a Dutch treaty based on the insertion of a Dutch subsidiary in the corporate structure, despite there being no evidence that the investment was made through that subsidiary.⁴⁶⁴ This case demonstrated how arbitrators can facilitate investor protection by ensuring that resource-rich developing countries adhere to their obligations.⁴⁶⁵

Furthermore, in *Philip Morris v Australia*, the mere insertion of a subsidiary in Hong-Kong enabled the investor, Philip Morris, to bring a case against Australia under the 1993 Australia–Hong Kong, China SAR BIT.⁴⁶⁶ This occurred despite the fact that Philip-Morris is actually a Swiss–American company,⁴⁶⁷ and was fraudulent to the extent that the subsidiary incorporated to achieve jurisdiction was not the one that had sent the investment to Australia in the first place.⁴⁶⁸

The fifth issue deals with transparency and legitimacy. With regards to transparency, a significant number of ISDS cases are held behind closed doors and seldom offers options for third-party participation.⁴⁶⁹ While ISDS was initially intended to prevent conflicts between investors and host-countries from escalating into disputes between states, it has become a growing political concern in many countries.⁴⁷⁰

⁴⁶¹ Schill *et al* (2015) 48; Baumgartner (2016) 10.

⁴⁶² Gaukrodger & Gordon (2012) 55.

⁴⁶³ *ConocoPhillips v Venezuela* (ICSID Case No. ARB/07/30).

⁴⁶⁴ Schill *et al* (2015) 49.

⁴⁶⁵ Schill *et al* (2015) 49.

⁴⁶⁶ *Philip Morris v Australia* (PCA Case No. 2012-12).

⁴⁶⁷ Schill *et al* (2015) 48.

⁴⁶⁸ Schill *et al* (2015) 47 and 53.

⁴⁶⁹ UNCTAD 'Review of ISDS Decisions in 2019: Selected IIA Reform Issues' 1 *IIA Issues Note* January 2012, 1 - For example, arbitral tribunals rendered 71 substantive decisions in investor-State dispute settlement (ISDS) cases in 2019. The majority of these cases were based on old-IIAs/BITs and only 39 were publicly available.

⁴⁷⁰ UNCITRAL Working Group III ISDS reform (A/CN.9/WG.III/WP.142) 10.

It is worth noting that certain IAT forums like ICSID, do not prohibit disclosure and openness. This was pointed out by the Tribunal in *Biwater v Tanzania*, which held that:⁴⁷¹

In the absence of any agreement between the parties on this issue, there is no provision imposing a general duty of confidentiality in ICSID arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise. Equally, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources.

This opinion was also shared in *Abaclat v Argentina*, where the ICSID Tribunal stated that:⁴⁷²

... transparency in investment arbitration shall be encouraged as a means to promote good governance of States, the development of a well-grounded and coherent body of case law in international investment law and therewith legal certainty and confidence in the system of investment arbitration.

This Tribunal stated, however, that ‘transparency considerations shall not justify actions that exacerbate the dispute or otherwise compromise the integrity of the arbitration proceedings.’⁴⁷³ It concluded that:⁴⁷⁴

... unless there exist an agreement of the Parties on the issue of confidentiality/transparency, the Tribunal shall decide on the matter on a case by case basis and, instead of tending towards imposing a general rule in favour or against confidentiality, try to achieve a solution that balances the general interest for transparency with specific interests for confidentiality of certain information and/or documents.

In both the *Biwater* and *Abaclat* cases, the foreign investors requested that the tribunals prohibit the host-countries from disclosing information pertaining to the dispute, while the respondent countries insisted that proceedings be transparent.⁴⁷⁵ It is interesting to note that both these cases concerned public policy issues, in that *Biwater* dealt with issues of Tanzania’s water and sewage, while *Abaclat* dealt with the restructuring of Argentina’s public debt.⁴⁷⁶

⁴⁷¹ *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 3 of September 29, 2006 para 121.

⁴⁷² *Abaclat and Others v the Argentine Republic* (formerly, *Giovanna A Beccara and Others v the Argentine Republic*) (ICSID Case No. ARB/07/5), Procedural Order No. 3 (Confidentiality Order) of 27 January 2010 para, 72.

⁴⁷³ *Abaclat and others v Argentina* (ICSID Case No. ARB/07/5) para, 72.

⁴⁷⁴ *Abaclat and others v Argentina* (ICSID Case No. ARB/07/5) para, 73.

⁴⁷⁵ *Biwater v Tanzania* (2005) paras, 42, 44–45; *Abaclat and others v Argentina* (2007) para, 44.

⁴⁷⁶ *Abaclat and others v Argentina* (ICSID Case No. ARB/07/5); *Biwater v Tanzania* (ICSID Case No. ARB/05/22).

In other words, third parties, like the citizens of the host-country, are seldom allowed to participate in arbitration proceedings, despite the fact that they can be affected by the issues pertaining to such cases and their outcomes. Awards in investment arbitration often have significant consequences for the general public, leading to regular media attention, particularly when investors are awarded with substantial or contentious amounts.⁴⁷⁷

Consequently, there has been an increasing demand for public access to relevant documents, public hearings and acceptance of *amicus curiae* briefs.⁴⁷⁸ Additionally, the process of party-appointment may be seen as less favourable than the appointment of judges in domestic courts, where procedures are typically in place to uphold the integrity of the rule of law and allow for public scrutiny of judicial decision-making.⁴⁷⁹

As such, there have been calls to remove the system of unilateral party appointments and replace it with a neutral, transparent appointment procedure with permanent arbitrators, to no avail.⁴⁸⁰ These issues have culminated in an increasing number of requests for the disqualification of certain arbitrators.⁴⁸¹ Moreover, critics do not acknowledge the authority of individual arbitrators to make decisions in an ISDS case.⁴⁸²

Moreover, the lack of consistency, with specific regards to the fact that there is no doctrine of precedent, erodes trust and faith in the ISDS mechanism, raising questions of its legitimacy.⁴⁸³ Although States themselves established and consented to the current ISDS regime and affirmed its legitimacy under international law, this legitimacy may not be accepted by their constituents.⁴⁸⁴

⁴⁷⁷ UNCITRAL Working Group III ISDS reform (A/CN.9/WG.III/WP.142) 10.

⁴⁷⁸ UNCTAD *WIR* (2012) 88; MH Negm 'Transparency and consistency in investor-State arbitration: Adding new ingredients to an old recipe of ISDS reform' (2021) African Arbitration Association (AfAA) 2nd Annual International Arbitration Conference, 15-16 April 2021 available at <https://afaa.ngo/page-18097/10501488> (accessed 13 August 2024)

⁴⁷⁹ UNCITRAL Working Group III ISDS reform (A/CN.9/WG.III/WP.142) 10; IBA Report (2018) 3 – 4.

⁴⁸⁰ UNCTAD *WIR* (2012) 88.

⁴⁸¹ UNCTAD *WIR* (2012) 88.

⁴⁸² UNCITRAL Working Group III ISDS reform (A/CN.9/WG.III/WP.142) 10.

⁴⁸³ Arato *et al* (2020) 4-5.

⁴⁸⁴ UNCITRAL Working Group III ISDS reform (A/CN.9/WG.III/WP.142) 10.

Lastly, if a Tribunal makes the wrong decision, it cannot be appealed even if it has an adverse effect on the implementation of public policy interests.⁴⁸⁵ Such decisions may only be challenged through limited review mechanisms, such as annulment proceedings or set-aside or enforcement procedures. One suggestion to address the issues of inconsistency, transparency and legitimacy in investment arbitration is the establishment of a multilateral investment court (MIC).⁴⁸⁶

The European Commission (EC), for example, has argued that a permanent court could provide more consistent and predictable rulings compared to the current *ad hoc* arbitration system.⁴⁸⁷ Another suggestion involves creating an appellate body to review decisions made by the proposed investment court and/or arbitration tribunals.⁴⁸⁸ These proposals aim to ensure that legal interpretations are more uniform.

While such reforms might enhance the consistency of decisions within specific treaties, these measures may not fully address and could potentially worsen other critical issues underlying these inconsistent decisions.⁴⁸⁹ These issues include the divergence between arbitrators' interpretations of treaties and countries' understanding of investment protection, as well as the alignment of treaty interpretations with other areas of law and public policy.⁴⁹⁰

2.2.2. Balance between the rights and obligations of investors and host-countries and the right to regulate

The debate over IIAs hinges on balancing investor protection with a country's right to regulate, especially amid increasing number of ISDS cases.⁴⁹¹ The right to regulate is a

⁴⁸⁵ 'Appellate mechanisms for ISDS: Inconsistency & Unpredictability of Arbitration Awards' (30 September 2018) available at <https://www.acerislaw.com/appellate-mechanisms-for-isds-inconsistency-unpredictability-of-arbitration-awards/> (accessed 10 May 2021).

⁴⁸⁶ L Johnson & L Sachs 'Inconsistency's many forms in investor-State dispute settlement and implications for reform' (2018) *Columbia Center on Sustainable Development (CCSI) Briefing Note* 2; A De Luca, M Feldman, M Paparinskis & C Titi 'Responding to incorrect ISDS decision-making: policy option' (2020) 21 *Journal of World Investment and Trade* 4.

⁴⁸⁷ European Commission (EC) 'A Multilateral Investment Court' (2018) available at https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en (accessed on 13 August 2024).

⁴⁸⁸ Johnson & Sachs (2018) 2.

⁴⁸⁹ Johnson & Sachs (2018) 2; DM Howard 'Creating consistency through a world investment court' (2017) 41 *Fordham International Law Journal* 18.

⁴⁹⁰ Johnson & Sachs (2018) 2.

⁴⁹¹ D Gaukrodger 'The balance between investor protection and the right to regulate in investment treaties: A scoping paper' (2017) 2 *OECD Working Papers on International Investment* 4.

fundamental aspect of State sovereignty,⁴⁹² defined as the ability of a host-country to enact legislation that may override its treaty commitments without compensating investors.⁴⁹³ This right is generally protected through treaty exceptions and CIL, which tribunals have upheld as a State's right to pursue non-discriminatory, public interest regulations without it being considered as indirect expropriation.⁴⁹⁴

However, many countries now include explicit regulatory rights in new IIAs to protect their sovereignty further.⁴⁹⁵ The contentious aspect of this right is the lack of an obligation to compensate affected foreign investors, highlighting that States act within their rights rather than needing 'authorisation'.⁴⁹⁶ Historically, developing countries signed BITs to attract FDI consequently limiting certain aspects of their sovereignty.⁴⁹⁷

As the predominantly capital-importing ones, developing countries were often at the receiving end of the spectrum as the weaker and more submissive parties to IIA negotiations.⁴⁹⁸ This enabled capital-exporting developed countries to draft BITs that severely limited host (developing) countries' regulatory experimentation that could be harmful to foreign investor rights.⁴⁹⁹

In the early 1990s, developed countries even tried to extend regulation restrictions in the MAI by prohibiting pre-investment restrictions and performance requirements and broadening

⁴⁹² LW Mouyal *International Investment Law and the Right to Regulate: A Human Rights Perspective* (2016) 31; Howard (2017) 18; F Morosini 'Making the Right to Regulate in Investment Law and Policy Work for Development: Reflections from the South African and Brazilian experiences' *Investment Treaty News* 30 July 2018 available at <https://www.iisd.org/itn/en/2018/07/30/making-the-right-to-regulate-in-investment-law-and-policy-work-for-development-reflections-from-the-south-african-and-brazilian-experiences-fabio-morosini/> (accessed 4 June 2021).

⁴⁹³ C Titi *The Right to Regulate in International Investment Law* (2014) 33; C Titi 'The right to regulate in international investment law (revisited – 2022) 18 *International And Comparative Law Research Center* 17.

⁴⁹⁴ Titi (2022) 17 – 18.

⁴⁹⁵ Titi (2022) 17 – 18.

⁴⁹⁶ Titi (2022) 18.

⁴⁹⁷ Sauvart & Sachs (2009) 41; Neumayer & Spess (2005) 1571; Titi (2022) 18; J Bird-Pollan 'The sovereign right to tax: How bilateral investment treaties threaten sovereignty' (2018) 32 *Notre Dame Journal of Law, Ethics and Public Policy* 108.

⁴⁹⁸ Titi (2022) 18.

⁴⁹⁹ F Morosini 'Making the right to regulate in investment law and policy work for development: Reflections from the South African and Brazilian experiences' 30 July 2018 *Investment Treaty News* available at <https://www.iisd.org/itn/en/2018/07/30/making-the-right-to-regulate-in-investment-law-and-policy-work-for-development-reflections-from-the-south-african-and-brazilian-experiences-fabio-morosini/> (accessed 04 June 2021).

the meaning of expropriation to include 'indirect' expropriation.⁵⁰⁰ Although the MAI negotiations failed, the same developed countries that were pushing these restrictions on developing countries were not keen on granting liberalised access to investors from other developed countries.⁵⁰¹

In recent years, the question of whether BITs increase foreign investment and live up to their promise, has become a relevant one. Although developing countries have been compelled to protect foreign investment by signing BITs, under the threat of international arbitration, many have yet to yield significant FDI flows.⁵⁰² In fact, developed countries have refused to agree to any provisions that obligate their nationals to invest in foreign countries.⁵⁰³

Instead, most old-BITs encourage the host-country to create a favourable environment in their territories for foreign investors.⁵⁰⁴ Some authors have even argued that BITs do not serve to attract additional FDI,⁵⁰⁵ while others insist that BIT provisions are no longer designed to protect FDI in exchange for FDI inflow.⁵⁰⁶ Moreover, while some studies have shown that BITs can have a positive effect on FDI inflows,⁵⁰⁷ others show that signing BITs might not automatically result in increased FDI inflows.⁵⁰⁸

Some have also argued that while it is unclear to what extent BITs lead to foreign investment, BITs could also work to retain foreign investments.⁵⁰⁹ It is worth noting that certain developing countries like Mexico, Brazil and India have managed to attract significant FDI inflows, despite previous reluctance to engage in BITs.⁵¹⁰ In Africa, the US, for example, provides significant FDI to South Africa without having a BIT in place.

⁵⁰⁰ Sauvnt & Sachs (2009) 231.

⁵⁰¹ Sauvnt & Sachs (2009) 231; Schill *et al* (2015) 49 – 50; Sornarajah (2017) 206; Alvarez *et al* (2011) XXXI-III

⁵⁰² M Hallward-Driemeier 'Do bilateral investment treaties attract FDI? Only a bit... and they could bite' (2003) *World Bank Policy Research Working Papers* 18.

⁵⁰³ Salacuse (1990) 661.

⁵⁰⁴ Salacuse (1990) 661.

⁵⁰⁵ Hallward-Driemeier (2003) 18.

⁵⁰⁶ Gaukrodger (2017) 6; Hallward-Driemeier (2003).

⁵⁰⁷ Sauvnt & Sachs (2009) 226 – 227.

⁵⁰⁸ Schill *et al* (2015) 46; Sauvnt & Sachs (2009) 226; Hallward-Driemeier (2003) 18.

⁵⁰⁹ T Kondo 'Investment law in a globalised environment: A proposal for a new foreign direct investment regime in Zimbabwe' unpublished LLD thesis from the University of the Western Cape 2017 78.

⁵¹⁰ Sauvnt & Sachs (2009) 226; Schill *et al* (2015) 43; Neumayer & Spess (2005) 4; Brazil signed its first BIT in 1994.

Furthermore, China, does not have a BIT with Uganda despite being its biggest source of FDI.⁵¹¹ Thus, it could reasonably be concluded that foreign investors choose to invest in particular countries, not because they have signed an IIA, but because the particular host-country has resources they are interested in.⁵¹² Therefore, FDI inflows do not necessarily depend on the presence of a BIT. Evidently, there is no proven correlation between BITs and increases in FDI inflows.⁵¹³

There have also been concerns with the effect of IIAs on a country's right to regulate or adopt measures in the public's interest. Initially, investment arbitration was considered a private commercial matter between disputing parties, but in recent years, the implications of ISDS cases have extended beyond traditional commercial concerns.⁵¹⁴ For instance, in the *Methanex v US* case, the Tribunal recognised the public interest at stake.⁵¹⁵

The *Methanex* case harboured substantive issues that surpassed the typical scope of international arbitration between commercial parties.⁵¹⁶ Environmental groups and experts had raised concerns, leading California to ban the use of MTBE as a gasoline additive due to its pollution of the State's water supply.⁵¹⁷ Methanex, the investor, argued that the ban violated the US' obligation under Article 1110 of NAFTA, claiming that it amounted to a measure tantamount to expropriation without paying compensation.⁵¹⁸

Although this case was ultimately decided in favour of the host-country, it highlighted the absurd nature of ISDS. Critics argued that foreign investors' interests were given equal

⁵¹¹ D Rupiny 'UIA Chair makes case for strengthening investment and trade between Uganda and China' *Uganda Investment Authority (UIA)* 31 July 2023 available at <https://www.ugandainvest.go.ug/uia-chair-makes-case-for-strengthening-investment-and-trade-between-uganda-and-china/> (accessed 3 August 2024).

⁵¹² Sauvant & Sachs (2009) 226; Schill *et al* (2015) 43; Neumayer & Spess (2005) 4.

⁵¹³ Y Caliskan 'The development of international investment law : lessons from the OECD MAI negotiations and their application to a possible multilateral agreement on investment' published dissertation, Washington University in St. Louis 2008 55.

⁵¹⁴ Subedi (2016) 193; UNCTAD *WIR* (2018) 88; Schill *et al* (2015) 48.

⁵¹⁵ *Methanex Corporation v United States of America*, UNCITRAL Decision of the tribunal on petitions from third persons to intervene as 'amicus curiae' of 15 January 2001 para 49; H Mann 'Methanex Corp. v United States of America (Methanex v United States)' in N Bernasconi-Osterwalder & L Johnson (eds) *International investment law and sustainable development: key cases from 2000–2010* (2010) 83.

⁵¹⁶ *Methanex Corporation v US*, para, 49.

⁵¹⁷ H Mann 'Methanex v United States' *Investment Treaty News* 18 October 2018 available at <https://www.iisd.org/itn/en/2018/10/18/methanex-v-united-states/> (accessed 20 August 2021); Bernasconi-Osterwalder & Johnson (2010) 84-5

⁵¹⁸ Bernasconi-Osterwalder & Johnson (2010) 83.

standing to public concerns, such as environmental protection.⁵¹⁹ Additionally, it was alleged that foreign investors had access to rights under NAFTA that were not available to domestic investors.⁵²⁰

In the *Vattenfall v Germany (II)* case, Germany had passed measures to protect life, health and property from the dangers of nuclear energy and the harmful effects of ionizing radiation in response to the 2011 Fukushima nuclear disaster in Japan.⁵²¹ It amended its Atomic Energy Act to expedite the phase-out of nuclear energy.⁵²² The law was also revised to provide compensation for damages caused by nuclear energy or ionizing radiation.⁵²³

The amended law further prevented the use or release of nuclear energy or ionizing radiation from endangering the internal or external security of Germany and ensured the fulfilment of the country's international obligations in the field of nuclear energy and radiation protection.⁵²⁴ These amendments resulted in the closure of two of investor Vattenfall's nuclear reactors, who argued that their closure had resulted in a loss of USD 1.5 billion in expected revenues.⁵²⁵

In 2013, Vattenfall initiated arbitration proceedings against Germany at ICSID and filed a lawsuit before the Federal Constitutional Court of Germany (FCCG).⁵²⁶ The investor sought more than USD 5.4 billion for both past and future profit losses.⁵²⁷ This case highlighted the tension between a country's right to regulate in the public interest and the protections afforded to foreign investors under IIAs.

⁵¹⁹ *Methanex Corporation v US* (1999) Final award of the Tribunal on jurisdiction and merits, 44 I.L.M., 1345 paras 291 – 320; K Dougherty 'Methanex v United States: the realignment of NAFTA Chapter 11 with Environmental Regulation' (2007) 27 *Northwestern Journal of International Law and Business* 735.

⁵²⁰ Dougherty (2007) 735.

⁵²¹ *Vattenfall v Germany (II)* (ICSID Case No. ARB/12/12); N Bernasconi-Osterwalder & MD Brauch 'The State of Play in Vattenfall v. Germany II: Leaving the German public in the dark' *IISD Briefing Note* 2014 2; German Atomic Energy Act (1959) sec 1(2) – (3) available at <http://www.gesetze-im-internet.de/atg/BJNR008140959.html#BJNR008140959BJNG000100326> (accessed 20 August 2021); Bernasconi-Osterwalder & Brauch (2014) 2.

⁵²² Bernasconi-Osterwalder & Brauch (2014) 2.

⁵²³ Atomic Energy Act (1959) sec 1(2) – (3) available at <http://www.gesetze-im-internet.de/atg/BJNR008140959.html#BJNR008140959BJNG000100326> (accessed 20 August 2021)

⁵²⁴ Atomic Energy Act (1959) sec 1(2) – (3) available at <http://www.gesetze-im-internet.de/atg/BJNR008140959.html#BJNR008140959BJNG000100326> (accessed 20 August 2021)

⁵²⁵ Bernasconi-Osterwalder & Brauch (2014) 2.

⁵²⁶ Bernasconi-Osterwalder & Brauch (2014) 2.

⁵²⁷ Bernasconi-Osterwalder & Brauch (2014) 2.

Germany's actions were taken to protect public health and safety, but Vattenfall's use of ISDS to seek compensation for both past and future profits raised concerns that such mechanisms could deter governments from implementing important public policies, particularly in areas like environmental protection and public safety.⁵²⁸ This phenomenon, known as a 'regulatory chill,' also has an impact on sustainable development.⁵²⁹

For developing countries, the mere threat of costly and lengthy ISDS cases, coupled with their potential to result in exorbitant damages, can discourage governments from implementing public policy measures.⁵³⁰ For instance, Togo, an African LDC, had expressed its intention to pass 'plain packaging' laws on tobacco products in response to the country's growing tobacco-smoking health related issues.⁵³¹

These laws aimed to replace the normal labelling of cigarette packets with the producer's logo, promotional, marketing and advertising features, with pictures depicting the effects of cigarette smoke on the human body.⁵³² Togo was also acting in compliance with its World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) obligations, to incorporate the Framework into domestic law.⁵³³

In 2013, in response to these potential measures by Togo, Philip Morris, a cigarette-making MNC with a value 23 times larger than Togo's GDP at the time, threatened to initiate international arbitration.⁵³⁴ Fearing the significant amounts in compensation that could result

⁵²⁸ O Abimbola 'The regulatory chill' available at <https://africasacountry.com/2020/11/the-regulatory-chill> (accessed 01 March 2021); S Shekhar 'Regulatory chill: Taking right to regulate for a spin' (2016) 27 *Centre for WTO studies working paper* 2.

⁵²⁹ Shekhar (2016) 2.

⁵³⁰ O Abimbola 'The regulatory chill' available at <https://africasacountry.com/2020/11/the-regulatory-chill> (accessed 01 March 2021); S Shekhar 'Regulatory chill: Taking right to regulate for a spin' (2016) 27 *Centre for WTO studies working paper* 2.

⁵³¹ Republic of Togo National Assembly, Law Concerning the Production, Sale and Consumption of Tobacco and its Derivative Products of 2010.

⁵³² Law Concerning the Production, Sale and Consumption of Tobacco and its Derivative Products (2010) sec 1.

⁵³³ WHO Framework Convention on Tobacco Control (2003) art 3.

⁵³⁴ 'How to Bully a Government' available at <https://unfairtobacco.org/en/strategies/how-to-bully-a-government/#/> (accessed 10 June 2019); 'Big Tobacco's controversial, ailing crusade against plain packaging' *The Economist* 4 August 2016 available at <https://www.economist.com/business/2016/08/04/no-logo> (accessed 03 August 2021); S Boseley 'Threats, bullying, lawsuits: tobacco industry's dirty war for the African market' *The Guardian* 12 July 2017.

from such a case, Togo withdrew its intention to implement plain packaging rules and have yet to do so to date.⁵³⁵

Interestingly, in 2011, the Australian Government had faced a similar challenge with Philip Morris.⁵³⁶ But unlike Togo, Australia had the resources and the capacity to respond to the ISDS case and establish its right to regulate in the public interest.⁵³⁷ This dispute was initiated when the Australian Government enacted and enforced the Tobacco Plain Packaging Act 2011,⁵³⁸ in order to improve public health and give effect to certain obligations in the FCTC.⁵³⁹

In response, Philip Morris requested arbitration proceedings under the 1993 Australia–Hong Kong, China SAR BIT,⁵⁴⁰ claiming, *inter alia*, indirect expropriation and that the policies amounted to arbitrary, unreasonable and discriminatory measures.⁵⁴¹ The Tribunal dismissed the case on jurisdictional grounds, significantly affirming the country’s right to implement public health measures despite challenges from MNCs under BITs.⁵⁴²

Furthermore, ISDS mechanisms inherently favour foreign investors by allowing them to challenge existing policy measures in IATs,⁵⁴³ effectively placing them above domestic laws.⁵⁴⁴ In the high-profile case of *Foresti v South Africa*,⁵⁴⁵ for instance, foreign investors claimed that the broad-based black economic empowerment (BBBEE) provisions of the South African

⁵³⁵ ‘How to Bully a Government’ available at <https://unfairtobacco.org/en/strategies/how-to-bully-a-government/#/> (accessed 10 June 2019); ‘Big Tobacco’s controversial, ailing crusade against plain packaging’ *The Economist* 4 August 2016; S Boseley ‘Threats, bullying, lawsuits: tobacco industry’s dirty war for the African market’ *The Guardian* 12 July 2017.

⁵³⁶ *Philip Morris v Australia* (PCA Case No. 2012-12).

⁵³⁷ Togo Law Concerning the Production, Sale and Consumption of Tobacco and its Derivative Products (2010) sec 1.

⁵³⁸ *Philip Morris v Australia* (PCA Case No. 2012-12) Award on jurisdiction and admissibility dated 17 December 2015 para, 5.

⁵³⁹ Tobacco Plain Packaging Act 148 of 2011, part 12 available at <https://www.legislation.gov.au/Details/C2011A00148> (accessed 10 February 2020).

⁵⁴⁰ *Philip Morris v Australia* (PCA Case No. 2012-12) Award on jurisdiction and admissibility dated 17 December 2015 para, 5.

⁵⁴¹ *Philip Morris v Australia* (PCA Case No. 2012-12) Award on jurisdiction and admissibility dated 17 December 2015 para, 111.

⁵⁴² *Philip Morris v Australia* (PCA Case No. 2012-12) Award on jurisdiction and admissibility dated 17 December 2015 para, 111.

⁵⁴³ E Neumayer & L Spess (2005) 1577; Sornarajah (2021) 1.

⁵⁴⁴ E Neumayer & L Spess (2005) 1577.

⁵⁴⁵ *Foresti v Republic of South Africa* (ICSID Case No. ARB(AF)/07/1).

Mineral and Petroleum Resources Development Act (MPRD Act) and Mining Charter expropriated their mineral rights.⁵⁴⁶

The Mining Charter required mining companies to allocate 26 per cent ownership of mining assets to ‘historically disadvantaged South Africans’ (HDSAs) by 2014.⁵⁴⁷ It also required the investor to publish employment equity plans directed towards achieving a 40 per cent HDSA participation in management by 2009.⁵⁴⁸ The MPRD Act subjects property rights to the Constitution of South Africa and guarantees them, albeit with public purpose limitations.⁵⁴⁹

The *Foresti* case was instituted pursuant to Article 5 of the Italy–South Africa and the Belgo-Luxembourg–South Africa BITs, respectively.⁵⁵⁰ In response to the investors’ allegations, the South African government argued that it had a Constitutional and international human rights obligation to promote equality and that the mining policy was aimed at realising its human rights obligations.⁵⁵¹

After the case was settled, South African authorities realised that their ability to regulate domestic public policy objectives was under serious threat from BIT obligations and ISDS.⁵⁵² Evidently, foreign investors managed to challenge an affirmative action public policy measure,

⁵⁴⁶ F Morosini ‘Making the Right to Regulate in Investment Law and Policy Work for Development: Reflections from the South African and Brazilian experiences’ (30 July 2018) available at <https://www.iisd.org/itn/en/2018/07/30/making-the-right-to-regulate-in-investment-law-and-policy-work-for-development-reflections-from-the-south-african-and-brazilian-experiences-fabio-morosini/> (accessed 04 June 2021); M Mossallam ‘Process Matters: South Africa’s Experience Exiting its BITs’ (2015) 97 *The Global Economic Governance Program, GEG Working Paper* 7.

⁵⁴⁷ Historically Disadvantaged South Africans (HDSAs) are defined by Section 1 of the MPRDA to mean : ‘a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect; b) any association, a majority of whose members are persons contemplated in paragraph (a); c) any juristic person other than an association, in which persons contemplated in paragraph (a) own and control a majority of the issued capital or members’ interest and are able to control a majority of the members’ votes;’ MG Dumisani ‘Solutions to Investor-State Dispute Settlement: Republic of South Africa vis-a-vis Australia’ unpublished LLM Thesis, University of the Western Cape 2017 14.

⁵⁴⁸ Dumisani (2017) 14.

⁵⁴⁹ F Morosini ‘Making the Right to Regulate in Investment Law and Policy Work for Development: Reflections from the South African and Brazilian experiences’ (30 July 2018).

⁵⁵⁰ F Morosini ‘Making the Right to Regulate in Investment Law and Policy Work for Development: Reflections from the South African and Brazilian experiences’ (30 July 2018); Mohammad (2015) 7.

⁵⁵¹ Mossallam (2015) 7; T Steenkamp ‘South Africa’s New Bilateral Investment Treaty Policy: A Reasonable Response to a Flawed Regime?’ unpublished LLM thesis, University of British Columbia 2014 available at file:///Users/nubianest/Downloads/ubc_2014_september_steenkamp_tania.pdf (accessed 10 march 2023).

⁵⁵² DTI ‘Bilateral investment treaty policy framework review’ (2009) 5 – 6.

despite it being enshrined in the Constitution of South Africa, which is the supreme law of the land.⁵⁵³

The fallout of the *Foresti* case resulted in South Africa initiating a three-year review of its investment policies, which resulted in the termination of several of its then-existing BITs and the enactment of a new domestic law – the Protection of Investment Act (PIA), which now regulates both domestic and foreign investment and requires that foreign investors first exhaust domestic remedies before consent can be given for international arbitration.⁵⁵⁴

Many of the older treaties in force to date are also silent on the investor's obligations to the host-country and have therefore become a weapon to fight regulation.⁵⁵⁵ This was observed by the Nobel Prize-winning economist Joseph Stiglitz, who stated that:⁵⁵⁶

Perhaps the most invidious – and most dishonest – part of such agreements concerns investor protection. Of course, investors have to be protected against the risk that rogue governments will seize their property. But that is not what these provisions are about. There have been very few expropriations in recent decades, and investors who want to protect themselves can buy insurance from the Multilateral Investment Guarantee Agency, a World Bank affiliate (the US and other governments provide similar insurance). ... The real intent of these provisions is to impede health, environmental, safety, and ... even financial regulations.

Vandavelde added that although, in rare occasions, BITs may liberalise or promote foreign investment, they are typically structured to protect investment.⁵⁵⁷

The protection afforded by old-IIAs has, however, come with unforeseen circumstances that host-developing and increasingly, developed countries might not have predicted.⁵⁵⁸ They afford foreign investors more rights than those available to domestic investors,⁵⁵⁹ which can

⁵⁵³ DTI 'Bilateral investment treaty policy framework review' (2009) 10, 24; Constitution of South Africa of 1996, preamble, secs 1(c) and 2.

⁵⁵⁴ Protection of Investment Act (PIA) 22 of 2015.

⁵⁵⁵ Gaukrodger (2017) 6.

⁵⁵⁶ J Stiglitz 'The Secret Corporate Takeover' *Project Syndicate* 13 May 2015 available at <https://www.project-syndicate.org/commentary/us-secret-corporate-takeover-by-joseph-e--stiglitz-2015-05> (accessed 11 November 2023).

⁵⁵⁷ Vandavelde (2010) 5.

⁵⁵⁸ F Morosini 'Making the Right to Regulate in Investment Law and Policy Work for Development: Reflections from the South African and Brazilian experiences' (30 July 2018).

⁵⁵⁹ Ofodile (2013) 147; Neumayer & Spess (2005) 1571.

in turn, force host-countries to implement policies that either harm domestic investors or make it difficult for them to compete with foreign ones.⁵⁶⁰

2.2.3. The development dimension of IIAs

Development and IIAs are closely related because IIAs are meant to promote and protect investments, which can have both positive and negative impacts on economic development. On the one hand, foreign investment can bring much needed capital, technology and expertise to countries, which can lead to economic growth, job creation and improvements in infrastructure and public services. As such, IIAs can help facilitate investments by providing legal protection and ensuring that investors are treated fairly and equally under the law.

On the other hand, there are also concerns that IIAs might limit the policy space of host-countries, by giving foreign investors the right to challenge government policies, hence affecting their economic and sustainable development objectives.⁵⁶¹ For instance, there have been several ISDS cases, where investors have challenged a host-country's tax,⁵⁶² environmental⁵⁶³ and human rights measures.⁵⁶⁴

Taxes are an important source of revenue, especially for developing countries and, in many cases, apply to both local and foreign investors. This, however, has not stopped some investors from challenging tax measures in IATs.⁵⁶⁵ Similarly, affirmative action policies aimed to address economic disparities, as seen in the case involving South Africa, have also been challenged by investors.⁵⁶⁶

In both cases, the measures that were challenged were, in one way or another, meant to have a positive effect on the host-country's economic and/or social development objectives. The relationship between IIAs and development has thereby been one of ignorance and mistrust

⁵⁶⁰ Ofodile (2013) 147; Neumayer & Spess (2005) 1571.

⁵⁶¹ Chapter 2, 'Balance between the rights and obligations of investors and host-countries and the right to regulate' para 2.2.2 above.

⁵⁶² At least 24 countries have faced ISDS cases related to tax including Uganda, India, Laos, Algeria, Yemen, Ecuador, Venezuela, Peru, Bolivia, Mexico and Argentina - UNCTAD WIR (2015).

⁵⁶³ See discussion on *Vattenfall v Germany (II)* and *Philip Morris v Australia* above.

⁵⁶⁴ See discussion on *Foresti v South Africa* above.

⁵⁶⁵ *Total E&P v Uganda* (ICSID Case No. ARB/15/11).

⁵⁶⁶ *Foresti v South Africa* (ICSID Case No. ARB(AF)/07/1)

despite the close relationship between the two.⁵⁶⁷ In fact, one could ask whether the laws protecting and promoting foreign investment would exist if there was no presumption that it would contribute to the host-country's development.⁵⁶⁸

Despite the close relationship between IIAs and development, it is only recently that scholars and governments have begun to view development and international investment more positively.⁵⁶⁹ Old-IIAs were seldom conceptualised from a development perspective⁵⁷⁰ and typically lack explicit commitments from capital-exporting countries toward development instead featuring vague language relating to investment promotion.⁵⁷¹

This is despite the fact that many developing countries were led to believe that signing BITs would spur economic development.⁵⁷² However, as Sornarajah point out, 'in reality, attracting foreign investment depends more on the political and economic climate for its existence rather than on the creation of a legal structure for its protection.'⁵⁷³ He also argues that IIAs are asymmetric because they limit only the sovereignty of developing countries, which receive FDI from developed countries.⁵⁷⁴

Sornarajah adds that IIAs are asymmetric treaties which benefit only MNCs from developed nations.⁵⁷⁵ He goes on to say that these treaties are based on lies and that the only economic development IIAs bring is to the arbitrators who interpret them and to lawyers in large law firms who represent parties and argue the case before the IATs.⁵⁷⁶ In his view, BITs 'plunder under the cloak of a law made through the instrumentality of power' and prolong the colonial domination of developing countries through mechanisms of investment regulation.⁵⁷⁷

⁵⁶⁷ Schill *et al* (2015) 3.

⁵⁶⁸ Schill *et al* (2015) 5.

⁵⁶⁹ Schill *et al* (2015) 5.

⁵⁷⁰ Schill *et al* (2015) 5.

⁵⁷¹ UNCTAD *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* (2009) XV; Alvarez *et al* (2011).

⁵⁷² Schill *et al* (2015) 43.

⁵⁷³ Available at <https://www.oecd-ilibrary.org/content/thematicgrouping/q2bf482b4-en/sectionchapters?fmt=ahah> (accessed 11 November 2022).

⁵⁷⁴ Schill *et al* (2015) 43 – 46.

⁵⁷⁵ Schill *et al* (2015) 44.

⁵⁷⁶ Schill *et al* (2015) 44.

⁵⁷⁷ Schill *et al* (2015) 46 - 47

VanDuzer *et al* further notes that the kinds of IIAs, usually sought by developed countries, tend to have the effect of constraining host (developing) countries' rights to regulate foreign investors operating within their borders.⁵⁷⁸ This inability to regulate can impact on a country's pursuit of development objectives.⁵⁷⁹ Other scholars even contended that FDI flows can negatively impact on host-developing countries that have concluded BITs.⁵⁸⁰

Despite differing views, most developing countries did and continue to conclude IIAs, hoping to attract FDI that would drive their economic development.⁵⁸¹ However, recent trends in IIA policymaking suggest growing unease about the actual effectiveness of BITs in promoting FDI and fostering development.⁵⁸² As previously stated, the majority of ISDS cases have been brought against developing countries by investors from developed countries, often when the former are experiencing significant FDI flows.⁵⁸³

For instance, Nigeria, which attracted the most FDI flows in Africa in 2012, became subject to an ISDS case, which resulted in it paying USD 6.6 billion in compensatory damages.⁵⁸⁴ It is almost as if the consequence for increased FDI is exorbitant compensatory awards, which are taken from public fund coffers reserved for other developmental considerations in the host-country like infrastructure, education and health.⁵⁸⁵ This is counterproductive to achieving development.

There have also been incidents when cases are initiated against a host-country during difficult financial periods, when they cannot afford to compensate investors.⁵⁸⁶ In other cases, ISDS awards have even included compensation for past as well as 'future' losses of profit, leading

⁵⁷⁸ JA VanDuzer, P Simons & G Mayeda *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (2013) 1.

⁵⁷⁹ JA VanDuzer *et al* (2013) 1.

⁵⁸⁰ A Žilinskė 'Negative and Positive Effects of Foreign Direct Investment' (2015) 15 *Economics and Management* 334.

⁵⁸¹ Subedi (2016) 2; H Mann 'Reconceptualizing International Investment Law: Its Role in Sustainable Development' (2013) *Lewis & Clark Law Review* 528.

⁵⁸² UNCTAD *WIR* (2014) 126.

⁵⁸³ T Chidede 'Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol' (2018) *Tralac*

⁵⁸⁴ *Process and Industrial Developments Ltd (P&ID) v The Ministry of Petroleum Resources of the Federal Republic of Nigeria* (2012) final award given on 31 January 2017 available at https://jsumundi.com/fr/document/decision/en-process-and-industrial-developments-ltd-v-the-ministry-of-petroleum-resources-of-the-federal-republic-of-nigeria-final-award-tuesday-31st-january-2017#decision_5289 (accessed 10 May 2021).

⁵⁸⁵ *Occidental v Ecuador (II)* (ICSID Case No. ARB/06/11 in SW Schill *et al* (2015) 44.

⁵⁸⁶ Schill *et al* (2015) 44.

to an inflation of awards.⁵⁸⁷ Tribunals have stopped asking whether such entitlement exists and instead, solely focus on the evidential question of whether there is sufficient evidence indicating that the investment would have been profitable.⁵⁸⁸

In effect, an investment does not need to be fully established or operational in the host-country to trigger an ISDS case.⁵⁸⁹ Moreover, ISDS awards can undermine the original intent of developing countries in signing BITs – namely, to boost FDI flows and promote economic development. Even when an investment has been somewhat beneficial, those benefits can be offset by damages awarded to foreign investors by arbitrators.

In some instances, investors can even claim damages for ‘future’ profits from investments that were never fully realised or operational, further skewing the benefits in favour of foreign investors. At most, therefore, BITs promote FDI only *indirectly* through the granting of investment protection, but increased FDI flows or resulting ‘economic’ development is not guaranteed.⁵⁹⁰

Economic growth, which is usually associated with FDI flows resulting from the conclusion of BITs, has therefore lost its privileged position in debates about development.⁵⁹¹ The majority of BITs lack performance requirements, which require foreign investors to meet certain goals with respect to their operation in a host-country.⁵⁹² These requirements are usually applied as conditions for the entry or establishment of an investment.⁵⁹³

⁵⁸⁷ Bernasconi-Osterwalder & Brauch (2014) 2; also see investor’s claim for past and future profits in *Vattenfall v Germany (II)* above.

⁵⁸⁸ *Banksitch Ghana Ltd. v The Republic of Ghana* (PCA Case No. 2011-10); T Marzal ‘Against DCF valuation in ISDS: on the inflation of awards and the need to rethink the calculation of compensation for the loss of future profits’ *Blog of the European Journal of International Law* 26 January 2021 available at <https://www.ejiltalk.org/against-dcf-valuation-in-isds-on-the-inflation-of-awards-and-the-need-to-rethink-the-calculation-of-compensation-for-the-loss-of-future-profits/> (accessed 10 May 2021).

⁵⁸⁹ *Vattenfall v Germany (II)* (ICSID Case No. ARB/12/12); *Wena Hotels Ltd v Arab Republic of Egypt* (ICSID Case No. ARB/98/4); Bernasconi-Osterwalder & Brauch (2014) 2.

⁵⁹⁰ UNCTAD *The role of IIAs in attracting FDI to developing countries* (2009) XV.

⁵⁹¹ O de Schutter, J Swinnen & J Wouters (eds) *Foreign direct investment and human development: The law and economics of international investment agreements* (2013) 4.

⁵⁹² P Muchlinski ‘Policy Issues’ in P Muchlinski, F Ortino & C Schreuer (eds) *The Oxford handbook of international investment law* (2008) 31.

⁵⁹³ Muchlinski *et al* (2008) 31.

They tend to minimise the potential disadvantages and maximise the potential benefits of FDI in line with a host-country's economic and social needs.⁵⁹⁴ The exclusion of these requirements in IIAs can, at least partially, be attributed to the WTO's TRIMs Agreement, which prohibits certain classes of performance requirements that are inconsistent with the GATT's provisions on the NT obligation and the prohibition of quantitative restrictions.⁵⁹⁵

Consequently, the majority of old-IIAs seldom impose any meaningful obligations on foreign investors to ensure that investments contribute to the host-country's developmental needs. Developing countries also tend to offer fiscal and financial incentives to foreign investments that are not always necessarily available to local investors.⁵⁹⁶ Fiscal incentives are usually tax advantages,⁵⁹⁷ while financial incentives can take the form of directly funding foreign investors to finance new investments, or to defray capital or operational costs.⁵⁹⁸

While tax advantages usually result in the host-country foregoing its revenue,⁵⁹⁹ a financial incentive usually means that public funds are attributed to the particular foreign investment, instead of being applied to other public purposes.⁶⁰⁰ The fact that local investors seldom have access to such incentives also affects their ability to compete with foreign businesses and given that they outnumber foreign ones, it defies logic that they are not offered the same benefits to establish investments.

Historically, 'development' in the context of IIL, referred only to 'economic' development,⁶⁰¹ however, in recent years, there have been increasing calls for IIAs and FDI to contribute to not only economic, but social development as well as environmental protection, now known as sustainable development.⁶⁰² While this notion has enjoyed a long history from its international environmental law origins and gained a status comparable to that of democracy, freedom and justice, it has only recently become a topic of emphasis in IIL.⁶⁰³

⁵⁹⁴ Muchlinski *et al* (2008) 31.

⁵⁹⁵ TRIMs Agreement (1994) art 2(1) – (2).

⁵⁹⁶ Muchlinski *et al* (2008) 33.

⁵⁹⁷ Muchlinski *et al* (2008) 33.

⁵⁹⁸ Muchlinski *et al* (2008) 33.

⁵⁹⁹ Muchlinski *et al* (2008) 33.

⁶⁰⁰ Muchlinski *et al* (2008) 33.

⁶⁰¹ Schill *et al* (2015) 78.

⁶⁰² Schill *et al* (2015).

⁶⁰³ Chi (2018) 9.

2.3. Integrating sustainable development into international investment law

For a long time, investors enjoyed absolute protections under IIAs, often with little consideration for developments in other areas of law,⁶⁰⁴ despite violations of environmental, labour and human rights by some investors.⁶⁰⁵ The rise in ISDS cases has also underscored the impact of old-IIAs on public policies, including those related to public international law and the right to develop.⁶⁰⁶ Older IIAs therefore primarily focused on protecting foreign investments, with little regard for a host-country's economic or SDGs.⁶⁰⁷

Owing mainly to the vigorous efforts by scholars and non-governmental organisations (NGOs) advocating for human rights and environmental concerns in investment law, a new investment-development paradigm has emerged, aiming for an IIA regime that promotes sustainable development.⁶⁰⁸ The following section examines the evolution of sustainable development as a global concern and analyses how countries have adapted their international investment regimes to align with sustainable development objectives.

2.3.1. The evolution of the notion of sustainable development

The concept of sustainable development was first introduced in the 1987 Brundtland Report,⁶⁰⁹ which defined it as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'⁶¹⁰ It further stated that sustainable development required 'extending to all the opportunity to fulfil their aspirations for a better life' and emphasised the need for a balance between economic growth and environmental protection.⁶¹¹

⁶⁰⁴ Subedi (2016) 194.

⁶⁰⁵ For instance, Shell Plc, an oil and gas MNC was accused of polluting the Niger Delta upon which thousands of people rely for food and water – S Tobin 'Nigerians accuse Shell of delay in oil spill London lawsuits' *Reuters* 5 April 2023 available at <https://www.reuters.com/business/energy/nigerians-accuse-shell-delay-oil-spill-london-lawsuits-2023-04-04/> (accessed 10 November 2023).

⁶⁰⁶ Subedi (2016) 194.

⁶⁰⁷ A Newcombe 'Sustainable Development and Investment Treaty Law' (2006) 3.

⁶⁰⁸ Subedi (2016) 194; UNCTAD *WIR* (2010) XV.

⁶⁰⁹ UN 'Report of the World Commission on Environment and Development: Our Common Future,' 1987 (Brundtland Report).

⁶¹⁰ Brundtland Report (1987) 15.

⁶¹¹ Brundtland Report (1987) 15.

Global efforts to develop an effective legal regime that addressed sustainable development began with the 1992 Rio Declaration on Environment and Development (Rio Declaration),⁶¹² making it a key focus of the international agenda and highlighting the importance of investment in helping developing countries meet their needs sustainably.⁶¹³ Prior to this, sustainable development was mainly addressed within environmental law, focusing on the potential conflict between economic development and environmental protection.⁶¹⁴

The 2000 United Nations Millennium Declaration, signed by 189 UN Members, introduced eight Millennium Development Goals (MDGs) that had to be achieved by 2015.⁶¹⁵ These goals emphasised the importance for international cooperation and partnerships, influencing investment policies⁶¹⁶ and the inclusion of sustainable development considerations in investment policymaking.

For instance, the MDGs influenced the creation of the UN Global Compact, a voluntary initiative, which was launched in 2000 to encourage businesses to adopt sustainable and socially responsible policies.⁶¹⁷ The Global Compact has since become a key reference point for companies seeking to align their activities with the principles of sustainable development.⁶¹⁸

The MDGs therefore promoted the idea that investments in social and environmental sustainability were both desirable and economically beneficial.⁶¹⁹ Although not all targets were fully achieved by 2015, significant progress was made and the goals catalysed action on

⁶¹² Report of the UNCED, I, UN Doc. A/CONF.151/26/Rev. 1 (1992), 31 ILM 874; P Birnie, A Boyle & C Redgwell *International Law and the Environment* (2009) 53.

⁶¹³ Chi (2018) 10; Newcombe (2006) 3.

⁶¹⁴ Chi (2018) 10.

⁶¹⁵ The MDGs are as follows: Goal 1 – Eradicate extreme poverty and hunger; Goal 2 – Achieve universal primary education; Goal 3 – Promote gender equality and empower women; Goal 4 – Reduce child mortality; Goal 5 – Improve maternal health; Goal 6 – Combating HIV/AIDS, malaria and other diseases; Goal 7 – Ensure environmental sustainability; and Goal 8 – Develop a global partnership for development – Available at <https://unglobalcompact.org/what-is-gc> (accessed 10 January 2023).

⁶¹⁶ Goal 8 of the MDGs; ‘The Ten Principles of the UN Global Compact’ available at <https://unglobalcompact.org/what-is-gc> (accessed 10 January 2023).

⁶¹⁷ ‘The Ten Principles of the UN Global Compact’ available at <https://unglobalcompact.org/what-is-gc> (accessed 10 January 2023).

⁶¹⁸ ‘The Ten Principles of the UN Global Compact’ available at <https://unglobalcompact.org/what-is-gc/mission/principles> (accessed 10 January 2023).

⁶¹⁹ ‘The Ten Principles of the UN Global Compact’ available at <https://unglobalcompact.org/what-is-gc/mission/principles> (accessed 10 January 2023).

key development challenges. Although they did not have a direct impact on IIL, as they were not designed to be legally binding, they created a global consensus around the importance of development and poverty reduction, shaping international policy and investment priorities.

The adoption of the MDGs was quickly followed by that of the 2002 Monterrey Consensus Report.⁶²⁰ This Report addressed the challenges of financing for development, particularly in developing countries⁶²¹ and highlighted the role of FDI in eradicating poverty, achieving sustained economic growth and promoting sustainable development for an inclusive and equitable global economic system.⁶²²

A few months later, the World Summit on Sustainable Development (WSSD) held in Johannesburg, South Africa, led to the Johannesburg Declaration on Sustainable Development (Johannesburg Declaration).⁶²³ It expanded the concept of sustainable development to include social development,⁶²⁴ in addition to the previously recognised pillars of environmental protection and economic development.⁶²⁵

The Johannesburg Declaration specifically stated that:⁶²⁶

Accordingly, we assume a collective responsibility to advance and strengthen the interdependence and mutually reinforcing pillars of sustainable development - economic development, social development and environmental protection - at the local, national, regional and global levels.

A more comprehensive understanding of sustainable development was also offered by the International Law Association (ILA) Committee on International Law on Sustainable Development. This Committee, which drafted the New Delhi Declaration of Principles of

⁶²⁰ Monterrey Consensus of the International Conference on Financing for Development, Report of the International Conference on Financing for Development, 22 March 2002, UN Doc. A/CONF.198/11 (Monterrey Consensus).

⁶²¹ Monterrey Consensus (2002) 5.

⁶²² Monterrey Consensus (2002) 5.

⁶²³ Johannesburg Plan of Implementation, Report of the World Summit on Sustainable Development, 4 September 2002, U.N. Doc. A/CONF.199/20 (2002).

⁶²⁴ HM Osofsky 'Defining Sustainable Development after Earth Summit 2002' (2003) *Loyola Los Angeles International and Comparative Law Review* 123; Chi (2018) 10 – 11.

⁶²⁵ Osofsky (2003) 123; Chi (2018) 10 – 11.

⁶²⁶ Johannesburg Declaration (2002) para 5.

International Law Relating to Sustainable Development (New Delhi Declaration), defined sustainable development as:⁶²⁷

... a comprehensive and integrated approach to economic, social and political processes, which aims at the sustainable use of natural resources of the Earth and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, with due regard to the needs and interests of future generations.

The Johannesburg Declaration also identified seven principles of sustainable development, including, the State's duty to ensure sustainable use of natural resources; the principles of equity and the eradication of poverty; common but differentiated responsibilities; precautionary approach to human health, natural resources and ecosystems; participation and access to information and justice; good governance; and integration and interrelationship, particularly in relation to human rights and social, economic and environmental objectives.⁶²⁸

Despite gaining international recognition, the content of sustainable development remains unclear and its definition is still contested.⁶²⁹ It is understood as a balancing paradigm as implied in the New Delhi Declaration, which proposed the principle of integration and interrelationship of the elements.⁶³⁰ The 2008 Doha Declaration on Financing for Development (Doha Declaration) further highlighted the critical role of investment policies in achieving sustainable development.⁶³¹ It emphasised the need for financial resources, particularly in the form of FDI, to reduce poverty,⁶³² and support productive sectors such as infrastructure, agriculture and manufacturing.⁶³³

⁶²⁷ New Delhi Declaration on Principles of International Law Relating to Sustainable Development, ILA Resolution 3/2002, Report of the 70th Conference of the International Law Association, April 2002 (now published as UN GAOR, 55th Sess., Annex, Agenda Item 89, UN Doc. A/57/329 (2002) (New Delhi Declaration).

⁶²⁸ New Delhi Declaration (2002) 211 – 216.

⁶²⁹ Newcombe (2006) 9; Chi (2018) 12.

⁶³⁰ Chi (2018) 11; Johannesburg Declaration (2002) principle 7.

⁶³¹ Doha Declaration on Financing for Development: Outcome Document of the Follow-Up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, Doha, Qatar, 29 November – 2 December 2008 (Doha Declaration).

⁶³² Doha Declaration (2008) paras 1 – 2.

⁶³³ Doha Declaration (2008) paras 23 – 29

Regarding IIL and policies, the Declaration highlighted the need for investment policies that foster economic development, job creation, poverty reduction and environmental sustainability.⁶³⁴ Member States were urged to implement investment policies that were conducive to development, including policies that ensured a transparent, non-discriminatory and predictable regulatory environment, and that promoted sustainable investment.⁶³⁵

During the 2012 UN Conference on Sustainable development (UNCSD), a process to develop a new set of development goals, this time known as the SDGs, was initiated,⁶³⁶ leading to the adoption of the 2030 Agenda for Sustainable Development (Agenda 2030) in 2015.⁶³⁷ The SDGs set a broader and more ambitious agenda than the MDGs, encompassing 17 goals to be achieved by 2030.⁶³⁸

The Agenda 2030 also recognises the need for investment policies that promote sustainable development and address the challenges of poverty, inequality and environmental degradation.⁶³⁹ It calls for a holistic approach to investment, balancing economic, social and environmental considerations.⁶⁴⁰ It emphasises inclusive and sustainable economic growth,

⁶³⁴ Doha Declaration (2008) paras 23 – 29.

⁶³⁵ Doha Declaration (2008) paras 23 – 29.

⁶³⁶ See <https://www.sdgfund.org/mdqs-sdqs> (accessed 02 September 2021).

⁶³⁷ Transforming Our World: The 2030 Agenda for Sustainable Development (2015) A/RES/70/1.

⁶³⁸ These SDGs include: Goal 1 – End poverty in all its forms everywhere; Goal 2 - End hunger, achieve food security and improve nutrition and promote sustainable agriculture; Goal 3 – Ensure healthy lives and promote wellbeing for all at all ages; Goal 4 - Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all; Goal 5 - Achieve gender equality and empower all women and girls; Goal 6 - Ensure availability and sustainable management of water and sanitation for all; Goal 7 – Ensure access to affordable, reliable, sustainable and modern energy for all; Goal 8 – Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all; Goal 9 – Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation; Goal 10 – Reduce inequality within and among countries; Goal 11 – Make cities and human settlements inclusive, safe, resilient and sustainable; Goal 12 – Ensure sustainable consumption and production patterns; Goal 13 – Take urgent action to combat climate change and its impacts; Goal 14 - Conserve and sustainably use the oceans, seas and marine resources for sustainable development; Goal 15 – Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss; Goal 16 – promote peaceful and inclusive societies for number teens as development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels; and Goal 17 - Strengthen the means of implementation and revitalize the global partnership for sustainable development – UN Agenda 2030.

⁶³⁹ Agenda 2030 (2015) para 2.

⁶⁴⁰ Agenda 2030 (2015) Preamble and paras 17 and 35 and Goal 8 of Agenda 2030 (2015).

job creation, poverty reduction, environmental sustainability, the protection of workers and communities' rights,⁶⁴¹ and the importance of sustainable public and private investment.⁶⁴²

Members are thereby called upon to implement policies that encourage private sector investment, particularly in sectors concerning renewable energy, infrastructure and sustainable agriculture, while also ensuring that public investment is directed towards sustainable development priorities.⁶⁴³ The Agenda further emphasises the importance of international cooperation in mobilising resources, particularly in developing countries.⁶⁴⁴

Simultaneously, the AU adopted Agenda 2063 in 2015,⁶⁴⁵ a strategic framework for Africa's socio-economic transformation over the next 50 years.⁶⁴⁶ Agenda 2063 contains seven aspirations⁶⁴⁷ and 20 goals,⁶⁴⁸ focused on sustainable development, job creation, poverty reduction and economic growth particularly in infrastructure, energy, agriculture and manufacturing, to be achieved by 2063.⁶⁴⁹

⁶⁴¹ Agenda 2030 (2015) Goal 8 and 1.b and para 67.

⁶⁴² Agenda 2030 (2015) para 67.

⁶⁴³ Agenda 2030 (2015) Goal 7.a.

⁶⁴⁴ Agenda 2030 (2015) Goal 2.a and 17.

⁶⁴⁵ AU Background Note to Agenda 2063: The Africa we want (2015) 1; AU Framework Document for Agenda 2063: The Africa We Want (September 2015) 5.

⁶⁴⁶ AU Framework Document for Agenda 2063: The Africa We Want (September 2015) 5.

⁶⁴⁷ The Aspirations in Agenda 2063 include: 1) A prosperous Africa, based on inclusive growth and sustainable development; 2) an integrated continent politically united and based on the ideals of Pan Africanism and the vision of African renaissance; 3) an Africa of good governance, democracy, respect for human rights, justice and the rule of law; 4) a peaceful and secure Africa; 5) Africa with a strong cultural identity common heritage, values and ethics; 6) an Africa whose development is people driven, relying on the potential offered by African people, especially its women and youth, and caring for children; and 7) Africa as a strong, united, resilient and influential global player and partner.

⁶⁴⁸ The goals in Agenda 2063 include: 1) A high standard of living, quality of life and wellbeing for all citizens; 2) well educated citizens and skills revolution underpinned by science, technology and innovation; 3) healthy and well-nourished citizens; 4) transformed economies; 5) modern agriculture for increased productivity and production; 6) blue/ ocean economy for accelerated economic growth; 7) environmentally sustainable and climate resilient economies and communities; 8) a united Africa (federal and confederate); 9) Continental financial and monetary institutions established and functional; 10) World class infrastructure criss-crosses Africa; 11) democratic values, practices, universal principles of human rights, justice and the rule of law entrenched; 12) capable institutions and transformative leadership in place; 13) peace, security and stability is preserved; 14) a stable and peaceful Africa; 15) A fully functional and operational APSA; 16) African cultural renaissance is pre-eminent; 17) full gender equality in all spheres of life; 18) engaged and empowered youth and children; 19) Africa as a major partner in global affairs and peaceful co-existence; and 20) Africa takes full responsibility for financing her development - AU Framework Document for Agenda 2063: The Africa We Want (September 2015) 105 – 106.

⁶⁴⁹ Agenda 2063 (2015) 32, 33, 51, 64, 65, 90.

The importance of investment is particularly recognised in achieving the Agenda's vision of an integrated, prosperous and peaceful Africa.⁶⁵⁰ It emphasises the need for policies that encourage private sector investment, domestic resource mobilisation and investment in education, health technology transfer, innovation and industrialisation.⁶⁵¹ Agenda 2063 also highlights the importance of intra-African investment, including through the establishment of the AfCFTA Protocol on Investment.⁶⁵²

2.3.2. The integration of sustainable development in international investment law

Initially, countries focused on FDI for economic development, often neglecting sustainable development considerations.⁶⁵³ Many are still not convinced that old-BITs were conceptualised from a development perspective.⁶⁵⁴ Furthermore, developed countries, which were the main drivers of these treaties until recently, consistently resisted including provisions that would require their nationals to invest in foreign countries.⁶⁵⁵

Old-BITs were therefore designed to protect foreign investments, often at the expense of public interests and lacked a focus on sustainable development.⁶⁵⁶ This oversight has led to negative consequences, such as environmental degradation, public health concerns, labour and human rights abuses, as seen in cases like Shell's pollution in the Niger Delta.⁶⁵⁷ Moreover, these concerns have been largely ignored in IIL jurisprudence and by arbitrators in IATs.⁶⁵⁸

⁶⁵⁰ Agenda 2063 (2015) 121.

⁶⁵¹ Agenda 2063 (2015) 3, 32 – 33, 51, 64, 65 143, 150.

⁶⁵² Agenda 2063 (2015) 18, 107; AfCFTA Protocol on Investment (2023).

⁶⁵³ Schill *et al* (2015) 78.

⁶⁵⁴ Schill *et al* (2015) 5.

⁶⁵⁵ Salacuse (1990) 661.

⁶⁵⁶ Schill *et al* (2015) 78; M Chi 'Sustainable development provisions in investment treaties' (2018) *United Nations Economic and Social Commission for Asia and the Pacific* 2.

⁶⁵⁷ RS Mesa 'Environmental degradation and human rights abuses: Does the refugee convention confer protection to environmental refugees?' (2007) 10 *International Law Review* 75; SJ Turner 'Business, Human Rights and the Environment—Using Macro Legal Analysis to Develop a Legal Framework That Coherently Addresses the Root Causes of Corporate Human Rights Violations and Environmental Degradation' (2021) 13 *Sustainability* 1, 3-6; S Laville 'Nearly 14,000 Nigerians take Shell to court over devastating impact of pollution' *The Guardian* 2 February 2023 available at <https://www.theguardian.com/world/2023/feb/02/nearly-14000-nigerians-take-shell-to-court-over-devastating-impact-of-pollution#:~:text=The%20oil%20spills%20have%20damaged,source%20of%20food%20or%20income>. (accessed 20 July 2023).

⁶⁵⁸ Mesa (2007) 75; Turner (2021) 1, 3 – 6.

A review of the current IIA regime's shortcomings has prompted countries to reconsider their IILs and policies.⁶⁵⁹ These challenges, coupled with various development policy tools, have transformed the concept of sustainable development into an unavoidable paradigm, underpinning all human action, including FDI.⁶⁶⁰ Many current global economic activities are unsustainable, and yet without investment, sustainability is unattainable.⁶⁶¹

As such, there is a growing consensus that FDI is needed to achieve the SDGs and should be a key component of any development agenda.⁶⁶² However, the broad interpretation of old-IIA provisions by arbitrators in ISDS cases can undermine the sustainable development objectives of host-countries.⁶⁶³ For instance, nearly all of the early cases brought under NAFTA involved environmental protection issues.⁶⁶⁴

In recent years, investment disputes have even extended to public policies concerning health,⁶⁶⁵ affirmative action,⁶⁶⁶ water and sewage infrastructure,⁶⁶⁷ tax measures⁶⁶⁸ and energy⁶⁶⁹ – all of which can be attributed to an element of sustainable development. In response, countless regimes have been created to address issues ranging from the management of cross-border wastewater treatment to financial transactions, human rights, sustainable development and nuclear proliferation.⁶⁷⁰

Efforts to reform IIAs are emerging at various levels, aiming to balance the protection of foreign investments with the promotion of sustainable development. However, there is no standardised approach to incorporating sustainability into these agreements, resulting in a diversity of methods being employed by different countries. For instance, policymakers are

⁶⁵⁹ Some of these shortcomings have been stated in previous sections of this study and include - increased ISDS cases, debates concerning the developmental dimension of IIAs, the effect of IIAs of a host-country's right to regulate and the unbalanced rights and obligations between foreign investors and host-countries.

⁶⁶⁰ Chi (2018) 9.

⁶⁶¹ K von Moltke *An International Investment Regime? Issues of Sustainability* (2000) 7.

⁶⁶² See discussions on Agendas 2030 and 2063 above.

⁶⁶³ Mann (2013) 533.

⁶⁶⁴ Mann (2013) 533.

⁶⁶⁵ *Philip Morris Asia v Australia* (PCA Case No. 2012-12); *Philip Morris v Ukraine* (ICSID Case No. ARB/21/3).

⁶⁶⁶ *Foresti v South Africa* (ICSID Case No. ARB(AF)/07/1).

⁶⁶⁷ *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania* (ICSID Case No. ARB/05/22).

⁶⁶⁸ *Total E&P Uganda BV v Uganda* (ICSID Case No. ARB/15/11).

⁶⁶⁹ *Vattenfall v Germany (ii)* (ICSID ARB/12/12).

⁶⁷⁰ von Moltke (2000) 39.

increasingly incorporating sustainable development provisions (SDPs) in IIA preambles, either explicitly or implicitly.⁶⁷¹

For example, in its preamble, the 2016 Model Indian BIT recognises that:⁶⁷²

... the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development.

Similarly, although it does not expressly refer to sustainable development, the 2012 US Model BIT contains elements from which sustainable development can be implied, including improving living standards and achieving the BIT objectives in a manner that is 'consistent with the protection of health, safety, and the environment, and the promotion of international recognized labor (sic) laws'.⁶⁷³

Sustainable development provisions have also been integrated into IIAs through their substantive provisions, which form the core of any IIA.⁶⁷⁴ These provisions outline the treatment foreign investments should be afforded in the host-country, guaranteeing protection, FET and MFN treatment. SDPs may require host-countries to act or refrain from acting in a certain way to promote sustainable development.⁶⁷⁵

Some countries have included provisions specifically tailored towards the protection of the public (or public interest provisions).⁶⁷⁶ In some cases, these provisions might even exempt host-countries from liability when implementing public interest policies.⁶⁷⁷ Additionally, incorporating soft law elements like corporate social responsibility (CSR), helps make IIAs more compatible with sustainable development.⁶⁷⁸

⁶⁷¹ Adeleke (2017) 1.

⁶⁷² Model Indian BIT (2016) preamble.

⁶⁷³ US Model BIT (2012) preamble.

⁶⁷⁴ Chi (2018) 20.

⁶⁷⁵ Chi (2018) 20 – 21.

⁶⁷⁶ Chi (2018) 21.

⁶⁷⁷ Chi (2018) 20 – 21.

⁶⁷⁸ Chi (2018) 21.

Sustainable development provisions can also be procedural, influencing the rules governing IATs. Recent IIA policy formulations indicate that governments are increasingly creating agreements that clarify the scope of treaties or the meaning of specific obligations to preserve their regulatory rights.⁶⁷⁹ This initiative helps to narrow down the interpretation of certain provisions, acting as a guide for arbitrators.⁶⁸⁰

International organisations have also played a role in shaping future global IIA policymaking. For instance, UNCTAD, a leading organisation in promoting sustainable development, especially in developing countries, published the Investment Policy Framework for Sustainable Development (IPFSD) in 2012, and a revised version in 2015.⁶⁸¹ The IPFSD offers policy suggestions and design criteria to mainstream sustainable development into IIA policymaking, while balancing sound development-oriented investment policies.⁶⁸²

Similarly, in August 2012, the Commonwealth Secretariat issued IIA policymaking guidelines for the developing country members of the Commonwealth (Commonwealth Guide).⁶⁸³ These guidelines were designed to ‘assist developing countries to negotiate IIAs that do a better job of promoting their sustainable development’.⁶⁸⁴ The Guide explains how IIAs:⁶⁸⁵

... can increase foreign investment flows into developing countries and addresses how these agreements can support the efforts of host countries to regulate foreign investment inflows in order to ensure that they contribute to sustainable development.

The Guide also identifies emerging best practices in existing agreements, suggests new and innovative provisions, acts as a source for developing country negotiations and describes how states can achieve coherence among their IIAs.⁶⁸⁶

Regional efforts have also been made to guide Member States in reforming their national model investment treaties in a sustainable manner. In Africa, the SADC developed a Model

⁶⁷⁹ UNCTAD ‘Review of ISDS Decisions in 2019: Selected IIA Reform Issues’ *IIA Issues Note* January 2021, 1.

⁶⁸⁰ UNCTAD ‘Review of ISDS Decisions in 2019: Selected IIA Reform Issues’ (2021) 1 *IIA Issues Note* 1.

⁶⁸¹ UNCTAD *investment policy framework for sustainable development (IPFSD)* (2015).

⁶⁸² UNCTAD *IPFSD* (2015) 25.

⁶⁸³ VanDuzer *et al* (2013).

⁶⁸⁴ VanDuzer *et al* (2013) 2.

⁶⁸⁵ VanDuzer *et al* (2013) 2.

⁶⁸⁶ VanDuzer *et al* (2013) 2.

BIT in 2012 to harmonise Member States' investment policies and laws,⁶⁸⁷ with an emphasis on promoting sustainable development through foreign investment governance.⁶⁸⁸ The EAC adopted a similar Treaty in 2016, recognising the importance of investment in sustainable development and aiming to enhance investment opportunities that contribute to this goal.⁶⁸⁹

The AfCFTA Protocol on Investment, which was recently adopted, contains provisions relating to sustainable development. Member States are required to review and revise their existing regional investment agreements and consider the Protocol when negotiating new IIAs and reviewing existing ones with Third Parties.⁶⁹⁰ At a plurilateral level, several WTO Member States have compiled a draft IFD Agreement.⁶⁹¹

The IFD Agreement aims to enhance transparency, streamline administrative procedures, adopt investment facilitation measures and promote international cooperation to increase FDI flows, especially to developing and least-developed countries, with a focus on fostering sustainable development.⁶⁹² All these efforts are intended to place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment.⁶⁹³

2.4. Conclusion

Chapter Two traced the historical evolution of IIL by examining three fundamental aspects of global investment – the treatment and protection of FDI and the dispute settlement mechanism associated with it. The analysis revealed how foundational principles from the Colonial and Post-Colonial Eras, such as territorial sovereignty and nationality, influenced early approaches to foreign investments.

It revealed that the Colonial era established the foundational principles of international investment law, which were heavily influenced by the interests of European powers and their

⁶⁸⁷ SADC Model Bilateral Investment Treaty Template with commentary (2012) 3.

⁶⁸⁸ Preamble of the SADC Model BIT Template with Commentary (2012), available at <https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> (accessed 10 March 2020).

⁶⁸⁹ EAC Model Investment Treaty (2016) preamble.

⁶⁹⁰ AfCFTA Protocol on Investment (2023) art 49(3) – (4).

⁶⁹¹ IFD Agreement (2024).

⁶⁹² IFD Agreement (2024) art 1.

⁶⁹³ UNCTAD *WIR* (2012) XII.

colonial ambitions. These principles, particularly that of nationality, allowed European powers to impose their legal standards on colonies, often disregarding the local laws and sovereignty of those territories.

However, as decolonisation efforts gained momentum, the inadequacies of the nationality principle particularly in Latin American countries, became evident as those countries began to gain independence, leading to a shift towards new methods for regulating foreign investments in developing, newly independent countries. Conversely, countries that escaped colonialism adhered to the sovereignty principle asserting that foreign investment was subject to their domestic laws.

The Post-Colonial Era marked a transition from the dominance of colonial powers to the emergence of newly independent countries asserting their sovereignty. The limitations of CIL and diplomatic protection, which had been cornerstones of the colonial investment regime, were exposed, prompting the search for alternative investment frameworks that could balance the interests of both foreign investors and host-countries.

The failure of the Havana Charter and decline of FCNs underscored the need for more robust frameworks, particularly in the context of developing countries. The creation of the first BIT in 1959 between Germany and Pakistan signalled the beginning of the IIA policymaking eras – Infancy, Dichotomy, Proliferation and Re-orientation. BITs in the Infancy Era primarily focused on protecting investments against expropriation and provided for dispute settlement through SSDS.

The Dichotomy Era marked a shift towards BITs as key tools for regulating foreign investments, particularly after the Cold War, with developing countries beginning to adopt principles similar to the Hull Rule, which emphasised prompt and adequate compensation for expropriation. This Era also witnessed the emergence of ISDS provisions and a contrast between the roles of developed and developing countries in BIT formulation, with the majority of BITs being North-South.

The Proliferation Era was characterised by a surge in the number and complexity of BITs, driven by the increasing importance of FDI for economic development particularly in

developing countries and supported by various international organisations. This period also witnessed a surge in South-South IIAs, a revival of RECs, an increase in ISDS cases primarily brought by investors from developed countries against developing countries and a re-evaluation of existing BITs in response to global financial crises and sustainability concerns.

Finally, the Re-orientation Era, shaped by global dynamics and events such as the 2006 financial crisis and the COVID-19 pandemic, led to a focus on integrating SDGs into IIAs and promoting sustainable investments. This era witnessed an emergence of regional and plurilateral agreements as well as regional model investment treaties aimed at promoting and facilitating sustainable investment such as the AfCFTA Protocol on Investment and the WTO's IFD Agreement as well as the SADC and EAC model investment treaties.

The Re-orientation Era also saw a growing dissatisfaction with the IIA regime, resulting in the termination and renegotiation of treaties, with some countries denouncing arbitration forums like ICSID and others limiting investor access to such forums subject to exhausting domestic remedies. Chapter Two also examined key shortcomings of the current IIA regime, particularly issues with the ISDS mechanism, the balance between investor rights and State obligations limitations on the right to regulate in the public interest and the development dimension of old-IIAs.

The Chapter found that the ISDS mechanism was criticised for its high costs, lack of arbitrator independence, inconsistent awards, treaty shopping, legitimacy and transparency issues. It further highlighted the tension between investor protection and the right of host-countries' to regulate in the public interest, noting that ISDS mechanisms often favoured foreign investors without considering the economic circumstances of the host-country.

The chapter also explored the relationship between IIAs and economic development and found that older IIAs, which primarily focused on investment protection, lacked explicit commitments to development, leading to potentially detrimental side-effects for developing country economies when ISDS cases arise. It revealed that while old-BITs aimed to protect foreign investments, they potentially limited a country's regulatory sovereignty and hindered its pursuit of not only economic, but sustainable development objectives.

Lastly, the integration of sustainable development into IIAs and its evolution within IIL was also analysed. It traced the concept of sustainable development from its initial mention in the 1987 Brundtland Report to its inclusion in global development agendas like the MDGs, the Doha Declaration, Agendas 2030 and 2063, emphasising the role of investment in achieving SDGs.

Chapter Two highlighted the shift in IIAs from prioritising economic development to integrating sustainable development objectives and a growing recognition of the need to balance foreign investment protection with sustainable development concerns, leading to reforms and the adoption of specific provisions, policies and guidelines at various levels. It also revealed that at regional level, RECs such as SADC and EAC have developed model investment treaties to promote sustainable development.

Additionally, the recently adopted continental AfCFTA Protocol on Investment emphasises the importance of considering sustainable development in IIAs, while the WTO's recently drafted plurilateral IFD Agreement, aims to promote, facilitate and foster sustainable investment. The next chapter analyses Uganda's FDI regime from the post-independence era to the present, focusing on the key laws and regulations governing FDI at the national, regional, and multilateral levels. It evaluates how these legal frameworks promote and protect foreign investments, assessing both the substantive protections for investors and the procedural mechanisms for dispute resolution.

Additionally, the chapter explores whether Uganda's FDI regime supports sustainable development, setting the foundation for later discussions on the implications of FDI policies for broader economic and sustainable development goals and highlighting the need for reform in its BIT system.

Chapter Three: Analysis of Uganda's foreign direct investment regime

3. Introduction

In recent years, African governments, including Uganda, have increasingly recognised the importance of foreign direct investment (FDI) in driving economic development. To enhance its investment landscape, Uganda has implemented various laws and policies aimed at attracting and regulating FDI while aligning with regional and global sustainable development objectives under various frameworks including those under the United Nations (UN) and the African Union (AU).¹

For instance, at the national level, Uganda introduced the National Investment Policy (NIP) in 2018, outlining principles such as policy coherence, return on investment, risk management, balanced rights and obligations, the right to regulate, equity and fairness, and sustainable development.² This policy framework is designed to guide investment management in the country.³ Additionally, the 2019 Investment Code Act (ICA - 19) replaced the 1991 Act,⁴ modernising Uganda's investment framework and expanding the Uganda Investment Authority's (UIA) role as a one-stop shop for all investment matters.⁵

Historically Uganda's investment climate was marred by the 1972 expulsion of over 50 000 Asians and the expropriation of their businesses under President Idi Amin's regime in what has become known as the 'Economic War of 1972'.⁶ However, the 1980s marked a turning point as President Yoweri Museveni's government worked to restore investor confidence,

¹ United Nations (UN) 'Transforming Our World: The 2030 Agenda for Sustainable Development' (2015) A/RES/70/1 (Agenda 2030); African Union (AU) 'Agenda 2063: The Africa We Want' (Agenda 2063).

² Uganda draft National Investment Policy (NIP) of 2018 IX.

³ Uganda NIP (2018) IX.

⁴ Uganda Investment Code Act of 1991 (ICA – 91).

⁵ Uganda Investment Code Act of 2019 (ICA – 19) short title.

⁶ MB Obwona MB 'Determinants of Foreign Direct Investments and their Impact on Economic Growth in Uganda' (1998) 1 *Les Cahiers du SISERA Working Paper Series* 8; MB Obwona 'Determinants of Foreign Direct Investments and their Impact on Economic Growth in Uganda' (2001) *African Development Bank* 48.

including compensating those affected by the past expropriations,⁷ promoting and incentivising investment in various sectors to encourage FDI flows.⁸

To date, Uganda boasts a liberalised investment environment and has become one of the top investment destinations in Sub-Saharan Africa.⁹ Its legal and regulatory investment framework is considered overly conducive compared to other East African countries.¹⁰ This framework is further bolstered by Uganda's participation in regional economic communities (RECs) such as the AU, the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC).

Uganda's commitment to treaties with investment provisions (TIPs) such as the Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (AfCFTA Protocol on Investment or the Protocol) – which has been adopted but is yet to be ratified,¹¹ the COMESA Common Investment Agreement (CCIA), and the World Trade Organization's (WTO) multilateral Agreement on Trade-Related Investment Measures (TRIMs).

Additionally, Uganda participated in the drafting of the WTO's plurilateral Investment Facilitation for Development (IFD) Agreement, which was finalised at the end of 2023 but is yet to be adopted by the country. The IFD Agreement aims to improve transparency of measures, streamline administrative procedures, adopt other investment facilitation measures and promote international cooperation, as a means of facilitating the flow of FDI between Parties, particularly to least-developed countries, with the goal of fostering sustainable development.¹²

Uganda is also a member of several dispute settlement and investment insurance fora including the Convention on the Settlement of Investment Disputes between States and

⁷ AK Hundle 'Insecurities of Expulsion: Emergent Citizenship Formations and Political Practices in Postcolonial Uganda' (2019) *Comparative Studies of South Asia, Africa and the Middle East* 12; World Trade Organization (WTO) 'Trade Policy Review: Uganda – Report by the Secretariat' (30 June 1995) WT/TPR/S/4, 28.

⁸ Uganda Investment Authority (UIA) *Annual Investment Abstract FY 2019 – 2020* (2020) 15; Obwona (2001) 47.

⁹ UNCTAD *World Investment Report (WIR) 2024: Investment facilitation and digital government* (2024)

¹⁰ Obwona (2001) 47.

¹¹ Protocol to the Agreement Establishing the African Continental Free trade Area on Investment (2023 Draft) STC/Legal/Exp.

¹² Ministerial Declaration on the Investment Facilitation for Development Agreement (IFD Agreement) WT/MIN(24)/7, art 1.

Nationals of Other States (ICSID Convention), the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Multilateral Investment Guarantee Agency (MIGA), which provide legal protections, ensuring enforceability of arbitration awards and mitigating political risks. It also enacted the Arbitration and Conciliation Act, which applies to domestic and international arbitration.¹³

This chapter will begin with an overview of Uganda's FDI regime in the post-independence era, providing a foundational understanding of the country's historical approach to FDI. It will explore the initial policies and regulations that shaped Uganda's investment landscape, tracing the evolution of its legal and institutional frameworks, to identify the factors that influenced Uganda's investment climate, including political changes, economic strategies and global trends.

This historical context will pave the way for a more detailed analysis of Uganda's current FDI regime, with a focus on key national, regional and international legal frameworks governing investment in Uganda. This chapter will also determine whether and to what extent these frameworks integrate sustainable development objectives, ultimately determining whether Uganda's existing legal investment structures are sufficient for regulating and protecting FDI and whether they justify the need for a bilateral investment treaty (BIT) system.

3.1. Historical overview of Uganda's FDI regime in the post-independence era

Uganda's post-independence FDI regime will be divided into two sections. The first examines the FDI regime from 1962, when it gained independence, to 1986. During this period, Uganda was governed by several presidents, including Sir Edward Mutesa II, Dr Milton Obote (twice) and General Idi Amin, all of whom had different approaches to the regulation of foreign investment in Uganda.

The second examines the FDI regime from 1986 onwards, when President Yoweri Kaguta Museveni took office. It also highlights how FDI regulation has evolved under his presidency

¹³ Uganda Arbitration and Conciliation Act (ACA) of 2000 sec 1.

and how his government's investment policy measures have impacted on Uganda's overall FDI regime.

3.1.1. Sir Edward Mutesa II era (1963 – 1966)

As a British protectorate, Uganda typically received its developmental finance from the British Government.¹⁴ In 1961, the then-King of the Buganda Kingdom, Sir Edward Mutesa II, formed an alliance between his Kabaka Yekka group and the Uganda People's Congress (UPC), which was led by Dr Milton Obote.¹⁵ This coalition led to independence elections, which ultimately ended British rule and led to Uganda's independence on 9 October 1962.¹⁶

In 1963, Mutesa II became the first President of Uganda, but had mostly ceremonial powers,¹⁷ while real political power rested with Prime Minister Obote.¹⁸ The early years of independence were marked by stability and economic progress.¹⁹ One of the significant legal developments during this period was the enactment of the Uganda Industrial Act of 1963, which focused on promoting both foreign and domestic investments.²⁰

This development was part of a broader strategy to seek alternative sources of foreign capital in the form of FDI and Official Development Assistance (ODAs) programs.²¹ Uganda's early economic development benefited from pre-independence infrastructure established under the British Colonial Development and Welfare Act of 1940, which had been amended in

¹⁴ S Sejjaaka 'A political and economic history of Uganda, 1962 – 2002' in F Bird & SW Herman (eds) *International businesses and the challenges of poverty in the developing world: case studies on global responsibilities and practices* (2004) 98.

¹⁵ MS Ulriksen & MW Katusiimeh 'The History of Resource Mobilization and Social Spending in Uganda' (2014) 6 UN Research Institute for Social Development Working Paper 1 available at [https://www.unrisd.org/80256B3C005BCCF9/%28httpAuxPages%29/BA1DCD92EA5EBF1EC1257CA0004E00B2/\\$file/Ulriksen%20and%20Katusiimeh.pdf](https://www.unrisd.org/80256B3C005BCCF9/%28httpAuxPages%29/BA1DCD92EA5EBF1EC1257CA0004E00B2/$file/Ulriksen%20and%20Katusiimeh.pdf) (accessed 14 July 2021).

¹⁶ Uganda State House, 'President Sir Edward Muteesa II' available at <https://statehouse.go.ug/the-state-house/past-presidents/president-sir-edward-luwangula-walugembe-muteesa-ii/> (accessed 2 August 2024).

¹⁷ Ulriksen & Katusiimeh (2014) 9.

¹⁸ 'Ugandan premier Apollo Milton Obote is shot' *South African History Online* 19 December 1969 available at <https://www.sahistory.org.za/dated-event/ugandan-premier-apollo-milton-obote-shot> (accessed 10 March 2023).

¹⁹ 'Ugandan premier Apollo Milton Obote is shot' *South African History Online* 19 December 1969 available at <https://www.sahistory.org.za/dated-event/ugandan-premier-apollo-milton-obote-shot> (accessed 10 March 2023).

²⁰ Obwona (2001) 49.

²¹ MB Obwona, I Shinyekwa, J Kiiza & E Hisali 'The evolution of industry in Uganda' *Learning to compete* Working Paper 1 – 3 available from https://www.brookings.edu/wp-content/uploads/2016/07/L2C_WP9_Obwona-et-al.pdf (accessed 14 July 2021).

1945.²² Despite being designed to assist Britain's post-World War II (WWII) recovery, the Act also facilitated £120 million for the development of resources in its colonies.²³

Uganda already had a culture of co-ordinated industrial development through strategic partnerships,²⁴ but remained uncertain of which developmental priorities to pursue after independence. This resulted in the adoption of a five-year national development plan (NDP): 1961/62 – 1965/66, which was influenced by the World Bank Mission Report of 1962.²⁵ This Plan emphasised the importance of agricultural development.²⁶

Nonetheless, Uganda's economy at the time was primarily based on agriculture, with coffee and cotton as the main cash crops,²⁷ as the mining and industry sectors begun to gain significant traction in the economy.²⁸ However, most of its products were exported, primarily as raw materials, with very little to no value addition.²⁹ The Plan also led to the construction of rural hospitals, schools, bore-holes, roads and other necessary infrastructure.³⁰

Internationally, Uganda took significant steps to integrate into the global economy. On 23 October 1962, 14 days after its independence, It became a Member of the 1947 General Agreement on Tariffs and Trade (GATT)³¹ and shortly after, joined the International Bank for Reconstruction and Development (IBRD) on 27 September 1963.³² On 7 June 1966, it ratified the International Convention on the Settlement of Investment Disputes (ICSID Convention),

²² Colonial Development and Welfare Act of 1940.

²³ Colonial Development and Welfare Act (1940) sec 1(1); Interestingly, the bulk of development 'aid' for manufacturing in Uganda came from the surpluses accumulated by the colonial produce marketing boards. By 9 December 1950, these surpluses, which essentially accrued to the cotton (and later, coffee) growers of Uganda, amounted to £129.6 million (Uganda Herald, 9 December 1950: 4) – Obwona *et al* 1 – 3 available from https://www.brookings.edu/wp-content/uploads/2016/07/L2C_WP9_Obwona-et-al.pdf (accessed 14 July 2021); W Kaberuka 'Uganda's 1946 Colonial Development Plan: An appraisal (1987) 16 *Trans African Journal of History* 185.

²⁴ Obwona *et al* 3 available from https://www.brookings.edu/wp-content/uploads/2016/07/L2C_WP9_Obwona-et-al.pdf (accessed 14 July 2021).

²⁵ International Bank for Reconstruction and Development (World Bank) *Eighteenth Annual Report 1962-1963* (1963) 10894; Obwona *et al* 2.

²⁶ Obwona *et al* 2, 4.

²⁷ Obwona *et al* 1 – 3.

²⁸ Obwona *et al* 3.

²⁹ ²⁹ Obwona *et al* 3 – 4.

³⁰ Obwona *et al* 2, 4.

³¹ WTO 'Uganda and the WTO' available at https://www.wto.org/english/thewto_e/Constitution_of_Ugandantries_e/uganda_e.htm#:~:text=Uganda%20has%20been%20a%20WTO,GATT%20since%2023%20October%201962. (accessed 10 March 2023).

³² 'Member Countries' available at <https://www.worldbank.org/en/about/leadership/members#ibrd> (10 May 2023).

which provided a framework for resolving disputes between foreign investors and host-countries.³³

Uganda also signed its first BIT with Germany in 1966, which came into force on 19 August 1968.³⁴ However, political and economic stability was short-lived as tensions between the UPC and Kabaka Yekka groups escalated, leading Obote to stage a *coup d'état*.³⁵ He overthrew President Mutesa II, effectively dismantling the Buganda Kingdom and forcing the former President into exile.³⁶

This *coup* allowed Obote to consolidate power and become Uganda's second President, a position he held until 1971.³⁷ Despite initial economic stability, these political upheavals marked the beginning of a period of instability that would have long-lasting effects on Uganda's investment climate and overall governance.

3.1.2. Milton Obote (I) era (1966 - 1971)

When Obote came into power, his administration embraced socialist ideas, focusing on acquiring stakes in key Ugandan companies, many of which belonged to European and Asian capitalists.³⁸ This approach was formalised through the 1970 Nakivubo Pronouncement,³⁹ which allowed the Government of Uganda (GOU) to take 60 per cent interest in over 80 Ugandan corporations.⁴⁰

While this move fell short of total nationalisation, it significantly altered the investment landscape in Uganda by asserting State control over major industries.⁴¹ However, the

³³ 'Member countries' available at <https://www.worldbank.org/en/about/leadership/members#ibrd> (10 May 2023); ICSID, 'Database of ICSID Member States' available at <https://icsid.worldbank.org/about/member-states/database-of-member-states> (10 May 2023); ICSID Convention (1965) art 1(2).

³⁴ Germany – Uganda BIT (1966).

³⁵ Ulriksen & Katusiimeh (2014) 1.

³⁶ Ulriksen & Katusiimeh (2014) 1.

³⁷ South African History Online, 'Ugandan premier Apollo Milton Obote is shot' available at <https://www.sahistory.org.za/dated-event/ugandan-premier-apollo-milton-obote-shot> (10 May 2023).

³⁸ Obwona (2001) 50; South African History Online, 'Ugandan premier Apollo Milton Obote is shot' available at <https://www.sahistory.org.za/dated-event/ugandan-premier-apollo-milton-obote-shot> (10 May 2023); G Glentworth & I Hancock, 'Obote and Amin: Change and Continuity in Modern Uganda Politics' (1973) *African Affairs* 244.

³⁹ The Nakivubo Pronouncements were published in consolidated form in June 1970; AM Obote 'The Common Man's Charter with appendices' (1970).

⁴⁰ Obwona (2001) 50; Glentworth & Hancock (1973) 244.

⁴¹ Obwona (2001) 50.

Nakivubo Pronouncement eventually failed to achieve the intended socialist transformation.⁴² Despite his socialist ideals, Obote recognised the importance of FDI, skills and technical assistance for Uganda's development.⁴³

This pragmatism led him to sign Uganda's second BIT with Netherlands on 24 March 1970, although the treaty never came into force.⁴⁴ Uganda's political environment deteriorated under Obote's rule, marked by violence, civil war and *coups*.⁴⁵ He himself was ousted by General Idi Amin Dada in a *coup d'état*, while attending the Commonwealth Heads of State meeting in Singapore in 1971.⁴⁶

3.1.3. Idi Amin era (1971 – 1979)

The investment climate under Idi Amin's regime became extremely hostile toward foreign investors.⁴⁷ Upon assuming power, Amin suspended the 1967 Constitution, declared himself President,⁴⁸ and revoked the 1970 Nakivubo Pronouncement, which had allowed for State control of key companies.⁴⁹ He claimed that Asians with British passports were sabotaging Uganda's economy and encouraging corruption,⁵⁰ and in 1972, issued a formal decree revoking their entry permits and certificates, leading to the 'Economic War'.⁵¹

⁴² J Russell & R Cohn *Nakivubo Pronouncement* (2012).

⁴³ Glentworth & Hancock (1973) 245.

⁴⁴ Netherlands – Uganda BIT (1971).

⁴⁵ Wakyereza (2017) 36.

⁴⁶ Ulriksen & Katusiimeh (2014) 1; Glentworth & Hancock (1973) 250.

⁴⁷ Obwona (2001) 50.

⁴⁸ 'Idi Amin' available at <https://www.history.com/topics/africa/idi-amin> (accessed 10 June 2020).

⁴⁹ Obwona (2001) 50.

⁵⁰ A Patel 'Idi Amin: The Expulsion of South Asians from Uganda' (2017) *Manchester Historian* available at <https://manchesterhistorian.com/2017/idi-amin-the-expulsion-of-south-asians-from-uganda/> (accessed 10 October 2021).

⁵¹ 'Asians' included people from Bangladesh, India and Pakistan - International Commission of jurists *Violations of human rights and the rule of law in Uganda* (1974) 3; Uganda: Presidential Decrees on the Expulsion of Asians (1972) The Immigration (Cancellation of Entry Permits and Certificates of Residence) Decree, sec 1; available at <https://www-jstor-org.uplib.idm.oclc.org/stable/20691015> (10 May 2023); Uganda: Presidential Decrees On The Expulsion Of Asians (November 1972) 11 *International Legal Materials* 1389.

This decree also gave Asians 90 days to leave the country⁵² and ordered the relevant Minister to start selling shops that belonged to Asians, effectively expropriating their properties.⁵³ As such, more than 30 foreign enterprises were expropriated⁵⁴ despite the existence of the Foreign Investment Protection (FIP) Act of 1964, which was supposed to protect foreign investments.⁵⁵

Amin's actions resulted in widespread nationalisation and expropriation of foreign properties and businesses, severely damaging investor confidence.⁵⁶ The investment climate was further destabilised by political unrest and insecurity, the collapse of the EAC in 1977 and the requirement that foreign investors had to become naturalised Ugandans to conduct business.⁵⁷

The regime was also characterised by smuggling, unregulated money inflows, balance of payment problems and high inflation,⁵⁸ leading to the collapse of industrial and commercial sectors, commodity shortages and price hikes.⁵⁹ Uganda also faced a lack of foreign exchange, was not credit worthy and suffered international sanctions imposed since 1972, which further deteriorated the economy.⁶⁰

Recognising the dire economic situation, the Ugandan government attempted to revive FDI by enacting the Foreign Investment Decree,⁶¹ which exempted foreign investors from import duties and sales taxes on plant and machinery for approved enterprises.⁶² The GOU also

⁵² 'Violations of human rights and the rule of law in Uganda' (1974) A study by the International Commission of jurists 3; Uganda: Presidential Decrees on the Expulsion of Asians (1972) The Immigration (Cancellation of Entry Permits and Certificates of Residence) Decree, sec 2(3) available at <https://www-jstor-org.uplib.idm.oclc.org/stable/20691015> (10 May 2023); Uganda: Presidential Decrees On The Expulsion Of Asians (November 1972) 11 *International Legal Materials* 1390.

⁵³ 'Violations of human rights and the rule of law in Uganda' (1974) A study by the International Commission of jurists 3.

⁵⁴ C Lipson *Standing guard: Protecting foreign capital in the Nineteenth and Twentieth Centuries* (1985) 110.

⁵⁵ Uganda Foreign Investments Protection (FIP) Act of 1964 available at <https://www-jstor-org.uplib.idm.oclc.org/stable/20689836> (accessed 10 May 2023); Uganda FIP Act (1964) preamble; FIP Act (1964) sec 1(1); Obwona (2001) 49.

⁵⁶ Obwona (2001) 49.

⁵⁷ Obwona (2001) 50; East African Legislative Assembly 'Facts and figures' available at <https://www.eala.org/about/category/facts-and-figures> (accessed 10 August 2023).

⁵⁸ Ulriksen & Katusiimeh (2014) 2.

⁵⁹ Obwona (2001) 50.

⁶⁰ Obwona (2001) 50; R Nurnberger 'Why sanctions (almost) never work' (2003) *The International Economy* 72.

⁶¹ Uganda Foreign Investment Decree of 1977.

⁶² Obwona (2001) 50.

started borrowing from international lenders to finance its development plans, leading to heavy indebtedness.⁶³

However, these efforts were largely unsuccessful as foreign investors were reluctant to risk investing in the country due to Amin's unpredictable and hostile regime, which had effectively outlawed FDI in Uganda.⁶⁴ Moreover, the overvaluation of Uganda's currency and strict rationing of official foreign exchange further discouraged FDI.⁶⁵ Only the Swiss – Uganda BIT was signed during his reign, which came into force on 8 May 1972.⁶⁶

In 1979, Idi Amin was defeated by the Tanzanians as several exile groups after he attacked and captured the Kagera Salient in Tanzania, leading to his exile into Libya and later Saudi Arabia, where he died in 2003.⁶⁷ Ultimately, Amin's regime made no meaningful reforms to promote FDI and his actions throughout his reign created a toxic environment for foreign investors in Uganda.⁶⁸

After Idi Amin went into exile, President Yusuf Kironde Lule succeeded him, serving the shortest time in Uganda's history – just two months and eight days, from 13 April 1979 – 20 June 1979.⁶⁹ He was then succeeded by Godfrey Binaisa who held presidency from 20 June 1979 – 12 May 1980.⁷⁰ Due to the brief duration of their terms, their governance had minimal impact on the regulation of foreign investment and will not be discussed further here.

3.1.4. Milton Obote (II) era (1980 - 1985)

Former President Milton Obote returned as President of Uganda after winning the elections, effectively returning democracy back into Uganda. However, the country faced significant challenges in repairing the reputational and economic damage as well as the poor foreign investment image left by Idi Amin's regime. The international sanctions imposed during

⁶³ Obwona *et al* 2; Obwona (2001) 50 – 51.

⁶⁴ Obwona *et al* 2; Obwona (2001) 50 – 51.

⁶⁵ Obwona (2001) 51.

⁶⁶ Swiss – Uganda BIT (1971)

⁶⁷ Uganda State House, 'President Idi amin Dada' available at <https://statehouse.go.ug/the-state-house/past-presidents/president-idi-amin-dada-field-marshal/> (accessed 9 August 2024).

⁶⁸ Obwona (2001) 50.

⁶⁹ Uganda State House, 'President Yusuf Kironde Lule' available at <https://statehouse.go.ug/the-state-house/past-presidents/president-yusuf-kironde-lule/> (accessed 9 August 2024).

⁷⁰ Uganda State House, 'President Godfrey Lukongwa Binaisa' available at <https://statehouse.go.ug/the-state-house/past-presidents/president-godfrey-lukongwa-binaisa/> (accessed 9 August 2024).

Amin's rule had resulted in the closure of Uganda's borders, disrupting trade and causing many industries to shut down, resulting in severe commodity shortages.⁷¹

Although Obote's second regime was relatively peaceful, it did not bring about significant economic improvement, as FDI continued to elude the country.⁷² From 1981 to 1985, Uganda's ratio of FDI to gross fixed capital, which measured the importance of FDI inflows to the economy, was -0.2 per cent, a stark contrast to the 2.3 per cent average for other LDCs in Africa during the same period.⁷³

Additionally, Uganda's GDP per capita had declined by approximately 40 per cent between 1971 and 1986.⁷⁴ Despite the setbacks, Obote's government made several attempts to encourage foreign investors back into the country, including by signing TIPs like the Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (OIC Investment Agreement) in 1981, which came into force after his regime in 1988.⁷⁵

In 1983, Obote's government also enacted the Expropriated Properties Act,⁷⁶ which aimed to return the properties expropriated by Idi Amin's back to their original Asian owners or compensate them accordingly.⁷⁷ The Act, however, was not implemented until 1990 by a subsequent government. Political instability resurfaced shortly after Obote's return to power, leading to another *coup d'état*.⁷⁸

General Tito Okello Lutwa briefly took control as President after Obote (II) for only 181 days before being overthrown in yet another *coup d'état* by the National Resistance Movement

⁷¹ Wakyereza (2017) 39.

⁷² Obwona (2001) 51.

⁷³ EH Fry *The Politics of International Investment* (1983).

⁷⁴ P Collier 'The Challenge of Ugandan Reconstruction, 1986-98' (1999) *World Bank* 6.

⁷⁵ UNCTAD 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2399/download> (accessed 20 June 2021).

⁷⁶ Uganda Expropriated Properties Act of 1983.

⁷⁷ Uganda Expropriated Properties Act of 1983 short title; Obwona (2001) 51.

⁷⁸ Uganda State House 'President Apollo Milton Obote' available at <https://statehouse.go.ug/the-state-house/past-presidents/president-apollo-milton-obote/> (accessed 8 August 2024).

(NRM) led by Yoweri Kaguta Museveni in 1985, who has remained president of Uganda for over 36 years.⁷⁹

3.1.5. Yoweri Kaguta Museveni era (1986 – to date)

When President Museveni came into power in 1986, Uganda's FDI regime was ineffective, almost non-existent and with an extremely damaged reputation. It was severely weakened and lacked credibility, largely due to the damage inflicted by Idi Amin's regime and subsequent unstable presidencies as well as civil war, mass emigration of skilled workers and mass murder.⁸⁰

To reverse this, Museveni's government made extensive and sustained economic reforms, which were implemented with the support of the International Monetary Fund (IMF) and the World Bank.⁸¹ Among these, was the introduction of the Economic Recovery Program (ERP) in 1987,⁸² which was implemented through the introduction of the Poverty Eradication Action Plan (PEAP).⁸³

The PEAP consisted of five pillars, including economic management; enhanced production, competitiveness and income; security conflict resolution and disaster management; good governance; and human development.⁸⁴ It aimed to reduce poverty through accelerated economic growth and development.⁸⁵ As part of the social dimensions' adjustment package, the GOU adopted several monetary and fiscal measures to make the UGX realistic.⁸⁶

⁷⁹ Wakyereza (2017) 40.

⁸⁰ Collier (1999) 2.

⁸¹ Wakyereza (2017) 40.

⁸² Wakyereza (2017) 40; W Kishamba-Kugerwa 'Poverty and Poverty Alleviation Programmes: The Experience of Uganda' available at <https://core.ac.uk/download/pdf/29136337.pdf> (accessed 20 July 2021).

⁸³ Wakyereza (2017) 40.

⁸⁴ Wakyereza (2017) 40.

⁸⁵ RKS Wakyereza 'The impact of foreign direct investment on economic growth, employment and poverty reduction in Uganda' (2017) unpublished PhD from Victoria University, Melbourne Australia 40; W Kishamba-Kugerwa 'Poverty and Poverty Alleviation Programmes: The Experience of Uganda' ii available at <https://core.ac.uk/download/pdf/29136337.pdf> (accessed 20 July 2021).

⁸⁶ W Kishamba-Kugerwa 'Poverty and Poverty Alleviation Programmes: The Experience of Uganda' ii available at <https://core.ac.uk/download/pdf/29136337.pdf> (accessed 20 July 2021).

The government also offered incentives to farmers to produce more cash crops through attractive pricing for their produce and introduced liberal marketing policies,⁸⁷ eased foreign exchange control regulations, launched civil servants' retrenchment schemes⁸⁸ and adjusted the national budgetary allocation to social services to make Uganda's investment environment more attractive to foreign investors.⁸⁹ Additional efforts were also made to spur private investment.⁹⁰

A significant milestone was the enactment of the Investment Code Act, 1991 (ICA-91) to regulate both domestic and foreign investments in the country.⁹¹ The Act established an investment promotion agency (IPA) – the Uganda Investment Authority (UIA),⁹² promoted investment, offering favourable conditions for investors, introduced a general set of incentives and guaranteed profit repatriation and protection against expropriation.⁹³

Under the ICA-91, the UIA was tasked with, *inter alia*, promoting, facilitating and supervising investments in Uganda; receiving investment applications; and supervising the implementation of the ICA-91.⁹⁴ This legal framework was updated in 2019 with a new Investment Code Act of 2019 (ICA - 19) to better align with Uganda's amended Constitution and contemporary economic needs.⁹⁵

Museveni's administration also established the Departed Asians' Property Custodian Board (DAPCB), which was tasked with returning properties expropriated during Amin's regime back to their original Asian owners in accordance with the Expropriated Properties Act of 1983.⁹⁶ Additionally, his administration sought to reintegrate Uganda into the global economy through treaties, including IIAs, multilateral and regional agreements.

⁸⁷ W Kishamba-Kugerwa 'Poverty and Poverty Alleviation Programmes: The Experience of Uganda' ii available at <https://core.ac.uk/download/pdf/29136337.pdf> (accessed 20 July 2021).

⁸⁸ W Kishamba-Kugerwa 'Poverty and Poverty Alleviation Programmes: The Experience of Uganda' ii available at <https://core.ac.uk/download/pdf/29136337.pdf> (accessed 20 July 2021).

⁸⁹ W Kishamba-Kugerwa 'Poverty and Poverty Alleviation Programmes: The Experience of Uganda' ii available at <https://core.ac.uk/download/pdf/29136337.pdf> (accessed 20 July 2021)..

⁹⁰ Wakyereza (2017) 40.

⁹¹ Uganda ICA – 91 (1991).

⁹² Uganda ICA – 91 (1991) sec 2.

⁹³ WTO 'Trade Policy Review: Uganda – Report by the Secretariat' (30 June 1995) WT/TPR/S/4, 28.

⁹⁴ Uganda ICA – 91 (1991) sec 6.

⁹⁵ Uganda Investment Code Act of 2019 (ICA – 19) short title.

⁹⁶ WTO *Trade Policy Review: Uganda – Report by the Secretariat* (1995) WT/TPR/S/4, 28.

For instance, Uganda signed the COMESA Treaty in 1993, which came into force in 1994.⁹⁷ This Treaty aimed to achieve sustainable development in the region and required Member States to, *inter alia*, co-operate in creating an enabling environment for foreign, cross border and domestic investment.⁹⁸ This resulted in the adoption of the CCIA by COMESA Heads of State in 2007, to establish a stable regional environment that fosters favourable investment conditions, promotes and protects foreign investment and enhances FDI flows to the region.⁹⁹

Furthermore, in 1999, the EAC was re-established and its Treaty signed by its original members – Uganda, Tanzania and Kenya, which came into force in 2000.¹⁰⁰ EAC Member States agreed to create enabling environments to attract investments, allow the private sector and civil society to play a role in socio-economic development activities¹⁰¹ and co-operate in investment development by harmonising and rationalising investment incentives.¹⁰²

At a multilateral level, on 2 February 1992, Uganda ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and acceded to it 10 days later, on 12 February 1992.¹⁰³ This Convention facilitates the recognition and enforcement of arbitration agreements and foreign arbitration awards.¹⁰⁴ This Convention is especially important for enforcing ISDS awards.

⁹⁷ COMESA 'What is COMESA: COMESA Objectives and Priorities' available at <https://www.comesa.int/what-is-comesa/> (accessed 10 May 2023); COMESA Member States include Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia and Zimbabwe – COMESA 'Member States' available at <https://www.comesa.int/members/> (accessed 10 May 2023).

⁹⁸ COMESA Treaty (2007) art 3(a) - (c).

⁹⁹ PT Muchlinski 'The COMESA Common Investment Area: Substantive standards and procedural problems in dispute settlement' (2008) 11 *SOAS School of Legal Studies* 1.

¹⁰⁰ East African Legislative Assembly, 'Facts and figures' available at <https://www.eala.org/about/category/facts-and-figures> (accessed 10 August 2023); MP Ibrahimu 'The importance of an effective institutional framework for the realisation of regional economic integration objective: A case study of the East African Community (EAC)' unpublished Master's thesis, University of the Western Cape 2009 1.

¹⁰¹ East African Community (EAC) Treaty (1999) preamble.

¹⁰² EAC Treaty (1999) art 80(f).

¹⁰³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958;

¹⁰⁴ Art I(1) of the New York Convention (1958).

The country also became a Member of the Multilateral Investment Guarantee Agency (MIGA) in 1992,¹⁰⁵ a specialised agency of the World Bank, which provides political risk insurance and credit enhancement to lenders and investors involved in FDI projects, primarily, if not exclusively, in developing countries.¹⁰⁶ It also promotes FDI in these countries by organising investment forums, workshops and conferences.¹⁰⁷

Further still, Uganda acceded to the World Trade Organization (WTO) on 1 January 1995, having been a Member of the GATT 1947 since 23 October 1962.¹⁰⁸ In joining the WTO, Uganda acceded to several binding WTO Agreements, including the TRIMs Agreement, which contains certain aspects and provisions relating to foreign investment regulation in Uganda.¹⁰⁹

In 2000, the United Nations Conference on Trade and Development (UNCTAD) published Uganda's Investment Policy Review (IPR).¹¹⁰ The Review formulated recommendations on how Uganda could improve its investment framework, investment promotion efforts and modify its efforts to attract more FDI inflows.¹¹¹ UNCTAD then prepared a Blue Book on the best practices in investment promotion and facilitation for Uganda.¹¹²

Most of the legal and regulatory recommendations in the IPR were partly or fully implemented, including foreign exchange regulations and taxations, which were fully implemented.¹¹³ The country also ratified the AfCFTA and deposited its instruments with the Chairperson of the African Union Commission (AUC) on 9 February 2019.¹¹⁴ The Protocol was

¹⁰⁵ 'Member countries' available at <https://www.worldbank.org/en/about/leadership/members#miga> (10 May 2023).

¹⁰⁶ Multilateral Investment Guarantee Agency (MIGA), 1985 preamble.

¹⁰⁷ MIGA available at

¹⁰⁸ WTO 'Uganda and the WTO' available at https://www.wto.org/english/thewto_e/countriess (10 May 2023).

¹⁰⁹ Marrakesh Agreement Establishing The World Trade Organization Annex 1a: Multilateral Agreements on Trade in Goods – Agreement on Trade-Related Investment Measures.

¹¹⁰ UNCTAD *Report on the implementation of the Investment Policy: Uganda* (2007).

¹¹¹ UNCTAD *Report on the implementation of the Investment Policy: Uganda* (2007) 1.

¹¹² UNCTAD *Report on the implementation of the Investment Policy: Uganda* (2007) 1.

¹¹³ UNCTAD *Report on the implementation of the Investment Policy: Uganda* (2007) 2.

¹¹⁴ Tralac 'Status of AfCFTA Ratification' available at <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> (accessed 10 May 2023).

then concluded and later adopted by the AU Assembly of Heads of State and Government on 19 February 2023 and will come into force upon ratification by 22 AU Member States.¹¹⁵

The AfCFTA Protocol on Investment will affect the way AU Member States regulate foreign investment within their territories and impact on current intra-African BITs, the formulation of future IIAs and amendment of current ones.¹¹⁶ More recently, Uganda took part in the drafting of the WTO's plurilateral IFD Agreement, which, if adopted by the country will also impact on the way FDI is regulated and facilitated.

While only a few of the BITs (5) signed under Museveni's administration are currently in force, his regime has been characterised by efforts to improve Uganda's investment climate and image through regionalisation, the adoption of investment treaties and national policies and the establishment of investment facilitation administrative structures contributing to a more favourable and stable investment climate.

The following section analyses Uganda's FDI environment from 2018 to date and the opportunities that have contributed to its FDI inflows during that time. It also outlines the benefits of FDI in Uganda. This examination will inform the areas where Uganda needs to make policy changes to ensure optimum benefits from FDI for its economic and sustainable development.

3.2. Brief overview of FDI inflow performance

Uganda has relied heavily on FDI to jump-start, improve and maintain its rapid economic growth and transformation. FDI has been a crucial source of external financing, accounting for about a quarter of Uganda's external development finance between 2009 – 2019.¹¹⁷

¹¹⁵ KAM Elitcha, MV Joergensen & N Teklewold, 'Deepening the AfCFTA: Celebrating the adoption of new protocols on investment, intellectual property rights and competition policy' (16 March 2023) *UN Economic Commission of Africa (ECA) Blog* 16 March 2023 available at <https://uneca.org/stories/%28blog%29-deepening-the-afcfta-celebrating-the-adoption-of-new-protocols-on-investment%2C#:~:text=The%20Protocol%20on%20Investment,promotion%2C%20facilitation%20and%20protection%E2%80%9D>. (accessed 10 August 2023); L Sithole & K Mokgonyana, 'Investment protocol holds the key to AfCFTA success' *Business Day* 15 March 2023 available at <https://www.businesslive.co.za/bd/opinion/2023-03-15-investment-protocol-holds-the-key-to-afcftas-success/> (10 May 2023).

¹¹⁶ AfCFTA Protocol on Investment (2023) art 49(1) – (4).

¹¹⁷ World Bank 'Uganda's Investment Reform Map: Preliminary Analysis and Findings' available at https://www.ldpq.or.ug/?smd_process_download=1&download_id=4157 (accessed 10 October 2023).

Between 2018 – 2023, Uganda’s FDI flows have generally increased, mainly driven by investments in oil, gas, manufacturing, hospitality, construction and agricultural sectors.¹¹⁸

For instance, in 2018, Uganda’s FDI inflows increased to a historical high of USD 1.3 billion from USD 803 million the previous year, mainly due to investments in the oil and gas sector, as well as those in manufacturing and hospitality.¹¹⁹ Oil and gas developments were led by a consortium made up of TotalEnergies (France), China National Offshore Oil Corporation (CNOOC) and Tullow Oil (United Kingdom).¹²⁰

Other 2018 investments included those in energy through the establishment of Fenix International by Engie and the opening of Roxio, a data processing centre.¹²¹ FDI flows remained high in 2019 driven by the continued development of projects in the construction and agricultural sectors.¹²² Industries in the mining, retail, telecommunications sectors, as well as business services and agribusiness, also continued to attract FDI.¹²³

In 2020, however, FDI inflows to Uganda decreased by 35 per cent to USD 823 million mainly due to the COVID-19 pandemic, which resulted in the stalling of work on the Lake Albert oil project.¹²⁴ There were also several disagreements between the GOU and oil companies regarding the development strategies.¹²⁵ The UIA also reported significant declines in the tourism and construction industries due to the pandemic.¹²⁶

These declines were brought about by disruptions in supply chains, reduced economic activity resulting from border closures, global lockdowns and national restrictions on movement, transportation and business operations, and delays in investment decisions.¹²⁷ Despite these

¹¹⁸ UNCTAD *WIR* (2019) 37; UNCTAD *WIR* (2020) 34.

¹¹⁹ C Tanui ‘Major Boost for Uganda’s FDI Inflows: 15 Qatar Companies Are Now Seeking Partnerships with Local Firms’ *WeeTracker* 11 September 2019 available at <https://weetracker.com/2019/09/11/15-qatar-companies-are-now-seeking-partnerships-with-local-firms/> (accessed 13 September 2019); UNCTAD *WIR* (2019) 37, 68.

¹²⁰ UNCTAD *WIR* (2019) 37 - 38.

¹²¹ UNCTAD *WIR* (2019) 87.

¹²² UNCTAD *WIR* (2020) 34.

¹²³ UNCTAD *WIR* (2020) 77.

¹²⁴ UNCTAD *WIR* (2021) 42.

¹²⁵ UNCTAD *WIR* (2021) 42, 82.

¹²⁶ UNCTAD *WIR* (2021) 83.

¹²⁷ UNCTAD *WIR* (2021) 83.

challenges, the GOU provided fiscal support to accelerate the development of its industrial parks.¹²⁸

The UIA also adopted policy measures that facilitated the establishment of science, industrial, and business parks that would connect with infrastructure development initiatives in response to the pandemic.¹²⁹ This included the construction and establishment of vital elements such as paved roads, industrial power and water supply systems, centralised sewage treatment facilities and effective systems for managing solid waste.¹³⁰

In 2021, FDI inflows to Uganda recovered to USD 1.6 billion, exceeding the 2018 peak¹³¹ and reached a new historic high of USD 2.9 billion in 2022,¹³² mainly due to projects in the extractive industries.¹³³ Two large greenfield projects were also announced by TotalEnergies during that year, including the development of a Lake Albert oil field in collaboration with the CNOOC and the Uganda National Oil Company (UNOC) worth USD 6.5 billion.¹³⁴

The other major project worth USD 2.5 billion, was the construction of a heated 1,440-kilometre East African Crude Oil Pipeline (EACOP) that will transport crude oil from western Uganda to Tanzania.¹³⁵ Moreover, in 2021, the Ayago hydroelectric power plant project expected to start construction in 2025, was approved and will be funded by the Chinese Government to the tune of USD 1.4 billion.¹³⁶

In 2023, FDI inflows to Uganda reached 2.8 billion, a slight decline from the previous year.¹³⁷ Nonetheless, Uganda has consecutively been among the top five recipients of FDI among landlocked developing countries (LLDCs) since 2022.¹³⁸ Evidently, there is great potential for

¹²⁸ UNCTAD *WIR* (2021) 87.

¹²⁹ UNCTAD *WIR* (2021) 95.

¹³⁰ UNCTAD *WIR* (2021) 95.

¹³¹ UNCTAD *WIR* (2022) 13, 18.

¹³² UNCTAD *WIR 2024: Investment facilitation and digital government* (2024) 157.

¹³³ UNCTAD *WIR* (2023) 11.

¹³⁴ UNCTAD *WIR* (2023) 11.

¹³⁵ UNCTAD *WIR* (2023) 11.

¹³⁶ GlobalData 'Power plant profile: Ayago, Uganda' available at <https://www.power-technology.com/data-insights/power-plant-profile-ayago-uganda/?cf-view> (accessed 12 October 2023); Power Technology, 'Power plant profile: Ayago, Uganda' available at <https://www.power-technology.com/data-insights/power-plant-profile-ayago-uganda/> (accessed 22 August 2024).

¹³⁷ UNCTAD *WIR* (2024) 157.

¹³⁸ UNCTAD *WIR* (2023) 14; UNCTAD *WIR* (2024) 16, 18.

increased FDI inflows into Uganda in the foreseeable future, provided it can harvest these opportunities and improve its investment policies in order to gain the most from them.¹³⁹

This could be achieved by attracting investments that not only provide foreign capital, but also long-term benefits, such as infrastructure, skills and capacity development – indirectly promoting sustainable development objectives.

3.3. The importance of FDI in Uganda

FDI is important in Uganda for several reasons. For starters, FDI assists with capital formation by broadening the financial base of the economy.¹⁴⁰ As a source of capital, funds from FDI often supplement savings, partially filling the economic gap caused by the lack of sufficient savings and resources.¹⁴¹ Foreign companies add to capital formation through their ability to raise additional finance from international banks and other financial institutions.¹⁴²

Furthermore, foreign investments in Uganda are taxed (eventually), which is an additional form of income for the country.¹⁴³ FDI also plays a significant role in driving Uganda's economic growth. As seen in the previous section, several investment projects have not only committed capital to the country, but also technology and expertise and boosted productivity in several sectors.¹⁴⁴

This infusion of resources can lead to the expansion of industries, the creation of new businesses and the overall enhancement of economic output. FDI also contributes to job creation and is a major source of employment in Uganda.¹⁴⁵ With a young, increasingly skilled, dynamic and highly rated workforce for recruitment potential, FDI can create higher productivity jobs, driving social and economic transformation.¹⁴⁶

¹³⁹ UNCTAD *WIR* (2019) 38; UNCTAD *WIR* (2021) 83.

¹⁴⁰ UNCTAD *Investment Policy Review of Uganda* (2000) 8.

¹⁴¹ Obwona (1998) 1; HS Kehal *Foreign Investment in Developing Countries* (2004) 1.

¹⁴² UNCTAD *Investment Policy Review of Uganda* (2000) 8.

¹⁴³ The GOU has been known to provide incentives for certain investments that exempt them from paying tax for a certain amount of time – usually five years.

¹⁴⁴ Chapter 3 'Brief overview of FDI inflow performance' para 3.2 above.

¹⁴⁵ UNCTAD *Investment Policy Review of Uganda* (2000) 8.

¹⁴⁶ UIA *A Practical Guide to Doing Business in Uganda* available at <https://www.ugandainvest.go.ug/wp-content/uploads/2019/11/A-practical-guide-to-doing-business-in-Uganda.pdf> (accessed 10 September 2021); World Bank 'Uganda Jobs Strategy: Creating More Jobs for Uganda's Youth and Economic Transformation' (17

To date, several jobs have been created in the communication and technology sectors, which account for the highest FDI contributions in the country.¹⁴⁷ Evidently, FDI provides a stable income for many Ugandan households, contributing to poverty alleviation – a sustainable development objective.¹⁴⁸ Agro-based industries also have the potential to boost employment and enhance productivity on a wide scale.¹⁴⁹

This is particularly important because the majority of people in Uganda, particularly those in the rural areas, are still heavily dependent on the agricultural sector.¹⁵⁰ In 2020, the International Labour Organisation (ILO) reported that 72 per cent of the Ugandan workforce was employed in the agricultural sector.¹⁵¹ Moreover, agro-processing represents 40 per cent of manufacturing activity in Uganda¹⁵² and agribusinesses along the dairy, coffee and maize value chains have developed in recent years, linking farmers to inputs, markets and finance.¹⁵³

Additionally, FDI enables the transfer of technology and skills development.¹⁵⁴ Technology spill overs, in this context, refer to the unintended and beneficial side effects of knowledge or

April 2020) available at <https://www.worldbank.org/en/Constitution of Ugandanry/uganda/publication/uganda-jobs-strategy-creating-more-jobs-for-ugandas-youth-and-economic-transformation> (accessed 10 September 2021).

¹⁴⁷ The World Bank 'Uganda Jobs Strategy: Creating More Jobs for Uganda's Youth and Economic Transformation' (17 April 2020) available at <https://www.worldbank.org/en/Constitution of Ugandanry/uganda/publication/uganda-jobs-strategy-creating-more-jobs-for-ugandas-youth-and-economic-transformation> (accessed 10 September 2021).

¹⁴⁸ UIA A Practical Guide to Doing Business in Uganda available at <https://www.ugandainvest.go.ug/wp-content/uploads/2019/11/A-practical-guide-to-doing-business-in-Uganda.pdf> (accessed 10 September 2021); The World Bank 'Uganda Jobs Strategy: Creating More Jobs for Uganda's Youth and Economic Transformation' (17 April 2020) available at <https://www.worldbank.org/en/Constitution of Ugandanry/uganda/publication/uganda-jobs-strategy-creating-more-jobs-for-ugandas-youth-and-economic-transformation> (accessed 10 September 2021); National Planning Authority (NPA) *National Development Plan (NDPIII) 2020/21 – 2024/25* (2020) XXII, XXV, 6; Agenda 2030: SDG 1 – End poverty in all its forms everywhere.

¹⁴⁹ Uganda NDPIII (2020) 6.

¹⁵⁰ 'Uganda – Employment in Agriculture (% of Total Employment)' available at [https://tradingeconomics.com/uganda/employment-in-agriculture-percent-of-total-employment-wb-data.html#:~:text=Employment%20in%20agriculture%20\(%25%20of%20total%20employment\)%20\(modeled%20ILO%20estimate,compiled%20from%20officially%20recognized%20sources](https://tradingeconomics.com/uganda/employment-in-agriculture-percent-of-total-employment-wb-data.html#:~:text=Employment%20in%20agriculture%20(%25%20of%20total%20employment)%20(modeled%20ILO%20estimate,compiled%20from%20officially%20recognized%20sources). (accessed 10 October 2021).

¹⁵¹ 'Uganda – Employment in Agriculture (% of Total Employment)' available at [https://tradingeconomics.com/uganda/employment-in-agriculture-percent-of-total-employment-wb-data.html#:~:text=Employment%20in%20agriculture%20\(%25%20of%20total%20employment\)%20\(modeled%20ILO%20estimate,compiled%20from%20officially%20recognized%20sources](https://tradingeconomics.com/uganda/employment-in-agriculture-percent-of-total-employment-wb-data.html#:~:text=Employment%20in%20agriculture%20(%25%20of%20total%20employment)%20(modeled%20ILO%20estimate,compiled%20from%20officially%20recognized%20sources). (accessed 10 October 2021).

¹⁵² Food and Agriculture Organisation of the United Nations (FAO) 'Decent Rural Employment: Uganda' available at <https://www.fao.org/rural-employment/work-areas/youth-employment/ica-programme/uganda/en/> (accessed 10 October 2021).

¹⁵³ FAO 'Decent Rural Employment: Uganda' available at <https://www.fao.org/rural-employment/work-areas/youth-employment/ica-programme/uganda/en/> (accessed 10 October 2021).

¹⁵⁴ Ajayi (2006) 2.

technology transfer from a foreign company to a domestic one.¹⁵⁵ These spill overs can lead to increased factor productivity, innovation and efficiency in the utilisation of resources, promote the development of local industries and improve the overall competitiveness of the economy.¹⁵⁶

Certain investments have also brought associative developments to the country. For instance, investments in the oil and gas industry have led to the construction of roads connecting the Hoima region (where the oil is), with Kampala (the capital), so that a journey which took six to seven hours before, now takes about three hours. This has encouraged people to settle outside the city and is in line with yet another one of the GOU's sustainable development objectives to urbanise rural areas, as seen in its recent NDPs.¹⁵⁷

Expanded urbanisation brings capital and employment opportunities to rural areas and encourages the expansion of facilities like electricity and tap-water to these areas. It also encourages tourism in rural areas, which can be beneficial for the locals to the extent that it not only increases employment opportunities but adds to the value of their land in some cases and has positive effects on socio-economic growth.

FDI and its benefits cannot be fully attained without legal and institutional structures in place. Uganda's current FDI regime is not only regulated by domestic laws and policies, but also investment-related treaties and investment agreements, which are binding on the country. The following section provides an analysis of Uganda's primary legal investment framework and determines the extent to which it aligns with its sustainable development objectives.

3.4. Uganda's legal, institutional and procedural FDI regime

Several of Uganda's laws were enacted before its economic liberalisation strategy in the 1990s.¹⁵⁸ Since then, Uganda's domestic investment policy has undergone several revisions to promote a more conducive environment for investment and economic growth. Moreover,

¹⁵⁵ BA Demena & PAG van Bergeijk 'Observing FDI Spillover Transmission Channels: Evidence from Firms in Uganda' (2019) 40 *Third World Quarterly* 1708 – 1729.

¹⁵⁶ Ajayi (2006) 2; Neumayer & Spess (2005) 1568.

¹⁵⁷ Uganda *NDP III* (2020)).

¹⁵⁸ Uganda NIP (2018) 11.

the country has signed or entered several multilateral, regional and plurilateral treaties which affect the way foreign investment is regulated in the country.

This section analyses the key legal frameworks affecting the regulation of foreign investment in Uganda. At the national level, this will include the amended Constitution of Uganda as the supreme law of the country, the ICA - 19 as the primary law regulating both domestic and foreign investments in Uganda, the 2018 NIP, as Uganda's most recent national investment policy and the Arbitration and Conciliation Act (ACA), which governs arbitration and conciliation proceedings in Uganda.¹⁵⁹

These domestic laws, however, are not the only laws that regulate investment in Uganda. Although they will not be analysed below, other significant laws include the Companies Act 2012, the Uganda Free Zones Act 2014, the Public Private Partnerships (PPP) Act of 2015, the Public Enterprise Reform and Divestiture (PERD) Act 1993 and the financial sector's legal and regulatory framework.¹⁶⁰

Uganda also enacted the Petroleum and Minerals Legal and Regulatory Framework (which includes the Petroleum Act, 2013,¹⁶¹ the Mineral Policy of 2001¹⁶² and the Mining Law of 2003).¹⁶³ This Framework gives effect to section 244 of the Constitution of Uganda which deals with 'minerals and petroleum'¹⁶⁴ and is responsible for overseeing the regulation of activities related to petroleum exploration, development and production.¹⁶⁵

Additionally, Uganda is a signatory of several multilateral, plurilateral and regional agreements that impact on the regulation of investment within its borders. This section will analyse some of these key instruments. At the regional level, this will include an examination

¹⁵⁹ Uganda Arbitration and Conciliation Act of 2000 sec 1 & parts III and IV.

¹⁶⁰ Uganda's financial sector legal and regulatory framework includes the Financial Institutions Act of 2004 as amended; the Microfinance Deposit-Taking Institutions Act of 2003; Uganda Insurance Act of 2017; Uganda Retirement Benefits Regulatory Authority Act of 2011; Uganda Capital Markets Authority Act of 2011 as amended; the Tier 4 Microfinance Institutions and Money Lenders Act of 2016 and the Anti-Money Laundering Act of 2013 as amended – Draft National Investment Policy (2018) 11.

¹⁶¹ Uganda Petroleum (Exploration, Development and Production) Act of 2013 (Petroleum Act).

¹⁶² Uganda Mineral Policy of Uganda (2000) Ministry of Energy and Mineral Development.

¹⁶³ Uganda Mining Act of 2003.

¹⁶⁴ Constitution of Uganda (1995) secs 244(1) – (6).

¹⁶⁵ Uganda Petroleum Act (2013) short title & sec 1(d).

of Uganda's regional integration obligations under the EAC and COMESA, including the CCIA and the AfCFTA Protocol on Investment.¹⁶⁶

The AfCFTA Protocol on Investment will form a part of this study due to its potential influence on future investment policymaking decisions in the continent.¹⁶⁷ Although adopted, when the Protocol has been ratified by 22 AU Member States and comes into force, Member States will be obligated to formulate investment policies that are consistent with it and consider it in any future IIA reforms, which makes it relevant for this study.

At the multilateral level, this section will analyse the New York Convention because it facilitates the recognition and enforcement of foreign arbitral awards.¹⁶⁸ By examining Uganda's obligations under this Convention, the research can determine how well the country's legal framework aligns with international standards, which is vital for providing a stable and predictable legal environment for foreign investors.

The ICSID Convention will also be analysed as it is the most cited international arbitration tribunal (IAT) forum, in not only Uganda's BITs, but its domestic laws as well, including the ICA - 19 and the ACA¹⁶⁹ and is crucial for understanding the current ISDS mechanism. Additionally, the TRIMs Agreement will be examined to gauge the sort of investment measures that would violate its WTO obligations when considering reform options.

Uganda was also part of the governments that negotiated the 2024 plurilateral IFD Agreement under the WTO.¹⁷⁰ Although it is yet to be adopted, it will be analysed to determine how it will influence the regulation of foreign investment in Uganda if it is ratified. Despite forming part of Uganda's investment regulatory regime, the current BIT system will be discussed in detail in chapter four.

¹⁶⁶ AfCFTA Protocol on Investment (2023).

¹⁶⁷ AfCFTA Protocol on Investment (2023) art 49(3) – (4).

¹⁶⁸ New York Convention (1958).

¹⁶⁹ Uganda Arbitration and Conciliation Act (2000) sec 1 & parts III and IV.

¹⁷⁰ IFD Agreement (2024).

3.4.1. Primary domestic laws and policies affecting investment in Uganda

3.4.1.1. *The Constitution of Uganda, 1995 (as amended on 5 January 2018)*

The Constitution of Uganda was adopted in 1995, repealing the former 1967 Constitution that had been enacted under President Obote's regime. It has since been amended several times, with its most recent amendment taking place on 5 January 2018.¹⁷¹ The Constitution of Uganda is the supreme law of the land and is binding on all authorities and persons in Uganda.¹⁷²

Any laws or customs inconsistent with the Constitution are void, to the extent of that inconsistency.¹⁷³ It generally establishes the government's structure, guarantees fundamental rights and freedoms and outlines the powers and responsibilities of citizens and various arms of government. Its investment provisions aim to eliminate obstacles to investment.¹⁷⁴

For instance, the government is empowered to regulate land and property acquisition, ownership, use and deposition in accordance with the Constitution of Uganda, which is significant since such assets may form part of foreign investor's holdings.¹⁷⁵ Uganda has also enacted several laws, which outline the conditions that must be met before an investment is established in Uganda.¹⁷⁶

For instance, the ICA – 19 stipulates that a foreign investor can only invest and participate in the operation of an investment after registration with the UIA.¹⁷⁷ As registration is an administrative action, the Constitution guarantees that:¹⁷⁸

Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.

¹⁷¹ Constitution of Uganda 1995 (amended by Constitution (Amendment Act 1 of 2018).

¹⁷² Constitution of Uganda (1995) sec 2(1).

¹⁷³ Constitution of Uganda (1995) sec 2(2).

¹⁷⁴ Wakyereza (2017) 83.

¹⁷⁵ Constitution of Uganda (1995) obligation XI(iii).

¹⁷⁶ See section on Investment Code Act, 2019 below.

¹⁷⁷ Uganda ICA – 19 (2019) sec 19(1); UNCTAD WIR (2024) 121.

¹⁷⁸ Constitution of Uganda (1995) sec 42.

Therefore, if a prospective investor feels unfairly treated by the UIA, which is an administrative body – regarding the establishment of an investment, they can seek recourse in Uganda’s domestic courts.¹⁷⁹ However, issues arising in the pre-establishment phase of an investment cannot be escalated to international arbitration, reflecting Uganda’s desire to reserve the right to admit investments into its territory.¹⁸⁰

The Constitution of Uganda also contains several ‘behind-the-border’ measures that promote and protect already established investments. For instance, section 26(1) provides that ‘every person has the right to own property’ individually or in association with others.¹⁸¹ Although the word ‘person’ is not defined in the Constitution, the Ugandan ICA – 19 defines both foreign or domestic investors to include natural or juristic persons.¹⁸²

The now repealed ICA – 91 prohibited foreign investors from engaging in crop or animal production businesses and acquiring or leasing land for those purposes,¹⁸³ but these restrictions have since been lifted in the ICA - 19, aligning with section 26(1) of the Constitution of Uganda. Regarding investment protection, the Constitution prohibits expropriation of property except when necessary for public use or interests such as defence, public safety or health and mandates prompt and adequate compensation.

The Constitution of Uganda specifically provides that:¹⁸⁴

- a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and
- b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for—
 - i. prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and
 - ii. a right of access to a court of law by any person who has an interest or right over the property.

¹⁷⁹ Constitution of Uganda (1995) sec 42.

¹⁸⁰ Constitution of Uganda (1995) 42.

¹⁸¹ Constitution of Uganda (1995) 26(1).

¹⁸² Uganda ICA – 19 (2019) sec 1.

¹⁸³ Uganda ICA – 91 (1991) sec 10(2).

¹⁸⁴ Constitution of Uganda (1995) sec 26(2)(a), (b)(i) – (ii).

This aligns with customary international law (CIL) principles on expropriation or nationalisation of foreign property, ensuring that investors receive fair compensation if their property is taken.¹⁸⁵

The Constitution of Uganda also grants ‘any person’ with rights to or interests in specific properties recourse to both domestic courts and, in the case of foreign persons, to international dispute settlement mechanisms,¹⁸⁶ reflecting Uganda’s commitment to international law and treaty obligations, including adherence to treaties like ICSID and New York Conventions,¹⁸⁷ as well as several IIAs, including BITs and TIPs.¹⁸⁸

The Constitution further upholds the government’s ‘sovereign and inalienable right’ to regulate in the public interest, an increasingly important issue in IIL.¹⁸⁹ It outlines the State’s role in the development of the country, by providing that:¹⁹⁰

- i. The State shall give the highest priority to the enactment of legislation establishing measures that protect and enhance the right of the people to equal opportunities in development.
- ii. The State shall stimulate agricultural, industrial, technological and scientific development by adopting appropriate policies and the enactment of enabling legislation.
- iii. In furtherance of social justice, the State may regulate the acquisition, ownership, use and disposition of land and other property, in accordance with the Constitution.

It also obligates the government to ensure social justice and economic development, aligning with the sustainable development commitments under Agenda 2030.¹⁹¹ It provides that:¹⁹²

... all developmental efforts are directed at ensuring the maximum social and cultural well-being of the people; and

all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.

¹⁸⁵ Constitution of Uganda (1995) sec 26(b)(ii).

¹⁸⁶ Constitution of Uganda (1995) objective XXVII(d).

¹⁸⁷ Constitution of Uganda (1995) objective XXVII(1)(b) & (d)

¹⁸⁸ Constitution of Uganda(1995) objective XXVIII(b); BIT examples include, the Uganda – UK (1998), Denmark – Uganda (2001) and France – Uganda (2003).

¹⁸⁹ Constitution of Uganda (1995) short title & objective XI(i), (ii).

¹⁹⁰ Constitution of Uganda (1995) objective XI(i) – (ii).

¹⁹¹ Constitution of Uganda(1995) objective XIV(a).

¹⁹² Constitution of Uganda (1995) objective XIV(a) and (b).

Both these objectives are in tandem with goals 10 and 9 of Agenda 2030 respectively,¹⁹³ as well as goals 1, 2, 3, 4, 6, 8 and 11.¹⁹⁴

The Constitution of Uganda explicitly mentions ‘sustainable development’ only in reference to environmental protection and preservation.¹⁹⁵ For instance, objective XXVII(i) provides that:¹⁹⁶

The State shall promote sustainable development and public awareness of the need to manage land, air and water resources in a balanced and sustainable manner for the present and future generations.

While section 245 further provides that:¹⁹⁷

Parliament shall, by law, provide for measures intended—

- a) to protect and preserve the environment from abuse, pollution and degradation.
- b) to manage the environment for sustainable development; and
- c) to promote environmental awareness.

Regardless, the Constitution contains numerous provisions that support economic and social development, albeit explicitly, making it consistent with general sustainable development imperatives. For instance, the Ugandan government is obligated to provide a peaceful, secure and stable political environment to enable economic development,¹⁹⁸ by adopting an

¹⁹³ Agenda 2030 goal 9: industry, innovation and infrastructure – build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation; Agenda 2030 goal 10: reduced inequality – reduce inequality within and among Constitution of Ugandan tries.

¹⁹⁴ Agenda 2030 goal 1: no poverty – end poverty in all its forms everywhere, goal 2: zero hunger – end hunger, achieve food security and improved nutrition and promote sustainable agriculture, goal 3: good health and well-being - , goal 4: quality education – ensure inclusive and equitable quality education and promote lifelong learning opportunities for all, goal 6: clean water and sanitation – ensure availability and sustainable management of water and sanitation for all, goal 8: decent work and economic growth – promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all, and goal 11: sustainable cities and economy – make cities and human settlements inclusive, safe, resilient and sustainable,

¹⁹⁵ Constitution of Uganda (1995) objective XXVII(i) & sec 245(a) – (c).

¹⁹⁶ Constitution of Uganda (1995) objective XXVII(i).

¹⁹⁷ Constitution of Uganda (1995) sec 245(a), (b) and (c).

¹⁹⁸ Constitution of Uganda (1995) objective III(v); Agenda 2030 goal 16: peace, justice and strong institutions – promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

integrated and co-ordinated planning approach towards balanced and equitable development.¹⁹⁹

With regards to economic rights, the government is required to, *inter alia*, enact laws that provide for the right of persons to work under satisfactory, safe and healthy conditions, which is in tandem with goal 8 of Agenda 2030 to promote productive employment and decent work for all.²⁰⁰ Under this Constitution every person in Uganda has the right to practice his or her profession and to carry on any lawful occupation, trade or business.²⁰¹

Overall, it can be concluded (at least in principle) that the Constitution of Uganda promotes and protects both domestic and foreign investments through fair administrative procedures, protection against expropriation and access to both domestic and international dispute settlement mechanisms. It also supports sustainable development through its social, economic and environmental aspects, while safeguarding the country's right to admit investments and regulate in the public interest.

3.4.1.2. *Uganda National Investment Policy 2018*

The 2018 NIP was introduced to accelerate Uganda's 'investment growth and diversification for socioeconomic transformation.'²⁰² It also marked the government's attempt to achieve the investment-related objectives of Uganda's Vision 2040,²⁰³ which serves as Uganda's comprehensive plan to elevate to upper middle-income status by 2040, targeting a GDP per capita of USD 9,500.²⁰⁴

Vision 2040 is supported by Uganda's economic development strategy, which is built on four key principles: economic liberalisation, economic diversification, economic integration, and economic industrialisation.²⁰⁵ The Vision recognised that economic changes had led to a

¹⁹⁹ Constitution of Uganda (1995) objective XII(i); Agenda 2030 goal 17: partnerships for the goals – strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development.

²⁰⁰ Constitution of Uganda(1995) sec 40(1)(a); Agenda 2030, goal 8.

²⁰¹ Constitution of Uganda (1995) sec 40(2).

²⁰² Uganda NIP (2018) 14.

²⁰³ Uganda Vision 2040.

²⁰⁴ Uganda Vision 2040.

²⁰⁵ Uganda NIP (2018) 2.

decline in investment shares and a shift towards less productive activities, particularly favouring non-tradable sectors over tradable ones.²⁰⁶

Additionally, Vision 2040 emphasised the crucial role of investment and its effective management in achieving its objectives.²⁰⁷ Accordingly, it outlines nine opportunities²⁰⁸ and seven fundamentals,²⁰⁹ urging for both public and private investments that are aligned with the country's core development priorities.²¹⁰ This need to restore Uganda's economic growth through investment was the driving force behind the introduction of the 2018 NIP.²¹¹

As previously mentioned, the NIP aims to accelerate investment growth and diversification for socioeconomic transformation.²¹² Specifically, it aims to:

- boost public and private investments in accordance with national development priorities;
- strengthen and streamline national investment mobilisation and management efforts;
- create an enabling environment for enterprises to improve in productivity and competitiveness; and
- provide a governance and institutional framework for a multi-sectoral and inter-agency approach to investment.²¹³

The implementation of the Policy is guided by key principles including policy coherence and complementarity, return on investment, risk management, maintaining a balance between investor and State rights and obligations, retaining the right to regulate, promoting equity and fairness and ensuring sustainable development.²¹⁴

²⁰⁶ Uganda NIP (2018) 2.

²⁰⁷ Uganda NIP (2018) 1

²⁰⁸ Oil and Gas; Tourism; Minerals; ICT Business; An Abundant Labour Force; Geographical location and trade; Water Resources; Industrialisation; and Agriculture – Uganda Vision 2040, 4; Uganda NIP (2018) 1.

²⁰⁹ Infrastructure for (energy, transport, water, oil and gas, and ICT); Science, Technology, Engineering and Innovation (STEI); Land Use and Management; Urbanisation; Human Resource; and Peace, Security and Defence and human capital development – Uganda Vision 2040, 4; Uganda NIP (2018) 1.

²¹⁰ Uganda NIP (2018) 1.

²¹¹ Uganda NIP (2018) 2 & 4.

²¹² Uganda NIP (2018) 14.

²¹³ Uganda NIP (2018) 14 – 17, 19.

²¹⁴ Uganda NIP (2018) 17 – 18.

The Policy's effectiveness is assessed based on its development impact and strategic achievements,²¹⁵ which are monitored through specific Key Performance Indicators (KPIs) corresponding to each of the policy strategies,²¹⁶ which, *inter alia*, include strengthening economic and social infrastructure for higher productive capacities, upgrading investment promotion, building a competitive incentives framework, streamlining the institutional, legal and regulatory framework, building strategic partnerships and strengthening the financial sector for better mobilisation and intermediation of financial resources for investment.²¹⁷

A critical aspect of this study focuses on the NIP's objective to strengthen the investment legal and regulatory framework (particularly because it relates to the reform of Uganda's BIT system – a crucial part of this framework).²¹⁸ This involves:

- streamlining and reforming investment law, guided by the principles and priorities of the Policy;
- harmonising existing policies, legal and procedural provisions that impact on investment in Uganda, to cover policy inadequacies and achieve coherence;
- standardising an effective and transparent incentives regime; and
- creating and sustaining an enabling business environment.²¹⁹

Attempts to streamline and reform investment law were seen when, for example, the government revised, modernised and replaced the previous domestic investment law with the ICA – 19 in 2019.²²⁰ Although efforts to harmonise existing policies, legal and procedural investment provisions remain to be seen, Uganda has made efforts to standardise an effective and transparent incentives regime in accordance with the 2018 NIP.

For instance, the government offers various incentives to both local and foreign investors,²²¹ including tax holidays, duty exemptions on imports of machinery and raw materials, and other preferential treatment to promote investment in specific sectors.²²² In 2018, it also

²¹⁵ Uganda NIP (2018) 7, 19.

²¹⁶ Uganda NIP (2018) 7, 19.

²¹⁷ Uganda NIP (2018) 7, 19.

²¹⁸ Uganda NIP (2018) 16.

²¹⁹ Uganda NIP (2018) 16.

²²⁰ Uganda ICA – 19 (2019) Short title.

²²¹ Uganda NIP (2018) 20.

²²² Uganda NIP (2018) 20.

introduced tax incentives to promote domestic and foreign investment focusing on industrialisation, exports and tourism.²²³

Uganda has also made several efforts to create and sustain an enabling business environment, while addressing several key areas, including investment promotion, facilitation, protection and coordination under the NIP.²²⁴ For instance, the new ICA – 19 expanded the UIA’s powers, making it a one-stop shop for the coordination, promotion, facilitation, monitoring and evaluation of investments and investors – fulfilling some of these policy objectives.²²⁵

This in turn simplified the procedures for business registration and licensing, making it easier for investors to set up and operate businesses in the country.²²⁶ The 2018 NIP also highlights the government’s commitment to providing necessary infrastructure, such as transportation, energy and telecommunications, to support investment activities across different sectors in the country.

As previously discussed, these efforts have been evident in the infrastructural improvements and developments, including transportation networks (for example, construction of road from Hoima to Kampala and the agreement to construct heated oil pipe from Uganda to Tanzania), energy supply,²²⁷ and communication systems, to support the growth of various industries and facilitate trade and investment activities.²²⁸

The government of Uganda has also established legal and regulatory frameworks to protect the rights and interests of investors, including mechanisms for dispute settlement and safeguards against expropriation without fair compensation. For instance, the ICA – 19 contains dispute settlement options, for both domestic and foreign investors, considering the NIP’s objective to promote and protect investments.²²⁹

²²³ UNCTAD *WIR* (2019) 87.

²²⁴ Uganda NIP (2018) 21.

²²⁵ Uganda ICA – 19 (2019) Short title.

²²⁶ Uganda ICA – 19 (2019) Short title.

²²⁷ Uganda was reported among the top five LDC economies for international renewable energy projects – UNCTAD *WIR* (2023) 37.

²²⁸ Uganda NIP (2018) 19; UNCTAD *WIR* (2023) 11

²²⁹ Uganda ICA – 19 (2019) sec 23.

Evidently, the Uganda's government has made commendable strides in attempting to promote, facilitate, protect and coordinate investment in Uganda, in accordance with the Policy, through the adoption of a new domestic law on investment, the provision of incentives, the establishment of the UIA as a one-stop shop for all investment matters and the provision of dispute settlement mechanisms.

However, as this study will later show, not all the NIP's principles have been incorporated in some of the most recent and key reforms to Uganda's legal and regulatory investment framework. For example, the ICA – 19 lacks obligations towards maintaining a balance between investor and State rights and obligations, retaining the right to regulate, promoting and ensuring sustainable development through investment.

3.4.1.3. Uganda Investment Code Act of 2019

Uganda's primary investment law, the ICA - 19 replaced the ICA – 91 to better align with the country's current development objectives and the Constitution of Uganda.²³⁰ The ICA – 91 had established the Uganda Investment Authority (UIA) as an independent investment promotion agency (IPA), but lacked clear enforcement powers, hindering its effectiveness.²³¹ As a result, Uganda's development objectives could not be achieved as anticipated.²³²

The new ICA – 19 modernises the legal framework, strengthens the UIA by designating it as a one-stop centre (OSC) for investment facilitation and redefines its mandate to include coordinating, promoting, facilitating, monitoring and evaluating and advising on investment.²³³ According to section 3(2)(a) of the ICA – 19, the UIA is mandated to:²³⁴

- a) promote, attract, advocate, facilitate, register, monitor and evaluate the development of all forms of investment and business activities in Uganda;
- b) promote and encourage investment in new technologies, skills upgrading, automation, training, research and product development;

²³⁰ Uganda ICA – 19 (2019) short title & sec 1; the ICA – 91 (1991)1; M Okot 'A critical analysis of the Uganda Investment Code Act 2019 in relation to other Uganda investment laws and policies in Uganda' (2019) 1.

²³¹ MT Rwakakamba, presentation before the Parliamentary Committee on Finance, Planning and Economic Development on the matter of the Investment Code Bill, 2017; Uganda ICA – 91 sec 2(1) and (2); Uganda ICA – 19 sec 2(2).

²³² Okot (2019) 2.

²³³ Uganda ICA – 19 (2019) short title & secs 2(1), 3(1) & 10(1)(a) – (l); UNCTAD WIR (2020) 102.

²³⁴ Uganda ICA – 19 (2019) sec 3(2)(a) – (f).

- c) establish and manage a one stop centre;
- d) publish and avail periodical reports on the state of investment in the country;
- e) assess for matters of incentives and utilization of local resources and services by the investments; and
- f) do any other act conducive or incidental to the foregoing.

It is worth noting that while the UIA has the power to attract and facilitate investments, it does not have the power to regulate them.²³⁵

As such, the Ugandan government should extend the Authority's powers to include the regulation of all investments in Uganda.²³⁶ This would operationalise section 18 of the ICA – 19 (see below), which deals with the obligations of registered investors and address issues of corporate closure regulation, including environmental, social and governance (ESG) concerns.²³⁷ It would also ensure that responsible investment practices, like labour rights, environmental audits and human rights commitments are considered.²³⁸

Section 10(1)(e) of the ICA – 19, which relates to the UIA's powers to acquire, develop and manage serviced land for investment, should also be amended to include a requirement that these activities should be 'in accordance with the Constitution of Uganda and the Lands Act.'²³⁹ Without this amendment, the current provision remains an open clause, which could potentially perpetuate land grabbing.²⁴⁰ Land designated for investment purposes should also be procured openly and transparently, in accordance with Uganda's domestic laws.²⁴¹

The UIA is governed by a Board, which is responsible for achieving the Authority's objectives and conducting its business and functions.²⁴² Section 10(2) grants the UIA the power to 'monitor the processing of investment approvals that are by law the mandate of other government agencies.'²⁴³ In other words, government ministries, departments and agencies

²³⁵ The Southern and Eastern Africa Trade Information and negotiations Institute (SEATINI) 'CSO proposals on the amendment of the Investment Code Act, 2019' (2019) 2.

²³⁶ SEATINI, 'CSO proposals on the amendment of the Investment Code Act, 2019' (2019) 2.

²³⁷ Uganda ICA – 19 (2019) sec 18(a) – (h); SEATINI, 'CSO proposals on the amendment of the Investment Code Act, 2019' (2019) 2.

²³⁸ SEATINI, 'CSO proposals on the amendment of the Investment Code Act, 2019' (2019) 2.

²³⁹ SEATINI, 'CSO proposals on the amendment of the Investment Code Act, 2019' (2019) 3.

²⁴⁰ SEATINI, 'CSO proposals on the amendment of the Investment Code Act, 2019' (2019) 3.

²⁴¹ SEATINI, 'CSO proposals on the amendment of the Investment Code Act, 2019' (2019) 3 – 4.

²⁴² Uganda ICA – 19 (2019) 4(1), (2)

²⁴³ Uganda ICA – 19 (2019) 10(2).

responsible for registering, licencing and approving investments must collaborate with the UIA.²⁴⁴

These entities are also required to sign service contracts with the UIA, outlining their service commitments and delivery timelines to investors.²⁴⁵ While section 10(2) grants the UIA significant oversight powers regarding the processing of investment applications, it lacks enforcement mechanisms if investors fail to meet their obligations under section 18 of the Act.²⁴⁶

The ICA – 19 should also expressly give the UIA powers to negotiate, monitor and oversee the implementation of BITs, to ensure coherence between the Act and the BITs signed by Uganda.²⁴⁷ Furthermore, both domestic and foreign investors must first meet the minimum investment capital requirements set by the Minister before establishing an investment in Uganda to benefit from the provisions of domestic investment laws.²⁴⁸

There is also a minimum threshold for ‘portfolio’ investment, which is governed by Uganda’s laws.²⁴⁹ Although the ICA – 19 defines portfolio investment, it does not regulate it beyond stating that its minimum threshold will be determined by domestic laws.²⁵⁰ Nonetheless, once the minimum investment requirements are met, investors can apply to the UIA for registration²⁵¹ and upon approval, are issued an investment certificate.²⁵²

Applications for investment registration must be accompanied with:²⁵³

²⁴⁴ Uganda ICA – 19 (2019) sec 11(1); The government ministries, departments and agencies referred to in ICA – 19 sec 11(1), include the Uganda Registration Services Bureau (URSB), the Uganda Revenue Authority (URA), the National Environmental Management Authority (NEMA), the National Bureau of Standards (NBOS), the Directorates of Citizenship and Immigration and Land Registration, the Kampala Capital City Authority (KCCA) and local governments, the national Identification and Registration Authority (NIRA), the Uganda Free Zones Authority (UFZA), the National Social Security Fund (NSSF) and any other ministry, department or agency specified by the Minister by notice in the Gazette – Uganda ICA – 19 sec 11(2)(a) – (k).

²⁴⁵ Uganda ICA – 19 (2019) sec 11(3).

²⁴⁶ SEATINI, ‘CSO proposals on the amendment of the Investment Code Act, 2019’ (2019) 3.

²⁴⁷ SEATINI, ‘CSO proposals on the amendment of the Investment Code Act, 2019’ (2019) 4.

²⁴⁸ Uganda ICA – 19 (2019) sec 15(1); UNCTAD *WIR* (2024) 121.

²⁴⁹ Under the Act, ‘portfolio investment’ means the acquisition of an entity participation in a business enterprise traded on a recognised stock exchange’ – Uganda ICA – 19 (2019) sec 1 & 15(2).

²⁵⁰ Uganda ICA – 19 (2019) sec

²⁵¹ Uganda ICA – 19 (2019) sec 16(1) and (2).

²⁵² Uganda ICA – 19 (2019) sec 16(1) and (2).

²⁵³ Uganda ICA – 19 (2019) sec 17 (a) – (e).

- a. certificate of registration of the business;
- b. business plan which shall include -
 - i. the name of the investment and detailed information on the type of investment;
 - ii. the action plan;
 - iii. the date of commencement of operations;
 - iv. detailed information on raw materials sourced in the country or in the locality where the investment is to operate;
 - v. detailed information on any financing and assets to be sourced from outside Uganda, including the timeframe in which these finances and assets shall be
 - vi. land requirement for the investment;
 - vii. the location of the investment;
 - viii. utilities required for the investment;
 - ix. a market survey;
 - x. details of the projected technology; and
 - xi. knowledge transfer;
- c. the environmental impact assessment certificate issued in accordance with the relevant laws;
- d. the projected number of employees; and
- e. licence granted by the business sector in which the investor intends to operate.

This section should include criteria for the approval of investment plans, in accordance with the domestic laws and NDPs in force at the time, to ensure that investment projects contribute to Uganda's evolving development goals.²⁵⁴

Upon registration, Investors assume certain obligations including to:²⁵⁵

- a) observe and adhere to the laws of Uganda;
- b) implement the proposal in accordance with the business plan submitted in the application for an investment licence;
- c) properly keep financial and accounting records of the investment and submit a copy of a certified financial report to the Board within three months following the preceding financial year;
- d) keep data relating to operations of the investment enterprise for a period of seven years;
- e) respond in a period prescribed by written notice to any query from the Board in connection with operations of the investment enterprise;

²⁵⁴ SEATINI, 'CSO proposals on the amendment of the Investment Code Act, 2019' (2019) 4.

²⁵⁵ Uganda ICA – 19 (2019) sec 18(a) – (h).

- f) periodically avail the books of accounts to the body responsible for taxation;
- g) register with the tax administration and file timely tax returns even in case of entitlement to tax exemption;
- h) permit the Authority or its employees or agents reasonable access to monitor the operations of the business enterprise.

Evidently, while the UIA has obligations to investors, such as promoting, evaluating, licensing, protecting them and their investments, the ICA – 19 also imposes obligations on investors, balancing the rights and obligations of the host-country *vis-à-vis the investor*.²⁵⁶

The definitions of ‘investor’ and ‘investment’ are critical in determining the scope and application of an investment treaty or domestic law. The ICA – 19 defines an ‘investment’ as the ‘creation or acquisition of business assets and services with a view to generate future higher value and includes the expansion, restructuring or rehabilitation of an existing business enterprise’.²⁵⁷

The ICA – 19 redefines a ‘foreign investor’ and ‘domestic investment’ to align with Uganda’s obligations under the EAC Treaty.²⁵⁸ Under the ICA – 19, a ‘foreign investor’ is now someone who is not a citizen of an EAC Partner State or a company/ partnership with the majority ownership from non-EAC citizens.²⁵⁹ A ‘domestic investment’ included citizens from EAC Partner states or entities with majority ownership by EAC citizens, holding an investment.²⁶⁰

This redefinition removes distinction between Ugandan citizens and other EAC citizens in investment matters, giving equal treatment to investments and investors from all EAC countries.²⁶¹ The ICA – 19 also protects investments from expropriation, consistent with section 26(2) of the Constitution, which protects the right of persons to own property, by

²⁵⁶ Uganda ICA – 19 (2019) sec 18(a) – (h).

²⁵⁷ Uganda ICA – 19 (2019) sec 1; The ICA-91 (1991) sec 1.

²⁵⁸ Uganda ICA – 19 (2019) (2019) sec 1; Okot (2019) 5; EAC Treaty (2000); E Katugugu & H Kamugisha, ‘Legal Alert: The Investment Code Act, 2019’ (2019).

²⁵⁹ Uganda ICA – 19 (2019) (2019) sec 1.

²⁶⁰ Uganda ICA – 19 (2019) (2019) sec 1.

²⁶¹ Uganda ICA – 19 (2019) (2019) sec 1; Okot (2019) 5; EAC Treaty (2000); E Katugugu & H Kamugisha, ‘Legal Alert: The Investment Code Act, 2019’ (2019).

prohibiting the deprivation of such property except under certain conditions.²⁶² Property can only be expropriated in the public interest, with fair and prompt compensation.²⁶³

Moreover, under the ICA – 19, compensation is freely transferable out of Uganda and is not subject to the exchange control restrictions of the Foreign Exchange Act, 2004, which limits the Bank of Uganda's (BOU) powers under the Uganda Foreign Exchange Act,²⁶⁴ which provides that the Governor of the BOU may restrict payments if Uganda has experienced a severe deterioration in its balance of payments, requiring temporary imposition of exchange controls.²⁶⁵

The ICA – 19 therefore limits the Governor's powers to the extent that the GOU would still be obligated to pay and transfer compensation to an affected investor, even where there is a deterioration of Uganda's balance of payments.²⁶⁶ This was the case with Argentina where it was ordered to pay investors millions in ISDS awards despite being in a financial crisis and unable to make such payments.²⁶⁷

In order to avoid such situations, it is recommended that section 24 of ICA – 19 and section 10 of the Foreign Exchange Act be amended to include exceptions or limitation provisions to at least delay the payment and transfer of compensation to an affected investor, where a country is experiencing financial or economic emergencies such as those arising from financial crises and severe balance of payment deteriorations.

Both domestic and foreign investors are eligible for incentives under the ICA – 19, if they meet the minimum investment capital requirement under section 15,²⁶⁸ engage in the priority areas under Schedule 2,²⁶⁹ export a minimum of 80 per cent of the goods they produce²⁷⁰ and

²⁶² Constitution of Uganda (1995) sec 26(1), (2)(b)(i) & (ii).

²⁶³ Constitution of Uganda (1995) sec 26(1), (2)(b)(i) & (ii); Uganda ICA – 19 (2019) (2019) sec 24(2)(a), (b).

²⁶⁴ Uganda ICA – 19 (2019) (2019) sec 24(3).

²⁶⁵ Foreign Exchange Act of 2004 sec 10.

²⁶⁶ Okot (2019) 8.

²⁶⁷ Schill *et al* (2015) 44.

²⁶⁸ Uganda ICA – 19 (2019) sec 12(a) & 15(2)

²⁶⁹ Uganda ICA – 19 (2019) sec 12(b).

²⁷⁰ Uganda ICA – 19 (2019) sec 12(c).

source 70 per cent of their raw materials locally.²⁷¹ The latter two requirements constitute export and local content subsidies.

These export and local content subsidies are, however, prohibited under the WTO's Agreement on Subsidies and Countervailing Measures (SCMA) to which Uganda is bound.²⁷² The SCMA prohibits subsidies contingent in law, or in fact, whether wholly or as one of several conditions, on export performance (export subsidies)²⁷³ and subsidies, whether solely or as one of several other conditions, on the use of domestic over imported goods (local content subsidies).²⁷⁴

The two requirements listed under section 12(c) and (e) of the ICA – 19, respectively, are therefore *prima facie* inconsistent with Uganda's obligations under the SCMA. Investors are additionally required to provide for a 30 per cent substitution of the value of imported products, employ a minimum of 60 per cent Ugandan citizens and introduce new technology or upgrade indigenous technology, to qualify for incentives under the Act.²⁷⁵

This section should be aligned with the provisions of the Public Finance Management Act, which regulates the procedures for granting incentives in Uganda.²⁷⁶ Some of the benefits that can be negotiated by or granted to the holder of an investment certificate include:

- a) concessional import duty rates for importing plant, machinery, equipment, vehicles or construction materials for an investment project;
- b) exemption from import duty on one motor vehicle for personal use, personal and household effects owned and used outside the EAC for at least twelve months, provided that the person is relocating to an EAC Partner State;
- c) general incentives for start-up businesses under customs laws, the Income Tax Act, Cap 340 (ITA) and the Value-Added Tax Act, Cap 349; and

²⁷¹ Uganda ICA – 19 (2019) sec 12(e).

²⁷² Agreement on Subsidies and Countervailing Measures (SCMA) art 3.2.

²⁷³ The SCMA art 3(1)(a) & Annex I.

²⁷⁴ The SCMA art 3(1)(b).

²⁷⁵ Uganda ICA – 19 (2019) sec 12(d), (f) and (g).

²⁷⁶ Uganda Public Finance Management Act of 2015; SEATINI 'CSO proposals on the amendment of the Investment Code Act, 2019' (2019) 5.

- d) duty drawback on imported inputs used to produce goods for export, as per relevant laws.²⁷⁷

Technology transfer is crucial for domestic productivity growth in Uganda²⁷⁸ and foreign investors transferring advanced technology to Uganda are protected under the Industrial Property Act,²⁷⁹ which promotes inventive and innovative activities and facilitates the acquisition of technology through the granting and regulation of industrial property rights and related matters.²⁸⁰

When disputes arise between either domestic or foreign investors and the Ugandan government, the ICA – 19 requires parties to first attempt resolution through negotiations under Uganda’s Arbitration and Conciliation Act (ACA).²⁸¹ It is only once the dispute cannot be resolved through such negotiations, that it can then be submitted for arbitration, with parties having three arbitration options,²⁸² which according to Section 25(2) of ICA – 19 include:²⁸³

- a) in accordance with the procedures for arbitration provided under the Arbitration and Conciliation Act;
- b) in accordance with the rules of procedure for arbitration of the International Centre for the Settlement of Investment Disputes; or
- c) within the framework of any bilateral or multilateral agreement on investment protection to which the Government and the country of which the investor is a national are parties.

Unlike the previous Act, which applied dispute settlement provisions only to foreign investors,²⁸⁴ the ICA – 19 extends these provisions to domestic investors. Although it is not

²⁷⁷ EAC ‘Uganda standard incentives for investors’ available at <https://www.eac.int/investment-climate-and-incentives/investment-incentives/243-sector/investment-promotion-private-sector-development/investment-guide/2478-uganda-standard-incentives-for-investors> (accessed 30 August 2024).

²⁷⁸ HM Osano & PW Koine, ‘Role of foreign direct investment on technology transfer and economic growth in Kenya: A case of the energy sector’ (2016) *Journal of Innovation and Entrepreneurship* 2.

²⁷⁹ Uganda Industrial Property Act of 2014.

²⁸⁰ Uganda Industrial Property Act (2014) short title.

²⁸¹ Uganda ICA – 19 (2019) sec 25(1) provides that: where a dispute arises between an investor and the Authority or the Government in respect of a registered business enterprise, all efforts shall be made to settle the dispute through negotiations for an amicable settlement in accordance with the Arbitration and Conciliation Act.

²⁸² Uganda ICA – 19 (2019) sec 25(1), 2(a) - (c)

²⁸³ Uganda ICA – 19 (2019) sec 25(2)(a) – (c).

²⁸⁴ Uganda ICA – 91 (1991) sec 28(1) and (2) provide that: (1) Where a dispute arises between a foreign investor and the authority or the Government in respect of a licensed business enterprise, all efforts shall be

expressly stated, both domestic and foreign investors can use the option under section 25(2)(a), however, only a foreign investor can use the section 25(2)(b) and (c) arbitration options as the ICSID Centre cannot preside over disputes between a host-country and its own citizens²⁸⁵ and international agreements are between other countries and the host-country.

Given that ICSID has a contentious history for being unfair and highly risky for developing countries, that international arbitration is expensive and that IAT interpretations often limit a country's right to regulate in the public's interest, other dispute settlement options such as mediation and conciliation, especially with regards to foreign investors should be mandatory and explored.²⁸⁶

It is recommended that section 25 of ICA – 19 be amended to include a provision that requires foreign investors to exhaust domestic remedies before being given leave to initiate international arbitration proceedings.²⁸⁷ After all, Uganda's ACA applies to domestic and international arbitration and is in accordance with international best practices.²⁸⁸

While there is provision for assessing an investment's impact on Uganda's environment,²⁸⁹ the express objective to promote sustainable investment is not provided for in the Act.²⁹⁰ The ICA - 19 does not once mention 'sustainable development' as its objective, in spite of Uganda having several commitments to pursuing such objectives in various development agendas and

made to settle the dispute through negotiations for an amicable settlement; (2) A dispute between a foreign investor and the authority or the Government in respect of a licensed business enterprise which is not settled through negotiations may be submitted to arbitration in accordance with the following methods as may be mutually agreed by the parties- (a) in accordance with the rules of procedure for arbitration of the International Centre for the Settlement of Investment Disputes; (b) within the framework of any bilateral or multilateral agreement on investment protection to which the Government and the country of which the investor is a national are parties; or (c) in accordance with any other international machinery.

²⁸⁵ ICSID Convention (1965) art 25.

²⁸⁶ SEATINI, 'CSO proposals on the amendment of the Investment Code Act, 2019' (2019) 7.

²⁸⁷ SEATINI, 'CSO proposals on the amendment of the Investment Code Act, 2019' (2019) 7.

²⁸⁸ Uganda ACA (2000) sec 1.

²⁸⁹ Uganda ICA - 19 (2019) sec 17(c).

²⁹⁰ Constitution of Uganda (1995) objective XXVII(i) & sec 245.

the Constitution of Uganda and the 2018 NIP.²⁹¹ Furthermore, it does not safeguard the country's right to regulate in accordance with the COU and the 2018 NIP.²⁹²

Notably, the review reveals that, while more modern and comprehensive than its 1991 predecessor, the ICA-19 does not contain sufficient provisions to promote sustainable development or to serve as an adequate tool for the effective regulation of foreign investment. The Act primarily focuses on facilitating and attracting investment through institutional reforms, such as establishing the UIA as a one-stop centre for investment coordination and licensing.²⁹³

It outlines procedures for investment registration, investor obligations and access to incentives, particularly for priority sectors listed in Schedule 2.²⁹⁴ Although these provisions reflect an effort to enhance Uganda's investment climate by streamlining procedures and offering incentives to investors, the Act fails to explicitly incorporate sustainable development as a guiding principle. Nowhere in the Act is "sustainable development" defined or operationalised, nor is it referenced in the objects or functions of the UIA or in the substantive provisions governing investor obligations and investment incentives.

The law does not acknowledge or align itself with global or regional development frameworks such as the SDGs (Agenda 2030), Agenda 2063, or Uganda's own National Climate Change Policy (2015), or National Environment Act (2019) despite the fact that most of these frameworks, laws and policies were adopted prior to its enactment in March 2019.²⁹⁵ These instruments collectively outline the country's sustainable development commitments and climate action priorities, yet the ICA-19 remains silent on them. This omission reflects a missed opportunity to position Uganda's investment law as a tool for advancing inclusive, equitable and environmentally conscious growth.

²⁹¹ Uganda NIP (2018) IX; For instance, the preamble of South Africa's Protection of Investment Act (PIA) of 2015, recognises 'the importance that investment plays in job creation, economic growth, sustainable development, and the well-being of the people of South Africa.' The ICA - 19 (2019) does not have a similar provision.

²⁹² Uganda NIP (2018) 17 – 18.

²⁹³ Uganda ICA – 19 (2019) preamble and sec 3(c) and 10(1).

²⁹⁴ Uganda ICA – 19 (2019) sec 12(b).

²⁹⁵ Agendas 2030 and 2063 were adopted in 2015.

Moreover, the Act does not impose any binding environmental, social, or human rights obligations on investors. The only reference to compliance is a general provision under section 18(a), which states that registered investors must “observe and adhere to the laws of Uganda.”²⁹⁶ While this provision implies conformity with Uganda’s legal framework—including environmental, labour, and human rights standards—it does not go further to impose direct obligations within the investment regime itself.

There are no provisions requiring investors to conduct environmental due diligence, adhere to labour standards, respect indigenous rights, or ensure gender equality. Nor does the Act incorporate mechanisms for enforcement, sanctions for non-compliance or remedies available to affected communities in cases of environmental or social harm. While the Act requires an EIA as part of the investment registration process (section 17(c)) and contemplates some degree of environmental consideration in the use of scarce resources (section 20), these provisions are limited in scope and not integrated into a broader sustainability framework.

In contrast, many new-generation investment laws and treaties, such as those adopted in South Africa, Nigeria, and Morocco, have introduced investor obligations linked to sustainability principles and created legal avenues to hold investors accountable.²⁹⁷ In Uganda’s case, the lack of such provisions risks perpetuating a model of investment that prioritises capital attraction at the expense of environmental protection, social welfare, and intergenerational equity. This reveals a significant normative and regulatory gap that undermines the role of investment law in supporting Uganda’s broader (sustainable) development vision.

Overall, while the ICA-19 introduces important structural and procedural reforms to Uganda’s investment regime, it is not, on its own, an adequate tool for promoting sustainable development or regulating foreign investment in a balanced and development-oriented manner. Its silence on sustainability principles, lack of alignment with key national and international development frameworks and absence of binding obligations on investors

²⁹⁶ Uganda ICA – 19 (2019) sec 18(a).

²⁹⁷ South Africa’s Protection of Investment Act (2015) preamble; and Morocco – Nigeria BIT (2016) arts. 15, 8, 19, 20, 23, and 24.

specifically with regard to sustainable development objectives, underscores the need for complementary legal instruments or substantial amendments. A more coherent and sustainability-focused investment governance framework is therefore essential to ensure that foreign investment genuinely supports Uganda’s long-term development objectives.

3.4.2. Investment-Related Instruments affecting FDI in Uganda

3.4.2.1. *Convention on the recognition and enforcement of foreign arbitral awards (New York Convention) 1958*

The 1958 New York Convention is a pivotal international treaty for simplifying the recognition and enforcement of international arbitration awards, providing a uniform legal framework to enhance the reliability of cross-border dispute resolution.²⁹⁸ It has become one of the most crucial instruments in international commercial arbitration by encouraging the recognition and enforcement of arbitration agreements and foreign arbitral awards.²⁹⁹

The Convention defines ‘foreign arbitral awards’ as those made outside the country of enforcement or non-domestic awards that involve foreign investors or foreign arbitration laws.³⁰⁰ Countries can limit the Convention’s application under Article 1(3), allowing flexibility to restrict it to commercial disputes or awards from other Contracting States.³⁰¹ This flexibility helps to mitigate the risk of undue interference in the arbitral process.

Uganda acceded to the New York Convention on 12 February 1992,³⁰² limiting its application to the recognition and enforcement of awards made in the territories of other Contracting States.³⁰³ Article II(3) of the Convention requires courts in Contracting States to refer the Parties to arbitration when an agreement exists between them, upon the request of one

²⁹⁸ New York Convention (2015 Version) 1; New York Convention (1958) arts XII & 1.

²⁹⁹ New York Convention (2015 Version) 1.

³⁰⁰ New York Convention (1958) art 1(1); van-den Berg (2003) 2.

³⁰¹ van-den Berg (2003) 2; New York Convention (1958) art 1(3).

³⁰² New York Arbitration Convention, ‘Contracting States’ available at <https://www.newyorkconvention.org/Countries> (accessed 30 October 2023).

³⁰³ New York Arbitration Convention, ‘Contracting States’ available at <https://www.newyorkconvention.org/Countries> (accessed 30 October 2023).

party, unless the agreement is found to be null and void, inoperative or incapable of being performed.³⁰⁴ This Article is also mirrored in Section 40 of Uganda's ACA.³⁰⁵

Contracting States are required to recognise arbitral awards as binding and enforce them in accordance with the procedural rules of the country where the award is being relied on.³⁰⁶ Section 43 of the ACA goes on to state that 'where the court is satisfied that a New York Convention award is enforceable under this Part, the award shall be deemed to be a decree of that court'.³⁰⁷

In order to obtain recognition and enforcement, the applying Party must, at the time of application, supply an authenticated original award or copy thereof or the original agreement or copy thereof, referred to under Article II of the Convention.³⁰⁸ This provision mirrors that of Sections 35 and 42 of the Uganda ACA as well.³⁰⁹ The recognition and enforcement of an award can be refused, by request of the Party against whom it was invoked if they provide proof to the competent authority that:³¹⁰

- a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

³⁰⁴ New York Convention (1958) art II(3); van-den Berg (2003) 9.

³⁰⁵ Uganda ACA (2000) sec 40 provides that - When seized of an action in a matter in respect of which the parties have made an arbitration agreement referred to in section 39, the court shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.

³⁰⁶ New York Convention (1958) art III.

³⁰⁷ Uganda ACA (2000) sec 43.

³⁰⁸ New York Convention (1958) art IV(1)(a) – (b).

³⁰⁹ Uganda Arbitration and Conciliation Act (2000) secs 35(1) - (3) provide that – (1) *An arbitral award shall be recognised as binding and upon application in writing to the court shall be enforced subject to this section; (2) Unless the court otherwise orders, the party relying on an arbitral award or applying for its enforcement shall furnish— (a) the duly authenticated original arbitral award or a duly certified copy of it; and (b) the original arbitration agreement or a duly certified copy of it; (3) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.*

³¹⁰ New York Convention (1958) art V(1)(a) – (e).

- c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Recognition and enforcement of an award may also be denied, where the competent authority in the country where such recognition and enforcement are sought, discovers that the subject matter of the dispute cannot be settled by arbitration under its domestic laws, or that such recognition and enforcement of the award would be contrary to that country's public policy interests.³¹¹

Overall, the New York Convention's framework ensures that arbitration awards are recognised and enforced across borders, thus providing a reliable and efficient mechanism for resolving international investment disputes. For Uganda, this reliability is crucial in attracting FDI, as it assures investors that their rights will be protected, and any disputes will be resolved fairly and enforceable.

The ability of Uganda as a Contracting State of the Convention, to enforce arbitral awards is directly tied to its international obligations and the confidence it instils in foreign investors. By integrating the principles of the New York Convention into its domestic laws (ACA), Uganda strengthened its national legal framework, ensuring that it aligned with international standards.

Moreover, the Convention's provisions on limiting its application through specific reservations offer Uganda a strategic tool to tailor its BIT system in a way that protects its sovereignty while still adhering to international norms. This flexibility can be leveraged to

³¹¹ New York Convention (1958) art V(2)(a) and (b).

ensure that Uganda's BIT system does not undermine its development goals or ability to implement policies aimed at achieving sustainable development.

3.4.2.2. Convention on the Settlement of Investment Disputes between States and nationals of other States (ICSID Convention) 1965

The ICSID Convention, formulated by the World Bank in 1965 and in force since 1966, is a cornerstone of international investment law (IIL), providing a framework for resolving disputes between investors and host-countries.³¹² It established the ICSID Centre, which facilitates the conciliation and arbitration of investor-State disputes (ISDS).³¹³ As of June 2023, 166 countries have signed and 158 have ratified the Convention, with ICSID having registered 991 cases, solidifying its role as the leading ISDS forum.³¹⁴

The ICSID Centre is overseen by an Administrative Council with representatives from each Contracting State; and the Secretariat led by the Secretary-General.³¹⁵ The Convention's provisions are complemented by the various Rules and Regulations, which govern administrative, financial, conciliation and arbitration procedures.³¹⁶ The ICSID Additional Facility Rules, introduced in 1978, extend the Centre's jurisdiction to cases where either the investor' or host-country is not a Convention member or involves investment types outside the Convention's scope.³¹⁷

This study highlights the arbitration framework within the ICSID Convention, focusing on the ICSID Arbitration Rules, as most ISDS cases are resolved through arbitration.³¹⁸ The ICSID Centre maintains a Panel of Arbitrators, composed of qualified individuals nominated by each Contracting State, with each State able to designate four arbitrators who can, but need not be nationals of the assigning Contracting State.³¹⁹

³¹² ICSID *Convention, Rules and Regulations* (2006) ICSID/15, 5; ICSID *Convention, Regulations and Rules* (2022) ICSID/15/Rev.3, IV.

³¹³ International Centre for Settlement of Investment Disputes, 'ICSID Convention, Rules and Regulations' (April 2006) ICSID/15, 5; ICSID Convention (1965) art 1(1) – (2).

³¹⁴ ICSID *The ICSID Caseload – Statistics: Issue 2024-2* (2024) 1.

³¹⁵ ICSID Convention (1965) arts 3, 4(1) and 9.

³¹⁶ ICSID Convention (1965) art 6(1)(a) – (c).

³¹⁷ ICSID *Additional Facility Rules and Regulations* (1967) 2022 version, art 3.

³¹⁸ R Cahil-O'Callaghan, A Howard & S Brekoulakis, 'Influence in investor-state dispute settlement: A dynamic concept' 14 (2023) *Journal of International Dispute Settlement* 25.

³¹⁹ ICSID Convention (1965) 2022 version, arts 3, 12 & 13(1) – (2).

The Centre's Chairperson can appoint ten additional arbitrators have different nationalities.³²⁰ Arbitrators serve renewable six-year terms and must demonstrate high morals, legal expertise and impartiality.³²¹ ICSID's jurisdiction cover investment-related disputes between Contracting States and nationals of other Contracting States, requiring written consent from both Parties.³²²

Once consent is given, it cannot be unilaterally withdrawn,³²³ though may limit the type of disputes submitted.³²⁴ Arbitration begins with a request to the Secretary-General, who assembles an Arbitral Tribunal if jurisdictional requirements are met.³²⁵ Typically, each Party appoints one arbitrator and both agree on a third, who serves as the Tribunal President.³²⁶ If Parties cannot agree on the Tribunal President the Secretary-General assists in the appointment process.³²⁷

An ICSID Tribunal must be constituted within 90 days of a dispute's registration with the Secretary-General.³²⁸ If not constituted within this period, the Chairperson must appoint arbitrators upon request of either Party, following consultations.³²⁹ Once established, the Tribunal determines its own jurisdictional objections as preliminary questions or alongside the case's merits.³³⁰

Disputes are resolved in accordance with the laws agreed upon by the Parties or, in absence of such agreement, under the host-country's domestic laws and the applicable principles of international law.³³¹ Awards require a majority vote, detailed reasoning and are binding without appeal, unless enforcement is stayed.³³² Awards cover interpretation, revision or

³²⁰ ICSID Convention (1965) 2022 version, art 13(2).

³²¹ ICSID Convention (1965) 2022 version, arts 15(1) and 14(1).

³²² ICSID Convention (1965) 2022 version, art 25(1).

³²³ ICSID Convention (1965) 2022 version, art 25(1).

³²⁴ ICSID Convention (1965) 2022 version, art 25(4).

³²⁵ ICSID Convention (1965) 2022 version, art 36(1) - (2); ICSID Rules of procedure for arbitration proceedings (Arbitration Rules) rule 2(1).

³²⁶ ICSID Convention (1965) 2022 version, art 37(2)(a) - (b).

³²⁷ ICSID Convention (1965) 2022 version, art 38.

³²⁸ ICSID Convention (1965) 2022 version, art 38

³²⁹ ICSID Convention (1965) 2022 version, art 38

³³⁰ ICSID Convention (1965) 2022 version, art 41(1) - (2).

³³¹ ICSID Convention (1965) 2022 version, art 42(1).

³³² ICSID Convention (1965) 2022 version, arts 48(1) - (3), (5), 53(1); ICSID Arbitration rule 59(2) and 62

annulment and are treated as domestic court judgements.³³³ Proceedings can be paused with Party consent or Tribunal decision and Parties may settle or discontinue proceeding by mutual agreement.³³⁴ A proceeding can also be discontinued if the Parties fail to Act in accordance with Arbitration Rule 57.³³⁵

Uganda ratified the ICSID Convention in 1966.³³⁶ It had not participated in ICSID disputes until efforts to exploit the oil and gas deposits in Western Uganda's Lake Albert took off. Its first ICSID ISDS case was *Tullow Uganda Operations Pty Ltd v Uganda*, registered in 2012,³³⁷ while its second case was the *Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited v Uganda* case, registered in 2013.³³⁸

Both of these cases were instituted by the same Australian investor, Tullow Uganda Operations (TUO), for breach of the production-sharing contract with the Ugandan government, granting the investor exploration, development and production rights in a certain oil exploration area of Lake Albert.³³⁹ Both cases were eventually discontinued in accordance with the-then ICSID Arbitration Rule 43(1).³⁴⁰

This means that Uganda must have filed a preliminary objection claiming either that the dispute was not within the Centre's jurisdiction, or that it was not within the competence of

³³³ ICSID Convention (1965) arts 53(2) & 54(1).

³³⁴ ICSID Arbitration Rules 54(1) - (2), 55(1) & 56(1).

³³⁵ ICSID Arbitration Rule 57 (Discontinuance for Failure of Parties to Act) provides that: '(1) If the parties fail to take any steps in the proceeding for more than 150 consecutive days, the Tribunal shall notify them of the time elapsed since the last step taken in the proceeding. (2) If the parties fail to take a step within 30 days after the notice referred to in paragraph (1), they shall be deemed to have discontinued the proceeding and the Tribunal shall issue an order taking note of the discontinuance. (3) If either party takes a step within 30 days after the notice referred to in paragraph (1), the proceeding shall continue. (4) The Secretary-General shall issue the notice and the order referred to in paragraphs (1) and (2) if the Tribunal has not yet been constituted or if there is a vacancy on the Tribunal.'

³³⁶ ICSID 'Contracting States and Measures Taken By Them for the Purpose of the Convention' (2019) 8 *ICSID* 6.

³³⁷ *Tullow Uganda v Uganda* (ICSID Case No. ARB/12/34) available at <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/15/11> (accessed 10 May 2023).

³³⁸ *Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited v Republic of Uganda* (ICSID Case No. ARB/13/25) available at <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/13/25> (accessed 10 May 2023).

³³⁹ AW Oguttu, 'Resolving double tax treaty disputes: The challenges of mutual agreement procedure with a special focus on addressing the concerns of developing Countries in Africa – the South African and Ugandan Experiences' (2015) *SAYIL* 196.

³⁴⁰ *Tullow Uganda Operations v Uganda* (ICSID Case No. ARB/12/34) available at <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/15/11> (10 May 2023); *Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited v Uganda* (ICSID Case No. ARB/13/25).

the Tribunal, however, the exact reasons for discontinuation are not available to the public.³⁴¹ The third ICSID case against Uganda – *Total E&P v Uganda*, was initiated in 2015 and was linked to the two previous ISDS cases.³⁴²

The Australian investor in the two previous cases – TUO, sold a portion of their interests in the oil exploration area on Lake Albert, to the China National Offshore Oil Corporation (CNOOC) and Total E&P Uganda BV.³⁴³ The Uganda Revenue Authority (URA) assessed TUO for USD 467,271,971 in capital gains tax, to which TUO objected, arguing that the production-sharing agreement exempted it from paying capital gains tax.³⁴⁴

In response, the URA argued that section 152 of the Constitution of Uganda provided that taxes could only be waived under the authority of an Act of Parliament (as opposed to a provision in a contract).³⁴⁵ Ultimately, Uganda’s Tax Tribunal ruled in favour of the URA, arguing that the tax waiver was illegal and invalid under Uganda’s tax laws and that TUO was not exempt from paying capital gains tax.³⁴⁶

Total E&P, the Dutch investor to whom some of TUO’s oil exploration interests had been sold, was therefore expected to pay a stamp duty of about USD 30 million, resulting from the sale, to which it objected.³⁴⁷ As a result, Total initiated arbitration before the ICSID Centre, alleging that Uganda had breached its obligations under the Netherlands – Uganda BIT (2000) and the production-sharing agreement between the Ugandan government and TUO.³⁴⁸

The *Total E&P* case was the first known time that an investor had invoked breach of a bilateral investment treaty (BIT) with Uganda.³⁴⁹ Total E&P claimed that the Ugandan government had levied an allegedly unlawful stamp duty since the production sharing agreement (with TUO) contained a tax waiver,³⁵⁰ despite the waiver itself being illegal and thus null and void to the

³⁴¹ ICSID Arbitration Rule 43(1).

³⁴² *Total E&P Uganda BV v Republic of Uganda* (ICSID Case No. ARB/15/11).

³⁴³ Oguttu (2015) 196.

³⁴⁴ Oguttu (2015) 196.

³⁴⁵ Oguttu (2015) 196.

³⁴⁶ Oguttu (2015) 196.

³⁴⁷ Oguttu (2015) 196.

³⁴⁸ *Total E&P v Uganda* (ICSID Case No. ARB/15/11).

³⁴⁹ *Total E&P v Uganda* (ICSID Case No. ARB/15/11).

³⁵⁰ *Total E&P v Uganda* (ICSID Case No. ARB/15/11).

extent of that illegality.³⁵¹ In 2018, Total E&P and Uganda settled the dispute, however, details of the settlement were not disclosed to the public.³⁵²

These cases highlight how investors can bypass national legal systems by choosing international arbitration, potentially undermining domestic laws and regulatory sovereignty. In all three cases, investors seemingly argued that Uganda's laws did not apply to them, presenting a colonialist approach despite the laws' general applicability.³⁵³ By pursuing claims before ICSID, investors sought favourable rulings outside Uganda's legal framework.

The *Total E&P* case highlighted the dangers of old generation BITs (old-BITs),³⁵⁴ notably when the Netherlands – Uganda BIT (2000) lacked provisions allowing Uganda to regulate taxes without ISDS risk, prompting Uganda to terminate this BIT in 2017.³⁵⁵ ICSID's arbitration framework, while essential for resolving investment disputes, has faced criticisms for high costs, lack of transparency and potential bias toward multinational corporations (MNCs).³⁵⁶

These concerns have led some countries including Venezuela, Australia and Indonesia to reconsider their participation in the ICSID framework.³⁵⁷ The rise in ISDS cases challenging public interest regulations – such as those on tax, health and environment – has raised

³⁵¹ ISDS Platform, 'Total vs. Uganda: Illegal tax waiver' May 2021 available at <https://isds.bilaterals.org/?total-vs-uganda-needs-title> (accessed 12 August 2024).

³⁵² ISDS Platform, 'Total vs. Uganda: Illegal tax waiver' May 2021 available at <https://isds.bilaterals.org/?total-vs-uganda-needs-title> (accessed 12 August 2024).

³⁵³ The Constitution of Uganda (1995); Uganda income Tax Act of 2000.

³⁵⁴ Old-BITs are BITs that were concluded before 2010 – see UNCTAD *WIR* (2017).

³⁵⁵ Both ENDS, 'Uganda terminates investment treaty' available at <https://annualreport.bothends.org/uganda-terminates-investment-treaty/> (10 May 2023).

³⁵⁶ *Tullow Uganda Operations v Uganda* (ICSID Case No. ARB/12/34) available at <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/12/34> (accessed 10 May 2023); *Total E&P v Uganda* (ICSID Case No. ARB/15/11); *Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited v Republic of Uganda* (ICSID Case No. ARB/13/25); C Olivet 'Why did Ecuador terminate all its bilateral Investment treaties? (2017) available at <https://www.tni.org/en/article/why-did-ecuador-terminate-all-its-bilateral-investment-treaties> (accessed 10 October 2023); MA Forere, 'Move away from BITs framework: A need for multilateral investment treaty?' (2017) *World Trade Institute* 10; SD Franck 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521; Qumba (2019) 364-7; ICSID Speeches and Articles, 'A brief history of amendment to the ICSID Rules and Regulations' (2020) available at <https://icsid.worldbank.org/news-and-events/speeches-articles/brief-history-amendment-icsid-rules-and-regulations> (accessed 10 October 2023).

³⁵⁷ C Olivet 'Why did Ecuador terminate all its bilateral Investment treaties? (2017) available at <https://www.tni.org/en/article/why-did-ecuador-terminate-all-its-bilateral-investment-treaties> (accessed 10 October 2023); Forere (2017) 10.

concerns that ISDS hinders sustainable development objectives.³⁵⁸ Uganda's experience underscores the need for carefully crafted BITs that protect regulatory sovereignty while supporting FDI, aligning investment protection with long-term national and sustainable development objectives.³⁵⁹

3.4.2.3. *Agreement on trade-related investment measures (TRIMs Agreement), 1994*

The TRIMs Agreement is part of the WTO Agreements, negotiated during the Uruguay Round, which involved 123 countries and spanned over seven and a half years.³⁶⁰ TRIMs addresses investment measures that affect trade in goods, recognising that such measures and policies can potentially distort or restrict international trade.³⁶¹ Member States are prohibited from adopting TRIMs that violate Articles III(4) and XI(1) of the 1994 GATT.³⁶²

Article III(4) ensures that imported goods receive treatment no less favourable than that given to domestic products regarding laws and regulations affecting sale, distribution and use (national treatment).³⁶³ Consequently, TRIMs that favour domestic over foreign products are prohibited. Article XI(1) prohibits measures such as quotas, import and export licenses or other restrictions on the importation or exportation of goods between Member States (quantitative restrictions).³⁶⁴

³⁵⁸ ICSID Speeches and Articles, 'A brief history of amendment to the ICSID Rules and Regulations' (2020) available at <https://icsid.worldbank.org/news-and-events/speeches-articles/brief-history-amendment-icsid-rules-and-regulations> (accessed 10 October 2023).

³⁵⁹ See discussion in Chapter 2 'The development dimension of IIAs' para 2.2.3 above.

³⁶⁰ Marrakesh Agreement Establishing the World Trade Organization - Annex 1a: Multilateral Agreements on Trade In Goods: Agreement on Trade-Related Investment Measures (TRIMs Agreement); WTO 'Understanding the WTO: Basics – The Uruguay Round' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (accessed 10 October 2022); 'Trade and Investment: Technical Information – Agreement on Trade Related Investment Measures' available at https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm (accessed 15 October 2021).

³⁶¹ TRIMs Agreement (1994) art 1; 'Trade and Investment: Technical Information – Agreement on Trade Related Investment Measures' available at https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm (accessed 15 October 2021).

³⁶² TRIMs Agreement (1994) art 2(1) and (2).

³⁶³ GATT (1994) art III(4) provides that: The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

³⁶⁴ GATT (1994) art IX(1) provides that: No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Prohibited TRIMs might include requirements for local content requirements (which require that locally sourced goods be purchased or used), manufacturing requirements (which require certain components be domestically manufactured), technology transfer requirements and export performance requirements (which require that a percentage of production volume be exported).³⁶⁵

Under the ICA - 19, investors in Uganda are eligible for incentives provided they, *inter alia*, export a minimum of 80 per cent of the goods they produce (export performance requirement), source 70 per cent of their raw materials locally (local content) and introduce advanced technology (technology transfer), which are *prima facie*, prohibited under the TRIMs Agreement as they are inconsistent with Article III(4) of the GATT.³⁶⁶

Normally, a local content requirement, even if applied equally to both domestic and foreign investors – as is the case under the Uganda’s ICA – 19 – is inconsistent with the TRIMs Agreement, because it inherently discriminates against imported products in favour of domestic ones.³⁶⁷ The fact that there is no discrimination between the two types of investors is irrelevant under the TRIMs Agreement.³⁶⁸

However, developing countries, like Uganda, can deviate from these restrictions under Article XVIII of the GATT 1994,³⁶⁹ which permits the country to modify or withdraw concessions or obligations under the GATT if it is necessary to achieve economic development objectives.³⁷⁰ Although some of Uganda’s measures appear to violate the TRIMs Agreement, they are allowed as they pursue economic development goals, even though sustainable development, which included social and environmental objectives, is not fully addressed.

³⁶⁵ Chapter 8 ‘Trade-related investment measures’ 331 – 33 available at <https://www.meti.go.jp/english/report/downloadfiles/qCT0219e.pdf> (accessed 12 August 2024).

³⁶⁶ Uganda ICA – 19 (2019) sec 12(c), (e) and (g).

³⁶⁷ WTO Trade and Investment: Technical information, ‘Agreement on trade Related Investment Measures’ available at https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm (accessed 1 September 2024).

³⁶⁸ WTO Trade and Investment: Technical information, ‘Agreement on trade Related Investment Measures’ available at https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm (accessed 1 September 2024).

³⁶⁹ TRIMs Agreement (1994) art 4.

³⁷⁰ GATT (1994) art XVIII(2)(a).

3.4.2.4. *Investment Facilitation for Development (IFD) Agreement, 2024*

The Investment Facilitation for Development (IFD) Agreement, initiated in 2017 by a group of developing and least-developed countries, including Uganda, was finalised in November 2023 after six years of negotiations.³⁷¹ This plurilateral agreement, open to all WTO Members and set to become part of Annex Four of the WTO Agreement, includes over 120 Members representing three-quarters of WTO membership.³⁷²

The IFD Agreement seeks to improve the investment and business environment by enhancing transparency, simplifying administrative processes and fostering international cooperation to boost FDI flows, especially to developing and least-developed countries, to promote sustainable development.³⁷³ It also aims to improve intra-governmental coordination and international cooperation on investment matters.³⁷⁴

The IFD Agreement defines ‘investment activities’ as ‘the establishment, acquisition, expansion, operation, management, maintenance and sale or other disposal of an investment.’³⁷⁵ ‘Investor of another Party’ is defined as:³⁷⁶

- i. A natural person having the nationality of that Party in accordance with its laws and regulations;
- ii. A natural person who has the right of permanent residence in that Party, where such party does not have nationals or has made a notification pursuant to Article XXVIII(k)(ii) of the General Agreement on Trade in Services (hereinafter referred to as the “GATS”); or
- iii. A juridical person with substantive business operations in the territory of that Party;

That is engaged in investment activities in the territory of any other Party...

A ‘juridical person’ is then defined as:³⁷⁷

³⁷¹ WTO, ‘Investment facilitation for development’ available at https://www.wto.org/english/tratop_e/invfac_public_e/invfac_e.htm (accessed 11 August 2024).

³⁷² WTO, ‘Investment Facilitation for Development Agreement’ (2024) 2 available at https://www.wto.org/english/tratop_e/invfac_public_e/factsheet_ifd.pdf (accessed 11 August 2024).

³⁷³ IFD Agreement (2024) art 1; Balistreri & Olekseyuk (2024) 2.

³⁷⁴ IFD Agreement (2024) art 2.3(a) - (b).

³⁷⁵ IFD Agreement (2024) art 3(a).

³⁷⁶ IFD Agreement (2024) art 3(d)(i) - (iii).

³⁷⁷ IFD Agreement (2024) art 3(e).

... any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association...

These definitions are generally in line with the definitions of ‘investment,’ ‘investor’ and ‘foreign investor,’ under Section 1 of Uganda’s ICA - 19 and are thus consistent with the Agreement.

The IFD Agreement applies to measures related to investment activities of foreign investors but does not create or modify commitments on market access, investment protection or ISDS.³⁷⁸ Upon ratification, these issues will remain subject to the existing bilateral and regional investment agreements under which Uganda has obligations.³⁷⁹ Furthermore, the Agreement does not apply to government procurement and subsidies or grants that are not available to foreign investors under a Party’s laws either.³⁸⁰

The IFD Agreement’s MFN treatment clause requires Parties to treat investors and investments from other Member States no less favourably than investors and investment from any other Member in similar circumstances.³⁸¹ However, it limits this requirement, excluding benefits arising from other agreements, IIAs, FTA, customs unions or measures related to authorisation, licensing and certification standards.³⁸²

Moreover, the provisions of other international agreements cannot serve as a basis for ‘treatment’ under the MFN obligation, preventing the use of provisions from these agreements to interpret or apply the IFD Agreement or support ISDS claims.³⁸³ The MFN clause therefore restricts ‘treaty shopping’ by blocking investors from seeking more favourable treatment available under different treaties concluded by a host-country.³⁸⁴

The limitation narrows the definition of ‘treatment’ to the provisions of the IFD Agreement itself, avoiding the import of obligations from external agreements. Such restrictions reduce

³⁷⁸ IFD Agreement (2024) art 1.

³⁷⁹ Balistreri & Olekseyuk (2024) 2.

³⁸⁰ IFD Agreement (2024) art 2.5(a) - (b).

³⁸¹ IFD Agreement (2024) art 5.1.

³⁸² IFD Agreement (2024) art 5.2(a) - (c).

³⁸³ IFD Agreement (2024) arts 5.3 & 2.2

³⁸⁴ Chapter 2 ‘Investor-State dispute settlement’ para 2.2.1 above.

legal uncertainties and preserve countries' regulatory autonomy, allowing flexibility in domestic policies, particularly regarding sustainable development, without undue influence from other investor-friendly agreements.

As Chapter Four will show, Uganda's in-force BITs do not limit the application of the MFN clause, subjecting it to possible incidents of treaty-shopping by investors.³⁸⁵ However, Uganda's ICA – 19 applies equally to all foreign investors. The IFD Agreement, unlike many old-BITs, lacks a NT clause and therefore does not compel Parties to treat foreign investors or their investments as favourably as domestic ones.

The IFD Agreement emphasises transparency in investment measures, requiring Parties to publish or make available up-to-date information on investment laws, sector restrictions, relevant authorities and procedures for taxes, registration and incentives.³⁸⁶ Information must be accessible online, preferably in a WTO language and free of charge, with a central information portal encouraged.³⁸⁷

Advance publication of proposed regulatory changes affecting investment, along with opportunities for feedback, is also recommended.³⁸⁸ Although the Agreement does not apply to regulations governing the entry or temporary stay of individuals in a Party's territory, nor to employment market access or matters related to citizenship, nationality or permanent residence,³⁸⁹ Parties are encouraged to make information on entry and temporary stay requirements accessible online, including relevant forms, fees and procedures.³⁹⁰

Uganda aligns well with these transparency requirements. The UIA website offers free, accessible information on investment laws, regulations, priority sectors, business registration and licensing in English, meeting IFD standards.³⁹¹ Uganda also provides an online visa and

³⁸⁵ Chapter 2 'Investor-State dispute settlement' para 2.2.1 above.

³⁸⁶ IFD Agreement (2024) arts 6.1, 6.2 & 6.4(c)(i) - (viii).

³⁸⁷ IFD Agreement (2024) arts 6.5, 7.1(a) – (i), 7.2. & 8.1 – 3.

³⁸⁸ IFD Agreement (2024) arts 10.1(a) – (b), 10.2. & 10.3.

³⁸⁹ IFD Agreement (2024) arts 12.1-2.

³⁹⁰ IFD Agreement (2024) art 12.3.

³⁹¹ See for instance <https://www.ugandainvest.go.ug/> (accessed 15 August 2024); UIA 'Brief guide to investing in Uganda' (2015) available at <https://www.ugandainvest.go.ug/wp-content/uploads/2016/04/Guide-to-investing-in-Uganda.pdf> (accessed 15 August 2024); <https://ura.go.ug/en/> (accessed 15 August 2024).

permit application system, supporting transparent entry and stay requirements for investment-related activities, consistent with the IFD Agreement provisions.³⁹²

The IFD Agreement also promotes streamlined, impartial and transparent administrative procedures for investment, urging Parties to simplify authorisation processes, ensure fair application evaluation and enable online application and payments.³⁹³ Year-round submissions, reasonable and transparent fees, clear timelines and single-entry point for applications are also recommended to enhance efficiency.³⁹⁴

Independent review mechanisms for administrative decisions and periodic assessment of facilitation measures to enhance efficiency and better address the needs of micro, small and medium-sized enterprises (MSMEs) are also encouraged by the Agreement.³⁹⁵ Such reviews should be objective, impartial and based on the merits of the case.³⁹⁶

Uganda aligns well with these provisions, with the UIA serving as a one-stop centre for investment-related services, offering online licensing and clear guidelines to avoid multiple applications across authorities.³⁹⁷ Uganda allows continuous submissions online,³⁹⁸ provides timely application status updates and ensures fees are transparent, including a no-charge policy for licenses if capital requirements are met.³⁹⁹

In fact, the UIA has established a Client Service Charter to ensure prompt processing of investment applications.⁴⁰⁰ Platforms like eBiz and the Uganda Registration Services Board

³⁹² 'Uganda e-Immigration System' available at <https://visas.immigration.go.ug/> (accessed 15 August 2024).

³⁹³ IFD Agreement (2024) arts 13 & 14.1 – 2.

³⁹⁴ IFD Agreement (2024) arts 15.1(b) - (g), 16, 17, 17 *Bis*, 18.1 – 2 & 19.

³⁹⁵ IFD Agreement (2024) art 20.1 & 21.

³⁹⁶ IFD Agreement (2024) art 20.1.

³⁹⁷ Uganda ICA – 19 (2019) short title; UIA eBiz Investor Services Online available at <http://www.ebiz.go.ug> (accessed 15 August 2024).

³⁹⁸ UIA <https://www.ugandainvest.go.ug/> (accessed 15 August 2024).

³⁹⁹ UIA 'Brief guide to investing in Uganda' (2015) available at <https://www.ugandainvest.go.ug/wp-content/uploads/2016/04/Guide-to-investing-in-Uganda.pdf> (accessed 15 August 2024); Uganda ICA – 19 (2019) secs 15 - 23; UIA eBiz Investor Services Online available at <http://www.ebiz.go.ug> (accessed 15 August 2024); See <https://www.ugandainvest.go.ug/> (accessed 15 August 2024); 'Uganda Investment Authority – One Stop Centre Client Service Charter' available at https://www.ugandainvest.go.ug/wp-content/uploads/2019/05/UIA_OSC_Client_Service_Charter-Jan-2019.pdf (accessed 15 August 2024);

⁴⁰⁰ 'Uganda Investment Authority – One Stop Centre Client Service Charter' available at https://www.ugandainvest.go.ug/wp-content/uploads/2019/05/UIA_OSC_Client_Service_Charter-Jan-2019.pdf (accessed 15 August 2024).

(USB) further streamline applications.⁴⁰¹ Investment decisions are independently made by the Director General and staff of the UIA, with the Commercial Court available for impartial reviews.⁴⁰²

Moreover, the ICA – 19 clearly outlines the procedure for the settlement of investment disputes,⁴⁰³ while Uganda’s ACA regulates issues relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and defines the law relating to conciliation of disputes.⁴⁰⁴ These initiatives demonstrate Uganda’s efforts to improve its investment climate and are aligned with the IFD Agreement to that extent.

The IFD Agreement encourage sustainable investment by advising Parties to promote responsible business conduct (RBC) aligned with international principles.⁴⁰⁵ It advocate for integrating sustainable practice and engaging indigenous, traditional and local communities,⁴⁰⁶ along with due diligence to manage supply chain impacts.⁴⁰⁷ Parties should share information on RBC, prevent corruption and adhere to anti-corruption and money laundering standards.⁴⁰⁸

Disputes concerning the interpretation and application of the IFD Agreement are resolved through the WTO’s Dispute Settlement of Understanding (DSU) in accordance with Articles XXII and XXIII of the 1994 GATT.⁴⁰⁹ Parties are also encouraged to resort to good offices, conciliation and mediation provided under Article 5 and arbitration provided under Article 25 of the DSU to facilitate the resolution of their disputes.⁴¹⁰ However, disputes arising from the

⁴⁰¹ UIA eBiz Investor Services Online available at <http://www.ebiz.go.ug> (accessed 15 August 2024); Uganda Registration Services Bureau (URSB) available at <https://www.ursb.go.ug/> (accessed 15 August 2024).

⁴⁰² Uganda ICA – 19 (2019) sec 10(1)(b); Uganda Legal Information Institute (ULII) ‘Commercial Court of Uganda’ available at <https://ulii.org/judgments/UGCommC/> (accessed 15 August 2024).

⁴⁰³ Uganda ICA – 19 (2019) sec 25.

⁴⁰⁴ Uganda ACA (2000) short title.

⁴⁰⁵ IFD Agreement (2024) art 37.1.

⁴⁰⁶ IFD Agreement (2024) art 37.2.

⁴⁰⁷ IFD Agreement (2024) art 37.3.

⁴⁰⁸ IFD Agreement (2024) arts 37.4, 38.1 – 3 & 38.2 – 3.

⁴⁰⁹ IFD Agreement (2024) art 44.1-2.

⁴¹⁰ IFD Agreement (2024) art 44.3; Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 U.N.T.S 401 33 I.L.M 1226 (1994) arts 5 and 25 – Article 5 of the DSU provides that: 1. *Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.* 2. *Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.* 3. *Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time.*

provisions on sustainable investment (RBC and corruption) are excluded from the dispute settlement process outlined in the Agreement.⁴¹¹

Uganda has made strides towards promoting sustainable development through responsible conduct, particularly in sectors like oil and gas, and agriculture. For instance, the environmental and social impact assessment (ESIA) requirements encourage businesses to integrate sustainability into their practices.⁴¹² However, it lacks comprehensive RBC standards across industries and frameworks for social engagement with communities.⁴¹³

Moreover, failing to adopt due diligence practices for supply chains leaves business vulnerable to non-compliance with international best standards. Corruption remains a challenge, despite Uganda's legal frameworks, including the Anti-Corruption Act and the Leadership Code Act and has ratified international agreements such as the UN Convention against Corruption (UNCAC) ratification, which may deter responsible, long-term

Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel. 4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute. 5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds. 6. The Director-General may, acting in an ex officio capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute; Article 25 of the DSU provides that: 1. Expedious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties. 2. Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process. 3. Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto. 4. Articles 21 and 22 of this Understanding shall apply mutatis mutandis to arbitration awards.

⁴¹¹ IFD Agreement (2024) art 44.4.

⁴¹² East African Crude Oil Pipeline, Uganda Environmental and Social Impact Assessment Report: Non-Technical Summary (2020) 7 – 24; Uganda ICA – 19 (2019) sec 17(c).

⁴¹³ Uganda ICA – 19 (2019) sec 17(c).

investments.⁴¹⁴ However, enforcement remains a challenge as corruption in the public sector and in business dealings continues to pose significant obstacles to investment.⁴¹⁵

The exclusion of RBC and corruption issues in investment related activities from formal dispute settlement channels reduces Uganda's ability to hold investors accountable in cases of non-compliance with sustainable investment principles. Although it is yet to be ratified by the country, the IFD Agreement thereby marks progress in reforming the IIA regime, emphasising transparency, cooperation and streamlining processes to improve the investment climate.

The Agreement addresses common issues in IIAs, like treaty shopping and vague investor protections, while promoting sustainable development through RBC, anti-corruption and money laundering measures. By steering clear of contentious areas like market access, investment protection and ISDS, the Agreement focuses on regulatory clarity and sustainable investment practices aligned with modern priorities, such as environmental and social responsibility.

Uganda has made strides in meeting IFD standards by streamlining processes, enhancing transparency and establishing online systems for investment promotion and facilitation. However, gaps remain in implementing comprehensive RBC standards and due diligence requirements across industries. Limited enforcement of anti-corruption and money laundering also weakens Uganda's investment climate.

The exclusion of RBC, corruption and money laundering from dispute settlement processes further restricts Uganda's ability to ensure accountability in sustainable investment. The IFD

⁴¹⁴ Uganda Anti-Corruption Act of 2009; Uganda Leadership Code Act of 2002; UN Convention Against Corruption (2003) General Assembly Resolution 58/4 of 31 October 2003; US Department of State '2024 Investment Climate Statements: Uganda (2024) para 9 available at <https://www.state.gov/reports/2024-investment-climate-statements/uganda/#:~:text=Corruption,-Uganda%20has%20adequate&text=However%2C%20endemic%20corruption%20remains%20a,improving%20one%20place%20from%202022>. (accessed 20 September 2024) – Uganda ranked 141 out of 180 countries in its 2023 Corruption Perceptions Index.

⁴¹⁵ US Department of State '2024 Investment Climate Statements: Uganda (2024) para 9 available at <https://www.state.gov/reports/2024-investment-climate-statements/uganda/#:~:text=Corruption,-Uganda%20has%20adequate&text=However%2C%20endemic%20corruption%20remains%20a,improving%20one%20place%20from%202022>. (accessed 20 September 2024) – Uganda ranked 141 out of 180 countries in its 2023 Corruption Perceptions Index.

Agreement offers a balanced approach, reducing issues like treaty shopping and excessive investor protections. For Uganda to fully benefit, it must continue strengthening its regulatory frameworks and enforcement to attract sustainable, responsible investment that align with its evolving development goals.

3.4.3. Treaties with investment provisions affecting FDI in Uganda

3.4.3.1. *The Common Market for Eastern and Southern Africa (COMESA) Treaty, 1993*

The COMESA Treaty, signed on 5 November 1993 in Kampala, Uganda, came into force on 12 May 1994.⁴¹⁶ It established the Common Market in December 1994, replacing the former Preferential Trade Area (PTA) that existed between Uganda, Kenya and Tanzania since 1981.⁴¹⁷ COMESA now has 21 Member States.⁴¹⁸ The Treaty focuses on trade of goods and services, but also contains provisions that directly affect investment in the Common Market.

The COMESA Treaty's provisions promote inclusive and sustainable growth and development objectives, with Member States committed to deepening economic integration 'through the implementation of common policies and programmes aimed at achieving sustainable growth and development.'⁴¹⁹ The COMESA Treaty contains six objectives, which aim:⁴²⁰

- a) to attain sustainable growth and development of the Member States by promoting a more balanced and harmonious development of its production and marketing structures;
- b) to promote joint development in all fields of economic activity and the joint adoption of macro-economic policies and programmes to raise the standard of living of its peoples and to foster closer relations among its Member States;
- c) 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;
- d) to co-operate in the promotion of peace, security and stability among the Member States in order to enhance economic development in the region;

⁴¹⁶ COMESA *COMESA in brief* (2018) 1

⁴¹⁷ 'COMESA Objectives and Priorities' available at <https://www.comesa.int/what-is-comesa/> (accessed 06 October 2021).

⁴¹⁸ COMESA Member States include Burundi, Comoros, the Democratic Republic of Congo (DRC), Djibouti, Egypt, Eritrea, eSwatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia and Zimbabwe - See <https://www.comesa.int/members/> (accessed 10 October 2021).

⁴¹⁹ COMESA Treaty (1993) preamble.

⁴²⁰ COMESA Treaty (1993) art 3(a) – (f).

- e) to co-operate in strengthening the relations between the Common Market and the rest of the world and the adoption of common positions in international fora; and
- f) to contribute towards the establishment, progress and the realisation of the objectives of the African Economic Community.

These objectives align with global and continental development agendas, including Agenda 2030 and Agenda 2063.⁴²¹

Chapter 26, which deals with the promotion and protection of investments, emphasises the importance of increasing private sector investment and outlines obligations for Member States to encourage cross-border investments, create predictable investment climates and remove barriers to intra-market investment.⁴²² Protected investments under the Treaty include, *inter alia*, property rights, shares, financial instruments and intellectual property.⁴²³

Subject to the principle of public interest, Member States are encouraged to abstain from expropriating or nationalising private investments, to create and maintain a conducive investment climate in the Common Market.⁴²⁴ The Treaty outlines the conditions for expropriation and the requirement for compensation. Accordingly, an investment is considered expropriated when a government measure has the effect of depriving an investor of ownership, control of, or a benefit from their investment.⁴²⁵ Such measures include:⁴²⁶

... creeping expropriation in the form of imposition of excessive and discriminatory taxes, restrictions in the procurement of raw materials, administrative action or omission where there is a legal obligation

⁴²¹ Resolution adopted by the General Assembly on 25 September 2015, 'Transforming our world: the 2030 Agenda for Sustainable Development (21 October 2015) A/RES/70/1; Agenda 2063: The Africa we want (September 2015) – Popular version - Article 3(a) and (c) of the Treaty, for example, reflect SDG 8 and 9 of Agenda 2030 and Aspiration 1. Additionally, Article 3(d) of the Treaty is consistent with SDG 16 of Agenda 2030 and Aspiration 4 of Agenda 2063.

⁴²² COMESA Treaty (1993) chapter 26, art 158 and 159(1)(a) - (e).

⁴²³ COMESA Treaty (1993) art 159(2)(a) - (f) which provides that protected investments include; (a) movable and immovable property and other property rights such as mortgages, loans and pledges; (b) shares and any other rights of participation in the management or economic results of a company or a firm, whether incorporated or not, including minority shares, corporate rights and any other kind of shareholding; (c) stocks, bonds, debentures, guarantees or other financial instruments of a company or a firm, government or other public authority or international organisation; (d) claims to money, goods, services or other performance having economic value; (e) intellectual and industrial property rights, technical processes, know-how, goodwill and other benefits or advantages associated with a business; and (f) such other activities that may be declared by the Council as investments.

⁴²⁴ COMESA Treaty (1993) art 159(3)(a).

⁴²⁵ COMESA Treaty (1993) art 159(4).

⁴²⁶ COMESA Treaty (1993) art 159(4).

to act or measures that frustrate the exercise of the investors' rights to dividends, profits and proceeds of the right to dispose of the investment.

This definition includes direct as well as indirect expropriation to the extent that it does not just prohibit the outright seizure of an investment, but also any other kinds of actions that might prevent or frustrate an investor's enjoyment of their investment.⁴²⁷ When a Member States expropriates or nationalises an investment in accordance with the Treaty, they are required to pay adequate compensation to the affected investor.⁴²⁸

The COMESA Treaty also outlines investors' rights, which include the right to:⁴²⁹

- a) repatriate investment returns including dividends and interest or other equivalent charges;
- b) repatriate royalties and other payments deriving from licences, franchises, concessions and other similar rights;
- c) repatriate funds for repayment of loans;
- d) repatriate proceeds from the liquidation or sale of the whole or part of the investment including an appreciation or increase of the value of the investment capital;
- e) payments for maintaining or developing the investment project, such as funds for acquiring raw or auxiliary materials, semi-finished products as well as replacing capital assets;
- f) remit the earnings of expatriate staff of the investment project; and
- g) the right to enjoy exemption from customs duties and other fiscal exemptions for the period provided for in the investment package of a Member State and depending on the area of investment.

Member States are encouraged to raise awareness of investment incentives, opportunities, legislation and practices through dissemination and awareness promoting activities,⁴³⁰ and accede to multilateral agreements on investment dispute resolution, such as the ICSID Convention⁴³¹ and guarantee arrangements, such as the MIGA Convention for promoting and protecting investments, to create a conducive investment promotion environment.⁴³²

⁴²⁷ UNCTAD *Expropriation* (2012) 6 – 7.

⁴²⁸ COMESA Treaty (1993) art 159(3)(b).

⁴²⁹ COMESA Treaty (1993) art 159(5)(a) – (g).

⁴³⁰ COMESA Treaty (1993) art 160.

⁴³¹ ICSID 'ICSID Convention, Rules and Regulations' (April 2006) ICSID/15, 5.

⁴³² COMESA Treaty (1993) art 162(a) – (c).

3.4.3.2. *The Investment Agreement for the COMESA Common Investment Area (CCIA Agreement), 2007*

The CCIA Agreement, adopted on 23 May 2007, seeks to create a competitive investment area within COMESA, aligning with the objectives of Articles 3(c) and 159(1) of the COMESA Treaty.⁴³³ It aims to foster a liberal and transparent investment environment, enhancing the region's appeal to both COMESA and non-COMESA investors.⁴³⁴ The Agreement outlines obligations for Member States to encourage investment flows, focusing on global investment issues, investor protections and sustainable development in line with the 2030 and 2063 Agendas.⁴³⁵

The Agreement promotes removing investment barriers, ensuring consistent and transparent application of investment laws and encouraging regional and local investment liberalisation.⁴³⁶ Additionally, the Agreement emphasises the integration of IIL with public international standards, requiring Member States to honour international agreements on labour, environment, health and safety.⁴³⁷

It mandates accession to key international conventions and agreements, including the New York and ICSID Conventions, MIGA and the African Trade Insurance (ATI) Agency, to bolster political risk insurance and investment protection.⁴³⁸ Under the CCIA Agreement, an 'investor' is defined as a natural or juristic person that makes an investment in accordance with the laws and regulations of the COMESA Member State in which the investment is established.⁴³⁹

⁴³³ CCIA Agreement (2007) preamble; P Muchlinski 'The COMESA common investment area: Substantive standards and procedural problems in dispute settlement' (2016) *SOAS* 1.

⁴³⁴ CCIA Agreement (2007) art 2(a).

⁴³⁵ CCIA Agreement (2007) preamble; 'Plans Afoot to Publicize Common investment Area Agreement' (2020) available at <https://www.comesa.int/plans-afoot-to-publicize-common-investment-area-agreement/> (accessed 10 October 2021); COMESA 'Campaign to promote Investment Agreement gets underway' available at <https://www.comesa.int/campaign-to-promote-investment-agreement-gets-underway/> (accessed 10 August 2023).

⁴³⁶ CCIA Agreement (2007) arts 2(b) - (d), 5(a) - (d).

⁴³⁷ CCIA Agreement (2007) art 5(a) - (e).

⁴³⁸ CCIA Agreement (2007) art 6(a) - (e); The ATI is a COMESA institution which was established in 2000 and has a membership of 14 countries. Its membership is open to all AU members and is supported by the World Bank, which provides low interest loans to participating Member States – COMESA *COMESA in brief* (2018) 4-5; Art 4(1) of ATI Agreement (2000) art 4(1).

⁴³⁹ CCIA Agreement (2007) art 1(4).

A 'natural person' refers to the citizens of each Member State,⁴⁴⁰ whereas a 'juristic person' refers to any legal entity constituted in accordance with the applicable laws and regulations of a Member State.⁴⁴¹ A 'juristic' person owned or controlled by foreign nationals does not qualify as a COMESA investor unless it can be proven that such entity maintains 'substantial business activity' in the territory of the Member State in which it is constituted.⁴⁴²

The 'substantial business activity' criteria is determined by way of an overall examination, which includes the amount of investment brought into the country; the number of jobs created; its effect on the local community; and the length of time the business has been in operation.⁴⁴³ The CCIA Agreement limits the scope of protected investments by providing a list of investments that are subject to protection under the Agreement. They include: ⁴⁴⁴

- a) moveable and immovable property and other related property rights such as mortgages, liens and pledges;
- b) claims to money, goods, services or other performance having economic value;
- c) stocks, shares and debentures of companies and interest in the property of such companies;
- d) intellectual property rights, technical processes, know-how, goodwill and other benefits or advantages associated with a business operating in the territory of the COMESA Member States in which the investment is made;
- e) business concessions conferred by law or under contract, including:
 - i. build, operate, own/transfer, rehabilitate, expand, restructure and/or improve infrastructure;
 - ii. concessions to search for, cultivate, extract or exploit natural resources; and
- f) such other activities that may be declared by the Council as investments;

but excludes: goodwill market share, whether or not it is based on foreign-origin trade, or rights to trade; claims to money deriving solely from commercial contracts for the sale of goods and services to or from the territory of a Member State to the territory of another Member State, or a loan to a

⁴⁴⁰ CCIA Agreement (2007) art 1(4)(i).

⁴⁴¹ CCIA Agreement (2007) art 1(4)(ii).

⁴⁴² CCIA Agreement (2007) art 1(4)(ii).

⁴⁴³ CCIA Agreement (2007) art 1(4)(ii)(a) – (d).

⁴⁴⁴ CCIA Agreement (2007) art 1(9)(a) – (f); COMESA Treaty (1993) art 159(2).

Member State or to a Member State enterprise; a bank letter of credit; or the extension of credit in connection with a commercial transaction, such as trade financing.

Under the CCIA Agreement, COMESA Member States can create a 'Sensitive List' to exclude certain investments from protections under Article 1(9) of the Agreement and Article 159(2) of the COMESA Treaty and a 'Temporary Exclusion List' to temporarily restrict protections for specific investments.⁴⁴⁵ The Agreement aims to balance investor rights and host-country obligations, requiring investors to comply with local laws while obliging Member States to offer fair and equitable treatment (FET), asset transfer rights, employment of qualified personnel, NT and MFN treatment to COMESA investors.⁴⁴⁶

The FET obligation ensures host-countries act fairly, consistent and non-discriminatorily, aligning with customary investment law (CIL) and the minimum standard of treatment (MST),⁴⁴⁷ without requiring states to exceed this standard.⁴⁴⁸ The NT and MFN provisions guarantee that foreign investors are treated no less favourably than domestic investors and enjoy equal treatment across all countries, respectively. Article 17(1) of the CCIA Agreement, which deals with NT, provides that:⁴⁴⁹

... each Member State shall accord to COMESA investors and their investments treatment no less favourable than the treatment it accords, in like circumstance, to its own investors and to their investments with respect to the establishment, acquisition, expansion, management, operation and disposition of investments in its territory.

In order to determine if an investment is in 'like circumstances,' an overall examination of the circumstances of the investment must be conducted on a case-by-case basis and include criteria based on:⁴⁵⁰

- 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;

⁴⁴⁵ CCIA Agreement (2007) arts 1(13)(c) & 1(14)(c); COMESA Treaty (1993) art 159(2)(a) - (f).

⁴⁴⁶ CCIA Agreement (2007) arts 11, 13, 14, 15, 16, 17, 18 & 19; COMESA Treaty (1993) art 159(5) outlines how said assets should be transferred.

⁴⁴⁷ CCIA Agreement (2007) art 14.

⁴⁴⁸ CCIA Agreement (2007) art 14(2) - (3) - The Agreement does not prescribe a single MST as Member States might have different forms of administrative, legislative and judicial systems and at different levels.

⁴⁴⁹ CCIA Agreement (2007) art 17(1).

⁴⁵⁰ CCIA Agreement (2007) art 14(a) - (f).

- 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;

and the examination shall not be limited to or be biased towards any one factor.

The inclusion of the words ‘establishment, acquisition and expansion,’ signifies that the NT obligation in this Agreement extends to investors and investment during the pre-establishment phase.⁴⁵¹ However, this treatment does not apply to investments included in the ‘Temporary Exclusion’ and ‘Sensitive’ specified by COMESA host-countries.⁴⁵² The MFN treatment obligation requires Member States to:⁴⁵³

... accord to COMESA investors and their investments treatment no less favorable than that it accords, in like circumstances, to investors and their investments from any third country with respect to the establishment, acquisition, expansion, management, operation and disposition of investments in its territory. This paragraph shall not apply to investment agreements entered into by Member States with non-Member States prior to the entry into force of this Agreement.

Like the NT provision, the MFN clause grants investors and their investments rights both in the pre-establishment and post-establishment phases. However, the MFN provision has limitations, as Member States are not required to extend benefits arising from customs unions, free trade agreements (FTAs), monetary unions, common markets, or any current or future regional preferential agreements or international tax-related agreements.⁴⁵⁴

The CCIA Agreement restricts expropriation and nationalisation, except when done in public interest, non-discriminatorily, with due process and prompt, adequate compensation.⁴⁵⁵ Unique provisions allow for compensation adjustment based on investor misconduct and

⁴⁵¹ SADC Model Investment BIT with commentary (2012) 16.

⁴⁵² CCIA Agreement (2007) art 18(1) – (2).

⁴⁵³ CCIA Agreement (2007) art 19(1); Article 19(2) further states that the provisions of Article 17(3) of the CCIA Agreement apply to the MFN provision with necessary modifications, however, there is no Article 17(3) in the CCIA Agreement.

⁴⁵⁴ CCIA Agreement (2007) art 19(3)(a) and (b)..

⁴⁵⁵ CCIA Agreement (2007) art 20(1)(a) – (c).

emergency safeguards to address severe economic threats from investment liberalisation.⁴⁵⁶ Article 25 permits temporary restrictions during balance of payments crises, enabling resource allocation to essential sectors while following non-discriminatory principles and IMF guidelines.⁴⁵⁷

Dispute resolution under the CCIA Agreement varies by party type. State-State disputes go through the COMESA Court of Justice (CCJ) or an independent arbitral tribunal, with public access to documents and hearings and the possibility of *amicus curiae* submissions.⁴⁵⁸ Investor-State disputes allow investors, after a six-month cooling-off period, to seek recourse in the host-country's courts, the CCJ or international arbitral bodies like ICSID.⁴⁵⁹

With regards to SSDS, if no resolution is reached within six months, the dispute can be escalated to an arbitral tribunal constituted under the CCJ in accordance with Article 28(b) of the main Treaty, the CCJ or an independent arbitral tribunal (IAT).⁴⁶⁰ The arbitral tribunal is established according to the arbitration provisions provided in Annex A.⁴⁶¹ Arbitration proceedings are governed by the Arbitration Rules of the CCJ.⁴⁶²

According to Rule 7 of these rules, CCJ arbitrators are appointed from among the judges of the court.⁴⁶³ The Parties involved in the dispute may agree on the number of arbitrators, which can be one, three or five.⁴⁶⁴ If an arbitration agreement specifies a number of arbitrators that are different from the rules, then the President or the Principal Judge of the CCJ can adjust the number to comply with said rules.⁴⁶⁵

Under the CCIA Agreement, all documents related to SSDS arbitration notices, dispute settlements, panel initiations and proceedings must be publicly accessible.⁴⁶⁶ Moreover, both

⁴⁵⁶ CCIA Agreement (2007) arts 20(2), 24 – Such safeguard provisions are typically seen in agreements that regulate the international trade of goods and services, as opposed to cross-border investments.

⁴⁵⁷ CCIA Agreement (2007) art 25.

⁴⁵⁸ CCIA Agreement (2007) arts 26(4) - (5), 27 & 28.

⁴⁵⁹ CCIA Agreement (2007) arts 26(1) – (6), 27 and 28.

⁴⁶⁰ CCIA Agreement (2007) art 27(1)(i) – (iii).

⁴⁶¹ CCIA Agreement (2007) art 27(2) and Annex A, arts 3, 6(1) - (3).

⁴⁶² Arbitration Rules of the COMESA Court of Justice (2018).

⁴⁶³ Arbitration Rules of the COMESA Court of Justice (2018) Rule 7(1).

⁴⁶⁴ Arbitration Rules of the COMESA Court of Justice (2018) Rule 7(2) - (3).

⁴⁶⁵ Arbitration Rules of the COMESA Court of Justice (2018) Rule 7(4).

⁴⁶⁶ CCIA Agreement (2007) art 27(3).

procedural and substantive oral hearings must be open to the public, though the tribunal can take measures to protect confidential business information.⁴⁶⁷ The Tribunal must also accept *amicus curiae* submissions.⁴⁶⁸

Once a Member State chooses a forum for its claim, it cannot later bring the claim to another forum and decisions by the CCJ or IAT are final and binding, with appeals only allowed in accordance to Article 13 of Annex A, which provides that:⁴⁶⁹

- 1) A Member State may appeal to the COMESA Court of Justice, within 60 days, a panel decision on the basis of procedural irregularity, an error of law or a material and manifest error of fact. Such appeals shall proceed in accordance with Annex A. No other appeal or arbitration review process shall be applicable to arbitrations under this Agreement.
- 2) The appellate process shall apply, *mutatis mutandis*, the rules of procedure for the arbitration tribunals, subject to such modifications as required by this Agreement.
- 3) The appeal must be filed within 60 days of the decision being appealed.
- 4) The CCIA Committee shall establish, at its first meeting, the timelines for the appellate process.
- 5) The decision on appeal shall be final and binding and not subject to further appeal or judicial review.
- 6) A tribunal decision not taken to appeal shall have the same final and binding status.

With regards to ISDS, if a dispute between a COMESA investor and a Member State remains unresolved after the six-month cooling period, the investor may submit a claim alleging that the Member State breached its obligations under Part Two of the Agreement and cause a loss or damage to the investment.⁴⁷⁰ The claim can be submitted to a competent court in the host-country, the CCJ or an IAT, including ICSID Centre or Additional Facility, UNCITRAL among others.⁴⁷¹

⁴⁶⁷ CCIA Agreement (2007) art 27(4) - (5).

⁴⁶⁸ CCIA Agreement (2007) art 27(6).

⁴⁶⁹ CCIA Agreement (2007) art 27(7) - (8) and Annex A, art 13(1) - (6).

⁴⁷⁰ CCIA Agreement (2007) art 28(1). Part Two of the CCIA Agreement contains provisions on coverage, investor obligation, FET, Transfer of Assets, MFN Treatment, Movement of Labour, NT, Exception to NT and other obligations, Expropriation, Compensation for Losses, General Exceptions, Non-Application to Tax Measures, Emergency Safeguard Measures and Measures to Safeguard Balance of Payments.

⁴⁷¹ CCIA Agreement (2007) art 28(1)(a) - (c)(i) - (iv).

Under the CCIA Agreement, ISDS claims must be made within three years of the investor becoming aware of the breach and resulting damage.⁴⁷² Moreover, once a claim is submitted to a chosen forum, it is final and an investor cannot bring the same claim to another forum.⁴⁷³ This prevents a situation where an investor engages in forum shopping, attempting to seek a more favourable outcome by submitting the same claim in different jurisdictions, ensuring efficiency and finality in ISDS.⁴⁷⁴

All arbitration documents and hearings are public, though confidential business information should be protected.⁴⁷⁵ The Tribunal can also accept *amicus curiae* submissions and Member States can use defences or counterclaims, including the investor's failure to meet obligations or mitigate damages.⁴⁷⁶ Arbitration awards are binding on Parties and Member States are expected to adopt domestic rules that enable their enforcement.⁴⁷⁷

Evidently, the CCIA Agreement is innovative in several aspects when compared to other old-generation IIAs (old-IIAs). It contains investor accountability measures, balancing the rights and obligations of investors and host-countries and allows for adjustments to investor compensation based on their conduct. Such provisions hold investors accountable incentivising responsible behaviour that aligns with the host-country regulatory framework. This helps align investors and investments with ethical and sustainable practices.

The inclusion of emergency safeguards in cases where investment liberalisation poses serious risks to a Member States' economy is also a forward-thinking approach that recognises the need for flexibility in protecting economic stability while balancing the benefits of open markets. This helps to ensure that investments contribute to sustainable growth rather than exacerbating economic vulnerabilities and helps protect domestic investors.

⁴⁷² CCIA Agreement (2007) art 28(2).

⁴⁷³ CCIA Agreement (2007) art 28(3).

⁴⁷⁴ JP Ewert & D Weslow, 'Forum hopping in Europe and the United States' 1 May 2011 *INTA Bulletin* 9 available at https://www.wiley.law/media/publication/116_Weslow--INTABulletin--05_01_11.pdf (accessed 2 August 2024).

⁴⁷⁵ CCIA Agreement (2007) art 29(5) - (7).

⁴⁷⁶ CCIA Agreement (2007) art 29(8).

⁴⁷⁷ CCIA Agreement (2007) art 29(9).

Additionally, the inclusion of balance of payments protections to manage external financial difficulties, such as financial crises, is critical for maintaining macroeconomic stability, ensuring that short-term economic shocks do not undermine long-term sustainable or economic development objectives. As previously mentioned, Argentina's 2001-2002 financial crisis triggered several ISDS claims.⁴⁷⁸

These claims resulted in several billions of dollars being awarded to foreign investors, even though, at a time, the country was recovering from its 2001 -2002 economic crisis and could not possibly afford to pay those monies to foreign investors.⁴⁷⁹ By allowing for temporary balance of payment restrictions, the CCIA Agreement supports a host-country's ability to prioritise economic resilience during financial difficulties.

As seen in Chapter Two, other central issues in the current IIA regime include the lack of transparency in ISDS mechanisms, the opaque process of appointing arbitrators and the use of private (not publicly elected) officials to preside over cases involving significant public interest issues.⁴⁸⁰ These concerns are compounded by the absence of an appeals mechanism, as well as the inability of host-countries to file counterclaims against investors.

Additionally, the problem of forum shopping or parallel court and arbitration proceedings creates confusion and inefficiencies in the resolution process. The CCIA Agreement addresses these issues in several ways. First, it enhances transparency by requiring that all documents related to arbitration, including notices, pleadings, evidence and decisions be made public, ensuring that the dispute settlement mechanism is open to public scrutiny and participation.

Moreover, oral hearings are also made public, and third Parties are allowed *amicus curiae* submissions, which must be accepted by Tribunals, thus encouraging participation from interested parties in SSDS and ISDS cases. This further open procedural and substantive

⁴⁷⁸ Schill *et al* (2015) 44.

⁴⁷⁹ Schill *et al* (2015) 44.

⁴⁸⁰ See discussion in Chapter Two, para 2.2.1 above; UNCITRAL 'Settlement of commercial disputes: Investor-State Dispute Settlement Framework - Comments from International Intergovernmental Organizations' (2017) A/CN.9/918/Add.7, OECD contribution, 4 – 5; UNCTAD, 'Reform of investor-State dispute settlement: In search of a roadmap' (2013) *IIA Issues Note* 1; Waibel *et al* (2010) XXXIX; D Gaukrodger & K Gordon 'Investor-State dispute settlement: A scoping paper for the investment policy community' (2012) 3 *OECD Working Papers on International Investment* 17 – 58.

hearings to the public, allowing greater accountability and insight into how disputes are managed and resolved.

Secondly, the CCIA Agreement addressed concerns over the appointment of arbitrators. Unlike the traditional system of IATs like ICSID, where counsel in one case can be appointed as an arbitrator in another – blurring the lines of impartiality, the CCIA prescribes that arbitrators be chosen from a roster composed by the COMESA Secretariat.⁴⁸¹ Moreover, appointed arbitrators are sitting judges from the CCJ, ensuring experience, impartiality and accountability to public interests, thus reducing concerns about conflicts of interest.

Thirdly, the CCIA Agreement introduces mechanisms for appeals, allowing for the review of arbitral decisions, which is absent in many traditional IIAs.⁴⁸² This provision promotes fairness and consistency in ISDS decisions, ensuring that errors in law or fact can be corrected and that the legal integrity of decisions is upheld. Moreover, the CCIA allows host-countries to file counterclaims against investors.

The inclusion of counterclaim provisions addresses the traditional imbalance where host-countries could only defend themselves but not investors accountable for breaches of domestic or international obligations. This provision helps create a more equitable dispute settlement process, ensuring that investors can also be held responsible for misconducts, such as failing to comply with environmental or social regulations.

Lastly, the CCIA Agreement resolves the issue of parallel court and arbitration proceedings by requiring that once an investor chooses a forum (be it domestic courts, CCJ or IAT), that decision is final, and the claim cannot be brought before another forum. This rule prevents forum shopping and reduces the complexity, and costs associated with managing multiple legal proceedings for the same dispute.

Despite being an old-IIA itself, having been drafted before 2010 and Agendas 2030 and 2063, through its provisions, the CCIA Agreement fosters an investment environment that promotes sustainable development. The accountability and flexibility mechanisms enable host-

⁴⁸¹ CCIA Agreement (2007) art 30.

⁴⁸² CCIA Agreement (2007) Annex A, art 13.

countries to ensure that FDI flows contribute positively to their economic, social and environmental goals, aligning with broader global efforts toward sustainability.

Uganda has made efforts to implement its obligations under the COMESA Treaty and the CCIA Agreement, particularly regarding the obligation to accord FET.⁴⁸³ The ICA – 19, Uganda’s primary domestic investment law, applies equally to both foreign and domestic investors, ensuring that they follow the same procedures, rights and obligations for establishing and maintaining investments, such as registration and licensing.⁴⁸⁴

Even Uganda’s tax system is premised on, *inter alia*, the principle of preventing discrimination between foreign and domestic investors.⁴⁸⁵ Moreover, these measures also align with the country’s MFN treatment and NT obligations under the COMESA Treaty and the CCIA as they prevent discrimination between nationals and foreign investors and between foreign investors. In principle, these measures align with Uganda’s FET obligations under Article 159(1)(a) of the COMESA treaty and Articles 14,17 and 19 of the CCIA Agreement.

In accordance with its obligation under Article 159(1)(b) of the COMESA Treaty, Uganda has established an investment promotion agency (IPA) – the UIA, which promotes, attracts, facilitates investment in Uganda and is a one-stop shop, creating a single access point for information and service delivery for both domestic and foreign investors in the country.⁴⁸⁶

By making the UIA a one-stop shop for all investment related activities, Uganda has also reduced the amount of bureaucracy needed to secure investment licences and permits and houses government and private sector institutions responsible for investment facilitation.⁴⁸⁷ These efforts are in line with its obligations under Article 159(1)(c) and (d) of the COMESA Treaty and Article 5(a) and (b) of the CCIA.

Moreover, as seen previously, Uganda is a signatory of the ICSID and New York Conventions, as well as the MIGA Convention and the ATI Agency, in accordance with its obligations under

⁴⁸³ OECD ‘Fair and Equitable Treatment Standard International Investment Law’ (2004) 3 *OECD Working Papers on International Investment* 2.

⁴⁸⁴ Uganda ICA – 19, sec 2; CCIA Agreement (2007) art 27(1)(i) –(iii).

⁴⁸⁵ UIA, ‘A practical guide to doing business in Uganda: Investor’s guide to Uganda’ 37.

⁴⁸⁶ UIA, ‘A practical guide to doing business in Uganda: Investor’s guide to Uganda’ 19.

⁴⁸⁷ UIA, ‘A practical guide to doing business in Uganda: Investor’s guide to Uganda’ 19.

Article 162 of the COMESA Treaty and Article 6 of the CCIA. Moreover, investors are protected from expropriation without compensation, subject to certain exceptions including public interest and morality in accordance with the Constitution of Uganda.⁴⁸⁸

Conversely, there are some aspects of Uganda's laws that are not consistent with the COMESA Treaty of the CCIA Agreement. First, it does not have safeguard measures against increased investment activities that might disrupt its economy, nor does it have measures to safeguard balance of payments in the event of external financial difficulties. In fact, with regards to the latter measures, Uganda's ICA - 19 allows for the free transfer of compensation out of Uganda, which is not subject to the exchange control restrictions of the Foreign Exchange Act, 2004.⁴⁸⁹

Under Uganda's Foreign Exchange Act, the Governor of the Bank of Uganda (BOU) may restrict payments between residents and non-residents, or between non-residents and payments to or from Uganda,⁴⁹⁰ if there is a severe deterioration in its balance of payments, which would require the temporary imposition of exchange controls.⁴⁹¹ As such, the Ugandan government would still be obligated to transfer compensation to an affected investor, even in the event of a financial crisis.

Although Uganda's laws give both foreign and domestic investors the right to approach domestic courts as well as national and international dispute settlement tribunals when an investment dispute arises, there is still a danger of parallel court and arbitration proceedings or forum shopping. Section 25(2) of the ICA - 19 allows investors to submit a dispute in accordance with Uganda's ACA rules, ICSID rules or within the framework of an IIA.

This provision does not preclude an investor from instituting a claim in both Uganda's tribunals and IAT. In fact, in the *Total E&P* case, it was after Uganda's Tax Tribunal ruled that the investor had to pay the capital gains tax and that the tax waiver in the production-sharing agreement was illegal, that the investor then initiated arbitration before the ICSID Centre alleging breach of the Netherlands – Uganda BIT, effectively forum shopping.⁴⁹²

⁴⁸⁸ Constitution of Uganda (1995) sec 26(2)(a) – (b).

⁴⁸⁹ Uganda ICA – 19 (2019) sec 24(3).

⁴⁹⁰ Uganda Foreign Exchange Act of 2004 sec 10.

⁴⁹¹ Uganda Foreign Exchange Act (2004) sec 10.

⁴⁹² *Total E&P v Uganda* (ICSID Case No. ARB/15/11); Oguttu (2015) 196.

Evidently, Uganda was forced to settle this case, compensating an investor over an agreement that clearly contravened Uganda's tax laws, Constitution and the investor's obligations to abide by Uganda's domestic laws under section 18(a) of the ICA - 19.⁴⁹³ Moreover, Uganda's domestic law do not make provision for the adjustment of compensation to reflect the aggravating conduct of an investor or conduct that does not seek to mitigate damages in accordance with Article 20(2) of the CCIA Agreement.

As such, the country would still be liable to pay the full compensation to an investor despite such investor having acted illegally or not abiding by the domestic laws of the country, as was the case in *Total E&P*. Additionally, there is no obligation under Uganda's laws for arbitration proceedings to be accessible to the public. Again, this is evident in the *Total E&P* case, where not only the facts of the case were vague, but the settlement reached was kept a secret.

While Uganda has made commendable strides in ensuring that its domestic legal framework aligns with its obligations under the COMESA Treaty and CCIA Agreement, demonstrating its dedication to fostering a conducive environment for regional investment and cooperation, there remain critical areas where its legal and regulatory structures fall short of fully meeting the standards set by these agreements.

Uganda's domestic laws should balance the rights and obligations between the host-country and the investor better to avoid situations where an investor is viewed to be above the law and claim compensation despite having acted in an illegal manner. Moreover, there should be safeguards to increased investments that can be economically detrimental and measures to safeguard balance of payments during financial emergencies.

Uganda's domestic laws should also be reformed to hold aggravating investors accountable for their misconduct, which should be considered when determining such investor's compensation. Moreover, as far as possible, arbitral proceedings should be made available to the public, especially when they involve public interest and moral issues. Addressing these gaps will be essential for Uganda to maximise the benefits of its participation in COMESA, attracting higher levels of FDI and support its broader sustainable development objectives.

⁴⁹³ Uganda ICA – 19 (2019) sec 24(4) and 18(a).

3.4.3.3. *East African Community (EAC) Treaty, 1999*

The EAC is a regional intergovernmental organisation comprised of seven Member States: Burundi, the Democratic Republic of Congo (DRC), Kenya, Rwanda, South Sudan, Tanzania and Uganda, with its headquarters in Arusha, Tanzania.⁴⁹⁴ Its founding document, the EAC Treaty, was signed on 30 November 1999 and came into force on 7 July 2000, after being ratified by its original members, Kenya, Tanzania and Uganda.⁴⁹⁵

The formation of the EAC in 2000 was a revival of earlier efforts at regional cooperation, dating back to 1917, when Kenya and Uganda formed a Customs Union, later joined by Tanganyika (now Tanzania) in 1927.⁴⁹⁶ One of the key objectives of the EAC Treaty is to promote rapid and equitable regional development by fostering environments that attract investments and enable private sector and civil society to take a leading role in driving socio-economic development.⁴⁹⁷

This is to be achieved by formulating and implementing robust macro-economic and sectoral policies that recognise global economic developments.⁴⁹⁸ The EAC Treaty seeks to enhance cooperation among Member States across various domains including, political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs for their mutual benefit⁴⁹⁹ by ensuring:⁵⁰⁰

- a) 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;
- b) the strengthening and consolidation of co-operation in agreed fields that would lead to equitable economic development within the Partner States and which would in turn, raise the standard of living and improve the quality of life of their populations;
- c) 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;

⁴⁹⁴ EAC 'Overview of EAC' available at <https://www.eac.int/overview-of-eac> (accessed 20 March 2021).

⁴⁹⁵ 'East African Community (EAC)' available from <https://au.int/en/recs/eac> (accessed 20 March 2021).

⁴⁹⁶ 'History of the EAC' available at <https://www.eac.int/eac-history> (accessed 04 October 2021); BR Mngomezulu 'Why did regional integration fail in East Africa in the 1970s? A historical explanation' (2013) 8 – 11 available at <https://phambo.wiser.org.za/files/seminars/Mngomezulu2013.pdf> (accessed 05 October 2021).

⁴⁹⁷ EAC Treaty (1999) preamble.

⁴⁹⁸ EAC Treaty (1999) preamble.

⁴⁹⁹ EAC Treaty (1999) art 5(1).

⁵⁰⁰ EAC Treaty (1999) art 5(3)(a) – (g).

- d) the strengthening and consolidation of the long standing political, economic, social, cultural and traditional ties and associations between the peoples of the Partner States so as to promote a people-centred mutual development of these ties and associations;
- e) the mainstreaming of gender in all its endeavours and the enhancement of the role of women in cultural, social, political, economic and technological development;
- f) the promotion of peace, security, and stability within, and good neighbourliness among, the Partner States;
- g) the enhancement and strengthening of partnerships with the private sector and civil society in order to achieve sustainable socio-economic and political development.

In order to achieve these objectives, Member States must, *inter alia*, take steps to spur industrial development that will 'promote self-sustaining and balanced industrial growth,'⁵⁰¹ by rationalising investments to make full use of established industries that promote production efficiency.⁵⁰² They must also harmonise investment incentives, including those relating to the taxation of industries, particularly those that use local materials, to promote the EAC as a single investment area.⁵⁰³

Although Article 80(1) of the Treaty contains local content measures, which are prohibited under Article XI of the GATT 1994, EAC Member States, which are all developing countries, are allowed to deviate from this provision to adopt investment measures that accelerate their economic growth and development, in accordance with Article XVII of the GATT.⁵⁰⁴

Article 127 of the EAC Treaty, which relates to the protection of investments, provides for the creation of an enabling environment for the private sector and the civil society by formulating strategies for the development of the private sector.⁵⁰⁵ These strategies aim to improve the EAC's business environment through the promotion of conducive investment codes, the protection of property rights and the proper regulation of the private sector.⁵⁰⁶

The Treaty also facilitates and supports the exchange of experiences as well as the pooling of resources through cross-border investments.⁵⁰⁷ In order to have common measures that

⁵⁰¹ EAC Treaty (1999) art 79(a).

⁵⁰² EAC Treaty (1999) art 80(1)(d).

⁵⁰³ EAC Treaty (1999) art 80(1)(f).

⁵⁰⁴ GATT (1994) art XI and XVIII; TRIMs Agreement (1994) arts 2(1), (2) and 4.

⁵⁰⁵ EAC Treaty (1999) art 127(1).

⁵⁰⁶ EAC Treaty (1999) art 127(2)(a).

⁵⁰⁷ EAC Treaty (1999) art 127(2)(d).

ensure the strengthening of linkages among business organisations, employees' and employers' organisations and professional bodies, Member States should support joint activities, which promote investments among themselves.⁵⁰⁸

Moreover, the EAC has also entered into TIPs with third countries in order to promote and protect investments. One such Treaty is the Trade and Investment Framework Agreement Between the East African Community and the Government of the United States of America (EAC – US TIFA).

Uganda's compliance with the EAC Treaty provisions, particularly those related to investment and sustainable growth, involves several key factors. The EAC Treaty promotes balanced regional development, sustainable growth and development, and equitable economic cooperation. Uganda has made efforts to align with these objectives by fostering industrial growth, through for instance, developing the 2020 national industrial policy and NDPIII and creating industrial parks, including the Namanve and Soroti industrial parks.⁵⁰⁹

In order to promote investment, Uganda offers a wide range of investment and tax incentives, which are also available to nationals from other EAC Member States.⁵¹⁰ Other promotion efforts include the establishment of the UIA as a one-stop shop to streamline all investment processes and strengthening its legal framework to regulate and protect investments.⁵¹¹

Moreover, the fact that Uganda's ICA - 19 – which regulates both domestic and foreign investment in the country, recognises nationals from other EAC Member States as 'domestic investors,' has encouraged cross border investment from these countries and the free movement of people and capital for investment purposes.⁵¹² This is in line with its obligation to achieve deeper integration and cooperation among Member States.⁵¹³

⁵⁰⁸ EAC Treaty (1999) art 129(1)(a).

⁵⁰⁹ Uganda Ministry of Trade, Industry and Cooperatives, 'National Industrial Policy: A framework for Uganda's industrialization, employment and wealth creation' (2020); Uganda NDPIII 2020/21 – 2024/25; UIA 'Industrial and Business Parks' available at <https://www.ugandainvest.go.ug/parks/> (accessed 20 September 2024).

⁵¹⁰ Uganda ICA – 19 (2019) sec 1

⁵¹¹ Uganda for example, has enacted the ICA – 19 (2019), to regulate both domestic and foreign investments and the ACA (2000) to regulate alternative dispute resolution mechanisms including conciliation and arbitration.

⁵¹² Uganda ICA – 19 (2019) sec 1.

⁵¹³ EAC Treaty (1999) preamble & art 1.

While Uganda's efforts have contributed to industrial growth, challenges remain including inadequate infrastructure, high energy costs and bureaucratic delays.⁵¹⁴ Nevertheless Uganda continues to implement policies to foster industrialisation as a key component of its long-term economic development strategy. Uganda also faces challenges in fully harmonising its investment incentives with other EAC Member States, particularly in taxation and local content measures.⁵¹⁵

Furthermore, Uganda's strategies for protecting investments and promoting private sector development may not yet fully realise the potential benefits of EAC-wide cooperation. As such further efforts are needed to fully leverage the benefits of regional cooperation. Nonetheless, Uganda's efforts to promote investment among EAC Member States aligns with the broader objectives of the EAC Treaty, fostering economic integration and regional cooperation – but are lacking on specific measures that specifically promote sustainable development.

3.4.3.4. Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (AfCFTA Protocol on Investment or the Protocol), 2023

The AfCFTA Protocol on Investment was adopted on 18 February 2023 by the AU Heads of State and Government in Addis Ababa, Ethiopia.⁵¹⁶ It will come into effect once it has been ratified by 22 AfCFTA Member States and only those who ratify it will have rights and obligations under the Protocol.⁵¹⁷ Once this Protocol enters into force, State Parties will be

⁵¹⁴ US Department of State, '2024 Investment Climate Statements: Uganda' available at <https://www.state.gov/reports/2024-investment-climate-statements/uganda/> (accessed 20 September 2024).

⁵¹⁵ US Department of State, '2024 Investment Climate Statements: Uganda' available at <https://www.state.gov/reports/2024-investment-climate-statements/uganda/> (accessed 20 September 2024).

⁵¹⁶ AfCFTA Protocol on Investment (2023); 'AfCFTA Protocol on Investment: Factsheet' *Tralac* 05 October 2023. available at <https://www.tralac.org/resources/infographic/16152-afcfta-protocol-on-investment-factsheet.html#:~:text=The%20AfCFTA%20Protocol%20on%20Investment,8%20chapters%20with%2054%20Articles.> (accessed 10 October 2023); Danish, H El-Kady, MM Mbengue, SH Nikiéma & D Uribe 'The Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area: What's in it and what's next for the Continent?' 1 July 2023 *IISD Investment Treaty News* available at <https://www.iisd.org/itn/en/2023/07/01/the-protocol-on-investment-to-the-agreement-establishing-the-african-continental-free-trade-area-whats-in-it-and-whats-next-for-the-continent/> (accessed 10 November 2023).

⁵¹⁷ 'AfCFTA Protocol on Investment: Factsheet' (05 October 2023) available at <https://www.tralac.org/resources/infographic/16152-afcfta-protocol-on-investment-factsheet.html#:~:text=The%20AfCFTA%20Protocol%20on%20Investment,8%20chapters%20with%2054%20Articles.> (accessed 10 October 2023).

obligated to terminate their intra-African BITs, along with several survival clauses within five years and will be prohibited from entering new ones.⁵¹⁸

State Parties are also required to consider the Protocol's provisions when negotiating or reviewing existing IIAs with third parties.⁵¹⁹ Since this study aims to propose the reform of Uganda's BIT system and a new draft Ugandan Model BIT focused on sustainable development, it is important to ensure that these reform efforts are consistent with the Protocol.

Additionally, the Protocol will serve as a key framework for revising and negotiating future IIAs and will be discussed in the context of integrating sustainable development objectives into Uganda's BIT system in Chapter Five. This section will therefore introduce certain provisions and determine Uganda's compliance with those provisions, while Chapter Five will provide a detailed analysis of its core substantive and innovative provisions to avoid repetition.

Signed in 2019, the Protocol aligns with the AfCFTA and AU's Agenda 2063, to create balanced, coherent, clear, transparent, predictable and mutually beneficial rules for promoting, facilitating and protecting investments in Africa.⁵²⁰ It incorporates regional and national investment laws, IIAs and development frameworks, including UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) and Agenda 2030.⁵²¹

The Protocol also emphasises inclusive, sustainable development, responsible business practices, addresses some of the inherent issues in the current global IIA regime like treaty shopping, and preserves State Parties' rights to regulate for public policy objectives.⁵²² It aims to encourage intra-African investment flows that support sustainable development, establish a balanced, predictable and transparent legal and institutional investment framework that considers the interests of State Parties, investors and local communities.⁵²³

⁵¹⁸ AfCFTA Protocol on Investment (2023) art 49(1) – (2).

⁵¹⁹ AfCFTA Protocol on Investment (2023) art 49(3).

⁵²⁰ AfCFTA Protocol on Investment (2023) preamble.

⁵²¹ AfCFTA Protocol on Investment (2023) preamble.

⁵²² AfCFTA Protocol on Investment (2023) preamble.

⁵²³ AfCFTA Protocol on Investment (2023) art 2(a) – (b).

The Protocol also seeks to provide a robust legal framework for preventing, managing and resolving investment disputes, encourage technology transfer within Africa and foster a coordinated cooperation on investment promotion, facilitation and protection.⁵²⁴ It sets out State Parties, investors and investments rights and obligations,⁵²⁵ and applies to investments made prior to and after its entry into force, provided that the former investments qualify as ‘investments’ under the Protocol and are present in the host-country when it is enforced.⁵²⁶

However, the Protocol does not apply to investment disputes that were initiated or settled prior to its enactment, government procurement, subsidies, grants (including loans, guarantees and insurance) or illegal investments, taxation measures, special financial advantages for development assistance, public debt operations and State enterprise debt restructuring, non-economic real estate or property and contract-based investment disputes between a State Party and investor.⁵²⁷

This is a particularly important inclusion in Uganda’s case given that its first ISDS case, revolved around tax issues where the investor refused to pay a capital gains tax in accordance with Uganda’s domestic laws, due to an illegal tax waiver in product-sharing contract between them and the Ugandan government, which was eventually settled – although details of the settlement remain elusive.

In order to establish the scope of any IIA, it is also crucial to clarify key terms such as ‘investment,’ ‘investor,’ and ‘host-state.’⁵²⁸ Accordingly, the Protocol adopts an enterprise-based definition of ‘investment’ (as opposed to asset-based approach), encompassing stocks and shares; movable and immovable property; intellectual property (IP); rights granted under the host-country’s laws or through contractual arrangements; and other contractual rights.⁵²⁹

⁵²⁴ AfCFTA Protocol on Investment (2023) art 2(c) – (e).

⁵²⁵ AfCFTA Protocol on Investment (2023) art 3(1).

⁵²⁶ AfCFTA Protocol on Investment (2023) art 3(1) & (2)(b); AfCFTA Protocol on Investment (2023) art 3(3)(a) – (b) – State Party obligations also apply to measures adopted by their central, regional and local governments and administrations and NGOs when performing powers delegated by such institutions.

⁵²⁷ AfCFTA Protocol on Investment (2023) art 3(4)(a) – (h) & 3(5).

⁵²⁸ El-Kady et al (2023) IISD Investment Treaty News available at <https://www.iisd.org/itn/en/2023/07/01/the-protocol-on-investment-to-the-agreement-establishing-the-african-continental-free-trade-area-whats-in-it-and-whats-next-for-the-continent/> (accessed 10 November 2023).

⁵²⁹ AfCFTA Protocol on Investment (2023) art 1.

In order to qualify for benefits and protection under the Protocol, investment must meet a specific criteria including ‘commitment of capital or other resources, the expectation of gain or profit, a certain duration, assumption of risk, and a significant contribution to the Host State's sustainable development.’⁵³⁰ Moreover, the establishment, acquisition and expansion of investments under this Protocol only applies to the post-establishment phase.⁵³¹

The Protocol excludes certain types of investments, such as debt securities, loans to a government or State owned enterprises (SOEs), claims to money for the sale of goods and services arising from commercial contracts, claims arising from judicial, administrative and arbitral proceeding orders and portfolio investments.⁵³² A ‘portfolio investment’ is then defined as an ‘investment that does not give an investor the possibility to exercise effective management or influence in the management of the enterprise.’⁵³³

Notably, the Protocol also defines ‘investment-related human rights’ – a definition not often seen in IIAs – as ‘human rights directly related to investment activity, including in particular environmental, health and core labour rights.’⁵³⁴ This addition addresses concerns from developing countries concerning the impact of business activities on human rights and encourages RBC, holding investors accountable for violations of internationally recognised human rights.⁵³⁵

Conversely, the Protocol defines an ‘investor’ as:⁵³⁶

- a) a natural person, who is a national of a State Party in accordance with its laws and regulations, who has made an investment in the territory of another State Party. For greater certainty, a natural person who holds dual nationality shall be deemed to be exclusively a national of the country of her or his effective nationality or where she/he ordinarily or permanently resides;
- b) a legal or juridical person, in accordance with the definition of the legal or juridical person of the Home State in this article, that has made an investment in the territory of the Host State.

⁵³⁰ AfCFTA Protocol on Investment (2023) art 1.

⁵³¹ AfCFTA Protocol on Investment (2023) art 1.

⁵³² AfCFTA Protocol on Investment (2023) art 1.

⁵³³ AfCFTA Protocol on Investment (2023) art 1.

⁵³⁴ AfCFTA Protocol on Investment (2023) art 1.

⁵³⁵ AfCFTA Protocol on Investment (2023) art 1; UN human Rights, ‘Report on human rights – compatible international investment agreements (IIAs)’ A/76/238.

⁵³⁶ AfCFTA Protocol on Investment (2023) art 1.

This means that the Protocol applies exclusively to African investors or companies operating within one of the AU's 55 jurisdictions.⁵³⁷ It also anticipates issues of dual citizenship, clarifying that an investor will be considered a national of the country of their effective nationality or permanent residence.⁵³⁸

Furthermore, the Protocol authorises each State Party to admit investments according to its domestic laws and regulations,⁵³⁹ which is crucial for ensuring that host-countries maintain sovereignty over the admission of investments into their territories. This provision is also particularly important for African countries, which may prioritise investment that generates long-term benefits for local communities, enhances technology and creates job opportunities.⁵⁴⁰

Under Article 5, a State Party may deny benefits to an investor from another State Party if the investment lacks substantial business activity in the home country, was established to access dispute settlement or engages in activities prejudicial to the national interests of the host-country.⁵⁴¹ Denial of benefits (DOB) is also permitted if the investment is linked to entities from third Parties without diplomatic relations, entities from the host-country or non-State Parties lacking significant business activity in a State Party's territory.⁵⁴²

The ability for a host-country to deny benefits is crucial for several reasons. First, it prevents treaty shopping by enabling a host-country to block investors who establish investments just to access dispute settlement mechanisms or lack substantial business activity in their home-country, preventing the exploitation of legal protections.⁵⁴³ States can also deny benefits if an investment threatens national or sustainable development interests, ensuring that key sectors like energy, water and national security remain secure.

⁵³⁷ Danish, H El-Kady, MM Mbengue, SH Nikièma & D Uribe, 'The Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area: What's in it and what's next for the Continent?' (2023) *IISD Investment Treaty News* available at <https://www.iisd.org/itn/en/2023/07/01/the-protocol-on-investment-to-the-agreement-establishing-the-african-continental-free-trade-area-whats-in-it-and-whats-next-for-the-continent/> (accessed 10 November 2023).

⁵³⁸ AfCFTA Protocol on Investment (2023) art 1.

⁵³⁹ AfCFTA Protocol on Investment (2023) art 4.

⁵⁴⁰ Chapter 1 'Introduction' para 1 above.

⁵⁴¹ AfCFTA Protocol on Investment (2023) art 5(1)(a) – (c).

⁵⁴² AfCFTA Protocol on Investment (2023) art 5(1)(d) – (g).

⁵⁴³ Chapter 2 'Issues with the current IIA regime' para 2.2 above.

With regards to the definitions of investor and investment, Uganda's ICA – 19 are somewhat consistent with the Protocol but may require specific adjustments to ensure that all the elements of the Protocol are incorporated, such as exclusions of portfolio investments. For instance, although the ICA – 19 defines portfolio investment and sets a minimum threshold for its registration, it does not appear to regulate it.⁵⁴⁴ Nevertheless, the Act exposes Uganda to investment disputes arising from such investments.

Moreover, the ICA – 19 supports the idea of investments contributing to economic development,⁵⁴⁵ but needs to explicitly incorporate criteria related to sustainable development including social aspects like human rights. Uganda's laws allow for the regulation and admission of investment in accordance with its laws and outline criteria under which an investor would be denied benefits and prosecuted for contravention of its laws.⁵⁴⁶

Regarding the definition of 'investor,' Uganda's ICA – 19 does not address dual citizenship in determining whether an investor is considered domestic or foreign. This gap could allow an investor with dual citizenship to bring an investment dispute against Uganda under a BIT with their other country of citizenship. As such, Uganda should revise its definition of an 'investor' to explicitly address dual citizenship issues in line with the Article 1 of the Protocol.

Uganda's investment legal framework also requires investments to be established in accordance with the domestic laws of the country including international agreements under which Uganda has obligations. The ICA – 19 specifically, gives the relevant Minister power to amend investment priority areas empowering Uganda to tailor its investment strategies to ensure that they align with its national developmental goals.⁵⁴⁷

However, the ICA – 19 does not specifically refer to Uganda's right to regulate on public policy issues such as health and human rights issues. As such the country could still be exposed to investment disputes arising from such measures. Uganda should therefore explicitly establish

⁵⁴⁴ Uganda ICA – 19 (2019) secs 1 & 15(2).

⁵⁴⁵ Uganda ICA – 19 (2019) sec 3 & 17.

⁵⁴⁶ Uganda ICA- 19 (2019) secs 17, 18 & 39.

⁵⁴⁷ Uganda ICA- 19 (2019) sec 40 & Schedule 2.

its right to regulate under this Act in accordance with the preamble and Article 4 of the Protocol, to mitigate exposure to cases resulting from adopting such measures.

Chapter Two of the Protocol contains provisions on investment promotion and facilitation, including key innovative provisions relating to incentives for sustainable investments, national focal points, publication of information and non-disclosure of confidential information.⁵⁴⁸

Accordingly, Article 6, which deals with investment facilitation – focuses on investment promotion, encouraging State Parties to enhance Africa’s appeal as an investment destination through joint ventures, business matching, coordination with the Pan-African Trade and Investment Agency and RECs, exchange of relevant information and promoting investments that contribute to gender equality, women empowerment, youth and disabled people.⁵⁴⁹

Article 7, which deals with investment facilitation – urges State Parties to facilitate sustainable investment, by facilitating visas and permits, streamlining procedures, establishing one-stop shops and promoting cooperation between regulatory authorities.⁵⁵⁰ This signifies that there is a coordinated effort to ensure that investments align with SDGs and encourages cooperation on policies and services for cross-border investments.

Article 8, which deals with incentives for sustainable investment, allows State Parties to introduce measures that support sustainable development, including financial measures, subsidised infrastructure and technology support, enhancing coherence of SDGs across the African continent.⁵⁵¹ Article 9 mandates the designation of national focal points that provide investors with information related to investments in State Parties,⁵⁵² ensuring that investors have information pertaining to investment laws, policy frameworks and support.

Under Article 10, State Parties are required to publish relevant laws, regulations and international agreements to ensure transparency and facilitate compliance for investors.⁵⁵³

⁵⁴⁸ AfCFTA Protocol on Investment (2023) arts 6 - 11.

⁵⁴⁹ AfCFTA Protocol on Investment (2023) art 6(a) – (g).

⁵⁵⁰ AfCFTA Protocol on Investment (2023) art 7(1) – (6).

⁵⁵¹ AfCFTA Protocol on Investment (2023) art 8(1)(a) – (g) & (2).

⁵⁵² AfCFTA Protocol on Investment (2023) art 9(1) – (2).

⁵⁵³ AfCFTA Protocol on Investment (2023) art 10(1) – (3).

Lastly, Article 11, which protects confidential information stipulates that the Protocol does not require State Parties to disclose information that compromises law enforcement, commercial interests or public security.⁵⁵⁴

Uganda promotes investments through various initiatives including organising and participating in investment forums – such as the one that led to the drafting of the IFD Agreement – and collaborating with regional bodies like AU, COMESA and EAC.⁵⁵⁵ Moreover, under the UIA, the government supports business matching and joint ventures, actively engaging in international investment forums and seminars.⁵⁵⁶

The UIA's involvement in organising joint activities and focus on inclusive investment practices, including those that support gender equality and youth empowerment, match the Protocol's objectives under Article 6.⁵⁵⁷ Furthermore, Uganda has made significant strides to facilitate investment by streamlining processes through initiatives like the one stop-shop under the UIA for business registration and digitisation of investment procedures.⁵⁵⁸

Visa and permit applications have also been simplified through digitisation and are accessible online as is all information pertaining to the establishment and registration of an investment, which is free of charge in accordance with Article 7 of the Protocol.⁵⁵⁹ The country has also made efforts to offer incentives for sustainable development, including tax incentives, investment guarantees and infrastructural support broadly satisfying the requirements of Article 8.⁵⁶⁰

However, apart from certain incentives, such as those for the acquisition of appropriate and clean technology,⁵⁶¹ many of Uganda's incentives are tailored towards investment and export

⁵⁵⁴ AfCFTA Protocol on Investment (2023) art 11.

⁵⁵⁵ UIA 'Investment promotion' available at <https://www.ugandainvest.go.ug/investment-promotion/> (accessed 20 September 2024).

⁵⁵⁶ UIA 'Investment promotion' available at <https://www.ugandainvest.go.ug/investment-promotion/> (accessed 20 September 2024).

⁵⁵⁷ Uganda NDIII 2020/21 – 2024/25, 35 – 52.

⁵⁵⁸ UIA 'Investor One Stop Centre (OSC)' available at <https://www.ugandainvest.go.ug/osc/#> (accessed 20 September 2024).

⁵⁵⁹ Uganda e-Immigration System available at <https://visas.immigration.go.ug/> (accessed 20 September 2024).

⁵⁶⁰ PwC 'Uganda: Tax credits and incentives' available at <https://taxsummaries.pwc.com/uganda/corporate/tax-credits-and-incentives> (accessed 20 September 2024).

⁵⁶¹ Uganda NDIII 2020/21 – 2024/25, 83.

promotion and value addition, as opposed to sustainable investment.⁵⁶² Moreover there is still poor management of sustainable development aspects like natural resources and forestry due to absence of appropriate incentives for good environmental management practices.⁵⁶³

Uganda's investment regime aligns with Article 9 through the UIA, which acts as the national focal point for investors and coordinates with other national and regional entities to facilitate investment.⁵⁶⁴ It also publishes all relevant investment laws through official channels, publications and the UIA website and maintains transparency about investment policies, aligning with Article 10 of the Protocol.⁵⁶⁵

Uganda also has provisions to protect confidential information and data in its legal framework, which also applies to investment. For instance, the country enacted the Data Protection and Privacy Act and its accompanying Regulations to safeguard sensitive information from disclosure where such disclosure could harm public interests, private rights or strategic national interests.⁵⁶⁶ Uganda's ICA – 19 also prohibits the disclosure of information, thus aligning with Article 11 of the Protocol.⁵⁶⁷

Chapter Three of the Protocol outlines key provisions on investment protection standards, including NT and MFN treatment along with their respective exceptions. It also covers the interpretation on non-discrimination, administrative and judicial treatment, physical protection and security, expropriation (including exceptions and compensation) and transfer of funds and its limitations.⁵⁶⁸

Furthermore, Chapter Seven of the Protocol outlines the management and settlement of disputes, including SSDS, ISDS but also includes innovative provisions such as those relating

⁵⁶² URA 'A guide on tax incentives available to the investors in Uganda' available at <https://thetaxman.ura.go.ug/?p=3091> accessed 20 September 2024).

⁵⁶³ Uganda NDIII 2020/21 – 2024/25, 105 – 11 & 121.

⁵⁶⁴ UIA 'Investor One Stop Centre (OSC) available at <https://www.ugandainvest.go.ug/osc/#> (accessed 20 September 2024).

⁵⁶⁵ UIA 'Investor One Stop Centre (OSC) available at <https://www.ugandainvest.go.ug/osc/#> (accessed 20 September 2024); UIA 'A practical guide to doing business in Uganda' available at <https://www.ugandainvest.go.ug/wp-content/uploads/2019/11/A-practical-guide-to-doing-business-in-Uganda.pdf> (accessed 20 September 2024).

⁵⁶⁶ Uganda Data Protection and Privacy Act of 2019; Uganda Data Protection and Privacy Regulations of 2021;

⁵⁶⁷ Uganda ICA – 19 (2019) sec 35.

⁵⁶⁸ AfCFTA Protocol on Investment (2023) arts 12 – 15 & 18 – 23..

to dispute prevention and grievance management and investment liability.⁵⁶⁹ These core substantive provisions are inherent in most IIAs and will not be reiterated here, as they form part of the analysis as to how Uganda could integrate sustainable development objectives in its BIT system in Chapter Five.

Notably however, Articles 16 and 17 introduce innovative provisions that are not commonly found in old-IIAs, especially old-BITs, as Chapter Four of this study will show. Article 16 addresses non-discrimination, specifying that Articles 12 – 15 of the Protocol govern its scope, application and interpretation.⁵⁷⁰ These provisions are crucial for arbitrators when interpreting discrimination claims in disputes, providing clear guidance on how non-discrimination should be understood within the Protocol.

Article 17 of the Protocol ensures that State Parties provide fair administrative and judicial treatment to investors, prohibiting denial of due process and discrimination based on gender, race or religion.⁵⁷¹ Interestingly, unlike most IIAs, the Protocol does not have an explicit FET clause. In fact, Article 17 further clarifies that the right to fair administrative and judicial treatment is rooted in the MST principle under CIL and does not go beyond what is required by that principle nor does it equate to FET.⁵⁷²

Although most of the provisions of Chapter Three of the Protocol will be discussed in detail in Chapter Five of this study, it should be noted that Uganda's legal investment framework is generally non-discriminatory, with fair administrative processes for both domestic and foreign investors and access to national judicial mechanisms, with foreign investors having additional access to international arbitration tribunals.⁵⁷³

Moreover, both the Constitution of Uganda and Uganda's ICA – 19 protect domestic and foreign investors from expropriation without fair and adequate compensation.⁵⁷⁴ Moreover, compensation funds are freely transferable from the territory without limitations.⁵⁷⁵ As such,

⁵⁶⁹ AfCFTA Protocol on Investment (2023) arts 44 – 47.

⁵⁷⁰ AfCFTA Protocol on Investment (2023) arts 16.

⁵⁷¹ AfCFTA Protocol on Investment (2023) arts 17(1).

⁵⁷² AfCFTA Protocol on Investment (2023) arts 17(2).

⁵⁷³ Uganda ICA – 19 (2019) sec 25; Uganda ACA (2000).

⁵⁷⁴ Uganda ICA – 19 (2019) sec 24; Constitution of the Republic of Uganda (1995) sec 26.

⁵⁷⁵ Uganda ICA – 19 (2019) sec 25(3).

the ICA – 19 is partially inconsistent with the Protocol to the extent that it does not limit the transfer of funds even in situations where Uganda is facing external financial difficulties.⁵⁷⁶

Chapter Four of the Protocol also outlines innovative provisions on sustainable development-related issues, not often seen in old-IIAs. These provisions include the right to regulate, the minimum standards on the environment, labour and consumer protection, investment and climate change, investment, public health and pandemics, pursuit of development goals, human resources development and transfer of technology.⁵⁷⁷

Evidently, these provisions address some of the main concerns surrounding the IIA regime in recent years and highlight State Parties' efforts to pursue investment that is sustainable development-oriented. As they form part of the analysis on how Uganda could integrate sustainable development objectives into its BIT system, they too will not be reiterated here and will be discussed in detail in Chapter Five of this study.

Chapter Five of the Protocol deals with investor obligations, including relations to State Party obligations, compliance with national and international law, business ethics, human rights and labour standards, environmental protection, indigenous peoples and local communities, socio-political obligations, anti-corruption, corporate social responsibility (CSR), corporate governance and taxation and transfer pricing.⁵⁷⁸

Accordingly, Article 31 emphasises that investor responsibilities do not negate a State Party's duty to promote laws protecting human and labour rights, the environment and ensuring compliance with anti-corruption, anti-bribery, anti-money laundering and anti-terrorism financing measures.⁵⁷⁹ Moreover, investors must comply with a State Party's national laws and international laws.⁵⁸⁰

According to Article 33, investors and their investments are required to uphold high standards of business ethics, respect human rights, adhere to labour standards and avoid discriminatory

⁵⁷⁶ AfCFTA Protocol on Investment (2023) art 23.

⁵⁷⁷ AfCFTA Protocol on Investment (2023) arts 24 – 30.

⁵⁷⁸ AfCFTA Protocol on Investment (2023) arts 31 – 43.

⁵⁷⁹ AfCFTA Protocol on Investment (2023) arts 31(a) – (c).

⁵⁸⁰ AfCFTA Protocol on Investment (2023) arts 31(2) & 32.

practices.⁵⁸¹ In addition, they must protect the environment, conduct environmental impact assessments and apply the precautionary principles of these assessments and avoid exploiting natural resources to the detriment of local communities.⁵⁸²

Investors are also obligated to respect indigenous peoples and local communities, ensuring their right to free, prior and informed consent where applicable and must respect tenure rights to land, water and other resources under Article 35.⁵⁸³ They are also required to submit ESIA's to the competent authorities in accordance with the domestic laws of the host-country and make them accessible to all interested parties.⁵⁸⁴

The Protocol prohibits investors from interfering in a host-country's political affairs and bans actions like financing political parties or influencing public opinion against the host-country.⁵⁸⁵ It also bans investors and their investments from engaging in corrupt practices and encourages them to cooperate with State Parties in preventing and eliminating corruption.⁵⁸⁶

Notably, the Protocol clarifies that a breach of its anti-corruption provision equates to a breach of domestic law regarding the establishment of the investment.⁵⁸⁷ As such, if an investor or their investment was found to be engaging in corrupt practices, it would be grounds to revoke their investment registration or license.

The Protocol also promotes CSR by encouraging investors to contribute to the sustainable development of the host-country and local communities by adopting socially responsible practices that align with international standards.⁵⁸⁸ This includes promoting economic, social and environmental progress, strengthening local capacities, developing human capital through job creation and training and fostering gender equality.⁵⁸⁹

⁵⁸¹ AfCFTA Protocol on Investment (2023) art 33(a) – (g).

⁵⁸² AfCFTA Protocol on Investment (2023) art 34(1)(a) – (e) & 34(2).

⁵⁸³ AfCFTA Protocol on Investment (2023) art 35(1) & (2).

⁵⁸⁴ AfCFTA Protocol on Investment (2023) art 35(3).

⁵⁸⁵ AfCFTA Protocol on Investment (2023) art 36.

⁵⁸⁶ AfCFTA Protocol on Investment (2023) art 37(1) – (2).

⁵⁸⁷ AfCFTA Protocol on Investment (2023) art 37(3).

⁵⁸⁸ AfCFTA Protocol on Investment (2023) art 38(1).

⁵⁸⁹ AfCFTA Protocol on Investment (2023) art 38(2)(a) – (e).

Investors are also encouraged to adopt self-regulatory practices, educate workers on corporate policies, promote responsible practices among business partners and ensure benefit-sharing with local communities.⁵⁹⁰ State Parties should also motivate investors to integrate internationally recognised CSR standards into their operations. While this provision is an innovative inclusion in this IIA, it is not mandatory and doesn't obligate investors to consider CSR practices.

Articles 39 and 40 of the Protocol outline investor obligations regarding corporate governance and taxation practices. Accordingly, investors must adhere to national, regional and international corporate governance standards, particularly those pertaining to transparency and accounting practices and equitable treatment of shareholders.⁵⁹¹ They are also required to cooperate with stakeholders to foster wealth creation sustainable financial management and provide timely disclosures, including those relating to environmental risks.⁵⁹²

Compliance with national policies on human resource development, capacity building and training is also emphasised, and State Parties are encouraged to enhance their regulatory frameworks to enhance the corporate governance standards under the Protocol.⁵⁹³ With regards to taxation and transfer pricing, investors must ensure that all company transactions are conducted at arm's length and at fair market prices consistent with domestic and international tax laws.⁵⁹⁴

Investors must also comply with domestic tax laws and international principles aimed at preventing base erosion and profit shifting and provide all tax compliance information required by the host-country.⁵⁹⁵ Furthermore, State Parties are required to cooperate in the detection and prevention of transfer pricing manipulation and facilitate joint audits through mutual administrative assistance in tax matters.⁵⁹⁶

⁵⁹⁰ AfCFTA Protocol on Investment (2023) art 38(2)(f) – (i).

⁵⁹¹ AfCFTA Protocol on Investment (2023) art 39(1) & (2)(a).

⁵⁹² AfCFTA Protocol on Investment (2023) art 39(2)(b) – (c).

⁵⁹³ AfCFTA Protocol on Investment (2023) art 32(2)(d), (3) & (4).

⁵⁹⁴ AfCFTA Protocol on Investment (2023) art 40(1)(a).

⁵⁹⁵ AfCFTA Protocol on Investment (2023) art 40(1)(b) – (c).

⁵⁹⁶ AfCFTA Protocol on Investment (2023) art 40(1)(b) – (c).

Uganda's investment regime partially complies with the provisions under Chapter Five of the Protocol to the extent that it has laws protecting human and labour rights, and the environment in the Constitution of Uganda.⁵⁹⁷ However, these provisions are not explicitly included in its ICA – 19 with regards to investment. It also has anti-corruption measures; however, these measures do not form part of its domestic investment law and does not constitute a breach for the purpose of revocation of an investment certificate or registration of an investment.⁵⁹⁸

Although the ICA – 19 mandates environmental impact assessments, it does not include social ones.⁵⁹⁹ Additionally, enforcement of these standards remains weak and CSR remains voluntary, limiting full compliance. Issues such as political interference, corruption and lack of transparency affect corporate governance, while challenges in enforcing taxation and transfer pricing regulations hinder Uganda's alignment with international standards.

3.5. Conclusion

Chapter Three analysed Uganda's legal, institutional and procedural FDI regime, examining its alignment with international and regional investment treaties, sustainable development commitments and national policy frameworks. It found that, while Uganda has made significant strides in establishing a conducive investment climate, key gaps remain between its domestic laws and its international obligations, particularly in sustainable development objectives.

The analysis also highlighted inconsistencies between Uganda's primary investment law, the ICA – 19 and other domestic laws. It revealed that Uganda's legal frameworks, including the Constitution, the NIP of 2018, and the ICA – 19, provide a robust foundation for FDI, supporting investor protection, fair dispute resolution and incentives aimed at promoting economic growth.

Uganda's participation in multilateral agreements – such as the New York Convention, ICSID, TRIMs and its participation in the drafting of the IFD Agreement – and regional agreements

⁵⁹⁷ Constitution of Uganda (1995) Chapter 4 &15.

⁵⁹⁸ Uganda ICA – 19 (2019) sec 23.

⁵⁹⁹ Uganda ICA – 19 (2019) sec 17(c).

under COMESA, the CCIA Agreement, the EAC and the AfCFTA Protocol on Investment has strengthened its regulatory framework, bringing it closer to international investment standards.

While Uganda's adherence to these treaties enhances investor confidence through stability and transparency, certain inconsistencies limit the regime's effectiveness in fostering sustainable development-oriented investments. For instance, while the ICA – 19 addresses previous policy gaps, it requires further amendments to fully reflect the sustainable development commitments of Agendas 2030, 2063, IFD Agreement and the AfCFTA Protocol on Investment.

Uganda's compliance with international investment-related treaties has indeed improved transparency and dispute resolution mechanisms. However, gaps remain in aligning Uganda's national laws with global sustainable investment practices, particularly regarding limited due diligence standards and environmental and social impact assessments. Furthermore, the inconsistent enforcement of anti-corruption measures undermines Uganda's efforts to create a fair investment landscape, potentially deterring long-term, responsible investments.

Additionally, Uganda's engagement with regional treaties—specifically, COMESA, EAC and the AfCFTA Protocol on Investment—reflects a commitment to regional integration and sustainable growth. The COMESA and CCIA Agreements, for example, emphasise investor protection, fair treatment and regional cooperation to remove intra-market barriers. Uganda has adopted many of these provisions, including establishing the UIA as a one-stop shop and adopting FET, NT and MFN treatment principles.

However, the analysis identified significant regulatory gaps. Uganda currently lacks safeguards against potential economic disruptions due to increased FDI, measures to protect its balance of payments during financial crises and enforcement mechanisms to hold investors accountable for misconduct, particularly in ESG compliance. Moreover, the ICA – 19 lacks comprehensive provisions on sustainable development, including the country's right to regulate in these areas and enforce social and environmental obligations.

The AfCFTA Protocol on Investment introduces progressive provisions centred on sustainable development and responsible business practices, with an emphasis on human rights, anti-corruption and climate action. Although Uganda has made partial progress toward these objectives, further adjustments are needed to fully align with the AfCFTA Protocol on Investment commitments.

For instance, Uganda's ICA – 19 does not explicitly address investor obligations related to ESG standards or mandatory CSR practices, nor does it provide a robust framework for managing dual citizenship, a critical factor in resolving jurisdictional ambiguities under AfCFTA Protocol. Additionally, Uganda remains exposed to ISDS cases, regardless of whether an investment has contributed substantially to the country's economy.

In conclusion, Uganda's FDI framework demonstrates a solid foundation aligned with investor protection principles and regional cooperation. However, meaningful reform of its BIT system is essential to fully integrate Uganda's sustainable development commitments, prevent regulatory circumvention by investors and embed investor accountability, as sustainable development priorities are not sufficiently reflected in the country's key national investment laws.

By refining its BIT system to incorporate SDG principles, clarify investor obligations and implement economic safeguards, Uganda can attract responsible, long-term investments that are aligned with national policies and regional development objectives. These reforms would not only improve Uganda's compliance with international standards but also support the country's sustainable economic transformation, enhancing Uganda's appeal as a destination for responsible, sustainable and impactful FDI.

The next Chapter examines Uganda's in-force and Model BITs. It analyses the core provisions of these treaties in order to determine whether they expose the country to the unforeseen risks identified with older BITs, align with sustainable development and evolving national developmental objectives and justifies whether there is the need to reform Uganda's BIT system.

Chapter Four: Analysis of Uganda's bilateral investment treaty-system

4. Introduction

Uganda has signed 17 bilateral investment treaties (BITs) since its independence. Of these, three have been terminated, nine were never ratified, and five are in force.¹ The BITs that are in force were signed over two international investment agreement (IIA) policymaking eras, namely the dichotomy (1965 – 1989) and proliferation (1990 – 2007) eras.²

These BITs were concluded with developed European countries only, including, Germany (1966), Switzerland (1971), UK (1998), Denmark (2001) and France (2003).³ Additionally, Uganda also has a Model BIT that was drafted in 2003.⁴ Evidently, all of Uganda's relevant BITs are regarded as old-generation BITs (old-BITs) having been concluded before 2010.⁵ Moreover, its Model BIT contains similar provisions to those found in Uganda's BITs.

As discussed in Chapter Two, old-BITs contain broad and vague provisions, which harbour unforeseen consequences that signatories might not have anticipated when they were concluding these earlier treaties.⁶ This chapter highlights critical issues with Uganda's current BITs and Model BIT, emphasising four key issues.

¹ The Italy – Uganda (1997), Netherlands – Uganda (1970) and Netherlands – Uganda (2000) BITs were terminated in 2014, 2003 and 2017, respectively, the Uganda – United Arab Emirates (UAE) 2017), Belgium-Luxembourg Economic Union (BLEU) – Uganda (2005), China – Uganda (2004), Uganda – Zimbabwe (2003), Nigeria – Uganda (2003), Cuba – Uganda (2002), Eritrea – Uganda (2001), South Africa – Uganda (2000), Egypt – Uganda (1995) BITs were never ratified, while the France – Uganda (2003), Denmark – Uganda (2001), Uganda – United Kingdom (1998), Switzerland – Uganda (1971) and Germany – Uganda (1966) BITs are the only ones in force to date – UNCTAD, 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/218/uganda?type=bits> (accessed 10 January 2022).

² UNCTAD *WIR 2017: Investment and the digital economy* (2017) 127 – 8; UNCTAD *UNCTAD's reform package for the international investment regime* (2018) 16.

³ Uganda's BIT with Germany (1966) and Switzerland (1971) were concluded in the dichotomy era, while its BITs with the UK BIT (1998), Denmark (2001) and France (2003), were concluded in the proliferation era.

⁴ Uganda Model BIT (2003).

⁵ UNCTAD *WIR* (2017) 127 – 8; UNCTAD *Reform package* (2018) 16.

⁶ J Lang 'Bilateral investment treaties – a shield of a sword' (2013) available at <https://bowmanslaw.com/insights/bilateral-investment-treaties/> (accessed 15 October 2023).

First, that these old-BITs contain broad and vague provisions that could expose the country to more ISDS mechanisms, which lack transparency, proper accountability and appeals processes, generate inconsistent and unpredictable arbitration decisions leading to substantial financial burdens.⁷ Secondly, that they are outdated and do not reflect Uganda's current economic or sustainable development goals.⁸

Thirdly, that these BITs disproportionately favour foreign investors over domestic ones and perpetuate unequal rights and obligations between the host-country and the investor, imposing binding obligations solely on Uganda, without corresponding responsibilities for investors or their home-countries.⁹ Lastly, that they restrict Uganda's country's right to regulate in the public interest and pursuit of sustainable development goals (SDGs).¹⁰

This chapter will delve into Uganda's existing BITs and Model BIT – as it forms the basis of any future BITs – and critically assess their alignment with sustainable development objectives, including economic, social and environmental factors. This chapter aims to determine whether these treaties, in their current form, perpetuate issues prevalent in the broader global investment regime as outlined in Chapter Two. The analysis will justify why modernising Uganda's BIT system is crucial for fostering sustainable development.

4.1. General provisions of bilateral investment treaties

Although BITs can be very diverse in nature, a number of regular features have emerged.¹¹ BITs usually start with a preamble, which is a statement of intent, and articulates the aim to protect and foster reciprocal investment.¹² The preamble is usually followed by a set of

⁷ P Muchlinski, F Ortino & C Schreuer *The Oxford handbook of international investment law* (2008) 9; UNCTAD *WIR 2012: Towards a new generation of investment policies* (2012) 86 – 7.

⁸ Both ENDS 'Uganda Terminates Investment treaty' available at <https://annualreport.bothends.org/uganda-terminates-investment-treaty/#:~:text=It%20was%20Both%20ENDS%20and,took%20the%20advice%20to%20heart>. (accessed 10 May 2019).

⁹ Muchlinski *et al* (2008) 9;

¹⁰ Muchlinski *et al* (2008) 9; UNCTAD *WIR* (2012) 86 – 7.

¹¹ LE Peterson *Bilateral Investment Treaties and Development Policy-Making* (2004) 3; UNCTAD *Report of the Expert Meeting on Experiences with Bilateral and Regional Approaches to Multilateral Cooperation in the Area of Long-Term Cross-Border Investment, Particularly Foreign Direct Investment* (2002) TD/B/COM.2/41, TD/B/COM.2/EM.11/3, 2.

¹² Peterson (2004) 3.

definitions of certain important expressions used in the treaty.¹³ Most importantly, this part defines the kind of ‘investor’ and ‘investment’ that is protected.¹⁴

Not every BIT defines the above two terms, however. Moreover, some old-BITs do not even contain a ‘definitions’ section.¹⁵ Definitions are typically followed by substantive provisions, which are designed to offer certain absolute and relative standards of treatment. Absolute standards include fair and equitable treatment (FET) and full protection and security (FPS) provisions.¹⁶

Relative standards of treatment include those relating to national treatment (NT) and most-favoured nation (MFN) treatment.¹⁷ Other core provisions include protections against expropriation or nationalisation, compensation, transparency, sunset clauses, transfer of funds and repatriation, duration and termination provisions.¹⁸ These substantive legal standards are typically enforced through dispute settlement provisions.¹⁹

Disputes settlement provisions can be in the form of investor-State dispute settlement (ISDS) and/ or State-to-State dispute settlement (SSDS) provisions.²⁰ To date, ISDS is the most utilised form of dispute settlement in IIAs,²¹ as it allows foreign investors to directly bring claims against the host-country in international arbitration tribunals (IATs) when a dispute arises.²² ISDS typically allows them to bypass local remedies, like domestic courts.

This following section will examine the preamble, and the core substantive provisions usually found in BITs. It will include an examination of Uganda’s BIT preambles, definitions (if any), FET, FPS, MFN treatment and NT, expropriation and compensation, transfer of funds, and

¹³ JP Sasse *An Economic Analysis of Bilateral Investment Treaties* (2011) 48.

¹⁴ Sasse (2011) 48.

¹⁵ Sasse (2011) 48.

¹⁶ Peterson (2004) 3; B Scharaw *The Protection of Foreign Investments in Mongolia: Treaties, Domestic Law, and Contracts on Investments in International Comparison and Arbitral Practice* (2018) 15 – 16; JW Salacuse *The law of investment treaties* (2021) 169.

¹⁷ Peterson (2004) 3; Scharaw (2018) 15 – 6.

¹⁸ Peterson (2004) 3; Scharaw (2018) 15 – 6.

¹⁹ Peterson (2004) 3; Uganda – UK BIT (1998) art 9(1).

²⁰ Peterson (2004) 3; Uganda – UK BIT (1998) art 9(1).

²¹ Peterson, (2004) 3; UNCTAD *Report of the expert meeting on experiences with bilateral and regional approaches to multilateral cooperation in the area of long-term cross-border investment, particularly foreign direct investment* (2002) TD/B/COM.2/41, TD/B/COM.2/EM.11/3, 2.

²² Scharaw (2018) Springer 15 & 106.

dispute settlement clauses – as well as the duration, termination and sunset clause provisions. These provisions are by no means the only important provisions in IIAs, but they are some of the most cited provisions in ISDS cases and the most relevant to this study.²³

Nonetheless, the following section will also examine the functions of these provisions and how they have been interpreted by arbitral tribunals in selected ISDS cases, enabling one to identify the provisions that are problematic and, perhaps, due for reform.

4.1.1. Preamble

Many BITs are prefaced with a preamble, which states the Parties' intentions and objectives for concluding the agreement and sets the tone for the rest of the treaty.²⁴ Often times, the preamble does not attract as much attention as core substantive provisions do, because it seldom establishes any legally binding rights and obligations.²⁵ Historical evidence also suggests that work on treaty interpretation rarely devotes a lengthy section to this obligatory element of any treaty.²⁶

This does not mean that the preamble's wording is completely irrelevant.²⁷ In fact, its importance has even been emphasised in Article 31 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention or VCLT), which states that the preamble constitutes part of the context of the agreement,²⁸ and plays a critical role in guiding the interpretation of the *agreement* when disputes arise.²⁹

²³ UNCTAD 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/investment-dispute-settlement> (10 February 2022).

²⁴ H Mann, K von Moltke, LE Peterson & A Cosbey *IISD Model International Agreement on Investment for Sustainable Development; Negotiator's Handbook* (2006) IISD 2; UNCTAD *Bilateral Investment Treaties 1995 – 2006: Trends in Investment Rulemaking* (2007) 3; FJ Laporta, A Peczenik & F Schauer (eds) *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007) 105.

²⁵ UNCTAD *BITs 1995 – 2006* (2007) 3; UNCTAD *Bilateral investment treaties in the Mid-1990s* (1998) 29.

²⁶ MH Hulme 'Preambles in Treaty Interpretation' (2016) 164 *University of Pennsylvania Law Review* 1283 – 1284.

²⁷ UNCTAD *BITs 1995 – 2006* (2007) 3.

²⁸ Vienna Convention On The Law Of Treaties (1969) art 31; UNCTAD *BITs 1995 – 2006* (2007) 3; UNCTAD *BITs in the Mid-1990s* (1998) 29.

²⁹ Mann *et al.* (2006) 2; UNCTAD *BITs 1995 – 2006* (2007) 3; SA Spears 'Making way for the public interest in international investment agreements' in C Brown & K Miles *Evolution in investment treaty law and arbitration* (2011) 290.

For instance, in the *MTD v Chile* case, the Tribunal considered the preamble in its interpretation of a BIT. It held that it had a duty to interpret the Malaysia – Chile BIT ‘in the manner most conducive to fulfil the objective of the BIT to protect investments and create conditions favourable to investments’ and that this objective could be found in the preamble.³⁰ In that preamble, both governments expressed their desire to:³¹

... expand and deepen economic and industrial cooperation on a long term basis, and in particular, to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party (own underlining) ...

... and recognised,³²

... the need to protect investments by investors of both Contracting Parties and to stimulate the flow of investments and individual business initiative with a view to the economic prosperity of both Contracting Parties (own underlining).

The absence of firm interpretive rules can limit the meaning of a given text and preserve the interpreter’s discretion to determine the meaning of a particular provision in any number of different ways.³³ As seen in Chapter Two of this study, such discretionary interpretation has led to various concerns in the current ISDS system.³⁴

Some scholars believe that a preamble is legally binding and creates obligations on contracting parties.³⁵ In the Senate hearings of the ‘New START’³⁶ arms treaty between Russia and the United States (US), for instance, a coalition of senators on the Foreign Relations Committee argued that the language in the preamble would place the US under a legal obligation to reduce its strategic defence missile capabilities.³⁷

³⁰ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile* (ICSID Case No. ARB/01/7) paras 104 & 114; Chile – Malaysia BIT (1992) preamble.

³¹ *MTD v Chile* (2001) para 113; Chile – Malaysia BIT (1992) preamble.

³² *MTD v Chile* (2001) para 113; Chile – Malaysia BIT (1992) preamble.

³³ Chapter 2 para 2.2.1 above.

³⁴ Chapter 2 para 2.2.1 above.

³⁵ MH Hulme ‘Preambles in Treaty Interpretation’ (2016) 164 *University of Pennsylvania Law Review* 1285.

³⁶ Treaty with Russia on Measures for Further Reduction and Limitation of Strategic Offensive Arms (New START Treaty) 2010, 111th Congress, 2nd Session, Senate REP. (2010) No. 111-6.

³⁷ New Start Treaty (2010) 7.

Another coalition argued that a preamble does not impose legally binding obligations.³⁸ The senators representing the State Department in the above hearings, argued that the language in the preamble could never be legally binding.³⁹ Whichever side of the debate one falls, there is no doubt that preambles play a significant role in treaty interpretation and in recent years, its importance has been increasingly cited by arbitrators in ISDS cases.⁴⁰

Several ISDS cases have even focused on the preamble to ascertain the scope of ‘investor’ and ‘investment’ protection objectives.⁴¹ In *Salini Construttori S.P.A and Italstrade S.P.A v Kingdom of Morocco*, for example, the Tribunal noted that ‘in reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.’⁴²

This meant that a Tribunal could use the preamble to ascertain the purpose or objective of a treaty. Additionally, in *CMS Gas Transmission Company v The Argentine Republic*, the Tribunal referenced the preamble to clarify the objectives of the Argentina–US BIT,⁴³ by stating that:⁴⁴

The Treaty Preamble makes it clear, however, that one principal objective of the protection envisaged is that fair and equitable treatment is desirable ‘to maintain a stable framework for investments and maximum effective use of economic resources.’ There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment.

Additionally, in *Siemens v Argentina*,⁴⁵ the Tribunal was guided by the purpose of the treaty as expressed in the preamble when interpreting the Germany–Argentina BIT.⁴⁶ The Tribunal reasoned that:⁴⁷

³⁸ New Start Treaty (2010) 7.

³⁹ New Start Treaty (2010) 268.

⁴⁰ *MTD v Chile* (2001) para 113.

⁴¹ Mann *et al* (2006) 2.

⁴² *Salini Construttori S.P.A and Italstrade S.P.A v Kingdom of Morocco* (ICSID Case No. ARB/00/4) para 52.

⁴³ Argentina – US BIT (1991).

⁴⁴ *CMS Gas Transmission Company v The Republic of Argentina* (ICSID Case No. ARB/01/8) para 274.

⁴⁵ *Siemens A.G. v The Argentine Republic* (ISDS Case No. ARB/02/8).

⁴⁶ *Siemens v Argentina* (2002) para 81.

⁴⁷ *Siemens v Argentina* (2002) para 81; SA Spears SA ‘Making way for the public interest in international investment agreements’ in C Brown & K Miles (2011) 291.

The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favourable conditions for the investments of nationals or companies of one of the two States in the territory of the other State.

In recent years, Arbitrators' reach when interpreting old-BITs has broadened and resulted in contradictory and inconsistent conclusions, even under similar facts.⁴⁸ A well-thought-out preamble can, therefore, significantly narrow down and clarify the way certain provisions are interpreted by courts and arbitration tribunals. As such, Contracting Parties must ensure that the preamble is consistent with the substantive provisions of the BIT and vice versa.⁴⁹ Policymakers should also give special regard to the wording of a preamble.

If a preamble contains sustainable development objectives or indicates that Parties do not intend to exclude their right to regulate in the public interest, then that treaty will likely be interpreted in consideration of those objectives.⁵⁰ In some cases, this could mean that a policy adopted by the host-country may be justifiable, even when it affects a foreign investment.⁵¹ The recent realisation by countries that a preamble can play a significant role in the interpretation of an IIA has prompted them to include specific language in their BITs.⁵²

This is being done to clarify that the objective of investment promotion and protection will not be pursued at the expense of other key public policy goals, such as the protection of health, safety, the environment, and the promotion of internationally recognized labour rights.⁵³ This trend has been reflected not only in the preambles, but also in the substantive

⁴⁸ UNCTAD *Most-Favoured Nation (MFN) Treatment* (2010) 3.

⁴⁹ UNCTAD *BITs 1995 – 2006* (2007) 3.

⁵⁰ SA Spears SA 'Making way for the public interest in international investment agreements' in C Brown & K Miles (2011) 294.

⁵¹ *Philip Morris International Inc. and others v Ukraine* (ICSID Case No. ARB/21/3); *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No. 2012-12); *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7).

⁵² UNCTAD *BITs 1995 – 2006* (2007) 3; SA Spears SA 'Making way for the public interest in international investment agreements' in C Brown & K Miles (2011) 294.

⁵³ UNCTAD *BITs 1995 – 2006* (2007) 3; SA Spears SA 'Making way for the public interest in international investment agreements' in C Brown & K Miles (2011) 294.

wording of BIT provisions,⁵⁴ which shows that an increasing number of countries have stopped compromising on important sustainable development policies to receive FDI.⁵⁵

Preambles usually come in two categories. The first focuses on the importance of fostering economic cooperation and promoting favourable conditions for reciprocal investments.⁵⁶ It also recognises the impact investment has on generating prosperity in the host-countries and is the most common type of preamble especially in old-BITs.⁵⁷ The second makes it clear that investment promotion and protection need to respect other key public policy objectives.⁵⁸

The latter type of preamble has become common among countries that wish to adopt more sustainable development-oriented BITs,⁵⁹ while the former type does not focus on the developmental needs of the host-country. Unfortunately, it is also this type of preamble that is perpetuated in all of Uganda's in-force and Model BITs. For instance, Uganda's BIT with Germany states that:⁶⁰

DESIRING to intensify economic cooperation between both States.

INTENDING to create favourable conditions for investments by nationals and companies of either State
In the territory of the other State, and

RECOGNISING that encouragement and contractual protection of such Investments are apt to stimulate
private business initiative and to increase the prosperity of both nations,

HAVE AGREED AS FOLLOWS:

This wording is also similar to that found in the preambles of Uganda's BITs with Switzerland, UK, Denmark, France and its Model BIT.⁶¹ These preambles emphasise the importance of

⁵⁴ UNCTAD *BITs 1995 – 2006* (2007) 3.

⁵⁵ SA Spears SA 'Making way for the public interest in international investment agreements' in C Brown C & K Miles (2011) 294.

⁵⁶ UNCTAD *BITs 1995 – 2006* (2007) 3; UNCTAD *BITs in the Mid-1990s* (1998) 30.

⁵⁷ UNCTAD *BITs 1995 – 2006* (2007) 3.

⁵⁸ UNCTAD *BITs 1995 – 2006* (2007) 4.

⁵⁹ UNCTAD *BITs 1995 – 2006* (2007) 4.

⁶⁰ Germany – Uganda BIT (1966) preamble.

⁶¹ Switzerland – Uganda BIT (1971) preamble; Uganda – UK BIT (1998) preamble; Denmark – Uganda BIT (2001) preamble; France – Uganda BIT (2003) preamble; Uganda Model BIT (2003) preamble.

creating favourable conditions for foreign investment to stimulate production and lead to the economic development of both parties.⁶²

Studies, however, show that foreign direct investment (FDI) has not always led to economic prosperity in developing countries and has sometimes even hindered development.⁶³ Many African countries, including Uganda, signed old-BITs under the mistaken belief that they would spur economic development.⁶⁴ These BITs often lack preambles addressing sustainable development, including labour, health and environmental standards.⁶⁵

Although the preambles of Uganda's BIT with France and the Model BIT recognise some sustainable development elements including 'the importance of technology transfer and human resources development',⁶⁶ Uganda's BITs generally follow a traditional approach focusing solely on investment protection and protection with no obligation for investors to contribute to sustainable development.⁶⁷

In conclusion, despite Uganda's commitment to promote and protect investments, there is no assurance that these investments will promote inclusive and sustainable growth. With the rise of ISDS cases, especially against developing and least-developed countries, Uganda should use a preamble that clarifies that investment promotion and protection need to respect other key public policy objectives if it wishes to conclude more sustainable development-oriented BITs.

4.1.2. Scope and definition

The scope of any BIT includes three key elements: the subject matter, to which the treaty applies – usually the investment made by the investor, the geographical coverage (usually the two Contracting Parties) and the temporal scope (the date of entry into force and treaty

⁶² UNCTAD *BITs in the Mid-1990s* (1998) 30; Peterson (2004) 23.

⁶³ WY Jason 'Bilateral investment treaties, credible commitment and the rule of law: Do BITs promote foreign direct investment?' (2008) 42 *Law & Society Review* 806.

⁶⁴ Chapter 2 para 2.2.3; Schill *et al* (2015) 43.

⁶⁵ UNCTAD *BITs 1995 – 2006* (2007) 4.

⁶⁶ France – Uganda BIT (2003) preamble; Uganda Model BIT (2003) preamble; UNCTAD *BITs 1995 – 2006* (2007) 3; UNCTAD *BITs in the Mid-1990s* (1998) 30.

⁶⁷ UNCTAD *BITs 1995 – 2006* (2007)4.

duration).⁶⁸ Although not defined, these aspects are usually determined through specific provisions therein.⁶⁹

Additionally, there is a general consensus that BITs should be interpreted in accordance with the rules outlined in Articles 31 and 32 of Vienna Convention. Article 31 of the VCLT, which deals with general rules of treaty interpretation, provides that:⁷⁰

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - a. any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - b. Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - a. Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - c. Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that parties so intended.

Article 32 of the VCLT, which deals with supplementary means of interpretation, then provides that:⁷¹

Recourse may be had to supplementary meanings of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- a. leaves the meaning ambiguous or obscure; or

⁶⁸ UNCTAD *BITs 1995 – 2006* (2007) 4; UNCTAD *Scope and definition* (2011) XI, 6.

⁶⁹ UNCTAD *Scope and definition* (2011) XI, 6.

⁷⁰ Vienna Convention (1969) art 31(1) – (4).

⁷¹ Vienna Convention (1969) art 32.

- b. leads to a result which is manifestly absurd or unreasonable.

Accordingly, the definitions' provision of an IIA is important for several reasons. Firstly, definitions provide clear and predictable meanings for terms used in the agreement. Secondly, and more importantly, they determine the scope of the agreement.⁷² Therefore, they are the part where Contracting Parties agree to attach a specific meaning to the words contained therein.⁷³

The two most important and referenced definitions of any BIT are those of the 'investor' and 'investment'.⁷⁴ Although there are several other terms that are usually contained in a BIT's definitions,' this section will only focus on these or similar definitions, as they determine who and what is protected in a particular BIT. Defining these terms therefore establishes the scope of a host-country's obligations and an investor or investment's rights – and, in turn, the exposure to ISDS claims.⁷⁵

4.1.2.1. *Definition of investment*

The definition of 'investment' normally contains six common elements. They include: 1) open-ended or closed definitions; 2) asset or enterprise based; 3) a list of the characteristics of an investment; 4) exclusions of specific types of assets; 5) a requirement to comply with domestic entry requirements; and 6) a temporal dimension, which states whether they cover existing and future investments or only future investments.⁷⁶

All of Uganda's current and Model BITs contain a definitions section, defining the term 'investment'. Uganda's BITs typically provide that an:⁷⁷

'investment' means every kind of asset and in particular, though not exclusively includes:

⁷² JA VanDuzer, P Simons & G Mayeda *Integrating sustainable development into international investment agreements: A guide for developing country negotiators* (2013) 48.

⁷³ Vienna Convention (1969) art 31(4).

⁷⁴ VanDuzer *et al* (2013) 48.

⁷⁵ UNCTAD *Scope and Definition* (2011) XI, 6; VanDuzer *et al* (2013) 48.

⁷⁶ UNCTAD *IIA Handbook* (2012) 13.

⁷⁷ Germany – Uganda BIT (1966) art 8(1); Switzerland – Uganda BIT (1971) art 1(3); Uganda – UK BIT (1998) art 1(a); Denmark – Uganda BIT (2001) art 1(1); France – Uganda BIT (2003) art 1(1); Uganda Model BIT (2003) art 1(1).

- 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;
- iv. business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

With the exception of Uganda's BIT with Switzerland, its other four current and Model BITs typically add that:⁷⁸

A change in the form in which assets are invested does not affect their character as investments and the term 'investment' includes all investments, whether made before or after the date of entry into force of this Agreement.

Evidently, all of the 'investment' definitions contained in Uganda's current and Model BITs are open-ended as opposed to closed ones. A closed definition may still be broad, protecting many kinds of interests.⁷⁹ However, since it is restricted to specific asset categories, it offers greater predictability for host-countries, allowing them to focus the BIT on the types of investments they want to attract.⁸⁰ This makes it easier for them to meet their obligations and manage the risk of investor-State claims.⁸¹

Secondly, these definitions apply to 'every kind of asset,' making them asset-based as opposed to enterprise-based (the second common element), by reference to 'every kind of asset'.⁸² This implies that an infinite list of assets qualify for protection and can be interpreted

⁷⁸ Germany – Uganda BIT (1966) art 8(1); Uganda – UK BIT (1998) art 1(a); Denmark – Uganda BIT (2001) art 1(2); France – Uganda BIT (2003) art 1(1); Uganda Model BIT (2003) art 1(1).

⁷⁹ VanDuzer *et al* (2013) 71.

⁸⁰ VanDuzer *et al* (2013) 71.

⁸¹ VanDuzer *et al* (2013) 71.

⁸² Germany–Uganda BIT (1966) art 8(1); Switzerland – Uganda BIT (1971) art 1(3); Uganda–UK BIT (1998) art 1(a); Denmark–Uganda BIT (2001) art 1(1); France–Uganda BIT (2003) art 1(1); Uganda Model BIT (2003) art 1(1); UNCTAD 'Review of 2021 investor-State arbitration decisions: Insights for IIA reform' *IIA Issues Note* July 2023, 3.

as such by tribunals.⁸³ Thirdly, the references to ‘every kind of asset’ are followed by an illustrative, non-exhaustive list of assets that qualify as investments.⁸⁴

These assets include movable or immovable property, claims to money, shares and intellectual property,⁸⁵ encompassing an even wider range of assets that are not limited to the business enterprise’s interests.⁸⁶ Additionally, none of Uganda’s current BITs contain a list of characteristics that an investment should have. A non-exhaustive asset list can have several disadvantages.

For instance, some kinds of assets that are eligible for protection might not produce the benefits commonly associated with investment, such as increased local employment, skills and technology transfer, and might make little or no contribution to the host-country’s development.⁸⁷ Interestingly, Uganda’s BITs with Germany and the UK promote an ‘investment of capital’.⁸⁸

This inclusion implies that at the very least, some sort of funds has to be injected into the host-country for an investment to be protected under the BIT.⁸⁹ However, it is not clear from the two BITs how much capital that should be or how it can be determined. As such, even the smallest amount of capital could qualify as an injection of capital. This oversight could give even the smallest of investments, with little to no impact on the country’s economic or social development, protection under the BIT.

Notably, Uganda’s Investment Code Act (ICA – 19), which regulates both domestic and foreign investments, sets a minimum investment capital requirement in order for foreign and domestic investors to register their investment.⁹⁰ Nonetheless, such registered investment

⁸³ UNCTAD *Scope and Definition* (2011) 9; UNCTAD ‘Review of 2021 investor-State arbitration decisions’ (2023) 3.

⁸⁴ Germany – Uganda BIT (1966) art 8(a) – (e); Switzerland – Uganda BIT (1971) art 1(3); Uganda – UK BIT (1998) art 1(a); Denmark – Uganda BIT (2001) art 1(1); France – Uganda BIT (2003) art 1(1); Uganda Model BIT (2003) art 1(1).

⁸⁵ Germany – Uganda BIT (1966) art 8(a) – (e); Switzerland – Uganda BIT (1971) art 1(3)(a) – (e); Uganda – UK BIT (1998) art 1(a)(i) – (v); Denmark – Uganda BIT (2001) art 1(1)(a) – (e); France – Uganda BIT (2003) art 1(1)(a) – (e); and 2003 Uganda Model BIT (2003) art 1(1)(a) – (e).

⁸⁶ VanDuzer *et al* (2013) 49.

⁸⁷ VanDuzer *et al* (2013) 50.

⁸⁸ Germany – Uganda BIT (1966) art 1; Uganda–UK (1998) art 2(1).

⁸⁹ Germany – Uganda BIT (1966) art 1; Uganda–UK (1998) art 2(1).

⁹⁰ Uganda Investment Code Act of 2019 (ICA – 19) sec 15(1).

does not have to make a significant contribution to Uganda's economy for a foreign investor to institute an investment claim against it.

Fourthly, a country usually decides whether to exclude certain types of investments, like portfolio investments. In fact, as seen in Chapter Three of this study, the definition of investment in the African Continental Free Trade Agreement (AfCFTA) Protocol on Investment explicitly does just this.⁹¹ BIT protections are less likely to attract investments with minimal sunk costs or limited government involvement, such as portfolio investment, bonds and other financial investments.⁹²

These kinds of investments tend to have short durations and minimal local impact, making such investors less interested with BIT protections or government interference.⁹³ Additionally, portfolio investors can reduce country-specific risks by diversifying their investments and can easily recover and withdraw the value of their investment from a host-country if it acts contrary to their interests, without seeking BIT protection.⁹⁴

This is different for foreign direct investors, who usually acquire ownership or control of real property, for example, land and equipment, in the host-country, making it harder to recover due to the higher sunk costs involved.⁹⁵ However, Uganda's current BITs and Model BIT do not explicitly exclude these types of investments, meaning that all investments, including portfolio ones, are potentially protected.

Although Uganda's ICA – 19 defines 'portfolio investment' as the 'acquisition of an entity participation in a business enterprise traded on a recognised stock exchange',⁹⁶ and establishes a minimum capital requirement for its registration,⁹⁷ it does not regulate such

⁹¹ Protocol to the Agreement Establishing the African Continental Free Trade Area (AfCFTA) on Investment (AfCFTA Protocol of Investment or the Protocol) 2023 art 1.

⁹² VanDuzer *et al* (2013) 50.

⁹³ VanDuzer *et al* (2013) 50.

VanDuzer JA *et al* (2013) 58.

⁹⁵ VanDuzer *et al* (2013) 50.

⁹⁶ Uganda ICA – 19 (2019) sec 1.

⁹⁷ Uganda ICA – 19 (2019) sec 15(2).

investments and excludes them from its dispute settlement scope,⁹⁸ which is in stark contrast with Uganda's current and Model BITs.

Furthermore, investors have been known to employ innovative legal strategies to classify portfolio investments as foreign direct investment (FDI) to bypass capital controls.⁹⁹ Therefore, the lack of clear 'investment' definitions in Uganda's BITs, expands the scope of protection to cover even short-term financial investments, such as debt and equity securities, and portfolio investments.

These types of investments do not create lasting interests or control over enterprises nor do they significantly contribute to a host-country's long term economic or sustainable development objectives, such as job creation, capacity building and infrastructure development.

With regards to the fifth element of an 'investment' definition, all of Uganda's in-force BITs state that an investment must comply with domestic entry requirements in order to be established in the territory and thus, protected.¹⁰⁰ As discussed earlier, both investment (local and foreign) and portfolio investments must meet the minimum investment capital requirements in order to be registered,¹⁰¹ however, the ICA – 19 does not regulate portfolio investments inadvertently differentiating them from domestic and foreign ones.

Although this is good, there have been instances where investors have challenged legitimate domestic laws under a BIT. In the *Total E&P v Uganda* case, brought under the 2000 Netherlands – Uganda BIT, the investor disputed the application of Uganda's tax laws, specifically a stamp duty on the sale of an investment, despite the law applying to all

⁹⁸ Uganda ICA – 19 (2019) sec 23.

⁹⁹ VanDuzer *et al* (2013) 52 fn 34.

¹⁰⁰ Switzerland – Uganda BIT (1971) art 2; Uganda – UK BIT (1998) art 2(1); Denmark – Uganda BIT (2001) art 2(1); France – Uganda BIT (2003) art 1(e); Germany – Uganda BIT (1966) ad art 1(a) – (b).

¹⁰¹ Uganda ICA – 19 (2019) secs 15(1) – (2).

investors, including domestic ones.¹⁰² This case highlighted the outdated nature of the BIT prompting Uganda to terminate it.¹⁰³

Lastly, regarding the temporal dimension that states whether investments cover existing and future investments or only future investments, Uganda's BIT with the UK provides that:¹⁰⁴

A change in the form in which assets are invested does not affect their character as investments and the term 'investment' includes all investments, whether made before or after the date of entry into force of this Agreement.

Similarly, Uganda's BIT with France and its Model BIT provides that:¹⁰⁵

It is understood that those investments are investments which have already been made or may be made subsequent to the entering into force of this Agreement, in accordance with the legislation of the Contracting Party on the territory or in the maritime area of which the investment is made.

Any alteration of the form in which assets are invested shall not affect their qualification as investments provided that such alteration is not in conflict with the legislation of the Contracting Party on the territory or in the maritime area of which the investment is made.

Evidently, the definition of 'investment' under both the UK and France BITs with Uganda as well as its Model BIT apply to investments that were made prior to and after the BITs came into force. Similar provisions can also be found in Uganda's BITs with Switzerland and Denmark.¹⁰⁶

However, Uganda's BIT with Denmark, contains carve-outs for pre-existing investment disputes, which are not repeated in the other BITs. Article 12 of this BIT provides that:¹⁰⁷

The provisions of this Agreement shall apply to all investments made by investors of one Contracting Party in the territory of the other Contracting Party prior to or after the entry into force of the

¹⁰² Total E&P Uganda BV v Republic of Uganda (ICSID Case No. ARB/15/11); UNCTAD, 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/657/total-e-p-v-uganda> (accessed 12 September 2022).

¹⁰³ Both ENDS 'Uganda terminates investment treaty' available at <https://annualreport.bothends.org/uganda-terminates-investment-treaty/> (accessed 10 September 2024).

¹⁰⁴ Uganda – UK BIT (1998) art 1.

¹⁰⁵ France – Uganda BIT (2003) art 1.

¹⁰⁶ Denmark – Uganda BIT (2001) art 12; Switzerland–Uganda BIT (1971) art 8.

¹⁰⁷ Denmark – Uganda BIT (2001) art 12.

Agreement. It shall, however, not be applicable to divergences or disputes which have arisen prior to its entry into force.

Conversely, Uganda's BIT with Germany applies to post-BIT investments only. It specifically provides that:¹⁰⁸

In respect of Investments in the territory of Uganda this Treaty shall only apply to investments which have been approved¹ under Uganda legislation for the protection of foreign investments or have received special approval for the application of this Treaty.

With the exception of Uganda's BIT with Germany, Uganda's other current and Model BITs, apply to investments regardless of when they were made. Moreover, its BIT with Denmark covers pre-existing investments but excludes investment disputes that arose before the treaty's effect.

Uganda may see limited benefit to protecting pre-existing investments, but this might encourage investors to stay and reinvest.¹⁰⁹ Moreover, if a BIT imposes obligations on investors that are intended to ensure that investment contributes to sustainable development, it should clearly be indicated when they begin to apply.¹¹⁰ From a developing country point of view, such obligations would be most effective if they commenced at the time the treaty came into force and applied to both pre-existing and future investments.¹¹¹

In conclusion, the broad description of 'investment' in Uganda's current and Model BITs allows foreign investors to bring disputes under BITs and cause tribunals to interpret provisions in ways that increase its exposure to investor claims.¹¹² As such, Uganda should adopt either an enterprise or asset-based definition of investment that is closed in nature, offering greater predictability and allowing Uganda to focus the BIT on the types of investments it wants to attract.

¹⁰⁸ Germany – Uganda BIT (1966) Ad art 1(b).

¹⁰⁹ VanDuzer *et al* (2013) 95.

¹¹⁰ VanDuzer *et al* (2013) 95.

¹¹¹ VanDuzer *et al* (2013) 95.

¹¹² VanDuzer *et al* (2013) 50.

This makes it easier for the country to meet its obligations and manage the risk of investor-State disputes and claims.¹¹³ Moreover, the definition should have specific limiting factors, including for instance, commitments of capital and other resources (as is the case with Uganda's BIT with Denmark), the expectation of gain or profit and the assumption of risk; contribute to the development and be made in accordance with the laws of the host-country.

The definition of 'investment' should also exclude certain types of investments from the scope, including bonds, securities and portfolio investments. This would also align with the provisions of the Uganda's ICA – 19, which excludes such investments from protection. Lastly, the definition should apply to pre-existing as well as future investments if the BIT imposes sustainable development obligations on investors. However, this provision should exclude pre-existing investment disputes.

Uganda should thereby seek to restrict its BITs to FDI by incorporating specific language to address this issue and narrowing the meaning of 'investment' to include only those investment it wants to attract.

4.1.2.2. Definition of investor

Bilateral investment treaties typically apply to investments made by individuals or entities that meet the treaty's criteria for being classified as an 'investor'.¹¹⁴ The definition of 'investor' is critical in determining the treaty's scope.¹¹⁵ Typically, two types of persons are included: natural and juristic persons. Some treaties avoid the term 'investor' all together, instead using terms like 'companies' for legal or juristic entities and 'nationals', for individuals or natural persons.¹¹⁶

The definition of 'investor' usually includes three key aspects: 1) determining the nationality of natural persons; 2) establishing the nationality of juristic persons and 3) addressing dual

¹¹³ VanDuzer *et al* (2013) 71.

¹¹⁴ UNCTAD Scope and definition (2011) 13; UNCTAD International investment agreements negotiators handbook: APEC/UNCTAD Modules (IIA handbook) (2012) 23.

¹¹⁵ UNCTAD Scope and definition (2011) 13.

¹¹⁶ UNCTAD *Scope and definition* (2011) 13 – 14.

nationality and permanent residence.¹¹⁷ Only Uganda's BIT with Denmark uses and defines the word 'investor', as:¹¹⁸

- a. Natural persons having the citizenship or nationality of, or who are permanently residing in each Contracting Party in accordance with its laws.
- b. Any entity established in accordance with, and recognised as a legal person by the law of that Contracting Party, such as companies, firms, associations, development finance institutions, foundations or similar entities irrespective of whether their liabilities are limited and whether or not their activities are directed at profit.

Uganda's other four in-force and Model BITs use the terms 'companies' and 'nationals' instead of 'investor'. For instance, Uganda's BITs with Germany and Switzerland define a 'national' of Uganda as a 'Ugandan within the meaning of Chapter II of the Constitution of Uganda'.¹¹⁹ However, since most BITs apply to investments made in accordance with the host-country's laws at the time of establishment, this provision is problematic.

The Constitution of Uganda has been amended since these BITs were signed,¹²⁰ Chapter II now refers to 'the Republic', not 'citizenship', which is addressed in Chapter III.¹²¹ This misalignment could complicate the interpretation of the provision. The other BITs and Model BIT avoid such issues by defining nationals without referencing specific legal or constitutional provisions.

For instance, Uganda's BIT with France provides that the term 'nationals' means 'physical persons possessing the nationality of either Contracting Party'.¹²² Uganda's BIT with the UK adds that such citizenship must be acquired in accordance with the 'law in force in Uganda'.¹²³ This approach allows the host-country to determine who qualifies as a national, even if the law changes after the investment has been established.

¹¹⁷ UNCTAD *IIA Handbook* (2012) 23.

¹¹⁸ Denmark – Uganda BIT (2001) art 1(5)(a) – (b).

¹¹⁹ Germany – Uganda BIT (1966) art 8(3)(b); Switzerland – Uganda BIT (1971) art 1(a)(i).

¹²⁰ The 1995 Constitution of Uganda has since been amended in 2018 with the Constitution (Amendment) Act, 2018.

¹²¹ Constitution of the Republic of Uganda (1995) ch 3, secs 9 and 10(a) – (b).

¹²² France – Uganda BIT (2003) art 1(2).

¹²³ Uganda – UK BIT (1998) art 1(c)(iii).

Moreover, the language found in these two BITs and Uganda's Model BIT limits the nationality test to the formal requirement of citizenship and does not require a genuine link between the person and the country of asserted nationality.¹²⁴ However, these BITs with the exception of Uganda's BIT with Denmark, fail to address the status of permanent residents,¹²⁵ and none of them address dual citizenship.

Given Uganda's large refugee population and immigrant business owners, this omission leaves the country vulnerable to treaty claims from nationals of non-party countries and potentially even from its own nationals.¹²⁶ By not explicitly addressing permanent residency, the treaties may inadvertently extend coverage to individuals without a formal connection to Uganda, or unduly restrict protection to full citizens.¹²⁷ Policymakers should consider addressing this gap by clarifying whether permanent residents qualify for treaty protection.

Dual nationality is another area not addressed by Uganda's in-force and Model BITs, despite its relevance in a country where many citizens hold dual nationality, often having migrated to more developed countries and returned to invest in Uganda.¹²⁸ Dual citizens could claim protection under BITs from their adopted countries, invoking diplomatic protection under customary investment law (CIL).¹²⁹

While Article 25(2)(a) of the Convention on the settlement of investment disputes between States and nationals of other States (ICSID Convention) generally excludes dual nationals from claiming protection,¹³⁰ the doctrine of dominant nationality has been rejected in ISDS cases,

¹²⁴ UNCTAD *Scope and definition* (2011) 74.

¹²⁵ Denmark – Uganda BIT (2001) art 1(5)(a).

¹²⁶ E Easton-Calabria 'Uganda has a remarkable history of hosting refugees, but its efforts are underfunded' *The Conversation* 26 August 2021 available at <https://theconversation.com/Uganda-has-a-remarkable-history-of-hosting-refugees-but-its-efforts-are-underfunded-166706> (accessed 2 October 2022); EH Shaps 'Strangers In A Strange Land: Young Adult Eritrean Migrants In Kampala, Uganda' unpublished thesis, Fletcher School of Law and Diplomacy and Report for Save the Children, 2019; UNCTAD *IIA Handbook* (2012) 24; A Petersson 'Perceptions of Chinese influence in Sub-Saharan Africa: Case studies of Uganda and Tanzania' (2018) 2 - 3.

¹²⁷ UNCTAD *IIA Handbook* (2012) 24; UNCTAD *Scope and definition* (2011) 14, 74.

¹²⁸ ML Oketch 'Uganda: Contribution of Diaspora to Economy Rises' *The Monitor* 5 April 2011 available at <https://allafrica.com/stories/201104110222.html> (accessed 3 September 2022).

¹²⁹ VanDuzer *et al* (2013) 76; UNCTAD *Scope and definition* (2011) 75 – 76.

¹³⁰ Article 25(2)(a) of the ICSID Convention provides that - ... any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, **but does not include any person who on either date also had the nationality of the Contracting State party to the dispute.** (own emphasis)

raising further risks for Uganda.¹³¹ Policymakers should clearly address dual citizenship in BITs to avoid ambiguities and potential abuses.

The definition of 'entity' or 'companies' also pose challenges. Uganda's BITs with Switzerland, the UK and Denmark are broad, unqualified and contain no further requirements,¹³² relying on place of incorporation alone, which can lead to 'treaty shopping' and the use of 'shell companies' or 'mailbox companies' by investors not conceived to be beneficiaries, to access treaty protections.¹³³

For instance, Uganda's BIT with the UK defines 'companies' with respect to Uganda as, 'companies, firms, associations, partnerships, clubs incorporated or constituted under the law in force governing formation of companies in Uganda'.¹³⁴ Similarly, Uganda's BIT with Switzerland provides that 'companies,' with respect to the Swiss federation, means:¹³⁵

Companies, institutions or foundations with legal personality, as well as partnership firms or limited partnerships and other associations without legal personality, in which Swiss nationals have directly or indirectly a substantial interest.

Interestingly, the definition of 'companies' with regards to Ugandan investors in Switzerland is qualified as it requires that a company be, either in fact or law, controlled by Ugandan nationals.¹³⁶ In other words, the definition of the term 'companies' in Uganda's BIT with Switzerland, is unqualified for Swiss investors in Uganda and qualified for Ugandan investors in Switzerland.

¹³¹ UNCTAD *Scope and definition* (2011) 76; Nottebohm Case (*Liechtenstein v Guatemala*) I.C.J. 1955, 4 Judgement 18 November 1953; Judgement, 6 April 1955 (ICJ Reports, 1955) 4 - 65; Barcelona Traction, Light and Power Company, Limited (*Belgium v Spain*), I.C.J., 1970, Judgement, 24 July 1964; Judgement, 5 February 1970 (ICJ Reports, 1970) 3 - 357; *Ula v Romania* (ICSID Case no. ARB/05/20) Decision on Jurisdiction and Admissibility, 24 September 2008; UNCTAD *IIA Handbook* (2012) 25; UNCTAD *Scope and Definition* (2010) 14.

¹³² Uganda – UK BIT (1998) art 1(d)(ii); Denmark – Uganda BIT (2001) art 1(5); Switzerland – Uganda BIT (1971) art

¹³³ UNCTAD *Investment Policy Framework for Sustainable Development* (IPFSD) (2015) 93; UNCTAD *IIA Handbook* (2012) 25; UNCTAD *Scope and definition* (2011) 15; *Philip Morris Asia Ltd v Australia*, PCA Case No 2012-12, UNCITRAL, Award on Jurisdiction and Admissibility (17 December 2015); J Hepburn & L Nottage 'Case Note: Philip Morris Asia v Australia' (2016) 86 *Legal Studies Research Paper* 1.

¹³⁴ Uganda – UK BIT (1998) art 1(d)(ii).

¹³⁵ Uganda – UK BIT (1998) art 1(d)(ii).

¹³⁶ Switzerland – Uganda BIT (1971) 1(d)(i).

It is also worth noting that unlike with Uganda's BITs with France, Denmark and the Model BIT, its BITs with Germany, Switzerland and the UK separate the companies' definition with respect to companies in Uganda and those established in Germany, Switzerland and the UK, by Ugandan nationals. In the case of the Swiss BIT, this presents a difference in treatment, which favours Swiss investors in Uganda over Ugandan investors in Switzerland.

In contrast, Uganda's BITs with Germany, France and the Model BIT have a qualified definition of 'companies,' incorporating stricter requirements, such as the company's 'seat',¹³⁷ or 'head office' being located in the host-country.¹³⁸ Moreover, the definition of 'companies' in Uganda's BIT with France requires both business presence and control, which, at the very least, ensures a more substantial economic connection.¹³⁹ This approach helps prevent exploitation of treaties by companies with no real economic ties to the host-country.¹⁴⁰

Furthermore, none of Uganda's BITs contain a denial of benefits (DOB) clause, which would limit treaty protection to investors and investments that meet specific criteria. Such a clause could help address concerns over treaty shopping and ensure that only genuine, economically linked investors receive protection.¹⁴¹ Uganda's BITs with Germany, Switzerland and Denmark include companies with limited or unlimited liability.¹⁴²

However, excluding limited liability companies from the definition of 'investor' may be prudent as these entities are insulated from financial responsibility for any injuries caused by their investment in the host-country.¹⁴³ Countries may also wish to exclude State-owned enterprises (SOEs) from this definition, as such companies may operate in accordance with the laws of their home-country rather than those of the host-country and in an ambiguous manner.¹⁴⁴

¹³⁷ Germany – Uganda BIT (1966) art 8(4)(b); France – Uganda BIT (2003) art 1(3); Uganda Model BIT (2003) art 1(3).

¹³⁸ UNCTAD *Scope and definition* (2011) 83.

¹³⁹ VanDuzer *et al* (2013) 84; UNCTAD *Scope and definition* (2011) 84.

¹⁴⁰ Colombia – Switzerland BIT (2006) art 1(2)(b); Canada – Jordan BIT (2009) art 1(k).

¹⁴¹ UNCTAD *Scope and definition* (2011) 18.

¹⁴² Germany – Uganda BIT (1966) art 8(4)(a) – (b); Switzerland – Uganda BIT (1971)(1)(2)(a); Denmark – Uganda BIT (2001) art 1(5)(b).

¹⁴³ UNCTAD *Scope and definition* (2011) 15.

¹⁴⁴ VanDuzer *et al* (2013) 79.

In conclusion, the definition of ‘investor,’ should be revised to include that citizenship will be determined in accordance with the laws in force in the host-country, accounting for changes in domestic laws, such as constitutional amendments. Moreover, this definition should address important considerations like dual citizenship, permanent residence and corporate nationality to mitigate Uganda’s exposure to potential risks, including treaty shopping, claims from nationals of non-party countries and inconsistent treatment of dual citizens.

Additionally, the broad definition of ‘companies’ in some BITs, which rely solely on the place of incorporation, should be replaced with stricter requirements such as business presence and economic control for companies to ensure that only genuine investors benefit from the treaties. Including DOB clauses would further enhance the effectiveness of the BIT by limiting protection to qualified investors and investments.

These reforms would align Uganda’s BITs with international best practices and strengthen the country’s ability to manage investment relationships in a more balanced and sustainable manner.

4.1.3. Standards of treatment

Several legal standards are found in various formats in almost all IIA, which determine how an investor or investment should be treated by the host-country. For this study, the key standards of treatment to focus on will be: 1) FET; 2) FPS and 3) transfer of funds, all of which are ‘absolute’ standards; and 3) MFN treatment and NT clauses, which are ‘relative’ standards.¹⁴⁵

Absolute standards of treatment are defined as those that outline the treatment to be provided though their exact meaning often depends on the specific circumstances of their application.¹⁴⁶ In contrast, relative standards require ‘a comparative assessment’ to determine whether there has been a breach, meaning the treatment of foreign investors must be assessed in comparison to that given to third-party investors and investments.¹⁴⁷

¹⁴⁵ Sasse (2011) 50.

¹⁴⁶ UNCTAD BITs in the Mid-1990s (1998) 53.

¹⁴⁷ UNCTAD BITs in the Mid-1990s (1998) 53; S Jagusch & N Duclos ‘Compensation for the breach of relative standards of treaty protection (2009) *Journal of World Investment and Trade* 516.

This section will examine each of these standards of treatment to evaluate their role in BITs. It will also examine how these provisions have been cited in ISDS cases, assessing their impact on a host-country in arbitration proceedings. Lastly, the section will review Uganda's current and Model BITs, to determine whether these provisions present potential risks in future ISDS claims and provide grounds for reform.

4.1.3.1. *Fair and equitable treatment*

The FET standard is a broad and significant protection in IIAs,¹⁴⁸ closely related to the due diligence provision, commonly found in most IIAs and frequently invoked in investment disputes, making it one of the most common grounds for treaty breaches.¹⁴⁹ In fact, the most successful ISDS cases have been based on the FET standard.¹⁵⁰ FET typically aims to protect foreign investors or investments against unfair treatment by a host-country, especially when specific protection standards are absent.¹⁵¹

First referenced in Article 11(2) of the 1948 Havana Charter for an International Trade Organisation (Havana Charter),¹⁵² which required that foreign investments be assured 'just and equitable treatment',¹⁵³ the FET standard gained prominence after World War II (WWII) in the US Friendship, Commerce and Navigation treaties (FCNs)¹⁵⁴ and later appeared in the

¹⁴⁸ 'Fair and Equitable Treatment in Investment Arbitration' available at <https://www.acerislaw.com/fair-and-equitable-treatment-in-investment-arbitration/> (accessed 12 January 2022).

¹⁴⁹ UNCTAD *BITs in the Mid-1990s* (1998) 53; Sasse (2011) 51; UNCTAD *IIA Handbook* (2012) 49; VanDuzer *et al* (2013) 138.

¹⁵⁰ C Schreuer & R Dolzer *Principles of International Investment Law* (2008) 129; Sasse (2011) 51.

¹⁵¹ J Feris 'Substantive Rights: Fair and Equitable Treatment Standard under International Investment Agreements' available at [https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Dispute/dispute-resolution-alert-28-november-Substantive-Rights-Fair-and-Equitable-Treatment-Standard-under-International-Investment-Agreements.html#:~:text=The%20fair%20and%20equitable%20treatment%20\(FET\)%20standard%20under%20international%20investment,of%20more%20specific%20protection%20standards](https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Dispute/dispute-resolution-alert-28-november-Substantive-Rights-Fair-and-Equitable-Treatment-Standard-under-International-Investment-Agreements.html#:~:text=The%20fair%20and%20equitable%20treatment%20(FET)%20standard%20under%20international%20investment,of%20more%20specific%20protection%20standards). (accessed 12 January 2022).

¹⁵² Havana Charter (1948) art 11(2).

¹⁵³ Havana Charter (1948) art 11(2); OECD 'Fair and Equitable Treatment Standard in International Investment Law' (2004) *OECD Working Papers on International Investment* 2004/3, 3.

¹⁵⁴ US FCNs with Ireland (1950), Israel (1954), Pakistan (1961) and Belgium (1963) all had provisions that assured foreign investors that their investments would receive 'equitable treatment' while others including that with Ethiopia used the terms 'fair and equitable' treatment – KJ Vandeveldel 'The bilateral treaty program of the United States (1988) *Cornell International law Journal* 201 -276; OECD 'Fair and Equitable Treatment Standard in International Investment Law' (2004) 4.

1967 Organisation for Economic Co-operation and Development's Draft Convention on the Protection of Foreign Property (OECD Draft Convention).¹⁵⁵

FET standards can be formulated as unqualified obligations or be linked to international law or the minimum standard of treatment (MST) under CIL.¹⁵⁶ They may also include substantive content like 'denial of justice'.¹⁵⁷ They are typically drafted in three models: 1) FET alone; 2) FET with FPS reference; and 3) FET with NT and MFN treatment.¹⁵⁸ The FET obligation requires host-countries to provide investors with protection from arbitrary or unfair government actions, though interpretations of MST vary.

This highlights a distinction between an unqualified FET standard and one linked to MST.¹⁵⁹ It is often argued that a host-country cannot breach the MST without also violating its treaty obligations.¹⁶⁰ However, there is no clear consensus among legal scholars on whether the MST requires a host-country to protect investors from the consequences of its own regulatory actions.¹⁶¹

The MST is sometimes interpreted as applying only to the treatment given to foreign investors, rather than domestic citizens or investors.¹⁶² As a result, foreign investors under BITs, particularly in developing countries, may receive more favourable treatment than

¹⁵⁵ OECD Draft Convention (1967) art 1(a) provides that, 'each Party shall at all times ensure fair and equitable treatment to the property of nationals of other Parties'.

¹⁵⁶ UNCTAD *Fair and equitable treatment* (2012) XIV; OECD 'Fair and Equitable Treatment Standard in International Investment Law' (2004) *OECD Working Papers on International Investment* 2004/3, 8; Dr Iona Knoll-Tudor 'Fair and Equitable Treatment' (2022) Jus Mundi available at <https://jusmundi.com/en/document/wiki/en-fair-and-equitable-treatment> (accessed 10 March 2022); KJ Vandeveld *Bilateral Investment Treaties; History, policy and Interpretation* (2010).

¹⁵⁷ UNCTAD Fair and equitable treatment: UNCTAD Series on issues in international investment agreements II (2012) XIV; OECD 'Fair and Equitable Treatment Standard in International Investment Law' (2004) OECD Working Papers on International Investment 2004/3, 8; Dr Iona Knoll-Tudor 'Fair and Equitable Treatment' (18 March 2022) Jus Mundi available at <https://jusmundi.com/en/document/wiki/en-fair-and-equitable-treatment> (accessed 10 March 2022); KJ Vandeveld *Bilateral Investment Treaties; History, policy and Interpretation* (2010).

¹⁵⁹ UNCTAD Fair and equitable treatment (2012) XIV.

¹⁵⁹ UNCTAD Fair and equitable treatment (2012) XIV.

¹⁶⁰ OECD 'Fair and Equitable Treatment Standard in International Investment Law' (2004) 8 – 9.

¹⁶¹ OECD 'Fair and Equitable Treatment Standard in International Investment Law' (2004) 8 – 9.

¹⁶² OECD 'Fair and Equitable Treatment Standard in International Investment Law' (2004) fn 32, 8.

domestic investors.¹⁶³ The *CMS Gas v Argentina* case illustrates some of the weaknesses in BITs in this regard, especially in relation to developing countries.¹⁶⁴

In the *CMS Gas* case, the investor alleged that Argentina had breached its obligations under the US – Argentina BIT.¹⁶⁵ After privatizing its gas industry, Argentina set gas tariffs in United States Dollars (USD) and adjusted them biannually based on the United States Producer Price Index (US PPI).¹⁶⁶ Due to economic struggles in the 1990s, Argentina temporarily suspended these tariff adjustments,¹⁶⁷ which later became permanent as the financial crisis worsened.¹⁶⁸

In response, Argentina passed the Emergency Law No. 25.561 in 2002, which decoupled the Peso from the USD, leading to its devaluation.¹⁶⁹ The investor, CMS Gas alleged that these actions caused a 75 per cent drop in tariff revenues for its subsidiary, *Transpotadora de Gas del Norte* (TGN), resulting in a loss of 92 per cent of CMS Gas' investment in TGN.¹⁷⁰ As such, the investor claimed that Argentina had, *inter alia*, breached its FET obligation under the US – Argentina BIT.¹⁷¹

In response, Argentina argued that the licence agreements with TGN did not constitute a guarantee against financial losses, but only ensured a fair tariff covering operating costs and reasonable returns.¹⁷² Argentina also argued that the measures were enacted in response to a national financial crisis, and that the investor had assumed the risk of changing domestic policies in such circumstances.¹⁷³

¹⁶³ OECD 'Fair and Equitable Treatment Standard in International Investment Law' (2004) fn 32, 8.

¹⁶⁴ *CMS Gas v Argentina* (ICSID Case No. ARB/01/8).

¹⁶⁵ US – Argentina BIT (1994).

¹⁶⁶ *CMS Gas v Argentina* (ICSID Case No. ARB/01/8) para 57.

¹⁶⁷ *CMS Gas v Argentina* (ICSID Case No. ARB/01/8) para 60.

¹⁶⁸ *CMS Gas v Argentina* (ICSID Case No. ARB/01/8) para 61.

¹⁶⁹ *CMS Gas v Argentina* (ICSID Case No. ARB/01/8) para 64; G Mayeda 'Playing fair: the meaning of fair and equitable treatment in bilateral investment treaties' (2007) *Journal of World Trade* 276; *CMS Gas v Argentina* (ICSID Case No. ARB/01/8) para 65.

¹⁷⁰ *CMS Gas v Argentina* (ICSID Case No. ARB/01/8) paras 69 – 70.

¹⁷¹ US – Argentina BIT (1994) art II(2)(a).

¹⁷² *CMS Gas v Argentina* (ICSID Case No. ARB/01/8) para 91; Mayeda (2007) 227.

¹⁷³ *CMS Gas v Argentina* (ICSID Case No. ARB/01/8) para 93 – 97.

The Tribunal, however, found that Argentina had breached its FET obligation,¹⁷⁴ by fundamentally altering the investment environment upon which the investor relied. Citing precedents from previous ISDS cases such as *CME* and *Tecmed*, the Tribunal held that Argentina had undermined the investor's legitimate expectations and assurances – factors that were central to its decision to invest.¹⁷⁵

Critics like Mayeda argue that the Tribunal did not interpret the FET provision correctly, providing undue protection to the investor's expectations rather than focusing on procedural fairness under the international MST.¹⁷⁶ The decision, according to Mayeda, did not account for Argentina's extreme economic crisis and its need to prioritise public welfare.¹⁷⁷ He believes that the Tribunal in this case compensated the investor for the value of its investment plus its profits instead of the 'lost value of its initial investment'.¹⁷⁸

Instead, the Tribunal's decision provided much higher protection by protecting the investor's expectation and guaranteeing the return on investment that the investor expected.¹⁷⁹ Mayeda also believes that the circumstances of the *CME* and *Tecmed* cases were different and less severe than those in the *CMS Gas* case.¹⁸⁰ As a result, Argentina was ordered to pay USD 149 million in damages, despite facing this crisis and numerous other ISDS claims.¹⁸¹

The *CMS Gas* case therefore highlights how BITs can undermine a developing country's ability to regulate in the public interest, particularly during financial crises, and how foreign investment protections can conflict with broader national development goals. The

¹⁷⁴ US – Argentina BIT (1994) art II(2)(a) provides that 'Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.'

¹⁷⁵ *CMS Gas v Argentina* (ICSID Case No. ARB/01/8) paras 266, 281 & 467; *CME Czech Republic B.V. v Czech Republic*, UNCITRAL para 611; *Técnicas Medioambientales Tecmed, (Tecmed) S.A. v The United Mexican States* (ICSID Case No. ARB (AF)/00/2) para 154.

¹⁷⁶ Mayeda (2007) 278.

¹⁷⁷ Mayeda (2007) 278.

¹⁷⁸ Mayeda (2007) 278.

¹⁷⁹ Mayeda (2007) 278.

¹⁸⁰ Mayeda (2007) 278.

¹⁸¹ Mayeda (2007) 274, 278 – 279; *CMS Gas v Argentina* (ICSID Case No. ARB/01/8) paras 468 – 72.

significance of the FET standard was truly realised in the *Metalclad v Mexico* and *Maffezini v Spain* ISDS cases, however.¹⁸²

In the *Metalclad v Mexico* case, Metalclad, alleged that Mexico had interfered with its hazardous waste landfill operation project, violating the Chapter Eleven investment provisions of the North American Free Trade Agreement (NAFTA).¹⁸³ Despite assurances from the Mexican federal officials that all necessary permits to start the construction of the hazardous waste landfill had been secured, the company was later denied municipal permits.¹⁸⁴

The Tribunal found that Mexico had failed to provide regulatory clarity and predictability thereby violating Article 1105 of NAFTA.¹⁸⁵ Article 1105 specifically required each Contracting Party to NAFTA to 'accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security'.¹⁸⁶ As a result, Metalclad was awarded USD 16,7 million in damages.¹⁸⁷

The *Metalclad* case attracted significant criticism, particularly from environmentalists who claimed that the Tribunal overstepped by ignoring Mexico's domestic environmental laws and prioritising corporate profits over legitimate regulatory measures.¹⁸⁸ Critics also condemned the case for its lack of transparency, suggesting that it created a 'regulatory chill' that discouraged governments from adopting necessary environmental protections.¹⁸⁹ The case became emblematic of how ISDS mechanisms could be used by multinational corporations

¹⁸² *Metalclad Corporation v United Mexican States* (ICSID Case No. ARB(AF)/97/1); *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID Case No. ARB/97/7).

¹⁸³ *Metalclad v Mexico* (ICSID Case No. ARB(AF)/97/1).

¹⁸⁴ *Metalclad v Mexico* (ICSID Case No. ARB(AF)/97/1) paras 75 – 87.

¹⁸⁵ North American Free Trade Agreement (signed 17 December 1992, entered into force 1 January 1994) 32 ILM 289 (1993) art 1105 - which deals with the MST provides that: 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security. 2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife. 3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b); *Metalclad v Mexico* (ICSID Case No. ARB(AF)/97/1) para 99.

¹⁸⁶ *Metalclad v Mexico* (ICSID Case No. ARB(AF)/97/1) para 1; NAFTA (1993) art 1105(1).

¹⁸⁷ *Metalclad v Mexico* (ICSID Case No. ARB(AF)/97/1) Award paras X, 35.

¹⁸⁸ L J Dhooge 'The North American Free Trade and the environment: The lessons of *Metalclad Corporation v United Mexican States*' (2001) *Minnesota Journal of International Law* 213.

¹⁸⁹ Dhooge (2001) 213.

(MNCs) to challenge legitimate public interest regulations, sparking debates about the balance between investor protection and a host-country's right to regulate in the public interest.

In the *Maffezini v Spain* case, the Tribunal reinforced the FET standard's requirement for transparency.¹⁹⁰ Mr Maffezini, who invested in a chemical production company in Galicia, Spain, filed an ISDS claim under the Argentina – Spain BIT after the project encountered financial difficulties.¹⁹¹ He alleged that *Sociedad para el Desarrollo Industrial de Galicia* (SODIGA), a Spanish entity, had misled him about the project's costs and made an unauthorised loan repayment from his personal account.¹⁹²

While the Tribunal dismissed most of his claims, it upheld the one regarding the unauthorised transfer, attributing responsibility to Spain due to SODIGA's public functions.¹⁹³ The Tribunal found that the lack of transparency in the loan transaction violated Spain's obligation to provide FET under the Argentina – Spain BIT.¹⁹⁴ This decision linked the FET standard to transparency, similar to the *Metalclad* case and concluded that Spain's actions breached the Treaty.¹⁹⁵

The FET clauses in BITs are not uniform and are often vaguely and broadly drafted, which can lead to problematic and inconsistent interpretations. In some cases, these provisions have been used by foreign investors and arbitration tribunals to limit the regulatory space of host-countries, as seen in the *Metalclad* case.¹⁹⁶ This has raised concerns about the potential for FET clauses to threaten a country's policymaking autonomy and even create a 'regulatory chill', where governments hesitate to implement regulations for fear of legal challenges.¹⁹⁷

¹⁹⁰ *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID Case No. ARB/97/7) para 39; R Dolzer 'Fair and Equitable Treatment: A Key standard in investment treaties' (2005) *The International Lawyer* 92.

¹⁹¹ *Maffezini v Spain* (ICSID Case No. ARB/97/7) paras 42 – 43; Argentina–Spain BIT (1991).

¹⁹² *Maffezini v Spain* (ICSID Case No. ARB/97/7) paras 44 & 83.

¹⁹³ *Maffezini v Spain* (ICSID Case No. ARB/97/7) para 83.

¹⁹⁴ *Maffezini v Spain* (ICSID Case No. ARB/97/7) para 83; Dolzer (2005) 94.

¹⁹⁵ *Maffezini v Spain* (ICSID Case No. ARB/97/7) para 83; Dolzer (2005) 94.

¹⁹⁶ UNCTAD *Fair and Equitable Treatment* (2012) 1; Dhooge (2001) 213; *Metalclad v Mexico* (ICSID Case No. ARB(AF)/97/1); UNCTAD *Fair and Equitable Treatment* (2012) 1.

¹⁹⁷ Regulatory chill occurs when certain investor protections like ISDS, make governments reluctant to adopt appropriate policy measures – E Janeba 'Regulatory Chill and the Effect of Investor State Dispute Settlements' (July 2019) 6188 *Working Paper* 1.

The *Phillip Morris v Uruguay* case,¹⁹⁸ provides a prominent example, where Uruguay's public health regulations, aimed at curbing tobacco consumption and in line with the World Health Organisation (WHO) Framework Convention on Tobacco Control (FCTC), were challenged by the tobacco giant.¹⁹⁹ Uruguay introduced the Single Presentation Regulation (SPR)²⁰⁰ and the 80/80 Regulation, which sought to limit tobacco advertising and ensure that cigarette packaging included graphic warnings about the dangers of smoking (plain packaging).²⁰¹

Philip Morris, whose annual revenue far exceeded Uruguay's gross domestic product (GDP),²⁰² first challenged these regulations through Uruguay's domestic courts.²⁰³ When this proved unsuccessful, it instituted an ISDS claim against Uruguay under the Switzerland–Uruguay BIT, an old-BIT.²⁰⁴ The MNC alleged that Uruguay's actions violated FET provisions and amounted to a denial of justice.²⁰⁵

However, the Tribunal upheld Uruguay's right to regulate in the public interest, stating that the FET standard did not prevent changes in general legislation, especially when such changes were made for legitimate public policy reasons and within the acceptable margin of regulatory change.²⁰⁶ The Tribunal ultimately ruled in favour of Uruguay, justifying the adoption of both regulations as reasonable and in good faith, in line with the country's obligations under the FCTC.²⁰⁷

¹⁹⁸ UNCTAD *Fair and Equitable Treatment* (2012); *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7).

¹⁹⁹ *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7) paras 85 – 87; WHO Framework Convention on Tobacco Control ('FCTC'), 2302 UNTS 166 (RLA-20) art 3.

²⁰⁰ Single Presentation Regulation adopted through Ordinance 514 (18 August 2008).

²⁰¹ 80/80 Regulation, adopted through Presidential Decree 287/009 (15 June 2009) reg 1 – It is herein ordered that the pictograms to be used in the packages of tobacco products are defined in six (6) images combined with the corresponding legends (back and front), which shall be printed in the 80% lower area of both main panels of any unit packet of cigarettes and in general in any packet and package of tobacco products.

²⁰² It is worth noting that this company recorded USD 82.223 billion in global net revenue at the end of its 2021 fiscal year. In comparison, Uruguay, had a gross domestic product (GDP) rate of USD 57 billion in the same year – Statista 'Global net revenue of Philip Morris International from 2010 to 2021' available at <https://www.statista.com/statistics/500455/net-revenue-of-philip-morris-worldwide/> (accessed 13 April 2022);

https://www.google.com/search?q=uruguay+gdp+2016&rlz=1C5CHFA_enZA978ZA979&oq=uruguay+gdp+2016&aqs=chrome..69i57j0i22i30j0i390l2.13969j1j4&sourceid=chrome&ie=UTF-8 (accessed 13 April 2022).

²⁰³ *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7) para 228.

²⁰⁴ Switzerland – Uruguay BIT (1988).

²⁰⁵ *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7) para 498.

²⁰⁶ *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7) paras 399, 409 – 410 & 423

²⁰⁷ *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7) paras 418 – 420 & 423

This case also emphasised the need to give deference to governments when regulating for public interest purposes. While Philip Morris lost the case against Uruguay, the lawsuit highlighted the power of MNCs to challenge host-country regulations in international arbitration tribunals (IATs), underscoring the potential for FET provisions in BITs to be used by large corporations to intimidate smaller nations and influence their regulatory decisions.

For instance, in 2006, Togo also became a party to the FCTC and sought to implement plain packaging regulations similar to those adopted by Uruguay, aiming to mitigate the effects of tobacco smoking.²⁰⁸ Its proposed law included pictograms on cigarette packaging to communicate health risks, especially since the majority of Togo's population was illiterate.²⁰⁹ Despite Philip Morris losing a similar case in Uruguay, the tobacco giant threatened to initiate an ISDS case against Togo if the plain packaging Decree was adopted.²¹⁰

With a GDP of around USD 4 billion, Togo was significantly smaller compared to Philip Morris, which had a global net value of over USD 77 billion at the time.²¹¹ As a result, Togo abandoned the proposed Decree and has yet to adopt plain packaging regulations.²¹² This pattern of

²⁰⁸ 'Legislation by country' available at <https://www.tobaccocontrollaws.org/legislation/togo> (accessed 10 May 2023); At the time, 40% of Togolese people were said to be illiterate – 'Tobacco Regulation – No Logo: Big Tobacco's controversial, ailing crusade against plain packaging' *The Economist* 4 August 2016 available at <https://www.economist.com/business/2016/08/04/no-logo> (accessed 10 March 2022).

²⁰⁹ At the time, 40% of Togolese people were said to be illiterate – 'Tobacco Regulation – No Logo: Big Tobacco's controversial, ailing crusade against plain packaging' *The Economist* 4 August 2016 available at <https://www.economist.com/business/2016/08/04/no-logo> (accessed 10 March 2022).

²¹⁰ Philip Morris has sent similar letters to Ethiopia (2015), Pakistan (2015), Jamaica (2013), Gabon (2012) and Namibia (2011). – Global Legal Center 'Big Tobacco's Threats and Allegations' available at <https://www.tobaccofreekids.org/what-we-do/global/legal/trade-and-investment/threats-and-allegations> (accessed 10 March 2022); In a memo on plain packaging from Philip Morris West Africa to the Minister of Commerce of Togo dated 21 June 2013, the Chief Executive Officer stated that 'as a country whose economy heavily relies on exports, Togo can ill afford to anger its international partners by introducing plain packaging' – S Boseley 'Threats, bullying, lawsuits: tobacco industry's dirty war for the African market' *The Guardian* 12 July 2017 available at <https://www.theguardian.com/world/2017/jul/12/big-tobacco-dirty-war-africa-market> (accessed 10 March 2022); Tobacco Regulation – No Logo: Big Tobacco's controversial, ailing crusade against plain packaging' *The Economist* 4 August 2016 available at <https://www.economist.com/business/2016/08/04/no-logo> (accessed 10 March 2022); Republic of Togo, Decree No. 2012-047/PR - Concerning modalities for the implementation of rules concerning packaging and labelling of tobacco and its derivative products.

²¹¹ See <https://www.statista.com/statistics/500455/net-revenue-of-philip-morris-worldwide/> (accessed 10 March 2022).

²¹² 'How to bully a government' available at <https://unfairtobacco.org/en/strategies/how-to-bully-a-government/#/> (accessed 10 March 2022); Tobacco Regulation – No Logo: Big Tobacco's controversial, ailing crusade against plain packaging' (August 2016) *The Economist*; Decree No. 2012-047/PR - Concerning modalities for the implementation of rules concerning packaging and labelling of tobacco and its derivative products.

corporate pressure is not unique to Togo. British American Tobacco (BAT), another cigarette MNC, has similarly threatened various other developing countries, including Kenya, Ethiopia and Uganda, in an attempt to block public health regulations aimed at reducing the harm caused by cigarette smoking.²¹³

BAT argued that such regulations would breach these countries' laws and international trade agreements and warned that adopting plain packaging policies would negatively impact their economies.²¹⁴ These cases illustrate the power imbalance between large MNCs and developing countries, where ISDS threats can undermine public health initiatives and even create a 'regulatory chill', thus encroaching on a host-country's right to regulate.²¹⁵

Uganda's five in-force and Model BITs include FET standards similar to those involved in the ISDS discussed above, potentially exposing it to similar claims in future.²¹⁶ These treaties and Uganda's Model BIT generally feature two types of FET provisions: unqualified and qualified. Unqualified FET provisions provide significant protection for investors but also open the door for extensive reviews of a host-country's actions by IATs under vague standards of fairness.²¹⁷

Uganda's BIT with Germany is a good example of an unqualified FET clause, requiring Uganda to provide FET to investments, without tying it to international law, MST or CIL.²¹⁸ It provides that:²¹⁹

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.

²¹³ S Boseley 'Threats, bullying, lawsuits: tobacco industry's dirty war for the African market' *The Guardian* 2 July 2017.

²¹⁴ S Boseley 'Threats, bullying, lawsuits: tobacco industry's dirty war for the African market' *The Guardian* 2 July 2017; and 'Tobacco Regulation – No Logo: Big Tobacco's controversial, ailing crusade against plain packaging' *The Economist* 4 August 2016.

²¹⁵ Global Legal Center 'Big Tobacco's Threats and Allegations' available at <https://www.tobaccofreekids.org/what-we-do/global/legal/trade-and-investment/threats-and-allegations> (accessed 10 March 2022).

²¹⁶ For instance, *Philip Morris v Uruguay* (2010) - Switzerland–Uruguay BIT (1988); *Maffezini v Spain* (1997) - Argentina–Spain BIT (1991); *Metalclad v Mexico* (ICSID Case No. ARB(AF)/97/1) – NAFTA (1993).

²¹⁷ VanDuzer et al (2013) 148; UNCTAD *IIA Handbook* (2012) 49 -50.

²¹⁸ UNCTAD Fair and equitable treatment (2012) 1, 6

²¹⁹ Germany – Uganda BIT (1966) art 1.

Moreover, Uganda's BIT with Germany contains a standalone FET provision as it does not tie it to additional substantive provisions including FPS, MFN treatment and NT provisions.

Similarly, Uganda's BITs with the UK and Denmark also feature unqualified FET standards. However, Uganda's BIT with the UK, combines the FET standard with the FPS provision. Article 2(2) of the Uganda – UK BIT provides that:²²⁰

Investments of nationals or companies of each 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. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. 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.
(own underlining)

This clause is comparable to Article 1105(1) of the NAFTA under which the *Metalclad v Mexico* case, above, was brought.²²¹ The combined FET and FPS provisions enhance investor protection but can limit the host-country's regulatory autonomy. Furthermore, the FET provisions in Uganda's BITs with Germany and the UK cover post-establishment investments, applying to the 'management, maintenance, use, enjoyment and disposal of investments' already submitted and established in the host-country.²²²

Uganda's BIT with Denmark also contains an unqualified FET standard but stands out as a hybrid due to its combination with NT and MFN treatment provisions. Article 3 of this BIT provides that:²²³

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 Protocol on Investment of view of the investor.

²²⁰ Uganda - UK BIT (1998).

²²¹ NAFTA (1993) art 1105(1) provides that 'Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.'

²²² Uganda – UK BIT (1998) art 2(2); SADC Model Bilateral Investment Treaty Template with commentary (2012) 22.

²²³ Denmark – Uganda BIT (2001) art 3(1) & (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 Protocol on investment of view of the investor.

This provision therefore ensures that investments receive FET, no less favourable than what is accorded to local or third-party investors. This provision applies to post-establishment investments and is similar to the Swiss – Uruguay BIT, which was invoked in the *Philip Morris v Uruguay* case.²²⁴

The FET standards in Uganda's BITs with Switzerland and France are more qualified, linking FET to international law principles. These provisions also tie the FET standard to the NT and MFN treatment provisions. For instance, Article 4 of the Switzerland – Uganda BIT provides that:²²⁵

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.

This treatment shall not be less favourable than the treatment which either Contracting Party accords within its territory to any other similar investment, to activities of its own nationals and companies or to activities of nationals and companies of a Third State in connection with such investments.

The treatment so granted shall not apply to privileges which either Contracting Party accords to nationals and companies of a Third State because of its membership in, or association with, a customs union, a common market or a free trade area.

²²⁴ Switzerland – Uruguay BIT (1988) art 3(1) and (2) provide that '(1) Each Contracting Party shall protect within its territory investments made in accordance with its legislation by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments. In particular, each Contracting Party shall issue the necessary authorizations mentioned in Article 2, paragraph (2) of this Agreement' and '(2) Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party. This treatment shall not be less favourable than that granted by each Contracting Party to investments made within its territory by its own investors, or than that granted by each Contracting Party to the investments made within its territory by investors of the most favoured nation, if this latter treatment is more favourable'; *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7).

²²⁵ Switzerland – Uganda BIT (1971) art 4.

Uganda's BIT with France as well as its model BIT contain similar qualified FET provisions, tying FET to NT and MFN treatment as well.²²⁶

The diverse FET provisions in Uganda's BITs, particularly the unqualified ones, present broad interpretations that could expose Uganda to ISDS claims, especially as arbitrators may interpret these provisions in ways that favour investors.²²⁷ This exposure could restrict Uganda's regulatory autonomy, particularly when foreign investors feel that their investments are being unfairly impacted by regulatory changes.

The *Philip Morris* case against Uruguay, despite its ruling in favour of the host-country, demonstrates the costly and burdensome nature of defending such claims, a risk Uganda also faces with its FET standards. Given the absolute nature of FET, which applies without reference to how other investments are treated,²²⁸ it is critical for Uganda to approach FET provisions with caution, as host-countries may face ISDS challenges even when treating foreign investors similarly to local ones (*CMS Gas case*).²²⁹

Uganda's existing and Model BITs therefore increase its vulnerability to such disputes and in order to mitigate this risk, future FET provisions should balance investor expectations with the host-country's right to regulate in the public interest, ensuring that legitimate expectations are carefully defined and aligned with the country's social and policy context.²³⁰

As such, Uganda could either do away with the FET clause in its BITs, as FET is already guaranteed under Uganda's constitution and domestic investment laws or include the FET standard in future BITs with clearer limitations. One approach is to link FET obligations to international law or MST, adding substantive content such as prohibitions on denial of justice, or treatment that is manifestly arbitrary, discriminatory, or abusive. This would clarify the meaning of FET and ensure that MST treatment does not extend beyond what is required under that standard.

²²⁶ France – Uganda BIT (2003) art 3.

²²⁷ See discussion of *CMS Gas* case above.

²²⁸ UNCTAD *Fair and Equitable Treatment* (2012) 6

²²⁹ UNCTAD *Fair and Equitable Treatment* (2012) 6.

²³⁰ UNCTAD *Fair and Equitable Treatment* (2012) 9.

By incorporating these specific parameters, Uganda could limit the broad and uncertain interpretations often associated with unqualified FET provisions, which can expose the country to investor-state disputes. Including references to MST and international law would set a baseline for investor protection, while allowing Uganda to retain regulatory space, particularly in matters of public interest such as health, safety and environmental protection.

Such a balanced approach would safeguard Uganda's policy autonomy and prevent foreign investors from exploiting vague FET provisions to challenge legitimate government actions. It would also provide clarity for arbitrators, reducing the risk of unpredictable interpretations that could otherwise impose burdensome legal and financial consequences on the country.

4.1.3.2. *Full protection and security*

Uganda's BITs generally include an FPS clause, often combined with the FET, MFN treatment and NT standards.²³¹ The FPS provision mandates constant and accurate protection and security for investments,²³² which has its roots in the international MST under CIL.²³³ The MST is absolute, meaning it applies regardless of how the host-country treats other investors, focusing primarily on preventing physical harm to investments.²³⁴

The FPS clause was originally meant to protect the investment from physical violence for example, the destruction of the premises.²³⁵ For instance, in the *El Paso Energy v Argentina* case,²³⁶ the Tribunal held that the treaty standard of FPS was 'no more than the traditional obligation to protect aliens under international customary law'. Furthermore, the Tribunal in the *Noble Ventures v Romania* case,²³⁷ stated that:²³⁸

²³¹ UNCTAD *BITs 1995 – 2006* (2007) 28; R Dolzer and M Stevens *International Investment Treaties* (1995) 62.

²³² Scharaw (2018) 83.

²³³ *Noble Ventures, Inc. v Romania* (ICSID Case No. ARB/01/11) Award, 12 October 2005 para 164; ELSI (*United States of America v Italy*) (Judgment) [1989] ICJ Rep. 15, 66; *Amco Asia Corporation and others v Republic of Indonesia* (ICSID Case No. ARB/81/1) Award, 20 November 1984 para 172; Scharaw (2018) 84; UNCTAD *IIA Handbook* (2012) 54.

²³⁴ N Junngam 'The full protection and security standard in international investment law: What and who is investment fully [?] protected and secured from?' (2018) 7 *American university Business Law Review* 4

²³⁵ M Dixon, R McCorquodale & S Williams *Cases and Materials on International Law* (2016) 518; Scharaw (2018) 85.

²³⁶ *El Paso Energy International Company v The Argentine Republic* (ICSID Case No. ARB/03/15) Award, 31 October 2011.

²³⁷ *Noble Ventures v Romania* (ICSID Case No. ARB/01/11) Award, 12 October 2005, para 164.

²³⁸ *El Paso Energy v Argentina* (ICSID Case No. ARB/03/15) Award, 31 October 2011, para 522.

... it seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security [...] found in the customary international law of aliens.

Some Tribunals are also of the opinion that a host-country cannot be strictly held liable for damages to the investment in its territory.²³⁹

In *AAPL v Sri Lanka*, for example, the Tribunal refused to interpret FPS as imposing a strict liability on the host-country for losses incurred by a foreign investment protected under a BIT, due to war destruction.²⁴⁰ However, some tribunals have interpreted the FPS standard more broadly to include legal, economic and regulatory protection, especially when the word 'full' is used, suggesting a wider obligation.²⁴¹

Nevertheless, the host-country still has an obligation to prevent physical attacks on investments and a duty to punish the perpetrators of such attack.²⁴² It must therefore exercise due diligence in protecting investments from destruction by third parties. However, this obligation should not impose a strict liability on the host-country that would render it liable for *any* destruction to the investment.²⁴³

The constant nature of FPS clauses requires host-countries to ensure that their laws and systems of protection assure safety and security to investments.²⁴⁴ In *Azurix Corp v Argentina*,²⁴⁵ it was held that there are cases where tribunals:²⁴⁶

... have held that the obligation of fair and equitable treatment was breached because there was a failure to provide full protection and security – *Wena Hotels v Egypt*. The inter-relationship of the two standards indicates that full protection and security may be breached even if no physical violence or damage occurs as it was the case in *Occidental v Ecuador*.

²³⁹ Scharaw (2018) 85.

²⁴⁰ *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (ICSID Case No. ARB/87/3) Award, 27 June 1990, para 53 & 194 - It should be noted that this was the first ISDS case ever concluded since the first BIT was signed in 1959. This case arose from the UK – Sri Lanka BIT; also see KJ Vandeveld 'Bilateral Investment Treaties: History, Policy and Interpretation' (2010) *Thomas Jefferson School of Law* (2010) 358.

²⁴¹ Scharaw (2018) 84; UNCTAD *IIA Handbook* (2012) 54; Junngam (2018) 4 – 5.

²⁴² Scharaw (2018) 84; Junngam (2018) 4.

²⁴³ M Matsushita & TJ Schoenbaum (eds) *Emerging Issues in Sustainable Development; International Trade Law and Policy Relating to Natural Resources, Energy, and the Environment* (2016) 390; Dolzer & Stevens *BITs* (1995) 61.

²⁴⁴ KJ Vandeveld *The First BITs: U.S Post war FCNs* (2017) 351; Junngam (2018) 4.

²⁴⁵ *Azurix Corp v The Argentine Republic*, (ICSID Case No. ARB/01/12) Award, 14 July 2006.

²⁴⁶ *Azurix v Argentina* (ICSID Case No. ARB/01/12) para 406.

The *Azurix Corp* case makes clear that a violation of the obligation to provide FPS does not necessarily require an act of physical violence, which widens the scope of the FET standard.²⁴⁷ The Tribunal in the *ADF v United States of America* case also pointed out that any general requirement to accord FET and FPS had to be disciplined by being based on State practice and judicial or arbitral case law or other sources of CIL.²⁴⁸

As to the question of compensation, if a violation of the FPS has occurred, an interference with FPS is one of loss and damage to property and not one of expropriation.²⁴⁹ It has been said that the proper approach is one of actual loss based on the actual market value of the damaged and lost property, taking into account the realities of the political and economic risks faced by the investor in the host-country.²⁵⁰

Uganda's BITs with Germany, France, the UK and its Model BIT include FPS provisions, requiring the country to provide consistent security for investments.²⁵¹ This obligation demands that Uganda's laws and protective systems assure the safety of foreign investments and are linked to the FET provision.²⁵²

This approach lacks clarity on whether the standard requires only physical protection and security or also legal and/or economic and/or regulatory protection and security i.e. ensuring a stable regulatory environment or providing investors with effective domestic legal means to enforce their rights.²⁵³ It further gives arbitrators significant discretion to interpret the provision thus increasing the chances for a broad interpretation when exposed to ISDS cases.²⁵⁴

²⁴⁷ *Azurix v Argentina* (ICSID Case No. ARB/01/12) para 406; Dixon et al (2016) 519; *Wena Hotels Ltd. v Arab Republic of Egypt* (ICSID Case No. ARB/98/4); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador* (ICSID Case No. ARB/06/11).

²⁴⁸ *ADF Group Inc v United States of America* (ICSID Case No. ARB(AF)/ 00/ 1) 9 January 2003 para 184.

²⁴⁹ Muchlinski et al (2008) 99.

²⁵⁰ Muchlinski et al (2008) 99.

²⁵¹ Germany – Uganda BIT (1966) art 3(1); France – Uganda BIT (2003) art 5(1); Uganda – UK BIT (1998) art 2(2); Uganda Model BIT (2003) art 5(1).

²⁵² Germany – Uganda BIT (1966) art 3(1); France – Uganda BIT (2003) art 5(1); Uganda – UK BIT (1998) art 2(2); Uganda Model BIT (2003) art 5(1); KJ Vandeveld *The First BITs: U.S Post war FCNs* (2017) 351.

²⁵³ UNCTAD *IIA Handbook* (2012) 54.

²⁵⁴ UNCTAD *IIA Handbook* (2012) 54.

The stand-alone FPS obligation approach may therefore generate different expectations between investors and countries as to the actual level of treatment that must be afforded.²⁵⁵ However, Uganda's BITs with Switzerland and Denmark only oblige the country to 'protect' investments, without specifying 'full' protection, potentially narrowing the scope of required protection.²⁵⁶

Moreover, none of Uganda's in-force BITs link the protection and security obligations to CIL or the international MST, making it difficult to determine the extent of protection investors are entitled to. This leaves room for IATs to invoke broader interpretations of these protection standards than is reasonable, leading to disputes that challenge the host-country's ability to protect foreign investments.

Additionally, Uganda's BIT with Germany, includes provisions for compensating investors for losses stemming from war, armed conflict, revolution, state emergencies and revolts.²⁵⁷ These provisions are directly linked to the NT provision,²⁵⁸ meaning that in such situations, the host-country is required to treat foreign investors no less favourably than its own nationals regarding restitution and compensation for those losses.²⁵⁹

Similar provisions can be found in Uganda's BIT with Denmark, the UK, France as well as its Model BIT.²⁶⁰ However, in these treaties, compensation for investment losses is tied to both NT and MFN treatment provisions.²⁶¹ This means that the host-country must not only treat foreign investors on par with its nationals but also ensure that these investors receive treatment that is as favourable as that provided to investors from third-party countries.²⁶²

Only Uganda's BIT with Switzerland lacks similar provisions. Nonetheless, the broad nature of these provisions suggests that Uganda may also be required to compensate an investor in

²⁵⁵ UNCTAD *IIA Handbook* (2012) 54.

²⁵⁶ Switzerland – Uganda BIT (1971) art 3; Denmark – Uganda BIT (2001) art 2(2).

²⁵⁷ Germany – Uganda BIT (1966) art 3(3).

²⁵⁸ Germany – Uganda BIT (1966) art 3(3).

²⁵⁹ Germany – Uganda BIT (1966) art 3(3).

²⁶⁰ Denmark – Uganda BIT (2001) art 6(1); Uganda – UK BIT (1998) art 4(1); France – Uganda BIT (2003) art 5(3); Uganda Model BIT (2003) art 5(3).

²⁶¹ Denmark – Uganda BIT (2001) art 6(1); Uganda – UK BIT (1998) art 4(1); France – Uganda BIT (2003) art 5(3); Uganda Model BIT (2003) art 5(3).

²⁶² Denmark – Uganda BIT (2001) art 6(1); Uganda – UK BIT (1998) art 4(1); France – Uganda BIT (2003) art 5(3); Uganda Model BIT (2003) art 5(3).

circumstances beyond its control such as natural disasters.²⁶³ As such, Uganda should explicitly include a stand-alone provision for the ‘physical’ protection and security of investments in its future BITs, excluding interpretations that include legal, economic and regulatory protection.

This provision should also be subject to the host-country’s capacity to act, guided by the principle of due diligence and aligned with CIL. This approach would ensure that Uganda commits to taking reasonable measures to safeguard foreign investments against threats such as violence, destruction or other forms of physical harm within its territory, to the extent that it is able.

In order to provide clarity and manage investor expectations, the compensation for breaches of this provision should be outlined within the same article, clearly defining the scope of compensation, limiting potential liabilities and preventing the award of excessive damages in cases where the host-country fail to meet its due diligence obligation. Furthermore, the provision should specify that compensation is limited to action attributed directly to the host-country itself, excluding events out of its control, such as natural disasters.

This distinction would protect Uganda from excessive financial exposure in situations where it cannot reasonably prevent the harm, ensuring a balanced and fair responsibility for the protection of investments. In this way, Uganda’s future BITs would align with international standards, while safeguarding the country from undue liabilities, ensuring that investors are protected within realistic boundaries.

4.1.3.3. Most-favoured-nation treatment and national treatment

The MFN treatment and NT standards are key non-discriminatory provisions in BITs, referred to as ‘relative standards’, since they apply to similar objective situations.²⁶⁴ For the purposes of this section, NT and MFN treatment will be discussed together to the extent possible, as

²⁶³ VanDuzer (2013) 180 – 181.

²⁶⁴ W Wang ‘Historical Evolution of National Treatment in China’ (2005) 39 *International lawyer* 759 available at <https://scholar.smu.edu/cqi/viewcontent.cqi?article=2356&context=til> (accessed 10 March 2022); UNCTAD *Most-favoured nation treatment: UNCTAD Series on Issues in International Investment Agreements* (2010) 23.

they often appear under the same article, but different paragraphs, or under the same article and paragraph in old-BITs.²⁶⁵

The MFN treatment clause ensures that the treatment given by the host-country to investors or investments of another country (beneficiary country) is no less favourable than the treatment accorded to investors of a third country (favoured country).²⁶⁶ NT, on the other hand, ensures that the host-country accords covered investments or investors, treatment no less favourable than it accords to domestic investors and/or their investments (sometimes, ‘in like circumstances’).²⁶⁷

While NT promotes equal treatment between domestic and foreign investors,²⁶⁸ MFN treatment focuses on ensuring equality between foreign investors in a given host-country.²⁶⁹ In this sense, NT presents ‘inland parity,’ while MFN presents ‘foreign parity.’²⁷⁰ These provisions typically appear alongside other provisions like FET and FPS as seen in the previous section with Uganda’s BITs with Denmark and Switzerland (FPS, MFN and NT) and France (FET, MFN and NT).²⁷¹

Historically, NT appeared less frequently than MFN treatment in investment treaties,²⁷² because foreigners were generally not entitled to the political rights of the host-country, as seen in the Calvo Doctrine, which resisted according preferential treatment to foreign

²⁶⁵ Mann *et al* (2006) art 6 commentary 14 - 15; UNCTAD *Most-favoured nation treatment* (2010) 1.

²⁶⁶ U Moshtaghi ‘The most-favoured-nation clause in international investment law’ unpublished LLD thesis from the University of Hamburg, 2018; UNCTAD *MFN treatment* (2010) 13.

²⁶⁷ UNCTAD *IIA Handbook* (2012) 34; VanDuzer *et al* (2019) 110; UNCTAD *Nation treatment* (1999) XI.

²⁶⁸ Wang (2005) 759.

²⁶⁹ Chapter 5 ‘Most-Favoured Nation Treatment’ 686 available at <https://www.cambridge.org/core> (accessed 10 March 2022); UN ‘Draft Articles on most-favoured-nation clauses with commentaries’ (1978) *Yearbook of the International Law Commission* 24, 48, 56; UNCTAD *MFN Treatment* (2010) 13.

²⁷⁰ G Schwarzenberger, *International Law and Order* (1971) Stevens & Sons, 157.

²⁷¹ For example, Switzerland – Uganda BIT (1971) art 4, which contains the NT, MFN Treatment and FET under the same provision – Chapter Four para 4.1.3.2 above.

²⁷² Vandevelde *BITs* (2010) 339.

investors.²⁷³ MFN treatment provisions also remained uncommon, particularly after WWII, when countries employed protectionist measures to rebuild their economies after the war.²⁷⁴

Providing MFN treatment during this time was viewed as antithetical to these national economic objectives. However, after WWII, multilateralism gained traction, leading to the inclusion of MFN treatment provisions in post-war agreements like the General Agreement on Tariffs and Trade (GATT).²⁷⁵ This shift reflected the desire to promote equal treatment in international trade and investment, helping to reduce discriminatory practices.²⁷⁶

The MFN treatment and NT provisions, once focused on goods and services, gradually made their way into IIAs, ensuring broader rights and protections for foreign investors. From the 1950s onwards, as newly independent developing countries emerged, NT provisions became increasingly important to prevent discriminatory treatment of foreign investments in these nations.²⁷⁷

As protectionist policies faded, NT and MFN treatment provisions became essential tools for developed countries to ensure fair competition and mitigate risks of discrimination in (developing) host-countries, levelling the playing field for foreign investors.²⁷⁸ This trend solidified NT and MFN treatment as key elements of modern IIAs.²⁷⁹

²⁷³ J Crawford Brownlie's *Principles of Public International Law* (2019) 851; The Calvo Doctrine is most associated with the protection of the sovereignty of Latin American countries and the promotion of their economic and legal independence. It emphasises the principle of sovereign equality among nations. It holds that foreign nationals should not be granted rights or privileges than those available to the nationals of the host-country. It is meant to prevent foreign interference in a country's internal affairs - KJ Vandeveld *Bilateral investment treaties: History, policy and interpretation* (2010) 31 – 32; MR Garcia-Mora 'The Calvo Clause in Latin American Constitutions and International Law (1950) 33 *Marquette Law Review* 205; Chapter 2 'colonial era (1600 – 1944)' para 2.1.1.

²⁷⁴ UNCTAD *MFN Treatment* (2010) 9; Chapter 1 'Most-Favoured Nation Treatment Principle' (2015) 305 available at https://www.meti.go.jp/english/report/data/2015WTO/02_01.pdf (accessed 12 March 2022).

²⁷⁵ OECD 'Most-Favoured Nation in International Investment Law' (2004) OECD Working Papers on International Investment 3; PV van Themaat, *The Changing Structure of International Economic Laws: A Contribution of International Economic Law* (1981) 19; UNCTAD *MFN treatment* (2010) 9 & 11.

²⁷⁶ UNCTAD *MFN treatment* (2010) 12.

²⁷⁷ Bajar Scharaw *The Protection of Foreign Investments in Mongolia: Treaties, domestic Law, and Contracts on Investments in international Comparison and Arbitral Practice* (2018) 20.

²⁷⁸ UNCTAD *MFN treatment* (2010) 12;

²⁷⁹ UNCTAD *MFN Treatment* (2010) 13; Scharaw (2018) 16; Wei Wang 'Historical Evolution of National Treatment in China' (2005) *International lawyer* Vol 39, No. 3, 759 available at <https://scholar.smu.edu/cgi/viewcontent.cgi?article=2356&context=til> (accessed 10 March 2022).

The MFN treatment and NT clauses typically consist of three key components: 1) a beneficiary, 2) a comparator and 3) an obligation of equivalency.²⁸⁰ The beneficiary is the investor or investment entitled to receive MFN treatment or NT.²⁸¹ The comparator refers to the investor or investment whose treatment serves as the standard that must be met.²⁸² In this context, the definitions of ‘investor’ and ‘investment’ are crucial for determining the content of the standard, rather than defining the scope of its application.²⁸³

The NT clause is one of the most important standards in IIAs, prohibiting two forms of discrimination: 1) *de jure* discrimination, where laws explicitly differentiate between foreign and domestic investors and *de facto* discrimination, where seemingly neutral laws result in unequal treatment in practice.²⁸⁴ Proving *de facto* discrimination does not require evidence of intent from the host-country.²⁸⁵

National treatment is also among the most difficult standards to achieve, as it concerns economically and politically sensitive issues.²⁸⁶ While it ensures equal treatment between foreign investors and domestic ones,²⁸⁷ it may conflict with the legitimate policy reasons for treating foreign investors differently.²⁸⁸ NT can be interpreted as formal equality between foreign and domestic companies, but in countries at different levels of development, this can lead to economic imbalances.²⁸⁹

Large MNCs may gain unfair advantages over local small and medium sized enterprises (MSMEs), especially in developing host-countries.²⁹⁰ As a result, NT requires more than just formal equality – it must consider the developmental needs of host-countries to avoid

²⁸⁰ KJ Vandevelde *Bilateral Investment Treaties: History, Policy and Interpretation* (2010) 340.

²⁸¹ Vandevelde *BITs* (2010) 339.

²⁸² Vandevelde *BITs* (2010) 339..

²⁸³ Vandevelde *BITs* (2010) 339..

²⁸⁴ VanDuzer *et al* (2019) 110.

²⁸⁵ VanDuzer *et al* (2019) 110; UNCTAD *IPFSD* (2015) 110.

²⁸⁶ UNCTAD *NT* (1999) XI.

²⁸⁷ ‘National Treatment’ available at

<https://www.investopedia.com/terms/n/nationaltreatment.asp#:~:text=Key%20Takeaways-.National%20treatment%20is%20the%20principle%20of%20giving%20others%20the%20same,trademarks%2C%20copyrights%2C%20and%20patents>. (accessed 10 March 2022).

²⁸⁸ VanDuzer *et al* (2019) 110.

²⁸⁹ UNCTAD *Nation Treatment* (1999) 61.

²⁹⁰ UNCTAD *NT* (1999) XI – XII, 3 & 61.

exacerbating inequalities.²⁹¹ Thus, NT should include qualifications or exceptions to ensure fairness.²⁹² For developing countries, such exceptions are crucial to supporting the growth of domestic firms and enhancing their competitiveness against foreign investors.²⁹³

During the earlier policymaking eras (1959 – 2007), developed countries focused on economic or policy considerations, such as the scope of application and exceptions in IIAs.²⁹⁴ However, in recent years, attention has shifted to the MFN clause, sparking ongoing debates.²⁹⁵ The landmark *Maffezini v Spain* case brought the issue to light by extending MFN treatment to include ISDS provisions, raising concerns about the clause's broad application in IATs.²⁹⁶

In fact, according to the United Nations Conference on Trade and Development (UNCTAD):²⁹⁷

... the Maffezini case was the first of a series of arbitral decisions regarding the application of the MFN treatment clause to import ISDS provisions from third treaties considered more favourable by claimants.

The *Maffezini* case involves an Argentine investor who bypassed a procedural requirement in the Argentina – Spain BIT by invoking the more favourable terms from the Chile – Spain BIT.²⁹⁸ The Tribunal ruled that the MFN clause allowed the claimant to apply more favourable provisions from third-party treaties.²⁹⁹ However, the ruling also introduced limits by stating

²⁹¹ UNCTAD NT (1999) 61.

²⁹² UNCTAD NT (1999) 61; VanDuzer *et al* (2019) 110.

²⁹³ VanDuzer JA *et al* (2019) 110.

²⁹⁴ UNCTAD MFN treatment (2010) 2.

²⁹⁵ UNCTAD MFN treatment (2010) 3.

²⁹⁶ *Maffezini v Spain* (ICSID Case No. ARB/97/7) - See facts of this case under 'fair and equitable Treatment' para 4.1.3.1 above; UNCTAD MFN treatment (2010) 2 – 3.

²⁹⁷ UNCTAD MFN treatment (2010) 3.

²⁹⁸ *Maffezini v Spain* (ICSID Case No. ARB/97/7); OECD 'MFN in IIL' (2004) 12; A Reinisch 'Maffezini v Spain Case' (2011) *Max Planck Institute for Comparative Public Law and International Law* 2 available at https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Publikationen/maffezini_spain_epil.pdf (accessed 12 March 2022); UNCTAD MFN treatment (2010) 3; Argentina – Spain BIT (1991); The Tribunal noted that the Argentina – Spain BIT provides domestic courts with the opportunity to deal with a dispute for a period of eighteen months before it may be submitted to arbitration. Article 10(2) of the Chile – Spain BIT, however, imposes no such condition. It provides merely that the investor can opt for arbitration after the six-month period allowed for negotiations has expired - ICJ Reports, 1952, p. 93 and <http://www.icj-cij.org/icjwww/idecisions/isummaries/ifusummary> (accessed 10 March 2022); Reinisch (2011) 2.

²⁹⁹ *Ejusdem generis*, means 'the same kind or class,' and is a long-standing principle of both contract and statutory interpretation. It provides that, where a general word or phrase follows a list of specific terms, the general word will be interpreted to include only items of a similar nature to the terms specified – TJ Hall & JA Archer 'Ejusdem Generis: It is known by the company it keeps' (October 14 2021) *New York Law Journal* available at https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/us_36962_reprint_ejusdem-

that MFN could not override public policy considerations fundamental to the original treaty.³⁰⁰ This decision opened the door to broader interpretations of MFN in ISDS cases.

Since *Maffezini*, investors have used the MFN clause to claim more favourable substantive protections,³⁰¹ even attempting to import more favourable FET provisions that would not be accessible under similar circumstances in the original treaty.³⁰² Others have substituted a qualified protection provision in the original treaty for an unqualified one of a similar nature from a third treaty.³⁰³

This has led to inconsistent interpretations of this clause by IATs,³⁰⁴ creating uncertainties for countries that have signed multiple BITs.³⁰⁵ The concern is no longer about the violation of the MFN treatment itself but the practice of ‘treaty shopping’, where claimants cherry-pick more favourable provisions from third-party treaties, thus, derogating from or modifying the basic provisions of the treaty.³⁰⁶

Additionally, while NT initially applied to foreign investors in the post-establishment phase, it has increasingly been applied in the pre-establishment phase. Usually, an indication that NT (or MFN treatment) covers ‘the ‘management, operation and disposition’ of an investment,’ means that it applies to investments in the post-establishment phase,³⁰⁷ while the use of the words ‘establishment, acquisition and expansion’ refers to pre-establishment.³⁰⁸

Extending these clauses to the pre-establishment phase could lead to foreign investors suing host-countries for breach of NT or MFN treatment before even actually establishing the investment, which undermines the purpose of BITs in promoting FDI for economic

[generis_nyli_r3.pdf?revision=&revision=#:~:text=Ejusdem%20generis%2C%20or%20literally%20%E2%80%9Cof,nature%20to%20the%20terms%20specified.](#) (accessed 10 March 2022); *Maffezini v Spain* (ICSID Case No. ARB/97/7) Decision on Jurisdiction of 25 January 2000 para 56 available at http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf (accessed 10 March 2022); OECD ‘MFN in IIL’ (2004) 12.

³⁰⁰ *Maffezini v Spain* (ICSID Case No. ARB/97/7) para 62.

³⁰¹ UNCTAD *MFN treatment* (2010) 3.

³⁰² UNCTAD *MFN treatment* (2010) 3.

³⁰³ UNCTAD *MFN treatment* (2010) 3.

³⁰⁴ UNCTAD *MFN treatment* (2010) 95.

³⁰⁵ UNCTAD *MFN treatment* (2010) 3 – 5.

³⁰⁶ UNCTAD *MFN treatment* (2010) 5.

³⁰⁷ EAC Investment Model (2016) explanation in art 4 and 5.

³⁰⁸ SADC Model Bilateral Investment Treaty with commentary (2012) 22.

development.³⁰⁹ To address this, policymakers should introduce DOB clauses to prevent investors without a genuine economic connection to their home-country from invoking treaty protections or adopt a narrower definition of ‘investor’, subjecting them to such criteria.³¹⁰

In Uganda’s in-force and Model BITs, NT and MFN treatment provisions are commonly combined and are subject to the same challenges.³¹¹ The interpretation of these clauses – whether they apply pre- or post-establishment, which investors they cover and the scope of exceptions – remains a key issue in ensuring balanced investment protection that considers both investor rights and host-country interests.

Four of Uganda’s in-force BITs expressly limit NT and MFN treatment to the post-establishment phase, meaning that foreign investors can only invoke these provisions once their investments have already been established according to the host-country’s domestic laws.³¹² This is reflected in the wording of the BITs, such as Uganda’s BIT with Denmark, which specifies that NT and MFN treatment apply to the ‘management, maintenance, use, enjoyment, or disposal’ of investments.³¹³

Similar wording can be found in Uganda’s BITs with the Germany, Switzerland, UK and Denmark.³¹⁴ This is also in tandem with Uganda’s ICA – 19, which outlines the requirements for registering an investment.³¹⁵ Uganda’s BIT with France and the Model BIT, on the other hand, lack such restrictions, potentially allowing for broader interpretations that could include pre-establishment treatment.³¹⁶

³⁰⁹ L Lévesque & A Newcombe ‘The evolution of IIA practice in Canada and the United States’ in A de Mestral and Lévesque C (eds) *Improving International Investment Agreements* (2013) 27.

³¹⁰ US Model BIT (2004) art 17; Canada Model BIT (2004) art 18; L Mistelis & C Baltag, ‘Denial of Benefits’ Clause in Investment Treaty Arbitration’ (2018) 293 *Queen Mary University of London, School of Law* 1.

³¹¹ Switzerland – Uganda BIT (1971) art 4 – this provision also combines FET with MFN treatment and NT obligations in the same provision; Uganda – UK BIT (1998) art 3(1) and (2); Germany – Uganda BIT (1966) Ad art 2(a); Switzerland – Uganda BIT (1971) art 3; Uganda – UK BIT (1998) art 3(2); Denmark – Uganda BIT (2001) art 2(2).

³¹² Germany – Uganda BIT (1966) art 2(1) and (2); France – Uganda (2003) art 4; Switzerland – Uganda (1971) art 4; Uganda – UK BIT (1998) art 3(1) and (2); and Denmark – Uganda BIT (2001) art 3; EAC Model investment Treaty (2016) commentary on art 4 and 5.

³¹³ Denmark – Uganda (2003) art 3(2).

³¹⁴ Germany – Uganda BIT (1966) art 2(1), (2) & ad art 2(a); Switzerland – Uganda BIT (1971) art 3; Uganda – UK BIT (1998) art 3(2); Denmark – Uganda BIT (2001) art 3(2).

³¹⁵ Uganda ICA – 19 (2019) secs 16 & 17.

³¹⁶ SADC Model BIT with commentary (2012) 22; EAC Model Investment Treaty (2016) commentary on art 4 and 5.

With regards to the second element, the NT and MFN treatment provisions in Uganda's in-force BITs could apply to 'investments' or 'investors'. For instance, Uganda's BIT with Germany accords NT and MFN treatment to 'investments' rather than 'investors'. It provides that:³¹⁷

Neither Contracting Party shall subject investments owned or controlled by nationals or companies of the other Contracting Party in its territory to treatment less favourable than that which it accords to investments of its own nationals or companies or to Investments of nationals or companies of any third State. (own underlining)

As regards activities in connexion with investments neither Contracting Party shall subject nationals or companies of the other Contracting Party in its territory to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

This distinction, with regards to NT, allows host-countries to discriminate against foreign investors in favour of domestic ones, as long as their investments are not treated unfairly.³¹⁸ While this restrictive approach may allow discriminatory policies against foreign investors, ensuring competitive equality and economic asymmetry between foreign MNCs and domestic MSMEs.³¹⁹

According to Article 2(2), Uganda cannot subject German investments to treatment that is less favourable than it accords to its own nationals. However, one could argue that German investors receive better treatment under this BIT, even by the mere fact that they have recourse to IATs in the case of a dispute and can bypass domestic remedies, while domestic investors only have recourse to domestic courts.

Uganda's BITs with France, Denmark and its Model BIT take a more investor-centric approach by extending NT and MFN to investors.³²⁰ Additionally, most of Uganda's BITs, including its Model BIT, contain exceptions to the MFN treatment and/ or NT clauses. For instance, with regards to the MFN treatment clause, Uganda's BIT with Germany excludes privileges

³¹⁷ Germany – Uganda BIT (1966) art 2(1) and (2).

³¹⁸ UNCTAD *IIA Handbook* (2012) 36.

³¹⁹ Economic asymmetry is illustrated by BITs in which one developing country partner will in practice operate only as a capital-importing country, so that its rights under the treaty as a home country may not mean much in reality – see UNCTAD *NT* (1999) 2, 61 and 70.

³²⁰ Denmark – Uganda BIT (2001) art 3(1); France – Uganda BIT (2003) art 4; Uganda Model BIT (2003) art 4.

extended to nationals of third-party countries due to customs unions or free trade agreements (FTAs).³²¹ It provides that:³²²

The most-favoured-nation treatment as understood in this Treaty shall not apply to privileges which either Contracting Party grants to nationals or companies of other States because of an existing customs union, free trade zone or because of the membership of a common market.

With regards to NT, Article 10 of Uganda's BIT with Germany provides that:³²³

Either 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.

This provision allows the host-country to impose discriminatory measures for reasons of public safety, health or morality, ensuring that legitimate public policy objectives are not undermined by the treaty's obligations.³²⁴

Moreover, the NT under this BIT can only be granted to a foreign investor if it would be 'granted by the other Contracting Party.' Put differently, the receipt of NT is conditional upon the reciprocal granting of NT to Ugandan investors in Germany. Uganda's BIT with Germany also lists the kind of activities that would be considered as 'less favourable treatment', as far as NT and MFN treatment is concerned.³²⁵ They include:³²⁶

...restricting the purchase of raw or auxiliary materials, of power or fuel or of means of production or operation of any kind, impeding the marketing of products inside or outside the country, as well as any other measures having a similar effect...

Uganda's BIT with Switzerland also provides exceptions, particularly with regards to FTAs, thus preventing Swiss investors from receiving preferential treatment that Uganda accords to

³²¹ Germany – Uganda BIT (1966) ad art 2(c).

³²² Germany – Uganda BIT (1966) ad art 2(c).

³²³ Germany – Uganda BIT (1966) art 10.

³²⁴ Germany – Uganda BIT (1966) ad art 2(a); VanDuzer JA *et al* (2019) 113.

³²⁵ Germany – Uganda BIT (1966) ad art 2(a).

³²⁶ Germany – Uganda BIT (1966) ad art 2(a).

investors from customs unions and FTAs like COMESA, AfCFTA and EAC Member States. It specifically provides that:³²⁷

The treatment so granted shall not apply to privileges which either Contracting Party accords to nationals and companies of a Third State because of its membership in, or association with, a customs union, a common market or a free trade area.

However, it is worth noting that only the Swiss – Uganda BIT sets out a basis for comparison of ‘similar investment’, though it lacks a clear definition of what this entails, leaving interpretation to the discretion of tribunals on a case-by-case basis.³²⁸ Nevertheless, this reference is meant to direct the interpreter, ensuring that the investment chosen to compare with the foreign one is an appropriate comparator.³²⁹

Uganda’s BITs with Denmark, France and the UK also contain MFN treatment exceptions, particularly in the areas of FTAs and taxation treaties. The Denmark – Uganda BIT, for instance, excludes benefits derived from Uganda’s tax laws or international taxation agreements from being extended to Danish investors. It specifically provides that:³³⁰

The provisions of this agreement relative to the granting of treatment not less favorable than that accorded to investors of each Contracting Party or of any third State shall not be construed 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.

A similar provision can also be found in Uganda’s BIT with the UK.³³¹

³²⁷ Switzerland – Uganda BIT (1971) art 4.

³²⁸ Switzerland – Uganda BIT (1971) art 4; UNCTAD *IIA Handbook* (2012) 35

³²⁹ UNCTAD *NT* (1999) 33 – 34.

³³⁰ Denmark – Uganda BIT (2001) art 4(a) and (b).

³³¹ Uganda – UK BIT (1998) art 7(a) – (b).

Similarly, Uganda's Model BIT and BIT with France both exempt MFN treatment and NT for tax matters, FET, customs unions and RECs, but only the France BIT includes NT exceptions, making it unique among Uganda's BITs.³³² The others do not have NT exceptions.

Interestingly, the UK – Uganda BIT contains an additional provision that is not expressly provided in any of Uganda's other in-force and Model BITs. It specifically states that MFN treatment and NT apply to Articles 1 to 11 of the BIT.³³³ These articles include, *inter alia*, the definitions, promotion and protection of investments, the MFN treatment and NT provisions, as well as those relating to dispute settlement.

Essentially, this means that the MFN and NT clauses apply to, *inter alia*, procedural issues as well (ISDS and SSDS), which are contained in Articles 8 and 9 of that treaty. Foreign investors could therefore import this more favourable condition to disputes initiated under other BITs with Uganda like in the *Maffezini v Spain* case.³³⁴ This possibility can break with the traditional international scheme of bilaterally negotiated investment advantages and 'multilateralise' the BIT's obligations.³³⁵

Moreover, Uganda's BITs should not extend NT to 'investments.' In the event that a BIT is signed with a country to which Uganda is at a different level of development, such formal equality may disregard the differences in the actual situation and capabilities of the companies on each side and cause economic asymmetry in the treatment of big MNCs *vis-à-vis* MSMEs, thus giving the former an unfair disadvantage over Uganda's own investors.³³⁶

Uganda's BITs should also contain more precise and clear exceptions to the NT clause. Moreover, exceptions to the MFN clause should include taxation treaties and exceptions to procedural issues, specifically ISDS, to prevent treaty shopping. These differences should be resolved to make Uganda's BIT regime more consistent, harmonised and clear to ensure that there is no discrimination between foreign investors and domestic ones, while promoting

³³² France – Uganda BIT (2003) art 4; Uganda Model BIT (2003) art 4(1).

³³³ Uganda – UK BIT (1998) art 3(3).

³³⁴ *Maffezini v Spain* (ICSID Case No. ARB/97/7) – Chapter four 'Fair and Equitable Treatment' para 4.1.3 above; UNCTAD *MFN treatment* (2010) 2.

³³⁵ Scharaw (2018) 64.

³³⁶ UNCTAD *NT* (1999) XI – XII, 3 & 61.

sustainable development objectives by safeguarding the right to regulate in the public interest.

4.1.4. Expropriation or nationalisation and compensation

One of the key motivations behind the adoption of BITs has been foreign investors' desire to protect their investments against the risk of unlawful expropriation or nationalisation.³³⁷ Under CIL, the principle of 'eminent domain' permits a State to take possession of property for economic, political, social or other reasons, provided that adequate compensation is offered.³³⁸

Expropriation occurs when a host-country unlawfully takes property from a foreign investor, triggering the host-country's international responsibility.³³⁹ It is the biggest impairment of the security of an investment and was one of the primary reasons why developed countries concluded BITs with developing countries.³⁴⁰ Such actions were particularly rife during the liberation efforts of formerly colonised territories.³⁴¹

Nationalisation, a form of expropriation, typically affects an entire industry or region and usually occurs in times of major social, political or economic change.³⁴² For expropriation to be lawful, certain conditions have to be met: 1) it must serve a public purpose; 2) be conducted on a non-discriminatory basis; 3) follow due process of law; and 4) be accompanied by adequate compensation.³⁴³

Expropriation can take two forms: 'direct' and 'indirect'. Direct expropriation involves the formal transfer of title or physical seizure of property, often to the benefit of the host-country

³³⁷ UNCTAD *BITs 1995 – 2006* (2007) 44.

³³⁸ UNCTAD *Expropriation* (2012) 1; Chapter 2 'Dichotomy era' para 2.1.2 above.

³³⁹ I san Martin 'Expropriation' available at <https://jusmundi.com/en/document/wiki/en-expropriation> (accessed 12 March 2022).

³⁴⁰ Vandevelde *BITs* (2010) 45 – 50.

³⁴¹ Chapter 2 'Dichotomy era' para 2.1.2 above.

³⁴² I san Martin 'Expropriation' available at <https://jusmundi.com/en/document/wiki/en-expropriation> (accessed 12 March 2022); UNCTAD *Bilateral Investment Treaties in the Mid-1990s* (1998) 65.

³⁴³ OECD 'Chapter 2 'Indirect Expropriation' and the 'Right to Regulate' in international investment law' in *International Investment Law: A Changing Landscape – A Companion Volume to International Investment Perspectives* (2005) 44; UNCTAD *BITs 1995 – 2006* (2007) XII.

and is carried out with clear intent through official decrees or legislation.³⁴⁴ A notable example of direct expropriation through a decree, was the Uganda's Presidential Decrees on the Expulsion of Asians in 1972, during President Idi Amin's era.³⁴⁵

This decree led to the forced expulsion of Asians who lived and operated businesses in Uganda, followed by the subsequent expropriation of their properties, which were then redistributed to native Ugandan citizens. Section 2(3) and (4) of the Decree specified that:³⁴⁶

- 2) The agent shall ensure that the property or business of a departing Asian, declared under subsection (1) of this section, is properly looked after until it is transferred by sale to a Uganda citizen.
- 3) An agent nominated under subsection (2), of this section, shall have all the powers the principal has over the property or business to be transferred under this Decree, except power to,
 - a) make a direct sale or transfer of the property or business to any person;
 - b) let any premises;
 - c) convey by way of gift to any person, the property or business;
 - d) acquire the property or carry on the business himself; or
 - e) deal with the property or business in any manner which intends or appears to frustrate the declared policy of the Government to transfer the property or business to a Ugandan citizen.

Effectively, the expropriated businesses, were handed over to a government agent, who later transferred or sold them to native Ugandan nationals.³⁴⁷

Indirect expropriation occurs when a host-country interferes with an investor's ability to use and enjoy their investment without, physically seizing the property or transferring the legal title.³⁴⁸ Various tribunals and judiciaries have considered this issue. For instance, in 1928,

³⁴⁴ OECD 'Chapter 2 'Indirect Expropriation' and the 'Right to Regulate' in international investment law' in *International Investment Law: A Changing Landscape – A Companion Volume to International Investment Perspectives* (2005) 44; UNCTAD *Expropriation* (2012) 6 – 7.

³⁴⁵ The Immigration (Cancellation of Entry Permits and Certificates of Residence) Decree, 1972 – Uganda: Presidential Decrees on the Expulsion of Asians (August 9 1972) available at https://www-jstor-org.uplib.idm.oclc.org/stable/pdf/20691015.pdf?refregid=excelsior%3A2a76cf7f21a997871de0ccb4da551eaf&ab_segments=&origin=&acceptTC=1 (accessed 19 May 2022).

³⁴⁶ The Immigration Decree (1972) secs 2(3) and (4)(a) – (e).

³⁴⁷ The Immigration Decree (1972) secs 2(3) and (4)(a) – (e).

³⁴⁸ OECD 'Chapter 2 'Indirect Expropriation' and the 'Right to Regulate' in international investment law' in *International Investment Law: A Changing Landscape – A Companion Volume to International Investment Perspectives* (2005) 46 – 47; UNCTAD *Expropriation* (2012) 7.

Germany brought a case against Poland alleging indirect expropriation after Poland sold two German factories in Upper Silesia, which the court upheld.³⁴⁹

Under the Agreement, Germany had transferred the control of Upper Silesia to Poland on condition that Poland did not forfeit any of Germany's property.³⁵⁰ In recent years, it has become apparent that certain country measures can be construed as indirect expropriation even when exercising its sovereign right to regulate public health, social welfare and safety or environmental protection.³⁵¹

A notable example is the *Philip Morris* cases against Uruguay and Australia, where the company challenged anti-tobacco regulations aimed at promoting public health.³⁵² Philip Morris claimed that the plain-packaging laws indirectly expropriated its intellectual property rights.³⁵³ Although it lost both cases, these disputes highlighted the risks posed by overly broad expropriation provisions and underscored the need for careful balancing between investor protection and a host-country's regulatory authority.

In another ISDS case, *Suez v Argentina*, the Tribunal analysed whether the measures adopted by the Argentinian Government during the economic crisis of 2000–2002 constituted indirect expropriation.³⁵⁴ The Tribunal explained that:³⁵⁵

In case of an indirect expropriation, sometimes referred to as a 'regulatory taking,' host States invoke their legislative and regulatory powers to enact measures that reduce the benefits investors derive

³⁴⁹ Case concerning certain German interests in Polish Upper Silesia (The Merits), *Germany v Poland*, Permanent Court of International Justice (PCIJ), Judgment, 25 May 1925; A Baruah 'Case Analysis On Charzow Factory Case (Germany V. Poland)' (2015) *Commonwealth Law Review Journal* 37; *Germany v Poland* (1925) PCIJ; UNCTAD *Expropriation* (2012) 7.

³⁵⁰ A Baruah 'Case Analysis On Charzow Factory Case (Germany V. Poland)' (2015) *Commonwealth Law Review Journal* 37; *Germany v Poland* (1925) PCIJ

³⁵¹ UNCTAD *Expropriation* (2012) 2.

³⁵² *Philip Morris v Australia* (UNCITRAL, PCA Case No. 2012-12); *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7).

³⁵³ IS de Oliveira 'Corporate restructuring and abuse of rights: PCA tribunal deems Philip Morris's claims against Australia's tobacco plain packaging rules inadmissible: *Philip Morris v. The Commonwealth of Australia*, PCA Case No. 2012-12' available at <https://www.iisd.org/itn/en/2016/08/10/philip-morris-asia-limited-v-the-commonwealth-of-australia-pca-case-no-2012-12/> (accessed 13 April 2022).

³⁵⁴ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v Argentine Republic* (ICSID Case No. ARB/03/17).

³⁵⁵ *Suez v Argentina* (ICSID Case No. ARB/03/17) para 121.

from their investments but without actually changing or cancelling investors' legal title to their assets or diminishing their control over them.

The Tribunal found that Argentina had indeed indirectly expropriated the investor's property and awarded USD 225,70 million in damages, despite the country being in the midst of an economic crisis and having adopted the measures that led to this dispute to mitigate the effects of the crisis.³⁵⁶

Many of the BITs negotiated during the proliferation era include both direct and indirect expropriation, unlike earlier treaties (infant and dichotomy eras), that seldom mentioned indirect expropriation or measures having a similar effect.³⁵⁷ ISDS cases challenging host-countries' regulatory actions have contributed to recent IIA reforms, clarifying concepts of indirect expropriation, its application and compensation standards.³⁵⁸

Modern IIAs define which measures constitute indirect expropriation, establish exceptions for public interest regulations and detail compensation methods.³⁵⁹ Expropriation provisions typically contains three common elements: 1) the covered form of expropriation; 2) its legality requirements; 3) and the characteristics of compensation.³⁶⁰ Uganda's in-force and Model BITs cover both forms of expropriation.

Uganda's BITs with countries like Switzerland and France, as well as its Model BIT, explicitly mention both direct and indirect expropriation or nationalisation.³⁶¹ Other BITs such as those with Germany, the UK and Denmark imply indirect expropriation through language referring to measures 'having effect equivalent to nationalisation or expropriation'.³⁶² Even without

³⁵⁶ *Suez v Argentina* (ICSID Case No. ARB/03/17).

³⁵⁷ UNCTAD *Expropriation* (2012) 7.

³⁵⁸ UNCTAD *Expropriation* (2012) 7.

³⁵⁹ UNCTAD *Expropriation* (2012) 7.

³⁶⁰ UNCTAD *IIA Handbook* (2012) 57.

³⁶¹ Switzerland – Uganda BIT (1971) art 6; France – Uganda BIT (2003) art 5(2); Uganda Model BIT (2003) art 5(2).

³⁶² Germany – Uganda BIT (1966) art 3(2) and ad art 3; Denmark – Uganda BIT (2001) art 5(1); Uganda – UK BIT (1998) art 5(1).

explicit mention, tribunals have interpreted such provisions to include indirect expropriation, as seen in the *Wena Hotels v Egypt* case.³⁶³

In that case, the host-country was found to have violated the indirect expropriation provision in the Egypt – UK BIT,³⁶⁴ despite the treaty not explicitly mentioning it. Article 5(1) of this Treaty states that:³⁶⁵

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 ...

The reference to ‘measures having the effect equivalent to nationalisation or expropriation’ implicitly includes indirect expropriation.

Uganda’s in-force and Model BITs actually lack a specific definition of ‘indirect expropriation’, making it challenging to distinguish between indirect expropriation and legitimate regulatory measures.³⁶⁶ Therefore, while direct expropriation is easier to identify, the ambiguity surrounding indirect expropriation could affect the host-country’s general right to regulate, for example in fulfilment of international obligations.³⁶⁷

Additionally, Uganda’s in-force and Model BITs contain legality requirements, ensuring expropriation (or nationalisation) is conducted fairly, non-discriminatorily and for a public purpose, benefit or interest,³⁶⁸ with the Denmark – Uganda BIT further allowing expropriation for defense, public safety, order, morality or health’.³⁶⁹ These provisions ensure that expropriation is justified and not for private gain or illicit ends.³⁷⁰

³⁶³ *Wena Hotels Ltd v Arab Republic of Egypt* (ICSID Case No. ARB/98/4); *Pope & Talbot Inc. v Canada*, UNCITRAL (1976) para 96 & 99; and *S D Myers v Canada*, UNCITRAL (1976) para 181; UNCTAD *IIA Handbook* (2012) 59.

³⁶⁴ Egypt – UK BIT (1975).

³⁶⁵ Egypt – UK BIT (1975) art 5(1).

³⁶⁶ UNCTAD *IIA Handbook* (2012) 58 & 66.

³⁶⁷ UNCTAD *IIA Handbook* (2012) 58 & 66; see discussion of Philip Morris cases with Uruguay and Australia, where the investor instituted a claim against these countries for adopting health measures, despite them being part of their WHO FCTC obligations – Chapter Four ‘fair and equitable treatment’ para 4.1.3.1 above.

³⁶⁸ Germany – Uganda BIT (1966) art 3(2); Switzerland – Uganda BIT (1971) art 6(1); Uganda - UK BIT (1998) art 5(1); Denmark – Uganda BIT (2001) art 5(1); France – Uganda BIT (2003) art 5(2); Uganda Model BIT (2023) art 5(2)

³⁶⁹ Denmark – Uganda BIT (2001) art 5(1).

³⁷⁰ UNCTAD *IIA Handbook* (2012) 59.

All of Uganda's in-force and Model BITs also require expropriation (and sometimes compensation) to follow 'due process of law', as recognised by CIL, meaning that legal procedures must be followed, with access to an independent court.³⁷¹ The host-country must therefore comply with certain fundamental rules of procedure and substantive fairness,³⁷² which include formal legal procedures and a right to recourse to an independent court.³⁷³

Lastly, expropriation must be non-discriminatory, a principle included in all Uganda's BITs except with Germany.³⁷⁴ Additionally, Uganda's in-force and Model BIT expropriation provisions also address compensation characteristics, including fair market value (appropriate or equitable compensation),³⁷⁵ the temporal aspect (promptly without delay or no promptness reference), compensation currency (freely convertible or transferable) and interest rates (general guidance or specific mechanism).³⁷⁶

However, only Uganda's BITs with the UK and Denmark have all four principles.³⁷⁷ For instance, Uganda's BIT with the UK mandates compensation to reflect the genuine value of the expropriated investment, be made without delay and include interest at a normal commercial value.³⁷⁸ The other three in-force BITs lack the interest rate principle.³⁷⁹

The principle of compensation adds concrete meaning to the Hull formula in the sense that it stipulates that such compensation should be 'adequate'.³⁸⁰ This often results in high compensation amounts, especially when market-based valuation methods such as discounted cash flow (DCF) analysis are applied.³⁸¹ For example, in the *Tethyan Copper v*

³⁷¹ Germany – Uganda BIT (1966) art 3(2); Switzerland – Uganda BIT (1971) art 6(1); Denmark – Uganda BIT (2001) art 5(1); Uganda – UK BIT (1998) art 5; France – Uganda BIT (2003) art 5; UNCTAD *IIA Handbook* (2012) 60.

³⁷² UNCTAD *IIA Handbook* (2012) 60.

³⁷³ UNCTAD *IIA Handbook* (2012) 60.

³⁷⁴ Switzerland – Uganda BIT (1971) art 6(2); Uganda – UK BIT (1998) art 5(1); Denmark – Uganda BIT (2001) art 5(1); France – Uganda BIT (2003) art 5(2).

³⁷⁵ UNCTAD *IIA Handbook* (2012) 57.

³⁷⁶ UNCTAD *IIA Handbook* (2012) 57.

³⁷⁷ Uganda – UK BIT (1998) art 5(1) – (2); Denmark – Uganda BIT (2001) art 5(1), (2), (3) and (5).

³⁷⁸ Uganda – UK BIT (1998) art 5(1) – (2).

³⁷⁹ Germany – Uganda BIT (1966); Switzerland – Uganda BIT (1971); France – Uganda BIT (2003).

³⁸⁰ The Hull formula provides that the investor whose investment has been expropriated, should be granted prompt, and adequate compensation in a freely transferable and exchangeable currency – see [\(https://jsumundi.com/en/document/wiki/en-prompt-adequate-and-effective-compensation#:~:text=This%20is%20the%20so%2Dcalled,and%20exchangeable%20currency%20\(effective\)\)](https://jsumundi.com/en/document/wiki/en-prompt-adequate-and-effective-compensation#:~:text=This%20is%20the%20so%2Dcalled,and%20exchangeable%20currency%20(effective)) (accessed 20 August 2022).

³⁸¹ UNCTAD *IIA Handbook* (2012) 61.

Pakistan case, the DCF method resulted in an award of over USD 4 billion plus interest, one of the largest in investor- State arbitration history.³⁸²

Valuation for certain investments can be highly complex, involving fact-based and case-specific assessments.³⁸³ While terms like ‘genuine value’, ‘real value’, ‘just price’, they are generally interpreted to mean fair market value.³⁸⁴ None of Uganda’s BITs contain carve-outs for general regulatory measures or compulsory licenses, such as those allowed under the WTO’s Agreement on Trade-Related Aspects of Intellectual Property Law (TRIPs Agreement).

Under this Agreement, a government authority or court may issue a compulsory license to utilise a patented invention without the patent holder's consent.³⁸⁵ This provision has been employed by several WTO members within the pharmaceutical domain.³⁸⁶ However, compulsory licenses are limited to domestic markets, except in cases addressing anti-competitive practices.³⁸⁷

However the Doha Declaration acknowledged that this limitation could impede its efficient utilisation by countries that do not have adequate pharmaceutical manufacturing capabilities.³⁸⁸ This issue became apparent during the COVID-19 pandemic, highlighting the

³⁸² IISD Webinar: ‘Valuation in investment arbitration: Spotlight on discounted cash flow analysis’ 26 March 2021 available at <https://www.iisd.org/events/valuation-investment-arbitration-spotlight-discounted-cash-flow-analysis> (accessed 10 November 2023); *Tethyan Copper v Pakistan* (ICSID Case No. ARB/12/1); de Murard S ‘Tribunal finds Pakistan breached FET, expropriation and non-impairment obligations in the context of a mining joint venture with Australian investor Tethyan Cooper company’ (2019) *Investment Treaty News* 17 December 2019 available at <https://www.iisd.org/itn/en/2019/12/17/tribunal-finds-pakistan-breached-fet-expropriation-non-impairment-obligations-mining-joint-venture-with-australian-investor-tethyan-copper-company-tethyan-copper-company-v-pakistan-icsid-arb-12-1/> (accessed 19 November 2023).

³⁸³ UNCTAD *IIA Handbook* (2012) 61.

³⁸⁴ UNCTAD *IIA Handbook* (2012) 61; Denmark – Uganda BIT (2001) art 5(3).

³⁸⁵ WTO ‘TRIPs and public health’ available at https://www.wto.org/english/tratop_e/trips_e/pharmapatent_e.htm (accessed 10 October 2023); Agreement on Trade-Related Aspects of Intellectual Property Law (1994) art 21.

³⁸⁶ WTO, ‘TRIPs and public health’ available at https://www.wto.org/english/tratop_e/trips_e/pharmapatent_e.htm (accessed 10 October 2023).

³⁸⁷ WTO ‘TRIPs and public health’ available at https://www.wto.org/english/tratop_e/trips_e/pharmapatent_e.htm (accessed 10 October 2023).

³⁸⁸ WTO ‘TRIPs and public health’ available at https://www.wto.org/english/tratop_e/trips_e/pharmapatent_e.htm (accessed 10 October 2023).

challenge of balancing investor protection with a host-country's right to regulate, without incurring compensation obligations.³⁸⁹

Given Uganda's history of expropriating foreign investments without compensation (which has since been given to affected investors), it is necessary to stipulate in its BIT that expropriation or nationalisation will be followed by adequate compensation. This is also reflected in the Constitution of Uganda and Uganda's ICA – 19 – signalling Uganda's commitment to improve its formerly hostile image towards FDI.³⁹⁰

Uganda's BITs therefore differ in specificity, with some addressing indirect expropriation, while others lack comprehensive definitions. In order to enhance investor confidence, Uganda's future BITs should clearly define both forms of expropriation and include clear exceptions to expropriation, including compliance with international obligations, climate action and environmental protection.

The expropriation provision should also specify that the issuance of compulsory licences in accordance with relevant international or regional agreements will be allowed. Moreover, it should be stipulated that compensation will be assessed based on an equitable balance between public interest and the interest of the affected investor, having regard for all relevant circumstances, including fair market value, the duration of the investment and profits made.³⁹¹

Moreover, the provision should clearly specify the date from which fair market value will be assessed or calculated and exclude consequential, future or speculative profits.³⁹² Such compensation should also be freely convertible, clarifying the interest rate to be used and when such rate will apply (i.e. from date of expropriation to date of payment) and be freely transferable.

³⁸⁹ E Bonadio & M Contardi 'Compulsory Licences during the COVID-19 Pandemic: A European and International Perspective' (2022); VanDuzer *et al* (2019) 152.

³⁹⁰ Constitution of Uganda (1995) secs 26(1) – (2)(a) – (b)(i) – (ii); Uganda ICA – 19 (2019) sec 24(1) – (4).

³⁹¹ AfCFTA Protocol on Investment (2023) art 21(2).

³⁹² See discussion of the *Vattenfall v Germany (III)* case, Chapter Two para 2.2.2.

4.1.5. Transfer of funds

The transfer of funds provision is a critical component of any BIT, as it governs the ability of foreign investors to freely transfer capital, returns and other related payments out of the host-country.³⁹³ This provision is essential to ensuring investor confidence and protecting foreign investments, as it guarantees that investors can repatriate profits, dividends, interest, royalties and proceeds from the sale of assets or liquidation of investments without undue restrictions.

By providing such assurances, the transfer of funds provision fosters a stable and predictable investment climate, making the host-country more attractive to foreign investors. Typically, the transfer of funds provision in a BIT outlines: 1) the types of transfers protected, 2) convertibility requirements and the conditions under which the transfer can be made, and 3) limitations, exceptions and temporary derogations.³⁹⁴

The three main categories of transfers are; outward transfers of amounts derived from profits, dividends, interest and liquidation proceeds, compensation for expropriation or losses from civil disturbances, settlement of disputes and government debts and inward transfers for new or additional investments, with most treaties covering the latter but not necessarily obligating host-countries to admit new investments.³⁹⁵ These provisions are usually structured as an open (non-exhaustive) or closed (exhaustive) list of protected transfers.³⁹⁶

Additionally, transfer obligations require foreign currency convertibility, often specifying ‘freely convertible’ or ‘freely usable’ currencies like the USD or Euro.³⁹⁷ Investment treaties vary on the exchange rate to be applied, with some offering investors the most favourable rate in case of multiple exchange rates or no market rate.³⁹⁸ Lastly, IIAs often include exceptions for taxes, adjudicatory proceeding, enforcement of creditor rights and screening measures.³⁹⁹

³⁹³ UNCTAD *Transfer of funds* (2000) 3.

³⁹⁴ UNCTAD *Transfer of funds* (2000) 30 – 31.

³⁹⁵ UNCTAD *Transfer of funds* (2000) 31 – 34.

³⁹⁶ VanDuzer (2013) 183 – 4.

³⁹⁷ UNCTAD *Transfer of funds* (2000) 33.

³⁹⁸ UNCTAD *Transfer of funds* (2000) 34.

³⁹⁹ UNCTAD *Transfer of funds* (2000) 34 – 36.

Some IIAs also allow temporary derogations in balance-of-payment crises, although most old-BITs do not include such provisions.⁴⁰⁰ Temporary derogations permit new restrictions on transfers in cases of macroeconomic crises.⁴⁰¹ Temporary derogations address the challenges of capital flow volatility, which can exacerbate balance-of-payment issues in countries facing economic crises.⁴⁰² Temporary restrictions may therefore be necessary, especially in extreme cases where outflows are significant.⁴⁰³

All of Uganda's in-force and Model BITs contain provision governing the transfer of funds, though the scope of protection varies across agreements. The UK BIT only protects transfers related to investments, returns and compensation from losses (for instance, those caused by war or civil disturbances) and expropriation, while the Swiss BIT expands this to include capital transfers, returns and liquidation proceeds,⁴⁰⁴ but does not include compensation for losses.⁴⁰⁵

In contrast, Uganda's BITs with Denmark, France and its Model BIT safeguard transfers related to interests, dividends, profits, and other returns, as well as payments derived from industrial and intellectual property rights.⁴⁰⁶ They also protect transfers related to liquidation, compensation for expropriation, restitution, indemnification, earnings or remuneration of personnel engaged with the investment and compensation for losses due to war or civil unrest.⁴⁰⁷

The Danish BIT, however, includes additional protections not found in Uganda's other BITs or the Model BIT, including transfers for the initial maintenance and development of investments, invested capital or proceeds from the sale or liquidation of investments and payments for the reimbursement of credits (including interest).⁴⁰⁸ Uganda's BIT with Germany provides a more limited scope, protecting transfers related to liquidation, capital

⁴⁰⁰ UNCTAD *Transfer of funds* (2000) 36 – 38.

⁴⁰¹ UNCTAD *Transfer of funds* (2000) 7.

⁴⁰² UNCTAD *Transfer of funds* (2000) 7.

⁴⁰³ UNCTAD *Transfer of funds* (2000) 8.

⁴⁰⁴ Uganda – UK BIT (1998) art 6.

⁴⁰⁵ Switzerland – Uganda (1971) art 3.

⁴⁰⁶ Denmark – Uganda (2001) art 7(1)(b), (c), (e) & (g); France – Uganda BIT (2003) art 6(a), (b), (d) & (e).

⁴⁰⁷ Denmark – Uganda (2001) art 7(1)(b), (c), (e) & (g); France – Uganda BIT (2003) art 6(a), (b), (d) & (e).

⁴⁰⁸ Denmark – Uganda (2001) art 7(1)(a), (b), (d) & (f).

transfers, returns, guarantee payments and compensation for expropriation or losses due to war or civil unrest.⁴⁰⁹

Lastly, Uganda's French and Model BITs further extend protection to transfers related to the repayment of regularly contracted loans and business concessions, including those related to the exploration and exploitation of natural resources—provisions not included in other BITs.⁴¹⁰ Additionally, All of Uganda's in-force BITs contain provisions addressing the transfer of funds, along with requirements for currency convertibility.

Uganda's BIT with Germany stipulates that protected transfers must be made without delay, using the exchange rate effective for current transactions on the transfer date. This rate is based on the par value agreed with the International Monetary Fund (IMF), or if unavailable, an official rate tied to the USD, another convertible currency or gold.⁴¹¹ In cases where no official rate is available, the host-country's agencies must establish a fair and equitable rate.⁴¹²

Similarly, Uganda's BIT with Switzerland requires that compensation for expropriation be paid in a convertible currency within a reasonable period, reflecting the investment's value at the time of expropriation.⁴¹³ This applies regardless of where the investor resides.⁴¹⁴ However, while the Swiss BIT covers other forms of protected transfers,⁴¹⁵ it does not specify how these transfers should be handled, such as timing or applicable rates.

Uganda's BIT with the UK allows for the repatriation of investments and returns, stating that transfers must be made without delay in either the originally invested convertible currency or another agreed convertible currency.⁴¹⁶ The applicable exchange rate is the one in effect on the transfer date, based on prevailing exchange regulations.⁴¹⁷ For expropriation

⁴⁰⁹ Germany – Uganda BIT (1966) arts 4, 5, 6(1) – (3), ad art 4.

⁴¹⁰ Denmark – Uganda BIT (2001) art 1 & 7(1)(a) – (g); France – Uganda BIT (2003) art 1(1)(e) & 6(a) – (e); Uganda Model BIT(2003) arts 6(a) – (e) & 1(1)(e).

⁴¹¹ Germany – Uganda BIT (1966) art 6(1) – (2).

⁴¹² Germany – Uganda BIT (1966) art 6(3).

⁴¹³ Switzerland – Uganda BIT (1971) art 3.

⁴¹⁴ Switzerland – Uganda BIT (1971) art 3.

⁴¹⁵ Switzerland – Uganda BIT (1971) art 5.

⁴¹⁶ Uganda – UK BIT (1998) art 6.

⁴¹⁷ Uganda – UK BIT (1998) art 6.

compensation, the BIT requires that such compensation include interest at a normal commercial rate, payable without delay, realisable and be freely transferable.⁴¹⁸

Notably, the provisions for repatriation of investments and returns and those for compensation for expropriation of Uganda's BIT with the UK are in separate articles.⁴¹⁹ Uganda's BIT with Denmark ensures that protected transfers are made without delay in a freely convertible currency, using the market exchange rate for spot transactions or the most recent rate for inward investments.⁴²⁰ The treaty emphasises that relevant legislation must not impair or restrict these transfers.⁴²¹

Uganda's BIT with France and its Model BIT, while mandating prompt transfers, do not explicitly mention the currency's convertibility. However, all Uganda's BITs ensure transfers are made without delay, with exchange rates varying between 'market' and 'official' rates depending on the agreement.⁴²² The Danish and UK BITs refer to the 'market' rate or the rate effective on the transfer date, while the German, French and Model BITs use the 'official' rate,⁴²³ which could either benefit or disadvantage investors depending on whether the official rate is overvalued or undervalued.⁴²⁴

Uganda's BIT with France and its Model BIT uniquely include provisions for temporary limitations on transfers during financial crises, with conditions that such limitations comply with the IMF's Articles of Agreement, be fairly applied and be temporary.⁴²⁵ The other four in-force BITs do not have limitations, exceptions and temporary derogations.

In conclusion, Uganda's BITs display inconsistency in their approach to protected transfers, oscillating between open (non-exhaustive) and closed (exhaustive) lists of protected funds. Some agreements, such as those with Denmark, Germany, France, and Uganda's Model BIT, include all protected transfers in one article, while others separate compensation transfers,

⁴¹⁸ Uganda – UK BIT (1998) art 5(1).

⁴¹⁹ Uganda – UK BIT (1998) arts 5(1) & 6.

⁴²⁰ Denmark – Uganda BIT (2001) art 7(2) – (4).

⁴²¹ Denmark – Uganda BIT (2001) art 7(4).s

⁴²² France – Uganda BIT (2003) art 6; Uganda Model BIT (2003) art 6.

⁴²³ Uganda – UK BIT (1998) art 6; Denmark – Uganda BIT (2001) art 7(3).

⁴²⁴ VanDuzer (2013) 184 – 5.

⁴²⁵ France – Uganda BIT (2003) art 6; Uganda Model BIT (2003) art 6(i) – (iii).

particularly those related to expropriation, into a different article from those covering investment returns, creating ambiguity with regards to the scope and treatment of transfers.

Another concern is that some of Uganda's BITs, particularly the Swiss BIT, does not specify how these transfers should be handled such as timing or applicable rates. Furthermore, except for the French and Model BITs, none of Uganda's BITs contain exceptions or limitations to the transfer of funds. This means that Uganda would still be compelled to allow such transfers, even in cases of severe economic crises, balance of payments issues, or external financial difficulties.

Without the ability to implement temporary restrictions in such circumstances, the country's economic stability could be at risk, as it would have to continue honouring investor claims despite external financial and balance-of-payment challenges. To address these gaps, Uganda's future BITs should specify the exact types of funds eligible for protection, adopting a closed list structure that provides legal certainty. Closed lists offer greater clarity and legal predictability by explicitly outlining the types of funds protected under the agreement.

Furthermore, these funds should be directly related to the investment to avoid ambiguity. Provisions should also require convertibility of funds, with transfers occurring at the market rate or the official exchange rate applicable on the date of transfer, in accordance with the host country's regulations and include temporal elements. This would ensure that investors receive a fair and consistent exchange rate when repatriating funds and ensure that such funds are received without undue delay.

Finally, it is crucial for Uganda's future BITs to include limitations, exceptions, and temporary derogations to the transfer of funds provisions. These should cover situations of economic crises or serious balance-of-payments difficulties, enabling Uganda to temporarily restrict transfers under clearly defined conditions. Such provisions would align Uganda's BIT framework with international standards, offering greater flexibility in times of financial instability while maintaining the rights of foreign investors in normal circumstances.

4.2. Dispute settlement

Old-BITs typically contain SSDS (diplomatic channels) and ISDS mechanisms for resolving investment disputes. While three of Uganda's in-force BITs provide for both types of dispute settlement mechanisms,⁴²⁶ its BITs with Germany and Switzerland only contain SSDS.⁴²⁷ Although SSDS was originally popular for resolving disputes between Contracting Parties regarding the interpretation or application of the treaty, ISDS has become the most frequently invoked mechanism in recent years.⁴²⁸

The SSDS mechanism, being a horizontal process, involves disputes between governments, whereas ISDS focuses on disputes between the host-country and foreign investors. With regards to the SSDS mechanism, Uganda's BITs with Germany and Switzerland require the Contracting Parties to first attempt to resolve disputes through settlements,⁴²⁹ while its BITs with Denmark and Switzerland also specifically require that Contracting Parties first attempt to resolve disputes through negotiations.⁴³⁰

Similarly, Uganda's BITs with the UK, France and its Model BIT require that Contracting parties first attempt to resolve disputes through diplomatic channels.⁴³¹ If these attempts fail, Contracting Parties can then agree to submit the dispute to arbitration.⁴³² Some BITs, like those with France and Denmark, include a six-month timeframe for amicable settlement before arbitration can be pursued, while others do not specify such a time limit.⁴³³

Once Contracting Parties refer a dispute to arbitration, a Tribunal is formed composing of two members, one appointed by each Contracting Party and a third member, who serves as the chairman, appointed by the other two members.⁴³⁴ If the Contracting Parties cannot make

⁴²⁶ Uganda's BITs with France, Denmark and UK contain both the SSDS and ISDS provisions.

⁴²⁷ Germany – Uganda BIT (1966) art 11; Switzerland – Uganda BIT (1971) art 11.

⁴²⁸ J Pohl, K Mashimo & A Nohen 'Dispute settlement provisions in international investment agreements: A large sample survey' (2012) *OECD Working Papers on International Investment* 7.

⁴²⁹ Germany – Uganda BIT (1966) art 11(1); Switzerland – Uganda BIT (1971) art 11.

⁴³⁰ Switzerland – Uganda BIT (1971) art 11; Denmark – Uganda BIT (2001) art 10(1).

⁴³¹ Uganda – UK BIT (1998) art 9(1); France – Uganda BIT (2003) art 10(1); Uganda Model BIT (2003) art 11(1).

⁴³² Germany – Uganda BIT (1966) art 11(2); Switzerland – Uganda BIT (1971) art 11; France – Uganda BIT (2003) art 10(2); Denmark – Uganda BIT (2001) art 10(2); Uganda – UK BIT (1998) art 10(2).

⁴³³ Denmark – Uganda BIT (2001) art 10(2); France – Uganda BIT (2003) art 10(2).

⁴³⁴ Uganda Model BIT (2003) art 11(3); Germany – Uganda BIT (1966) art 11(3); Switzerland – Uganda BIT (1971) art 11; Uganda – UK BIT (1998) art 9(3); Denmark – Uganda BIT (2001) art 10(3); France – Uganda BIT (2003) art 10(3).

these appointments, the President or Vice President of the International Court of Justice (ICJ) is empowered to do so.⁴³⁵ Notably, Uganda's BIT with France also allows the Secretary-General of the UN to make these appointments if Contracting Parties are unable to agree.⁴³⁶

Conversely, ISDS mechanisms are typically invoked when a foreign investor and host-country are in dispute, often allowing the investor to bypass domestic courts and bring the case directly to an IAT.⁴³⁷ Only Uganda's BITs with France, Denmark and the UK as well as its Model BIT contain ISDS provisions. For example, Uganda's BIT with the UK requires that Parties first attempt to resolve the dispute through local remedies, within three months before escalating it to an IAT.⁴³⁸

Uganda's BIT with Denmark and France requires Parties to first attempt to settle investment disputes amicably, where possible – or in the case of the Model BIT, through negotiations or conciliation, before submitting the case to an IAT.⁴³⁹ In contrast, Uganda's BIT with the UK requires that Parties initially seek resolution through domestic remedies, including negotiation and conciliation, before advancing to arbitration.⁴⁴⁰

Once local or alternative dispute resolution efforts fail, Uganda's BIT with the UK allows disputes to be escalated to the ICSID Tribunal for either conciliation or arbitration, while the BIT with France permits arbitration only.⁴⁴¹ Uganda's BIT with Denmark offers multiple arbitration options, including the ICSID Centre, the Additional Facility of ICSID, an ad hoc Tribunal set up in accordance with the UNCITRAL Rules or the International Chamber of Commerce (ICC).⁴⁴²

⁴³⁵ Uganda Model BIT (2003) art 11(3); Germany – Uganda BIT (1966) art 11(4); Switzerland – Uganda BIT (1971) art 11; Uganda – UK BIT(1998) art 9(4); Denmark – Uganda BIT (2001) art 10(4); Uganda Model BIT (2003) art 11(3); Germany – Uganda BIT (1966) art 11(3); Switzerland – Uganda BIT (1971) art 11; Uganda – UK BIT(1998) art 9(3); Denmark – Uganda BIT (2001) art 10(3).

⁴³⁶ France – Uganda BIT (2003) art 10(4).

⁴³⁷ Canada's Coalition to end Global Poverty 'Bilateral Investment Treaties: A Canadian Primer' available at http://www.ccic.ca/files/en/what_we_do/trade_2010-04_investment_treaties_primer_e.pdf (accessed 31 May 2022).

⁴³⁸ Uganda – UK BIT (1998) art 8(3).

⁴³⁹ Denmark – Uganda BIT (2001) art 9(1); France – Uganda BIT (2003) art 7; Uganda Model BIT (2003) art 7(1).

⁴⁴⁰ Uganda – UK BIT (1998) art 8(3).

⁴⁴¹ Uganda – UK BIT (1998) art 8(3); France – Uganda BIT (2003) art 7.

⁴⁴² Denmark – Uganda BIT (2001) art 9(2)(a) – (d).

In recent years, ISDS cases have surged bringing the total number of publicly known cases to 1 332 in 2024.⁴⁴³ This trend is particularly concerning for developing countries, as many of these disputes target them, including African countries.⁴⁴⁴ According to UNCTAD, African countries have appeared as respondents in 158 ISDS between 1959 and 2023,⁴⁴⁵ with Egypt facing the most, followed by Algeria.⁴⁴⁶ Moreover, the majority of these cases have been brought under old-BITs.⁴⁴⁷

Uganda has also faced ISDS claims, including three cases under the ICSID forum, all of which were discontinued in accordance with ICSID Arbitration Rule 43(1).⁴⁴⁸ Notably, only one of these cases, *Total E&P v Uganda*,⁴⁴⁹ was brought under a BIT, specifically the Netherlands – Uganda BIT,⁴⁵⁰ which has since been terminated.⁴⁵¹ Critics argued that the former BIT gave undue protection to foreign investors at the cost of local people’s environment and livelihoods.⁴⁵²

Regardless, the rise in ISDS cases highlights the vulnerability of developing countries, including Uganda, to international arbitration proceedings that may challenge their ability to implement domestic policies.⁴⁵³ The ISDS provisions in Uganda’s BITs allow foreign investors to bypass local courts, undermining the country’s sovereignty and judiciary.⁴⁵⁴ These

⁴⁴³ UNCTAD ‘Trends in the investment treaty regime and reform toolbox for the energy transition’ *IIA Issues Note* 21 August 2023 1; UNCTAD ‘Investment Policy Hub’ available at

<https://investmentpolicy.unctad.org/investment-dispute-settlement> (accessed on 10 September 2024);

⁴⁴⁴ T Chidede ‘Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol’ (2018) *Tralac*.

⁴⁴⁵ UNCTAD ‘Investment Policy Hub’ available at <https://investmentpolicy.unctad.org/investment-dispute-settlement> (accessed 21 November 2023).

⁴⁴⁶ Investment Policy Hub available at <https://investmentpolicy.unctad.org/investment-dispute-settlement> (accessed 10 May 2022).

⁴⁴⁷ UNCTAD ‘Trends in the investment treaty regime and reform toolbox for the energy transition’ (2023) 2 *IIA Issues Note* 1.

⁴⁴⁸ This Rule has since changed to ICSID Arbitration Rule 55(1), which provides that: ‘if the parties notify the Tribunal that they have agreed to discontinue the proceeding, the Tribunal shall issue an order taking note of the discontinuance.’

⁴⁴⁹ *Total E&P v Uganda* (ICSID Case No. ARB/15/11).

⁴⁵⁰ Netherlands – Uganda BIT (2000).

⁴⁵¹ B-J Verbeek & R Knottnerus ‘The 2018 draft Dutch Model BIT: A critical assessment’ *IISD Investment Treaty News* 30 July 2018 available at <https://www.iisd.org/itn/en/2018/07/30/the-2018-draft-dutch-model-bit-a-critical-assessment-bart-jaap-verbeek-and-roeline-knottnerus/> (accessed 12 September 2024).

⁴⁵² Both ENDS ‘Uganda terminates investment treaty’ available at <https://annualreport.bothends.org/uganda-terminates-investment-treaty/> (accessed 14 September 2024).

⁴⁵³ Vandevelde ‘Bilateral Investment Treaties: History, Policy and Interpretation’ *Thomas Jefferson School of Law* (2010) 351.

⁴⁵⁴ S Mutsau *Revisiting Bilateral Investment Treaties in the 21st Century: A Kenyan and South African Experience* (2017) 20.

provisions pose a significant risk as the decisions made by IATs often impact public policies without considering domestic interests or legal frameworks.⁴⁵⁵

Arbitrators, who are not elected by the people of the host-country, wield significant power in these cases, potentially influencing regulatory policies in areas such as environmental protection, labour rights and social welfare. Allowing Uganda's courts to handle disputes first would enable judges, who are more familiar with the country's legal system and its policy priorities, to interpret and apply its laws.

This is to ensure that disputes are resolved in line with Uganda's domestic interests and legal norms, rather than being subjected to the broad discretion of international arbitrators.⁴⁵⁶ Requiring decisions to go through local remedies first would benefit Uganda's sustainable development objectives by giving national courts the authority to interpret and enforce laws designed to promote social, environmental and economic sustainability.

Domestic judges are more likely to consider broader national development goals, such as protecting natural resources, promoting inclusive growth and ensuring equitable social outcomes, while arbitrators have been known to focus solely on the protection of investor rights, often prioritising financial compensation over sustainable development considerations.⁴⁵⁷

By allowing local courts to address disputes in the first instance, Uganda can better balance the interests of investors with the need to achieve long-term sustainability goals. Additionally, the incorporation of local remedies and alternative dispute resolution (ADR) mechanisms such as conciliation and mediation, in Uganda's future BITs would align with its domestic investment laws, including its ICA -19 and Arbitration and Conciliation Act (ACA).⁴⁵⁸

⁴⁵⁵ UNCTAD *Investor-State dispute settlement and impact on investment rulemaking* (2007) 34.

⁴⁵⁶ Krajewski & Hoffman (2019) 2; UNCTAD 'Trends in the investment treaty regime and reform toolbox for the energy transition' (2023) 2 *IIA Issues Note* 1.

⁴⁵⁷ P Draper 'Africa: South Africa's Termination of Bilateral Investment Treaties Featured' available at <http://allafrica.com/stories/201309301804.html> (accessed 31 May 2022); *Philip Morris v Ukraine* (ICSID Case No. ARB/21/3), *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7), *Philip Morris v Australia* (UNCITRAL, PCA Case No. 2012-12); *Vattenfall v Germany* (ICSID Case No. ARB/12/12); Chapter 2 'Issues with the current IIA regime' para 2.2 above.

⁴⁵⁸ Uganda ICA – 19 (2019) sec 25(1) – (2); Uganda Arbitration and Conciliation Act of 2000.

These laws promote negotiation and amicable settlement of disputes, which not only help to preserve Uganda's regulatory space, but also foster a more stable investment climate that encourages responsible and sustainable development. Overall, this approach would ensure that Uganda retains greater control over the interpretation of its laws and is better positioned to align its investment policies with its sustainable development objectives.

Uganda's in-force and Model BITs have several shortcomings. Its BITs with Germany and Switzerland do not have ISDS provisions. As such, investors do not have the option to seek redress directly if a dispute arises. Moreover the ISDS provisions in the other three in-force and Model BITs allow foreign investors to bypass local courts, undermining its sovereignty and right to regulate in the public interest.

There is also a notable absence of provisions that align investor rights with obligations related to sustainable development, limiting Uganda's capacity to implement necessary policies without fear of costly arbitration claims. To reform these BIT, future Model BITs should require investors to exhaust local remedies before resorting to IATs, ensuring that Ugandan courts and tribunals have the opportunity to interpret the law.

Additionally, incorporating investor obligations concerning environmental and social governance, emphasizing alternative dispute resolution mechanisms, and establishing clear timelines for dispute resolution would create a more balanced framework. Such reforms would not only protect Uganda's interests but also promote sustainable development by aligning investment with the country's long-term policy objectives.

4.3. Duration, termination and sunset clauses

The termination of BITs has become a growing concern as countries reassess their costs and benefits.⁴⁵⁹ Many nations now recognise the need for reform, as older IIAs, particularly BITs, are increasingly perceived as unbalanced and inadequate.⁴⁶⁰ BIT termination is governed by CIL

⁴⁵⁹ N Bernasconi-Osterwalder & S Brewin with MD Brauch & S Nikiéma 'Terminating a Bilateral Investment Treaty' (March 2020) *IISD Best Practices Series* 1.

⁴⁶⁰ Bernasconi-Osterwalder *et al* (March 2020) 1.

and the treaty itself. Under Article 54 of the Vienna Convention, a treaty can be terminated either according to its provisions or by mutual consent of the Parties involved.⁴⁶¹

There are two primary models for BIT termination: the ‘tacit renewal’ and ‘fixed term’ clauses. In the tacit renewal model, a BIT remains in force for a specified period and is automatically renewed upon completion of the initial period, unless a Party notifies its intention to terminate.⁴⁶² In contrast, a fixed-term model allows termination after the initial term has expired, with a written notification from either Party. The decision to terminate can be either mutual or unilateral, with or without plans to renegotiate a new agreement.⁴⁶³

Where a new BIT is negotiated, Contracting Parties may opt to replace the old BIT without any time gap, or agree that the old BIT be terminated first and subsequently be replaced with the new BIT.⁴⁶⁴ In 2017, Uganda unilaterally terminated its BIT with Netherlands, a decision which the Dutch government later accepted.⁴⁶⁵ The two governments agreed to negotiate a new agreement to replace the old one, but at the time of writing, this has yet to happen.⁴⁶⁶

A sunset clause—also known as a survival clause—ensures that certain provisions of a BIT, such as those relating to ISDS, FET and MFN status, remain in force for a defined period (usually 10 – 20 years) after the treaty’s formal termination.⁴⁶⁷ Its purpose is to protect the legal expectations of investors when they make investments, especially long-term ones, which tend to extend beyond the initial validity period of the BIT.⁴⁶⁸

Without a sunset clause, existing investments lose protection immediately after the BIT is terminated, leaving investors vulnerable.⁴⁶⁹ Sunset clauses provide a transitional period,

⁴⁶¹ Vienna Convention (1969) art 54(a) and (b).

⁴⁶² Bernasconi-Osterwalder *et al* (March 2020) 2.

⁴⁶³ Bernasconi-Osterwalder *et al* (March 2020) 3.

⁴⁶⁴ Bernasconi-Osterwalder *et al* (March 2020) 3.

⁴⁶⁵ Bart-Jaap Verbeek & Roeline Knottnerus ‘The 2018 draft Dutch Model BIT: A critical assessment’ IISD Investment Treaty New 30 July 2018 available at <https://www.iisd.org/itn/en/2018/07/30/the-2018-draft-dutch-model-bit-a-critical-assessment-bart-jaap-verbeek-and-roeline-knottnerus/> (accessed 12 September 2024).

⁴⁶⁶ ‘Uganda terminates investment treaty: Time for a new and better agreement with the Netherlands’ available at <https://annualreport.bothends.org/uganda-terminates-investment-treaty/> (accessed 20 November 2023).

⁴⁶⁷ N Lavranos & A Willcocks ‘Sunset Clauses’ (2023) available at <https://jusmundi.com/en/document/wiki/en-sunset-clause> (accessed 11 November 2023).

⁴⁶⁸ Lavranos & Willcocks (2023).

⁴⁶⁹ Lavranos & Willcocks (2023).

allowing investors time to adjust and take appropriate measures following the termination of a BIT. These clauses also ensure that investors can continue to access the dispute settlement mechanisms outlined in the BIT.⁴⁷⁰

Even after termination, an investor can still file a claim under the treaty, provided their investment was made before the treaty ended, offering continued recourse for grievances during the sunset period. While the inclusion of sunset clauses is standard in many BITs, Contracting Parties can agree to amend or remove them before terminating the BIT.⁴⁷¹ This would require both Parties to engage in negotiations and mutually agree to revise the terms of the BIT, including the sunset clause.⁴⁷²

For instance, when Indonesia and Argentina agreed to terminate the BIT between them, they mutually agreed to neutralize the sunset clause before termination.⁴⁷³ In effect, the sunset clause no longer confers residual protection for investments that had been established prior to the termination of the Indonesia – Argentina BIT.⁴⁷⁴ Moreover, Ecuador, which terminated 16 of its BITs in 2017, managed to negotiate the waiver or reduce the duration of the sunset clauses in some of these treaties.⁴⁷⁵

The country did this to avoid prolonged investor-State disputes, while shifting focus towards establishing a new investment policy framework.⁴⁷⁶ To ensure that foreign investors remain

⁴⁷⁰ Lavranos & Willcocks (2023).

⁴⁷¹ Lavranos & Willcocks (2023).

⁴⁷² Lavranos & Willcocks (2023).

⁴⁷³ Lavranos & Willcocks (2023); [bilaterals.org](https://www.bilaterals.org/?indonesia-ramps-up-termination-of) 'Indonesia ramps up termination of BITs – and kills survival clause in one such treaty – but faces new \$600 mil. claim from Indian mining investor' (20 November 2015) available at <https://www.bilaterals.org/?indonesia-ramps-up-termination-of> (accessed 31 May 2022).

⁴⁷⁴ Indonesia – Argentina BIT (1995).

⁴⁷⁵ Ecuador managed to negotiate the waiver of the sunset clauses in its BITs with Uruguay, the Dominican Republic and Guatemala – J Jaramillo & C Muriel-Bedoya 'Ecuadorian BITs' termination revisited: Behind the Scenes' *Kluwer Arbitration Blog* 26 May 2017 available at <https://arbitrationblog.kluwerarbitration.com/2017/05/26/ecuadorian-bits-termination-revisited-behind-scenes/> (accessed 31 May 2022); 'Ecuador denounces its remaining 16 BIT and publishes CAITISA audit report' *Investment Treaty News* 12 June 2017 available at <https://www.iisd.org/itn/en/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report/> (accessed 31 May 2022).

⁴⁷⁶ Ecuador managed to negotiate the waiver of the sunset clauses in its BITs with Uruguay, the Dominican Republic and Guatemala – J Jaramillo & C Muriel-Bedoya 'Ecuadorian BITs' termination revisited: Behind the Scenes' *Kluwer Arbitration Blog* 26 May 2017 available at <https://arbitrationblog.kluwerarbitration.com/2017/05/26/ecuadorian-bits-termination-revisited-behind-scenes/> (accessed 31 May 2022); 'Ecuador denounces its remaining 16 BIT and publishes CAITISA audit report' *Investment Treaty News* 12 June 2017 available at <https://www.iisd.org/itn/en/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report/> (accessed 31 May 2022).

protected after the termination of a BIT (including its sunset clauses), countries may negotiate a ‘transitional’ agreement such as a Model BIT, or offer other forms of legal protection for existing investment, such as replacing the BIT with domestic laws.

For instance, when India terminated several of its BITs, it developed a new Model BIT to form the basis of future BIT negotiations.⁴⁷⁷ Similarly, South Africa terminated its BITs in 2015, however, it enacted the Protection of Investment Act, which provides legal recourse for foreign investors in the absence of BITs.⁴⁷⁸ In recent years, there has also been a growing trend of terminating intra-regional BITs and their sunset clauses, replacing BIT protections with regional investment treaty frameworks.

For instance, on 5 May 2020, 23 European Union (EU) countries signed an agreement to terminate all intra-EU BITs, which took effect on 29 August 2020.⁴⁷⁹ This Agreement covers around 130 intra-EU BITs (Annex A), making their sunset clauses invalid for future arbitration proceedings.⁴⁸⁰ Similarly, once the AfCFTA’s Protocol on Investment enters into force, African State Parties will be required to terminate all their intra-African BITs, including their sunset clauses, and will not be allowed to conclude new BITs among themselves.⁴⁸¹

Table 1 below, shows that all of Uganda’s BITs contain duration, termination and sunset clauses.

Table 1: Initial duration and sunset period of Uganda’s BITs.

BIT	Date of Signature	Date of Entry into Force	Initial Period of Duration	Period of Sunset Clause
Germany – Uganda	29/11/1966	19/08/1968	10 years	20 years
Switzerland – Uganda	23/08/1971	08/05/1972	5 years	10 years
UK – Uganda	24/04/1998	24/04/1998	10 years	20 years
Denmark - Uganda	26/11/2001	19/10/2005	10 years	10 years

⁴⁷⁷ India Model BIT (2015).

⁴⁷⁸ South Africa Protection of Investment Act of 2015 sec 13.

⁴⁷⁹ Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (SN/4656/2019/INIT).

⁴⁸⁰ Agreement for the termination of intra-EU BITs (2019) Annex A & art 2.

⁴⁸¹ AfCFTA Protocol on Investment (2023) art 49(1) – (2).

France - Uganda	03/01/2003	20/12/2004	20 years	20 years

Source: UNCTAD Investment Policy Hub

Uganda's BITs with Germany, UK and Denmark were originally concluded with an initial term of 10 years, all of which have since lapsed.⁴⁸² The BIT with France, which had a 20-year initial duration, also lapsed in 2024. Uganda may now terminate all these treaties either unilaterally or by mutual consent, provided that it gives the other Contracting party at least one year's notice.⁴⁸³ Similarly, Uganda's BIT with Switzerland had an initial term of five years and has likewise expired; it may be terminated with six months' notice.⁴⁸⁴

Uganda has not yet issued notice for the termination of any of its existing BITs whose initial validity periods have already lapsed. This means that, despite the expiry of the initial treaty terms, these agreements continue to remain in force under their respective renewal or survival provisions. As a result, the obligations and protections granted to foreign investors under these treaties—such as access to ISDS mechanisms and substantive protections like FET—remain legally binding until formal termination procedures are initiated and the required notice periods elapse.

Furthermore, both the Swiss and French BITs contain sunset clauses of 10 and 20 years, respectively.⁴⁸⁵ This means that investments made while these treaties were in force will continue to benefit from treaty protections for those additional periods following termination. In particular, the French BIT guarantees that such protections will remain in effect for 20 years after termination.⁴⁸⁶

⁴⁸² Germany – Uganda BIT (1966) art 14(2); Uganda – UK BIT (1998) art 14;

⁴⁸³ Germany – Uganda BIT (1966) art 14(2); Uganda – UK BIT (1998) art 14; Denmark – Uganda BIT (2001) art 16(1).

⁴⁸⁴ Switzerland – Uganda BIT (1971) art 13.

⁴⁸⁵ Switzerland – Uganda BIT (1971) art 13; France – Uganda BIT (2003) art 11.

⁴⁸⁶ France – Uganda BIT (2003) art 11; also see Investment Policy Hub, 'Uganda' available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/218/uganda?type=bits> (accessed 31 May 2022).

Furthermore, both the Swiss and French BITs include sunset clauses of 10 and 20 years, respectively,⁴⁸⁷ which means that investments made while these treaties were in force will continue to be protected for those additional termination periods. The French BIT's sunset period will also apply to investments for 20 years after the date of its termination unless Contracting parties agree otherwise.⁴⁸⁸

Evidently, the duration of Uganda's BITs is extensive, with some treaties remaining in force for decades and incorporating prolonged sunset clauses that extend investor protections well beyond the treaties' formal termination. This extended timeframe significantly constrains Uganda's ability to revise or modernise its investment policy framework to reflect shifting national development priorities and the global move towards more sustainable and balanced investment regimes.

Moreover, these extended durations and sunset clauses lock the country into outdated treaties that do not adequately address present-day realities such as environmental protection, social equity and responsible investment. While they were designed to protect existing investors during the transitional phase, sunset clauses disproportionately favour investor interests, preventing Uganda from pursuing necessary regulatory reforms.

To adopt a more balanced and adaptable investment treaty framework, Uganda should consider initiating the termination of its in-force BITs and revising its Model BIT. Future treaties should be renegotiated with shorter initial durations and reduced sunset periods. This approach would allow for more frequent reviews and timely renegotiations, enabling Uganda to better align its investment policy with evolving national priorities, global best practices, and sustainable development objectives.

The country should also negotiate to waive the application of the sunset clauses in its current in-force BITs in order to shift towards establishing a new sustainable investment policy framework. Since Uganda's national investment policy framework already protects foreign investments, giving them access to both domestic and international dispute settlement

⁴⁸⁷ Switzerland – Uganda BIT (1971) art 13; France – Uganda BIT (2003) art 11.

⁴⁸⁸ France – Uganda BIT (2003) art 11; also see Investment Policy Hub, 'Uganda' available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/218/uganda?type=bits> (accessed 31 May 2022).

options, it is sufficient to protect their interests during the transitional period of renegotiating these BITs.

4.4. Sustainable development provisions

Notably, Uganda's in-force and Model BITs lack provisions addressing sustainable development, which poses significant challenges in aligning foreign investment practices with national development goals. The absence of explicit investor obligations to comply with the laws of the host-country creates a regulatory gap, as foreign investors may not feel compelled to adhere to local legal frameworks (as was the *Total E&P* and *Tullow* cases), undermining Uganda's sovereignty and its ability to regulate investment in the public interest.

Uganda's BITs currently lack provisions that explicitly mandate investors to respect key public international laws, including those related to human rights, environmental protection, and health and labour rights. This omission creates a significant accountability gap, as investors may not be compelled to adhere to international standards or national legal frameworks, which can lead to violations affecting local communities and the environment.

Without these legal safeguards in place, foreign investors could potentially engage in practices that degrade natural resources, exploit labour, or infringe on the rights of local populations, with little recourse for the affected parties. This regulatory vacuum undermines Uganda's ability to enforce responsible business conduct, leaving it vulnerable to investment practices that may be detrimental to its long-term social and environmental objectives.

Furthermore, by failing to ensure that investors uphold fundamental labour rights, Uganda's BITs risk facilitating labour exploitation and abuse, contrary to both national and international efforts to promote decent work conditions. Incorporating sustainable development provisions into Uganda's BITs, such as those requiring compliance with local laws, respect for human rights, and adherence to labour standards, would enhance the framework governing foreign investment, ensuring that FDI contributes positively to Uganda's social, economic and environmental landscape, fostering a more equitable and sustainable future.

4.5. Conclusion

Chapter Four analysed the key provisions of Uganda's in-force and Model BITs, with the purpose of identifying areas that could be problematic and offering solutions to align these provisions with sustainable development objectives. The analysis revealed that Uganda's BITs preambles predominantly followed a conventional framework focused on economic cooperation and favourable investment conditions, often neglecting sustainable development and public policy objectives.

This narrow perspective could complicate ISDS cases due to the lack of clear public policy language, hindering the enforcement of sustainable practices. To enhance the alignment of BITs with Uganda's development aspirations, the chapter suggests incorporating explicit commitments to sustainable development within preambles, thereby creating a balanced approach that prioritises both investment protection and public policy goals.

The study also examined the scope and definitions of 'investor' and 'investment' within Uganda's BITs, finding that their broad definitions could lead to the inclusion of non-beneficial short-term financial instruments, like portfolio investments, which do not contribute to local economic growth. Furthermore, these current definitions fail to adequately address dual nationality and permanent residency issues, increasing the risk of treaty shopping.

In order to better serve sustainable development, the chapter recommends adopting more closed definitions that limit protection to FDI and specifying criteria such as minimum capital commitments and local contributions. By addressing these gaps, Uganda could strengthen its investment framework, ensuring that only genuinely economically linked investors benefit from protections while supporting local development.

Regarding FET provisions, the analysis highlighted the challenges posed by broad formulations that can expose Uganda to ISDS claims. The varying interpretations of FET across treaties complicate the balance between investor protection and regulatory autonomy. The chapter therefore advocates for clearer definitions of FET that consider Uganda's socio-economic context, allowing for necessary regulatory actions without incurring excessive legal repercussions.

Additionally, the FPS provisions within Uganda's BITs were analysed, with recommendations to clarify the FPS scope, focusing on physical protection as opposed to 'full' protection and incorporating due diligence principles. Such reforms would align Uganda's BITs with international standards while minimising liabilities from factors beyond its control. The chapter also discussed the implications of the MFN treatment and NT provisions, suggesting that clearer definitions and limitations could mitigate risks like 'treaty shopping.'

Furthermore, it identified the need to revise provisions on expropriation and compensation to establish explicit definitions and equitable compensation methodologies that reflect international norms. Additionally, inconsistencies in the transfer of funds provisions and the dispute settlement mechanisms were addressed, recommending closed structures for protected transfers and a balance between ISDS and local remedies.

The analysis underscored the necessity for Uganda's BITs to include commitments to sustainable development, such as compliance with local laws and labour standards, to ensure that foreign investments contribute positively to the country's social, economic, and environmental landscape.

Lastly, the analysis examined the duration, termination and sunset provisions of these treaties, revealing that lengthy durations and extended sunset clauses limited Uganda's ability to adapt investment policies to contemporary challenges like environmental sustainability and social equity, ultimately favouring investor interests over regulatory autonomy and development goals.

With many initial BIT durations expired, Uganda has the opportunity to terminate these treaties and create a more flexible investment framework. By revising future Model BITs to shorten durations and sunset periods and negotiating waivers for existing clauses, Uganda can align its investment policies with national priorities, supporting sustainable development while safeguarding investor interests—reforms essential for establishing a balanced investment environment that benefits both investors and the country's long-term development objectives.

Chapter Five: Reform options to integrate sustainable development into Uganda's bilateral investment treaties

5. Introduction

Chapter Five of this thesis focuses on the reform of Uganda's bilateral investment treaties (BITs) system to better align them with national and sustainable development objectives. As explored in Chapter Four, Uganda's existing and Model BITs, much like the old-generation BITs across the African continent, were designed by capital-exporting developed countries with a primary focus on investment protection.

These Agreements neglect sustainable development considerations, creating vulnerabilities to investor-State dispute settlement (ISDS) claims and leaving the country exposed to obligations that undermine its regulatory autonomy and long-term development objectives. Uganda's current BIT framework is marked by outdated provisions that do not reflect the country's evolving socio-economic priorities, including the need for investments that foster social equity and environmental sustainability. As such, the necessity for reform is evident.

Chapter Four recommended that Uganda terminate its current BITs due to their incompatibility with modern development priorities. Chapter Five will therefore explore how Uganda can undertake the necessary reforms. To address these challenges, this chapter will explore different reform strategies adopted by other countries, particularly focusing on South Africa's approach, which terminated outdated BITs and enacted domestic legislation aimed at balancing investment protection with sustainable development.

In addition, this chapter will review examples of modern investment agreements, including the Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (Protocol on Investment or the Protocol),¹ the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area (CCIA) Agreement, the World Trade Organisation's (WTO) Investment Facilitation for Development (IFD) Agreement and various

¹ Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (2023) STC/Leg/Exp (Protocol on Investment or the Protocol).

Model BITs, such as the Southern African Development Community (SADC) and East African Community (EAC) Model BITs, to identify best practices for Uganda.

Drawing on international frameworks, such as the United Nations Conference on trade and Development (UNCTAD)'s Investment Policy Framework for Sustainable Development (IPFSD) and the Commonwealth Guide for Developing Country Negotiators (Commonwealth Guide), this chapter will propose a draft Model BIT designed to address the gaps identified in Uganda's current investment treaty framework.

In doing so, it will provide policymakers with a foundational framework for negotiating future treaties, ensuring that Uganda's investment regime aligns with both national priorities and international sustainability standards.

5.1. Reform strategies: Integrating sustainable development into Uganda's bilateral investment treaty system

UNCTAD suggests several options for countries to reform their investment regimes, such as amending outdated treaties, terminating unratified BITs and replacing old agreements with modern ones that reflect sustainable development goals. Uganda currently has several unratified and outdated BITs that favour foreign investors, restrict regulatory autonomy, and lack provisions aligned with sustainable development.

This section explores strategies for Uganda to reform its BITs, proposing that it terminates unratified treaties, replaces outdated ones, and develops a new Model BIT focused on sustainable development. South Africa's approach, where it terminated outdated BITs and enacted domestic legislation, serves as a valuable case study for Uganda, which has similarly enacted its Investment Code Act (ICA – 19).

However, Uganda's ICA – 19 lacks key sustainable development provisions, reinforcing the need for BITs to fill gaps in areas like labour rights, environmental standards and regulatory flexibility. BITs offer benefits that domestic laws cannot fully provide, such as legal certainty for foreign investors, reciprocal protection for Ugandan investors abroad and the ability to foster foreign direct investment (FDI) from outside Africa.

For a least developed country (LDC) like Uganda, BITs can attract the necessary capital and expertise to drive economic growth and achieve sustainable development goals (SDGs). This section also draws lessons from modern IIAs and development frameworks like the Commonwealth Guide which focus on balancing investor protection with host-state regulatory autonomy and provide guidance on aligning investment agreements with sustainability objectives.

Through these insights, the section outlines a strategy for Uganda to reform its BIT regime, proposing a new Model BIT that promotes FDI while contributing positively to Uganda's social, economic, and environmental development.

5.1.1. Termination of old-BITs: A case of South Africa

Since its independence, South Africa has signed 50 BITs of which 12 have come into force to date.² The first post-apartheid BIT, signed with the United Kingdom (UK) in 1994, was based on a draft presented to the outgoing apartheid government, which had accepted it without further negotiation.³ The UK was concerned that South Africa's new government might expropriate British investments.⁴

This led to the use of the UK's draft Model BIT, based on the Organisation for Economic Corporation and Development (OECD) Model, as South Africa's template for future BITs.⁵ South Africa used this Model to negotiate a further 46 BITs, primarily with European countries, to signal its openness to foreign investment after years of economic isolation due to apartheid-related sanctions.⁶

However, these broad and vaguely worded BITs provided strong protections for foreign investors and lacked provisions on host-country rights, investor obligations and sustainable

² UNCTAD, 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa?type=bis> (accessed 10 November 2023).

³ R Williams, 'Nothing sacred: Developing countries and the future of international investment treaties' *IISD* (2009) 2.

⁴ Williams (2009) 2.

⁵ M Mossallam 'Process matters: South Africa's experience exiting its BITs' (2015) 97 *GEG working paper* 7.

⁶ Williams (2009) 2; Department of Trade and Industry (DTI) 'Bilateral Investment Treaty Policy Framework Review: Government Position Paper' (2009) 5; J Burton 'Sanctions will Exacerbate Apartheid' (1986) 7 *Economic Affairs* 22; OECD *OECD-South Africa investment policy dialogue: Self-assessment of South Africa's investment regime in relation to the OECD Codes of Liberalisation and the principle of National Treatment* (2014) 15.

development.⁷ Despite its growing economic role as a leading capital importer and exporter in Africa,⁸ South Africa remained plagued by pervasive poverty and high income inequality.⁹ In response, the government introduced the Broad-Based Black Economic Empowerment (BBBEE) Act in 2003.¹⁰

The BBBEE Act aimed to address apartheid-era inequalities by providing economic opportunities to historically disadvantaged South Africans (HDSAs), including Africans, Coloureds and Indians, regarding employment, equity, skills development, ownership, management, socioeconomic development, enterprise development and preferential procurement measures.¹¹

Alongside this, the Mineral and Petroleum Resources Development (MPRD) Act and the Broad-based Socio-Economic Empowerment Charter of the South African Mining Industry (Mining Charter) were enacted to ensure that HDSAs could participate in and benefit from the exploitation of South Africa's mineral resources.¹² These policies imposed compulsory equity divestiture requirements with respect to investors' shares in certain mining companies.¹³

These policies also set frameworks for HDSA inclusion in the mining industry, mandating the Minister of Minerals and Energy to develop a broad-based socioeconomic empowerment charter,¹⁴ aimed at setting the framework, targets and time-tables for effecting HDSA's entry into the mining industry.¹⁵ However, these goals were not reflected in South Africa's earlier BITs, which lacked alignment with the country's socio-economic development strategies.

⁷ Mossallam (2015) 7.

⁸ Mossallam (2015) 3.

⁹ A Wöcke & L Sing 'Inward FDI in South Africa and its Policy Context' (2013) *Vale Columbia Center on Sustainable International Investment*.

¹⁰ Broad-Based Black Economic Empowerment Act of 2003; BBBEE Amendment Act 46 of 2013.

¹¹ OECD OECD-South Africa investment policy dialogue (2004) 30.

¹² Mineral and Petroleum Resources Development (MPRD) Act of 2002 sec 2(d); Broad-based Socio-Economic Empowerment Charter of the South African Mining Industry (the Mining Charter), 2018.

¹³ See <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/262/foresti-v-south-africa> (accessed 20 November 2021).

¹⁴ DG Mlauzi 'Solutions to investor-State dispute settlement: Republic of South Africa *vis-à-vis* Australia' unpublished LLM thesis, University of the Western Cape, 2017 13; South Africa Mining Charter (2018) sec 100(2)(a).

¹⁵ Mlauzi (2017) 13.

In response to these regulations, foreign investors instituted an ISDS case against South Africa (*Foresti v South Africa*) in 2007, where they argued that the country's Mining Charter, requiring a 26 per cent transfer of mining assets to HDSAs, amounted to indirect expropriation and violated the fair and equitable (FET) principle in South Africa's BITs with Belgium-Luxembourg (BLEU) and Italy, which prohibited discrimination.¹⁶

These investors contended that the divestment under this BBBEE policy constituted expropriation, requiring compensation as outlined in South Africa's relevant BITs.¹⁷ The South African Government, however, argued that any differentiation in favour of HDSAs was justified within the government's discretion to determine reasonable and justifiable measures in advancing essential public interests and that its actions did not constitute expropriation as they pursued legitimate public regulatory objectives.¹⁸

Ultimately, a settlement was reached without full trial,¹⁹ with South Africa allowing these foreign investors to obtain new licenses requiring only five per cent divestment instead of the mandated 26 per cent.²⁰ This concession reflected a move away from South Africa's post-apartheid reparation objectives and was likely made to prevent further ISDS claims against the country.²¹

The case highlighted misunderstandings about the BBBEE internationally, with the OECD even observing that such policies, when correctly understood and implemented, could enhance FDI by promoting skills development and economic participation without discriminating based on nationality.²² Evidently, the *Foresti* case underscored the tensions between foreign investor

¹⁶ *Piero Foresti, Laura de Carli and others v Republic of South Africa* (ICSID Case No. ARB(AF)/07/1) para 56 – 8; Italy – South Africa BIT (1997); BLEU – South Africa BIT (1998); Mining Charter (2018) sec 2.1.1.

¹⁷ BLEU – South Africa BIT (1998); Italy – South Africa BIT (1997); *Foresti v South Africa* (ICSID Case No. ARB(AF)/07/1) Award 4 August 2010 para 58.

¹⁸ MF Qumba 'South Africa's move away from international investor-state dispute: a breakthrough or bad omen for investment in the developing world?' (2019) *De Jure Law Journal* 364.

¹⁹ Qumba (2019) 364.

²⁰ TNI 'Foresti vs. South Africa: Measures to remedy discrimination and inequalities' (May 2021) available at <https://www.isds.bilaterals.org/?foresti-vs-south-africa-measures> (accessed 12 May 2022).

²¹ TNI 'Foresti vs. South Africa' (2021)

²² OECD *OECD-South Africa Investment Policy Dialogue* (2014) 39.

protection and South Africa's development goals, particularly with regards to affirmative action.²³

The Foresti case also prompted South Africa to review its BIT policy framework in 2009. The Department of Trade and Industry (DTI) recognised the need for a comprehensive risk assessment due to the growing number of ISDS cases globally.²⁴ The review exposed the biases of old-generation BITs (old-BITs), which favoured foreign investor's rights over legitimate public policy considerations and objectives.²⁵

It was found that South Africa's BITs, based on outdated models, lacked sufficient safeguards to ensure that investment positively contributed to South Africa's SDGs, extended into South Africa's policy space and did not correlate strongly with increased FDI.²⁶ Another contentious issue was having to submit to investor-State disputes at international arbitration tribunals (IATs).²⁷ The review found that the ISDS mechanism opened the door for foreign investors to pursue narrow commercial interests, subjecting public interest matters to unpredictable ISDS cases.²⁸

Following the review, South Africa made three key decisions: to refrain from entering into any more BITs unless there were compelling reasons to do so; to terminate its existing BITs and offer partners a chance to renegotiate them on the basis of a new model; and to develop a new domestic investment law that aligned with the Constitution of South Africa and clarified typical BIT provisions under South African law.²⁹

The review also recommended that reliance on IATs for investor-State disputes be reduced, advocating instead that they be referred to domestic courts – which are independent of public authority and are able to discharge their duties in accordance with the basic principles of good governance – to ensure that public interests were not compromised by unpredictable ISDS

²³ DTI 'Bilateral investment treaty policy framework review: Executive Summary of government position paper' *Government Gazette No. 32386* 7 July 2009.

²⁴ DTI, 'BIT policy framework review' (2009) 5.

²⁵ DTI, 'BIT policy framework review' (2009) 5, 7, 8 & 11.

²⁶ UNCTAD 'Shift African investment towards industry, South African Minister recommends' (2012); DTI, 'BIT policy framework review' (2009) 11 & 22; Mossallam (2015) 4.

²⁷ X Carim 'Lessons from South Africa's BITs review' (2013) 109 *Vale Columbia Center on Sustainable International Investment* 1.

²⁸ Carim, (2013) 1.

²⁹ Carim (2013) 2.

rulings³⁰This shift aimed to balance investor protection with the need to safeguard national regulatory autonomy and uphold constitutional obligations.³¹

Following the *Foresti* case, South Africa terminated its BITs with BLEU and Italy and in 2012, announced the unilateral termination of several other BITs,³² including those with Germany, Netherlands, Spain, Switzerland, Austria and Denmark.³³ The country also introduced the Protection of Investment Act in 2015 (PIA), to regulate both local and foreign investments.³⁴ The efforts to update and modernise South Africa's investment regime received mixed reviews.

While some commentators praised South Africa for taking the initiative to rebalance the rights and obligations of host-countries and foreign investors,³⁵ others, like Peter Leon, were sympathetic to the Government's position, noting that many of South Africa's post-Apartheid BITs had been concluded under conditions of limited legal capacity and external pressure—particularly from the UK.³⁶ In contrast, several European officials criticised the Government's decision to unilaterally terminate its BITs, warning that such actions could undermine investor confidence and deter future investment.³⁷

Although the South African Government recommended renegotiating the terminated BITs, no renegotiations have taken place to date.³⁸ Critics have also argued that the PIA offers foreign investors a lower standard of protection compared to the former BITs.³⁹ Specifically,

³⁰ J Maupin & M Langford 'Submission Concerning the Bilateral Investment Treaty Policy Framework Review Government Position Paper' (2009) 42; Mlauzi (2017) 17.

³¹ J Klaaren & F Adeleke 'SA on the Right Path with New Foreign Investment Law' *Business Day Live* 25 September 2015 available at <http://www.bdlive.co.za/opinion/2015/09/25/sa-on-the-right-path-withnew-foreign-investment-law> (accessed 21 November 2023).

³² UNCTAD *WIR 2013: Global value chains: Investment and trade for development* (2013) 108.

³³ UNCTAD *WIR 2014: Investing in SDGs: An action plan* (2014) 114, fn 54 – It is worth noting that by virtue of survival clauses, 'investments made by investors in South Africa before the BITs' termination will remain protected for another 10 years in the case of Spanish investments (and vice versa), 15 years in the case of Dutch investments and 20 years in the cases of German and Switzerland investments. Investments made by Dutch investors in Indonesia will remain protected for an additional 15 years after the end of the BIT;' UNCTAD *WIR 2015: Reforming international investment governance* (2015) 110.

³⁴ Protection of investment Act (PIA) 22 of 2015.

³⁵ S Woolfrey, 'South Africa's Promotion and Protection of Investment Bill' (2013) *Tralac* available at <https://www.tralac.org/discussions/article/5345-south-africa-s-promotion-and-protection-of-investmentbill.html> (accessed 10 November 2023).

³⁶ Mossallam (2015) 15; Leon, P. (2014).

³⁷ Woolfrey (2013); Mossallam (2015) 15.

³⁸ Carim (2013) 2.

³⁹ Woolfrey (2013).

the Act limits access to international arbitration by requiring foreign investors first exhaust the domestic legal remedies. Only thereafter may investors seek international arbitration and even then, only with express consent of the Government.⁴⁰ Critics highlight that this discretionary power effectively allows the Government to block access to IATs, further diminishing the legal certainty and recourse available to foreign investors under the PIA compared to the BIT regime it replaced.⁴¹

In defence of the PIA, it was argued that the law provided adequate protection for all investors, including foreign ones,⁴² ensuring clarity, transparency around South Africa's domestic investment regime and alignment with South Africa's Constitution, while preserving the Government's right to regulate in the public interest.⁴³ Despite European concerns about the potential negative impact on foreign investment, South Africa's review found no clear correlation between BITs FDI inflows.⁴⁴

The Act, *inter alia*, recognises the importance of investment in creating jobs and fostering economic growth and sustainable development.⁴⁵ It also secures the balance of rights and obligations of investors to increase investment flows, aligns its provisions with those of the Constitution of South Africa and reaffirms the Government's right to regulate in the public interest.⁴⁶

In 2013, the year after South Africa announced its intention to unilaterally terminate its BITs, it received about USD 8.3 billion in FDI flows.⁴⁷ This was actually an increase from the previous year, that had attracted USD 4.5 billion in FDI inflows. FDI inflows decreased to USD 1.7 billion

⁴⁰ PIA (2015) sec 13(5).

⁴¹ Mossallam (2015) 15; DTI, 'BIT policy framework review' (2009) 11.

⁴² Woolfrey (2013); N Greve, 'Investment Bill imposes no new obligations on investors – Davies' *Cremer Media's Engineering News* 4 November 2013.

⁴³ South Africa PIA (2015) preamble; N Greve 'Investment Bill imposes no new obligations on investors – Davies' *Cremer Media's Engineering News* 4 November 2013.

⁴⁴ DTI, 'BIT policy framework review' (2009) 11.

⁴⁵ South Africa PIA (2015) preamble.

⁴⁶ South Africa PIA (2015) preamble.

⁴⁷ UNCTAD *WIR 2017: Investment and the digital economy* (2017) 223; UNCTAD *WIR 2018: Investment and new industrial policies* (2018) 185.

in 2015 then increased slightly to USD 2.2 billion in 2016, decreased again to USD 2 billion in 2017 and so forth.⁴⁸

In 2018, FDI flows increased to USD 5.5 billion, decreasing slightly to 5.11 billion in 2019 and then to USD 3 billion in 2020.⁴⁹ Evidently, until 2021, the country had been unable to achieve the same level or more FDI flows as it had in 2013.⁵⁰ However, FDI jumped to USD 40 billion in 2021 due to a large corporate reconfiguration, regarding a share exchange between Naspers and Prosus in the third quarter of that year.⁵¹

In the same year, new projects were also announced including a USD 4.6 billion and a USD 1 billion projects in energy and greenfield, respectively.⁵² Following this FDI flow hike, FDI flows dropped to USD 9 billion in 2022, then again to USD 5 billion in 2023, returning to the similar levels of FDI flows it had in 2018, prior to the COVID-19 pandemic.⁵³ With the exception of 2021 and 2022, the country has generally witnessed decreasing FDI flows.

Some commentators have also added that the unstable political situation, made visible through discussions on the nationalisation of certain industries as well as the strikes in the mining and automotive sectors created an unfavourable atmosphere for the country.⁵⁴

As previously discussed in Chapter Four, Uganda's in-force and Model BITs are outdated, containing vague provisions that pose similar risks to those experienced by South Africa, such as limiting regulatory autonomy and exposing the country to ISDS claims. Moreover, these treaties favour foreign investors over the public policy interests such as environmental protection and domestic investors and do not reflect Uganda's evolving national development priorities.

However, rather than following South Africa's approach of terminating BITs, this thesis proposes that Uganda terminate and renegotiate its BITs based on a new model BIT. One key reason is south Africa's experience after terminating its BITs. For eight years, the country

⁴⁸ UNCTAD *WIR 2023: Investing in sustainable energy for all* (2023) 197.

⁴⁹ UNCTAD *WIR 2024: Investment facilitation and digital government* (2024) 157.

⁵⁰ UNCTAD *WIR* (2017) 223; UNCTAD *WIR* (2023) 197.

⁵¹ UNCTAD *WIR 2022: International tax reforms and sustainable investment* (2022) 13.

⁵² UNCTAD *WIR* (2022) 13.

⁵³ UNCTAD *WIR* (2024) 157.

⁵⁴ Mossallam (2015) 15.

struggled to regain its 2013 FDI inflows and has faced declining FDI since its brief increase in 2021.⁵⁵

Uganda, being less economically developed and still reliant on external capital to develop infrastructure and critical sectors, cannot afford to see a reduction in FDI. This is more so the case given that the country has witnessed increasing FDI inflows from USD 1.6 billion in 2021 to a record USD 2.9 billion in 2023.⁵⁶ Uganda should carefully consider the risks of deterring foreign investors, particularly those from Europe—given its reliance on FDI, a significant part of which comes from countries with which Uganda currently has old-BITs.⁵⁷

Another reason for Uganda to renegotiate its existing BITs is the regional and global competition for FDI. Even countries like India and Brazil, which had previously experienced significant FDI growth without BITs, have now begun concluding new BITs to bolster investor confidence.⁵⁸ In fact, India has drafted a new sustainable development-oriented BIT to guide the negotiation of its future BITs.⁵⁹

Additionally, Uganda's neighbouring countries, like Kenya, already have BITs in place and attract more FDI, making it essential for Uganda to remain competitive.⁶⁰ Given the country's history of expropriation during the Obote and Amin regimes, BITs also serve to reassure foreign investors by providing legal protections against similar risks.⁶¹ Uganda's high corruption rate creates further investment mistrust in its administrative and judicial systems, making access to IATs essential for safeguarding as well as attracting FDI.⁶²

Furthermore, Uganda's domestic investment law, the ICA – 19, does not yet address the right to regulate in the public interest, perpetuates inconsistencies with other domestic laws and

⁵⁵ UNCTAD *WIR* (2017) 223; UNCTAD *WIR* (2023) 197; UNCTAD *WIR* (2024) 157.

⁵⁶ UNCTAD *WIR* (2024) 157.

⁵⁷ Uganda draft National investment policy (2018); Uganda NDPIII.

⁵⁸ P Cavallo 'Brazil, BITs and FDI: A synthetic control approach' (2019) *The Journal of World Investment and Trade*.

⁵⁹ Indian Model BIT (2018).

⁶⁰ UNCTAD *WIR* (2023) 197; UNCTAD *WIR* (2024) 157; UNCTAD, 'Investment Policy Hub' available at <https://investmentpolicy.unctad.org/> (accessed 10 September 2024).

⁶¹ Chapter 3 'Milton Obote (I) era (1966 – 1971) para 3.1.2 & 'Idi Amin era (1971 – 1979)' para 3.1.3 above.

⁶² Uganda is the 141st least corrupt nation of 180 countries, making it a very corrupt country – Trade Economics 'Uganda corruption rank' available at <https://tradingeconomics.com/uganda/corruption-rank> (accessed 10 September 2024).

does not incorporate sustainable development objectives, making it all the more critical that these goals are reflected in any new and renegotiated BITs. Therefore, in addition to the identified benefits of BITs to a country like Uganda, this thesis adopts the assumption that the BITs can influence an investor's decision to invest in one country over another and can therefore attract more FDI inflows.⁶³

For these reasons, it is recommended that, like South Africa, Uganda unilaterally terminate its in-force BITs and renegotiate its existing BITs on the basis of a new model BIT. These BITs should be renegotiated during their respective notice periods, with the old BITs as well as the Uganda's ICA – 19 continuing to protect foreign investments until they are replaced by the renegotiated BITs. Moreover, Uganda should endeavour to negotiate that the sunset clauses in its old BITs be waived to enable its rapid shift towards establishing a new sustainable investment policy framework.

5.1.2. Integrating sustainable development provisions in a new Ugandan Model BIT

Chapter Four of this study examined Uganda's current and Model BIT general BIT provisions, including the preamble, scope and definitions, as well as the core standards of treatment such as fair and equitable treatment (FET), full protections and security (FPS), most-favoured nation (MFN) treatment and national treatment (NT). Additionally, the analysis examined provisions governing the transfer of funds, dispute settlement mechanisms and clauses related to the duration, sunset periods and termination of treaties.⁶⁴

The study revealed that Uganda's in-force and current Model BITs are outdated, failing to align with the country's evolving national development priorities. Their vaguely worded provisions expose Uganda to significant risk, including ISDS cases, which have led to inconsistent and controversial outcomes that can limit a host-country's ability to regulate in the public interest.⁶⁵

⁶³ Africa and bilateral investment treaties: To 'BIT' or not?' *Polity* 23 July 2014 available at <https://www.polity.org.za/article/africa-and-bilateral-investment-treaties-to-bit-or-not-2014-07-23> (accessed 4 September 2023).

⁶⁴ Chapter 4r 'Analysis of Uganda's bilateral investment treaty-system' paras 4.1 – 4.5 above.

⁶⁵ Chapter 4 'Analysis of Uganda's bilateral investment treaty-system' para 4.5.

The analysis also found that these treaties are disproportionately tilted towards protecting investor rights, often at the expense of public policy interests, have unbalanced rights and obligations between the host-country and foreign investors and lack provisions addressing modern sustainable development concerns, including responsible investment, environmental sustainability and social equity, which are crucial for Uganda's development.⁶⁶

In order to remedy these shortcomings, this section aims to draw from modern international investment agreements (IIAs), model BITs and frameworks to propose key sustainable development provisions that should be integrated into a new Ugandan Model BIT. These provisions not only reflect Uganda's development priorities but also address some of its challenges, like corruption, and ensure that its future BITs are aligned with global development trends.

While there are many relevant provisions that could be incorporated, this section will focus on the core provisions identified in Chapter Four of this study, as well as innovative sustainable development-oriented provisions tailored to Uganda's specific context. A comprehensive Model BIT will be included in Annex A, encompassing these recommended provisions and others, presenting a holistic and modern proposal for Uganda's future investment treaties.

5.1.2.1. Preamble

Uganda's old-BIT preambles commonly emphasise three goals: intensifying economic cooperation, creating favourable conditions for investment and fostering economic prosperity.⁶⁷ The first objective of economic cooperation introduces the treaty as a tool for economic diplomacy.⁶⁸ The second, creating favourable investment conditions, often leads Tribunals to adopt investor-friendly interpretations of treaty provisions, especially when no

⁶⁶ Chapter 4 'Analysis of Uganda's bilateral investment treaty-system' para 4.5.

⁶⁷ UNCTAD *IIA Handbook* (2012) 10; Germany – Uganda BIT (1966) preamble; Switzerland – Uganda BIT (1971) preamble; Uganda – UK BIT (1998) preamble; Denmark – Uganda BIT (2001) preamble; France – Uganda BIT (2003) preamble; Uganda Model BIT (2003) preamble.

⁶⁸ Germany – Uganda BIT (1966) preamble; Switzerland – Uganda BIT (1971) preamble; Uganda – UK BIT (1998) preamble; Denmark – Uganda BIT (2001) preamble; France – Uganda BIT (2003) preamble; Uganda Model BIT (2003) preamble; UNCTAD *IIA Handbook* (2012) 10; Chapter 4 'Preamble' para 4.1.1 above.

exceptions or references to other policy considerations like the right to regulate or environmental protection are included.⁶⁹

The third objective of promoting investment for economic growth tends to prioritise capital flows over broader considerations such as sustainability and public welfare.⁷⁰ As a result, Uganda's BIT preambles lack references to key sustainable development considerations including the right to regulate and social or environmental protections, leaving room for interpretations that could undermine these policy goals.⁷¹

In order to address these gaps, Uganda should reform its BITs by incorporating hortatory language in the preambles that extends beyond investment protection and acknowledges broader development goals. While most modern IIA preambles still reflect such goals, they are now explicitly tied to sustainable development objectives.

For instance, in terms of economic cooperation, the Commonwealth Guide prioritises sustainable development through foreign investment, recognising the need for cooperation between host-countries, home-countries and investors to create equitable and favourable conditions that support development.⁷² Similarly, the EAC Model Investment Treaty's preamble highlights the importance of cooperation between the Parties and their commitment to promoting investment, recognising its potential contribution to sustainable development.⁷³

In terms of creating favourable conditions for investment, many modern IIA preambles now incorporate additional values, committing to sustainable development and guiding the interpretation of Parties' obligations. These values include the protection of health, safety, the environment, human and labour rights, the rights of indigenous people, as well as the

⁶⁹ Germany – Uganda BIT (1966) preamble; Switzerland – Uganda BIT (1971) preamble; Uganda – UK BIT (1998) preamble; Denmark – Uganda BIT (2001) preamble; France – Uganda BIT (2003) preamble; Uganda Model BIT (2003) preamble; UNCTAD *IIA Handbook* (2012) 10; Chapter 4 'Preamble' para 4.1.1 above.

⁷⁰ Germany – Uganda BIT (1966) preamble; Switzerland – Uganda BIT (1971) preamble; Uganda – UK BIT (1998) preamble; Denmark – Uganda BIT (2001) preamble; France – Uganda BIT (2003) preamble; Uganda Model BIT (2003) preamble; UNCTAD *IIA Handbook* (2012) 10; Chapter 4 'Preamble' para 4.1.1 above.

⁷¹ Chapter 4 'Preamble' para 4.1.1 above.

⁷² VanDuzer *et al* (2013) 46 – 7.

⁷³ EAC Model Investment Treaty, preamble.

promotion of democracy and the rule of law.⁷⁴ For instance, the Commonwealth Guide provides that:⁷⁵

... each Party has, in accordance with general principles of international law, the right to pursue its own development objectives and priorities and 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 social and economic policy objectives, including the promotion and protection of human rights, labour rights, the rights of indigenous peoples, and the protection of the environment.

Moreover, the inclusion of labour rights in the preamble is particularly important for a country like Uganda, as foreign investors, especially in the agricultural and hospitality sectors, have been known to violate these rights.⁷⁶ It is also necessary for investors to respect human rights as well-managed investments more often result in economic development and yet, foreign investors in Uganda tend to completely disregard human rights.⁷⁷

A preamble should also clarify that investor protection objectives shall not override a Contracting Party's right to regulate in the public interest and that the objectives of the Treaty can be achieved without compromising public interests, including health, safety and environmental concerns or measures.⁷⁸ For instance, the AfCFTA Protocol on Investment reaffirms:⁷⁹

... the inherent right of State Parties to regulate in their territories and to introduce measures in order to achieve their national public policy objectives, promote sustainable development objectives and protect legitimate public welfare objectives, such as public health, national security, the environment, the conservation of living and non-living exhaustible natural resources, labour standards, the integrity and stability of the financial system and public morals.

In terms of promoting investment for economic growth, the SADC Model BIT provides that it seeks 'to promote, encourage and increase investment opportunities that enhance

⁷⁴ VanDuzer *et al* (2013) 46.

⁷⁵ VanDuzer *et al* (2013) 47 para 4.2.5..

⁷⁶ D Obot 'Investment and labour rights: A case study' available at https://www.socialwatch.org/node/11109#_ftn11 (accessed 10 November 2023).

⁷⁷ D Obot 'Investment and labour rights: A case study' available at https://www.socialwatch.org/node/11109#_ftn11 (accessed 10 November 2023).

⁷⁸ EAC Model Investment Treaty (2016) preamble.

⁷⁹ AfCFTA Protocol on Investment (2023) preamble.

sustainable development within the territories of the State Parties’.⁸⁰ The Protocol on Investment further recognises:⁸¹

...the significant contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, and the furtherance of investment-related human rights and human development while understanding that sustainable development requires the fulfilment of its economic, social and environmental pillars.

Evidently, although these treaties still incorporate the three goals found in Uganda’s old-BIT preambles, these goals have now been tied to sustainable development objectives in modern IIAs.

A preamble should not only encourage investment that contributes to sustainable development, but also strive to balance the rights and obligations of investors and States. This is reflected in the EAC Model Investment Treaty and the AfCFTA Protocol on investment, which emphasise a host-country rights to regulate for public interest, while promoting sustainable development.⁸²

Furthermore, as seen in the *Philip Morris* cases, investors can bring investor-State disputes against the home-country for attempting to fulfil its public international law obligations, such as those relating to health.⁸³ To mitigate the chances of this happening, a preamble should indicate that investment promotion and protection will be pursued in compliance with the Parties’ obligations under international law and agreements.

For instance, the preamble of the Protocol on Investment urges Member States to consider ‘the relevant obligations of State parties under international law and international agreements to which they are parties.’⁸⁴ The Commonwealth Guide goes further to affirm that Member States are committed.⁸⁵

⁸⁰ EAC Model Investment Treaty (2016) preamble.

⁸¹ AfCFTA Protocol on Investment (2023) preamble.

⁸² EAC Model Investment Treaty (2016) preamble; AfCFTA Protocol on Investment (2023) preamble.

⁸³ *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7); *Philip Morris v Australia* (PCA Case No. 2012-12).

⁸⁴ AfCFTA Protocol on Investment (2023) preamble.

⁸⁵ VanDuzer et al (2013) para 4.2.5, 47.

... to democracy, the rule of law, human rights and fundamental freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter, the Universal Declaration of Human Rights, customary international law and provisions of international agreements relating to the environment, human rights, labour rights and the rights of indigenous peoples binding on the Parties and desiring to have this Agreement interpreted in a manner consistent with these commitments.

This provision can also include additional obligations and commitments with respect to the elimination of discrimination against women, the abolition of forced labour, the minimum age of entry to employment and that on the elimination of the worst forms of child labour.⁸⁶

Considering Uganda's evolving developmental needs as reflected in its national development plan (NDP),⁸⁷ including the need to create jobs for the youth, increase skill capacity and transfer, address income inequality, empower women and reduce poverty, it would also be recommended that the preamble reflect these objectives.⁸⁸ For instance, the Protocol on Investment recognises:⁸⁹

... the importance of encouraging investment activities that benefit economically disadvantaged areas, small and medium-sized enterprises, local communities, indigenous peoples, and underrepresented groups, including women and youth.

Uganda also faces significant challenges with corruption, ranking 142nd out of 180 countries on the Corruptions Perceptions Index.⁹⁰ According to the NDPIII, the GOU aims to streamline its operations to cut bureaucratic red tape and speed up clearances to fight corruption.⁹¹ Uganda's national Investment Policy (NIP) also highlights the importance of combating corruption to achieve its objectives and promote a culture of zero tolerance for corruption.⁹²

Currently, none of Uganda's in-force or Model BITs address corruption. To improve this, both government officials and investors should be held liable for acts of bribery or corruption,

⁸⁶ D Obot 'Investment and labour rights: A case study' available at https://www.socialwatch.org/node/11109#_ftn11 (accessed 10 November 2023).

⁸⁷ National Planning Authority (NPA) *Third National Development Plan (NDPIII) 2020/21 – 2024/25* (2020)

⁸⁸ EAC Model Investment Treaty (2016) preamble.

⁸⁹ AfCFTA Protocol on Investment (2023) preamble.

⁹⁰ Trade Economics 'Uganda Corruption Rank' available at <https://tradingeconomics.com/uganda/corruption-rank> (accessed 10 November 2023).

⁹¹ NPA, NDPIII (2020) 46.

⁹² Draft National Investment Policy (NIP) (2018) 20 – 1.

which undermine business operations and trust in the country's administrative and judicial systems. The Commonwealth Guide, for example, emphasises preventing and combating corruption in international trade and investment, while promoting corporate social accountability.⁹³

Uganda's NDPIII also recognises other social and environmental development challenges including climate change, gender inequality and health-related issues.⁹⁴ As with the inclusion of corruption preventative objectives, policymakers should include objectives unique to the specific economic and developmental needs and strategies of Uganda. For example, the 'natural resources, environment, climate change and water management' programmes designed to address the 13 bottlenecks adopted by the African Union (AU) aim to:⁹⁵

... stop, reduce and reverse environmental degradation and the adverse effects of climate change as well as improve utilisation of natural resources for sustainable economic growth and livelihood security.

As Uganda gears up to extract crude oil from its western region and capitalise on newly discovered gold deposits, it becomes even more crucial to consider the impact of these activities on local livelihoods and the surrounding environment. Despite growing interest from investors, none of Uganda's current BITs address these concerns.

The country's current economic strategies and developmental needs, which have evolved remarkably since the signing of these BITs, are also not reflected in these agreements, nor are Uganda's commitments to sustainable development under the various international and regional agendas. Therefore, Uganda's BIT preambles should adopt a broader approach to sustainable development, acknowledging economic, social and environmental pillars.⁹⁶

Preambles that focus solely on creating a 'stable framework for investments' or 'favourable conditions for investments' tend to lead tribunals to resolve interpretive uncertainties in favour of investors.⁹⁷ On the other hand, when preambles incorporate additional objectives – such as sustainable development or the host-country's right to regulate – they help promote

⁹³ VanDuzer *et al* (2013) 47.

⁹⁴ NPA, NDPIII (2020) XIX and XX.

⁹⁵ NPA, NDPIII (2020) XIII.

⁹⁶ EAC Model Investment Treaty (2016) preamble.

⁹⁷ UNCTAD *IPFSD* (2015) 92.

more balanced interpretations, harmonising investment protection with broader policy objectives and legal frameworks.⁹⁸

In the *Philip Morris v Uruguay* case, for example, the Tribunal sided with the host-country, emphasising that it had the right to regulate and therefore implement regulations aimed at safeguarding public health, even if such measures negatively impacted foreign investments.⁹⁹ To reach this decision the Tribunal referred to the preamble of the Switzerland – Uruguay BIT, which acknowledged the right of the Parties to regulate to protect public welfare, including health.¹⁰⁰

5.1.2.2. *Scope of application*

Bilateral investment treaties should clarify their geographical, temporal and subject matter coverage,¹⁰¹ but none of Uganda’s in-force or Model BITs specifically address the scope of application. Instead, the scope is delimited through the definitions of ‘investment’ and ‘investor’ or similar wording.¹⁰² This section, however, is crucial for defining the parameters and extent of a treaty’s coverage as it outlines the specific elements and investors or investments that fall within the scope of a treaty’s protection.¹⁰³

The scope of application thereby clarifies and delineates the boundaries of the treaty, making it essential to include such a provision in Uganda’s proposed BIT reforms.¹⁰⁴ A useful example is found in the AfCFTA Protocol on Investment, which provides detailed provisions on the rights and obligations of State Parties, investors and investments. It specifically that:¹⁰⁵

1. This Protocol sets out the rights and obligations for State Parties, investors and investments.
2. This Protocol shall apply to:
 - a) all investments of investors of State Parties made after the entry into force of this Protocol;
 - and

⁹⁸ UNCTAD *IPFSD* (2015) 92.

⁹⁹ *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7) paras 295 – 305.

¹⁰⁰ *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7) 179.

¹⁰¹ UNCTAD *Scope and Definition* (2011) XI.

¹⁰² UNCTAD *Scope and Definition* (2011) 5.

¹⁰³ UNCTAD *Scope and definition* (2011) 10, 13.

¹⁰⁴ UNCTAD *Scope and definition* (2011).

¹⁰⁵ AfCFTA POI (2023) art 3.

- b) all investments of investors of State Parties made prior to the entry into force of this Protocol provided that they meet the criteria of an investment under Article 1 of this Protocol and that they are still present on the territory of the Host State at the time of the entry into force of this Protocol.
3. The obligations of a State Party under this Protocol shall apply to measures adopted or maintained by:
- a) Its central, regional or local governments and administrations; and
 - b) non-governmental bodies when exercising powers delegated by central, regional or local governments or authorities.

[...]

4. This Protocol shall not apply to:
- a) any investment dispute that arose or any claim that was settled before the entry into force of the Protocol;
 - b) government procurement;
 - c) subsidies or grants provided by a State Party, including government-supported loans, guarantees and insurance under national development programmes;
 - d) investments made with capital or assets of illegal origin in accordance with the applicable laws and regulations of a State Party;
 - e) taxation measures taken in accordance with the applicable laws and regulations of a State Party;
 - f) any special advantages accorded in the Host State by finance institutions for the purpose of development assistance or the development of small and medium businesses or new industries;
 - g) operations of public debt and state enterprise debt restructuring taken by one of the State Parties; and
 - h) real estate or other property other than acquired for the purpose of economic benefit or other business purposes.
5. This Protocol shall not apply to any dispute arising solely from an alleged breach of a contract between a State Party and an investor.

The Protocol specifies that it applies to investments made after its entry into force, as well as certain pre-existing investments, while also exempting matters like government procurement, taxation and public debt structuring.¹⁰⁶ To ensure that these recommended reforms promote sustainable development from the host-country's perspective, it would be most effective for investor obligations to apply not only to new investments but also those already in place at the time the BIT comes into force.¹⁰⁷

The above provision also limits the Protocol's application to disputes arising solely from alleged breaches of contracts between the investor and the host-country.¹⁰⁸ This type of provision is particularly relevant to Uganda, as all of its ISDS cases before the ICSID forum involved tax matters and were instituted for the alleged violation of a contract between the investor and Uganda.¹⁰⁹ Including such a scope provision would allow Uganda to implement take measures without breaching the treaty, reducing the risk of future disputes.

Moreover, an investor would not be able to use an unlawful contract clause to avoid complying with domestic laws when those laws do not align with their interests, as was the case in these cases.¹¹⁰ Therefore, by adopting provisions that exclude ISDS claims arising solely from contract disputes, Uganda could mitigate the likelihood of such cases being brought to international arbitration, allowing them to be resolved within domestic courts instead.

5.1.2.3. Definitions

There is a general consensus that the interpretation of BITs should be in accordance with the rules of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention or VCLT).¹¹¹ The 'definitions' section of a BIT is crucial for providing clear and predictable meanings and determining the treaty's scope.¹¹² In other words, the definitions

¹⁰⁶ AfCFTA POI (2023) art 3(2) & (4).

¹⁰⁷ VanDuzer *et al* (2013) 95.

¹⁰⁸ AfCFTA POI (2023) art 3(4).

¹⁰⁹ *Tullow Uganda Operations (TUO) Pty Ltd v Republic of Uganda* (ICSID Case No. ARB/12/34); *Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited v Republic of Uganda* (ICSID Case No. ARB/13/25); *Total E&P Uganda BV v Republic of Uganda* (ICSID Case No. ARB/15/11).

¹¹⁰ 'Total vs. Uganda: Illegal tax waiver' *ISDS Platform* available at <https://isds.bilaterals.org/?total-vs-uganda-needs-title> (accessed 10 September 2024).

¹¹¹ Vienna Convention on the Law of Treaties (1969).

¹¹² VanDuzer *et al* (2013) 48; Vienna Convention (1969) art 31(4).

section of a BIT is the part where Contracting Parties agree to attach a specific meaning to the words contained therein.¹¹³

The definitions of ‘investor’ and ‘investment’ are particularly important as they establish who and what is protected under the BIT, shaping a host-country’s obligations and its potential exposure to ISDS claims.¹¹⁴ ISDS outcomes often hinge on whether a particular transaction or asset qualified as a protected investment or whether the claimant qualified as a protected investor.¹¹⁵ Therefore, Uganda, as a predominantly capital-importing country, must ensure it is comfortable assuming the substantive obligations contained in its BITs relating to all investors and investments that fit within those definitions.

5.1.2.3.1. Definition of investment

The definitions section is often the first substantive provisions in a BIT and is crucial, especially for defining ‘investment,’ as this informs the kind of investment that gets protection under a particular BIT.¹¹⁶ IATs often refer to this definition to determine whether a particular investment is indeed protected under the particular BIT.¹¹⁷

As discussed in Chapter Four of this study, the ‘investment’ definition normally contains six elements: 1) open-ended or closed definitions; 2) asset or enterprise based; 3) a list of the characteristics of an investment; 4) exclusions of specific types of assets; 5) a requirement to comply with domestic entry requirements; and 6) a temporal dimension, which states whether they cover existing and future investments or only future investments.¹¹⁸

In Uganda’s in-force and Model BITs, the definition of ‘investment’ is open-ended, asset based, lacks a list of characteristics or exclusions and can include a broad range of assets including portfolio investments, which may not significantly contribute to a host-country’s development.¹¹⁹ Uganda’s NDPIII emphasises the importance of investments in research,

¹¹³ Vienna Convention (1969) art 31(4).

¹¹⁴ UNCTAD *Scope and Definition* (2011) XI; VanDuzer *et al* (2013) 48.

¹¹⁵ UNCTAD *Scope and Definition* (2011) XI.

¹¹⁶ UNCTAD *Scope and Definition* (2011) XI, 6.

¹¹⁷ UNCTAD *Scope and Definition* (2011) XI, 6.

¹¹⁸ UNCTAD *IIA Handbook* (2012) 13; Chapter 4 ‘Definition of investment’ para 4.1.2.1 above.

¹¹⁹ Chapter 4 ‘Definition of investment’ para 4.1.2.1 above; VanDuzer *et al* (2013) 49.

innovation and technology transfer, as well as creating employment, which contrasts with the broad, open-ended definition of ‘investment’ in its current and Model BITs.¹²⁰

Without a ‘contribution to development’ criterion, Uganda’s BITs may not align with its development goals and may even expose the country to unnecessary ISDS, including from portfolio investors.¹²¹ Although some argue that including this development criterion creates uncertainty as to its meaning and makes it hard for a Tribunal to interpret,¹²² others argue that some Tribunals have considered development factors even without explicit provisions.¹²³

Therefore, including such criteria in BITs would ensure that arbitrators account for sustainable development in their decisions, helping Uganda avoid protecting investments that do not advance its development agenda. Uganda’s in-force and Model BITs also lack a clear list of characteristics that an investments must have to be protected, which broadens the scope of assets eligible for protection, including those without vested capital in the country.¹²⁴

The absence of such a list could extend to protection of investments like bonds, debt and equity securities, intended solely for capital gain, without creating lasting interests in or control over an enterprise.¹²⁵ However, all of Uganda’s in-force and Model BITs include a requirement that investments must comply with domestic laws to be protected, ensuring that their establishment is subject to the host-country’s legal framework.¹²⁶

Lastly, the temporal dimension, which specifies whether BITs cover existing and future investments or only future investments, is included in all of Uganda’s in-force and Model BIT(s).¹²⁷ Uganda’s BITs with the UK, France as well as its Model BIT cover both pre-existing and post-BIT investments, while its BITs with Denmark and Switzerland also apply to both

¹²⁰ NDPIII (2020) 179.

¹²¹ VanDuzer *et al* (2013) 54.

¹²² VanDuzer *et al* (2013) 54.

¹²³ VanDuzer *et al* (2013) 54.

¹²⁴ Switzerland – Uganda BIT (1971) art 1(3)(a) – (e); Uganda - UK BIT (1998) art 1(a)(i) – (v); Denmark – Uganda BIT (2001) art 1(a) – (e); France – Uganda BIT (2003) art 1(1)(a) – (e); Uganda Model BIT (2003) art 1(1)(a) – (e); UNCTAD *IIA Handbook* (2012) 17; Chapter 4 ‘Definition of investment’ para 4.1.2.1 above.

¹²⁵ Chapter 4 ‘Definition of investment’ para 4.1.2.1 above; UNCTAD *IIA Handbook* (2012) 17.

¹²⁶ Chapter 4 ‘Definition of investment’ para 4.1.2.1 above; UNCTAD *IIA Handbook* (2012) 17.

¹²⁷ Germany – Uganda BIT (1966) Ad art 1(b); Switzerland – Uganda BIT (1971) art 8; Uganda – UK BIT (1998) art 1(a); Denmark – Uganda BIT (2001) art 12; France – Uganda BIT (2003) art 1(1); and Uganda Model BIT (2003) art 1.

although this is mentioned outside the ‘definitions’ section.¹²⁸ In contrast, Uganda’s BIT with Germany only applies to investments made after the treaty came into force.¹²⁹

Capital-exporting countries generally prefer an open-ended definition of investment, as it covers a broad range of investors assets.¹³⁰ However, as a predominantly capital-importing country, Uganda should adopt a more targeted approach, ensuring its BITs focus on attracting the kinds of investments it wants while excluding those it does not wish to protect.¹³¹ Accordingly, Uganda should consider an enterprise-based approach, which can be found in the SADC Model BIT, the EAC Model Investment Treaty and the Protocol on Investment.¹³²

The enterprise-based approach requires the establishment or acquisition of an enterprise and is typically associated with FDI.¹³³ The assets belonging to the enterprise are included among the protected assets of the investor.¹³⁴ The wording mandates the creation of an operational enterprise within the host-country.¹³⁵ The list of assets in this option are illustrative, showing the types of assets an investment under the treaty may hold, but it is not the defining criteria of what constitutes an asset.¹³⁶

According to the approach taken by the Protocol on Investment, an investment refers to an enterprise or a company, which is established, acquired or expanded in accordance with the laws and regulations of the host-country by an investor who maintains substantial business activity within that country.¹³⁷ Such enterprises or companies may hold assets like shares, stocks or other forms of participation in the enterprise or another company, movable and immovable property (including mortgages, liens and pledges), intellectual property rights

¹²⁸ Uganda – UK BIT (1998) art 1; France – Uganda BIT (2003) art 1; Denmark – Uganda BIT (2001) art 12; Switzerland – Uganda BIT (1971) art 8.

¹²⁹ Germany – Uganda BIT (1966) Ad art 1(b).

¹³⁰ VanDuzer *et al* (2013) 50.

¹³¹ VanDuzer *et al* (2013) 48.

¹³² SADC Model BIT with commentary (2012) 9; EAC Model Investment Treaty (2016) art 2; AfCFTA Protocol on Investment (2023) art 1.

¹³³ SADC Model BIT with commentary (2012) 12.

¹³⁴ SADC Model BIT with commentary (2012) 12.

¹³⁵ SADC Model BIT with commentary (2012) 12.

¹³⁶ SADC Model BIT with commentary (2012) 12.

¹³⁷ AfCFTA Protocol on Investment (2023) art 1.

such as copyrights and patents and rights granted by law or contract, including licenses to exploit natural resources.¹³⁸

To qualify as an investment, the Protocol further provides that the enterprise must possess specific characteristics including a commitment of capital or resources, an expectation of profit, a certain duration, assumption of risk and a significant contribution to the host-country's sustainable development.¹³⁹ Additionally, the definition applies only to the post-establishment phase and clarifies that only investments meeting these criteria qualify under the Protocol.¹⁴⁰

This provision ensures that investments make an actual contribution to the host-country's economy and mitigates incidents where investors bring ISDS disputes before an IAT for breach of a treaty, when such investors never actually physically established the investment in the host-country or conducted any profitable business therein.¹⁴¹ The treaty should also expressly exclude certain kinds of investments, including portfolio investment.¹⁴² This is typically meant to clarify the meaning of investment rather than adopt a narrow meaning.¹⁴³

The EAC Model Investment Treaty goes further to define a 'portfolio investment' as:¹⁴⁴

... investment that constitutes less than 10 per cent of the shares of the company or otherwise does not give the portfolio investor the possibility to exercise effective management or influence on the management of the investment.

This is also similar to the enterprise-based definition of investment found in the SADC Model BIT.¹⁴⁵ By contrast, Uganda's ICA – 19 does not set a clear threshold, such as the 10 per cent shareholding criterion.¹⁴⁶ The lack of specificity could allow for the inclusion of investments

¹³⁸ AfCFTA Protocol on Investment (2023) art 1.

¹³⁹ AfCFTA Protocol on Investment (2023) art 1.

¹⁴⁰ AfCFTA Protocol on Investment (2023) art 1.

¹⁴¹ *Nigeria v P&ID* (2023) EWHC 2638 (Comm); *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1).

¹⁴² EAC Model Investment Treaty (2016) art 2; AfCFTA Protocol on Investment (2023) art 1.

¹⁴³ VanDuzer *et al* (2013) 50.

¹⁴⁴ EAC Model Investment Treaty (2016) art 2

¹⁴⁵ SADC Model Bilateral Treaty Template with Commentary (2012) 9.

¹⁴⁶ Uganda ICA – 19 (2019) sec 1.

that are purely speculative, despite the fact that the investors need to meet the minimum capital requirements to register a portfolio investment in Uganda.¹⁴⁷

Such speculative portfolio investments typically do not contribute meaningfully to the local economy in terms of job creation, technology transfer or infrastructure development, which are crucial for Uganda's growth.¹⁴⁸ As such, by excluding such investments from Uganda's BITs, Uganda can ensure that its BITs actually focus on investments that will contribute to sustainable development.

As a predominantly capital importing country, Uganda should also consider including provisions that state that a changed investment must fall within the definition of investment as agreed within the treaty in order to be protected.¹⁴⁹ This is because that would be the definition that was agreed to and the obligation to protect new forms of investment is inherently unpredictable.¹⁵⁰

Moreover, the Protocol explicitly includes intellectual property rights such as copyrights, patents, trademarks, industrial designs, trade names, know-how and goodwill as protected investments, provided that they are acquired, maintained and protected under the host-country's laws. Notably, 'goodwill' is excluded from the definition of investment under the SADC Model BIT and included in the Protocol.¹⁵¹

The Protocol also clarifies that the 'establishment, acquisition and expansion' of the investment only applies to the post-establishment phase and that 'only investment that meet the criteria' as defined in the Protocol are eligible.¹⁵² In addition to the exclusions in the SADC Model BIT, the Protocol also excludes claims arising from judicial, administrative or arbitral orders or judgements from the definition of investment.¹⁵³

It is strongly recommended that the *Salini* test, which was derived from arbitration cases that evaluated what qualifies as an investment under the ICSID Convention, be used to assess the

¹⁴⁷ Uganda ICA – 19 (2019) sec 15(2).

¹⁴⁸ Chapter 4 'Definition of investment' para 4.1.2.1 above.

¹⁴⁹ VanDuzer *et al* (2013) 67.

¹⁵⁰ VanDuzer *et al* (2013) 67.

¹⁵¹ SADC Model BIT with commentary (2012) 10.

¹⁵² AfCFTA Protocol on Investment (2023) art 1.

¹⁵³ AfCFTA Protocol on Investment (2023) art 1.

relationship between the investment and the host-country's economy.¹⁵⁴ While this test may not be necessary for the enterprise-based option, its inclusion would provide better clarity of the 'investment' definition.¹⁵⁵

Accordingly, for an investment to qualify for international protection under ICSID, the Tribunal considers six elements: 1) a substantial contribution in capital or other assets, 2) a certain duration, 3) an element of risk, 4) the investment must aim to promote the host-country's economic activity, 5) the assets must be made in accordance with the host-country's laws and 6) the investment must be made in good faith.¹⁵⁶

The 'contribution to the economy' condition can be done by approving investments or granting protection only to investments that bring concrete benefits to the host-country, for example, long-term capital commitment, employment generation, technology transfer, research and innovation in technology, and so on.¹⁵⁷ While this requirement is included in the investment registration criteria of Uganda's ICA – 19 (specifically regarding projected technology and property transfer), it should also apply to investments after their registration in Uganda to determine whether they are genuinely contributing to the country's economy.

5.1.2.3.2. Definition of investor

Chapter Four of this study revealed that the definition of 'investor' in BITs was crucial in determining the scope of the treaty and typically included both natural and juristic persons.¹⁵⁸ It also revealed that this definition typically contained three elements: nationality of natural persons, nationality of juristic persons and, in some cases, the rules for dual nationality or permanent residence.¹⁵⁹

¹⁵⁴ VanDuzer *et al* (2013) 55; SADC Model BIT with commentary (2012) 13; UNCTAD *Scope and Definition* (2011) 9.

¹⁵⁵ SADC Model BIT with commentary (2012) 13.

¹⁵⁶ VanDuzer *et al* (2013) 54 - 5; SADC Model BIT with commentary (2012) 13; *Phoenix Action Limited v Czech Republic* (ICSID Case No. ARB/06/5, IIC 367) Award, 15 April 2009.

¹⁵⁷ UNCTAD *IPFSD* (2015) 93; Uganda ICA – 19 (2019) sec 17(a) – (e); VanDuzer *et al* (2013) 54 - 5; *Phoenix Action Limited v Czech Republic* (ICSID Case No. ARB/06/5, IIC 367) Award, 15 April 2009.

¹⁵⁸ Chapter 4 'Definition of investor' para 4.1.2.2; UNCTAD *Scope and definition* (2011) 13 – 14; UNCTAD *IIA handbook* (2012) 23.

¹⁵⁹ UNCTAD *IIA Handbook* (2012) 23.

Uganda's BIT with Denmark defines 'investor', which can be a natural or juristic person,¹⁶⁰ while other BITs and Model BIT refer to 'nationals' and 'companies'.¹⁶¹ While the nationality of a natural person is typically determined by the domestic laws of the country, Uganda's BITs with Switzerland and Germany refer to the outdated constitutional provisions that were in force at the time of signing, making it necessary to align the definition with the current Constitution of Uganda or other laws to avoid future inconsistencies.¹⁶²

Additionally, most of Uganda's BITs, except for Denmark's, do not address permanent residents who are not citizens.¹⁶³ As a country with plenty of permanent residents who are not necessarily citizens,¹⁶⁴ not addressing permanent citizenship in a BIT could enable such person to seek the benefit of BIT protection for actions by Uganda that are contrary to the treaty, relying on their status as a citizen or permanent resident of the other State Party.¹⁶⁵

Furthermore, none of Uganda's in-force and Model BITs address the issue of dual nationality, which can lead to potential claims based on either nationality in accordance with CIL.¹⁶⁶ Consequently, a dual national might claim either nationality and use one nationality as the basis of their claim against the host-country to which they are also a national.¹⁶⁷

Moreover, while the definition of 'companies' for Ugandan investors in Switzerland is qualified, requiring control by Ugandan nationals either in fact or law, it is unqualified for Swiss investors in Uganda, creating disparity in treatment that favours Swiss investors in

¹⁶⁰ Denmark – Uganda BIT (2001) art 1(5).

¹⁶¹ Uganda Model BIT (2003) art 1(2) – (3); Germany – Uganda BIT (1966) art 8(3) – (4); Switzerland – Uganda BIT (1971) art 1(1) – (2); Uganda – UK BIT (1998) art 1(c) – (d); France – Uganda BIT (2003) art 1(2) – (3).

¹⁶² Constitution of the Republic of Uganda (1995) chapter 3, secs 9 and 10(a) – (b); Constitution of Uganda has since been amended in 2018 with the Constitution (Amendment) Act, 2018; Chapter 4 'Definition of investor' para 4.1.2.2 above.

¹⁶³ VanDuzer et al (2013) 76; *Marvin Roy Feldman Karpa v Mexico* (ICSID Case No. ARB(AF)/99/1) Award 16 December 2002, 74.

¹⁶⁴ E Easton-Calabria 'Uganda has a remarkable history of hosting refugees, but its efforts are underfunded' *The Conversation* 26 August 2021 available at <https://theconversation.com/Uganda-has-a-remarkable-history-of-hosting-refugees-but-its-efforts-are-underfunded-166706> (accessed 2 October 2022); EH Shaps 'Strangers In A Strange Land: Young Adult Eritrean Migrants In Kampala, Uganda' unpublished thesis, Fletcher School of Law and Diplomacy and Report for Save the Children, 2019; Chapter 4 'definition of investor' para, 4.1.2.

¹⁶⁵ VanDuzer et al (2013) 76; *Marvin Roy Feldman Karpa v Mexico* (ICSID Case No. ARB(AF)/99/1) Award 16 December 2002, 74.

¹⁶⁶ VanDuzer et al (2013) 76; UNCTAD *Scope and definition* (2011) 75 – 76; Chapter 4 'Definition of investor' para 4.1.2.2 above.

¹⁶⁷ VanDuzer et al (2013) 76 – 7.

Uganda over Ugandan investors in Switzerland.¹⁶⁸ Additionally, Uganda's BITs with Switzerland (regarding Swiss investors in Uganda), the UK and Denmark define 'company' or 'companies' without additional requirements, which could allow for treaty shopping.¹⁶⁹

With regards to treaty shopping, an investor's home-country and the host-country of their current or potential investment may not have a BIT or have one with unsatisfactory provisions.¹⁷⁰ Therefore, an investor may seek to route their investment through a third country to secure the most advantageous procedural or substantive BIT protection by altering their nationality, acquiring a new one or restructuring their investment.¹⁷¹

Treaty shopping violates the principle of reciprocity because it allows investors to benefit from BIT protections without the host-country receiving reciprocal advantages from the investor's home-country, as the investor manipulates nationality to access favourable BITs.¹⁷² It also undermines State consent by granting treaty benefits to investors from countries with no treaty relationship with the host-country, bypassing the host-country's consent to protect only investors from specific countries through carefully negotiated BITs.¹⁷³

In contrast, Uganda's BITs with France and Germany as well as its Model BIT include stricter (or qualified) definitions, requiring companies to have a 'seat' or 'head office' in Uganda to qualify for protection.¹⁷⁴ This requirement, which is more complex than just determining a

¹⁶⁸ Switzerland – Uganda BIT (1971) art 1(2)(a) – (b); Germany – Uganda BIT (1966) art 8(4)(a) – (b); Chapter 4 'Definition of investor' para 4.1.2.2 above.

¹⁶⁹ Uganda – UK BIT (1998) art 1(d)(ii); Denmark – Uganda BIT (2001) art 1(5); Switzerland – Uganda BIT (1971) art 1(2)(b); UNCTAD *IPFSD* (2015) 93; UNCTAD *IIA Handbook* (2012) 25; UNCTAD, *Scope and definition* (2011) 15; *Philip Morris Asia Ltd v Australia*, PCA Case No 2012-12, UNCITRAL, Award on Jurisdiction and Admissibility (17 December 2015); J Hepburn & L Nottage, 'Case Note: Philip Morris Asia v Australia' (2016) 86 *Legal Studies Research Paper* 1; *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7).

¹⁷⁰ Jus Mundi 'Treaty shopping' available at <https://jusmundi.com/en/document/publication/en-treaty-shopping> (accessed 10 September 2024); *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7).

¹⁷¹ Jus Mundi 'Treaty shopping' available at <https://jusmundi.com/en/document/publication/en-treaty-shopping> (accessed 10 September 2024); *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7).

¹⁷² Jus Mundi 'Treaty shopping' available at <https://jusmundi.com/en/document/publication/en-treaty-shopping> (accessed 10 September 2024); *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7).

¹⁷³ Jus Mundi 'Treaty shopping' available at <https://jusmundi.com/en/document/publication/en-treaty-shopping> (accessed 10 September 2024); *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7).

¹⁷⁴ France – Uganda BIT (2003) art 1(3); Germany – Uganda BIT (1966) art 8(4)(b); Uganda Model BIT (2003) art 1(3).

company's country of incorporation, implies that the company's effective management or at least some of it, must occur in the host-country.¹⁷⁵

Lastly, none of Uganda's BITs have denial of benefits (DOB) provisions. DOBs are intended to exclude from protection provided by the applicable BIT, those investors or investments who, while formally meeting the definition of 'investor', lack a genuine economic connection to the host-country.¹⁷⁶ In the *Caratube v Kazakhstan* case, the Tribunal explained that this provision allows each Party to deny BIT protection benefits to a company controlled by nationals of a third country, which does not have substantial activities in the other country party to the BIT.¹⁷⁷

In order to address these issues, the definition of investor should be reformed in the following ways: First, a national or citizen should be determined in accordance with the relevant domestic laws of the host and home-countries (as opposed to a specific law) to allow flexibility in the event that the country changes or amends those laws. Secondly, the definition should address permanent residency and dual citizenship.

This is illustrated in the Protocol on Investment, which defines an 'investor' as:¹⁷⁸

... a natural person, who is a national of a State Party in accordance with its laws and regulations, who has made an investment in the territory of another State Party. For greater certainty, a natural person who holds dual nationality shall be deemed to be exclusively a national of the country of her or his effective nationality or where she/he ordinarily or permanently resides.

Similar provisions can also be found in the Canadian Model BIT.¹⁷⁹

Thirdly, the definition of investor, particularly regarding a juristic person or company, should be qualified.¹⁸⁰ To enhance the effectiveness of the country-in-seat criterion and prevent the protection of 'shell companies,' certain BITs stipulate that companies must carry out genuine

¹⁷⁵ UNCTAD *Scope and definition* (2011) 83; Chapter 4 'Definition of investor' para 4.1.2.2 above.

¹⁷⁶ L Mistelis & C Baltag 'Denial of Benefits' Clause in Investment Treaty Arbitration' (2018) 293 *Queen Mary University of London, School of Law Legal Studies Research Paper* 1.

¹⁷⁷ *Caratube International Oil Company LLP v Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Award, 5 June 2012 para 354.

¹⁷⁸ AfCFTA Protocol on Investment (2023) art 1.

¹⁷⁹ 2021 Model FIPA art 1.

¹⁸⁰ UNCTAD *Scope and definition* (2011) 83; Chapter 4 'Definition of investor' para, 4.1.2.2 above.

economic activities in the host-country.¹⁸¹ The CCIA for example, requires that an investor have ‘substantial business activity in the Member State in which it is constituted or organised’ to be recognised as such.¹⁸²

The CCIA further lists the criteria for determining ‘substantial business activity’, requiring a comprehensive case-by-case analysis of various factors, including: 1) the amount of investment brought into the country; by the number of jobs created; c) the impact on the local community; and 4) the duration of the business operation.¹⁸³ By requiring that investments demonstrate substantial business activity, Uganda can filter out shell or mailbox companies.

Additionally, this aligns with sustainable development objectives by fostering responsible investment that contributes to economic growth, environmental sustainability and social well-being. Lastly, Uganda should include DOB provisions to ensure that investors and their investments comply with certain requirements to be protected under the treaty. A good illustration of DOB provisions can be found in the AfCFTA Protocol on Investment.

Accordingly, the Protocol allows a State Party to deny benefits of the Protocol to an investor of another State Party and their investment if: the investment lacks substantial business activity in the investor’s home-country; the investment was established or restructured primarily to gain access to the dispute settlement mechanism under the Protocol; and the investor or investment engages in activities detrimental to the essential or national interests of the host-country.¹⁸⁴

Moreover, if the investment is controlled or owned by persons from a third country with which the denying country has no diplomatic relations or prohibits transactions or by persons of the denying host-country or by persons from a none-State Party without substantial activity

¹⁸¹ Colombia – Switzerland BIT (2006) art 1(2)(b); Canada – Jordan BIT (2009) art 1(k); Chapter 4 ‘Definition of investor’ para, 4.1.2.2 above.

¹⁸² COMESA Common Investment Area (CCIA) Agreement (2007) art 1(4)(ii).

¹⁸³ CCIA Agreement (2007) art 1(4)(ii)(a) – (d).

¹⁸⁴ AfCFTA Protocol on Investment (2023) art 5(1)(a) – (c).

in a State Party or the investor or investment has breached specific obligations under Chapter 5 (investor obligations) of the Protocol, a State Party can also deny such investor benefits.¹⁸⁵

The Protocol further provides that any decision by a host-country to exercise its right to deny benefits can be reviewed under its Chapter 7 (management and settlement of disputes), ensuring checks and balances in the application of the provision.¹⁸⁶

5.1.2.4. *Fair and equitable treatment*

Fair and equitable treatment (FET) is an absolute standard of treatment ensuring a minimum level of protection for investors and their investments, often linked to international law or customary international law (CIL), without requiring comparison to the treatment of domestic or other foreign investors.¹⁸⁷ Its content varies depending on the treaty's wording, and in older BITs, such as those in Uganda, it has been broadly and vaguely defined.¹⁸⁸

This vagueness has allowed arbitrators in ISDS cases to interpret it expansively, sometimes limiting a host-country's right to regulate in the public interest.¹⁸⁹ For instance, in the *CMS Gas v Argentina* case, the interpretation of FET discouraged the adoption of environmental measures, creating a 'regulatory chill'.¹⁹⁰ Developing countries, fearing costly ISDS claims, have been hesitant to introduce regulations that might conflict with FET.¹⁹¹

As seen in Chapter Four of this study, this standard is the most commonly invoked treaty violation in ISDS cases and serves as the most frequent basis for finding a treaty breach,¹⁹² is

¹⁸⁵ AfCFTA Protocol on Investment (2023) art 5(1)(d) – (g).

¹⁸⁶ AfCFTA Protocol on Investment (2023) art 5(2).

¹⁸⁷ UNCTAD *IIA Handbook* (2012) 49.

¹⁸⁸ UNCTAD *IIA Handbook* (2012) 49.

¹⁸⁹ UNCTAD *IIA Handbook* (2012) 50; *CMS Gas v Argentina* (ICSID Case No. ARB/01/8); G Mayeda, 'Playing fair: the meaning of fair and equitable treatment in bilateral investment treaties' (2007) *Journal of World Trade* 278.

¹⁹⁰ L J Dhooge, 'The North American Free Trade and the environment: The lessons of Metalclad Corporation v United Mexican States (2001) *Minnesota Journal of International Law* 213; Chapter 4 'fair and equitable treatment' para, 4.1.3.

¹⁹¹ Dhooge (2001) 213; see example with Togo in Chapter 4 'Fair and equitable treatment' para 4.1.3.2 above.

¹⁹² UNCTAD *IIA Handbook* (2012) 49; VanDuzer *et al* (2013) 138; Center for the Advancement of the Rule of law in the Americas, Georgetown Law 'Number of claims by treaty obligation' available at <https://isdslac.georgetown.edu/legal-provisions-most-invoked-in-disputes/> (accessed 10 November 2023).

often interpreted and applied beyond its intended scope and purpose,¹⁹³ with arbitrators failing to consider certain important mitigating circumstances when interpreting it.¹⁹⁴ The standard's lack of a clear, specific definition further exposes it to broad interpretations, contributing to these challenges.¹⁹⁵

Uganda's in-force BITs contain both qualified and unqualified FET standards that expose the country to potential ISDS cases. Uganda's BITs with Germany, Denmark and the UK contain unqualified FET provisions,¹⁹⁶ lacking links to international law or substantive content, allowing wide interpretation by tribunals and giving investors strong protections.¹⁹⁷ Conversely, Uganda's BITs with Switzerland, France and its Model BIT contain qualified FET standards tied to international law,¹⁹⁸ including CIL and general international law principles.¹⁹⁹

Qualifying the FET provision to international law means that the standard must be determined by referring to all sources of international law.²⁰⁰ Although a number of new IIAs have adopted this option, there is still debate, especially among developing countries, as to what CIL entails. Nevertheless, Uganda's FET provisions should be reformed in a way that is more certain than is the case with its existing in-force BIT FET provisions.

Several options exist to address the deficiencies of an unqualified FET standard, each with its pros and cons.²⁰¹ One option would be to remove the FET provision entirely as was the case in the 2015 Indian Model BIT. Interestingly, the 2003 Indian Model BIT had an FET obligation

¹⁹³ UNCTAD *IIA Handbook* (2012) 50; *CMS Gas v Argentina* (ICSID Case No. ARB/01/8); G Mayeda 'Playing fair: the meaning of fair and equitable treatment in bilateral investment treaties' (2007) *Journal of World Trade* 278.

¹⁹⁴ For instance, the mitigating financial crisis circumstances in Argentina – *CMS Gas v Argentina* (ICSID Case No. ARB/01/8); Mayeda (2007) 278; Chapter 4 'Fair and equitable treatment' para 4.1.3.2 above.

¹⁹⁵ UNCTAD *A Review of fair and Equitable Treatment* (2012) 2 -3; VanDuzer et al (2013) 138.

¹⁹⁶ Germany – Uganda BIT (1966) art 1; Denmark – Uganda BIT (2001) art 3(1); Uganda – UK BIT (1998) art 2(2).

¹⁹⁷ UNCTAD *Fair and equitable treatment* (2012) XIV; OECD 'Fair and Equitable Treatment Standard in IIL' (2004) 8; I Knoll-Tudor 'Fair and Equitable Treatment' (18 March 2022) Jus Mundi available at <https://jusmundi.com/en/document/wiki/en-fair-and-equitable-treatment> (accessed 10 March 2022); Vandevelde *BITs* (2010); VanDuzer et al (2013) 148; UNCTAD *IIA Handbook* (2012) 49 – 50.

¹⁹⁸ France – Uganda BIT (2003) art 3; Switzerland – Uganda Bit (1971) art 4.

¹⁹⁹ VanDuzer et al (2013) 139.

²⁰⁰ VanDuzer et al (2013) 148.

²⁰¹ UNCTAD *IPFSD* (2015) 97.

relating to investments and their returns²⁰² and expropriation.²⁰³ The 2015 Indian Model BIT, however, removes all these obligations, which makes it inconsistent with the dominant IIA policymaking practice.

The complete removal of the FET standard would undoubtedly be of concern to capital-exporting countries wishing to invest in a developing country.²⁰⁴ As a predominantly capital-importing country, it is important for Uganda to assure investors that they will be treated fairly. However, Uganda's Constitution already provides for just and fair administrative treatment.²⁰⁵

Moreover, under Uganda's ICA – 19, foreign and domestic investors are treated the same with regards to registration and administrative procedures, negating fears of unjust or unfair treatment.²⁰⁶ In fact, foreign investors receive better judicial treatment as they not only have access to the domestic courts and tribunals, but also IATs, while domestic investors only have access to domestic dispute settlement options.²⁰⁷

As such, this study proposes that the second option be used—the 'administrative and judicial treatment' provision—like the AfCFTA Protocol on Investment does. According to this Protocol, each State Party must ensure that investors and their investments from other State Parties are not subjected to treatment that constitutes a fundamental denial of justice in criminal, civil or administrative proceedings.²⁰⁸

This includes protections against evident denial of due process, manifest arbitrariness, discrimination based on gender, race and religious beliefs or abusive treatment in judicial or administrative process.²⁰⁹ Additionally, the Protocol clarifies that this provision does not

²⁰² Indian Model BIT (2003) art 3(2).

²⁰³ Indian Model BIT (2003) art 5(1) – (3).

²⁰⁴ VanDuzer *et al* (2013) 147.

²⁰⁵ Constitution of Uganda (1995) sec 42.

²⁰⁶ Uganda ICA – 19 (2019) secs 12, 13, 16, 17, 22, 24.

²⁰⁷ Uganda ICA – 19 (2019) sec 25.

²⁰⁸ AfCFTA Protocol on Investment (2023) art 17(1).

²⁰⁹ AfCFTA Protocol on Investment (2023) art 17(1).

equate to the FET standard and that the MST under CIL applies, without allowing interpretations or applications that go beyond the outlined elements.²¹⁰

This provision offers greater clarity and specificity, limiting broad interpretations that often arose with FET clauses. It explicitly ties protections to procedural fairness, such as the denial of justice, due process and discrimination, while grounding these protections in CIL. This reduces the risk of overreach by tribunals and prevents expansive claims commonly seen under vague FET provisions.

5.1.2.5. *Full protection and security*

The FPS obligation may be formulated either as a stand-alone provision or in conjunction with FET or international MST.²¹¹ It requires the host-country to exercise due diligence in protecting foreign investments from harm caused by both private actors and State organs, without the need to compare treatment with domestic or other foreign investors.²¹² Uganda's in-force and Model BITs contain both FPS as a stand-alone obligation.²¹³

The term 'full' can lead to broader interpretations, which might extend to legal, economic and regulatory protections and security obligations,²¹⁴ potentially hindering the government's regulatory authority and sustainable development objectives.²¹⁵ For example, in *AAPL v Sri Lanka*, the investor claimed that FPS imposed strict liability on the host-country.²¹⁶ As such, Uganda could even be liable to an investor for actions out of its control such as natural disasters.

²¹⁰ AfCFTA Protocol on Investment (2023) art 17(2).

²¹¹ Netherlands Model Investment Agreement (2019) art 9(1); Norway Model BIT (2015) art 5; 2012 U.S. Model Bilateral Investment Treaty (2012) art 5(1) – (3); Morocco – Nigeria BIT (2016) art 7(1) – (3); UNCTAD *IIA Handbook* (2012) 54.

²¹² UNCTAD *IIA Handbook* (2012) 54; N Junngam, 'The full protection and security standard in international investment law: What and who is investment fully (?) protected and secured from?' (2018) 7 *American university Business Law Review* 4; C McLachlan, L Shore & M Weiniger *International Investment Arbitration: Substantive Principles* (2007) 247.

²¹³ Germany – Uganda (1966) art 3(1); Uganda - UK BIT (1998) art 2(2); France – Uganda BIT (2003) art 5(1); Uganda Model BIT (2003) art 5(1); UNCTAD *IIA Handbook* (2012) 54.

²¹⁴ UNCTAD *IIA Handbook* (2012) 54.

²¹⁵ UNCTAD *IIA Handbook* (2012) 54.

²¹⁶ *Asian Agricultural Products Ltd. v Republic of Sri Lanka* (ICSID Case No. ARB/87/3); Malik (2011) 5.

In contrast, Uganda's BITs with Switzerland and Denmark contain the obligation to provide 'protection' without the express mention of it having to be 'full.'²¹⁷ Traditionally, it is understood that this obligation requires the provision of a certain level of police protection and physical security.²¹⁸ However, IATs have thus far refused to hold host-countries to an absolute standard.²¹⁹

Nonetheless, it is crucial for countries like Uganda to offer protection that is consistent with its developmental capabilities, avoiding overly burdensome obligations. The AfCFTA Protocol on Investment, for instance, explicitly provides that 'physical protection and security' should align with the host-countries capabilities, ensuring that foreign investors receive no greater protection than domestic investors (NT) and investors from other countries or third parties (MFN).²²⁰

However, it is recommended that Uganda The Protocol provides that Uganda adopt an approach that ties this provision to the NT clause only and not the MFN clause, as the latter would open it up to the problems often associated with this clause, such as unequal treatment between domestic and foreign investors, treaty shopping, expansion of obligations beyond the original intention and conflicting jurisprudence.²²¹

This approach limits protections to physical security, preventing expansive interpretations that could result in Uganda being held liable for actions out of its control and restrict regulatory flexibility as it maintains predictability in investment protections even in times of civil unrest.²²²

5.1.2.6. Most-favoured-nation treatment and national treatment

The NT provision ensures that foreign investors and their investments receive treatment equal to that of domestic investors, aiming to prevent discrimination based on nationality and

²¹⁷ Switzerland – Uganda BIT (1971) art 3; and Denmark – Uganda BIT (2001) art 2(2); M Malik 'The full protection and security comes of age: Yet another challenge for states in investment treaty arbitration?' (2011) 2.

²¹⁸ UNCTAD *IIA Handbook* (2012) 54.

²¹⁹ UNCTAD *IIA Handbook* (2012) 54.

²²⁰ AfCFTA Protocol on Investment (2023) art 18(1).

²²¹ Chapter 4 'Most-favoured-nation treatment and national treatment' para 4.1.3.3 above.

²²² AfCFTA Protocol on Investment (2023) art 18(2); UNCTAD *IPFSD* (2015) 98.

maintain competitive equality.²²³ The MFN treatment provision obligates host-countries to provide foreign investors and their investments with treatment no less favourable than that given to investors/investments from third countries (sometimes, in like circumstances), ensuring fairness among foreign investors.²²⁴

Both the NT and MFN treatment provisions typically share three common elements: 1) the substantive scope (whether they apply pre- or post-establishment, 2) the subjective scope (applicable investors and/or investments) and 3) exceptions. In four of Uganda's in-force BITs, these provisions explicitly apply to investments and/ or investors in the post-establishment phase as seen in phrases like 'management, maintenance, use, enjoyment or disposal' of investments.²²⁵

If the BITs referred to terms such as 'establishment', 'acquisition' and 'expansion', the NT and MFN treatment obligations would create a right of establishment for foreign investors, meaning that they would have to be treated no less favourably than domestic investors, or foreign investors from third countries, with regards to being allowed to operate in the host-country.²²⁶

However, Uganda's Model BIT and its BIT with France do not clearly specify whether the NT and MFN treatment provisions apply to the post-establishment, but it is implied with reference to 'activities related to the investments', meaning that the investment must first be established according to the domestic laws of the host-country.²²⁷ Nonetheless, this leaves room for broader interpretations by tribunals.

For instance, in *Tethyan*, Pakistan argued that the investment did not meet legal requirements, excluding it from treaty protection law and was therefore outside the treaty's scope (Australia – Pakistan BIT).²²⁸ The Tribunal rejected this claim and held that the treaty

²²³ UNCTAD *IIA Handbook* (2012) 34; VanDuzer *et al* (2019) 110; Chapter 4 'Most-favoured-nation and national treatment' para 4.1.3.3 above.

²²⁴ UNCTAD *IIA Handbook* (2012) 41.

²²⁵ Germany – Uganda BIT (1966) art 2(1) and (2); France – Uganda (2003) art 4; Switzerland – Uganda (1971) art 4; Uganda – UK BIT (1998) art 3(1) and (2); Denmark – Uganda BIT (2001) art 3; EAC Model investment Treaty (2016) commentary on art 4 and 5.

²²⁶ VanDuzer *et al* (2019) 116.

²²⁷ France – Uganda BIT (2003) art 4; Uganda Model BIT (2003) art 4.

²²⁸ S de Murard, 'Tribunal finds Pakistan breached FET, expropriation and non-impairment obligations in the context of a mining joint venture with Australian investor Tethyan Copper Company' *Investment Treaty News*

covered investments accepted into the host-country at the time of their establishment and not only those investments that had been legally established.²²⁹

Uganda's in-force and Model BITs extend NT and MFN treatment to investors and/ or their investments. Moreover, all of Uganda's BITs include exceptions to the MFN clause, allowing host-countries to withhold favourable treatment derived from customs treaties, tax agreements, regional economic communities (RECs), free trade agreements (FTAs) or zones, and similar arrangements from foreign investors whose home-countries are not party to those arrangements.²³⁰

Notably, Uganda's BITs with France, Denmark and its Model BIT, apply these exceptions to both NT and MFN treatment, without distinguishing between them, whereas the BIT with Germany specifically outlines exceptions to the NT clause.²³¹ The principle of NT, which requires reciprocal treatment for investors from Contracting Parties, can create economic imbalances between foreign multinational corporations (MNCs) and micro, small and medium-sized enterprises (MSMEs), particularly in developing countries like Uganda.²³²

To address this imbalance, Uganda may need to adopt measures that are *prima facie*, discriminatory to grow and advance their domestic industries and enable them to compete with foreign ones.²³³ Policymakers should consider including an NT clause that compares investors or investments 'in like circumstances' or provides express exceptions to the standard.

17 December 2019 available at <https://www.iisd.org/itn/en/2019/12/17/tribunal-finds-pakistan-breached-fet-expropriation-non-impairment-obligations-mining-joint-venture-with-australian-investor-tethyan-copper-company-tethyan-copper-company-v-pakistan-icsid-arb-12-1/> (10 November 2023); *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1); Australia – Pakistan BIT (1998).

²²⁹ S de Murard, 'Tribunal finds Pakistan breached FET, expropriation and non-impairment obligations in the context of a mining joint venture with Australian investor Tethyan Copper Company' *Investment Treaty News* 17 December 2019; *Tethyan Copper v Pakistan* (ICSID Case No. ARB/12/1) paras 940 – 2..

²³⁰ Germany – Uganda BIT (1966) Ad art 2(c); France – Uganda (2003) art 4; Switzerland – Uganda (1971) art 4; Uganda – UK BIT (1998) art 7(a) – (b); Denmark – Uganda BIT (2001) art 4(a) – (b); Uganda Model BIT (2003) art 4.

²³¹ Denmark – Uganda BIT (2001) art 4(a) – (b); France – Uganda BIT (2003) art 4; Germany – Uganda BIT (1966) art 10.

²³² UNCTAD *Nation Treatment* (1999) 61; Chapter 4 'Most-favoured-nation treatment and national treatment' para 4.1.3.3 above.

²³³ VanDuzer *et al* (2019) 110; UNCTAD *NT* (1999) 61;

The Protocol on Investment, for instance, reinforces this by requiring an assessment of ‘in like circumstances’ when applying NT:²³⁴ This involves evaluating various factors, such as the investment’s impact on the community, environment, sectors and regulatory objectives.²³⁵ By directing IATs to consider multiple factors, this provision helps safeguard the host-country’s regulatory authority while determining whether foreign and domestic investors are truly in similar situations.²³⁶

Moreover, in addition to tax measures, the NT obligation can be limited to exclude certain sectors or measures where a host-country does not wish to be bound. Various approaches have been used to manage these exclusions. For instance, the US Model BIT adopts a negative list approach, where sectors and activities are listed in a schedule, exempting them from NT obligations.²³⁷

Countries can also adopt a general exception approach, which apply to both parties. Such exceptions typically cover policy areas like health and the environment.²³⁸ This is done in the AfCFTA Protocol on Investment, which provides that the NT obligation does not apply to:²³⁹

Measures taken by a State Party that are designed and applied to protect or enhance legitimate public policy objectives such as, but not limited to, public morals, public health, prevention of diseases and pests in animals or plants, climate action, essential security interests, safety and the protection of environment...

Development-related exceptions, such as those in the Italy – Morocco BIT, exclude certain government aid and grants from NT.²⁴⁰ However, such broad exceptions can create uncertainty for investors, potentially discouraging investment, though they offer more flexibility for host-countries.²⁴¹

Evidently, policymakers can include country-specific reservations to the NT provision such as measures meant to protect health, the environment, public security, among other interests,

²³⁴ AfCFTA Protocol on Investment (2023) art 12(1) – (2)(a) – (f).

²³⁵ AfCFTA Protocol on Investment (2023) art 12(1) – (2)(a) – (f).

²³⁶ VanDuzer *et al* (2019) 115.

²³⁷ US Model BIT (2012) art 14.

²³⁸ VanDuzer *et al* (2019) 117.

²³⁹ AfCFTA Protocol on Investment (2023) art 13(1).

²⁴⁰ Italy – Morocco BIT (1992) art 3(3).

²⁴¹ VanDuzer *et al* (2019) 117 – 8.

without being in breach of the NT standard.²⁴² They can also include carve-outs of certain policy measures like government procurement and measures regarding government bonds, as seen in the International Institute for Sustainable Development (IISD) Model Agreement, which provides that:²⁴³

Measures taken in accordance with government procurement policies specifically for the purchase of goods or services by any level of government shall not be considered a breach of this Article.

In some situations, and in accordance with their development strategies, countries may even want to accord preferential treatment through temporary grants or subsidies, to national investors or investments, without extending the same benefits to comparable foreign investments or investors. Overall, such exceptions allow a host-country flexibility to regulate for development goals.²⁴⁴ This is illustrated in the AfCFTA Protocol on Investment, which provides that:²⁴⁵

Preferential treatment granted by State Parties to national investments and investors, in accordance with domestic laws and regulations, in order to achieve national development objectives or address the internal needs of designated disadvantaged persons, groups, or regions shall not be construed as a breach of [NT].

If a host-country is reluctant to rescind the right to discriminate in favour of domestic investors, it can also make the NT obligation 'subject to their domestic laws and regulations.'²⁴⁶ For instance, with regards to NT, the EAC Model Investment Treaty provides that:²⁴⁷

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.

²⁴² AfCFTA Protocol on Investment (2023) art 13(1).

²⁴³ International Institute for Sustainable Development (IISD) Model Agreement (2006) art 5(c) in von Molke (2006).

²⁴⁴ UNCTAD *IPFSD* (2015) 96 – 97.

²⁴⁵ AfCFTA Protocol on Investment (2023) art 13(2).

²⁴⁶ UNCTAD *IPFSD* (2015) 96 .

²⁴⁷ EAC Model Investment Treaty (2016) art 4.4.

This approach gives full flexibility to grant preferential treatment to domestic investors if this is in accordance with the country's legislation.²⁴⁸

Carve-outs of the NT provision can therefore balance the protection received by foreign investors and their investments, against the host-country's rights and development objectives.²⁴⁹ This is especially important given that historically, BITs have been known to provide foreign investors with rights that are often not available to domestic investors.²⁵⁰ This tends to create unjustifiable advantages over the latter, for instance, with regards to access to additional dispute settlement mechanisms such as IATs and economic asymmetry.²⁵¹

Countries could also wish to include that:²⁵²

4.4. Notwithstanding any other provision of this Agreement, the provisions of this Article shall not apply to concessions, advantages, exemptions or other measures that may result from:

a bilateral investment treaty or free trade agreement [that entered into force prior to this agreement];
or

any multilateral or regional agreement relating to investment or economic integration in which a State Party is participating or may participate.

Conversely, Uganda's in-force and Model BITs include MFN exceptions for customs unions, RECs, FTAs and sometimes, double taxation treaties (DTTs) or taxation laws. However, these treaties do not preclude foreign investors from importing favourable substantive provisions from one BIT that Uganda is a Party to, into another, allowing for treaty shopping. Although MFN provisions are typically applied in a uniform, impartial and reasonable manner, Uganda's in-force and Model BITs are inconsistent in this regard.²⁵³

For instance, Uganda's BIT with the UK explicitly extends MFN treatment to Articles 1 – 11 of the treaty, covering provisions like ISDS and FET provisions.²⁵⁴ This provision is not repeated in any of the other in-force BITs. It should be noted that the MFN provision is rarely invoked

²⁴⁸ UNCTAD *IPFSD* (2015) 96

²⁴⁹ von Molke (2006) 8.

²⁵⁰ von Molke (2006) 8.

²⁵¹ von Molke (2006) 8.

²⁵² SADC Model BIT (2012) art 4.4(a) and b).

²⁵³ K Kuhlmann *Handbook on provisions and Options for Trade in Times of Crisis and Pandemic* (2021) 21.

²⁵⁴ Uganda – UK (1998) art 3(3).

to challenge the actual level of material treatment given to foreign investors regarding establishment, access or competitive conditions in host-countries.²⁵⁵

Instead, it has been used by foreign investors to import more favourable ISDS or other substantive provisions from a third-party treaty into the basic treaty.²⁵⁶ In other words, the vague and broad nature of the MFN provisions in Uganda's in-force BIT can enable a foreign investor to seek favourable protections from the treaties that Uganda has with other countries (treaty shopping).²⁵⁷ Moreover, the inclusion of the MFN provision can result in unintended multilateralization.²⁵⁸

In order to address this, Uganda's policymakers could opt to leave MFN treatment out completely. This was certainly the approach taken in the SADC Model BIT. The drafters of that treaty argued that BITs 'should not establish unintended multilateralization through the MFN provision'.²⁵⁹ In effect, the host-country is not obligated to grant MFN treatment to foreign investors and only has to ensure that discriminatory measures are authorised by law.

This thesis, however, proposes that policymakers leave in the MFN provision. In such a case, the MFN treatment and NT provisions should be separated in different articles, making it easier to discern the scope and limitations of the individual obligations. This also allows Contracting Parties to submit lists of measures and sectors that they might wish to exclude from the scope of those obligations.²⁶⁰ The EAC Model Investment Treaty, the Commonwealth Guide, CCIA Agreement and the AfCFTA Protocol on Investment all contain separate MFN and NT clauses.²⁶¹

²⁵⁵ UNCTAD Most-favoured-nation treatment (2010) 18.

²⁵⁶ UNCTAD *MFN treatment* (2010) 18.

²⁵⁷ *Maffezini v Spain*, Decision on Jurisdiction of 25 January 2000 and Award of the Tribunal of 13 November 2000; Porterfield 'The Exhaustion of Local Remedies in Investor-State Dispute Settlement: An Idea Whose Time Has Come?' (2015) *Yale Journal of International Law* 4.

²⁵⁸ SADC Model Bilateral Investment Treaty with Commentary (2012) 22.

²⁵⁹ SADC Model Bilateral Investment Treaty with Commentary (2012) 22.

²⁶⁰ EAC Model Investment Treaty (2016) commentary on art 4.

²⁶¹ EAC Model Investment Treaty ((2016) arts 4 & 5; VanDuzer *et al* (2019) 123 – 4, 136 – 7; CCIA (2007) arts 17 & 19; AfCFTA Protocol on Investment (2023) arts 12 & 14.

With regards of MFN treatment, for instance, the AfCFTA Protocol on Investment provides that:²⁶²

- 1) Each State Party shall accord to investors of another State Party and their investments treatment no less favourable than it accords, in like circumstances, to investors of any other State Party or Third Parties with respect to the management, conduct, operation, use, expansion and sale or other disposition of their investments.
- 2) The provisions of Article 12, Paragraph 2 of this Protocol on assessing ‘in like circumstances’ shall apply mutatis mutandis to this Article.
- 3) For greater certainty, the ‘treatment’ referred to in Paragraphs 1 and 2 does not include dispute settlement procedures, including, but not limited to, those related to admissibility and jurisdiction, provided for in other treaties. Substantive obligations in other investment treaties, do not in themselves constitute ‘treatment’, and cannot give rise to a breach of this Article.

This provision anticipates treaty shopping possibilities as it specifically provides that the MFN obligation does not include ISDS procedures.²⁶³ It also directs IATs to assess various factors when deciding which foreign businesses to compare with the foreign investor for the purposes of implementing the MFN obligation, by its reference to ‘like circumstances’, and provides the necessary criteria for determining those circumstances.²⁶⁴

The MFN obligation also applies to investments in the post-establishment phase. The Protocol (and CCIA Agreement) also contains specific exceptions to MFN treatment, that are different from the NT ones.²⁶⁵ It provides that:²⁶⁶

1. Measures taken by a State Party that are designed and applied to protect or enhance legitimate public policy objectives, such as, but not limited to, public morals, public health, prevention of diseases and pests in animals or plants, climate action, essential security interests, safety and the protection of environment, shall not be construed as a breach of Article 14.
2. Nothing in Article 14 shall oblige a State Party to extend to the investors and their investments the benefit of any treatment, preference or privilege contained in:

²⁶² AfCFTA Protocol on Investment (2023) art 14.

²⁶³ AfCFTA Protocol on Investment (2023) art 14 (3).

²⁶⁴ AfCFTA Protocol on Investment (2023) art 14 (1) – (2).

²⁶⁵ CCIA Agreement (2007) art 18; AfCFTA Protocol on Investment (2023) art 15.

²⁶⁶ AfCFTA Protocol on Investment (2023) art 15(1) – (2)(a) – (b).

- a. any existing or future free trade area, customs union, common market agreement or any similar international agreements or arrangements to which the investor's Home State is not a Party; or
- b. any existing or future international agreement or domestic legislation relating wholly or mainly to taxation.

Policymakers should also include other more recent privileges derived from any international environmental or international health agreements to which the investor's home-state is not a Party. In the past, investors like Philip Morris, for instance, have brought ISDS cases against countries like Uruguay and Australia when they attempted to implement measures aimed at achieving consistency with an international health agreement, the World Health Organization (WHO) Framework Convention on Tobacco Control.²⁶⁷

5.1.2.7. *Expropriation or nationalisation and compensation*

Expropriation is allowed under international trade and investment law, provided it is lawful and followed by adequate compensation.²⁶⁸ BITs typically include expropriation provisions to protect investors against uncompensated expropriation or nationalisation. These provisions address both 'direct' (legal transfer of property or physical seizure) and 'indirect' expropriation (significant deprivation of investment without formal transfer or seizure).²⁶⁹

As seen in Chapter Four of this study, most of Uganda's in-force and Model BIT cover both forms of expropriation, either explicitly or implicitly,²⁷⁰ with legality requirements such as public purpose and fair, non-discriminatory processes.²⁷¹ Some treaties, like the Uganda – Denmark BIT, extend the grounds for expropriation to include public safety, morality and health, provided due process is followed and the expropriation is for a legitimate public purpose.²⁷²

²⁶⁷ *Philip Morris v Uruguay* (ICSID Case No. ARB/10/7); *Philip Morris v Australia* (PCA Case No. 2012-12).

²⁶⁸ UNCTAD IIA Handbook (December 2012) 57; VanDuzer *et al* (2019) 152.

²⁶⁹ UNCTAD IIA Handbook (December 2012) 57 – 8; UNCTAD *Expropriation* (2012) 6 – 7.

²⁷⁰ Switzerland – Uganda BIT (1971) art 6; France – Uganda BIT (2003) art 5(2); Uganda Model BIT (2003) art 5(2).

²⁷¹ Germany – Uganda BIT (1966) art 3(2) and ad art 3; Denmark – Uganda BIT (2001) art 5(1); UK – Uganda BIT (1998) art 5(1); Chapter 4 'Expropriation or nationalisation and compensation' para 4.1.4. above.

²⁷² Denmark – Uganda BIT (2001) art 5(1); Chapter 4 'Expropriation or nationalisation and compensation' para 4.1.4. above.

Additionally, most of Uganda's BITs include non-discrimination clauses with regards to expropriation, except the one with Germany.²⁷³ Compensation for expropriation in Uganda's BITs generally requires it to be adequate, ensuring investors are compensated at market value, often using valuation methods such as the discounted cash flow (DCF).²⁷⁴ This method, which estimates future investment value, can lead to high awards, particularly for investments that are not yet operational.²⁷⁵

For example, in the *Tethyan Copper v Pakistan* case, the DCF method resulted in resulting in an award of over USD 4 billion plus interest, one of the largest in investor- State arbitration history.²⁷⁶ The case involved Tethyan Copper's claim that Pakistan's denial of a mining lease for the Reko Diq project violated the Australia – Pakistan BIT.²⁷⁷ Pakistan argued that the investment failed to comply with Pakistani law, and thus, fell outside the treaty's jurisdiction.²⁷⁸

The Tribunal dismissed this defence, ruling that the BIT covered investments, not only legally established ones and found Pakistan's denial constituted unlawful expropriation and awarded substantial damages.²⁷⁹ This case raises concerns over excessive compensation, especially for unestablished projects, as it could burden host-countries' disproportionately and undermine

²⁷³ Switzerland – Uganda BIT (1971) art 6(2); UK – Uganda BIT (1998) art 5(1); Denmark – Uganda BIT (2001) art 5(1); France – Uganda BIT (2003) art 5(2); Uganda Model Bit (2003) art 5(2); Chapter 4 'Expropriation or nationalisation and compensation' para 4.1.4. above.

²⁷⁴ The Hull formula provides that the investor whose investment has been expropriated, should be granted prompt, and adequate compensation in a freely transferable and exchangeable currency – see [https://jusrundi.com/en/document/wiki/en-prompt-adequate-and-effective-compensation#:~:text=This%20is%20the%20so%2Dcalled,and%20exchangeable%20currency%20\(effective\).](https://jusrundi.com/en/document/wiki/en-prompt-adequate-and-effective-compensation#:~:text=This%20is%20the%20so%2Dcalled,and%20exchangeable%20currency%20(effective).) (Accessed 20 August 2022).

²⁷⁵ IISD Webinar: 'Valuation in investment arbitration: Spotlight on discounted cash flow analysis' 26 March 2021 available at <https://www.iisd.org/events/valuation-investment-arbitration-spotlight-discounted-cash-flow-analysis> (accessed 10 November 2023).

²⁷⁶ IISD Webinar: 'Valuation in investment arbitration: Spotlight on discounted cash flow analysis' 26 March 2021 available at <https://www.iisd.org/events/valuation-investment-arbitration-spotlight-discounted-cash-flow-analysis> (accessed 10 November 2023); *Tethyan Copper v Pakistan* (ICSID Case No. ARB/12/1); de Murard (2019) available at <https://www.iisd.org/itn/en/2019/12/17/tribunal-finds-pakistan-breached-fet-expropriation-non-impairment-obligations-mining-joint-venture-with-australian-investor-tethyan-copper-company-tethyan-copper-company-v-pakistan-icsid-arb-12-1/> (accessed 19 November 2023).

²⁷⁷ *Tethyan Copper v Pakistan* (ICSID Case No. ARB/12/1) paras 1 – 5; Australia – Pakistan BIT (1998).

²⁷⁸ *Tethyan Copper v Pakistan* (ICSID Case No. ARB/12/1) paras 1 – 5.

²⁷⁹ *Tethyan Copper v Pakistan* (ICSID Case No. ARB/12/1) Award 12 July 2019 para 2; de Murard (2019).

development goals.²⁸⁰ In Pakistan's case, the award was nearly twice its entire public health spending, raising concerns about the fairness of such outcomes.²⁸¹

A key issue with Uganda's in-force and Model BITs is the absence of explicit carve-outs for general regulatory measures and compulsory licenses, which can limit governments' ability to regulate without compensating investors.²⁸² Compulsory licenses permit the use of a patented invention without the patent holder's consent,²⁸³ creating challenges in distinguishing expropriation from legitimate regulation.²⁸⁴

Without these, governments may be constrained in implementing public policy regulations, such as those related to public health or environmental protection, without compensating investors. To balance investor protection and the host-country's right to regulate, carve-outs similar to those in the US Model BIT and the EAC Model Investment Treaty, should be incorporated, particularly for compulsory licensing in compliance with the WTO TRIPS Agreement.²⁸⁵

The EAC Model Investment Treaty particularly provides carve-outs for general regulatory measures and compulsory licensing. It states that:²⁸⁶

7.5. 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.

²⁸⁰ IISD Webinar: 'Valuation in investment arbitration: Spotlight on discounted cash flow analysis' 26 March 2021 available at <https://www.iisd.org/events/valuation-investment-arbitration-spotlight-discounted-cash-flow-analysis> (accessed 10 November 2023).

²⁸¹ IISD Webinar: 'Valuation in investment arbitration: Spotlight on discounted cash flow analysis' 26 March 2021 available at <https://www.iisd.org/events/valuation-investment-arbitration-spotlight-discounted-cash-flow-analysis> (accessed 10 November 2023).

²⁸² UNCTAD – Investment policy hub available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/> (accessed 10 October 2023); WTO, 'TRIPs and public health' available at https://www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm (accessed 10 October 2023); VanDuzer *et al* (2019) 152.

²⁸³ WTO 'TRIPs and public health' available at https://www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm (accessed 10 October 2023).

²⁸⁴ VanDuzer *et al* (2019) 152.

²⁸⁵ US Model BIT (2012) art 6(5); EAC Model Investment Treaty (2016) art 7.5 & 7.6.

²⁸⁶ EAC Model Investment Treaty (2016) art 7.5 & 7.6.

7.6. A non-discriminatory measure of general application shall not be considered an expropriation of a debt security or loan covered by this Treaty solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

Furthermore, the scope of expropriation should be expanded to include legitimate policy objectives beyond just public purpose. For instance, human rights, environmental protection and social justice should be expressly recognised as valid grounds for expropriation.²⁸⁷ The Commonwealth Guide, for instance, includes *inter alia* human rights, labour rights, social justice and environmental protection objectives.²⁸⁸ It provides that:²⁸⁹

The determination of whether an action or a series of actions constitutes expropriation requires a case-by-case, fact-based enquiry considering factors such as the character and purpose of the government action. A non-discriminatory measure by a Party designed and applied to achieve legitimate public objectives, such as the economic security of residents, public health, safety, the protection or promotion of internationally and domestically recognised human rights, labour rights, the rights of indigenous peoples, social justice and the protection of the environment, does not constitute expropriation.

Such a provision would align Uganda's BITs with global trends in sustainable development and prevent regulatory measures aimed at these objectives from being treated as compensable expropriation.

Moreover, Uganda's BITs should not only define direct and indirect expropriation, but should also clarify the criteria for determining indirect expropriation, distinguishing legitimate regulation from expropriation more clearly. The AfCFTA Protocol on Investment provides a useful framework, indicating that not all losses in investment value or unmet investor expectations, qualify as indirect expropriation. It specifically provides that:²⁹⁰

2. For the purposes of this Protocol:

- a. Direct expropriation occurs when an investment is nationalised or expropriated directly, through a formal transfer of ownership or outright seizure;
- b. Indirect expropriation results from a measure or a series of measures having an equivalent effect of direct expropriation without formal transfer of title or outright seizure. The sole fact

²⁸⁷ VanDuzer *et al* (2019) 174.

²⁸⁸ VanDuzer *et al* (2019) 177.

²⁸⁹ VanDuzer *et al* (2019) 177.

²⁹⁰ AfCFTA Protocol on Investment (2023) art 19(2)(a) – (c)(i) and (ii).

that a measure or a series of measures has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; and

- c. the determination of whether a measure or a series of measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, that takes into consideration among others:
 - i. the duration of the measure or series of measures of a State Party; and
 - ii. the character of the measure or series of measures, notably their object, context and intent.

Including similar provisions in Uganda's treaties would provide clarity and predictability for both the government and foreign investors, reducing the risk of arbitrary or excessive This claims. It would also help preserve Uganda's regulatory space by ensuring that non-discriminatory measures—such as those adopted for health, environmental protection, labour rights or economic development—are not mischaracterised as indirect expropriation. This is particularly important as Uganda seeks to implement policies that support sustainable development, climate resilience and inclusive growth.

Expressly excluding indirect expropriation in an IIA may be perceived as considerably reducing the protective value of the IIA as it would leave investors unprotected from certain types of indirect expropriation such as 'creeping' or 'disguised' takings (noting that these measures could be covered by the FET standard).²⁹¹ Therefore, protection in the case of indirect expropriation could be limited by establishing criteria that needs to be met for indirect expropriation to be found.²⁹²

For example, the Canada – EU Comprehensive Economic and Trade Agreement (CETA) provides a list of factors that must be considered to determine whether indirect expropriation has occurred. They include: the economic impact of the measure, the duration of the measure

²⁹¹ UNCTAD *IPFSD* (2015) 99.

²⁹² Such actions can include e.g., the economic impact of the government action; the extent of government interference with distinct, reasonable investment backed expectations; the character of the government action (e.g. whether it is discriminatory or disproportionate to the purpose of the measure under challenge); the effect of the government action (whether it has resulted in a direct economic benefit for the State); and defining in general terms what measures do not constitute indirect expropriation (non-discriminatory good faith regulations relating to public health and safety, protection of the environment, etc.) – UNCTAD *IPFSD* (2015) 99.

or series of measures, the character of the government action, including its objective and context and whether the measure was intended to protect legitimate public policy objectives, such as health, safety or environmental protection.²⁹³

Additionally, the provisions relating to procedure and that expropriation and nationalisation should be conducted under due process of the law, should also be maintained.²⁹⁴ Due process requires that expropriation adhere to both local regulations and international standards.²⁹⁵ It specifically demands an opportunity for the investor to have the expropriation decision evaluated by an unbiased entity that operates independently from the host-country.²⁹⁶

Usually, seeking redress through domestic courts or independent administrative tribunals fulfils this criterion. However, to ensure clarity, certain IIAs explicitly outline the mandate for such a review.²⁹⁷ For instance, Article 20(9) of the CCIA provides that:²⁹⁸

The investor affected by the expropriation shall have a right under the law of the Member State making the expropriation, to a review by a juridical or other independent authority of that Member State, of his/its case and the valuation of his/its investment in accordance with the principles set out in paragraphs (1) to (8) of this Article. The Member State making the expropriation shall ensure that such a review is carried out promptly.

Lastly, in addition to providing that compensation be ‘prompt, adequate and effective’, the policymakers can specify limitations to the amount of compensation awarded, in the interests of certainty and predictability. This can be seen in the Commonwealth Guide, which provides that compensation:²⁹⁹

... shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place and not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria may include asset value, including declared tax value of tangible property and other criteria, as appropriate, to determine fair market value provided that compensation (i) shall be limited to direct losses of the investor, (ii) shall not include loss of future

²⁹³ Canada – EU Comprehensive Economic and Trade Agreement (CETA) 2016 Annex 8-A 2(a) – (d).

²⁹⁴ VanDuzer *et al* (2019) 156 – 7.

²⁹⁵ VanDuzer *et al* (2019) 157.

²⁹⁶ VanDuzer *et al* (2019) 157.

²⁹⁷ CCIA (2007) art 20(9); VanDuzer *et al* (2019) 157.

²⁹⁸ CCIA (2007) art 20(9).

²⁹⁹ VanDuzer *et al* (2019) 176.

profits or be calculated on the basis of the discounted value of future cash flows, (iii) shall be adjusted to reflect any aggravating conduct by the investor, including conduct that caused the state to take the action that constitutes an expropriation, or a failure by the investor to take reasonable steps to mitigate its damages, and (iv) shall not include punitive or moral damages.

Such a provision restricts compensation to actual losses and ensures that speculative or punitive damages are not awarded. Other specificities could include that the compensation to be paid, in case of lawful expropriation, be appropriate, justly or equitably based, for example, on an equitable balance between public and private interests, where the fair market value of investment is only one of the factors to be considered.³⁰⁰

To reform its BIT system and make it more sustainable development-oriented, Uganda should include explicit exceptions for compulsory licenses in its expropriation provisions. This would allow Uganda to issue compulsory licenses for critical public health and environmental needs without triggering compensation claims. Additionally, broader exceptions for regulatory measures related to intellectual property should be incorporated to safeguard Uganda's right to regulate in the public interest while balancing investor protection.

5.1.2.8. Transfer of funds

As seen in Chapter Four of this study, the transfer of funds provision is essential to any BIT as it directly influences the ability of foreign investors to repatriate profits, dividends, and other returns from their investments in the host country.³⁰¹ This provision is crucial to ensuring investor confidence and the smooth operation of cross-border investments.³⁰² It guarantees that investors can transfer capital, interest, royalties and proceeds from liquidation without unreasonable restrictions, fostering a stable investment climate.³⁰³

However, while important for investor protection, the transfer of funds provision must also account for the host-country's macroeconomic stability, particularly in times of financial crises. Therefore, reforming Uganda's transfer of funds provisions to ensure they are both

³⁰⁰ UNCTAD *IPFSD* (2015) 99

³⁰¹ UNCTAD *Transfer of funds* (2000) 3; Chapter 4 'Transfer of funds' para 4.1.5. above.

³⁰² UNCTAD *Transfer of funds* (2000) 30 – 31; Chapter 4 'Transfer of funds' para 4.1.5. above.

³⁰³ UNCTAD *Transfer of funds* (2000) 30 – 31; Chapter 4 'Transfer of funds' para 4.1.5. above.

investor-friendly and sustainable development-oriented is necessary. Typically, transfer of funds provisions in BITs have four common elements.

They include protected transfers (profits, dividends, interest, royalties, and proceeds from liquidation or sale of assets), which may be either open (non-exhaustive) or closed (exhaustive) lists; a currency convertibility provision, often specifying that transfers must be made in freely convertible currencies, such as USD or Euro; an exchange rate mechanism, stipulating the exchange rate applicable at the time of the transfer, usually a market rate; and exceptions and temporary derogations, which allow temporary restrictions in cases of balance-of-payments crises or other economic emergencies, ensuring that the host-country can protect its financial stability.³⁰⁴

Uganda's BITs exhibit significant variation in their treatment of transfer of funds. The Uganda – UK BIT protects transfers related to investments, returns and compensation for expropriation but does not extend to all types of transfers seen in more comprehensive BITs.³⁰⁵ The Switzerland – Uganda BIT extends this scope to capital transfers, returns and liquidation proceeds but excludes compensation for losses.³⁰⁶ Uganda's BITs with Denmark, France and its Model BIT offer broader protections, covering transfers related to industrial and intellectual property rights, liquidation, remuneration and compensation for losses due to war or civil unrest.³⁰⁷

Despite these protections, several inconsistencies exist in Uganda's BITs, particularly concerning the treatment of currency convertibility and exchange rates.³⁰⁸ Some BITs, such as the Switzerland – Uganda BIT, do not specify how transfers should be handled in terms of timing or applicable rates. Additionally, with the exception of the French and Uganda Model BITs, most of Uganda's BITs do not provide for temporary derogations in times of economic crises.³⁰⁹

³⁰⁴ UNCTAD *Transfer of funds* (2000) 31 – 38; Chapter 4 'Transfer of funds' para 4.1.5. above.

³⁰⁵ Uganda – UK BIT (1998) art 6; Chapter 4 'Transfer of funds' para 4.1.5. above.

³⁰⁶ Switzerland – Uganda (1971) art 3; Chapter 4 'Transfer of funds' para 4.1.5. above.

³⁰⁷ Denmark – Uganda BIT (2001) art 1 & 7(1)(a) – (g); France – Uganda BIT (2003) art 1(1)(e) & 6(a) – (e); Uganda Model BIT(2003) arts 6(a) – (e) & 1(1)(e); Chapter 4 'Transfer of funds' para 4.1.5. above.

³⁰⁸ Chapter 4 'Transfer of funds' para 4.1.5. above.

³⁰⁹ France – Uganda BIT (2003) art 6; Uganda Model BIT (2003) art 6(i) – (iii); Chapter 4 'Transfer of funds' para 4.1.5. above.

Uganda's current transfer of funds provisions present several issues. First, there is inconsistency in the scope of protection, as different BITs cover varying types of transfers, creating legal uncertainty for investors and potentially deterring investment from certain countries. Additionally, some BITs offer broader protections than others, leading to a perception of unfair treatment among foreign investors.

This disparity could result in claims of a MFN breach, where investors might argue that those from countries like France receive better treatment than investors from Switzerland, given the wider scope of protected transfers in the France – Uganda BIT.³¹⁰ Secondly, some of Uganda's BITs such as its BIT with Switzerland, lack a clear exchange rate mechanism to be applied for transfers (market v official rates), which can lead to arbitrary decisions, potentially disadvantaging either the host-country or investors.

Lastly, with the exception of the French and Model BITs, the rest of Uganda's BITs lack temporary derogations and exceptions.³¹¹ Without provisions for temporary restrictions on transfers during economic crises, Uganda risks financial instability, as the country would be forced to honour investor claims even in times of severe economic challenges. This was the case in *CMS Gas v Argentina*, where the host-country was ordered to pay USD 149 million in damages, despite facing a financial crisis and numerous other ISDS claims at the time.³¹²

To ensure Uganda's transfer of funds provisions are more aligned with sustainable development, it is recommended that the country adopt a closed list of protected transfers to provide greater legal certainty and predictability. This list should cover only transfers directly related to the investment, such as profits, dividends, interest and proceeds from liquidation.

The transfer of funds provision should also clarify exchange and convertibility requirements, stipulating that transfers must be made in a freely convertible currency at the market rate prevailing at the time of the transfer. This would ensure consistency and fairness in the exchange rates applied to transfers. Uganda should incorporate provisions that allow for

³¹⁰ France – Uganda BIT (2003) art 6; Switzerland – Uganda (1971) art 3.

³¹¹ France – Uganda BIT (2003) art 6; Uganda Model BIT (2003) art 6(i) – (iii); Chapter 4 'Transfer of funds' para 4.1.5. above.

³¹² Mayeda (2007) 274, 278 – 279; *CMS Gas v Argentina* (ICSID Case No. ARB/01/8) paras 468 – 72.

temporary restrictions on transfers during periods of financial crises or serious balance-of-payments difficulties.

These derogations should be temporary, non-discriminatory and in line with international standards such as the International Monetary Fund's (IMF) Articles of Agreement. Lastly, to avoid ambiguity and ensure clarity, Uganda should consolidate all transfer-related provisions (including those relating to expropriation and investment returns) into a single article in its BITs.

These approaches have been adopted in the SADC Model BIT, the EAC Model Investment Treaty, the Commonwealth Guide, the Rwanda – United Arab Emirates (UAE) BIT and the AfCFTA Protocol on Investment.³¹³ For instance, the SADC Model BIT provides that:³¹⁴

8.1. A State Party shall accord to Investors the right to:

- a) repatriate the capital invested and the Investment returns;
- b) repatriate funds for repayment of loans;
- c) repatriate proceeds from compensation upon expropriation, the liquidation or sale of the whole or part of the Investment including an appreciation or increase of the value of the Investment capital;
- d) transfer payments for maintaining or developing the Investment project, such as funds for acquiring raw or auxiliary materials, semi-finished products as well as replacing capital assets;
- e) remit the unspent earnings of expatriate staff of the Investment project;
- f) any compensation to the investor paid pursuant to this Agreement; and
- g) make payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the State Party to the dispute.

8.2. Each State Party shall allow transfers in paragraph 8.1 to be made in a freely convertible currency at the market rate of exchange prevailing at the time of transfer.

³¹³ SADC Model BIT with commentary (2012) art 8; EAC Model Investment Treaty (2016) art 9; VanDuzer *et al* (2013) 192 – 3; AfCFTA Protocol on Investment (2023) art 22; Rwanda – United Arab Emirates (UAE) BIT (2017) art 10.

³¹⁴ SADC Model BIT with commentary (2012) art 8.

8.3. Notwithstanding paragraphs 8.1 and 8.2, 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) ensuring compliance with orders or judgments in judicial or administrative proceedings;
- f) taxation;
- g) social security, public retirement or compulsory savings schemes;
- h) severance entitlements of employees; and
- i) the formalities required to register and satisfy the Central Bank and other relevant authorities of a State Party.

8.4. Safeguard provision:

- a) Where, in the opinion of a State Party, payments and capital movements under this Agreement cause or threaten to cause serious
 - i. difficulties for balance of payment purposes,
 - ii. external financial difficulties, or
 - iii. difficulties for macroeconomic management including monetary policy or exchange rate policy, the State Party concerned may take safeguard measures with regard to capital movements on a temporary basis so as to be eliminated as soon as conditions permit, and in any event as it relates to measures taken under paragraphs (ii)-(iii), for a period of not longer than 12 months if it considers such measures to be necessary.
- b) Where such measures are taken under 4.1(a)(ii) or (iii), a State Party shall enter into consultations with the other State Party at its request, with a view to review such measures and seek the minimum impact of such measures on an investor.
- c) Where, in the opinion of a State Party that has taken such measures, it is necessary to extend them for a further period due to the extended period of conditions described in paragraph 4.1(a), the State Party shall offer to enter into consultations with the other State Party with a

view to seeking the minimum impact of such measures on an investor. Such measures shall again be taken on a temporary basis so as to be eliminated as soon as conditions permit, and in any event for a period of no longer than 12 months from their renewal.

By reforming its transfer of funds provisions, Uganda can enhance the predictability and transparency of its investment regime, making it more attractive to foreign investors while safeguarding its macroeconomic stability.

Drawing from modern IIAs, such as the SADC Model BIT, the EAC Model Investment Treaty, the Commonwealth Guide, the Rwanda –UAE BIT and the AfCFTA Protocol on Investment, Uganda can develop a balanced approach that aligns with sustainable development objectives. These reforms will ensure Uganda remains competitive in attracting FDI while retaining the ability to manage financial crises effectively.

5.1.2.9. *Dispute settlement*

Historically, foreign investors had to rely on their home-country to bring claims against the host-country through diplomatic intervention or SSDS.³¹⁵ However, modern IIAs and those concluded after the 1970s, include ISDS, allowing investors to directly seek redress from the host-country, while SSDS focuses on resolving treaty interpretation and application disputes between States.³¹⁶

Uganda's in-force and Model BITs contain a mix of SSDS and ISDS mechanisms, with varying degrees of coverage depending on the treaty. Uganda's BITs with Germany and Switzerland only SSDS, meaning disputes between investors and the host-country cannot be directly resolved under those BITs.³¹⁷ However, Uganda's domestic laws such as the ICA – 19, allow foreign investors to arbitrate disputes if their investments are properly registered, providing access to arbitration despite the absence of ISDS in those BITs.³¹⁸

³¹⁵ VanDuzer *et al* (2019) 408; UNCTAD *Dispute settlement: Investor-State* (2003) 6.

³¹⁶ VanDuzer *et al* (2019) 408; German – Uganda BIT (1966) art 11; Switzerland – Uganda BIT (1971) art 11; France – Uganda BIT (2003) art 10(1); Denmark – Uganda BIT (2001) art 10(1); Uganda – UK (1998) art 9(1); Uganda Model BIT (2003) art 11(1).

³¹⁷ German – Uganda BIT (1966) art 11; Switzerland – Uganda BIT (1971) art 11.

³¹⁸ Uganda ICA – 19 92019) sec 25; Uganda Arbitration and Conciliation Act of 2000.

Still, Ugandan investors in Germany or Switzerland lack the ability to bring treaty-based claims in those countries. In contrast, Uganda's BITs with the UK, Denmark, France and its Model BIT provide both SSDS and ISDS mechanisms.³¹⁹ These BITs encourage amicable settlement of disputes before arbitration, with some treaties like the Denmark and France BIT imposing a six-month negotiation period before an ISDS dispute can be escalated to IAT.³²⁰

The Model BIT offers a fork-in-the-road provision, allowing investors to choose between arbitration and local courts, but once arbitration is chosen, domestic remedies are forfeited.³²¹ Uganda's BIT with the UK also gives investors the option to pursue local remedies before resorting to arbitration.³²² Moreover, BITs with the UK and France direct disputes to the ICSID.³²³

Meanwhile, the BITs with Denmark and the Model BIT allow for arbitration under ICSID, UNCITRAL and other forums, offering more flexibility.³²⁴ The ISDS mechanism was developed by developed countries to protect their citizens' investments, particularly in developing countries, where domestic legal systems were perceived to be weak.³²⁵ This mechanism has several benefits, such as depoliticising disputes and ensuring investor protection, which can attract more FDI.³²⁶

However, it also has several shortcomings as seen in Chapter Two of this study, including risks of regulatory chill, where governments hesitate to enact public policies for fear of being sued and concerns about legitimacy and transparency, as ISDS lacks the openness of domestic legal systems.³²⁷ These cases are also very expensive to defend and many BITs do not guarantee

³¹⁹ France – Uganda BIT (2003) art 7 & 10; Denmark – Uganda BIT (2001) arts 9 & 10; Uganda – UK (1998) arts 8 & 9; Uganda Model BIT (2003) art 7 & 11.

³²⁰ France – Uganda BIT (2003) art 7; Denmark – Uganda BIT (2001) art 9(2) – (3); Uganda – UK (1998) art 8(3); Uganda Model BIT (2003) art 7(2).

³²¹ Uganda Model BIT (2003) art 7(2).

³²² Uganda – UK (1998) art 8(3).

³²³ Uganda – UK (1998) art 8(1); France – Uganda BIT (2003) art 7.

³²⁴ Denmark – Uganda BIT (2001) art 9(2)(a) – (d); Uganda Model BIT (2003) art 7(3).

³²⁵ VanDuzer *et al* (2019) 408.

³²⁶ VanDuzer *et al* (2019) 409 – 10.

³²⁷ Chapter 2 'Investor-State dispute settlement' para 2.2.1 above; VanDuzer *et al* (2019) 410 – 11; The *Nigeria v P&ID* case, for example, had been going on since 2012, before the public knew about it in 2015 - J Bonnitcha 'Corruption and confidentiality in contract-based ISDS: The case of P&ID v Nigeria' *Investment Treaty News* 23 March 2021.

public access to tribunal documents or final awards, limiting transparency and civil society involvement, despite the fact that often times, disputes and awards impact public interests.³²⁸

Though some progress has been made, such as allowing *amicus curiae* submissions, ISDS still falls short in terms of public participation.³²⁹ Moreover, investor–State arbitration is instigated by investors primarily to advance commercial objectives, like profit and future profits even before the investment is actually established in the host-country, allowing investors to gain awards for investments that have neither been realised or contributed to the host-country’s economy.³³⁰

ISDS cases like *Tethyan Copper v Pakistan* and *Nigeria v P&ID* highlight the potential for disproportionately large awards that can severely impact a country’s economy, especially in developing nations. In the *Tethyan Copper* case, the Tribunal awarded the investor USD 4 billion for future losses for an investment that had not yet been established.³³¹ This amount was twice the size of Pakistan’s annual health care budget.³³²

In *Nigeria v P&ID*, the Nigerian Ministry of Petroleum Resources entered into an unusual contract with Process and Industrial Developments (P&ID) Limited, a company from the British Virgin Islands, for the construction and operation of a gas processing facility.³³³ The contract, which was based on an unsolicited proposal, bypassed the usual tender process, and

³²⁸ VanDuzer *et al* (2019) 411; In the *Occidental Petroleum v Ecuador* (ICSID Case No. ARB06/11, Award, 5 October 2012) case, Ecuador had to pay a US investor USDD 1,9 billion, for instance.

³²⁹ VanDuzer *et al* (2019) 411; VanDuzer (2007) 681.

³³⁰ VanDuzer *et al* (2019) 410; Chapter 2 ‘Investor-State dispute settlement’ para 2.2.1 above.

³³¹ *Tethyan Copper v Pakistan* (ICSID Case No. ARB/12/1).

³³² IISD Webinar: ‘Valuation in investment arbitration: Spotlight on discounted cash flow analysis’ 26 March 2021 available at <https://www.iisd.org/events/valuation-investment-arbitration-spotlight-discounted-cash-flow-analysis> (accessed 10 November 2023); S de Murard, ‘Tribunal finds Pakistan breached FET, expropriation and non-impairment obligations in the context of a mining joint venture with Australian investor Tethyan Copper Company’ *Investment Treaty News* 17 December 2019 available at <https://www.iisd.org/itn/en/2019/12/17/tribunal-finds-pakistan-breached-fet-expropriation-non-impairment-obligations-mining-joint-venture-with-australian-investor-tethyan-copper-company-tethyan-copper-company-v-pakistan-icsid-arb-12-1/> (accessed 19 November 2023).

³³³ *The Federal Republic of Nigeria v Process & Industrial Developments Limited (P&ID)* [2023] EWHC 268 (Comm) Award paras 1 – 10.

P&ID had limited experience in the gas sector.³³⁴ It stipulated that disputes would be resolved through arbitration in London, England.³³⁵

In 2012, P&ID initiated arbitration proceedings, claiming that Nigeria had repudiated the contract.³³⁶ Despite clear signs of corruption, Nigeria did not address this issue in its defence.³³⁷ The arbitration, which remained private until 2015, resulted in an extraordinary USD 6.6 billion damages award in P&ID's favour.³³⁸ The Tribunal's decision, based on limited evidence with just one witness, raised significant concerns, especially given that P&ID had not actually begun any construction.³³⁹

Further investigation revealed discrepancies in claimed expenditures.³⁴⁰ Nigeria argued that the investors had not established an investment, let alone one that entitled them to USD 6 billion in lost profits.³⁴¹ Nevertheless, despite the lack of actual performance by the investor, a tribunal in Europe ruled in favour of P&ID, delivering a massive award that could have devastating effects on Nigeria's economy.³⁴²

Uganda's ISDS provisions perpetuate several issues that could result in the negative consequences associated with broad and vaguely worded provisions. Firstly, Uganda's BITs with Germany and Switzerland lack ISDS provisions, meaning that disputes between investors and the host-country cannot be resolved directly under the BIT itself.³⁴³ While these investors can pursue disputes under Uganda's domestic laws,³⁴⁴ Ugandan investors in Germany or Switzerland lack the same recourse to IATs.

³³⁴ J Bonnitcho, 'Corruption and confidentiality in contract-based ISDS: The case of P&ID v Nigeria' *Investment Treaty News* 23 March 2021 available at <https://www.iisd.org/itn/en/2021/03/23/corruption-and-confidentiality-in-contract-based-isds-the-case-of-pid-v-nigeria-jonathan-bonnitcho/> (accessed 19 November 2023).

³³⁵ J Bonnitcho, 'Corruption and confidentiality in contract-based ISDS: The case of P&ID v Nigeria' *Investment Treaty News* 23 (2021).

³³⁶ *Nigeria v P&ID* [2023] Award paras, 9 – 10.

³³⁷ J Bonnitcho (2021); *Nigeria v P&ID* [2023] Award paras, 11 – 12 & 212.

³³⁸ *Nigeria v P&ID* [2023] Award paras 266(6) & 35.

³³⁹ J Bonnitcho, 'Corruption and confidentiality in contract-based ISDS: The case of P&ID v Nigeria' *Investment Treaty News* 23 March 2021.

³⁴⁰ J Bonnitcho, 'Corruption and confidentiality in contract-based ISDS: The case of P&ID v Nigeria' *Investment Treaty News* 23 March 2021.

³⁴¹ *Nigeria v P&ID* [2023] Award paras 357 – 8.

³⁴² *Nigeria v P&ID* [2023] Award paras 357 – 8.

³⁴³ German – Uganda BIT (1966) art 11; Switzerland – Uganda BIT (1971) art 11.

³⁴⁴ Uganda ICA – 19 (2019) sec 25(2)(a) – (c).

To address this inconsistency and promote fairness, future BITs should contain both ISDS and SSDS mechanisms, aligning with international best practices and Uganda’s domestic laws, which make provision for these options.³⁴⁵ For example, Uganda might be facing another ISDS case which was filed in accordance with the provisions of Uganda’s ICA – 19 in 2022.³⁴⁶ The dispute concerns the redevelopment of Owino market, one of Africa’s biggest open markets.³⁴⁷

A Yemeni investor alleged that Kampala City Council Authority (KCCA) and the Ugandan government had frustrated the project for the redevelopment of the market and eventually expropriated it through an unlawful takeover by the KCCA.³⁴⁸ In effect, the investors’ personnel were expelled from the site after work on the project had already commenced.³⁴⁹ Absent any BIT between Uganda and Yemen, national investment laws contemplating recourse to IATs proved equally effective legal instruments.³⁵⁰

³⁴⁵ Uganda ICA – 19 (2019) sec 25(2)(a) – (c).

³⁴⁶ Notice of Claims Under the Investment Code Act of the Republic of Uganda dated 21 March 2022 available at [https://files.lbr.cloud/public/2022-04/Notice%20of%20Dispute%20under%20Ugandan%20Investment%20Code%20Act%20\(without%20attachments\)-1-1.pdf?VersionId=mlekn5Mf90wHYemSPbWI2CFjsF2VELi](https://files.lbr.cloud/public/2022-04/Notice%20of%20Dispute%20under%20Ugandan%20Investment%20Code%20Act%20(without%20attachments)-1-1.pdf?VersionId=mlekn5Mf90wHYemSPbWI2CFjsF2VELi) (accessed 1 October 2022); *Ahmed et al v Uganda*, Notice of Dispute, March 21, 2022; ‘A billion-dollar dispute over one of the biggest markets in Africa at sight?’ 7 October 2022 *Jindal Forum for International and Economic Laws* available at <https://jindalforinteconlaws.in/2022/10/07/a-billion-dollar-dispute-over-one-of-the-biggest-markets-in-africa-at-sight/> (accessed 10 September 2024).

³⁴⁷ Notice of Claims Under the Investment Code Act of the Republic of Uganda, 21 March 2022 available at [https://files.lbr.cloud/public/2022-04/Notice%20of%20Dispute%20under%20Ugandan%20Investment%20Code%20Act%20\(without%20attachments\)-1-1.pdf?VersionId=mlekn5Mf90wHYemSPbWI2CFjsF2VELi](https://files.lbr.cloud/public/2022-04/Notice%20of%20Dispute%20under%20Ugandan%20Investment%20Code%20Act%20(without%20attachments)-1-1.pdf?VersionId=mlekn5Mf90wHYemSPbWI2CFjsF2VELi) (accessed 1 October 2022); *Ahmed et al v Uganda*, Notice of Dispute, March 21, 2022; ‘A billion-dollar dispute over one of the biggest markets in Africa at sight?’ 7 October 2022 *Jindal Forum for International and Economic Laws* available at <https://jindalforinteconlaws.in/2022/10/07/a-billion-dollar-dispute-over-one-of-the-biggest-markets-in-africa-at-sight/> (accessed 10 September 2024).

³⁴⁸ Notice of Claims Under the Investment Code Act of the Republic of Uganda para 37; ‘A billion-dollar dispute over one of the biggest markets in Africa at sight?’ 7 October 2022 *Jindal Forum for International and Economic Laws* available at <https://jindalforinteconlaws.in/2022/10/07/a-billion-dollar-dispute-over-one-of-the-biggest-markets-in-africa-at-sight/> (accessed 10 September 2024).

³⁴⁹ Notice of Claims Under the Investment Code Act of the Republic of Uganda para 37; ‘A billion-dollar dispute over one of the biggest markets in Africa at sight?’ 7 October 2022 *Jindal Forum for International and Economic Laws* available at <https://jindalforinteconlaws.in/2022/10/07/a-billion-dollar-dispute-over-one-of-the-biggest-markets-in-africa-at-sight/> (accessed 10 September 2024).

³⁵⁰ ‘A billion-dollar dispute over one of the biggest markets in Africa at sight?’ 7 October 2022 *Jindal Forum for International and Economic Laws* available at <https://jindalforinteconlaws.in/2022/10/07/a-billion-dollar-dispute-over-one-of-the-biggest-markets-in-africa-at-sight/> (accessed 10 September 2024); Uganda ICA – 19 (2019) sec 25(2)(a) – (c).

This case highlights the importance of such platforms, especially because Uganda has a history of bribery and corruption. It is for such reasons that ISDS mechanisms remain important in the country but that is not to say that the ISDS provisions in Uganda's BITs do not need to be reformed.

Secondly, the ISDS provisions in Uganda's BITs with the UK, Denmark, France and its Model BIT allow foreign investors to bypass local courts and bring disputes directly to IATs. This undermines Uganda's sovereignty and restricts its ability to regulate in the public interest. Moreover, it exposes the country to the risk of having private, unelected arbitrators adjudicate over public interest matters and laws.³⁵¹

As such, Uganda's BITs should be reformed to require investors to exhaust domestic remedies before turning to IATs. In fact, the ACA of 2000 provides both domestic and foreign investors with the option of seeking independent conciliation and arbitration procedures on the event of a dispute.³⁵² Additionally, while some of Uganda's BITs encourage negotiations, most do not emphasise alternative dispute resolution (ADR) mechanisms such as mediation and conciliation.

Such mechanisms could help amicably resolve disputes before they escalate to costly arbitration. As such, another option could be for Uganda's BITs to integrate ADR mechanisms, providing clear timelines and procedures for negotiations, conciliation and mediation. This is illustrated in the Commonwealth Guide, EAC Model Investment Treaty and the SADC Model BIT ISDS provision, with the latter being based on the US Model BIT.³⁵³

These modern investment treaties all require Parties to first attempt to settle disputes amicably, through consultations, negotiations, mediation and other mechanisms.³⁵⁴ The settlement of disputes using these ADR mechanisms should also include time-limits of at least

³⁵¹ Chapter 2 'Investor-State dispute settlement' para 2.2.1 above.

³⁵² Uganda ICA – 19 (2019) sec 25(2)(a)

³⁵³ VanDuzer *et al* (2019) 466; EAC Model Investment Treaty (2016) art 23.1; SADC Model BIT (2012) art 29.1; US Model BIT (2012) art 23.

³⁵⁴ VanDuzer *et al* (2019) 466 art D; EAC Model Investment Treaty (2016) art 23.1; SADC Model BIT (2012) art 29.1; US Model BIT (2012) art 23.

three to six months before an investor can escalate proceedings to arbitration, as seen in Uganda's BITs with France, Denmark and its Model BIT.³⁵⁵

Such a provision should be accompanied by specific time limits, which govern the dispute resolution process and ensure that it proceeds expeditiously.³⁵⁶ Once Parties are unable to reach an amicable settlement, ISDS and SSDS provisions should also require that they submit a notice of intent to arbitrate, with a clear criteria of what it should contain and its temporal requirements (i.e. six months before submitting claim to arbitration).

This would enable Parties to decide whether to reach a settlement outside of costly arbitration procedures.³⁵⁷ Thirdly, the Uganda's BITs with ISDS provisions lack limitations, dictating the exact circumstances under which an investor can bring a dispute against the host-country. Instead, they allow an investor to bring 'any' investor-related dispute before an IAT.

These gaps enable the possibility of disputes not related to the treaty's substantive protections, for example, those arising out of domestic law and CIL, to be brought by an investor.³⁵⁸ As such, policymakers should limit the scope of protection by offering a comprehensive definition of obligations along with procedures that enhance clarity about the scope and implementation of ISDS and SSDS procedures.³⁵⁹

This is illustrated in several modern IIAs, including the US, Indian and Canadian Model BITs and the Commonwealth Guide,³⁶⁰ which specifically provides that an investor may submit a claim to arbitration if the other Party has breached an obligation under provisions such as NT, MFN, FET, limitations on expropriation and nationalisation, compensation for losses or free transfer of funds.³⁶¹

³⁵⁵ France – Uganda BIT (2003) art 7; Denmark – Uganda BIT (2001) art 9(2); Uganda Model BIT (2003) art 7(2).

³⁵⁶ VanDuzer *et al* (2019) 460.

³⁵⁷ VanDuzer *et al* (2019) 458.

³⁵⁸ UNCTAD *IIA Handbook* (2012) 136.

³⁵⁹ VanDuzer *et al* (2019) 453 – 60.

³⁶⁰ US Model BIT (2012) art 24(1)(a)(i)(A); Indian Model BIT (2015) art 13.2; Canadian Model BIT (2021) art 24(2); VanDuzer *et al* (2019) 466.

³⁶¹ VanDuzer *et al* (2019) 466.

The Guide further provides that the breach must arise from a measure implemented after the agreement came into force and the investor must demonstrate that they incurred loss or damage as a result of the breach.³⁶² Such an inclusion helps add more certainty to the scope of the host-country's responsibility.

Fourthly, none of Uganda's ISDS provisions include additional institutional requirements to ensure fairness and process quality. While most of them offer a choice between ICSID and other forums, modern IIAs opt for certain specific sets of rules (for instance, UNCITRAL and/or ICSID) for predictability. As such, Uganda should ensure that any procedural gaps in these rules are addressed directly within its treaties.

This is illustrated in several modern IIAs and frameworks including the US, Canadian and Indian Model BITs, as well as the EAC Model Investment Treaty and the Commonwealth Guide, which explicitly provide the rules that must apply to an arbitration claim submission, and typically include those under UNCITRAL, ICSID Convention and ICSID Additional Arbitration Rules.³⁶³

Specific qualifications for arbitrators should also be established, including competence in investment law and policy areas like environmental or social governance.³⁶⁴ This approach was adopted in the Canadian Model BIT, which stipulates that arbitrators should possess expertise and experience in public international law, international investment law or dispute resolution related to IIAs.³⁶⁵

Although missing from this Model BIT, it is recommended that arbitrators also have competence in sustainable development areas such as environmental protection, human rights and social governance in light of the current global trend to promote investment that contributes to sustainable development objectives. Moreover, greater transparency in ISDS proceedings and inclusion of *amicus curiae* submissions would increase accountability, enhance awareness of public policy issues.

³⁶² VanDuzer *et al* (2019) 466.

³⁶³ US Model BIT (2012) art 24(3)(a) – (d); Indian Model BIT (2015) art 16.1; Canadian Model BIT (2021) art 27(6); EAC Model Investment Treaty (2026) art 23.6; VanDuzer *et al* (2019) 468 art F.

³⁶⁴ VanDuzer *et al* (2019) 455.

³⁶⁵ Model FIPA (2021) art 30(2).

Here, ISDS and SSDS provisions should include measures to ensure public access to hearings and documents, while allowing for the redaction of confidential or sensitive information. In addition, treaties should incorporate explicit reservations and exceptions to protect the integrity of domestic legal systems and national interests. These may include provisions that prohibit a tribunal from compelling a party to disclose or grant access to information that could compromise law enforcement activities, breach laws safeguarding government confidentiality or personal privacy, reveal the financial details of clients of financial institutions, or relate to matters the state deems essential to its national security. Including such safeguards would enhance transparency while ensuring that the disclosure of information does not undermine legitimate regulatory or security interests.³⁶⁶

Moreover, to avoid unnecessary delays, *amicus curiae* and non-party submissions should be subject to certain restrictions, including the length of the submission and the requirement to obtain leave from the tribunal.³⁶⁷ Nonetheless, transparency and *amicus curiae* participation contribute to the legitimacy of ISDS procedures thus promoting sustainable development objectives.³⁶⁸

Uganda's ISDS provisions should also address jurisdictional challenges and frivolous claims before proceeding to the merits, reducing unnecessary costs. The Indian Model BIT adopts this approach by requiring tribunals to assess objections raised by the defending party, such as whether the claim falls outside the tribunal's jurisdiction or is legally unfounded.³⁶⁹ Moreover, the tribunal must issue a decision on these objectives within a certain time and if the defending party prevails, may reward reasonable costs, particularly if the claim or objection is found to be frivolous.³⁷⁰

Furthermore, Uganda's BITs lack provisions on limitation of damages, meaning that investors can also seek future profit losses, even for investments that have not physically been established in a host-country.³⁷¹ As such, Uganda should implement ruling limiting damages

³⁶⁶ VanDuzer *et al* (2019) 475.

³⁶⁷ VanDuzer *et al* (2019) 462.

³⁶⁸ VanDuzer *et al* (2019) 456.

³⁶⁹ Indian Model BIT (2015) art 21.1 – 3.

³⁷⁰ Indian Model BIT (2015) art 21.4 – 6.

³⁷¹ See discussion on *Nigeria v P&ID* and *Tethyan Copper v Pakistan* cases above.

to direct losses, excluding speculative future profits and prohibiting punitive damages. This is evidenced in the Commonwealth Guide.³⁷²

Additional provisions indicating that damages can be reduced where the investor is partly responsible for the losses suffered or failed to take reasonable steps to mitigate such losses, and that no damages are payable where an investment was made in contravention of the host-country's domestic legislation (such as on corruption), should also be included, especially in light of Uganda's objective to tackle corruption.

This approach was adopted in the SADC Model Investment Treaty and mitigates incidents of opportunistic investors who seek BIT protections for investments that were hardly established or contracts that were awarded through bribery and corruption as was the case in *Nigeria v P&ID*.³⁷³ Referring to such principles ensures that IATs also take account of them while interpreting the BIT.³⁷⁴

Fifthly, the vagueness of Uganda's in-force BITs could also allow investors to bring claims against the legitimate public policy measures of the host country, including those in pursuit of sustainable development objectives. This possibility can be mitigated with compromiser provisions, where Contracting Parties agree that BIT obligations will not prevent a host-country from pursuing SDGs and legitimate policy objectives. For example, the Norwegian Model BIT provides that:³⁷⁵

Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety, human rights, labour rights, resource management or environmental concerns.

Moreover, the US Model BIT also prohibits investors from submitting investment disputes relating to sustainable development objectives, such those relating to 'investment and

³⁷² VanDuzer *et al* (2019) 476 art V.

³⁷³ SADC Model Investment BIT (2012) art 19(1) – (4); *Nigeria v P&ID* (2023).

³⁷⁴ VanDuzer *et al* (2019) 457.

³⁷⁵ Draft Norway Model BIT (2015) art 12.

labour’,³⁷⁶ ‘investment and environment’³⁷⁷ and ‘transparency.’³⁷⁸ Consequently, the alleged violation of these provisions is not a legal ground for foreign investors to have recourse to IATs and such disputes should be submitted to the national courts of the host-countries.³⁷⁹

Sixthly, policymakers should consider including provisions that allow the host-country to counterclaim and create a monetary liability in domestic courts of the host-country for breach of the treaty obligations by an investor. This would make an investor who has caused harm to individuals, communities or the environment or engaged in corruption or breached country obligations, such as failing to pay taxes (as was the case with the ISDS disputes brought against Uganda) liable for such damages.³⁸⁰

This would also be the case if it is found that the investor used corruption or bribery to establish an investment or get a contract to establish such investment, as was the case in *Nigeria v P&ID*.³⁸¹ This provision is illustrated in the SADC Model BIT, which provides that:³⁸²

19.1. Subject to any other specific directions under this Agreement as to the consequences of a breach of an obligation, where an Investor or its Investment is alleged by a State Party in a dispute settlement proceeding under this Agreement to have failed to comply with its obligations under this Agreement, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.

19.2. A Host State may initiate a counterclaim against the Investor before any tribunal established pursuant to this Agreement for damages or other relief resulting from an alleged breach of the Agreement.

19.3. In accordance with its applicable domestic law, the Host State, including political subdivisions and officials thereof, private persons, or private organizations, may initiate a civil action in domestic courts

³⁷⁶ US Model BIT (2012) art 13.

³⁷⁷ US Model BIT (2012) art 12.

³⁷⁸ US Model BIT (2012) art 11.

³⁷⁹ Chi (2018) 116.

³⁸⁰ *TUO v Uganda* (ICSID ARB/12/34); *TUO and Tullow Uganda Ltd v Uganda* (ICSID ARB/13/25); *Total E&P v Uganda* (ICSID ARB/15/11).

³⁸¹ *Nigeria v P&ID* [2023]; J Bonnitcha, ‘Corruption and confidentiality in contract-based ISDS: The case of P&ID v Nigeria’ *Investment Treaty News* 23 March 2021 available at <https://www.iisd.org/itn/en/2021/03/23/corruption-and-confidentiality-in-contract-based-isds-the-case-of-pid-v-nigeria-jonathan-bonnitcha/> (accessed 19 November 2023).

³⁸² SADC Model BIT (2012) arts 19.1 – 4.

against the Investor or Investment for damages arising from an alleged breach of the obligations set out in this Agreement.

19.4. In accordance with the domestic law of the Home State, the Host State, including political subdivisions and officials thereof, private persons, or private organizations, may initiate a civil action in domestic courts of the Home State against the Investor, where such an action relates to the specific conduct of the Investor, and claims damages arising from an alleged breach of the obligations set out in this Agreement.

In fact, counterclaims are consistent with both the UNCITRAL and ICSID arbitration rules, which are applicable to most investor-State arbitrations.³⁸³

It is problematic when an investor can institute a claim against a host-country in an IAT, but a host-country cannot institute a claim against an investor for breaches in a domestic court. In fact, this study argues that BITs should contain a comprehensive list of investor obligations that include sustainable development objectives to balance State and investor rights and enable the host-country to hold an investor liable for breach of those obligations.

Currently, with the exception of requirements to establish an investment in accordance with the domestic laws of the host-country, none of Uganda's BITs have explicit investor obligations. Moreover, any time an investor's actions aggrieve the local community, such cases have to be heard by courts outside the host-country that was affected. For instance, more than 13,000 Nigerians have instituted a claim against oil and gas MNC, Shell, alleging that the company is responsible for the over-pollution of Nigeria's oil producing Niger Delta.³⁸⁴

This case was instituted in a London High Court and, in effect, enables English judicial personnel to interpret laws and issues emanating from Nigeria.³⁸⁵ As such, BITs should also contain provisions that enable the host-country to hold investors liable for breach of domestic

³⁸³ ICSID Convention art 46; UNCITRAL Arbitration Rules art 21.3; VanDuzer *et al* (2019) 401 – 402.

³⁸⁴ S Tobin 'Nigerians accuse Shell of delay in oil spill London lawsuits' *Reuters* 5 April 2023 available at <https://www.reuters.com/business/energy/nigerians-accuse-shell-delay-oil-spill-london-lawsuits-2023-04-04/> (accessed 10 November 2023).

³⁸⁵ S Tobin 'Nigerians accuse Shell of delay in oil spill London lawsuits' *Reuters* 5 April 2023..

laws and gross environmental, human rights and labour abuses, in domestic courts or tribunals.

Lastly, BITs should clearly state that they apply exclusively to investments in the post-establishment phase, subject to the applicable domestic laws. This would mitigate situations like in the *Nigeria v P&ID* and *Tethyan Copper v Pakistan* cases.³⁸⁶ Accordingly, Uganda should clearly set out the criteria for protection of investments, including that investments should be established in accordance with its domestic laws and that they should contribute to the sustainable development of the country.

5.1.2.10. *Duration, termination and sunset clauses*

Like many older BITs, Uganda's in-force and Model BITs include duration, termination and sunset clauses that influence the length of time a treaty remains in force and how long investors are protected after a treaty is terminated. These provisions are critical for balancing investor protection with the host-country's ability to adapt its regulatory framework to evolving policy priorities.³⁸⁷

However, these clauses in Uganda's BITs present several challenges that hinder the country's efforts to promote sustainable development. Uganda's BIT durations range between ten and 20 years after which time they can be either unilaterally terminated or continue being valid for an indefinite amount of time.³⁸⁸ Once terminated, their sunset clauses continue to apply for an average of ten years.³⁸⁹

Lengthy duration and sunset periods, especially those in Uganda's BITs with Germany, the UK, Denmark and France, lock Uganda into outdated treaties for decades, restricting its ability to update regulatory frameworks to address modern challenges like environmental protection, social equity and responsible investment practices, effectively delaying its transition to modern sustainable development-oriented investment practices.

³⁸⁶ *Nigeria v P&ID* (2023); *Tethyan Copper v Pakistan* (ICSID Case No. ARB/12/1).

³⁸⁷ Chapter 4 'Duration, termination and sunset clauses' para 4.3 above.

³⁸⁸ Chapter 4 'Duration, termination and sunset clauses' para 4.3 above.

³⁸⁹ Chapter 4 'Duration, termination and sunset clauses' para 4.3 above.

The extended duration and sunset periods also limit Uganda's flexibility to revise or renegotiate its BITs in alignment with current SDGs. As these treaties disproportionately favour investor interests, they prevent Uganda from making necessary regulatory reforms that prioritise public welfare and environmental protection without fear of costly investor-state disputes.

The outdated provisions of many of Uganda's BITs do not adequately address present-day realities such as climate change, social justice, or responsible investment, all of which are crucial for sustainable development. The long sunset clauses keep Uganda bound to old treaty obligations that were negotiated with minimal consideration for these issues. To promote sustainable development, Uganda should consider reforming its BITs by addressing the issues posed by lengthy duration and sunset clauses.

As such, Uganda should renegotiate its in-force and future BITs to shorten both the duration and sunset periods, allowing for more frequent reviews and updates to reflect changing national and global investment priorities. This approach was adopted by the Commonwealth Secretariat Guide, which provides that:³⁹⁰

In respect of investments made prior to the date when the termination of this Agreement becomes effective, the provisions of the Agreement shall remain in force for a period of five (5) years from the date of termination.

This approach has been adopted by countries like Ecuador, which negotiated shorter sunset clauses during the termination of its BITs. Uganda's BITs can be unilaterally or mutually terminated with proper notice, providing an opportunity to renegotiate these treaties with provisions that better reflect sustainable development objectives and mitigate the risks of investor-state disputes.

Uganda could also seek to waive the application of sunset clauses in its current BITs, similar to the approach taken by Indonesia and Argentina in their BIT terminations. This would enable Uganda to terminate outdated treaties without being bound by prolonged investor

³⁹⁰ VanDuzer *et al* (2019) 513.

protections, allowing it to develop a new investment policy framework that aligns with sustainable development.

During the transitional period of renegotiating or terminating its BITs, Uganda can rely on its national investment policy framework to protect foreign investors. Uganda's domestic laws, such as the Investment Code Act, already provide investors access to both domestic and international dispute settlement mechanisms, ensuring their interests are safeguarded while the country shifts towards sustainable investment policies.

Uganda's current BITs, with their lengthy duration and sunset clauses, limit the country's ability to adapt its investment framework to modern sustainable development imperatives. To overcome these challenges, Uganda should focus on terminating or renegotiating outdated BITs, shortening the duration and sunset periods, and waiving sunset clauses where possible. These reforms will allow Uganda to develop a sustainable, flexible, and responsible investment policy framework that balances investor protection with the country's long-term environmental, social, and economic goals.

5.1.2.11. Other provisions

The above-mentioned provisions are not *numerus clausus*, as Uganda's existing BITs encompass other provisions to which the country is bound. Some of these provisions include subrogation; amendments, among others. Although these provisions do not form part of the core substantive provisions discussed in this study, they will be included in the proposed model treaty in Annex A of this thesis.

5.2. Sustainable development-related issues

There is no doubt that foreign investment contributes to sustainable development, however, increased FDI inflows do not automatically lead to such development.³⁹¹ Old-BITs seldom have provisions aimed at promoting investments that contribute to sustainable development

³⁹¹ VanDuzer *et al* (2019) 252.

objectives in the host-country.³⁹² Moreover, although newer BITs have started including provisions aimed at promoting such objectives, they are normally confined to the preamble.

As seen in chapter four, there is debate as to the legal standing of preambles with some arguing that preambles constitute legally binding obligations, while others contend that they do not.³⁹³ For this reason, BITs should contain substantive provisions aimed at promoting sustainable development objectives, especially those relating to the right to regulate, environment, labour and consumer protection, climate change, public health, human rights and investment, transfer of technology, and business ethics (CSR).

This is even more important considering the weaknesses in international law that seldom provide effective methods to hold foreign investors liable for human and labour rights violations or harm to the environment.³⁹⁴ Victims of such violations typically have redress in the domestic courts of their countries and if this fails, they can only bring a claim against their country-governments for failing to take steps to prevent the investor from violating their rights.³⁹⁵

Victims therefore lack effective methods for holding investors liable directly in international law. Another issue is that investors could use BIT provisions to escape their obligations under the host-country's domestic laws.³⁹⁶ A good illustration of this can be seen in the events that led to Uganda's three ISDS cases under the ICSID forum. The investor in the first two cases, Tullow Uganda Operations (TUO), brought a dispute before ICSID, alleging that Uganda had breached a production-sharing contract, which it had entered into with the GOU.³⁹⁷

The dispute was heard by Uganda's Tax Tribunal which ruled in favour of the URA and ordered the investor to pay the tax. It held that the waiver in the production-sharing agreement was

³⁹² E Chalamish 'The future of bilateral investment treaties: A de facto multilateral agreement' (2009) 34 *Brooklyn Journal of International Law* 307; Jason (2008) 62; OECD *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs – Overview* (2002) 3; UNCTAD *WIR* (2014) 126.

³⁹³ Chapter 4 'preamble' para. 4.1.1; MH Hulme, 'Preambles in Treaty Interpretation' (2016) 164 *University of Pennsylvania Law Review* 1285.

³⁹⁴ VanDuzer *et al* (2019) 254.

³⁹⁵ VanDuzer *et al* (2019) 254.

³⁹⁶ VanDuzer *et al* (2019) 254.

³⁹⁷ AW Oguttu 'Resolving double tax treaty disputes: The challenges of mutual agreement procedure with a special focus on addressing the concerns of developing countries in Africa – the South African and Ugandan Experiences' (2015) *SAYIL* 196.

invalid under Uganda's tax laws and that TUO was not exempt from paying capital gains tax.³⁹⁸ The investor to whom the rights had been sold, Total E&P, was also expected to pay a stamp duty of USD 30 million and refused to do so.³⁹⁹

They then requested for arbitration before ICSID, alleging that Uganda had breached its obligations under the Netherlands – Uganda BIT (2000) and the production-sharing agreement between the GOU and TUO.⁴⁰⁰ In effect, the investors put themselves above the domestic law effectively implying that Uganda's Income Tax Act and the Constitution of Uganda did not apply to them, despite the fact that both of these laws are laws of general application, from which no one is exempt.⁴⁰¹

This case therefore illustrates how an investor used the protections provided in a BIT to escape its obligations under Uganda's domestic laws and ignore judgements handed down by its domestic courts. This tactic was also used by the Chevron Corporation, an American energy MNC, to escape liability for the severe environmental damage it had caused to Ecuador's part of the Amazon.⁴⁰²

In an effort to pre-empt an unfavourable ruling, Chevron initiated an international arbitration claim against Ecuador under the US–Ecuador BIT, alleging that the Ecuadorian courts' exercise of jurisdiction over the underlying environmental litigation constituted a violation of the State's obligation to provide FET.⁴⁰³ Despite this, the Ecuadorian court ultimately ruled in favour of the plaintiffs, awarding them damages and imposing punitive damages on Chevron.⁴⁰⁴

In response, some of the Tribunal's rulings required Ecuador to suspend its judgements.⁴⁰⁵ When it refused to do so, the Tribunal established jurisdiction over the matter and proceeded

³⁹⁸ Oguttu (2015) 196.

³⁹⁹ Oguttu (2015) 196.

⁴⁰⁰ *Total E&P Uganda BV v Republic of Uganda* (ICSID Case No. ARB/15/11) available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/657/total-e-p-v-uganda> (accessed 10 May 2023).

⁴⁰¹ Constitution of Uganda (1995); Uganda income Tax Act of 2000.

⁴⁰² *Chevron and Texaco v Ecuador* (PCA Case No. 334877) Second Interim Award on Interim Measures, 16 February 2012.

⁴⁰³ VanDuzer *et al* (2019) 256.

⁴⁰⁴ VanDuzer *et al* (2019) 256.

⁴⁰⁵ VanDuzer *et al* (2019) 256.

to the merits, thus illustrating how an investor can use a BIT to ignore or nullify domestic court rulings.⁴⁰⁶ IATs also seldom give regard to investor obligations to respect labour, human and indigenous' people's rights.⁴⁰⁷

BITs should therefore impose obligations on the investor to respect human, labour and indigenous people's rights and the environment, prohibit bribery and corruption, create civil and criminal liability for investors that violate human rights or harm the environment and hold them accountable for those actions.⁴⁰⁸ This would also go a long way in addressing the imbalance between host-countries and investors under current BITs.⁴⁰⁹

Accordingly, Uganda should adopt treaty-based provisions that require investors to behave in a manner that is in tandem with sustainable development objectives.⁴¹⁰ When designing such future BIT, it should contain substantive provisions that safeguard the right to regulate, reform investment dispute settlement, promote and facilitate investment, ensure responsible investment and systematic consistency.

This approach was adopted in the AfCFTA Protocol on Investment, which contains specific provisions to address sustainable development issues, including those pertaining to the right to regulate;⁴¹¹ minimum standards on the environment, labour and consumer protection;⁴¹² investment and climate change;⁴¹³ investment and public health;⁴¹⁴ pursuit of development goals;⁴¹⁵ human resources development;⁴¹⁶ and transfer of technology,⁴¹⁷ among others.

⁴⁰⁶ VanDuzer *et al* (2019) 256.

⁴⁰⁷ VanDuzer *et al* (2019) 256; JD Taillant & J Bonnitchal, 'International Investment Law and Human Rights' in M-CC Segger, MW Gehring & A Newcombe (eds) *Sustainable Development in World Investment Law* (2011) 77 in *International investment law and human rights* available from https://www.researchgate.net/publication/291776310_International_investment_law_and_human_rights (accessed 27 November 2023).

⁴⁰⁸ VanDuzer *et al* (2019) 253.

⁴⁰⁹ VanDuzer *et al* (2019) 253.

⁴¹⁰ VanDuzer *et al* (2019) 253.

⁴¹¹ AfCFTA Protocol on Investment (2023) art 24(1) – (3); Annex 1.

⁴¹² AfCFTA Protocol on Investment (2023) art 25(1) – (2); Annex 1.

⁴¹³ AfCFTA Protocol on Investment (2023) art 26(a) – (f); Annex 1.

⁴¹⁴ AfCFTA Protocol on Investment (2023) art 27(1); Annex 1.

⁴¹⁵ AfCFTA Protocol on Investment (2023) art 28(a) – (f); Annex 1.

⁴¹⁶ AfCFTA Protocol on Investment (2023) art 29(1) – (2); Annex 1.

⁴¹⁷ AfCFTA Protocol on Investment (2023) art 30(a) – (h); Annex 1.

Adopting such provisions would not only be consistent with the Protocol itself, but also Uganda's own developmental goals as evidenced in its national investment policy (NIP)⁴¹⁸ and NDPIII,⁴¹⁹ as well as its commitments to promote and achieve sustainable development objectives, under agendas 2030 and 2063.⁴²⁰ The Protocol also contains provisions on investor obligations, including State Party obligations that allow the host-country to promote and enforce:⁴²¹

- a) laws and policies to protect investment-related human rights, labour rights and the environment;
- b) anti-corruption, anti-money laundering, anti-terrorism financing and anti-bribery measures; or
- c) laws and policies to protect the rights of indigenous peoples and local communities.

2. State Parties shall ensure that investors and their investments comply with their domestic law and regulations and international law.

Investors are additionally required to operate in compliance with all relevant domestic laws and regulations and international laws.⁴²²

The Protocol also includes provisions on indigenous peoples and local communities;⁴²³ anti-corruption;⁴²⁴ CSR;⁴²⁵ environmental protection,⁴²⁶ which could mitigate some of the issues that will emerge once efforts to extract Uganda's oil and gas fields take off; and taxation and transfer pricing,⁴²⁷ which would address the issues that led to Uganda's three ISDS cases above; and technical assistance, capacity building and cooperation.⁴²⁸

Increased FDI can therefore contribute to sustainable development by aligning with principles that prioritise human rights, labour rights, indigenous peoples' rights, and environmental

⁴¹⁸ Uganda NIP (2018)

⁴¹⁹ NDPIII (2020/21 – 2024/25)

⁴²⁰ AfCFTA Protocol on Investment (2023) art 32; Annex 1.

⁴²¹ AfCFTA Protocol on Investment (2023) art 31(1) – (2); Annex 1.

⁴²² AfCFTA Protocol on Investment (2023) art 31(1) – (2); Annex 1.

⁴²³ AfCFTA Protocol on Investment (2023) art 35(1) – (3); Annex 1.

⁴²⁴ AfCFTA Protocol on Investment (2023) art 37(1) – (3); Annex 1.

⁴²⁵ AfCFTA Protocol on Investment (2023) art 38(1) – (3); Annex 1.

⁴²⁶ AfCFTA Protocol on Investment (2023) art 34.

⁴²⁷ *Tullow Uganda v Uganda* (ICSID ARB/12/34); *Tullow Uganda Operations and Tullow Uganda Ltd v Uganda* (ICSID ARB/13/25); *Total E&P v Uganda* (ICSID ARB/15/11).

⁴²⁸ AfCFTA Protocol on Investment (2023) art 43; Annex 1.

protection.⁴²⁹ In order to promote sustainable development, foreign investment should address the host-country's needs and developing countries' needs for proper technical preparation and information when negotiating BITs.⁴³⁰

Considering that developing countries' political and institutional challenges is crucial, BITs should reflect efforts to overcome these challenges.⁴³¹ Involving local communities, including indigenous groups, in the consultation process is also essential for creating rules that are consistent with sustainable development.⁴³² Transparency and consistency in the negotiation, application and interpretation of BITs are key to achieving sustainable development and requires cooperation between developed and developing countries.⁴³³

Recognising the equality of all countries and overcoming political, social, and economic barriers are essential for fair international investment regimes that foster sustainable development.⁴³⁴

5.3. Conclusion

Chapter Four of this thesis found that Uganda's current and Model BITs contain ambiguous and problematic clauses that favour foreign investors and undermine the country's ability to pursue its sustainable development and domestic policy goals. These provisions create an imbalance in rights and obligations between investors and the host-country, restricting Uganda's regulatory autonomy. As such, it was recommended that Uganda terminate its outdated BITs.

Drawing on South Africa's experience, where BITs were terminated and replaced by a domestic law following a review of their impact on the country's regulatory sovereignty, Chapter Five advocated for a similar approach in Uganda, while also emphasising, that unlike

⁴²⁹ VanDuzer *et al* (2019) 260.

⁴³⁰ VanDuzer *et al* (2019) 260.

⁴³¹ VanDuzer *et al* (2019) 260.

⁴³² VanDuzer *et al* (2019) 260.

⁴³³ VanDuzer *et al* (2019) 260.

⁴³⁴ VanDuzer *et al* (2019) 260.

South Africa, it terminate and renegotiate those BITs based on a new Model BIT integrated with sustainable development objectives.

Subsequently, Chapter Five provided a comprehensive analysis of the BIT reform options available to Uganda, aimed at aligning them with SDGs. Each of the key provisions in Uganda's BITs needs targeted reform to better serve Uganda's socio-economic and environmental needs. The preambles of Uganda's current BITs focus solely on promoting investment and economic cooperation, neglecting sustainable development.

Reformed BIT preambles should explicitly reference the right to regulate in the public interest and commit to sustainable development objectives, including environmental and social protections. This would provide guidance for arbitral tribunals to interpret the treaties in a balanced manner, ensuring that investment protection does not come at the expense of public welfare.

Additionally, the current BITs lack precise definitions for 'investment' and 'investor'. A reformed Model BIT should adopt an enterprise-based or asset-based, closed-list definition of investment that focuses on assets contributing to sustainable development and excludes speculative investments such as portfolio investments. This ensures that only investments that provide long-term benefits, such as employment generation and technology transfer, are protected.

Similarly, the definition of 'investor' should include clear criteria regarding the nationality of natural and legal persons, and avoid protections for shell companies or treaty-shopping investors. Moreover, this definition should require companies to conduct substantial business in the host-country, accompanied by criteria for determining substantial business activity and be incorporated according to its domestic laws. The BIT should also include OB provisions to ensure that investors and their investments comply with certain requirements to be protected under the treaty.

Moreover, the broad FET clauses in Uganda's BITs could expose the country to arbitrary interpretations that undermine its regulatory flexibility. As such, Uganda could opt to exclude the FET provision completely, or replace it with an 'administrative and judicial treatment'

provision to avoid expansive interpretations, restricting it to cases of denial of justice, due process, or manifest arbitrariness. This would prevent tribunals from interpreting Uganda's legitimate regulatory actions as violations of investor rights.

Furthermore, Uganda's BITs currently include vague FPS provisions that could be interpreted too broadly by arbitral tribunals. A reformed FPS provision should clarify that it only covers physical security and not regulatory or commercial risks. This narrower interpretation ensures that Uganda retains its policy space to implement regulations for the public good without facing potential claims for failing to 'fully protect' investors' commercial interests and safeguards the country from being held liable for actions beyond its control.

The existing MFN and NT provisions in Uganda's BITs also expose the country to risks of 'treaty shopping', where investors exploit more favourable provisions from other treaties. Uganda's reformed BITs should consider leaving the MFN provision out of new BITs or opt to leave it in but include specific carve-outs that prevent MFN from being used to import more favourable dispute settlement mechanisms or substantive protections from other treaties.

Similarly, NT provisions should ensure that foreign investors are not treated more favourably than domestic investors, preserving Uganda's ability to implement policies that favour local businesses and industries for development purposes. Moreover, in addition to tax measures, the NT obligation can be limited to exclude certain sectors or measures where a host-country does not wish to be bound. Countries can also adopt a general exception approach, which apply to both parties and include development-related exceptions including certain government aid, subsidies and grants.

Furthermore, Uganda's current BITs allow investors to freely transfer funds abroad, which can create risks to the country's financial stability. Reforms should introduce conditions for fund transfers, allowing Uganda to restrict transfers during balance of payment crises or other economic emergencies. These provisions could mirror those found in newer agreements such as the AfCFTA Protocol on Investment, which balances the right to transfer funds with host-state policy objectives.

Uganda's BITs provide overly broad protections against both direct and indirect expropriation, with investors often receiving excessive compensation for regulatory measures taken in the public interest. The reformed expropriation provision should distinguish between legitimate regulatory actions and expropriation, with clear carve-outs for measures related to health, environmental protection, and other public policy objectives.

Compensation should only be granted in cases of direct expropriation where there is clear financial loss, aligning Uganda's BITs with sustainable development principles. Uganda should also include explicit exceptions for compulsory licenses in its expropriation provisions, allowing Uganda to issue compulsory licenses for critical public health and environmental needs without triggering compensation claims.

Uganda's exposure to costly ISDS claims under its current BITs poses significant financial and regulatory risks. As such, the reformed dispute settlement mechanism should prioritise ADR methods such as mediation and consultation before escalating to international arbitration (including for SSDS) with temporal requirements. Additionally, the new BITs should restrict the scope of ISDS claims, especially in matters related to public policy and taxation, which should be resolved in domestic courts.

Moreover, ISDS provisions should include time-limits in which investors can be allowed to institute disputes and fork-in-the-road provisions to prevent investors from instituting multiple claims with different dispute settlement fora. Additionally, Uganda's current BITs contain lengthy sunset clauses that continue to protect investments long after the treaties are terminated, limiting Uganda's ability to shift toward a modern investment regime. Reformed BITs should reduce the duration of sunset clauses or waive them altogether (in terminated BITs), allowing Uganda to quickly implement new agreements aligned with its national priorities and sustainable development objectives.

Uganda's current BITs lack any reference to sustainable development, CSR, or the environmental and social impact of investments. The new Model BIT should include enforceable sustainable development provisions that require investors to respect human rights, labour standards, and environmental regulations. This will ensure that investments

contribute to Uganda's broader goals of social equity, environmental protection and long-term economic development.

Provisions should also reflect Uganda's National Development Plan (NDP), addressing key issues such as youth employment, technology transfer, and climate change. Lastly, while Uganda's current BITs focus almost exclusively on investor protections, they fail to impose reciprocal obligations on investors. The reformed Model BIT should introduce specific investor obligations, including adherence to environmental regulations, respect for labour rights, and compliance with anti-corruption standards.

This would ensure that foreign investors are held accountable for their actions and that their activities contribute to Uganda's sustainable development goals. In conclusion, Uganda's current BIT framework is not fit for purpose in its evolving socio-economic context and requires significant reforms to balance the protection of foreign investments with the pursuit of sustainable development and must be reformed to reflect Uganda's priorities.

The adoption of a new Model BIT, incorporating sustainable development principles and lessons from modern treaties, will allow Uganda to attract FDI while safeguarding its regulatory autonomy. By embedding sustainable development provisions, Uganda can ensure that foreign investments contribute to its long-term economic, social and environmental goals, creating a more equitable and prosperous future.

Chapter six: Conclusions and Recommendations

6. Introduction

In the wake of a dynamically evolving international economic landscape, the nexus between international investment law (IIL) and sustainable development has emerged as a critical area of concern. Uganda, as a growing economy, is positioned to benefit from foreign direct investment (FDI) but must also ensure the preservation of not only its economic, but environmental and social fabric.

This thesis undertook a comprehensive examination of the international investment agreement (IIA) regime, tracing its historical origins, identifying current challenges and exploring the evolution of sustainable development within IIL. It analysed Uganda's FDI framework, focusing on the post-independence period and highlighting the critical role of FDI in the country's development.

It also reviewed the legal, institutional and procedural aspects of Uganda's FDI regime, focusing on key domestic laws as well as regional, plurilateral and multilateral investment treaties. Additionally, the core provisions of Uganda's in-force and Model bilateral investment treaties (BITs) were critically assessed to determine whether they are aligned with the country's sustainable development and national policy goals.

The findings revealed that Uganda's primary domestic investment framework was inconsistent with other laws. It also found that while the country continues to protect and promote investment, its domestic laws lacked emphasis on the promotion of sustainable investment, which was antithetical to its own national investment policy (NIP) and national development plans (NDPIII).

The study also revealed that Uganda's BIT system was outdated, containing vague and broadly worded provisions that expose the country to Investor-State dispute settlement (ISDS) claims. It revealed that these treaties created an imbalance in rights and obligations, favouring foreign investors over domestic ones, neglected Uganda's development priorities and had the potential to limit its regulatory autonomy.

These shortcomings highlighted the urgent need for BIT reform to better support Uganda's inclusive and sustainable development objectives. Building on this analysis, the thesis explored potential reform strategies, drawing from South Africa's experience with BIT termination, modern IIA examples and development frameworks to provide a foundation for reforming Uganda's BIT system to incorporate sustainable development objectives.

Chapter Six synthesizes these key findings and provides concrete recommendations for reforming Uganda's BITs to align with its sustainable and evolving national development goals. This Chapter offers a holistic conclusion, reflecting on the insights gained from Uganda's current BIT regime and international best practices. It emphasises the necessity for Uganda to shift towards a more balanced and development-oriented BIT framework.

The recommendations outlined in this Chapter are targeted at policymakers and stakeholders, offering actionable steps for integrating sustainable development into Uganda's investment regime and proposing a new draft Model BIT for future negotiations. These reforms aim not only to protect foreign investors but also promote sustainable development by crafting a Model BIT tailored to Uganda's specific socio-economic and environmental context.

Ultimately, this Chapter underscores the importance of a comprehensive reform that balances investor protection with Uganda's national interests and long-term development objectives. It sets the stage for a more resilient, inclusive and balanced investment framework in Uganda, one that could serve as a model for other developing countries facing similar challenges.

6.1. Key findings

Chapter One introduced the concept of FDI and outlined the background of the thesis. Chapter Two traced the historical development of IIL through the different policymaking eras, focusing on three key aspects: treatment and protection of investors and their investments and the dispute settlement mechanisms.¹ It highlighted that the foundations of IIL were laid

¹ Chapter 2, 'Historical origins of international investment law, surrounding issues and sustainable development in international investment law'.

during the Colonial Era, where principles like territorial sovereignty and nationality, influenced by European powers, shaped IIL.²

Territorial sovereignty allowed countries to control activities within their borders, while the nationality principle focused on how a country's nationals were treated abroad.³ As colonialism spread, European powers redefined the nationality principle, asserting that they were governed by their home-countries' laws even in foreign territories.⁴ They viewed the legal systems of these colonies as inferior, a perception that ultimately facilitated the exploitation and looting of colonial resources.⁵

In order to protect their investments, European powers employed force or gun-boat diplomacy tactics until reparations were forthcoming (especially in uncolonized or newly independent territories) and simply used violence and military force to acquire and protect investments in colonies.⁶ Latin America, being the first bloc to gain independence, began to challenge the principle of nationality, leading to the emergence of the Calvo Doctrine.⁷

This Doctrine argued that foreign investors should not receive better treatment than domestic investors and that disputes should be settled in local courts.⁸ Developed countries responded with forceful protection of their investments, resulting in the development of the Drago Doctrine, which condemned the use of military intervention to enforce individual claims.⁹ This Era also witnessed initiatives like the Hague Convention, which provided for the settlement of disputes between States in a peaceful manner.¹⁰

The Post-colonial Era was marked by the end of WWII as the decolonisation process of other regional blocs began.¹¹ Notably, most African countries remained under colonial rule until the late 1950s and early 1960s. After the War, developed countries particularly faced

² Chapter 2, 'Colonial Era (1600 – 1944)' para 2.1.1 & 'Pre-colonial Era (1945 – 1958)' para 2.1.2 above.

³ Chapter 2, para 2.1.1 above.

⁴ Chapter 2, para 2.1.1 above.

⁵ Chapter 2, para 2.1.1 above.

⁶ Chapter 2, para 2.1.1 above.

⁷ Chapter 2, para 2.1.1 above.

⁸ Chapter 2, para 2.1.1 above.

⁹ Chapter 2, para 2.1.1 above.

¹⁰ Chapter 2, para 2.1.1 above.

¹¹ Chapter 2, 'Post-colonial era (1945 – 1958)' para 2.1.2 above.

investment disputes, revealing the inadequacies of customary investment law (CIL) and diplomatic protection.¹²

In response, efforts were made to create more balanced frameworks for foreign investment, including the Havana Charter, which *inter alia*, aimed to promote investment liberalisation.¹³ However, disagreements between developed and developing countries over CIL and the international minimum standard of treatment (MST) led to the Charter's abandonment causing developed countries to revert back to using friendship, commerce and navigation (FCN) treaties, particularly with the US to regulate certain investment aspects.¹⁴

In Africa, colonial laws continued to govern investment, but as liberation efforts increased, most newly independent African countries rejected FCNs and sought to eliminate former colonial influence and assert their sovereignty by subjecting foreign investors and investments to domestic laws.¹⁵ Notably, the adoption of the 1958 New York Convention was a significant development in foreign investment regulation, laying the groundwork for the future ISDS mechanism.¹⁶

Nonetheless, as decolonisation accelerated, African countries remained sceptical of FDI and hesitant to provide guarantees to protect foreign investments.¹⁷ Additionally, the failure of initiatives like the Havana Charter and the decline of FCN treaties emphasised the need for stronger frameworks to regulate foreign investment, especially in developing, newly independent countries, ultimately leading to the conclusion of the first BIT with Germany and Pakistan in 1959.¹⁸

The conclusion of the first BIT marked the beginning of the IIA policymaking eras, including the Infancy, Dichotomy, Proliferation and the Re-orientation eras.¹⁹ The Infancy Era focused on protecting investments, particularly against expropriation and nationalisation, with State-State dispute settlement (SSDS) mechanisms, usually before the International Court of Justice

¹² Chapter 2, 'Post-colonial era (1945 – 1958)' para 2.1.2 above.

¹³ Chapter 2, para 2.1.2 above.

¹⁴ Chapter 2, para 2.1.2 above.

¹⁵ Chapter 2, para 2.1.2 above.

¹⁶ Chapter 2, para 2.1.2 above.

¹⁷ Chapter 2, para 2.1.2 above.

¹⁸ Chapter 2, para 2.1.2 above.

¹⁹ Chapter 2, 'IIA policymaking eras' para 2.1.3 above.

(ICJ).²⁰ During this era, however, developing countries were particularly sceptical of FDI and BITs as threats to national sovereignty, resulting in the conclusion of just a few BITs.²¹

The Dichotomy Era shifted focus on BITs as key instruments for foreign investment regulation, highlighting the evolving attitudes of developing countries towards FDI and its role in their economic development.²² It underlined the contradictory dynamic of BITs, which saw developed capital-exporters as the primary initiators of BITs and developing capital-importing countries, as their submissive counterparts, giving way to North – South agreements.²³

This era introduced ISDS provisions in BITs, allowing investors to directly institute claims against host-countries without involving their home-country governments.²⁴ This Era also witnessed the first ISDS case.²⁵ Key concepts like the Hull Rule, which called for prompt and adequate compensation for expropriation, also emerged.²⁶ The Proliferation Era, marked by a surge of BITs, saw a major shift in not only IIAs but countries' attitude towards them.²⁷

Beyond North – South treaties, South – South BITs between developing countries increased.²⁸ This expansion was driven by the need for external capital in developing countries, especially as development aid declined and the realisation of the importance of foreign investment to their economic development.²⁹ The era also witnessed a rise in treaties with investment provisions (TIPs) and an increase in ISDS cases.³⁰

However, countries soon realised that old-generation BITs (old-BITs), which were those BITs concluded before 2010, harboured unintended and unforeseen consequences that potentially limited their ability to pursue public policy interests leading to adverse impacts on development.³¹

²⁰ Chapter 2, 'Dichotomy Era (1965 – 1989)' para 2.1.3.2 above.

²¹ Chapter 2, para 2.1.3.2 above.

²² Chapter 2, para 2.1.3.2 above.

²³ Chapter 2, para 2.1.3.2 above.

²⁴ Chapter 2, para 2.1.3.2 above.

²⁵ Chapter 2, para 2.1.3.2 above.

²⁶ Chapter 2, para 2.1.3.2 above.

²⁷ Chapter 2, 'Proliferation Era (1990 – 2007)' para 2.1.3.3 above.

²⁸ Chapter 2, para 2.1.3.3 above.

²⁹ Chapter 2, para 2.1.3.3 above.

³⁰ Chapter 2, para 2.1.3.3 above.

³¹ Chapter 2, para 2.1.3.3 above.

The Re-orientation Era, influenced by global dynamics, such as the 2008 financial crisis and the COVID-19 pandemic, marked a shift towards integrating sustainable development goals (SDGs).³² This era has seen the emergence of new regional and plurilateral agreements such as the AfCFTA Protocol on Investment and the World Trade Organization's (WTO) Investment Facilitation for Development (IFD) Agreement, aimed at promoting and facilitating sustainable investments.³³

Growing dissatisfaction with the IIA regime, particularly surrounding the ISDS mechanism, the balance of rights and obligations between investors and host-countries, the systemic complexity of the IIA regime and the development dimension of IIAs, has led to a decline in the number of BITs signed annually, treaty renegotiations and terminations, along with restrictions on investor access to ISDS forums.³⁴

Chapter Two further examined key issues with the current IIA regime, particularly criticisms of ISDS such as high costs, arbitrator bias, inconsistent awards and issues of legitimacy and transparency.³⁵ These issues prompted discussions about reforming ISDS, International Arbitration Tribunal (IAT) for arbitration rules and creating a world investment court with an appeal mechanism.³⁶

The tension between protecting foreign investors and allowing host-countries to regulate in the public interest was also highlighted, with cases like *Methanex v US* and *Vattenfall v Germany (II)* showcasing how ISDS could limit a country's ability to regulate. This also showed that old-BITs had become weaponised to keep countries in line under threat of ISDS claims (regulatory chill).³⁷

The analysis also highlighted several other concerns, including unequal treatment of domestic and foreign investors, whether BITs truly increase FDI and the underrepresentation of developing countries in arbitration panels, which allegedly favours developed countries and

³² Chapter 2, 'Re-orientation Era (2008 – to date)' para 2.1.3.4 above.

³³ Chapter 2, para 2.1.3.4 above.

³⁴ Chapter 2, para 2.1.3.4 above.

³⁵ Chapter 2, 'Issues with the current IIA regime' para 2.2 & 'Investor-State dispute settlement' para 2.2.1 above.

³⁶ Chapter 2, para 2.2.1 above; Chapter 2, 'Balance between the rights and obligations of investors and host-countries and the right to regulate' para, 2.2.2. above.

³⁷ Chapter 2, para 2.2.2 above.

the subordination of public interests to commercial ones.³⁸ Moreover, debates surfaced about whether BITs effectively attract FDI, with examples from countries like Mexico, Brazil and India suggesting that a country's natural resources, rather than BITs, drove investment.³⁹

The study found that older IIAs lacked development commitments, leading to detrimental effects on developing countries. BITs, initially designed to promote economic benefits such as job creation and infrastructure development, often favoured multinational corporations (MNC) from developed countries over the developmental needs of host-countries.⁴⁰ The rise in ISDS cases and hefty compensation awards, sometimes for investments not yet established, also diverted funds away from critical public services such as health and education, effectively impacting economic development.⁴¹

Lastly, Chapter Two traced the historical development of the sustainable development concept and its integration into IIL,⁴² from the Brundtland Report to its inclusion in SDGs. Initially rooted in environmental law, it had become recognised in various aspects of public international law, including investment law and reflected a growing recognition of the relationship between economic, social and environmental dimensions.⁴³

The introduction of SDGs in Agenda 2030 and Agenda 2063 marked a pivotal moment, which called for a holistic approach to investment that balanced economic, social and environmental considerations and emphasised inclusivity, job creation, poverty reduction and environmental sustainability.⁴⁴ The Chapter highlighted how older IIAs, which favoured foreign investors over public interests, triggered a re-examination of investment policies worldwide.⁴⁵

The Chapter also found that countries had begun incorporating sustainable development imperatives into IIAs through preambles, substantive and procedural provisions to ensure that IIAs promoted investments that contributed to development, while safeguarding social

³⁸ Chapter 2, para 2.2.1 above.

³⁹ Chapter 2, para, 2.2.2. above.

⁴⁰ Chapter 2, 'The development dimension of IIAs' para 2.2.3 above.

⁴¹ Chapter 2, para 2.2.3 above.

⁴² Chapter 2, 'Integrating sustainable development into international investment law' para 2.3 above.

⁴³ Chapter 2, 'The evolution of the notion of sustainable development' para 2.3.1 above.

⁴⁴ Chapter 2, para 2.3.1 above.

⁴⁵ Chapter 2, 'The integration of sustainable development in international investment law' para 2.3.2 above.

and environmental interests.⁴⁶ International forums also contributed to this changing paradigm by issuing model treaties, guidelines and frameworks, which prioritised investments that contributed to sustainable development.⁴⁷

Chapter Two concluded that the historical focus of older BITs on investment protection, protection and economic development, neglected broader social and environmental concerns, but there has been a recent shift toward integrating sustainable development into investment treaties, reflecting a growing recognition of the need for a balanced, inclusive and comprehensive investment framework.

Chapter Three then began by exploring the complex historical relationship between Uganda and foreign investment, shaped by its various leaders.⁴⁸ Under Sir Edward Mutesa II, pro-investment laws were enacted,⁴⁹ but Obote (I)'s socialist policies, attempting to acquire stakes in Uganda's leading companies,⁵⁰ and Idi Amin's expropriation of Indian-owned investments negatively impacted investor confidence.⁵¹

From 1962 to 1986, Uganda only signed three BITs (Germany – 1966, Switzerland – 1971 and Netherlands – 1970).⁵² President Museveni's administration improved Uganda's investment environment through the Economic Recovery Program (ERP) and the enactment of the now repealed Investment Code Act of 1991 (ICA-91), which regulated both foreign and domestic investment in Uganda and established the Uganda Investment Authority (UIA).⁵³

The government under Museveni restored the properties that were expropriated from Asians during Amin's regime and engaged in several multilateral and regional economic blocs including the WTO as well as the African Union (AU), the Common Market for Eastern and Southern Africa (COMESA) and East African Community (EAC) and ratified the AfCFTA.⁵⁴

⁴⁶ Chapter 2, para 2.3.2 above.

⁴⁷ Chapter 2, para 2.3.2 above.

⁴⁸ Chapter 3, 'Historical overview of Uganda's FDI regime in the post-independence era' para 3.1 above.

⁴⁹ Chapter 3, 'Sir Edwards Mutesa II era (1963 – 1966)' para 3.1.1 above.

⁵⁰ Chapter 3, 'Milton Obote (I) era (1966 – 1971)' para 3.1.2 above.

⁵¹ Chapter 3, 'Idi Amin era (1971 – 1979)' para 3.1.3 above.

⁵² Chapter 3, para 3.1.3 above.

⁵³ Chapter 3, 'Yoweri Kaguta Museveni era (1986 – to date)' para 3.1.5 above.

⁵⁴ Chapter 3, para 3.1.5 above.

Museveni also signed 14 BITs, with five still in force, reflecting the government's efforts to create a more favourable environment for FDI.⁵⁵

Chapter Three also emphasised the macro-economic benefits of FDI to the country, ranging from job creation, skills and technology transfer, infrastructural and business development and improved competitiveness of Ugandan businesses.⁵⁶ It revealed that FDI inflows to Uganda had significantly improved, driven by key sectors such as oil, gas, manufacturing and agriculture, positioning Uganda as one of the top FDI recipients among landlocked developing countries.⁵⁷

An analysis of Uganda's Constitution found that foreign investors have access to domestic courts if they are treated unfairly by administrative bodies, such as the UIA, but disputes from the pre-establishment phase cannot be taken to IATs. The Constitution protects property ownership, prohibits expropriation without adequate and prompt compensation and grants both Ugandans and foreign investors access to domestic courts, with foreign investors also having recourse to IATs.⁵⁸

The analysis also revealed that the Constitution upholds the Ugandan government's right to regulate in the public interest and promotes social and economic development. While it explicitly references 'sustainable development' only in relation to environmental protection and preservation, the Constitution contains several other provisions that align with broader SDGs.⁵⁹

The analysis of Uganda's 2018 national investment policy (NIP) revealed that it aimed to, *inter alia*, strengthen Uganda's legal and regulatory framework to promote sustainable socioeconomic transformation by accelerating investment growth, aligning with national priorities and enhancing Uganda's global competitiveness.⁶⁰ The analysis also found that the policy aligns with SDGs, emphasising investments that balance economic growth with

⁵⁵ Chapter 3, para 3.1.5 above.

⁵⁶ Chapter 3, 'The importance of FDI in Uganda' para 3.2 above.

⁵⁷ Chapter 3, 'The importance of FDI in Uganda' para 3.2 above.

⁵⁸ Chapter 3, 'The Constitution of Uganda, 1995 (as amended on 5 January 2018)' para 3.4.1.1 above.

⁵⁹ Chapter 3, para 3.4.1.1 above.

⁶⁰ Chapter 3, 'Uganda National Investment Policy 2018' para 3.4.1.2 above.

environmental sustainability, social inclusion and long-term development, while avoiding negative environmental and social impacts.⁶¹

It found that the objectives and strategies of the NIP were premised on the principles of policy coherence, balanced rights and obligations, the right to regulate, equity and fairness and sustainable development.⁶² However, although the country has made efforts to strengthen its legal and regulatory investment framework through, for instance, the enactment of the ICA – 19, this Act lacks the above principles. Moreover, Uganda BITs are outdated and do not reflect any of these principles.

Chapter Three found that Uganda's ICA – 19 is the main law regulating foreign and domestic investments, replacing the ICA – 91 and strengthening the UIA.⁶³ While the Act includes provisions supporting sustainable development, such as the requirement for an Environmental Impact Assessment (EIA) and adherence to Ugandan laws, it lacks explicit references to broader SDGs.⁶⁴

Key gaps include the absence of requirements for ongoing social and environmental impact assessments after registration, insufficient emphasis on the State's right to regulate in the public interest and a lack of provisions promoting sustainable investments and social development, such as job creation. It also found that although the UIA was empowered to promote and facilitate investment, it lacked powers to regulate investment and negotiate investment treaties on behalf of the country.⁶⁵

Moreover, the ICA – 19 provides requirements for both foreign and local investors to qualify for incentives including export and local content subsidies, both of which are prohibited under the Agreement on Subsidies and Countervailing Measures (SCMA), thus making them *prima facie* inconsistent with the Agreement even for Uganda as a least-developed country (LDC).⁶⁶

⁶¹ Chapter 3, para 3.4.1.2 above.

⁶² Chapter 3, 'Uganda National Investment Policy 2018' para 3.4.1.2 above.

⁶³ Chapter 3, 'Uganda Investment Code Act of 2019' para 3.4.1.3 above.

⁶⁴ Chapter 3, para 3.4.1.3 above.

⁶⁵ Chapter 3, para 3.4.1.3 above.

⁶⁶ Chapter 3, para 3.4.1.3 above.

Moreover, there is no stipulation that such incentives should be in accordance with the Public Finance Management Act, which governs procedures for granting incentives.⁶⁷

The analysis also found that, although the ICA-19 introduced procedural improvements and institutional reforms to enhance Uganda's investment climate, it lacks the substantive content required to regulate foreign investment in a sustainable manner.⁶⁸ It does not incorporate sustainable development as a guiding principle, nor does it align with global or national frameworks such as the SDGs, Agenda 2063, or Uganda's environmental and climate policies.⁶⁹ The Act imposes no binding environmental, social, or human rights obligations on investors beyond a general requirement to comply with national laws.⁷⁰ Consequently, it concluded that the Act was not sufficient, by itself, to regulate foreign investment in the country in a manner that safeguards Uganda's sustainable development priorities.⁷¹

Furthermore, Uganda's international obligations, particularly under the ICSID and New York Conventions, expose the country to potential risks in ISDS proceedings. These risks raise concerns regarding transparency, procedural fairness and the government's ability to regulate in the public interest without facing costly legal challenges. Chapter three also revealed that three ISDS cases had been brought against Uganda under the ICSID framework, including one based on an alleged breach of the Netherlands–Uganda BIT (2000). That particular case was settled, although the terms of the settlement remain confidential.⁷²

An analysis of the Agreement on trade-related investment measures (TRIMs Agreement) then revealed that it applied to investment measures that affected trade in goods, as they could potentially distort or restrict international trade.⁷³ It was also found that the TRIMs agreement did not regulate FDI on a multilateral level.⁷⁴ As an old-IIA, the Agreement also lacks provisions that promote sustainable development objectives and as such, investment

⁶⁷ Chapter 3, para 3.4.1.3 above.

⁶⁸ Chapter 3, para 3.4.1.3 above.

⁶⁹ Chapter 3, para 3.4.1.3 above.

⁷⁰ Chapter 3, para 3.4.1.3 above.

⁷¹ Chapter 3, para 3.4.1.3 above.

⁷² Chapter 3, para 3.4.2.2 above.

⁷³ Chapter 3, 'Agreement on trade-related investment measures (TRIMs), 1994' para 3.4.2.3 above.

⁷⁴ Chapter 3, para, 3.4.2.3 above.

measures that disrupt trade in goods could be considered a breach of the agreement even when such measures are aimed at promoting such objectives.

An analysis of plurilateral IFD Agreement found that, although it is yet to be ratified by Uganda, it aims to enhance transparency measures, simplify administrative procedures and promote international cooperation to facilitate FDI flows, especially to developing and least-developed countries like Uganda, in alignment with SDGs.⁷⁵ It also encourages responsible business conduct (RBC) and anti-corruption measures, which are vital for Uganda's investment framework.⁷⁶

However, the IFD Agreement avoids contentious issues such as market access, investment protection and ISDS, focusing instead on improving the regulatory environment for investments.⁷⁷ Uganda's investment legal framework was found to be mostly consistent with the IFD Agreement, especially regarding the definitions of 'investor' and 'investment' under Uganda's ICA – 19.⁷⁸

The analysis also found that Uganda has made significant strides in meeting the Agreement's transparency and administrative streamlining provisions by, *inter alia*, designating the UIA as its investment promotion agency (IPA), simplifying investment registration and visa processes, availing investment information digitally and free of charge and making investment registration procedures easy, digital and free of charge.⁷⁹

Nevertheless, the analysis found that gaps remain in fully integrating sustainable development principles, particularly those relating to business conduct and robust anti-corruption measures.⁸⁰ In its regional commitments, it was found that Uganda complies with the Common Market for Eastern and Southern Africa (COMESA) Treaty along with the CCIA

⁷⁵ IFD Agreement (2024) art 1; Chapter 3, 'Investment Facilitation for Development (IFD) Agreement, 2024' para 3.4.2.4 above.

⁷⁶ Chapter 3, para 3.4.2.4 above.

⁷⁷ Chapter 3, para 3.4.2.4 above.

⁷⁸ Chapter 3, para 3.4.2.4 above.

⁷⁹ Chapter 3, para 3.4.2.4 above.

⁸⁰ Chapter 3, para 3.4.2.4 above.

Agreement, fostering investment-friendly policies, but gaps remain in compensating host-countries for investor misconduct and addressing public access to arbitration remain.⁸¹

Under the EAC Treaty, Uganda promotes industrial growth and offers tax incentives.⁸² However, challenges such as inadequate infrastructure and high energy costs hinder full harmonisation with other EAC Member States.⁸³ Lastly, Chapter Three also analysed the AfCFTA Protocol on Investment, which presents a key opportunity for Uganda to reform its legal framework, particularly by defining ‘investment’ and ‘investor’ to focus on sustainable development.⁸⁴

It found that the Protocol contains innovative provisions such as ‘investment-related human rights’ and offers protection against treaty shopping by allowing host-countries to deny benefits to certain investors.⁸⁵ While Uganda aligns with some Protocol provisions, such as through the UIA’s digitised investment information and visa systems, it lacks comprehensive sustainable development criteria, RBC practices, robust anti-corruption measures and investor obligations specifically tailored to promoting SDGs.⁸⁶

Chapter Four examined Uganda’s in-force BITs with Germany, Switzerland, the United Kingdom (UK), Denmark, France and its Model BIT, to ascertain their intricacies by shedding light on their preambles, definitions and core substantive provisions.⁸⁷ The analysis found that Uganda’s BIT preambles were brief and broadly worded, predominantly focusing on economic cooperation and favourable investment conditions, often neglecting sustainable development and public policy objectives.⁸⁸

This limited perspective complicates the enforcement of sustainable practices in ISDS cases.⁸⁹ The analysis also revealed that Uganda’s BITs lacked a section exclusively dedicated to the

⁸¹ Chapter 3, ‘The Investment Agreement for the COMESA Common Investment Area (CCIA) Agreement, 2007’ para 3.4.3.2 above.

⁸² Chapter 3, ‘East African Community (EAC) Treaty, 1999’ para 3.4.3.3 above.

⁸³ Chapter 3, para 3.4.3.3 above.

⁸⁴ Chapter 3, ‘Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment (AfCFTA Protocol on Investment or the Protocol), 2023’ para 3.4.3.4 above.

⁸⁵ Chapter 3, para 3.4.3.4 above.

⁸⁶ Chapter 3, para 3.4.3.4 above.

⁸⁷ Chapter 4, General provisions of bilateral investment treaties’ para, 4.1.

⁸⁸ Chapter 4, ‘Preamble’ para 4.1.1 above.

⁸⁹ Chapter 4, para 4.1.1 above.

‘scope’ of the treaty.⁹⁰ It also revealed that the broad, asset-based definitions of ‘investment’ unintentionally included non-beneficial short-term investments, like portfolio investments, which do not promote local economic growth and exposed the country to ISDS cases resulting from such investments.⁹¹

Chapter Four also found that the definition of ‘investment’ in most of Uganda’s BITs lacked limiting factors such as commitments of capital and other resources, the expectation of gain or profit and the assumption of risk and contribution to development, which further exposed the country to ISDS cases from investors whose investments have not had an actual impact on the development of the country.⁹²

With regards to the definition of ‘investor’, the Chapter found that in some of Uganda’s BITs, the definition, particularly that of a citizen, was inconsistent with the current provisions of the Constitution of Uganda, which has been amended since their conclusion.⁹³ Moreover, the definitions in Uganda’s BITs failed to address issues like dual nationality and permanent residency, increasing the risk of treaty shopping.⁹⁴

The analysis found that the definitions of ‘entity’ or companies’ were unqualified in some of Uganda’s BITs, relying on the place of incorporation only and containing no further qualifications, which could potentially lead to treaty shopping and the use of shell companies by investors to access treaty protections.⁹⁵ The analysis also revealed a disparity in the treatment of Swiss investors in Uganda versus Ugandan investors in Switzerland, as the definition of ‘companies’ is unqualified for the latter and qualified for Ugandan investors in Switzerland.⁹⁶

Furthermore, Uganda’s BITs with Germany, France and the Model BIT have stricter definitions of ‘companies’, requiring a real business presence and control, which helps prevent treaty exploitation by companies without genuine economic ties to Uganda.⁹⁷ However, none of

⁹⁰ Chapter 4, ‘Scope and definition’ para 4.1.2 above.

⁹¹ Chapter 4, ‘Definition of investment’ para 4.1.2.1 above.

⁹² Chapter 4, para 4.1.2.1 above.

⁹³ Chapter 4, ‘Definition of investor’ para 4.1.2.2 above.

⁹⁴ Chapter 4, para 4.1.2.2 above.

⁹⁵ Chapter 4, para 4.1.2.2 above.

⁹⁶ Chapter 4, para 4.1.2.2 above.

⁹⁷ Chapter 4, para 4.1.2.2 above.

Uganda's BITs include a denial of benefits (DOB) clause, which could limit protection to qualified investors, addressing treaty shopping issues.⁹⁸

Moreover, there were no limitations to the kind of companies or juristic persons protected under the BITs. It recommended revising the definitions of 'investor' and 'companies' to include stronger requirements like business presence and economic control and to account for dual citizenship, permanent residents and corporate nationality issues.⁹⁹

The Chapter also highlighted the risks of Uganda's broad fair and equitable treatment (FET) provisions, which can lead to increased ISDS claims, as this was one of the most invoked provisions in dispute settlement cases. It advocated for clearer FET definitions that account for Uganda's socio-economic context, allowing for necessary regulatory actions without excessive legal risks.¹⁰⁰

The full protection and security (FPS) provisions were also reviewed, finding that they could be interpreted to encompass wider protection obligations, including legal, economic and regulatory protections.¹⁰¹ It was also found that the FPS provision in the majority of Uganda's in-force BITs could be interpreted to include actions beyond its control and should be limited to physical protection and security with a consideration of the host-country's capacity to act, which should be guided by due diligence principles and aligned with CIL.¹⁰²

An analysis of Uganda's MFN treatment and NT in-force and Model BIT provisions revealed that these provisions were usually combined in the same article but different provisions or in the same provision and applied to either or both investors and investments.¹⁰³ Moreover, while some provisions explicitly limited investors and/or investments to the post-establishment phase, others lacked clarity, allowing broader interpretations that could include pre-establishment treatment.¹⁰⁴

⁹⁸ Chapter 4, para 4.1.2.2 above.

⁹⁹ Chapter 4, para 4.1.2.2 above.

¹⁰⁰ Chapter 4, 'Fair and equitable treatment' para 4.1.3.1 above.

¹⁰¹ Chapter 4, 'Full protection and security' para 4.1.3.2 above.

¹⁰² Chapter 4, para 4.1.3.2 above.

¹⁰³ Chapter 4, 'Most-favoured-nation treatment and national treatment' para 5.1.2.6 above.

¹⁰⁴ Chapter 4, para 5.1.2.6 above.

The analysis also found that while the Uganda's in-force and Model BITs contained exceptions for MFN treatment, most lacked exceptions for the NT clause, which could potentially create imbalances between foreign MNCs and Uganda's micro, small and medium-sized-enterprises (MSMEs), thus inhibiting the country's ability to grow and advance those domestic industries.¹⁰⁵

Provisions on expropriation and compensation were found to need revisions, including explicit definitions and fair compensation methods that align with international standards.¹⁰⁶ Issues with the transfer of funds and dispute settlement mechanisms were also identified, suggesting more controlled transfer provisions and a balance between ISDS and local remedies.¹⁰⁷

The analysis revealed that Uganda's BITs with Germany and Switzerland do not contain ISDS provisions, but instead provide solely for State-to-State Dispute Settlement (SSDS) mechanisms. Moreover, the ISDS provisions in the other three in-force and Model BITs allow foreign investors to bypass local courts, undermining its sovereignty and right to regulate in the public interest.¹⁰⁸ Additionally, these BITs lack mandatory alternative dispute resolution (ADR) mechanism options, which would mitigate dispute settlement expenses.¹⁰⁹

There is also a notable absence of provisions that align investor rights with obligations related to sustainable development, limiting Uganda's capacity to implement necessary policies without fear of costly arbitration claims.¹¹⁰ Sustainable development commitments should also be included in Uganda's BITs, such as compliance with local laws and labour standards, to ensure that investments contribute positively to Uganda's social, economic, and environmental goals.¹¹¹

Lastly, the analysis in Chapter Four found that the long durations and extended sunset clauses in Uganda's BITs were constraints that hinder policy adaptation to modern challenges like

¹⁰⁵ Chapter 4, para 5.1.2.6 above.

¹⁰⁶ Chapter 4, 'Expropriation or nationalisation and compensation' para 4.1.4 above.

¹⁰⁷ Chapter 4, 'Transfer of funds' para 4.1.5 above.

¹⁰⁸ Chapter 4, 'Dispute settlement' para 4.2 above.

¹⁰⁹ Chapter 4, para 4.2 above.

¹¹⁰ Chapter 4, para 4.2 above.

¹¹¹ Chapter 4, para 4.2 above.

environmental sustainability and social norms.¹¹² The Chapter recommended that Uganda terminate its existing in-force BITs as they were outdated, perpetuate inconsistencies, exposed the country to ISDS cases, restricted its right to regulate, favoured foreign investors over domestic ones and lacked comprehensive sustainable development objectives.¹¹³

Regarding termination, the analysis revealed that countries like Indonesia and Argentina had successfully negotiated the waiver of sunset clauses when terminating their BITs, enabling them to transition into a new investment policy framework and it was recommended that Uganda do the same.¹¹⁴ Furthermore, countries could agree for existing investments to be protected under a ‘transitional’ agreement such as a Model BIT or domestic laws, while replacement BIT are being re-negotiated.¹¹⁵

Chapter Five then examined how Uganda could reform its investment treaty framework by exploring strategies adopted by South Africa as a case study. It found that South Africa signed 50 BITs after apartheid, which provided broad protections for foreign investors but lacked provisions supporting host-country rights and sustainable development. Following a dispute (*Foresti v South Africa*) over its BBBEE policies, South Africa reviewed its BIT regime.¹¹⁶

The review found that South Africa’s old BITs compromised regulatory autonomy and did not correlate strongly with increased FDI. Consequently, the country terminated several of its BITs and introduced the Protection of Investment Act (PIA), which regulates both foreign and domestic investments, limits investor access to international arbitration and aligns investment protections with national and sustainable development priorities.¹¹⁷

The analysis also found that Uganda's in-force and Model BITs face similar issues, including vague provisions that could limit regulatory autonomy and expose the country to ISDS claims. However, in addition to terminating its BITs as South Africa did, the thesis recommends that

¹¹² Chapter 4, ‘Duration, termination and sunset clauses’ para 4.3 above.

¹¹³ Chapter 4, Chapter 4, para 4.3 above.

¹¹⁴ Chapter 4, para 4.3 above.

¹¹⁵ Chapter 4, para 4.3 above.

¹¹⁶ Chapter 5, ‘Termination of old-BITs: AA case of South Africa’ para 5.1.1 above.

¹¹⁷ Chapter 5, para 5.1.1 above.

Uganda also renegotiate its existing BITs based on a new sustainable development-oriented Model BIT.

The thesis argues that given Uganda's reliance on FDI and increasing inflows, it cannot afford to see a reduction in foreign investment. As such, renegotiating BITs will ensure investor protections while aligning with sustainable development objectives. Moreover, Uganda must also address sunset clauses and inconsistencies with domestic laws during renegotiation to expedite its transformation into a modern sustainable development-oriented investment framework.

In order to do this, Chapter Five then reviewed modern investment agreements such as the AfCFTA Protocol on Investment, CICA Agreement, WTO's IFD Agreement and Model BITs from SADC and EAC, among others, identifying best reform practices for Uganda.¹¹⁸ It also drew on international frameworks like UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) and the Commonwealth Guide for Developing Country Negotiators (Commonwealth Guide).¹¹⁹

The Chapter proposed a draft Model BIT for Uganda, designed to address gaps in its current treaty framework and provide policymakers with a foundation for negotiating future treaties aligned with national priorities and international sustainability standards.

6.1.1. Conclusion on key findings

The findings of this study conclusively demonstrate that Uganda's current BIT system—comprising five in-force BITs and a Model BIT from 2003—is outdated, overly investor-centric, and insufficiently aligned with the country's national development priorities and international sustainable development obligations. The analysis of historical, legal and policy contexts confirms that these treaties were concluded during a period when sustainable development considerations were either marginal or entirely absent from IIA policymaking.

The examination of Uganda's BITs revealed provisions that are broad, vaguely worded, and asymmetrically favour investor rights while imposing few, if any, corresponding obligations.

¹¹⁸ Chapter 5, 'Integrating sustainable development provisions in a new Ugandan Model BIT' para 5.1.2 above.

¹¹⁹ Chapter 5, para 5.1.2 above.

Critically, these treaties limit Uganda's policy space to regulate in the public interest, especially in areas central to sustainable development such as public health, environmental protection, labour rights, and resource governance. The inclusion of ISDS clauses further compounds this imbalance, exposing Uganda to costly arbitration proceedings and potential liabilities without equivalent enforcement mechanisms for state interests or counterclaims.

In light of these findings, it is evident that the current BIT system fails to reflect Uganda's changed economic circumstances and its developmental aspirations under frameworks such as Agenda 2063, Agenda 2030, and the AfCFTA Protocol on Investment. The comparative review of treaty reforms undertaken in South Africa and other jurisdictions confirms that Uganda is not alone in grappling with the legacy of old-generation BITs. These jurisdictions have initiated substantive reforms to assert regulatory sovereignty and embed sustainable development considerations into their investment frameworks.

The findings also demonstrate that Uganda's Model BIT is ill-equipped to guide future treaty negotiations. Its lack of references to sustainable development, corporate accountability, or policy flexibility underscores the urgent need for a new model that incorporates best practices from new-generation investment treaties and regional instruments such as the SADC and EAC Model BITs.

Overall, the research establishes a compelling case for comprehensive reform of Uganda's BIT system. The existing framework does not adequately serve Uganda's strategic interests, nor does it provide the legal architecture necessary to advance inclusive, equitable and sustainable economic transformation. Reform is not only desirable—it is imperative. The adoption of a new, sustainable development-oriented Model BIT, accompanied by the termination or renegotiation of existing outdated treaties, is essential to realign Uganda's investment regime with its evolving national objectives and international legal commitments.

6.2. Reform recommendations

An analysis of Uganda's FDI regime revealed several inconsistencies. First, there were inconsistencies with Uganda's ICA – 19 and other domestic laws such as those pertaining to

its Foreign Exchange Act and Public Finance Management Act.¹²⁰ It was also found that the provisions relating to incentives in the ICA – 19 were *prima facie* inconsistent with its international obligations under the WTO.

The analysis also found that although Uganda’s National Investment Policy (NIP) aimed to streamline investment with sustainable development objectives by, *inter alia*, strengthening its legal and regulatory framework, the ICA – 19 still lacked comprehensive objectives reflecting these principles. Moreover, Uganda’s BITs remain outdated, encompassing provisions that do not reflect these objectives and expose the country to ISDS cases.

6.2.1. Uganda’s domestic FDI regime

The analysis of Uganda’s ICA – 19 found that although the UIA is mandated to attract and facilitate investment, it does not possess the authority to regulate investment activities. To address this limitation,¹²¹ it is recommended that the Ugandan government extend the Authority’s powers to include the regulation of all investments and related treaties in the country.¹²² Moreover, the ICA – 19 should expressly give the UIA powers to negotiate, monitor and oversee the implementation of BITs, to ensure coherence between the Act and Uganda’s BITs.¹²³

Uganda’s ICA – 19 application for investment registration requirements should also include criteria for the approval of investment plans, in accordance with the domestic laws in force at the time, to ensure that investment projects contribute to Uganda’s evolving national development goals.¹²⁴ Moreover, it should be mandatory for foreign investors to explore the alternative dispute resolution (ADR) options, including mediation, conciliation, arbitration as well as exhaust domestic remedies before escalating a dispute to international arbitration.¹²⁵

Under Uganda’s Foreign Exchange Act, the Governor of the Bank of Uganda (BOU) may impose restrictions on payments between residents and non-residents if the country

¹²⁰ Chapter 3, ‘Analysis of Uganda’s Foreign Direct Investment Regime’ para 3.4.1.3 above

¹²¹ Chapter 3, para 3.4.1.3 above.

¹²² Chapter 3, para 3.4.1.3 above.

¹²³ Chapter 3, para 3.4.1.3 above.

¹²⁴ Chapter 3, para 3.4.1.3 above.

¹²⁵ Chapter 3, para 3.4.1.3 above.

experiences a severe deterioration in its balance of payments.¹²⁶ However, Section 24 of ICA –19 limits the Governor’s powers by obligating Uganda to pay and transfer compensation to investors, even during financial crises.¹²⁷

This could expose Uganda to financial liabilities similar to Argentina’s situation, where it was required to pay ISDS awards despite economic hardship. To mitigate this risk, it is recommended that amendments be made to both the ICA - 19 and the Foreign Exchange Act to allow for exceptions that delay compensation payments during such financial emergencies.¹²⁸ Additionally, the ICA – 19 offers incentives to both domestic and foreign investors if they meet certain criteria, such as export and local content requirements.¹²⁹

However, these subsidies are inconsistent with Uganda’s obligations under the SCMA, which prohibits export subsidies and local content subsidies and should be aligned with international obligations.¹³⁰ Moreover, the subsidies under Section 12 of Uganda’s ICA – 19 should be aligned with the Public Finance Management Act, which governs the procedures for granting incentives in Uganda, to ensure compliance with domestic legal frameworks.¹³¹

Moreover, the Act lacks explicit references to broader SDGs. Key gaps include the absence of requirements for ongoing social and environmental impact assessments after registration, insufficient emphasis on the state's right to regulate in the public interest and a lack of provisions promoting sustainable investments and social development, such as job creation.¹³² The Act needs further reform to fully integrate sustainable development objectives throughout the investment process.¹³³

Lastly, unlike South Africa’s Protection of Investment Act (2015), Uganda’s ICA – 19 lacks explicit sustainable development provisions, particularly those that aim to promote investments that contribute to sustainable investment, safeguard the right to regulate and

¹²⁶ Chapter 3, para 3.4.1.3 above.

¹²⁷ Chapter 3, para 3.4.1.3 above.

¹²⁸ Chapter 3, para 3.4.1.3 above.

¹²⁹ Chapter 3, para 3.4.1.3 above.

¹³⁰ Chapter 3, para 3.4.1.3 above.

¹³¹ Chapter 3, para 3.4.1.3 above.

¹³² Chapter 3, para 3.4.1.3 above.

¹³³ Chapter 3, para 3.4.1.3 above.

achieve a balance of rights and obligations applicable to all investors.¹³⁴ As such, it is recommended that the ICA – 19 explicitly include these objectives in its preambular and substantive provisions.¹³⁵

6.2.2. Uganda's bilateral investment treaty system

An analysis of Uganda's in-force and Model BITs revealed that Uganda had five in-force BITs and nine unratified BITs, most of which were concluded before 2010 and therefore qualified as old generation BITs. Uganda's in-force and Model BITs were found to have vague and overly broad provisions that exposed the country to ISDS cases, while limiting its regulatory autonomy.

These treaties contained unbalanced rights and obligations, favouring foreign investors over domestic ones, and were outdated, lacking alignment with Uganda's evolving national development strategies and SDGs. Drawing on South Africa's experience, the thesis noted that South Africa's review of its BITs exposed similar issues, including prioritising foreign investor rights over public policy objectives, inadequate safeguards for contributing to SDGs and limited correlation between BITs and increased FDI.

South Africa ultimately terminated its BITs without renegotiation, but this led to several criticisms followed by a gradual decrease in FDI inflows, a risk Uganda cannot afford due to its smaller economy and reliance on foreign investment. Recognising historical investor preferences for countries with BITs, the thesis emphasised the potential influence of BIT availability on investment decisions, especially given the country's history with expropriations of foreign investments.¹³⁶

The thesis recommends the following reforms for Uganda's BIT system:

- a. **Abandon unratified BITs:** These BITs are outdated and contain similarly vague and broadly worded provisions as those in Uganda's existing in-force BITs and would therefore expose Uganda to the same risks if ratified.

¹³⁴ Chapter 3, para 3.4.1.3 above.

¹³⁵ Chapter 3, para 3.4.1.3 above.

¹³⁶ Chapter 5, para 5.1.2 above.

- b. **Terminate existing BITs:** Current BITs create inconsistencies, limit the government's regulatory powers, favour foreign investors over domestic ones, expose Uganda to ISDS cases, are unbalanced regarding the rights and obligations of the host-country, and the investor, outdated and lack alignment with national priorities and sustainable development objectives.
- c. **Negotiate waivers or reductions of sunset clauses:** During termination, Uganda should seek to shorten or eliminate sunset clauses to minimise extended exposure to outdated treaty provisions.
- d. **Protect investment under domestic laws during transition:** While negotiating new BITs, Uganda can ensure existing investments are safeguarded by domestic investment laws during the transitional period.
- e. **Draft a new sustainable development-oriented Model BIT:** The new Model BIT should serve as a basis for future treaty negotiations, ensuring alignment with Uganda's national priorities and SDGs

The thesis therefore emphasised that Uganda should terminate and renegotiate its BITs, but based on a new sustainable development-oriented Model BIT to ensure future FDI.

Chapter Five recommended reforms to Uganda's BITs, using examples from modern IIAs, along with sustainable development frameworks like the Commonwealth Guide. The thesis proposed specific changes to problematic provisions, which should be included in Uganda's future Model BIT as follows:

1. Preamble

The original brief preamble, which primarily emphasised fostering economic cooperation, promoting favourable conditions for reciprocal investments and generating prosperity in the host-country, has been replaced with a more comprehensive one.¹³⁷ This proposed preamble clarifies that the treaty is not only aimed at promoting and protecting investment but also at

¹³⁷ Chapter 4, "Analysis of Uganda's bilateral investment treaty-system" para 4.1.1. above; Chapter 5, "Integrating sustainable development provisions in a new Ugandan Model BIT" para 5.1.2.1 above.

advancing broader public policy goals such as sustainable development, job creation and the transfer of technology and skills.¹³⁸

It highlights the treaty's objective of balancing the rights and obligations of the Contracting Parties, investors and investments, while recognising the importance of supporting investment activities that benefit economically disadvantaged areas, small and medium enterprises (SMEs), local communities, indigenous peoples, and underrepresented groups, including people with disabilities, youth and women.¹³⁹

The treaty provisions ensure that its obligations do not override national development priorities, preserving each Party's right to regulate in the public interest on matters such as public health, safety, morals and the environment.¹⁴⁰ It aligns with other international commitments, including those related to human rights, labour rights, environmental protection and health, affirming that Contracting Parties should not derogate from these obligations to promote and protect investment.¹⁴¹

Furthermore, it underscores the State Parties' commitment to democracy, the rule of law and fundamental freedoms as recognised under international law.¹⁴² The preamble also promotes investment opportunities that foster sustainable development, while reaffirming the Parties' dedication to combating corruption in international investment.¹⁴³ It adopts a holistic approach to sustainable development, acknowledging its economic, social and environmental dimensions.¹⁴⁴

2. Scope of application

None of Uganda's in-force BITs currently includes a specific article on the scope of application, making the addition of this provision necessary.¹⁴⁵ This section is essential for defining the treaty's coverage, clearly outlining which investors, investments and actions fall under its

¹³⁸ Chapter 5, para 5.1.2.1 above.

¹³⁹ Chapter 5, para 5.1.2.1 above.

¹⁴⁰ Chapter 5, para 5.1.2.1 above.

¹⁴¹ Chapter 5, para 5.1.2.1 above.

¹⁴² Chapter 5, para 5.1.2.1 above.

¹⁴³ Chapter 5, para 5.1.2.1 above.

¹⁴⁴ Chapter 5, para 5.1.2.1 above.

¹⁴⁵ Chapter 4, para 4.1.2 above.

protection.¹⁴⁶ It therefore establishes the parameters of the treaty and clarifies its boundaries.¹⁴⁷

The proposed scope of application provision applies to investments made after the treaty enters into force, as well as certain pre-existing investments, provided these investments meet the treaty's definition of an investment and are still present in the host country when the treaty takes effect.¹⁴⁸ It also covers actions taken by the government and non-governmental bodies exercising delegated authority.¹⁴⁹

Additionally, the provision specifies situations to which it does not apply. These include, but are not limited to, investor-State disputes arising before the treaty's entry into force, government procurement, subsidies or grants and taxation measures implemented in accordance with the laws of the Contracting Party.¹⁵⁰ The treaty also excludes disputes solely concerning alleged breaches of contracts between investors and the host country.¹⁵¹

3. Definitions

3.1. Definition of investment

The broad, open-ended asset-based definition of investments found in Uganda's BITs has been replaced with a more focused approach to ensure that the BIT attracts only the types of investments the country seeks, while excluding those it does not.¹⁵² Two options have been considered for the proposed definition: an enterprise-based approach or an asset-based closed-list approach.¹⁵³

The enterprise-based approach requires the establishment or acquisition of an enterprise, aligning it primarily with FDI.¹⁵⁴ The assets belonging to the enterprise are protected under the treaty and the language emphasises the creation of an operational enterprise in the host-

¹⁴⁶ Chapter 4, para 4.1.2 above.

¹⁴⁷ Chapter 4, para 4.1.2 above.

¹⁴⁸ Chapter 5, para 5.1.2.2 above.

¹⁴⁹ Chapter 5, para 5.1.2.2 above.

¹⁵⁰ Chapter 5, para 5.1.2.2 above.

¹⁵¹ Chapter 5, para 5.1.2.2 above.

¹⁵² Chapter 4, para 4.1.2.1 above;

¹⁵³ Chapter 5, para 5.1.2.3.1 above.

¹⁵⁴ Chapter 5, para 5.1.2.3.1 above.

country.¹⁵⁵ This approach provides an illustrative list of assets that an investment may hold under the treaty, but the list itself does not define what constitutes an asset.¹⁵⁶

The proposed definition also includes six characteristics that an investment must have to qualify for protection: (1) a substantial contribution of capital or other assets, (2) a certain duration, (3) an element of risk, (4) an intent to promote economic activity in the host-country, (5) compliance with the host country's laws, and (6) the investment must be made in good faith.¹⁵⁷ Additionally, the definition of investment excludes claims arising from judicial, administrative, or arbitral orders or judgments, as well as portfolio investments.¹⁵⁸

3.2. Definition of investor

The definition of 'investor' includes flexibility by determining a citizen's nationality according to the relevant laws of their home or host country, allowing for adjustments in case those laws change.¹⁵⁹ The issues of dual nationality and permanent resident status have been addressed. In cases of dual nationality, an investor is considered a national or citizen only of the country where they permanently reside.¹⁶⁰

For juristic persons, entities are regarded as legal entities in the country where they are headquartered and conduct substantial business activity.¹⁶¹ The definition also specifies the criteria for determining "substantial business activity," requiring a case-by-case analysis of factors such as the amount of investment made in the host country, the number of jobs created, the impact on the local community, and the duration of the business operation.¹⁶²

4. Denial of benefits

None of Uganda's in-force or Model BITs contains a 'denial of benefits' (DOB) provision and, as such, this thesis proposes that it be included. A DOB provision has been incorporated. This

¹⁵⁵ Chapter 5, para 5.1.2.3.1 above.

¹⁵⁶ Chapter 5, para 5.1.2.3.1 above.

¹⁵⁷ Chapter 5, para 5.1.2.3.1 above.

¹⁵⁸ Chapter 5, para 5.1.2.3.1 above.

¹⁵⁹ Chapter 5, para 5.1.2.3.2 above.

¹⁶⁰ Chapter 5, para 5.1.2.3.1 above.

¹⁶¹ Chapter 5, para 5.1.2.3.1 above.

¹⁶² Chapter 5, para 5.1.2.3.1 above.

provision allows the host country to deny the benefits of the treaty to an investor if the investor does not have substantial business operations in the home country or if it is controlled by investors from a non-party country, preventing the misuse of treaty protections by shell companies or entities without genuine links to the home country.

5. Fair and equitable treatment

In order to address the deficiencies of the unqualified FET standard, it is proposed that the FET provision be replaced with an 'administrative and judicial treatment' provision ensuring that investors and/ or investments are not subjected to treatment that constitute a fundamental denial of justice in criminal, civil or administrative proceedings.¹⁶³

The provision includes protections against evident denial of due process, manifest arbitrariness, discrimination based on gender, race and religious beliefs or abusive treatment in judicial or administrative process.¹⁶⁴ It also clarifies that it does not equate to the FET standard and that the MST under CIL applies and does not allow interpretations or applications that go beyond the outlined elements.¹⁶⁵

6. Full protection and security

The proposed reform integrates the full protection and security provision, albeit in a more concise manner.¹⁶⁶ The standard is now framed as a provision on 'physical protection and security,' addressing concerns related to the clause's scope.¹⁶⁷ Additionally, a stipulation is introduced, specifying that the provision of physical protection and security to foreign investors is subject to the host-country's capabilities.¹⁶⁸

Further clarification as to the meaning of 'subject to its capabilities' is provided, which refers to a host-country's obligation to exercise due diligence in accordance with CIL and prohibits any interpretations that go beyond the elements contained therein.¹⁶⁹ This serves to prevent

¹⁶³ Chapter 5, para 5.1.2.4 above.

¹⁶⁴ AfCFTA Protocol on Investment (2023) art 17(1); Chapter 5, para 5.1.2.4 above.

¹⁶⁵ AfCFTA Protocol on Investment (2023) art 17(2); Chapter 5, para 5.1.2.4 above.

¹⁶⁶ Chapter 5, para 5.1.2.5 above.

¹⁶⁷ Chapter 5, para 5.1.2.5 above.

¹⁶⁸ Chapter 5, para 5.1.2.5 above.

¹⁶⁹ Chapter 5, para 5.1.2.5 above.

the country from being excessively burdened by the obligation to safeguard foreign investments.¹⁷⁰

7. Most-favoured-nation treatment

It is proposed that the MFN provision be retained but separated from the NT provision—placing them in distinct articles, each with its own exceptions. This approach clarifies the scope and limitations of each obligation.¹⁷¹ While some of Uganda’s existing BITs specify that MFN treatment applies to post-establishment investments, others are ambiguous and could be interpreted to include pre-establishment commitments.¹⁷²

To address this, the reform specifies that MFN treatment applies only to the ‘management, maintenance, use, enjoyment, or disposal’ of investments, ensuring it applies to post-establishment phase only.¹⁷³ The reform further clarifies that MFN treatment applies to investors and investments ‘in like circumstances,’ establishing clear criteria to ensure foreign investors are only compared with other foreign investors operating under similar conditions, such as the type of investment or sector involved.¹⁷⁴

Additionally, the reform provides specific exceptions to MFN treatment, stating that it does not apply to concessions, advantages, exemptions, or other measures arising from pre-existing BITs, FTAs, or any multilateral or regional investment agreements in which the host-country participates.¹⁷⁵ It also addresses treaty shopping concerns by explicitly excluding MFN obligations from applying to ISDS procedures.¹⁷⁶ Other exceptions include privileges derived from public international laws, such as those related to health and environmental protection, which do not themselves constitute ‘treatment’ and cannot be used to claim a breach of the MFN treatment clause.¹⁷⁷

¹⁷⁰ Chapter 5, para 5.1.2.5 above.

¹⁷¹ Chapter 5, para 5.1.2.6 above.

¹⁷²

¹⁷³ Chapter 5, para 5.1.2.6 above.

¹⁷⁴ Chapter 5, para 5.1.2.6 above.

¹⁷⁵ Chapter 5, para 5.1.2.6 above.

¹⁷⁶ Chapter 5, para 5.1.2.6 above.

¹⁷⁷ Chapter 5, para 5.1.2.6 above.

8. National treatment

The NT obligation is outlined in a dedicated article with its own set of specific exceptions, applying to investors and their investments in the post-establishment phase. The proposed reform clarifies that the NT obligation applies to investors and their investments ‘in like circumstances’ and sets forth criteria for making this assessment, including evaluating various factors, such as the investment’s impact on the community, environment and regulatory objectives.¹⁷⁸

By directing IATs to consider multiple factors, this provision helps safeguard the host-country’s regulatory authority while determining whether foreign and domestic investors are truly in similar situations.¹⁷⁹ This clarification is crucial as it reduces ambiguity regarding when foreign and domestic investors should be treated equally.¹⁸⁰ The provision allows for country-specific reservations, enabling the host-country to adopt measures aimed at protecting the environment, public health, security, and other public interests.¹⁸¹

Additionally, certain policy measures, such as government procurement and government bonds, are carved out from the NT obligation.¹⁸² It is proposed that the NT obligation be subject to the domestic laws of the host country, providing flexibility to grant preferential treatment to domestic investors.¹⁸³ This approach also helps mitigate potential economic asymmetries between global MNCs and SMEs.¹⁸⁴ The provision also includes tax exemptions and those specifying that it does not apply to concessions, advantages, exemptions, or other measures resulting from BITs, FTAs or regional and multilateral investment agreements.¹⁸⁵

9. Expropriation or nationalisation and compensation

¹⁷⁸ AfCFTA Protocol on Investment (2023) art 12(1) – (2)(a) – (f).

¹⁷⁹ Chapter 5, para 5.1.2.6 above.

¹⁸⁰ Chapter 5, para 5.1.2.6 above.

¹⁸¹ Chapter 5, para 5.1.2.6 above.

¹⁸² Chapter 5, para 5.1.2.6 above.

¹⁸³ Chapter 5, para 5.1.2.6 above.

¹⁸⁴ Chapter 5, para 5.1.2.6 above.

¹⁸⁵ Chapter 5, para 5.1.2.6 above.

The proposed expropriation (or nationalisation) clause adheres to the four key conditions: public purpose, non-discrimination, due process, and payment of compensation.¹⁸⁶ It carefully balances investor protection against uncompensated expropriation while safeguarding the host-country's regulatory space to advance sustainable development objectives. The provision clearly defines both 'direct' and 'indirect' expropriation.¹⁸⁷

The application of 'indirect' expropriation is further restricted by a set of criteria that IATs must consider when determining whether a government measure constitutes indirect expropriation.¹⁸⁸ This approach enhances legal clarity and fosters a balanced framework that protects investor rights while preserving the host-country's ability to regulate, thereby promoting a more stable and predictable investment environment and reducing the risk of ISDS cases.¹⁸⁹

The proposal also broadens the grounds for lawful expropriation to include legitimate public policy objectives, such as environmental protection, human rights, labour rights, indigenous peoples' rights and social justice. It also includes carve-outs for regulatory measures and compulsory licensing in accordance with WTO rules.¹⁹⁰ The provision mandates a review process for expropriated investments to ensure transparency and limits compensation in certain situations, such as when investors demand compensation for future profit losses.¹⁹¹

Compensation is restricted to what is deemed 'appropriate, just, or equitable,' rather than the traditional standard of 'prompt, effective, and adequate'. It is also limited to actual losses, excluding speculative or punitive damages.¹⁹² Moreover, the provision allows for compensation adjustments based on the investor's conduct, particularly if the investor's actions contributed to the expropriation or loss.¹⁹³

¹⁸⁶ Chapter 5, para 5.1.2.7 above.

¹⁸⁷ Chapter 5, para 5.1.2.7 above.

¹⁸⁸ Chapter 5, para 5.1.2.7 above.

¹⁸⁹ Chapter 5, para 5.1.2.7 above.

¹⁹⁰ Chapter 5, para 5.1.2.7 above.

¹⁹¹ Chapter 5, para 5.1.2.7 above.

¹⁹² Chapter 5, para 5.1.2.7 above.

¹⁹³ Chapter 5, para 5.1.2.7 above.

The proposed provision also permits a reduction in damages where the investor failed to take reasonable steps to mitigate losses.¹⁹⁴ Other details could include that compensation, in cases of lawful expropriation, be based on an equitable balance between public and private interests, where the fair market value of the investment is just one factor among others.¹⁹⁵ The clause also explicitly includes exceptions for compulsory licenses.¹⁹⁶

10. Transfer of funds

The proposed transfer of funds provision is more aligned with sustainable development, adopting a closed list of protected transfers to provide greater legal certainty and predictability.¹⁹⁷ The list covers only transfers directly related to the investment, such as profits, dividends, interest and proceeds from liquidation.¹⁹⁸ It clarifies exchange and convertibility requirements, stipulating that transfers must be made in a freely convertible currency at the market rate prevailing at the time of the transfer, ensuring consistency and fairness in the exchange rates applied to transfers.¹⁹⁹

The proposed provision incorporates temporary restrictions on transfers during periods of financial crises or serious balance-of-payments difficulties, which are non-discriminatory and in line with international standards such as the International Monetary Fund's (IMF) Articles of Agreement.²⁰⁰ The provision also consolidates all transfer-related provisions (including those relating to expropriation and investment returns) into a single article.²⁰¹

11. Dispute settlement

The proposed dispute settlement provision includes both SSDS for treaty interpretation and ISDS for disputes between the host-country and investors.²⁰² It requires the exhaustion of local judicial and administrative remedies.²⁰³ Time limits are imposed to ensure expedited

¹⁹⁴ Chapter 5, para 5.1.2.7 above.

¹⁹⁵ Chapter 5, para 5.1.2.7 above.

¹⁹⁶ Chapter 5, para 5.1.2.7 above.

¹⁹⁷ Chapter 5, para 5.1.2.8 above.

¹⁹⁸ Chapter 5, para 5.1.2.8 above.

¹⁹⁹ Chapter 5, para 5.1.2.8 above.

²⁰⁰ Chapter 5, para 5.1.2.8 above.

²⁰¹ Chapter 5, para 5.1.2.8 above.

²⁰² Chapter 5, para 5.1.2.9 above.

²⁰³ Chapter 5, para 5.1.2.9 above.

procedures, with ADR (negotiation, conciliation and mediation) being mandatory before escalating to arbitration.²⁰⁴

Moreover, the provision contains temporal limitations in which an investor is allowed to institute a case against the host-country for a breach and contains fork-in-the-road provisions, preventing investors from instituting multiple claims with different dispute settlement fora.²⁰⁵ The ISDS only applies to breaches of treaty obligations occurring after the treaty comes into force.²⁰⁶

The procedural gaps for arbitration are addressed within the treaty's rules and include ICSID and UNCITRAL arbitration rules. Arbitrator qualifications, third-party and *amicus curiae* submissions as well as public access to proceedings are also outlined, while protecting confidential information.²⁰⁷ The provision also mandates that jurisdictional challenges and frivolous claims are addressed early to reduce costs, with timely decisions.²⁰⁸

Damages are limited to actual losses, excluding speculative or punitive damages.²⁰⁹ The provision includes counterclaim provisions, holding investors liable in domestic courts for breaching obligations.²¹⁰ No damages are payable if an investment was made in violation of local laws and the provision prohibits disputes related to sustainable development from being submitted for ISDS.²¹¹

12. Sustainable development-oriented provisions

Several key provisions to align with sustainable development objectives have also been included in the substantive portion of the treaty.²¹² They include the right to regulate, ensuring State Parties can pursue public interest goals, such as environmental protection, without fear of excessive investor claims, investor obligations, which holds investors

²⁰⁴ Chapter 5, para 5.1.2.9 above.

²⁰⁵ Chapter 5, para 5.1.2.9 above.

²⁰⁶ Chapter 5, para 5.1.2.9 above.

²⁰⁷ Chapter 5, para 5.1.2.9 above.

²⁰⁸ Chapter 5, para 5.1.2.9 above.

²⁰⁹ Chapter 5, para 5.1.2.9 above.

²¹⁰ Chapter 5, para 5.1.2.9 above.

²¹¹ Chapter 5, para 5.1.2.9 above.

²¹² Chapter 5, para 5.2 above.

accountable to domestic laws, including environmental, labour, and human rights standards.²¹³

Anti-corruption and bribery provisions have also been added to promote transparency and ethical business practices as well as business ethics and human rights provisions, protecting against investor violations of human rights and labour standards, thus promoting fair working conditions.²¹⁴ Information sharing provisions have been added, obligating investors to provide necessary data, ensuring transparency, while host-countries also provides relevant information to investors, improving governance.²¹⁵

Corporate Governance and Taxation provisions ensure investors comply with tax and corporate governance rules, contributing fairly to local development.²¹⁶ Technology Transfer provisions encourage technology sharing to build local capacity and promote sustainable economic growth and are aligned with Uganda's domestic laws, while environmental protection and climate change provisions hold investors accountable for their environmental impact, supporting green transition.²¹⁷

The addition of corporate Social Responsibility (CSR) provisions will encourage socially responsible business practices to foster inclusive development, while public health provisions safeguard State Parties' health systems, ensuring investments do not undermine public health protections.²¹⁸ These provisions balance attracting investment with protecting State Parties' long-term development, ensuring FDI contributes positively to its social, economic and environmental goals.²¹⁹

13. Other provisions

²¹³ Chapter 5, para 5.2 above.

²¹⁴ Chapter 5, para 5.2 above.

²¹⁵ Chapter 5, para 5.2 above.

²¹⁶ Chapter 5, para 5.2 above.

²¹⁷ Chapter 5, para 5.2 above.

²¹⁸ Chapter 5, para 5.2 above.

²¹⁹ Chapter 5, para 5.2 above.

The provisions outlined in this thesis are not *numerus clausus*, as the Model treaty encompasses other provisions to which Parties are bound, including amendment of the treaty and authentic text of the treaty.²²⁰

14. Duration, termination and sunset clauses

The provisions on duration, termination and sunset clauses remain largely unchanged, with a few exceptions. The treaty's duration is set at ten years, reflecting the fact that Uganda currently has several capital-intensive projects that require extended timeframes for completion.²²¹ Additionally, the treaty will automatically renew unless one of the Contracting Parties submits a Notice of Intention to terminate at least six months in advance.²²²

Should either Party wish to terminate the treaty before its expiration, a 12-month notice must be given to the other Party, allowing for unilateral termination provided proper notice is given.²²³ The duration of the sunset clause, which extends protections after termination, has been reduced to five years.²²⁴ The proposed treaty will also include a periodic review provision requiring a review of the treaty's operation and effectiveness every five years after its entry into force.²²⁵

6.3. Final remarks

This thesis proposed a new sustainable development-oriented Model BIT⁷ to be used as the basis of future BIT negotiations with Uganda. The Model BIT is consistent with Uganda's regional, plurilateral and continental obligations, providing clear, precise and qualified provisions that are consistent with CIL and pursue sustainable development objectives. The proposed Model BIT also aligns with Uganda's evolving national development priorities and is in consideration of the provision in the AfCFTA Protocol on Investment. The proposed reform provisions are detailed in the annex A below:

²²⁰ Chapter 5, para 5.1.2.11 above.

²²¹ Chapter 5, para 5.1.2.10 above.

²²² Chapter 5, para 5.1.2.10 above.

²²³ Chapter 5, para 5.1.2.10 above.

²²⁴ Chapter 5, para 5.1.2.10 above.

²²⁵ Chapter 5, para 5.1.2.10 above.

Annex I: Treaty Between the Republic of Uganda and _____ for the Promotion and Protection Of Investments

Preamble

Desiring to intensify economic cooperation for the mutual benefit of both State Parties;

Recognising that investment is essential for sustainable development and acknowledging that the promotion of investment requires co-operative efforts between investors and both the host and home State Parties;

Seeking to encourage, create and maintain equitable and favourable conditions for investors of one Party and their investments in the territory of the other Party on the basis of equality and mutual benefit with a view to encouraging investment that contributes to sustainable development;

Reaffirming the inherent right of State Parties to regulate in their territories and to introduce measures in order to achieve their national public policy objectives, promote sustainable development objectives and protect legitimate public welfare objectives, such as public health, national security, the environment, the conservation of living and non-living exhaustible natural resources, labour standards, the integrity and stability of the financial system and public morals;

Recognising that each State Party has, in accordance with general principles of international law, the right to pursue its own development objectives and priorities and 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 social and economic policy objectives, including the promotion and protection of labour right and the rights of indigenous peoples;

Recognising the importance of encouraging investment activities that benefit economically disadvantaged areas, micro, small and medium-sized enterprises, local communities, indigenous peoples, and underrepresented groups, including women and youth;

Seeking an overall balance of the rights and obligations among the State Parties, the investors and the investments under this Treaty;

Seeking to stop, reduce and reverse environmental degradation and the adverse effects of climate change as well as improve utilisation of natural resources for sustainable economic growth and livelihood security;

Recognising commitments to international conventions 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;

Reaffirming the importance of promoting responsible business conduct, cultural identity and diversity, environmental protection and conservation, gender equality, inclusive trade and traditional knowledge;

Agreeing that the objectives of this Treaty can be achieved without compromising public interests such as health, safety and environmental measures;

Have agreed as follows:

PART I: Common provisions

Article 1: Scope of application

- 1) This treaty sets out the rights and obligations for State Parties, investors and investments.
- 2) This treaty shall apply to:
 - a) all investments of investors of State Parties made after the entry into force of this Treaty; and
 - b) all investments of investors of State Parties made prior to the entry into force of this Treaty, provided that they meet the criteria of an investment under Article 2 of this Treaty and that they are still present on the territory of the host-State at the time of entry into force of this Treaty;
- 3) The obligations of a State Party under this Treaty shall apply to measures adopted or maintained by:
 - a) Its central, regional or local governments and administrations; and
 - b) non-governmental bodies when exercising powers delegated by central, regional or local governments or authorities.
- 4) This Treaty shall not apply to:
 - a) any investment dispute that arose or any claim that was settled before the entry into force of the Treaty;
 - b) government procurement;
 - c) subsidies or grants provided by a Contracting Party, including government-supported loans, guarantees and insurance under national development programmes;
 - d) investments made with capital or assets of illegal origin in accordance with the applicable laws and regulations of a Contracting Party;
 - e) taxation measures taken in accordance with the applicable laws and regulations of a Contracting Party;
 - f) any special advantages accorded in the host-State Party by finance institutions for the purpose of development assistance or the development of micro, small and medium businesses or new industries;

- g) operations of public debt and state enterprise debt restructuring taken by one of the State Parties; and
 - h) real estate or other property other than acquired for the purpose of economic benefit or other business purposes.
- 5) This Treaty shall not apply to any dispute arising solely from an alleged breach of a contract between a State Party and an investor.

Article 2: Definitions

‘Home-State’ means, in relation to:¹

- a) a natural person, the State Party of nationality or predominant residence of the investor in accordance with the laws of that State Party;
- b) a legal or juridical person, the State Party of incorporation or registration of the investor in accordance with the laws of that State Party;

‘Host-State’ means the State Party where the investment is made, located or undertaken.²

‘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 registered in accordance with the legal requirements of the host-State.³

An enterprise may possess assets such as:

- a) Shares, stocks, debentures and other equity instruments of the enterprise or another enterprise;
- b) A debt security of another enterprise;
- c) Loans to an enterprise;
- d) Movable or immovable property and other property rights such as mortgages, liens or pledges;

¹ Based on the AfCFTA Protocol on Investment (2023); SADC Model BIT (2012); and EAC Model Investment Treaty (2016).

² Based on the AfCFTA Protocol on Investment (2023); SADC Model BIT (2012); and EAC Model Investment Treaty (2016).

³ Based on the SADC Model BIT (2012) 9; AfCFTA Protocol on Investment (2024); and EAC Model Investment Treaty (2016) art 3 – 4.

- e) Claims to money or to any performance under contract having a financial value;
- f) Copyrights, know-how, goodwill and industrial property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognised under the law of the host-State;
- g) Rights conferred by law or under contract, including licences to cultivate, extract or exploit natural resources;

provided that an investment must have the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit and the assumption of risk and must make a contribution to development.

For greater certainty, Investment does not include:

- i. Debt securities issued by a government or loans to a government;
- ii. Portfolio investments; and
- iii. 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.
- iv. Claims arising from an order or judgment rendered in any judicial, administrative or arbitral proceeding;

In order to qualify as an investment under this Treaty, an enterprise must have the characteristics of an investment, such as the substantial commitment of capital or other resources, the expectation of gain or profit, the assumption of risk and significance for the host-State's development.

'investor' means:⁴

- a) a natural person, who is a national of a State Party in accordance with its laws and regulations, who has made an investment in the territory of another State Party. For purposes of this provision, a natural person who holds dual nationality shall be deemed to be exclusively a national of the country of her or his effective nationality or where she/he ordinarily or permanently resides.

⁴ Based on AfCFTA Protocol on Investment (2023) art 1; Model FIPA (2021) art 1.

- b) an enterprise constituted or organised under the law of a host-State that has its seat and carries on substantial business activities in that Party, that has made an investment in the other State party.

‘Measure’ means any form of legally binding governmental act directly affecting an investor or its investment, and includes any law, regulation, procedure, requirement, final judicial decision, or binding executive decision;⁵

‘Portfolio investment’ means an investment that constitutes less than 10 per cent of the shares of the enterprise or otherwise does not give the portfolio investor the possibility to exercise effective management or influence on the management of the investment.⁶

‘State Party’ or ‘Party’ means the Contracting State that has ratified and acceded to this Treaty and for which this Treaty is in force.⁷

‘Substantial business activity’ requires an overall examination of all the circumstances on a case-by-case basis, by a State Party, of all the circumstances, including, among other factors: (i) the nature, size, scope and sector of business, (ii) the amount of investment brought into the territory of the State Party, (iii) the effect of the investment on the local community and (iv) the length of time the investment has been in operation;⁸

Generally, an investment shall be taken to have substantial business activities in the territory of a State Party where it conducts its core and relevant income generating activities, through the employment of a reasonable number of suitably qualified persons and by having a minimum level of expenditure which is proportionate to its level of the relevant activities in the territory of that State Party;⁹

For greater certainty, the overall assessment on the case-by-case basis shall take into account the specific economic and investment policies of the concerned State Party at the time of the admission of the investment;¹⁰

‘Sustainable development’ embodies, in accordance with relevant United Nations documents and resolutions, the three independent and mutually reinforcing pillars that are economic and social development and environmental protection;¹¹

⁵ Based on the World Trade Organization’s IFD Agreement (2024); AfCFTA Protocol on Investment (2023); and the EAC Model Investment Treaty (2016).

⁶ EAC Model Investment Treaty (2016); and SADC Model BIT (2012).

⁷ Based on the AfCFTA Protocol on Investment (2023); EAC Model Investment Treaty (2016).

⁸ Based on the AfCFTA Protocol on Investment (2023); COMESA Common Investment Area (CCIA) Agreement.

⁹ Based on the AfCFTA Protocol on Investment (2023).

¹⁰ Based on the AfCFTA Protocol on Investment (2023).

¹¹ Based on the AfCFTA Protocol on Investment (2023).

‘Third Party’ means a State that is not a Party to this Treaty.

Article 3: Admission of investments

Each State Party shall admit investments in accordance with its domestic laws and regulations.

Article 4: Denial of benefits¹²

A State Party may at any time deny an investor of another State Party and the investment of such investor the benefits of this Treaty if:

- a) an investment has no substantial business activity in the territory of the home-State;
- b) an investment has been established or restructured with the primary purpose of gaining access to the dispute settlement mechanism under this Treaty;
- c) an investor or investment is engaged in activities prejudicial to the essential and national interests of the host-State;
- d) an investment is owned or controlled, directly or indirectly, by natural or juridical persons of a Third Party with which the denying Party does not maintain a diplomatic relationship or toward which it prohibits transactions;
- e) an investment is owned or controlled, directly or indirectly, by natural or legal persons of the denying host-State;
- f) an investment is owned or controlled, directly or indirectly, by natural or juridical persons of a non-Contracting Party that has no substantial business in the territory of the Contracting Party; or
- g) an investor or investment has committed a breach of a specific binding obligation under this Treaty.¹³

¹² Based partly on the SADC Model BIT (2012) art 26; Commonwealth Guide (2013) 91; US Model BIT (2012) art 17; Canada Model BIT (2021) art 17; and AfCFTA Protocol on Investment (2023) art 5.

¹³ Based on the AfCFTA Protocol on Investment (2023).

PART II: Substantive obligations of host-States regarding investor protection

Article 5: Administrative and judicial treatment¹⁴

- 1) Each State Party shall ensure that, in administrative and judicial matters, investors and investments of another State Party are not subject to treatment which constitutes a fundamental denial of justice in criminal, civil and administrative adjudicative proceedings, an evident denial of due process, a manifest arbitrariness, a discrimination based on gender, race or religious beliefs, or an abusive treatment in administrative and judicial proceedings.
- 2) For greater certainty, Paragraph 1 shall not be interpreted as equivalent to fair and equitable treatment. For further certainty, Paragraph 1 includes the minimum standard of treatment under customary international law and does not allow for an interpretation and application of such a standard that would go beyond the elements contained in Paragraph 1.¹⁵
- 3) 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.¹⁶
- 4) 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 host-Party.
- 5) 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) 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.
- 7) A determination that there has been a breach of another provision of this Treaty, or of a separate Treaty, does not establish that there has been a breach of this Article.

¹⁴ Based on the AfCFTA Protocol on Investment (2023) at 17.

¹⁵ Based on the AfCFTA Protocol on Investment (2023) art 17.

¹⁶ Based on the EAC Model Investment Treaty (2016) art 6.

- 8) This Article shall not be interpreted to preclude the State Parties from adopting regulatory or other measures that pursue legitimate policy objectives, including measures adopted to comply with other international obligations, so long as the manner in which such measures are implemented is consistent with this Article.
- 9) The amount of any compensation to be paid to an investor as a result of a breach of this Article shall be equitable, taking into account the relevant circumstances of the case.

Article 6: Physical security and protection

- 1) A State Party shall, subject to its capabilities, accord to investors and their investments physical protection and security no less favourable than that which it accords to the investments of its own investors.

The expression 'subject to its capabilities' refers to the obligation of due diligence that a State Party shall exercise on its territory in accordance with customary international law and does not allow for an interpretation and application of such a standard that would go beyond the elements contained in this Paragraph.

- 2) Investors of one State Party whose investments in the territory of the other State Party suffer losses as a result of a failure of the host-State to comply with Paragraph 1, owing to war or other armed conflict, revolution, revolt, insurrection or riot in the territory of the host-State shall, as regards restitution, indemnification, compensation or other settlement, be accorded by the host-State treatment no less favourable than that which the host-State accords to investments of its own natural and legal persons.¹⁷

Article 7: Most-favoured-nation treatment

- 1) Each State Party shall accord to investors of another State Party and their investments treatment no less favourable than it accords, in like circumstances, to investors of any other State Party or Third Parties with respect to the management, conduct, operation, use, expansion and sale or other disposition of their investments.
- 2) In assessing 'in like circumstances' an overall examination is required 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;

¹⁷ Based on the AfCFTA Protocol on Investment (2023) art 18.

- d) the aim of the measure in question;
 - e) the regulatory process generally applied in relation to a measure in question; and
 - f) any other factor directly relating to the investment or investor in relation to the measure in question.
- 3) The 'treatment' referred to in Paragraphs 1 and 2 does not include dispute settlement procedures, including, but not limited to, those related to admissibility and jurisdiction, provided for in other treaties. Substantive obligations in other investment treaties do not in themselves constitute 'treatment', and cannot give rise to a breach of this Article. ¹⁸

Article 8: Exceptions to most-favoured-nation treatment¹⁹

- 1) Measures taken by a State Party that are designed and applied to protect or enhance legitimate public policy objectives, such as, but not limited to, public morals, public health, prevention of diseases and pests in animals or plants, climate action, essential security interests, safety and the protection of environment, shall not be construed as a breach of Article 7.
- 2) Nothing in Article 7 shall oblige a State Party to extend to the investors and their investments the benefit of any treatment, preference or privilege contained in:
 - a) any existing or future free trade area, customs union, common market Treaty or any similar international Agreements or arrangements to which the investor's Home State is not a Party; or
 - b) any existing or future international Treaty or domestic legislation relating wholly or mainly to taxation.
- 3) Discriminatory measures taken by a State Party to comply with its obligations under other regional or international Agreements shall not be construed as a breach of Article 8.
- 3) Notwithstanding any other provision of this Treaty, the provisions of this Article shall not apply to concessions, advantages, exemptions or other measures that may result from a bilateral investment treaty or free trade Treaty that entered into force prior to this Treaty.

¹⁸ Based on the AfCFTA Protocol on Investment (2023) art 14;

¹⁹ Based on the AfCFTA Protocol on Investment (2023) art 15;

Article 9: National treatment²⁰

- 1) Each State Party shall accord to investors of another State Party and their investments treatment no less favourable than it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, use, expansion and sale or other disposition of their investments.
- 2) In assessing 'in like circumstances' an overall examination is required 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) the human rights of individuals and rights of indigenous people;
 - c) its effects on the local, regional or national environment, the health of the populations, or on the global commons;
 - d) the business sector in which the investor is active;
 - e) the aim of the measure in question;
 - f) the regulatory process generally applied in relation to a measure in question; and
 - g) any other factor directly relating to the investment or investor in relation to the measure in question.
- 4) The examination referred to in this Paragraph shall not be limited to or biased towards any one of the factors.

Article 10: Exceptions to national treatment²¹

- 1) A measure of a Party that treats investors of the other Party or their investments less favourably than its own investors or their investments is not inconsistent with this article if it is adopted and applied by the Party in pursuit of a legitimate public purpose that is not based on the foreign nationality of investors, including the protection of health, safety, the environment and internationally and domestically recognised human rights, labour rights or rights of indigenous peoples, or the elimination of bribery and corruption, and it bears a reasonable connection to the purpose.
- 2) Measures taken in accordance with government procurement policies specifically for the purchase of goods or services by any level of government shall not be considered a breach of Article 9.

²⁰ Based on the AfCFTA Protocol on Investment (2023); Commonwealth Guide (2013) 123 – 4.

²¹ Based on the AfCFTA Protocol on Investment (2023); Commonwealth Guide (2013) 123 – 4;

- 3) Nothing in Article 9 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.
- 5) Preferential treatment granted by State Parties to national investments and investors, in accordance with domestic laws and regulations, in order to achieve national development objectives or address the internal needs of designated disadvantaged persons, groups, or regions shall not be construed as a breach of Article 9.
- 6) Each State Party reserves the right to adopt or maintain certain exceptions to the standard of national treatment provided by Article 10 to investments made by investors of another State Party in its territory if those exceptions fall within one of the sectors or geographical regions that represent strategic importance for the Host State in accordance with its laws and regulations.

Article 11: Expropriation or nationalisation²²

- 1) State Parties shall not, directly or indirectly, expropriate or nationalise investments in their territory except:
 - a) for a public purpose;
 - b) in accordance with due process pursuant to the procedure established by the laws of the State Party;
 - c) in a non-discriminatory manner; and
 - d) against a fair and adequate compensation paid within a reasonable period of time in accordance with Article 12, and taking into account that the assessment of the reasonable period of time shall be made on a case-by-case basis in accordance with the domestic laws and regulations of the State Party and on a non-discriminatory basis.
- 2) For the purposes of this Treaty:
 - a) Direct expropriation occurs when an investment is nationalised or expropriated directly, through a formal transfer of ownership or outright seizure;

²² Based on EAC Model Investment Treaty (2016) art 7.5 & 7.6; Commonwealth Guide (2013) 174 – 77; AfCFTA Protocol on Investment (2023) art 19(11) – (2).

- b) Indirect expropriation results from a measure or a series of measures having an equivalent effect of direct expropriation without formal transfer of title or outright seizure. The sole fact that a measure or a series of measures has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; and
 - c) The determination of whether a measure or a series of measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, that takes into consideration among others:
 - i. the duration of the measure or series of measures of a State Party; and
 - ii. the character of the measure or series of measures, notably their object, context and intent.
- 3) 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.
- 4) A non-discriminatory measure of general application shall not be considered an expropriation of a debt security or loan covered by this Treaty solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.
- 5) A non-discriminatory measure by a Party that is designed and applied to achieve legitimate public objectives, such as the economic security of residents, public health, safety, the protection or promotion of internationally and domestically recognised human rights, labour rights, the rights of indigenous peoples, social justice and the protection of the environment, does not constitute expropriation.
- 6) The investor affected by the expropriation shall have a right under the law of the Member State making the expropriation, to a review by a judicial or other independent authority of that State Party, of his/its case and the valuation of his/its investment in accordance with the principles [in the objectives, definitions, scope, national treatment and exceptions, most-favoured-nation treatment and exceptions, treatment on investors and investment and expropriation provisions] of this treaty. The State Party making the expropriation shall ensure that such a review is carried out promptly.

Article 12: Compensation for expropriation²³

- 1) Fair and adequate compensation shall be assessed on a case-by-case basis in relation to the fair market value of the expropriated investment, and in a reasonable period of time, in accordance with domestic laws and regulation.
- 2) 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 the current and past use of the investment, the history of its acquisition, the fair market value of the investment, the purpose of the expropriation, the extent of previous profit made by the investor through the investment, the previous behaviour of the investor and the duration of the investment.
- 3) Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place and not reflect any change in value occurring because the intended expropriation had become known earlier.
- 4) Valuation criteria may include asset value, including declared tax value of tangible property and other criteria, as appropriate, to determine fair market value provided that compensation:
 - a) shall be limited to direct losses of the investor;
 - b) shall not include loss of future profits or be calculated on the basis of the discounted value of future cash flows;
 - c) shall be adjusted to reflect any aggravating conduct by the investor, including conduct that caused the state to take the action that constitutes an expropriation; or a failure by the investor to take reasonable steps to mitigate its damages; and
 - d) shall not include punitive or moral damages.
- 1) Any payment of compensation according to this Article shall be made in a freely convertible currency. On payment, compensation shall be freely transferable.

²³ Based on AfCFTA Protocol on Investment (2023) art 21; Norway Model BIT (20115) art 6;

Article 13: Compensation for losses²⁴

- 1) Each Party shall accord to investors of another Party, and to investments by such investors, non-discriminatory treatment with respect to measures, including restitution, indemnification, compensation or other settlement, it adopts or maintains relating to losses suffered by investments in its territory owing to war or other armed conflict, civil strife, state of national emergency or a natural disaster.
- 2) Paragraph 1 shall not apply to investors of the other Party or to their investments where such investors or investments are complicit in the perpetration of egregious violations of human rights, including war crimes, crimes against humanity, genocide, torture, extra judicial killing, forced disappearance and forcible displacement, in the Party in connection with armed conflict or civil strife referred to in paragraph 1.

Article 14: Transfer of funds²⁵

- 1) A State Party shall accord to Investors the right to:
 - h) repatriate the capital invested and the Investment returns;
 - i) repatriate funds for repayment of loans;
 - j) repatriate proceeds from compensation upon expropriation, the liquidation or sale of the whole or part of the Investment including an appreciation or increase of the value of the Investment capital;
 - k) transfer payments for maintaining or developing the Investment project, such as funds for acquiring raw or auxiliary materials, semi-finished products as well as replacing capital assets;
 - l) remit the unspent earnings of expatriate staff of the Investment project;
 - m) any compensation to the investor paid pursuant to this Agreement; and
 - n) make payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the State Party to the dispute.

Each State Party shall allow transfers in paragraph 1 to be made in a freely convertible currency at the market rate of exchange prevailing at the time of transfer.

²⁴ Based on India Model BIT (2015) art 7; and Commonwealth Guide (2013) 241.

²⁵ Based on SADC Model BIT with commentary (2012) art 8; but also, the EAC Model Investment Treaty (2016) art 9; Commonwealth Guide (2013) 192 – 3; AfCFTA Protocol on Investment (2023) art 22; Rwanda – United Arab Emirates (UAE) BIT (2017) art 10.

Notwithstanding paragraphs 1 and 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) ensuring compliance with orders or judgments in judicial or administrative proceedings;
- f) taxation;
- g) social security, public retirement or compulsory savings schemes;
- h) severance entitlements of employees; and
- i) the formalities required to register and satisfy the Central Bank and other relevant authorities of a State Party.

Safeguard provision:

- d) Where, in the opinion of a State Party, payments and capital movements under this Agreement cause or threaten to cause serious
 - iv. difficulties for balance of payment purposes,
 - v. external financial difficulties, or
 - vi. difficulties for macroeconomic management including monetary policy or exchange rate policy, the State Party concerned may take safeguard measures with regard to capital movements on a temporary basis so as to be eliminated as soon as conditions permit, and in any event as it relates to measures taken under paragraphs (ii)-(iii), for a period of no longer than 12 months if it considers such measures to be necessary.
- e) Where such measures are taken under 4(a)(ii) or (iii), a State Party shall enter into consultations with the other State Party at its request, with a view to review such measures and seek the minimum impact of such measures on an investor.

- f) Where, in the opinion of a State Party that has taken such measures, it is necessary to extend them for a further period due to the extended period of conditions described in paragraph 4(a), the State Party shall offer to enter into consultations with the other State Party with a view to seeking the minimum impact of such measures on an investor. Such measures shall again be taken on a temporary basis so as to be eliminated as soon as conditions permit, and in any event for a period of no longer than 12 months from their renewal.

PART III: Sustainable development-related issues

Article 15: Sustainability Assessment of Investments Standards²⁶

- 1) Each State Party affirms its right to determine its own level of domestic environmental protection and to develop its own policies and priorities for sustainable development. In accordance with this right, each Party shall establish and enforce laws and regulations to create an effective and efficient system for the sustainability assessment of all foreign investments within its territory by investors from the other Party.
- 2) The laws and regulations in paragraph 1 above shall incorporate standards consistent with each State Party's national and international obligations, with the aim of promoting sustainable development, safeguarding human health, protecting the natural environment, upholding human and labour rights, and recognizing and promoting the rights of indigenous peoples.
- 3) In establishing the laws and regulations in paragraph 1 above, each State Party shall ensure that they reflect the following standards:
 - a) Measures shall promote sustainable development, balancing economic growth with environmental and social objectives.
 - b) Standards shall align with the State Party's national and international commitments to uphold human rights, labour rights, the rights of indigenous peoples and environmental protections as recognised under international obligations and customary international law.
 - c) In the face of environmental or public health uncertainties, the State Party shall apply the precautionary principle, prioritizing preventive action where potential risks to the environment or human health exist.

²⁶ Based on Commonwealth Guide (2013). 289 – 90.

- d) State Parties shall ensure that investors bear the costs associated with managing and mitigating pollution resulting from their activities.
 - e) State Parties shall ensure that affected communities are fully involved in decisions regarding investments with potential impacts on their welfare and environment.
 - f) For investments that may affect indigenous peoples, the State Party shall require that such communities provide their free, prior, and informed consent.
 - g) State Parties shall promote responsible performance from investors, mandating the integration of risk prevention and mitigation measures in their management systems to address environmental, social, and human rights impacts.
 - h) State Parties shall promote respect for the dignity, human rights, cultures, and traditional livelihoods of indigenous peoples, in accordance with national and international laws and other applicable international instruments.
 - i) Each State Party shall take all necessary steps to effectively implement and enforce these provisions, ensuring that foreign investments are conducted in a manner consistent with the above principles and that they contribute positively to the sustainable development goals of each Party.
- 2) Before establishing the standards referred to in paragraph 1, a State Party shall consult with all persons of the Party potentially affected by the standards or their implementation and take into account the feedback from such persons.
 - 3) The consultation process referred to in paragraph 5 must be open, transparent and accessible to the public and to investors of the other Party and any other person of the State Party affected by the standards and criteria.

Article 16: Pre-establishment sustainability assessment process²⁷

Before a Party approves an investment in that Party by an investor of the other Party, the following must occur.

- 1) Where required under the standards and screening criteria determined under Article 16 above, the investor or its investment must conduct a sustainability assessment of the proposed investment in accordance with the laws and regulations established in accordance with that article.

The State Party approving the investment shall review the assessment.

²⁷ Based on Commonwealth Guide (2013). 290 – 1.

- 2) The investor and the investment and the State Party approving the investment shall agree on a management plan in relation to the investment that is in accordance with the assessment as reviewed by the State Party, and that provides steps to ensure that the investment achieves the assessment standards determined under Article 16 and that it avoids, minimises, mitigates or compensates for adverse impacts of the investment on workers, affected communities and the environment.
- 3) Each State Party shall make sustainability assessments, reviews and management plans relating to investments in its territory public and accessible to persons in the Party affected by them.

Article 17: Minimum standards on the environment, labour and consumer protection²⁸

- 1) State Parties shall ensure environmental, labour, and consumer protection, taking into account domestic policies, international best standards and relevant international Agreements to which they are parties, and shall continue to improve their standards within their domestic laws and regulations.
- 2) State Parties shall not encourage investment by relaxing or waiving domestic standards, or compliance with environment, labour and consumer protection laws and international minimum standards.

Article 18: Investment and climate action²⁹

In accordance with their domestic climate change policies, the principle of Common but Differentiated Responsibilities, and relevant international climate change instruments, each State Party shall:

- a) promote and facilitate investments that support actions to mitigate greenhouse gas emissions and measures to adapt to the negative impacts of climate change;
- b) promote and facilitate investments that support initiatives conducive to the financing of regional climate mitigation and adaptation programmes;
- c) promote and facilitate investment of relevance for a fair and just transition in sectors such as renewable energy, low-carbon technologies, and by adopting policy frameworks conducive to transfer and deployment of climate-friendly technologies and goods and services, taking into account socio-economic constraints, in particular those related to the transition of the workforce;
- d) promote, facilitate and encourage new investment regimes;

²⁸ Based on AfCFTA Protocol on Investment (2023) art 25; SADC Model BIT (2012) art 22.

²⁹ Based on AfCFTA Protocol on Investment (2023) art 26.

- e) encourage investments that mitigate climate change impacts on exhaustible natural resources such as fresh water and biological diversity; and
- f) cooperate with the other State Parties on investment-related aspects of climate change policies and measures.

Article 19: Right to regulate³⁰

- 1) In accordance with customary international law and other general principles of international law, each State Party has the right to regulate, including to take measures to ensure that investment in its territory is consistent with the goals and principles of sustainable development, and with other national environmental, health, climate action, social, and economic policy objectives and essential security interests.
- 2) Measures taken by a Contracting Party to comply with its international obligations under other relevant treaties shall not constitute a breach of this Treaty.
- 3) The exercise of the right to regulate under Paragraphs 1 and 2 cannot give rise to any claim by an investor for compensation.

Article 20: Investment and public health³¹

- 1. Each State Party has the right to determine its public health policies and priorities, to establish its own levels of domestic public health protection, and to adopt or modify its relevant laws and measures in the context of epidemics, pandemics and other public health emergencies in accordance with its international commitments.

Article 21: Pursuit of development goals³²

Pursuant to the objectives set out in this Treaty, State Parties may introduce measures to promote domestic development including local content, taking into account Articles 7, 8, 9, and 10 of this Treaty. Measures covered under this Article include among others:

- a) granting of preferential treatment to any enterprise qualifying under the domestic law of a State Party in order to achieve national, sub-regional, or regional development goals;
- b) supporting the development of local entrepreneurs and to establish linkages with local firms, supply chains, industries and institutions with a view to strengthening local capabilities;

³⁰ Based on AfCFTA Protocol on Investment (2023) art 24; SADC Model BIT (2012) art 20;

³¹ Based on AfCFTA Protocol on Investment (2023) art 27;

³² Based on AfCFTA Protocol on Investment (2023) art 28; and partly EAC Model Investment Treaty (2016) art 16.

- c) enhancing productive and trade capacity, generating employment, wealth creation, developing human resource capacity and training, research and development;
- d) appointing, where appropriate, as executives, managers or members of board of directors, nationals from the State Party where the investment is made;
- e) promoting transfer of technology, skills and know-how, innovation and other benefits, a production process or other proprietary knowledge; or
- f) addressing economic and development disparities suffered by identifiable groups, including historically marginalised groups including women, youth, people with disabilities or geographical regions and localities.

Article 22: Human resources development³³

1. State Parties shall develop national policies to guide investors in developing human capacity of the labour force, including for mid-level and managerial positions. Such policies may include incentives to encourage employers to invest in training, capacity building and knowledge transfer.
2. In developing such policies, State Parties shall pay particular attention to the needs of youth, women, persons with disabilities and vulnerable groups.

Article 23: Transfer of technology³⁴

- 1) State Parties, in accordance with their domestic laws and regulation and their respective capabilities, shall facilitate the intra-regional and international transfer of technology by various measures, such as:
 - a) accessing available information regarding description, location and, as far as possible, approximate cost of technology;
 - b) establishing or strengthening of technology transfer centres;
 - c) providing training for research, engineering, design and other personnel engaged in the development of national technologies or in the adaptation and use of technologies transferred;
 - d) providing assistance in the development and implementation of laws and regulations with a view to facilitating the transfer of technology;

³³ Based on AfCFTA Protocol on Investment (2023) art 29

³⁴ Based on AfCFTA Protocol on Investment (2023) art 30;

- e) encouraging the granting of credits on preferential terms for financing the acquisition of capital and intermediate goods in the context of approved development projects involving transfer of technology transaction;
- f) assisting in the development of technological capabilities of the companies and their personnel;
- g) encouraging investors to adopt in the course of their business activities, practices that permit the transfer and rapid diffusion of technologies and know-how, with due regard to the protection of intellectual property rights, on reasonable terms and conditions; and
- h) fostering conditions that encourage investors to undertake research and development in a manner that contributes to the national development goals of the host-State.

PART IV: Investor obligations

Article 24: Obligation to comply with the laws of the host-country³⁵

- 1) Investors from each State Party and their investments shall be subject to, and shall respect, the laws and regulations of the host Party. This includes, but is not limited to, compliance with the host Party's laws, regulations, and standards related to the protection of human rights, labour rights, indigenous rights, and environmental standards. Investors shall not engage in, support, or be complicit in violations of these rights by other parties, including public authorities or during periods of civil strife within the host-State's jurisdiction.
- 2) Investors from each State Party and their investments shall, through their management policies and practices, strive to support and advance the development objectives of the host-State, including those set by sub-national levels of government in the region where the investment is located.

³⁵ Based on CCIA Agreement (2007) art 13; International Institute for Sustainable Development (IISD) Model Treaty (2004) art 11(a); Commonwealth Guide (2013) 294.

Article 25: Environmental and social impact assessment³⁶

- 1) Investors or their Investments shall comply with environmental and social assessment screening criteria 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 International Finance Corporation's performance standards on Environmental and Social Impact Assessment, whichever is more rigorous in relation to the Investment in question.
- 2) The impact assessments required under paragraph 1 shall include assessments of the impacts on the human rights of the persons in the areas potentially impacted by the investment, including the progressive realisation of human rights in those areas.
- 3) Investors or their Investments shall make the environmental and social impact assessments:
 - a) public, including via the Internet; and
 - b) accessible to the local communities, or other areas with potentially affected interests, in an effective and sufficiently timely manner so as to allow comments to be made to the Investor, Investment and/or government prior to the completion of the host-State processes for establishing an Investment.
- 4) Investors, their Investments and the host-State authorities shall apply the precautionary principle to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approaches to the Investment, or precluding the Investment if necessary. The application of the precautionary principle by Investors and Investments shall be described in the environmental impact assessment.

³⁶ Based on SADC Model BIT (2012) art 13; CCIA Agreement (2007) art 7.

Article 26: Obligation not to commit, be complicit in or benefit from grave violations of human rights³⁷

- 1) Investors of each State Party and their investments shall not engage in, support, or be complicit in grave violations of international human rights or international humanitarian law committed by the other State Party or by non-State actors within the territory of the other Party. Such violations include, but are not limited to, genocide, war crimes, crimes against humanity, torture, enforced or involuntary disappearances, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, forced displacement, and other international crimes against persons as defined by international law, particularly international criminal law, international human rights law and international humanitarian law.
- 2) Investors of each State Party and their investments shall conduct their activities in the host-State in a manner that neither directly nor indirectly contributes to international crimes, grave violations of international human rights, or violations of international humanitarian law as specified in paragraph 1. Furthermore, investors and their investments shall not derive any benefit from such violations.
- 3) Investors of each State Party and their investments shall ensure that any security arrangements for the protection of the investor or their investments adhere to international human rights standards regarding the use of force within the host-State's territory. Such standards include the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the United Nations Code of Conduct for Law Enforcement Officials, and the laws and professional standards of the host-State.
- 4) For clarity, 'security arrangement' in this Treaty includes any public or private security force or other means employed to protect an investor or its investments in the host-State.

Article 27: Anti-corruption³⁸

- 1) Investors and their Investments shall not, prior to the establishment of an Investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State, or a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences permits, contracts or other rights in relation to an Investment.

³⁷ Based on the Commonwealth Guide (2013) 322.

³⁸ Based on the AfCFTA Protocol on Investment (2023) art 37; Commonwealth Guide (2013) 345; SADC Model BIT (2012) art 10; EAC Model Investment BIT (2016) art 11.

- 2) Investors and their Investments shall not be complicit in any act described in Paragraph 1, including incitement, aiding and abetting and conspiracy to commit or authorisation of such acts.
- 3) A breach of this Article by an Investor or an Investment is deemed to constitute a breach of the domestic law of the host-State concerning the establishment and operation of an investment.
- 4) The State Parties to this Treaty, consistent with their applicable law, shall prosecute and where convicted penalise persons that have breached the applicable law implementing this obligation.

Article 28: Corporate governance³⁹

- 1) Investments shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and in the application of internationally accepted accounting standards.
- 2) Investors and their investments shall ensure that all transactions with related or affiliated companies shall be arm's length transactions at fair market price. Investors and their investments shall not undertake any transfer pricing practices between themselves or any other related or affiliated companies.

Article 29: Investor liability⁴⁰

- 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.
- 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.

³⁹ Based on the SADC Model BIT (2012) art 16.

⁴⁰ Based on the SADC Model BIT (2012) art 17.

Article 30: Corporate social responsibility⁴¹

- 1) Investors and their investments shall endeavour to achieve the highest possible level of contribution to the sustainable development of the host-State and the local community, through the adoption of a high degree of socially responsible practices, in accordance with the principles and standards set out in Paragraph 2 of this Article.
- 2) Investors and their investments shall endeavour to:
 - a) stimulate economic, social and environmental progress, aiming at achieving sustainable development;
 - b) encourage the strengthening of local capacities through close cooperation with the local community;
 - c) encourage the development of human capital, especially by creating employment opportunities and facilitating access of workers to professional training;
 - d) promote gender equality and inclusiveness in their activities;
 - e) refrain from seeking exemptions that are not established in the legislation of the Host State, relating to environment, health, security, work or financial incentives, or other issues;
 - f) develop and apply effective self-regulatory practices and management systems that foster a relationship of mutual trust between the enterprises and the community in which the operations are conducted;
 - g) promote the knowledge of workers about corporate policies, through appropriate dissemination of these policies, including programmes for professional training;
 - h) encourage, whenever possible the business associates, including service providers and sub-contractors, to apply the principles of corporate social responsibility provided for in this Article; and
 - i) foster the benefit sharing arising from an investment with the local communities concerned based on mutually agreed terms to facilitate access to an adequate standard of living.

41

- 3) State Parties undertake to encourage investors operating within their territories or subject to their jurisdiction to incorporate into their internal policies internationally recognised standards, guidelines and principles of corporate social responsibility including those set out in Paragraph 2 of this Article.

PART V: Dispute settlement

Article 31: Dispute settlement between the investor and the Contracting Party⁴²

31.1. Purpose

Without prejudice to the rights and obligations of the Parties under Article 32., this Article establishes a mechanism for the settlement of investment disputes.

31.2. Claim by an Investor of a State Party

An investor of a State Party may submit to arbitration a claim that the other State Party has breached an obligation under Articles 5 – 15 by a measure that becomes effective after this Treaty has come into force and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

31.3. Notice of Intent to Submit a Claim to Arbitration

- 1) The disputing investor shall deliver to the disputing State Party written notice of its intent to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify:
 - a) The name and address of the disputing investor;
 - b) The provisions of this Treaty alleged to have been breached and any other relevant provisions;
 - c) The issues and the factual basis for the claim, including the measures at issue; and
 - d) The relief sought and the approximate amount of damages claimed.
- 2) The disputing investor shall also deliver, with its Notice of Intent to Submit a Claim to Arbitration, evidence establishing that it is an investor of the other State Party.

31.4. Settlement of a Claim through Consultation

⁴² Based on the Commonwealth Guide (2013) 466 – 81; EAC Model Investment Treaty (2016) arts 21, 23 & 24.

- 1) Before a disputing investor may submit a claim to arbitration, the disputing parties shall first hold consultations in an attempt to settle the claim amicably.
- 2) Consultations shall be held within 30 days of the submission of the Notice of Intent to Submit a Claim to Arbitration unless the disputing parties otherwise agree.
- 3) The place of consultation shall be the capital of the disputing Party, unless the disputing parties otherwise agree.
- 4) At any time, the disputing parties may agree to use any non-binding dispute resolution procedures, including mediation, fact finding and conciliation, with a view to settling a dispute.

31.5. Conditions Precedent to Submission of a Claim to Arbitration

- 1) A disputing investor may submit a claim to arbitration under paragraph 31.2 above, only if:
 - a) The investor consents to arbitration in accordance with the procedures set out in this Treaty, including to arbitration of any counterclaim by the disputing Party under paragraph 31.23.
 - b) At least six months have elapsed since the events giving rise to the claim;
 - c) Not more than five years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby;
 - d) The investor can demonstrate that local remedies in the disputing Party have been exhausted, provided that the investor does not need to satisfy this requirement if the investor can demonstrate that there are no reasonably available local remedies to provide effective redress to the investor for losses resulting from the alleged breach referred to in paragraph 31.2 or more than 36 months have passed since the investor has made a claim in a local court in the disputing Party in relation to the measure that is the basis of the alleged breach, after having exhausted any administrative remedies in the disputing Party;
 - e) The investor has delivered the Notice of Intent to Submit a Claim to Arbitration required under paragraph 31.3 in accordance with the requirements of that Article at least 90 days prior to submitting the claim;
 - f) The investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise waive their right to initiate or continue before any

administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in paragraph 31.2, except for proceedings for injunctive, declaratory or other extraordinary relief not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party; and

g) It identifies any government, person or organisation (a ‘third party funder’) that has provided or agreed to provide any financial or other assistance to the investor in connection with the claim or has an interest in the outcome of the claim, including the following information:

- i. its membership and legal status (e.g. company, trade association or other non-governmental organisation), its general objectives, the nature of its activities, and any parent organisation (including any organisation that directly or indirectly controls the third party funder);
- ii. whether the third party funder has any affiliation, direct or indirect, with any disputing party; and
- iii. the nature of the interest that the third party funder has in the arbitration.

- 2) A consent and waiver required by this paragraph shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.
- 3) A waiver under subsection 1(f) from the enterprise owned or controlled by the investor shall not be required only where a disputing Party has deprived a disputing investor of control of the enterprise.
- 4) Failure to meet any of the conditions precedent provided for in sections 1 through 3 shall nullify the consent of the Parties given in paragraph 31.7 below.

31.6. Submission of a Claim to Arbitration

- 1) A disputing investor of a Party who meets the conditions precedent provided for in paragraph 31.5, may submit a claim to arbitration under:
 - a) The ICSID Convention provided that both the disputing Party and the Party of the disputing investor are parties to the Convention;
 - b) The Additional Facility Rules of ICSID provided that either the disputing Party or the Party of the disputing investor, but not both, is a party to the ICSID Convention;
 - c) The UNCITRAL Arbitration Rules as they exist at the time the investor submits its claim;or

- d) Any other body of rules approved by the Commission as available for arbitrations under this Article.
- 2) The Commission shall have the power to make rules supplementing the applicable arbitral rules and may amend any rules of its own making. Such rules shall be binding on a Tribunal established under this Article and on individual arbitrators serving on such Tribunals.
- 3) The applicable arbitration rules shall govern the arbitration except to the extent modified by this Article and supplemented by any rules adopted by the Commission under this Article.

31.7. Consent to Arbitration

- 1) Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Treaty, including paragraph 31.23.
- 2) The consent given in section 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:
 - a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties; and
 - b) Article II of the New York Convention for an agreement in writing.

31.8. Arbitrators

- 1) Except in respect of a Tribunal established under paragraph 31.11 and unless the disputing parties agree otherwise, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
- 2) Arbitrators shall:
 - a) Have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements;
 - b) Be independent of, and not be affiliated with or take instructions from, either Party or the disputing party;
 - c) Comply with Annex A(1) and any Code of Conduct for Dispute Settlement adopted by the Commission; and
 - d) Be chosen from the roster established under this paragraph.

- 3) Where a disputing investor claims that a dispute involves measures adopted or maintained by a Party relating to financial institutions of the other Party, or investors of the other Party and investments of such investors, in financial institutions in a Party's territory, then:
 - a) Where the disputing parties are in agreement, the arbitrators shall, in addition to meeting the criteria set out in section 2, have expertise or experience in financial services law or practice, which may include the regulation of financial institutions; or
 - b) Where the disputing parties are not in agreement,
 - i. each disputing party may select arbitrators who meet the qualifications set out in subsection 3(a), and
 - ii. if the Party complained against invokes Article 14 the chair of the panel shall meet the qualifications set out in subsection 3(a).
- 4) Where a Party claims that a dispute (including a counterclaim under paragraph 31.23, involves measures relating to the protection of human rights, labour rights or the rights of indigenous peoples or the environment or the interpretation of the domestic law of a Party:
 - a) Where the disputing parties are in agreement, the arbitrators shall, in addition to meeting the criteria set out in section 2, have expertise or experience in the relevant area of law or practice; or
 - b) Where the disputing parties are not in agreement, each disputing party may select arbitrators who meet the qualifications set out in subsection 4(a).
- 5) 5. The Parties shall establish a roster of 40 arbitrators for the purposes of conducting arbitrations under the Treaty. Each Party shall nominate 20 individuals to the roster who shall meet the requirements of subsections 2(a), (b) and (c).
- 6) 6. The disputing parties should agree upon the arbitrators' remuneration. If the disputing parties do not agree on such remuneration before the constitution of the Tribunal, the prevailing ICSID rate for arbitrators shall apply.
- 7) The Commission may establish rules relating to expenses incurred by the Tribunal and maximum fees that may be paid to arbitrators.

31.9. Constitution of a Tribunal When a Party Fails to Appoint an Arbitrator or the Disputing Parties Are Unable to Agree on a Presiding Arbitrator

- 1) The President of the International Court of Justice shall serve as appointing authority for an arbitration under this section. If the President is a national of either Party or is

otherwise prevented from discharging the appointment function, the Vice-President of the International Court of Justice shall be invited to make the necessary appointments. If the Vice-President is a national of either Party or is otherwise prevented from discharging the appointment function, the member of the International Court of Justice next in seniority who is not a national of either Party shall be invited to make the necessary appointments.

- 2) If a Tribunal, other than a Tribunal established under paragraph 31.11, has not been constituted within 90 days from the date that a claim is submitted to arbitration, the President of the International Court of Justice, on the request of either disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed from the roster established under paragraph 31.8, except that the presiding arbitrator shall not be a national of either Party. In making any such appointment, the President of the International Court of Justice shall ensure that any agreement of the disputing parties or any preference expressed by either of the disputing parties under paragraph 31.8 in relation to the expertise, experience or independence of the arbitrators is given effect.
- 3) If no roster has been established under paragraph 31.8 or no person on the roster is available to be appointed in accordance with the requirements of this Article, the President shall appoint another person who meets the requirements of subsections 2(a), (b) and (c) of paragraph 31.8 and this paragraph.

31.10. Agreement to Appointment of Arbitrators

For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on a ground other than citizenship or permanent residence:

- a) The disputing Party agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules; and
- b) A disputing investor referred to in paragraph 31.2 may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing investor agrees in writing to the appointment of each individual member of the Tribunal.

31.11. Consolidation

- 1) A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with those Rules, except as modified by this Part.

- 2) Where a Tribunal established under this Article is satisfied that claims submitted to arbitration under paragraph 31.6 have a question of law or fact in common, the Tribunal may, in the interests of the fair and efficient resolution of the claims, and after hearing the disputing parties, by order:
 - a) Assume jurisdiction over, and hear and determine together, all or part of the claims;
or
 - b) Assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.
- 3) A disputing party that seeks an order under section 2 shall request the President of the International Court of Justice to establish a Tribunal and shall specify in the request:
 - a) The name of the disputing Party and/or disputing investors against which the order is sought;
 - b) The nature of the order sought; and
 - c) The grounds on which the order is sought.
- 4) The disputing party shall deliver to the disputing Party and/or disputing investors against which the order is sought a copy of the request.
- 5) Within 60 days of receipt of the request, the President of the International Court of Justice shall establish a Tribunal comprising three arbitrators. The President shall appoint the presiding arbitrator from the roster of arbitrators established under paragraph 31.8 who shall not be a national of any of the Parties. The President shall appoint the two other members of the Tribunal from the roster within the same time period. One member of the Tribunal shall be a national of the disputing Party and one member shall be a national of the Party of the disputing investors. If the President is a national of either Party or is otherwise prevented from discharging the appointment function, the Vice-President of the International Court of Justice shall be invited to make the necessary appointments. If the Vice-President is a national of either Party or is otherwise prevented from discharging the appointment function, the member of the International Court of Justice next in seniority who is not a national of either Party shall be invited to make the necessary appointments.
- 6) Where a Tribunal has been established under this Article, a disputing investor that has submitted a claim to arbitration under paragraph 31.6 that has not been named in a request made under section 3 may make a written request to the Tribunal that it be included in an order made under section 2, and shall specify in the request:
 - a) The name and address of the disputing investor;

- b) The nature of the order sought; and
 - c) The grounds on which the order is sought.
- 7) A disputing investor referred to in section 6 shall deliver a copy of its request to the disputing parties named in a request made under section 3.
- 8) A Tribunal established under paragraph 31.6 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.
- 9) On application of a disputing Party, a Tribunal established under this Article, pending its decision under section 2, may order that the proceedings of a Tribunal established under paragraph 31.6 be stayed, unless the latter Tribunal has already adjourned its proceedings.

31.12. Notice to the Non-Disputing Party

A disputing Party shall deliver to the other Party a copy of the Notice of Intent to Submit a Claim to Arbitration and other documents, such as a Notice of Arbitration and Statement of Claim filed under this Part, no later than 30 days after the date that such documents have been delivered to the disputing Party.

31.13. Documents

- 1) The non-disputing Party shall be entitled, at its cost, to receive from the disputing Party in relation to a claim under this Part a copy of:
- a) The evidence that has been tendered to the Tribunal;
 - b) Copies of all pleadings filed in the arbitration; and
 - c) The written argument of the disputing parties.
- 2) The Party receiving information pursuant to section 1 shall treat the information as if it were a disputing Party.

31.14. Participation by the Non-Disputing Party

- 1) On written notice to the disputing parties, the non-disputing Party may make submissions to a Tribunal on a question of interpretation of this Treaty in an arbitration under this Part.
- 2) The non-disputing Party shall have the right to attend any hearings held under this Part, whether or not it makes submissions to the Tribunal.

31.15. Place of Arbitration

Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a state that is a party to the New York Convention, selected in accordance with:

- a) The ICSID Arbitration Rules, if the arbitration is under the ICSID Convention;
- b) The ICSID Additional Facility Rules, if the arbitration is under those Rules;
- c) The UNCITRAL Arbitration Rules, if the arbitration is under those Rules; and
- d) Any other rules governing the arbitration in accordance with this Part.

31.16. Preliminary Objections to Jurisdiction or Admissibility or that a Claim is Manifestly without Merit

- 1) Where an issue relating to jurisdiction or admissibility of a claim is raised as a preliminary objection by a disputing Party or a preliminary objection is made that a claim is manifestly without merit, a Tribunal shall decide on the objection before proceeding to the merits.
- 2) For greater certainty, the grounds for a preliminary objection include the following:
 - a) The investor is not an investor within the meaning of this Treaty;
 - b) The investor has not made or is not making an investment within the meaning of this Treaty; and
 - c) The investor has not fulfilled one of the conditions precedent to the submission of a claim to arbitration under paragraph 31.5.

31.17. Public Access to Hearings and Documents

- 1) Hearings held under this Part shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the Tribunal may hold portions of hearings in camera.
- 2) The Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for open hearings in consultation with the disputing parties. Where a hearing has been closed to the public, transcripts of the hearings shall be prepared, and all aspects of those transcripts that are not protected from disclosure pursuant to this article shall be made available to the public. The disputing Party shall make public transcripts of hearings in the form and in the language in which it receives them from the Tribunal.

- 3) All Notices of Intent to Submit a Claim to Arbitration under paragraph 31.3 and claims to arbitration under paragraph 31.2 shall be made publicly available by the disputing Party in a timely manner, in the form and in the language in which it receives them, subject to the deletion of confidential information.
- 4) All documents submitted to, or issued by, the Tribunal shall be made publicly available by the disputing Party in a timely manner, in the form and in the language in which it receives them, subject to the deletion of confidential information.
- 5) Any Tribunal award under this Part shall be made publicly available by the disputing Party, subject to the deletion of confidential information, immediately upon its issue to the disputing parties.
- 6) If there is a dispute regarding designation of confidential information in documents referred to in section 2, 3, 4 or 5, the Tribunal, once constituted, shall promptly resolve that dispute and make an order regarding what must be disclosed.
- 7) For the purposes of this article, confidential information is information that is protected against disclosure by this Treaty or applicable law, confidential business information and information that may be designated as confidential by the Tribunal. A disputing party that provides information shall clearly designate whether it contends that the information is confidential at the time it submits the information to the disputing Party, in the case of information in documents referred to in section 3, or at the time it submits information to the Tribunal in all other cases and shall, at the time it submits a document containing such information, submit a redacted version of the document that does not contain the information. Where the other disputing party disputes that any or all of such information is confidential, it shall so indicate within 30 days of receipt of the redacted document from the other party, identifying with precision the portions of the document that it contends ought not to be redacted. The arbitral tribunal shall then rule on any such objection to the designation or redaction of confidential information.
- 8) A disputing party may disclose to other persons in connection with the arbitral proceedings such unredacted documents referred to in section 2, 3, 4 or 5 as it considers necessary for the preparation of its case, but it shall ensure that those persons protect the confidential information in such documents.
- 9) The Parties may share with officials of their respective federal and sub-national governments all relevant unredacted documents referred to in section 2, 3, 4 or 5 in the course of dispute settlement under this Treaty, but they shall ensure that those persons protect any confidential information in such documents.
- 10) A Tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law

protecting government confidences, personal privacy or the financial affairs and accounts of individual customers of financial institutions, or which the Party determines to be contrary to its essential security interests.

- 11) To the extent that a Tribunal's confidentiality order designates information as confidential and a Party's law on access to information requires public access to that information, the Party's law on access to information shall prevail. However, a Party should endeavour to apply its law on access to information so as to protect information designated as confidential by the Tribunal.
- 12) Requirements for disclosure under this Article shall be satisfied by each Party establishing a publicly accessible web site and posting on that site all documents required to be disclosed under sections 2, 3, 4 and 5 of this Article in connection with any dispute with respect to which it is the disputing Party as required in those articles.

31.18. Submissions by a Non-Disputing Party

- 1) Any non-disputing party that is a person of a Party that wishes to file a written submission with a Tribunal (the 'Applicant') may apply for leave from the Tribunal to file such a submission, in accordance with Annex B(1). The Applicant shall attach the submission to the application.
- 2) The Applicant shall serve the application for leave to file a non-disputing party submission and the submission on all disputing parties and the Tribunal.
- 3) The Tribunal shall set an appropriate date for the disputing parties to comment on the application for leave to file a non-disputing party submission.
- 4) In determining whether to grant leave to file an Applicant's submission, the Tribunal shall consider, among other things, the extent to which:
 - a) The Applicant's submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
 - b) The Applicant's submission would address a matter within the scope of the dispute;
 - c) The Applicant has a significant interest in the arbitration; and
 - d) The subject matter of the arbitration affects a public interest.
- 5) The Tribunal shall ensure that:
 - a) Any Applicant's submission does not disrupt the proceedings; and

- b) Neither disputing party is unduly burdened or unfairly prejudiced by such submissions.
- 6) The Tribunal shall decide whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal shall set an appropriate date for the disputing parties to respond in writing to the non-disputing party submission. By that date, the non-disputing Party may, pursuant to paragraph 31.14, address any issues of interpretation of this Treaty presented in the non-disputing party submission.
- 7) A Tribunal that grants leave to file a non-disputing party submission is not required to address the submission at any point in the arbitration or in the reasons for its decision, nor is the non-disputing party that files the submission entitled to make further submissions in the arbitration.
- 8) Access to hearings and documents by non-disputing parties that file applications under these procedures shall be governed by the provisions pertaining to public access to hearings and documents under paragraph 31.17.

31.19. Governing Law

- 1) A Tribunal established under this Part shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law and the domestic law of the disputing Party.
- 2) Where a disputing Party requests an interpretation of a provision of this Treaty, the Tribunal shall request the interpretation of the Commission on the issue. The Commission, within 60 days of delivery of the request, shall submit in writing its interpretation to the Tribunal. If the Commission fails to submit an interpretation within 60 days, the Tribunal shall decide the issue.
- 3) An interpretation by the Commission of a provision of this Treaty shall be binding on a Tribunal established under this Part and any award under this Part shall be consistent with such interpretation.

31.20. Expert Reports

Without prejudice to the appointment of other kinds of experts where authorised by the applicable arbitration rules, a Tribunal, at the request of a disputing party or, unless the disputing parties disagree, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

31.21. Interim Measures of Protection

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in paragraph 31.2.

31.22. Final Award

- 1) Subject to paragraph 31.23, where a Tribunal makes a final award against the disputing Party, the Tribunal may award, separately or in combination, only:
 - a) Monetary damages and any applicable interest;
 - b) Restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution. After making a finding of liability against a disputing Party but prior to making an award of damages under this Section, the Tribunal shall provide a reasonable time for the disputing parties to agree on the compensation to be paid by the disputing Party to the disputing party.
- 2) 2. Where a Tribunal makes an award under paragraph 31.23 against a disputing party, the Tribunal shall deduct the amount of any damages to be paid to the disputing Party under that award from any damages to be paid to the disputing party under this Section.
- 3) 3. The Tribunal may also award costs in accordance with the applicable arbitration rules.
- 4) 4. In assessing damages to be paid by a disputing Party, the Tribunal shall take into account the following principles:
 - a) The investor shall take reasonable steps to mitigate its losses, and damages shall be reduced to the extent that it has not;
 - b) Damages shall be reduced to the extent that the loss to the investor is attributable to the conduct of the investor;
 - c) No punitive or moral damages shall be awarded;
 - d) Damages shall be limited to direct losses of the investor and shall not include any amount for loss of future profits or be calculated on the basis of the discounted value of future cash flows; and
 - e) No damages shall be awarded unless the breach of an obligation listed in paragraph 31.2 is sufficiently serious, in the Tribunal's discretion, to justify an award of damages.

- 5) The Parties confirm their shared understanding that when a disputing investor submits a claim to arbitration under this Part, it has the burden of proving all elements of its claim, including the damages that it alleges were sustained by reason of, or arising out of, the measures that are the basis of the claim.
- 6) Notwithstanding paragraph 31.24, a Tribunal shall have a discretion to make an order that any payment of damages by a disputing Party be delayed where it determines that the payment would be a serious hardship for the Party. If the Tribunal determines that payment may be delayed, it shall establish a schedule for the payment of damages taking into account the ability of the disputing Party to make payments.

31.23. Counterclaims

- 1) Where an investor has submitted a claim under paragraph 29.6 the disputing Party may counterclaim against the investor before the Tribunal established under this Treaty to hear the investor's claim that the investor has breached an obligation under Articles 24, 25, 26, 27, 28, 29 and 30 or any other obligation owed to the disputing Party and the disputing Party or a person of the Party has suffered loss or damage by reason of, or arising out of, that breach.
- 2) Where a Tribunal makes a final award against the disputing party under this article, the Tribunal may award monetary damages and any applicable interest.
- 3) Where a disputing Party counterclaims against an investor under section 1, on the basis that the investor has breached an obligation under Article 24 the Tribunal can only award damages if it determines that the breach is sufficiently serious, in the Tribunal's discretion, to justify an award of damages.
- 4) The Tribunal may also award costs in accordance with the applicable arbitration rules.
- 5) In assessing damages to be paid by a disputing party, the Tribunal shall take into account the following principles:
 - a) The disputing Party shall take reasonable steps to mitigate its losses and damages shall be reduced to the extent that it has not;
 - b) Damages shall be reduced to the extent that the loss to the disputing Party is attributable to the conduct of the disputing Party; and
 - c) No punitive damages shall be awarded.
- 6) The Parties confirm their shared understanding that when a Party submits a counterclaim under this Article, it has the burden of proving all elements of its claim, including the

damages that it alleges were sustained by reason of, or arising out of, the alleged actions which are the basis of the counterclaim.

31.24. Finality and Enforcement of an Award

- 1) An award, including any award made under paragraph 31.23, made by a Tribunal shall have no binding force except between the disputing parties and in respect of that particular case.
- 2) Subject to paragraph 31.22, section 3 and any applicable review procedure for an interim award, a disputing investor and a disputing Party shall abide by and comply with an award without delay.
- 3) A disputing investor or a disputing Party may not seek enforcement of a final award, including any award made under paragraph 31.23, until:
 - a) In the case of a final award made under the ICSID Convention
 - i. 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or
 - ii. revision or annulment proceedings have been completed and the award has not been annulled; and
 - b) In the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or any other rules agreed to by the disputing parties
 - i. 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or
 - ii. a court has dismissed or allowed an application to revise, set aside or annul the award and no further appeal is available.
- 4) Each Party shall provide for the enforcement of an award, including any award made under paragraph 31.23, in its territory.
- 5) If the disputing Party fails to abide by or comply with a final award, the Commission, on delivery of a request by the Party of the disputing investor, shall establish an arbitral panel under Article 32. The requesting Party may seek in such proceedings:
 - a) A determination that the failure to comply with the final award is inconsistent with the obligations of this Treaty; and
 - b) A recommendation that the disputing Party abide by or comply with the final award.

- 6) A disputing investor or a disputing Party may seek enforcement of an award, including any award made under paragraph 31.23, under the ICSID Convention, or the New York Convention regardless of whether proceedings have been taken under section 5.
- 7) 7. A claim that is submitted to arbitration under this Part shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention.
- 8) 8. If a disputing party against which an award of damages by counterclaim has been made under paragraph 31.23 fails to satisfy the award in full within 12 months of the date of the award, the non-disputing Party of the investor shall pay any outstanding amount to the disputing Party.

31.25. Time when a Claim is Submitted to Arbitration

- 1) A claim is submitted to arbitration under this Part when:
 - a) The request for arbitration under paragraph (1) of Article 36 of the ICSID Convention is received by the Secretary-General of ICSID;
 - b) The notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General of ICSID;
 - c) The notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party; or
 - d) The requirements for the initiation of an arbitration under any other rules governing the arbitration in accordance with this Part have been satisfied.
- 2) Delivery of notices and other documents on a State Party shall be made to the place named for that State Party.

Article 32: Dispute settlement between the Contracting Parties⁴³

- 1) Either Party may request consultations on the interpretation or application of this Treaty. The other Party shall give sympathetic consideration to the request. Any dispute between the Parties concerning the interpretation or application of this Treaty shall, whenever possible, be settled amicably through consultations.
- 2) If a dispute cannot be settled through consultations within 180 days of the submission of the request under section 1, it shall, at the request of either Party, be submitted to an arbitral panel for decision.

⁴³ Based on the Commonwealth Guide (2013) 466 – 81; EAC Model Investment Treaty (2016) arts 22.

- 3) Within two months after receipt through diplomatic channels of the request for arbitration, each Party shall appoint one member to the arbitral panel. The two members shall then select a national of a third state who, upon approval by the two Parties, shall be appointed Chair of the arbitral panel. The Chair shall be appointed within two months from the date of appointment of the other two members of the arbitral panel.
- 4) If within the periods specified in section 3 of this article the necessary appointments have not been made, either Party may invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Party or is otherwise prevented from discharging the appointment function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Party or is otherwise prevented from discharging the appointment function, the member of the International Court of Justice next in seniority who is not a national of either Party shall be invited to make the necessary appointments.
- 5) Panel members shall:
 - a) Have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements;
 - b) Be independent of, and not be affiliated with or take instructions from, either Party; and
 - c) Comply with the Annex C to this Section and any code of conduct for dispute settlement agreed by the Commission.
- 6) Where a Party claims that a dispute involves measures relating to financial institutions, or to investors or investments of such investors in financial institutions, then:
 - a) Where the disputing Parties are in agreement, the panel members shall, in addition to meeting the criteria set out in section 5, have expertise or experience in financial services law or practice, which may include the regulation of financial institutions; or
 - b) Where the disputing Parties are not in agreement, each disputing Party may select arbitrators who meet the qualifications set out in subsection 6a.
- 7) Where a Party claims that a dispute involves measures relating to the protection of labour rights, human rights, the rights of indigenous peoples or the environment, or the interpretation of the domestic law of a Party:
 - a) Where the disputing Parties are in agreement, the arbitrators shall, in addition to meeting the criteria set out in section 5, have expertise or experience in the relevant area of law or practice; or

- b) Where the disputing Parties are not in agreement, each disputing Party may select members who meet the qualifications set out in subsection 7a.
- 8) The arbitral panel shall determine its own procedure. The arbitral panel shall reach its decision by a majority of votes. Such decision shall be binding on both Parties. Unless otherwise agreed, the decision of the arbitral panel shall be rendered within 180 days of the appointment of the Chair in accordance with sections 3 or 4 of this article.
- 9) Each Party shall bear the costs of its own member of the panel and of its representation in the arbitral proceedings; the costs related to the Chair and any remaining costs shall be borne equally by the Parties. However, the arbitral panel may in its decision direct that a higher proportion of costs be borne by one of the two Parties, and this award shall be binding on both Parties.
- 10) The Parties shall, within 60 days of the decision of a panel, reach agreement on the manner in which to resolve their dispute. Such agreement shall implement the decision of the panel.
- 11) Article 31 (investor-State dispute settlement), paragraphs 31.17, 31.18 and 31.19 shall apply, *mutatis mutandis*, to dispute settlement proceedings under this Article.
- 12) Paragraphs 1 through 11 shall not apply to a matter arising under Article 15, 16, 24, 25, 26, 27, 28, 29 of this Treaty.

PART VI: Final provisions

Article 33: Entry into force

2. This Treaty shall be subject to ratification by the State Parties in accordance with their constitutional procedures. It shall enter into force 60 days after the deposit by the last State Party of its instrument of ratification with the other Party.

Article 34: Termination⁴⁴

1. This Treaty shall automatically be renewed for an additional period of ten years, unless either Contracting Party has submitted a Notice of Intent to terminate the Treaty at the expiration of the current ten-year period at least six months prior to the renewal date.

⁴⁴ Based on the Indian Model BIT (2015) art 38; Commonwealth Guide (2013) 513

2. Either State Party may terminate this Treaty by giving an official notice to the other Party twelve months prior to its intended termination date, notwithstanding any prior renewal of this Treaty.
3. The rights of Investors and the State Parties shall continue in force for five years following the expiration of the period in force for investments made during the period the Treaty was in force.

Article 36: Amendment⁴⁵

This Treaty may be amended by the mutual consent of the State Parties through an exchange of notes or signing of an amendment agreement. An amendment shall enter into force 60 days following the deposit by the last State Party of its instrument of ratification of the amendment with the other Party.

Article 35: Authentic text

The authentic text of this Treaty shall be in [English] and [...]

⁴⁵ Based on the SADC Model BIT (2012) art 35; EAC Model Investment Treaty (2016) art 29

Annex A: Rules for Arbitrator conduct⁴⁶

- 1) Every arbitrator shall avoid impropriety and the appearance of impropriety and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement process under this Agreement is preserved. Without limiting the generality of the foregoing, arbitrators shall meet the following requirements during an arbitration under this Part:
 - a) An arbitrator shall be independent and impartial. An arbitrator shall act in a fair manner and shall avoid creating an appearance of impropriety or an apprehension of bias;
 - b) An arbitrator shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a disputing party or fear of criticism;
 - c) An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of the arbitrator's duties;
 - d) An arbitrator shall not use the arbitrator's position on the Tribunal to advance any personal or private interests. An arbitrator shall avoid actions that may create the impression that others are in a special position to influence the arbitrator. An arbitrator shall make every effort to prevent or discourage others from representing themselves as being in such a position;
 - e) An arbitrator shall not allow past or existing financial, business, professional, family or social relationships or responsibilities to influence the arbitrator's conduct or judgment; and
 - f) An arbitrator shall avoid entering into any relationship, or acquiring any financial interest, that is likely to affect the arbitrator's impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias.
- 2) For a period of one year after the completion of an arbitration under the Agreement, a former arbitrator shall not personally advise or represent either of the disputing parties.

⁴⁶ Based on the Commonwealth Guide (2013) 481.

- 3) An arbitrator shall disclose any interest, relationship or matter that is likely to affect the arbitrator's independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias in the arbitration to the disputing parties in writing prior to the arbitrator's appointment, taking into account the International Bar Association Guidelines on Conflicts of Interest for International Arbitrations. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters, including:
 - a) Any past or existing financial, business, professional, family or social relationship with either of the disputing parties, or their counsel, or any such relationship involving a candidate's employer, partner, business associate or family member; and
 - b) Public advocacy or legal or other representation concerning an issue in dispute in the arbitration.
- 4) Once appointed, an arbitrator shall continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in section 3 and shall disclose them to the disputing parties in writing immediately upon becoming aware of them.
- 5) An arbitrator or former arbitrator shall not at any time disclose or use any non-public information concerning the dispute or acquired during the arbitration except for the purposes of the arbitration and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to affect adversely the interest of another.

Annex B: Non-disputing Party submissions⁴⁷

- 1) An application for leave to file a non-disputing party submission shall:
 - a) Be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant;
 - b) Be no longer than five (5) typed pages;
 - c) Describe the applicant, including, where relevant, its membership and legal status (e.g. company, trade association or other non-governmental organisation), its general objectives, the nature of its activities, and any parent organisation (including any organisation that directly or indirectly controls the applicant);

⁴⁷ Based on the Commonwealth Guide (2013) 482.

- d) Disclose whether the applicant has any affiliation, direct or indirect, with any disputing party;
 - e) Identify any government, person or organisation that has provided any financial or other assistance in preparing the submission;
 - f) Specify the nature of the interest that the applicant has in the arbitration;
 - g) Identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;
 - h) Explain, by reference to the factors specified in Article [R](4) (submissions by non-disputing party), why the Tribunal should accept the submission; and
 - i) Be made in a language of the arbitration.
- 2) The submission filed by a non-disputing party shall:
- a) Be dated and signed by the person filing the submission;
 - b) Be concise, and in no case longer than 20 typed pages, including any appendices;
 - c) Set out a precise statement supporting the applicant's position on the issues; and
 - d) Address only matters within the scope of the dispute.

Annex C: Rules for Panel Member Conduct⁴⁸

- 1) Every panel member shall avoid impropriety and the appearance of impropriety and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement process is preserved. Without limiting the generality of the foregoing, panel members shall meet the following requirements.
 - a) A panel member shall be independent and impartial. A panel member shall act in a fair manner and shall avoid creating an appearance of impropriety or an apprehension of bias.
 - b) A panel member shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or fear of criticism.

⁴⁸ Based on the Commonwealth Guide (2013) 491.

- c) A panel member shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of the panel member's duties.
- d) A panel member shall not use the panel member's position on the tribunal to advance any personal or private interests. A panel member shall avoid actions that may create the impression that others are in a special position to influence the panel member. A panel member shall make every effort to prevent or discourage others from representing themselves as being in such a position.

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