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RESOLVING THE NORMATIVE COMPLEXITIES IN BALANCING INVESTORS' HUMAN RIGHTS OBLIGATIONS IN INVESTMENT AGREEMENTS: DOES AFRICA'S EMERGING INVESTMENT LANDSCAPE PROVIDE SOME HOPE?

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ABSTRACT: *The obligations arising from investment protection regimes can impede states' power to pursue legitimate human rights policy objectives. This raises unique obligatory challenges for a host state in balancing human rights obligations and investment protection. Will the emergence of the new Africa's Continental Free Trade Area Agreement (AfCFTA) investment chapter provide the much-needed regulatory balance between investment protection and human rights obligations of host states and promote investors' human rights responsibility? This paper raises this question through the analytical lens of the asymmetrical relationship between investment protection and human rights and x-rays Africa's structural responses to this relational imbalance. The paper recognizes the obligatory potentials of the reform models in Africa's treaty-making practices towards expanding regulatory space of the host states for human rights and promoting investors' human rights responsibility. The paper, however, highlights the limitations inherent in the existing models. The paper identifies normative human rights disparity and human rights deficit in Africa as a major hindrance in measuring realizable investors' human rights obligations in investment treaties. By introducing the human rights integration model, the paper offers new insights and approaches that harmonize Africa's human rights landscape for determining and measuring investors' human rights obligations under the emerging AfCFTA's investment chapter.*

KEYWORDS: Investor Protection, Human Rights, Investor Obligation, regulatory autonomy, Responsibility, legitimate expectations, Sovereign Power to Regulate, Equitable Treatment.

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INTRODUCTION

In recent years, international investment and human rights have become subjects of notable discourse. This is due to the significant changes that both laws have undergone.[2] These changes have narrowed the fragmentation that existed between two distinct subjects of international law and brought them into a broad sphere of interactional relatedness.[3] This is typical of international law disciplines.

From the plethora of scholarship on this interaction, the perspectives that shape this relationship have been shown to manifest in different dimensions. One of the profound perspectives dominating the discussion is the perception that assumes that there is an asymmetrical relationship between investment law and human rights. This assumption suggests that the regime governing international investment law is structured in a manner that marginalizes human rights. This is largely based on the notion that the legal landscape of the international investment treaty regime is lopsided in nature by creating rights for investors without corresponding obligations.

Another major concern about the international investment law regime is rooted in the arbitral tribunals' reliance on the open-ended language of standard clauses in interpreting investors' rights in investment treaties. At the same time, the tribunals place too little or no weight on the justification by the host state to regulate and protect public interest objectives such as human rights or the environment. This is exacerbated by a lack of jurisprudential certainty in the interpretation of these standard clauses, such as fair and equitable treatment and indirect expropriation. In most cases, investment usually flows from developed (home-state) to developing (host state) countries. It is therefore possible to assume that the regulatory space of developing countries is most affected and stifled under the treaty regime. Thus, restoring the regulatory space of the host-developing-state to accommodate human rights objectives and promote investors' human rights obligations is the main crisis facing international investment, which emerging Africa's treaty-making practices seek to balance.

Human rights system in Africa was essentially created as a safeguard against the actions of the state that affect the rights of citizens. However, the treaty has empowered investing corporations in a manner that tends to insulate them against human rights responsibility arising from their conduct. Obligations emanating from international law mandates States to protect their citizens against abuses of state agents and acts of investing corporations that affect their recognized human rights.

Human rights law in Africa promotes and upholds the entitlement and enjoyment of rights through standards established under the African Charter on Human and Peoples Rights (ACHPR) complimented by Constitutions and other legislation in Africa.[4] This is supplemented by other international human rights instruments to which African states are parties and other domestic constitutional and legislative instruments applicable in respective

[2] U Kriebaum, 'Foreign Investments and Human Rights – The Actors and their Different Roles' (2013) 10 (1) Transnational Dispute Management, 1. available at www.Transnational Dispute-Manangement.com URL: WWW.Transnationaladispute-management.com/article.asp?key=1925 Accessed 12/1/2023

[3] ibid

[4] See Chapter 4 of the Constitution of Federal Republic of Nigeria, 1999, as amended, Chapter 5 of the 1992 Constitution of Ghana, Chapter 4, Part 2 (Bill of Rights) of the 2010 Constitution of Kenya, and Article 9 of the maroc Constitution, 2011.

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African states. Thus, it is the responsibility of African State parties to the human rights treaties to protect, fulfil and realize human rights. This places the host state at the center stage of human rights enforcement and realization under the State obligation principles. In most cases, obligations arising from investment agreements tend to impede state powers in fulfilling their human rights obligations. In some cases, it is prohibitively expensive to regulate human rights.

In Africa, emerging treaty-making practices tend to suggest clear adoption of structural steps in responding to the imbalance of human rights and the international investment protection regime. Although, such responses have been fragmented along domestic, regional and continental regimes.[5]

Some African models have taken the reformist approach, while others have been rejectionist measures in pursuit of this balance. South Africa, for instance, has undertaken a systematic rejection of older BIT Models and has proceeded to domesticate investment protection laws with the aim of providing a better balance between investment protection and the right to regulate.[6] Nigeria and Morocco have been in the form of reforming the existing regime by express inclusion of investors' human rights obligations in the BIT. In a similar reform approach, both the Pan-African investment code and the ECOWAS Supplementary Act have included human rights clauses in the investment agreements.

This express inclusion of investors' human rights responsibility and binding obligation clauses in BITs and other IIAs appear to be one of the most audacious reformist approaches among the emerging treaty-making practices in Africa towards abridging the investment protection and human rights gap. This perhaps is in response to some of the emerging views in this scholarship that tend to suggest that inclusion of human rights obligations in BITs and other investment agreements will resolve the imbalance in investment-human rights asymmetry.

This paper challenges this trend on the basis that it lacks adequate criteria to determine *realistic* investors' human rights responsibility within the context of investment law. Accordingly, the paper demonstrates that mere inclusion of human rights obligations in a BIT and/or other investment agreements is a solution that still leaves room for greater concerns. The contention in the paper is that the trend demands a more significant paradigm shift and substantial change in the treaty-making context that allows for human rights clauses that properly recognize the limits of investor human rights responsibility.

The paper clearly identifies, from the context of states' human rights obligation mechanisms in Africa, disparity of human rights objectives and enforcement in Africa. It informs that there is normative conflict and challenge of hierarchy in application between national and international human rights instruments in many African states. It argues that this conflict creates normative complexities in the application of national and international human rights law, which does not allow for human rights parity within and among host states in Africa. This poses a challenge in determining boundaries of human rights responsibility between the state and the investor in Africa's current investment landscape.

[5] See W Mutubwa 'Fragmentation of Investment Codes in Africa: The Pan African Investment Code (PIAC) as a Centripetal Continental Force' (2020) 4 Journal of Conflict Management and Sustainable Development, 15.

[6] For instance, Article 21 of New Model BIT proposed by Ecuador provides for the right of the host state to file counterclaim in arbitration based on violations by investor of treaty obligations such as human rights, environment, etc.

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The paper suggests mainly that the African Charter on Human and Peoples' Rights as a uniform human rights norm in Africa should be the yardstick for human rights compliance of the investor. This paper therefore calls for the integration of the charter into the human rights clause of Africa's investment Agreements to form a proper benchmark for human rights compliance for investors.

1. Investment Protection under Bilateral Investment Treaty Regime

Bilateral Investment Treaties (BIT) have emerged as a fundamental instrument in the modern regulatory landscape of international investment protection. Their preference for customary international law as a protection mechanism is traceable to the enhanced protection, certainty and clarity of legal rules operational in the flow of foreign investment between countries and investor-state relationships.[7]

Countries, no matter their economic development or political system, have embraced BITs as a significant instrument in promoting the flow of foreign investment.[8] According to the United Nations Commission on Trade and Development (UNCTAD), a total of about 2833 BITs have been concluded, with about 2222 in force as of 2024.[9] Majority of these BITs are concluded between developed and developing countries, with only about 26% accounting for those between developing countries themselves and only 9% between developed countries.[10]

Descriptively speaking, a BIT is a treaty between two independent countries. The primary essence of signing this kind of treaty is to ensure that investors from a state party receive a minimum prescribed standard of treatment and protection when investing in the other country within a defined investment.[11] Where there is any violation of the stipulated standard of treatment under the BIT, the victim investor is procedurally empowered to proceed to the arbitration tribunal against the host state. BITs, therefore, confer rights on the corporate citizens of the home state who invest in the host state. This protects the investor against acts of the host state that are inimical to the interest of the investor and his investment.

The investment protection provisions of BITs operate on the inferred assumption that investors from both parties will invest in the respective countries. This is, however, really the case in practice, especially with respect to BITs concluded between developed and developing countries where one party is the *capital-exporting* and the other, a *capital-importing* country. Since investment always flows from developed to developing countries, there is therefore a greater presumption that the standard protections that BITs confer on investors are intended to protect the interests of corporate citizens of the developed world. In an apparent situation where no investor, say, from Nigeria, will likely come to invest in Europe on such a scale that requires

[7] It must be stated that the claim for certainty and clarity of legal rules holds sway to the extent that the treaty regime offers ascertainable promises and determinable standard of how the investor should be treated. But the apparent vagueness, as shall be shown, of the basic standard clauses of BITs have given room to expansive interpretations in most cases beyond their ordinary context. In some instances, completely unspecific.

[8] A Al Faruque, 'Mapping the Relationship between Investment Protection and Human Rights' (2010) 11 Journal of World Investment & Trade, 539 Assessed 13th October 2024.

[9] UNCTAD 'Investment Policy Hub' Available at http://investmentpolicyhub.unctad.org/IIA

[10] See UNCTAD, 'Recent Development in International Investment Agreements (2008-June 2009)' (IIA Monitor No. 3 (2009), International Investment Agreements) available at http://unctad.org/en/docs/webdiaeia20098_en.pdf Accessed 3rd April 2024

[11] J E Alvarez, 'Empire, Contemporary Foreign Investment Law: An "Empire of Law " or the "Law of Empire?' (2009) 60 ALA. L. REV. 943, 957-59

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protection under the BIT raises further issues of the "bilateralism" in BITs. Perhaps, only to the extent that there are eventually two parties to the agreement.

Like other investment protection regimes, BITs have come under attack largely because of their lopsided nature in creating rights for investors without corresponding duties. In line with the already established objective, the extensive protection mechanisms, together with the ever-expanding scope of rights of the foreign investors, have given rise to the belief that BITs are 'too one-sided'.[12] Traditionally, BITs do not contain provisions enabling governments to challenge investors' misconduct that affects the rights of individuals within their territories of operation.[13] It has therefore been argued that the substantive obligations contained in investment treaties and their expansive interpretation by arbitral tribunals have the potential to limit the power of the states to regulate social and environmental issues and the duty of states to protect and promote human rights.[14] This is in line with the report of the UN Special Representative on Business and Human Rights, according to which it was stated that:

Recent experience suggests that some treaty guarantees and contract provisions may unduly restrain the host Government's ability to achieve its legitimate policy objectives, including its international human rights obligations. That is because, under threat of binding international arbitration, a foreign investor may be able to insulate its business venture from new laws and regulations or seek compensation from the Government for the cost of compliance.[15]

This illustrates instances where an investor may rely on the provisions of the BIT to challenge human rights-inspired regulations of the host state, which they consider to be detrimental to their investment. Secondly, investors may use the BIT provisions to challenge laws and policies of the host state aimed at implementation of human rights obligations of the state under the Constitution or under international human rights treaties.[16] A notable example was in 2007 when investors from Luxembourg and Italy, relying on the Belgium-Luxembourg-South Africa BIT provision, brought a claim under the ICSID additional facility rule against South Africa on the primary ground that the 2002 Mining and Petroleum Resources Development Act (MPRDA) contained provisions that expropriated their mining rights. The MPRDA forms part of South Africa's Black Economic Empowerment (BEE) Policy (an affirmative action policy) and requires, among other things, equity in mining companies to be partly owned by 'Historically Disadvantaged Persons'.[17] Upon settlement, South Africa subsequently terminated the BIT with Belgium and Luxembourg, concluding that BITs 'pose risks and

[12] See, NJ Schrijver, 'A Multilateral Investment Agreement from a North-South Perspective', in EC Nieuwenhuys and MMTA Brus, (eds) *Multilateral Regulation of Investment*, (Kluwer Law International, 2001) 17-33
[13] Amnesty International UK, *Human Rights, Trade and Investment Matters*, (May 2006) 20
[14] M Sornarajah, *The International Law on Foreign Investment*, (2nd edn. CUP, 2004) 259; A Al Faruque, 'Mapping the Relationship between Investment Protection and Human Rights' (2010) 11 Journal of World Investment and Trade, 539, 543
[15] Report of the Special Representative of the Secretary-General Business and Human Rights, A/HRC/ 11/13 (23 April 2009), paras 29-31
[16] R Suda, 'The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization', Hauser Global Law School Program, Global Law Working Paper 01/05, New York University School of Law, New York.
[17] *Piero Foresti, Laura de carli and others v Republic of South Africa* (ICSID case No AR(AF/07/01) Available at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB(AF)/07/1 accessed 4th April 2024

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limitations on the ability of the government to pursue its constitutional-based transformation agenda'.[18]

2. Substantive Treaty Provisions and Human Rights Obligations: Addressing the relational Interference

The treaty provisions are the main source of rights under which an investor derives the power to challenge the action of a state that affects his investment. It does not matter if these actions are motivated by human rights objectives. An investor who is aggrieved by the action of the state may rely on any of the clauses in the following discussion.

3.1 *Fair and Equitable Treatment (FET)*

The "fair and equitable treatment" (FET) provision is perhaps the most important provision in an investment treaty.[19] This is so because it offers the investor protection over a range of actions of government within the ambit of its interpretive context. It is difficult to bring the meaning of this clause under one sweeping definition across all BITs and the disagreement regarding whether its standard depends on the country's level of development has been on.[20] These have raised unique legal issues regarding the contours within which a State's responsibility for an alleged breach of a standard of treatment based on fairness and equity for investments can or cannot be maintained. It is also a matter of some contention whether its standard stretches beyond the customary standard.[21]

Due to its flexibility and open-textured nature, the FET clauses offer arbitrators a large margin of appreciation and this has contributed to the evolving nature of the clause.[22] The trend emerging from the debate as to whether the FET standard in a BIT has or has not been breached is that the task has been rendered difficult because of the sheer paucity of definitions of the key terms "fair" and "equitable" constituting the standard.[23] It has also been emphasized that arbitrators faced with relief based on the FET standard have as a result been forced to apply "equity" and "fairness" criteria while acknowledging the subjective, vague and ambiguous

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[18] J Lang and B Gilfillan, 'Bilateral Investment Treaties – A shield or a Sword? Available at http://www.bowmanslaw.com/wp-content/uploads/2016/09/PPI-article_mailshot_08112013_1038389_1-1.pdf accessed 25th February 2020. South Africa subsequently embarked on an aggressive review of its BITs which culminated in a policy decision by South Africa to terminate the majority of its first - generation BITs (pursuant to the terms of such BITs especially those operating under the so-called survival clause. Only 12 out of 50 South African BIT are in force) Info: Available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa. Accessed October 2024. *See* also EC Schlemmer 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 31 *ICSID Review - Foreign Investment Law Journal*, 167–193 available at https://academic.oup.com/icsidreview/article-abstract/31/1/167/2356755?redirectedFrom=fulltext accessed 25th February 2024

[19] For a general discussion of the FET and its importance, *see* FM Palombino, *Fair and Equitable Treatment and the Fabric of General Principles* (Springer, 2017) Ch 2 - 6

[20] N Gallus, 'The influence of the host state's level of development on international investment treaty standards of protection' (2005) 6 Journal of World Investment and Trade 711

[21] M Jacob, 'International Investment Agreement and Human Rights' INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development Duisburg: Institute for Development and Peace, University of Duisburg-Essen (March 2010) 17

[22] See *Mondev International Ltd v United States of America*, ICSID, Final Award, 11 October 2002, ARB(AF)/99/2, para. 112

[23] SM Perera 'Equity-Based Decision-Making and the Fair and Equitable Treatment Standard: Lessons from the Argentine Investment Disputes – Part I' (2012) 13 Journal of World Investment and Trade 210

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characteristics of those undefined terms. As a result, the application of subjective criteria has resulted in inconsistent conclusions, thereby limiting the possibility of establishing a consistent line of precedents.[24]

Despite its contextual fluidity, the FET is tied within a technical legal meaning that revolves around issues such as good faith, procedural propriety, abuses by authority, legitimate expectation, and transparency.[25] Although a lot depends on the contextual interpretation of the action of the state and inferable expectations of the investor, it is expected that an investor should know beforehand all the laws and rules under which its investment will be regulated.[26] Some other tribunals seem to tilt the pendulum in favor of the state's right to exercise its sovereign powers to regulate.[27] Whichever way, the threshold standard expected of a state under this clause is to act fairly, reasonably or equitably in the exercise of its regulatory powers. Yet, it is uncertain what is unreasonable, unfair and inequitable. A lot depends on the circumstances of each case and the contextual limitations, if any, of the clause in a BIT.

In effect, given the ever-growing modern governmental regulatory powers and the expansive nature of the FET standards, there is a potential risk of obligatory intersection capable of sparking a claim against the state. This can occur in a situation where the host state, in a bid to fulfill its human rights obligations adopts legislative or regulatory or other measures that affect its observance of the FET minimum standards against which the investor is empowered to challenge. This may arise in regulatory spheres such as environmental rights, labor rights, indigenous people's rights, public health, etc.[28] For example, in the *Piero Foresti* case, the adoption by South Africa of legislative measures aimed at improving the rights of historically disadvantaged people was challenged for violating the FET provision.[29]

It has been argued, and rightly so, that it will be unacceptable that the competing human rights obligation should preclude the finding of a violation of the FET clause.[30] It has rather been suggested that human rights obligations should be factored into the calculation of the compensation the host state should pay.[31] But there is no consistency of arbitral jurisprudence emerging on this issue to suggest a development of this trend, perhaps because the BIT obligations are largely non-reciprocal. It has been argued that the phrase 'equitable treatment' offers a degree of elasticity to accommodate this competing interest.[32] This, to my mind, continues to subject the clause to the plague of vagueness and arbitral uncertainty. It is apparent that the lack of definition of the key terms constituting the FET standard and the conditions tribunals can determine a breach of that standard are mired in inconsistency and, often,

[24] Ibid 213

[25] TJ Grierson-Weiler and IA Laird, 'Standards of Treatment' in P. Muchlinski, F Ortino and C Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP, 2008) 272-290

[26] *See* for instance the decision in *MTD Chile, SA v. Republic of Chile (MTD Chile),* ICSID Case No. ARB/01/7, Award, 25 May 2004, section 4.

[27] See on the other hand the decision in *Parkerings-Compagniet AS v Republic of Lithuania,* ICSID Case No. ARB/05/8, Awards, 11 September 2007, para. 332

[28] For several arbitral decisions on this, *see* I Knoll-Tudor, 'The Fair and Equitable Treatment Standards and Human Rights Norms' in P-M Dupuy, F Francioni and E U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP, 2009) 339

[29] *See Piero Foresti, Laura de carli and others v Republic of South Africa* (ICSID case No AR(AF/07/01)

[30] Knoll-Tudor, (n 28) 340-343

[31] Jacob, Marc (n 21) 18

[32] G Schwarzenberger, *Foreign Investments and International Law* (Stevens, 1969) 114

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controversy. It is argued, therefore, that until BITs begin to offer clear guidance as to the limit of this clause respecting human rights obligations, FET will remain an attractive option for investor claims and a potential fetter on state human rights regulatory autonomy.[33]

3.2 Full Protection and Security (FPS)

Most bilateral and multilateral investment treaties contain clauses guaranteeing the investor "full protection and security" (FPS). This clause, in its strong character, offers the investor a minimum standard of behavioral commitment of the host state, both in positive and negative terms. Its principle requires a minimum standard of action by the state to refrain from any sort of interference with the rights of the investor in respect of investment property.[34] It also requires positive action by the host state to protect the investor's property against acts of violation or destruction by private or non-state actors.[35]

From the jurisprudence emerging from some of the arbitral awards, the obligation to provide FPS has been viewed to be part of the conglomerate of the general duty of the host state to provide for a minimum standard of treatment, merged with the obligation towards investors to grant fair and equitable treatment.[36] Some treaties have brought this standard under those measurable under customary international law or at least necessary in ascertaining its meaning.[37] For instance, Article 10.4 of the United States – Chile Free Trade Agreement provides:

Each Party shall accord covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. For greater certainty, [this] prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide . . . 'full protection and security' requires each Party to provide the level of police protection required under customary international law.[38]

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[33] *See* SG Gross, 'Inordinate Chill: Bits, Non-NAFTA Mits, and Host-State Regulatory Freedom: An Indonesian Case Study' (2003) 24 Michigan Journal of International Law 893, 934 (on the different contexts in which the clause has been invoked to limit the regulatory autonomy of the state).

[34] *See Compañia de Aguas del Aconquija S.A. and Vivendi Universal v Argentina*, ICSID case no. ARB/97/3 (August 20, 2007) where the tribunal rejected the argument that the protection and security standard was limited to physical interference.

[35] HE Zeitler, 'Full Protection and Security' In SW Schill, *International Investment Law and Comparative Public Law*, (OUP 2010) 184

[36] *See* for instance *Wena Hotels Ltd v Arab Republic of Egypt* ICSID Case No ARB/98/4, Award, 8 December 2000, 41 ILM 896 (2002), paras 84–95.

[37] *See Texaco Overseas Petroleum Co/California Asiatic Oil Co v Libya Award*, 19 January 1977, 17 ILM 3, 13 (1978), para 32

[38] *US – Chile FTA* (adopted 06 June 2003, entered into force 01 January 2004) available at <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text> accessed 18 February 2020. See also the United States Free Trade Agreements (FTAs) with Singapore, Morocco, Australia, and Peru, and the BIT with Uruguay. The first draft of the US-Chile FTA still had contained the option in brackets to refer to 'juridical protection and security'.

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Beyond the reliance on the express reference to customary international law in BITs, arbitral bodies seem to retain, in explicit terms, principles of customary international law when construing the scope of duty of a host state for FPS. This was demonstrated in *AAPL v. Sri Lanka*.[39] The tribunal, while interpreting the standard of the host state's liability under the FPS clause in the BIT between Sri Lanka and the United Kingdom, held that the BIT was not a 'self-contained closed legal regime.'[40] According to the tribunal, it must be 'envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods or by direct reference to certain supplementary rules, whether of international law character or domestic law nature.'[41]

It may be recalled, as earlier stated, that the emergence of the BIT regime was intended to bring interpretive certainty, which the customary international law lacked.[42] The overreliance on international customary law jurisprudence in interpreting substantive rights in BIT clauses remains a factor that renders the interpretation of FSP clauses by tribunals subject to contextual fluidity and indeterminacy. Even in cases where treaties have appeared to have been interpreted autonomously, it nevertheless was based on obligations like those under customary international law, either on state complicity or on the violation of a duty to provide protection through the police or by legal means.[43]

In the *Sri Lanka case*, the claimant failed to adduce sufficient evidence to prove that State security forces were responsible or involved in the destruction of the investor's property.[44] This is vital because the standard of obligation required of a state includes the duty of abstention and the duty to prevent harm caused by private actors. As seen in *Biwater Gauff v Tanzania*, the tribunal found a violation of the FPS clause when it held that direct action of the state in removing management from offices and in the seizure of City Water's premises was abusive and unnecessary.[45] It does, however, appear that the tribunal may, in exceptional circumstances exclude the direct damage caused by the state from the scope of FSP and limit state obligation to harm caused by third parties that the state is obliged to prevent.[46]

The obligation of the state to protect against harm caused by third parties under the FSP clause in BITs extends to the duty to provide police protection. In the views of the tribunal in *AAPL v. Sri Lanka*, 'the addition of words like "constant" or "full" to qualify "protection and security"

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[39] *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* ICSID Case No ARB/87/3, Award, 27 June 1990, para 56.

[40] The tribunal allowed extension of the applicable legal system by virtue of Article 3 (1), Article 3 (2), and Article 4 of the Sri Lanka/UK Bilateral Investment Treaty.

[41] *AAPL v Sri Lanka* (n 39) para 21; see also the Report of the study group of the International Law Commission on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, UN.4/L.682, 13 April 2006, para 414. This report is available on <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> accessed 25th May 2020

[42] *See* head 2 of the paper

[43] Zeitler, (n 35) 191

[44] *AAPL v Sri Lanka* (n 39) para. 50

[45] *Biwater Gauff Tanzania (Ltd) v United Republic of Tanzania* ICSID Case No ARB/02/25, Award, 24 July 2008, para. 731.

[46] *See* the views of the tribunal in *Eastern Sugar BV v Czech Republic* SCC Case No 088/2004, Partial Award, 27 March 2007, paras 203–207. Here the tribunal was of the view that the positive actions of state should be considered in the light of other clauses such as "fair and equitable treatment" clause. I consider this view erroneous since the use of the word "full" in the FPS clause must necessarily include protection of the action of the state itself.

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could be a justification to indicate that parties…' intend to create within their treaty relationship a standard of "due diligence" higher than the "minimum standard" under generally understood customary international law standards.[47] The tribunal, however, recognized that the use of the words alone without more is not sufficient to establish that the parties intended to transform their mutual obligation into a "strict liability".[48] The tribunal in *Azurix v. Argentina*, on the other hand, saw no limitation in justifying such intention beyond physical protection when such words are used.[49] Undoubtedly, the duty to provide police protection to an extent extends to the obligation to provide legal protection through legislation and a legal system for redress.[50]

Some questions may be raised as to whether the obligation to provide police security carries a strict liability. From the positions reached in ICSID tribunals in *Wena v. Egypt*[51], *Noble Ventures v. Romania*, and *Tecmed v.. Mexico*[52], it suggests that the guarantee of FPS 'is not absolute and does not impose strict liability upon the State that grants it.'[53]

Having said this, my concern with police protection is its potential impact on human rights. This is not viewed from the substantive or procedural standpoint but from the angle of the use of state police apparatus for physical protection of investors and investment, which raises human rights concerns. This is prevalent in Africa and especially in petroleum and other related industries, where armed policemen are used to protect oil installations against possible destruction.

More often than not, a host state may, in a bid to provide adequate physical protection of investment installation, perpetrate violence on its own population or passively stand by and tolerate human rights abuses on its own citizens. In Nigeria for instance, International Oil Companies (IOC) such as Shell, Agip, ExxonMobil, etc., own a special police force dedicated to protecting them and the oil installations. Instances arise when the Nigerian government, in the event of clashes with oil-bearing communities, sends back-up military forces to suppress agitations and, in the process, kills, destroys properties and displaces communities.[54] In the famous *Ogoni case* brought before the African Human Rights Commission against Nigeria, it was held that Nigeria and private actors, namely an oil consortium that included Shell, had

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[47] *AAPL v Sri Lanka* (n 39) para. 50
[48] ibid para 50
[49] *Azurix Corp v Argentine Republic* ICSID Case No ARB/01/12, Final Award, 14 July 2006, para 408
[50] For detailed discussion on the scope and liability of legal protection see *Zeitler*, (n 33) 195
[51] *Wena Hotels Ltd v Arab Republic of Egypt* (n 36) para. 84
[52] *Tecnicas Medioambientales TECMED SA v United Mexican States* ICSID Case No ARB (AF)/00/2, Award, 29 May 2003, para 176
[53] Ibid para 177
[54] This was prevalent in most oil-related crises like the Umuechem and Ogoni cases in the Niger Delta region of Nigeria. For detailed discussions on the human rights implication of oil exploration in Nigeria and these crises, *see* R Boele, H Fabig and D Wheeler, 'Shell, Nigeria and the Ogoni. A study in unsustainable development: 1. The story of shell, Nigeria and the Ogoni people – environment, economy, relationships: conflict and prospects for resolution' (2001) 9 *Sustainable Development* 74; R Boele, H Fabig and D Wheeler, 'Shell, Nigeria and the Ogoni. A study in unsustainable development: II. Corporate social responsibility and environmental management and stakeholder management versus a right-based approach to sustainable development' (2001) 9 *Sustainable Development* 39; Manby, *The Price of Oil: Corporate Social Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (1999, Human Rights Watch, New York) 27; H Fabig, 'The Body Shop and the Ogoni' in M Addo (ed) *Human Rights Standards and Responsibility of Transnational Corporations* (1999, Kluwer, the Hague) 309; O.O Amao, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' Journal of African Law(2008)52 (1) 89

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violated human rights, including the right to life.[55] It was stated that following 'widespread violations perpetrated by the Government of Nigeria and by private actors, the most fundamental of all human rights, the right to life, has been violated'.[56]

3.3 Regulatory Dilemma in Expropriation of Investment

It is a well-ingrained principle of customary international law that a host state has the sovereign power to regulate or take certain measures within the public policy space that may significantly affect the foreign investor's property interest without incurring any compensatory obligation.[57] Such a measure, for it not to amount to a compensable expropriation, must 'pursue a legitimate purpose, be aimed at the general welfare, be non-discriminatory and fall within the ambit of the state's general regulatory or administrative powers.'[58] The British Government in response to the Libyan action in 1971 to nationalize the property, rights and assets under an oil concession contract of British Petroleum, stated that:

An act of nationalization is not legitimate in international law unless it satisfies the following requirements:

(i) It must be for a public purpose related to the internal needs of the taking state; and

(ii) It must be followed by payment of prompt, adequate and effective compensation.

Nationalization measures that are arbitrary or discriminatory or that are motivated by considerations of a political nature unrelated to the internal well-being of the taking state are, by reference to those principles, illegal and invalid.[59]

Treaties provide for restrictions on expropriation or indirect expropriation of foreign investment and impose an obligation on the host state to make prompt, adequate and effective compensation for any act of expropriation except where such taking is *legitimate and bona fide* and as such justified.[60] Notably, the US-Argentina BIT concluded in 1991, perhaps providing the most comprehensive and favorable protection to the investors at the time.[61] It provides that:

1. Investment shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate, and effective compensation; and in accordance with due process of law and general principles of treatment

[55] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, African Commission on Human and Peoples' Rights Communication 155/96 (13 to 27 October 2001)

[56] ibid, para 67

[57] See *Saluka Investment BV (the Netherlands) v the Czech Republic*, partial award of 2 March 2006: Permanent Court of Arbitration, para. 276

[58] R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP, 2008) 91

[59] (1974) 53 ILR 317

[60] *See* for instance Methanex Corporation v United States of America, part IV, para 410, final award of the tribunal on jurisdiction and merits of 3 August 2005. Here it was held in its final award that: 'It is a principle of customary international law that, where economic injury results from a bona fide regulation within the police powers of a State, compensation is not required'

[61] Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (United States-Argentina) (adopted 14 November 1991, entered into force 20 October 1994) (1992) 31 ILM 124

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provided for in Article II (2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realized; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

2. A national or company of either party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by appropriate judicial or administrative authorities of the other party to determine whether any such expropriation has occurred and, if so, whether such expropriation and any compensation therefore conform to the provisions of this Treaty and the principles of international law.

3. Nationals or companies of either party whose investments suffer losses in the territory of the other party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards measures it adopts in relation to such losses.[62]

The above provision exemplifies the tightest protection BITs can afford a foreign investor. Most of the possible eventualities have been captured to serve as guidance to arbitral bodies in any eventual investor-state dispute.[63]

Majority of tribunal cases where expropriation had been found, together with juristic views, tend to suggest a notable distinction between (i) direct forms of expropriation where the government directly transfers to the state or mandates the transfer to a third party the investment property and (ii) indirect forms of expropriation in which government measures, which are not physical takings, result in the deprivation of a foreign investor's property or investment interest. It has been held that

it is recognized in international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have appropriated them and the legal title to the property formally remains with the original owner.[64]

Such clauses in BITs have the potential to make it prohibitively expensive for the host state to regulate and pursue human rights objectives in areas such as land rights, public health, etc. The South African *Piero Foresti* case involving a legislative regulation to protect the rights of historically disadvantaged groups was challenged on grounds that such a measure violated the expropriation clause in the BIT.[65]

Whereas the law may be settled about what amounts to direct expropriation, it remains cloudy and uncertain, in jurisprudential terms, what amounts to indirect expropriation and under what exact circumstances a tribunal will find a case of expropriation. This has been made difficult due to the progressive expansion of the concept of taking, in which modern views now identify

[62] ibid Article IV
[63] SP Subedi, *International Investment Law: Reconciling Policy and Principle* (Heart, 2016) 124
[64] *Starrett Housing Corporation v. Islamic Republic of Iran* (1983) 4 Iran-USCTR 122 at 154 per Lagergren
[65] *Piero Foresti* (n 17)

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the concept of 'disguised expropriation'[66] or 'anything tantamount to a taking'.[67] In *Middle East Cement Shipping and Handling Co.* v. *Egypt*[68] The tribunal described indirect expropriation as 'measures taken by a state the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights'. In *Lauder v. Czech Republic,*[69] The view was that the taking 'does not involve an overt taking but effectively neutralizes the enjoyment of property'.

The challenge facing the arbitral tribunal is to determine when a state measure is expropriatory or legitimate and non-compensable expropriation. Evidence emerging from older arbitral awards offers no clue regarding a coherent approach in developing a rule in this respect. For example, in *Sapphire* v. *NIOC, a state* oil corporation's interference with the operations of an IOC, including insisting on the right to veto decisions to be made, was held by the tribunal to amount to a taking.[70]. On the other hand, in *Amco v Indonesia*, the foreign investor's license was withdrawn on grounds of alleged failure to capitalize the venture in line with entry commitments.[71] The tribunal failed to pronounce on the issue of whether the withdrawal of the license amounted to a taking but proceeded to give an award on the grounds of the failure of the state to follow a minimum standard of procedure before withdrawing the license.[72]

Recently, arbitral bodies seem to be developing a trend towards determining the legitimacy of a measure's objective in proportion to the investor's legitimate expectation. Some seem to hold that economic injuries occasioned because of *bona fide* regulation within the accepted limit of inherent sovereign power to protect public interest is not compensable unless they are contrary to the investor's legitimate expectation.[73] For example, in *Waste Management v Mexico*, the tribunal stated, with respect to the minimum standard of FET, that 'in applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied upon by the claimant.'[74] This view was cited with approval in the later and more popular *Methanex* award. In upholding the regulatory power of the state, the tribunal in the *Methanex* award held that:

as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, inter alios, a foreign investor or investment, is not deemed expropriatory and compensable unless specific

[66] Judge Fitzmaurice in *Barcelona Traction Case* [1971] *ICJ Reports* 3

[67] Although, because of the expansionary nature of these phrases, States have responded by leaving them out in newer BITs - thus, returning the law to its previous position of customary international law

[68] ICSID Case No. ARB/99/6 (2002)

[69] UNCITRAL Arbitration Proceedings (Final Award, 3 September 2001)

[70] Ad hoc Arbitral award of March 1963 (Pierre Cavin, Federal Judge, Lausanne, Switzerland)

[71] (1988) 27 *ILM* 1281

[72] ibid

[73] *Sedco Inc v Iran,* 9 Iran US-Claims Tribunal Reports 248, para. 275; *Técnicas Medioambientales Tecmed SA v Mexico* (Tecmed), ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, (2004) 43 ILM 133, para.119; *Saluka Investments BV (The Netherlands) v Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para. 255

[74] *Waste Management v. Mexico, Waste Management, Inc v United Mexican StatesI*, ICSID Case No. ARB(AF)/98/2, Award, 02 June 2000, 43 ILM 967, para. 98

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commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation'.[75]

The above passage is particularly relevant to the discussion of the regulatory dilemma in the expropriation of investment. First, the tribunal restates the notion that *bona fide* regulations enacted using due and normal processes are not an expropriation even where they have an impact on the investor. The tribunal thus makes clear that regulations are not an expropriation and are therefore not compensable.

As Howard Mann argues, the position taken by the *Methanex* tribunal opposes the view put forward by some[76] that regulations aimed at protecting 'the environment, human health, etc., should be seen as expropriatory if they have a significant economic impact on an investor, but the amount of compensation may be adjusted depending on the purpose behind it).'[77] This interpretation, Mann further argues, 'is critical to preserving regulatory space for governments in the face of investment treaty provisions on expropriation.'[78]

The jurisprudence of expropriation thus seems to be developing into a nuanced concept suggesting a growing balance between investors' rights and the legitimate regulatory rights of the host state by considering the impact of regulation, its purpose, intensity of interference, interests at stake and even-handedness in the application of the measure.[79] It has been argued that this proportionality-based approach will improve arbitral decision-making. Some commentators suggest that adopting the European Court of Human Rights' approach to proportionality in expropriation will create the much-needed transparency in decision-making structure and certainty in expropriation claims.[80]

Despite the room to regulate under police powers and the seemingly changing trends in treaty interpretation, the expropriation clauses and the uncertainty in finding indirect expropriation remain a limiting factor on the freedom of action of states to regulate. An attempt to give certainty to regulatory expropriation and perhaps create more regulatory space can be found in the side letter on expropriation accompanying the 2003 Singapore-US Free Trade Agreement,

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[75] *Methanex Corporation v United States* (Methanex), ICSID Case No ARB/98/3, Pt IV, ch.D, para 7

[76] *See* for example, the *Metalclad v. Mexico* award, which ignited the debate on the meaning and scope of regulatory measures that amount to expropriation and whether any regulatory measure that has a significant economic impact on the investor should be treated as indirect expropriation, regardless of the purpose of the measure.

[77] H Mann, 'Methanex Corp. v. United States of America (Methanex v. United States)' in N Bernasconi-Osterwalder and L Johnson (eds), *International Investment Law and Sustainable Development Key cases from 2000–2010* (IISD 2011) 81 – 89 available at <https://www.iisd.org/sites/default/files/publications/int_investment_law_and_sd_key_cases_2010.pdf> accessed 18 February 2020

[78] ibid 87 -88

[79] *SD Myers, Inc v Government of Canada (Myers),* Partial Award, 13 November 2000, 40 ILM 1408 (2001) paras. 282-283; SW Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?' (2007) Journal of International Arbitration 469, 473-474.

[80] *See* eg Xiuli Han, 'The Application of the Principle of Proportionality in *Tecmed v. Mexico*', 6 Chinese Journal of International Law (2007); William Burke-White and Andreas Von Stade, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitration' (2010) 35 Yale Journal of International Law, 283

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which clarifies that regulatory actions applied to protect public welfare objectives, such as public health, safety and the environment, do not constitute direct expropriation.[81]

It remains arguable and unclear whether human rights can generally be brought within this class of regulatory space. I do not agree that it is so intended, as nothing suggests that effect. At best, a liberal interpretation would suggest that it is intended to cover aspects of human rights regulations that purely fall within the public and environmental domain. Ultimately, it is yet to be certain whether human rights-motivated regulations that affect the rights of investors are covered within what can be interpreted as a justified expropriation. Until clearer normative interpretive benchmarks are established in the absence of express provisions in the BITs, states regulating public interest with human rights in mind would likely continue to find themselves at the receiving end of expropriation claims. As such, the role of investment arbitral tribunals in establishing this normative benchmark to determine the place of human rights in investment law for now remains central in rebalancing the relationship between investment protection and regulatory freedom of the host state. Such benchmark must be sufficiently provided in the substantive provisions of the BIT itself.)

4. Emerging Trends in Balancing Investment Protection and Human Rights: Africa's Structural Responses

There have been emerging trends in recent years that suggest clearly that Africa is responding to balance investment and human rights obligations. This is necessary to redeem the regime's image and regulatory space of the host states. South Africa's Protection of Investment Act 22 of 2015, which came into force on July 13, 2018, was an attempt to codify BIT protection standards and provide a regulatory balance in investor-state relations.[82]

Perhaps the most remarkable departure where there is a specific and express reference to human rights can best be found in the new Morocco – Nigeria BIT, which was signed on December 3rd, 2016.[83] Article 18 section 2, provides that 'Investors and investments shall uphold human rights in the host state.' Upon entry into force, the Morocco-Nigeria BIT would be the first international investment agreement to establish binding obligations on investors to uphold human rights. This is perhaps the most innovative agreement in modern treaty-making practices.[84] In this regard, there is a clear and definite legal basis for human rights obligations of investors of the respective parties to the treaty investing in the other country.

[81] The side letters were exchanged pursuant to Article 15:26 (b) United States-Singapore Free Trade Agreement (signed 06 May 2003, entered into force 01 January 2004) 42 ILM 1026, available at https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf accessed 18 February 2020. The US Model BIT as well as the Model treaties of other countries such as Canada (its Annex), Columbian 2007 Model (Article 6(2) (c) and the Investment Agreement for COMESA Common Investment Area (2007) under Article 20(8) all have similar provisions.

[82] L Magubane, 'Investment Protection Legislation in South Africa', available at www.dlapiper.com/en/southafrica/insights/publications/2018/11/africa-connected-doing-business-in africa/investment-projection-legislation-in-south-africa/ accessed 3 October 2020.

[83] See Treaty between Morocco and Federal Republic of Nigeria Concerning the Reciprocal Encouragement and Protection of Investment (Morocco-Nigeria) (adopted 3rd December 2016)

[84] Tarcisio Gazzini, The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties, 8 Investment Treaty News, Issue 3, September 2017. Available at www.iisd.org/sites/default/files/publications/iisd-itn-september-2017-english.pdf Accessed 26 April 2020

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Another clear and express incorporation of human rights can be found in the ECOWAS Supplementary Act 2009.[85] Particularly, Article 14, section 2 states that:

Investors shall uphold human rights in the workplace and the community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors shall not manage or operate the investments in a manner that circumvents human rights obligations, labor standards, and regional environmental and social obligations to which the host State and/or home State are Parties.[86]

In a similar streak but in a looser language Article 24 of the African Union's Draft Pan-African Investment Code of 2016 requires 'the following principles to govern compliance with business ethics and human rights by investors: a. support and respect the protection of internationally recognized human rights; b. ensure that they are not complicit in human rights abuses; (…).'[87] It may seem safe to say that entrenching human rights obligations for investors is part of a new African paradigm approach to investment treaty-making.[88]

It may generally be argued that the legal basis upon which the human rights obligations of the investors are found, especially under Article 18 of the Morocco – Nigeria BIT, remains vaguely worded in its content. The article does not provide sufficient criteria for determining what human rights obligations are to be respected by the investor because there are some rights that can be classified as human rights but that realistically cannot fall under what can be termed 'investor responsibility.' For instance, it is impossible to hold an investor responsible for the right to vote and be voted for, the right to a fair hearing, etc within the context of investment. These are rights that fall absolutely within the sphere of the state.

Again, what human rights are to be respected? Is it all international human rights or only those rights provided for within the national constitutions of the parties, given that the parties to a BIT may have varying degrees of human rights that are justiciable within their respective domestic laws? In this situation of uncertainty, it is difficult to determine equal human rights obligations for investors from each home state. It is also difficult to differentiate what should amount to human rights obligations in terms of responsibility to fulfill, protect and respect between the state and the investor.

Thus, the contention that this paper raises is that the mere incorporation of or reference to human rights obligations in investment agreements is not a sufficient solution to the inequity between investment protection and human rights. Its operational context should be measured against a harmonized human rights standard that shores off the human rights disparity between the state parties within the African human rights framework. For instance, in some African states like Nigeria, international human rights instruments are not applicable and do not form

[85] ECOWAS, Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS of 19 December 2008, text available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/3266 Accessed 26 April 2020
[86] ibid
[87] African Union Commission, Economic Affairs Department, Draft Pan- African Investment Code, December 2016, available at https://au.int/sites/default/files/documents/32844-doc-draft_panafrican_investment_code_december_2016_en.pdf. Accessed 26 April 2020
[88] *See* also the views of Makane Moïse Mbengue and Stefanie Schacherer, 'The 'Africanization' of International Investment Law: The Pan-African Investment Code and the Reform of the International Investment Regime' (2017) 18 The Journal of World Investment & Trade, 414, 434-436.

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the gamut of human rights laws. They can only apply upon domestication by parliament. Even when they are domesticated, like the African Charter, most of the rights protected under it are not justiciable under the Nigerian Constitution.[89] This is not the case in Kenya, where international human rights laws have direct application. Thus, a mere reference to human rights in a continental treaty without creating a uniform standard for measuring compliance creates a complex disparity in human rights enforcement. The approach this paper offers by integrating the African Charter standards will provide the much-needed sufficient criteria to measure the extent and limits of such responsibility on the part of the investor under investment law, irrespective of the human rights application status of the charter in different African States. Thus, providing such an equal standard of obligatory measure will help to resolve the complexities created by the monist/dualist dichotomy in the application and justiciability of human rights norms in respective African states.

If customary international human rights law is allowed to form the benchmark of compliance, then the issue becomes to what extent those rights have been internalized within the national systems of the state parties such that they form the gamut of laws that bind the investor. Thus, the African Charter on Human and Peoples' Rights presents us with a proper benchmark that needs to be integrated into the African Continental Free Trade Agreement investment chapter to define Africa's human rights compliance benchmark for investors. The benchmark created by this integration will sufficiently provide the investor a clear idea of the extent of its human rights obligations.

5. **Concluding Remark**

The treaty-making practice in Africa and the potential it holds in balancing some of the relational issues as presented earlier between investment protection and human rights foretell a great opportunity for regulatory balance under AfCFTA. The prospect of having the first African continental framework on investment governance, no doubt, comes with receptive hopes. However, the ambition of developing an African investment landscape that takes care of and balances some of the regulatory and obligatory dilemmas associated with the neoliberal investment protection doctrines and philosophy is very vital for Africa.

Therefore, AfCFTA offers that opportunity for the Africanization of an investment protection regime capable of expanding the regulatory space of host states and which harmonizes investment protection-human rights asymmetry in a realistic, practical, and determinable manner. This is important because for far too long, Africa has been rule-takers rather than rule-makers within the global economic space. Africa's power of negotiation has in the past been fragmented, as each country in Africa, whether big or small, has had to face other mighty developed nations of the world all alone. AfCFTA unifies Africa as a big trading bloc with full powers to call the shots at any trade or investment negotiation table.

As rightly put by the South African ambassador to the WTO, 'Rebalancing the relationship between investor protection and the right to regulate in the public interest has moved to the center of the debate on the future'.[90] The efforts remain, as important as it seems, work in progress. The vital role investment arbitrations play in dealing with these issues raised so far

[89] *See* Sections 6 (6) (c), 12, 1 (3) of the Constitution of Nigeria, 1999

[90] X Carim, 'International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa', *Investment Policy Brief*, no 4, August 2015

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remains a fundamental factor in measuring the success of this emerging paradigm. It is concluded that to achieve a meaningful result, human rights need to be harmonized and operationalized to properly ascertain what constitutes human rights responsibility between the investor and the host state, both in national and international law contexts and within the narrower context of investment law. Therefore, the integration of the African Charter on Human and Peoples' Rights as a uniform human rights standard in Africa's investment Agreements provides that operational context, harmonisation and certainty required to determine the standard of investors' human rights responsibility in the investment agreement.

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