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Bilingual Master's Thesis in Law

Reconciling Foreign Investors' Rights and Environmental Protection Obligations in African IIAs

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Abbreviations

AfCFTA	African Continental Free Trade Agreement
BEE	Black Economic Empowerment
BIT	Bilateral International Treaty
CAR	Central Africa Republic
CCIA	COMESA Common Investment Area
COMESA	Common Market for Eastern and Southern Africa
COTCO	Cameroon Oil Transportation Company
CPP	Chad – Cameroon Pipeline Project
DRC	Democratic Republic of the Congo
DSB	Dispute Settlement Body
ECOWAS	Economic Community of West African States
ECOWIC	Economic Community of West African States Common Investment Code
EIA	Environmental Impact Assessment
EMS	Environmental Management System
EHR	Environmental and Human Rights
FDI	Foreign Direct Investment
FES	Friedrich Ebert Stiftung
FET	Fair and Equitable Treatment
FMV	Fair Market Value
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes

IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
IMF	International Monetary Fund
IPFSD	Investment Policy Framework for Sustainable Development
KNCCI	Kenya National Chamber of Commerce and Industry
Ltd.	Limited
MFN	Most Favoured Nation
MST	Minimum Standard of Treatment
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
PAIC	Pan African Investment Code
PSA	Production Sharing Agreement
PSC	Production Sharing Contract
REC	Regional Economic Communities
SADC	South African Development Community
SDG	Sustainable Development Goal
TIP	Treaty with Investment Provisions
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

Introduction

In 2023, more than 2'500 IIAs are in force[1], including BITs and TIPs. African States have signed almost one-third of these IIAs. Foreign investment has always been a driver of economic development in African host States[2]. However, it has usually harmed rather than protected the environment[3]. Indeed, the primary goal of IIAs is to protect and promote investments, which creates an asymmetry between investors' rights and the will of host States to protect their environment. The current environmental situation demonstrates the need to reform the IIAs system so that host States can protect their territory and population from investor infringement.

The international community is aware of the urgent need to transform our economy into one based on sustainable development. Indeed, in 2015, the United Nations General Assembly adopted a Resolution known as the Agenda 2030[4]. This Resolution established 17 global goals designed to promote sustainable development: the 17 SDGs. One of the SDGs is to protect the planet from degradation through sustainable consumption and production, sustainable management of its natural resources, and by taking urgent action on climate change[5]. At the same time, the 24th Ordinary Assembly of the Heads of States and Governments of the African Union adopted a set of initiatives to develop the African continent economically, politically, socially, and sustainably. This decision is known as Agenda 2063[6]. In both Agendas, foreign investment is essential to achieve these goals. More recently, the United Nations General Assembly recognised the right to a clean, healthy, and sustainable environment as a human right[7], drawing attention to the need to consider environmental protection as an obligation and

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[4] UNITED NATIONS, "Transforming our World: the 2030 Agenda for Sustainable Development", Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1 (Agenda 2030).

[5] Agenda 2030, *op. cit.*, p. 3.

[6] AFRICA UNION, Agenda 2063: The Africa We Want, adopted on 31 January 2015 (Agenda 2065).

[7] UNITED NATIONS, "The human right to a clean, healthy and sustainable environment", Resolution adopted by the General Assembly on 28 July 2022, A/RES/76/300.

not as an option. We cannot yet measure this Resolution's impact, but we hope its effect will go far beyond international investment law.

Nevertheless, host States still need to attract investment. There is, therefore, a need to find a way to reconcile the rights of foreign investors with environmental protection obligations. Given the leading role of IIAs in the African economy, we will focus on IIAs concluded by African States. Accordingly, we will answer the following question: How have African States resolved conflicts between foreign investors' rights and environmental protection obligations in their IIAs?

With this in mind, we will first describe how environmental provisions are integrated into reformed African IIAs. Secondly, we will analyse the conflicts in reconciling foreign investors' rights and environmental protection obligations. Finally, we will demonstrate that African States are pioneers in reforming IIAs, but challenges remain.

I. Broad Integration of Environmental Provisions in Modern African IIAs

African States are increasingly incorporating environmental protection standards into their IIAs. However, before showing the processes by which this protection is implemented, we need to show why this reform of IIA drafting is necessary.

A. Need to Reform the Content of African IIAs

The main reason for reforming the content of IIAs remains in the disastrous experience of African States with the traditional method of drafting IIAs and resolving environmental protection disputes. It is, therefore, essential to explain the context in which IIAs were first drafted and then to illustrate this experience with a relatively recent case. Finally, we will show what guidelines and principles African States have used to reform their IIAs.

1. Unbalanced Traditional IIAs

After the decolonisation movement, in the sixties, African States began to conclude IIAs. At that time, African States had many natural resources but needed the financial means and infrastructure to exploit them. They, therefore, started to enter into North-South BITs, mainly with former colonialist countries, to enable companies from these countries to invest in Africa. The content of these BITs follows the traditional approach of treaties elaborated by capitalexporting countries[8]. These early North-South BITs aimed to protect the interests of former colonialist countries, mainly in the extractive industries. It was all about investors' rights and host States' obligations, but none about sustainable development or balanced treaties. *Biwater Gauff v. Tanzania*[9] is a dramatic example of the consequence of an unbalanced treaty. We will outline only the facts and outcome of this case. We will have an opportunity to discuss the specific arguments below.

2. *Biwater v. Tanzania*: the Glaring Example of the Consequences of an Unbalanced Treaty

This arbitration case from 2008 opposed Biwater Gauff, a company incorporated under the laws of English and Wales, as the Claimant and Tanzania as the Respondent. The investment treaty relevant in this case was the Tanzania – United Kingdom BIT (1994)[10].

In 2003, the World Bank decided to grant US$ 140'000'000 to Tanzania to enable the country to develop its water and sewerage infrastructure, particularly in Dar es Salaam, which was insufficient to provide adequate services to the population[11]. As a condition of the funding, Tanzania should appoint a private party to operate and manage the project. Biwater Gauff obtained the right to manage and created another company – City Water – to operate the project[12]. City Water and the government's Water Authority (Dar es Salaam Water and Sewerage Authority) entered into a ten-year contract in February 2003[13]. However, City Water could not fulfil its contractual obligations due to multiple financial difficulties and poor management[14]. As a result, the company severely affected Tanzania's water infrastructure and

[8] MBENGUE Makane Moïse/SCHACHERER Stefanie, "Evolution of International Investment Agreements in Africa: Features and Challenges of Investment Law "Africanization"", *in* CHAISSE Julien/CHOUKROUNE Leïla/JUSOH Sufian, *Handbook of International Investment Law and Policy*, Springer, Singapore, 2019, p. 4.

[9] Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008.

[10] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments, signed on 07 January 1994, entered into force on 02 August 1996 (Tanzania – United Kingdom BIT (1994)).

[11] JOHNSON Lise, "Biwater v. Tanzania", *in* BERNASCONI-OSTERWALDER Nathalie/JOHNSON Lise (eds.), *International Investment Law and Sustainable Development: Key cases from 2000-2010*, IISD, Geneva, 2011, p. 23.

[12] *Ibid.*, p. 23.

[13] *Ibid.*, p. 23.

[14] Biwater v. Tanzania, *op. cit.*, para. 789.

supply policy[15]. After eighteen months, the company asked for a renegotiation of the terms of the contract[16]. The renegotiation failed; consequently, the Water Authority decided to terminate the contract on 25 May 2005[17].

Biwater brought the case before an ICSID Tribunal, alleging violations of the United Kingdom – Tanzania BIT (1994), including unlawful expropriation[18], violation of FET standard[19], unreasonable and discriminatory measures[20], and failure to provide full protection and security[21]. However, even though the Tribunal found an expropriation and a violation of the FET standard, Tanzania did not have to pay damages, as Biwater also violated its obligations and could not demonstrate any damages[22].

This case illustrates the general weakness of traditional IIAs when Contracting Parties are required to implement provisions to protect the environment and promote sustainable development more broadly[23]. The United Kingdom – Tanzania BIT (1994) does not refer to environmental protection or sustainable development. Article 3 about national treatment and MFN does not specify what constitutes a favourable treatment. Moreover, Article 5, which governs expropriation, focuses mainly on the conditions for compensation. This lack of precision has allowed the Tribunal to interpret these provisions with huge flexibility. Tribunals have, therefore, no obligation to consider host States' need to pursue measures in the public interest[24], such as environmental protection. In this particular case, the Tribunal recognised that "the crisis could have threatened a vital public service […] and had to be resolved one way or the other"[25]. Nevertheless, it argued that there was "no necessity or impending public purpose to justify the Government's intervention in the way that took place"[26]. This position reflects

[15] ZAGEL Gudrun Monika, "International Investment Agreements (HAs) and Sustainable Development: Are the African Reform Approaches a Possible Way out of the Global IIA Crisis?", *Manchester Journal of International Economic Law*, Vol. 17, No. 1, 2020.
[16] JOHNSON, "Biwater v. Tanzania", *in* BERNASCONI-OSTERWALDER/JOHNSON (eds.), *op. cit.*, p. 23.
[17] Biwater v. Tanzania, *op. cit.*, para. 15.
[18] *Ibid.*, paras. 451-519.
[19] *Ibid.*, paras. 622-628.
[20] *Ibid*, paras. 707-709.
[21] *Ibid*, paras. 729-731.
[22] *Ibid*, para. 807.
[23] ZAGEL, *op. cit.*, p. 32.
[24] ZAGEL, *op. cit*, p. 32.
[25] Biwater v. Tanzania, *op. cit.*, para. 654.
[26] *Ibid.*, para. 515.

the fact that compliance with contractual obligations is more fundamental than compliance with public interests such as the environment, health, or the protection of human rights[27].

Fortunately, this dangerous and unbalanced way of drafting IIAs diminishes over time. In addition, due to States' awareness of environmental protection and their various international commitments, such as the Agenda 2030 (2015), the Paris Agreement (2015) and the Kyoto Protocol (1997), States are obliged to include provisions on environmental protection.

Nevertheless, in order to reform IIAs, it remains to be seen from which sources States initially drew inspiration for their new IIAs.

3. How to Implement Environment Protection Provisions in IIAs?

UNCTAD, in its Investment Policy Framework for Sustainable Development (IPFSD), provides various tools to implement environmental protection objectives in IIAs[28]. The IPFSD applies more broadly to sustainable development with its 17 SDGs, including climate action on land and life below water. One of these tools is the principle of balance: investment protection must be balanced between investors' obligations and the promotion of sustainable investment[29]. For instance, States should include investor liability provisions in case of domestic or international law breaches[30]. In addition, they should specify and clarify the scope and meaning of particularly vague treaty provisions such as the FET standard and expropriation[31]. For example, with respect to expropriation, they could specify that non-discriminatory and *bona fide* regulation in pursuit of public policy objectives does not constitute indirect expropriation[32]. The FET standard could also include an exhaustive list of State obligations[33].

This document is a non-binding instrument. It contains only recommendations that should be followed to achieve the 17 SDGs. Nevertheless, it has been 15 years since African countries started reforming their IIAs, respecting sustainable development and especially environmental

[27] JOHNSON, "Biwater v. Tanzania", *in* BERNASCONI-OSTERWALDER/JOHNSON (eds.), *op. cit.*, p. 32.
[28] UNCTAD, Investment Policy Framework for Sustainable Development, UNCTAD/DIAE/PCB/2015/5, United Nations, 2015, pp. 3-4.
[29] *Ibid.*, p. 8.
[30] *Ibid.*, p. 19.
[31] *Ibid.*, p. 78.
[32] *Ibid.*, p. 85; for a deeper explanation, *infra* pp. 14-16.
[33] *Ibid.*, p. 85; for a deeper explanation, *infra* pp. 38-39.

protection, such as the Morocco-Nigeria BIT (2016)[34], the SADC Model BIT Template (2012)[35], the Draft Pan-African Investment Code (2016)[36], the ECOWAS Supplementary Act on Investments (2008)[37], the COMESA Common Investment Area (2007)[38], and many more recent BITs or investment chapters in FTAs. It is, therefore, worth analysing how environmental protection is concretely taken into account in modern African IIAs. Before discussing the substantive provisions, we will focus on the impact of the preambles.

B. Preambles Including a General Commitment to Environmental Protection

References to environmental protection or, more generally, to sustainable development in treaties are most often found in the preambles[39]. We will, therefore, discuss the purpose of the preambles of the treaties and how their content has evolved over the years.

1. Purpose of Preambles

The content of preambles does not establish rights or obligations as do the substantive provisions of IIAs[40]. However, Article 31 of the VCLT (1969) states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose […] including its preamble and annexes"[41]. Thus, the preambles are rather an aid to interpreting the main body of the agreements.

As BITs primarily protect investments, Tribunals often rely on their preambles to justify expensive interpretations of investors' protections, since they indicate that investment

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[34] Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, signed on 3 December 2016 (Morocco – Nigeria BIT (2016)).

[35] SADC Model Bilateral Investment Treaty Template, July 2012 (SADC Model BIT (2012)).

[36] Draft Pan-African Investment Code, 31 December 2016 (PAIC).

[37] Supplementary Act A/SA.3/12/08 adopting community rules on investment and the modalities for their implementation with the Economic Community of West African States, signed on 12 December 2008, entered into force on 19 January 2009 (ECOWAS Supplementary Act on Investments).

[38] Investment Agreement for the Common Market for Eastern and Southern Africa Common Investment Area, signed on 23 May 2007 (COMESA Investment Agreement).

[39] BJORKLUND Andrea K., "Sustainable development and International Investment Law" *in* MILES Kate (ed.), *Research Handbook on Environment and Investment Law*, Edward Elgar Publishing, Northampton, 2019, p. 47.

[40] LIANG Danni, "Environmental concerns and China's international investment agreements", *in* MILES, *ibid*., p. 369.

[41] Vienna Convention on Law of Treaties, concluded at Vienna, on 23 May 1969 (VCLT).

promotion and protection is the treaty's overriding objective[42]. For instance, in *Siemens v. Argentina*[43], the Tribunal referred to the title and preamble of the Germany – Argentina BIT (1991)[44]. It states that the treaty's purpose is to protect and promote investment and that the Parties have agreed on the treaty's provisions to create favourable conditions for foreign investment[45]. Conversely, if a preamble contains references to environmental protection, Tribunals have to interpret substantive provisions in a more balanced approach[46]. However, mentioning "environment protection" or "sustainable protection" is not enough to ensure a balanced interpretation by arbitrators. The Contracting Parties must clarify the meaning and the scope of these terms, otherwise they become meaningless[47]. The following section shows how the Parties concretely include environmental protection in their preambles, and how their content has evolved over the years.

2. Evolution over the Years of the Preambles' Content

In 1962, Cameroon and Germany concluded a BIT[48]. It was only on 1 January 1960 that Cameroon proclaimed its independence from France[49]. This treaty is thus the ideal example of a North-South treaty between an ex-colonialist country and a newly independent one. The preamble is quite brief and contains no reference to environmental protection or sustainable development. It only refers to the protection and promotion of investments.

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[42] KEBETA DJIGSA Wakgari, "The Adequacy of Ethiopia's Bilateral Investment Treaties in Protecting the Environment: Race to The Bottom", *Haramaya Law Review*, Vol. 6, 2017, p. 76.
[43] Siemens A.G v. The Argentine Republic, ICSID Case No. ARB/02/8, Award, 17 January 2007.
[44] Vertrag zwischen der Bundesrepublik Deutschland und der Argentinischen Republik über die Förderung und den gegenseitigen Schutz von Kapitalanlangen, signed on 9 April 1991, entered into force on 8 November 1993 (Germany – Argentina BIT (1991)).
[45] Siemens v. Argentina, *op. cit.*, para. 81.
[46] MANN Howard, "Reconceptualizing International Investment Law: Its Role in Sustainable Development", *Lewis & Clark Review*, Vol. 17, 2013, p. 537.
[47] ZAGEL, *op. cit.*, p. 35.
[48] Traité entre la République fédérale d'Allemagne et la République fédérale du Cameroun relatif à l'encouragement des investissements de capitaux, signed on 29 June 1962, entered into force on 2 November 1963 (Germany – Cameroon BIT (1962)).
[49] HOUPERT Pierre, *Ce jour-là : le 1er janvier 1960, l'indépendance du Cameroun*, 1 January 2017, accessed on 22 November 2022, available at: https://www.jeuneafrique.com/382834/politique/jour-1er-janvier-1960-lindependance-cameroun/.

In 1994, China and Egypt concluded a BIT[50]. Unfortunately, despite the conclusion of a treaty between two countries of the South, its preamble follows the model of an unbalanced treaty developed by the Northern States:

> "Intending to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party; Recognizing that the reciprocal encouragement, promotion and protection of such investments will be conducive to stimulating business initiative of the investors and will increase prosperity in both States".

After years of unbalanced treaties, African States have finally begun integrating environmental protection references in their preambles. An interesting example is the SADC Model BIT. It was completed in June 2012 by the 16 Member States of the Community[51]. The objective is to promote the harmonisation of the Member States' investment policies and laws[52]. This Model is not a legally binding document but a guide to be used and adapted as needed. Nevertheless, even UNCTAD considers it as part of the new generation of investment policies[53]. Its preamble contains several references to sustainable development:

> "Recognizing the important contribution investment can make to the sustainable development of the States Parties";
>
> "Seeking to promote, encourage and increase investment opportunities that enhance sustainable development within the territories of the State Parties";
>
> "Understanding that sustainable development requires the fulfilment of the economic, social and environmental pillars that are embedded within the concept";
>
> "Taking into account the SDGs and the UNCTAD…";
>
> "Reaffirming the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives";

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[50] Agreement between the Government of the Arab Republic of Egypt and the Government of the people's Republic of China concerning the encouragement and reciprocal protection of investments, signed on 21 April 1994, entered into force on 1 April 1996 (Egypt – China BIT (1994)).

[51] For the list of the Member States of SADC: https://www.sadc.int/member-states, accessed on 30 October 2022.

[52] SADC Model Bilateral Investment Treaty Template with Commentary, 2nd ed., June 2017, p. 3.

[53] MANN Howard, "The SADC Model BIT Template: Investment for Sustainable Development", *Investment Treaty News*, 30 October 2012, accessed on 30 October 2022, available at: https://www.iisd.org/itn/en/2012/10/30/the-sadc-model-bit-template-investment-for-sustainable-development/#_ftn1.

"Seeking an overall balance of the rights and obligations among the State Parties, the investors, and the investments".

All these quotes demonstrate one thing: investments cannot be made in isolation from the interests of States to protect their territory. This preamble shows the will of the States not to be subjected to foreign investments but to develop a balance between their rights and those of the investors. However, it does not contain explicit references to environmental protection.

Adding a definition of sustainable development would have been beneficial, either in the preamble or the definitions section. The Morocco-Nigeria BIT (2016) took a step forward by stating in its preamble the three pillars of sustainable development to be respected:

"Understanding that sustainable development requires the fulfilment of the economic, social and environmental pillars that are embedded within the concept".

We demonstrate that preambles are a strategic place to integrate environmental protection references. However, as these provisions are not binding, it is necessary to analyse the substantive provisions, which create rights and obligations for the Parties.

C. Rights of Host States

Balanced treaties require the development of host States' rights. The difficulty of their development lies in the fact that these rights are not absolute. The obligations of States, respectively the rights of foreign investors, must also be addressed. Thus, we will successively analyse the rights that raise the most problems and controversies in the drafting of treaties and in arbitral jurisprudence, i.e. general exception clauses, clauses guaranteeing a right to environmental expropriation, and clauses ensuring the right of States to regulate.

1. Environmental General Exception Clauses

First, to address environmental protection in their treaty, Contracting Parties started to include general exception clauses modelled on Article XX of GATT[54], Article XIV of GATS[55], or both. Governments are exempted from treaty obligations when they take good faith measures to

[54] General Agreement on Tariffs and Trade, Annex 1A to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakech, 15 April 1994, in World Trade Organisation.
[55] General Agreement on Trade in Services, Annex 1B to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakech, 15 April 1994, in World Trade Organisation.

protect the environment[56]. A State is, indeed, entitled to retain policy space where measures are non-discriminatory and do not impose disguised restrictions on trade or investment in certain areas such as the protection of human, animal, plant and public health, or the conservation of exhaustible natural resources[57]. The purpose of these provisions is then to prevent the interests of a foreign private person from prevailing over those of the States' population[58]. General exception clauses generally share three elements: an exhaustive list of permissible policy objectives (protection of human life, plant life, public health), a nexus requirement between a State measure and a permissible objective ("necessary", "relating to", "designed and applied for"), and a prohibition of discrimination and arbitrariness[59]. For instance, Article 22 of the COMESA Investment Agreement repeats verbatim the chapeau of Article XX of GATT:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investors where like conditions prevail, or a disguised restriction on investment flows, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures:
>
> (a) designed and applied to protect national security and public morals;
>
> (b) designed and applied to protect human, animal or plant life or health;
>
> (c) designed and applied to protect the environment; or
>
> (d) any other measures as may from time to time be determined by a Member State, subject to approval by the CCIA Committee."

It differs somewhat in the type of measures covered by Article XX of GATT but explicitly includes protection of the environment (art. 22.1(c)) and protection of human, animal, and plant

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[56] KEBETA DJIGSA, *op. cit.*, p. 80; SABANOGULLARI Levent, "The Merits and Limitations of General Exception Clauses in Contemporary Investment Treaty Practice", *Investment Treaty News*, 21 May 2015, accessed on 1 November 2022, available at: https://www.iisd.org/itn/en/2015/05/21/the-merits-and-limitations-of-general-exception-clauses-in-contemporary-investment-treaty-practice/.

[57] MARTINI Camille, "Balancing Investors' Rights with Environmental Protection in International Investment Arbitration", *The International Lawyer*, Vol. 50, No. 3, 2017, p. 576.

[58] DE NANTEUIL Arnaud, *International Investment Law*, Edward Elgar Publishing, Northampton, 2020, N 11.07.

[59] SABANOGULLARI, *op. cit.*

life (art. 22.1(b)). Another interesting example is the BIT between Canada and Egypt (1996)[60]. This BIT was concluded between a Northern and a Southern country. It was not balanced, as reflected in the rather brief preamble, but the Contracting Parties did include a general exception provision in Articles XVII (2) and (3). These Articles incorporate the substance of Article XX of the GATT, with explicit references to environmental protection. At the time, it was rather surprising to consider environmental protection in an IIA, especially in an unbalanced treaty whose sole objective was protecting and promoting foreign investment.

However, the general exception provisions do not constitute an exception for all environmentally friendly state conduct[61]. Indeed, where the wording of the general exception provisions is the same as that of Article XX of GATT, they must be read as required by the WTO DSB[62]. First, under the "Two-Tier Test", Parties must determine whether the host State measure falls into one of the categories mentioned. Secondly, they must demonstrate that the measure is not arbitrary or discriminatory to investors[63].

Nevertheless, we encourage States wishing to include a general exception clause in their BIT to keep this clause open to the wording of Article XX of GATT. This provision was actually designed to address the specificities of international trade law but not those of international investment law[64]. Furthermore, the effectiveness of general environmental exceptions is restrained because some IIAs Tribunals have suggested that exceptions to IIA obligations should be interpreted narrowly to be consistent with investment promotion and protection[65]. For instance, in *Enron Corporation v. Argentina*, the Tribunal stated that: “any interpretation resulting in an escape route from the obligations defined [in the Agreement] cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory”[66]. However, given that the general exceptions clauses are modelled

[60] Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the promotion and protection of investments, signed on 13 November 1996, entered into force on 3 November 1997 (Canada – Egypt BIT (1996)).
[61] BJORKLUND, *op. cit.*, p. 54.
[62] DE NANTEUIL, *op. cit.*, N 11.10.
[63] WORLD TRADE ORGANISATION, Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, 20 May 1996, AB-1996-1, pp. 22-23.
[64] MARTINI, *op. cit.*, p. 579.
[65] NEWCOMBE Andrew, “General Exceptions in International Investment Agreement”, *in* SEGGER CORDONIER Marie-Claire/GEHRING W Markus/NEWCOMBE Andrew (eds.), *Sustainable Development in World Investment Law*, Wolters Kluwer, Alphen aan den Rijn, 2011, p. 363.
[66] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 331.

on Article XX of GATT almost verbatim, it would be preferable for arbitral Tribunals to follow the interpretation of the WTO Appellate Body[67]. Indeed, the Appellate Body emphasises that exception clauses are treaty provisions that should be interpreted per its terms, its context, and in the light of the object and purpose of the treaty, and not by the mere application of presumptions of restrictive application[68]. Despite this, Tribunals have been reluctant to apply WTO jurisprudence, perhaps because of the diversity of interpretations concerning Article XX of GATT that have been given by WTO dispute settlement panels[69]. A clause covering "any measure necessary to protect human, animal, or plant life" as it is provided in Article 9 of ECOWIC[70], would, therefore, provide a weak defence in case of measures regulating sensitive sectors such as mining projects, where the host State may have an interest in regulating under the precautionary principle[71]. The more comprehensive the list of permissible purposes, the more regulatory flexibility the clause gives to the host State[72]. It helps host States to ensure that Tribunals take into account the public interest reasons for a challenged measure[73].

Finally, while such "general exceptions" clauses are common in FTAs, they remain rare in BITs[74]. In contrast, expropriation clauses appear in all BITs.

2. Environmental Carve-Outs in Expropriation Clauses

Since this section is intended to provide an overview of how African BITs integrate environmental protection into their text, we will not dwell on the issues it raises. We will return to these points later[75]. Expropriation clauses are the most common provisions that we can find in BITs. Almost all BITs provide protection against direct and indirect expropriation[76].

An expropriation is an act by which a State takes away property from its owner. In international investment law, the State takes away the investor's title, or the right to use and benefit from his

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67 NEWCOMBE, *op. cit.*, p. 364.

68 NEWCOMBE, *op. cit.*, p. 364.

69 NEWCOMBE, *op. cit.*, p. 364; CALDWELL Douglas J., Multilateral Environmental Agreements and the GATT/WTO Regime, Discussion Draft, 1998, p. 13.

70 Economic Community of West African States Common Investment Code, signed and entered into force on 22 December 2019 (ECOWIC).

71 MARTINI, *op. cit.*, p. 579.

72 SABANOGULLARI, *op. cit*.

73 SABANOGULLARI, *op. cit*.

74 MARTINI, *op. cit.*, p. 577.

75 *Infra* pp. 25-30.

76 WAGNER Jan-Martin, "International Investment, Expropriation and Environmental Protection", *Golden Gate University Law Review*, Vol. 29, 1999, p. 471.

investment[77]. For expropriation to be legal, four criteria must be fulfilled, provided by international customary law[78]. As mentioned in Article 8 of Morocco-Nigeria BIT (2016):

> "A Party shall not nationalize or expropriate an investment directly or indirectly through measures having an effect equivalent to nationalization or expropriation except:
>
> a) for a public purpose;
>
> b) in a non discrimination manner;
>
> c) on payment of prompt, adequate, and effective compensation; and
>
> d) in accordance with due process of law".

Nevertheless, these requirements are indeterminate legal concepts that need to be clarified. First, a State may expropriate an investor if it acts based on imperatives of public utility, security, or national interest[79]. However, it cannot be a mere public interest, but it must be a genuine one, otherwise this criterion would be meaningless[80]. Nevertheless, it is often interpreted broadly by Tribunals[81], and genuine environmental protection is usually a valid public interest[82].

Then, an investor might be expropriated if the decision is taken based on the due process principle. This requires procedural fairness, transparency in administrative proceedings before and during the expropriation, notification to the investor of impending expropriation, and a right to be heard of investors[83].

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[77] NADAKAVUKAREN SCHEFER Krista, *International Investment Law: Text, Cases and Materials*, 3rd ed., Edward Elgar Publishing, Cheltenham, Northampton, 2020, p. 208.
[78] Vigotop Ltd. v. Hungary, ICSID Case No. ARB/11/12, Award, 1 October 2014, para. 275.
[79] Antoine Goetz et consorts v. République du Burundi, ICSID Case No. ARB/95/3, Award, 10 February 1999, para. 126.
[80] ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 432.
[81] Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran, National Iranian Oil Company, National Petrochemical Company and Kharg Chemical Company Limited, IUSCT Case No. 56, Partial Award, 14 July 1987, para. 145.
[82] VARGIU Paolo, "Environmental Expropriation in International Investment Law", *in* TREVES Tullio/SEATZU Francesco/TREVISANUT Seline (eds.), *Foreign Investment, International Law and Common Concerns*, Routledge, New York, 2014, p. 222.
[83] NADAKAVUKAREN SCHEFER, *op. cit.*, p. 221.

Furthermore, to be lawful, expropriation must be non-discriminatory[84]. In international investment law, the non-discriminatory principle requires respect for national and MFN treatment. Briefly, in the expropriation context, these rules stipulate that a host State that only expropriates the property of foreigners, or only the property of one group of foreigners based on race, colour, sex, language, religion, opinions, property, birth, etc. is acting illegally[85].

Finally, if a host State expropriates an investor, it must compensate him for the damages caused in a prompt, adequate and effective manner[86]. Compensation must be paid as soon as possible[87]. The investor must receive the value for its investment loss. The value is calculated before the expropriation, depending on the value of the investment and the profits that would have resulted if the expropriation had not occurred[88]. Compensation must be paid in convertible money[89].

SADC BIT Model (2012) has innovated on the last requirement for a legal expropriation. Article 6.1 states that the compensation shall be fair, adequate and payable within a reasonable time. The amount of the compensation must be calculated based on the value of the investment immediately before the expropriation. However, "the assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and the interest of those affected, having regard for all relevant circumstances and taking account of: the current and past use of the property, the history of its acquisition, the fair market value (FMV) of the investment, the purpose of the expropriation, extent of previous profit made by the foreign investor through the investment, and the duration of the investment" (Article 6.2. SADC BIT Model (2012)). This text opens the possibility that compensation may not be FMV[90]. This is quite innovative and shows the willingness of African States to develop more balanced treaties.

Expropriation can, in fact, be direct or indirect. In the case of direct expropriations, the State directly divests the investor of his investment. The State takes away its property. However, it is more common for States to put in place a series of measures that lead to the investor being unable to operate[91]. This is what we call an indirect expropriation. Several types of indirect expropriation exist. Regulatory expropriation is a dispossession resulting from a general

[84] Goetz v. Burundi, *op. cit.*, para. 128.
[85] NADAKAVUKAREN SCHEFER, *op. cit.*, p. 225-226.
[86] HULL formula: Goetz v. Burundi, *op.cit.*, para. 129.
[87] NADAKAVUKAREN SCHEFER, *op. cit.*, p. 235.
[88] Goetz v. Burundi, *op. cit.*, para. 128.
[89] Goetz v. Burundi, *op. cit.*, para. 128.
[90] SADC Model Bilateral Investment Treaty Template, with commentary, 2nd ed., June 2017, Article 6.
[91] DAZA-CLARK Ana Maria, *International Investment Law and Water Resources Management: An Appraisal of Indirect Expropriation*, Brill Nijhoff, Leiden, Boston, 2017, p. 97.

regulatory measure usually unrelated to foreign investment (environmental protection measures, or economic measures)[92]. Furthermore, creeping expropriation is a situation in which an accumulation of state acts has the same effect as an expropriation, whereas, taken in isolation, these elements would not constitute an expropriation measure[93]. Determining whether the measure constitutes an expropriation and, therefore, requires compensation or a mere non-compensable measure can be tricky for the Tribunals and Contracting Parties[94]. For instance, in *Ampa-American v. Egypt*[95], Egypt and Ampa-American entered into a contract, allowing the investor to produce and export natural gas from Egypt. The investor was exempt from a 20 per cent corporate tax but had to provide proof of a licence to operate its gas operations. In 2008, Egypt revoked the exemption granted to the investor. Ampa-America sued Egypt before an ICSID jurisdiction, claiming unlawful indirect expropriation, while Egypt defended a regulatory measure. The Tribunal ruled in favour of the claimant and found creeping expropriation[96].

To avoid those problems, African States have introduced in their modern IIAs provisions that non-discriminatory environmental regulation does not constitute indirect expropriation. For instance, Article 6.7 of SADC Model BIT (2012) states that:

> "a [non-discriminatory] measure of a State Party that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute an indirect expropriation under this Agreement".

This provision flows from customary international law confirmed by *Methanex c. USA*[97].

Away from the provisions on expropriation, the Morocco – Nigeria BIT (2016) Article 13.4 states that:

> "Nothing in this Agreement shall be constructed to prevent a Party from adopting, maintaining, or enforcing, in a non-discriminatory manner, any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment

[92] DE NANTEUIL, *op. cit.*, N 9.056.
[93] DE NANTEUIL, *op. cit.*, N 9.057.
[94] DAZA-CLARK, *op. cit.*, p. 97.
[95] Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017.
[96] *Ibid.*, paras. 159-187.
[97] Methanex Corporation v. United States of America, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005; for a deeper development, see *infra* p. 27.

activity in its territory is undertaken in a manner sensitive to environmental and social concerns."

These implementations demonstrate that Contracting Parties want to prevent States from having to endure foreign investments that do not respect their environment or their population because they cannot pay compensation due in case of expropriation. These provisions show a willingness to give power back to States, allowing them to develop their right to regulate. However, with this kind of formulation, host States are only allowed to take measures consistent with the investment agreement. When the host State adopts a measure that violates the protection afforded to the foreign investors under the Agreement, a genuine right to regulate in the public interest would intervene to offset the alleged violation[98]. Modern IIAs now contain explicit right to regulate clauses to further guarantee this right.

3. Explicit Right to Regulate Clauses

The right to regulate is the legal right of the host State to adopt legislation or other measures derogating from the substantive commitments it has made in its IIAs without compensating injured investors[99]. To attract foreign investors and protect their investments, States have mainly limited their policy space at the expense of public health, human rights, and environmental protection[100]. ISDS arbitration has also discouraged African governments from adopting regulations for public interests. For instance, in *Foresti v. South Africa*[101], Luxembourgish and Italian investors had mineral rights. In 2006, the Mineral and Petroleum Resources Development Act[102], designed by the South-African government, entered into force. This act withdrew certain mining rights from its investors, notably for environmental protection reasons, and to develop social and labour rights as part of South Africa's Black Economic Empowerment (BEE) policies[103]. Foreign investors sued South Africa before an ISDS

[98] TITI Catharine, *The Right to Regulate in International Investment Law*, PhD thesis, Nomos, Baden-Baden, 2014, pp. 112-115.
[99] *Ibid.*, p. 33.
[100] *Ibid.*, p. 19.
[101] Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01, Award, 4 August 2010.
[102] Mineral and Petroleum Resources Development Act 28 of 2002, Republic of South Africa, signed on 3 October 2022, entered into force on 1 May 2004 (MPRDA).
[103] Cf. MPRDA preamble; LEIBOLD Annalisa M., "The Friction between Investor Protection and Human Rights: Lessons from Foresti v. South Africa", *Houston Journal of International Law*, Vol. 38, No. 1, 2016, p. 244: BEE policies were designed as remedial measures to alleviate the effects of racial discrimination from the apartheid era.

jurisdiction arguing unlawful expropriation, violation of fair and equitable treatment and violation of national treatment. The Tribunal decided that the South African government must pay EUR 400'000.- to the investors to support their procedural costs. The cost of international investment disputes can be an insurmountable burden on States' resources, especially for low-income countries[104]. As a result of this type of decision, Contracting Parties of IIAs introduce "right to regulate" clauses to conclude more balanced treaties and to take into environmental considerations. We have already implicitly mentioned the States' right to regulate in the preambles, the general exceptions, and expropriation clauses. Mentions of right to regulate in preambles are not as far-reaching as the substantive provisions[105]. We also demonstrate the limits of general exception clauses and expropriation clauses mentioning the right to regulate[106]. Increasingly African IIAs include an explicit right to regulate clauses, and host States' right to adopt environmental measures has increasingly become a part of modern IIA practice[107].

For instance, Article 23 of Morocco-Nigeria BIT (2016), as well as Articles 12.1 and 12.2 of the Agreement Amending Annex 1 of the SADC Finance and Investment Protocol (Amended Annex)[108] state that:

> "In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.
>
> Except where the rights of Host States are expressly stated as an exception to the obligation of this Agreement, a Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of Investors and Investments and Host States, as set out in the Agreement.

104 LEIBOLD Annalisa M., *op. cit.*, p. 257.
105 *Supra* p. 9.
106 *Supra* pp. 10, 15.
107 TALKMORE Chidede, "The Right to Regulate in Africa's International Investment Law Regime", *Oregon Review of International Law*, Vol. 20, No. 2, p. 452.
108 Agreement Amending Annex I (Co-operation on Investment) of the Protocol on Finance and Investment, signed on 31 August 2016.

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

This type of formulation comes the closest to a genuine right to regulate. Indeed, reference is made to international law, implying that the right to regulate is a fundamental attribute of State sovereignty. To this effect, the clause embodies the aim of the right to regulate in order to ensure a proper balance between public and private interests[109].

Thus, promoting environmental protection in IIAs requires the development of host State rights, such as general exception clauses, environmental expropriation and the right to regulate. It does, nevertheless, require the development of foreign investors' obligations to protect the environment.

D. Obligations of Foreign Investors and States towards Environmental Protection

In unbalanced investment treaties, the Parties ensured that investors' rights were protected as much as possible and that States were held to the highest standards. However, in these treaties, investors' obligations were missing. On UNCTAD's advice[110], to protect the environment, many modern African IIAs include investor obligations, known as Environmental and Human Rights (EHR) obligations. For instance, ECOWAS Supplementary Act establishes a whole chapter imposing "Obligation and Duties of Investors and Investments"[111]. Tribunals also signal that foreign investors have rights and obligations in the countries where they invest[112].

1. Compliance with Domestic and International Law

To include EHR obligations for investors, Contracting Parties can incorporate two provisions: those requiring investors to comply with domestic laws and those that stipulate autonomous international obligations or incorporate soft law standards[113]. As an example, *World Duty Free*

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[109] NYFELER Chiara, *Including environment protection in international investment agreements*, Master's thesis, Geneva, 2015, p. 28.

[110] UNCTAD/DIAE/PCB/2015/5, *op. cit.*, pp. 8, 77, 78.

[111] Cf. Chapter 3 ECOWAS Supplementary Act.

[112] JOHNSON, "World Duty Free v. Kenya", *in* BERNASCONI-OSTERWALDER/JOHNSON, *op. cit.*, p. 166; *Infra* p. 18, World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7.

[113] SHAO Xuan, Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law, *in* Journal of International Economic Law, Vol. 24, No. 1, 2021, p. 164.

v. Republic of Kenya[114], as well as *Inceysa v. El Salvador*[115], recognises the investors' obligation to comply with national and international law relating to their investments[116]. For instance, Article 13 COMESA provides that :

> "COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made".

Moreover, Article 14.1 of Morocco – Nigeria BIT (2016) requires that investors and investments comply with the laws of host States and home States, whichever is more rigorous. Article 27.1(a) ECOWIC is more precise by providing investor environmental obligations and states that investors doing business in the ECOWAS territory shall carry out their business activities in strict conformity with the applicable national environmental laws, regulations, and administrative practices of the Member States and other multilateral agreements applicable to their investments.

Investors and investments shall comply with all laws, regulations, administrative guidelines and policies of the host State concerning the establishment, acquisition, management, operation and disposition of investments[117]. It implies that a breach of domestic law is a breach of the treaty[118], though it is essential to ensure that the domestic laws applicable to the investors are, at a minimum, consistent with international law in terms of promoting environmental protection. Where the domestic standards are lower than relevant international standards, those international standards should be expressly referenced in the treaty.

2. Environmental Impact Assessment

As mentioned in the introduction, foreign investment can easily harm the environment. Therefore, EIA is useful in evaluating the consequences on the environment of investment. The EIA is a typical obligation of investors that arises from the obligation to comply with national law.

For instance, in a very concise way, Article 37.4 PAIC states that:

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[114] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006.
[115] Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, 2 August 2006.
[116] JOHNSON, "World Duty Free v. Kenya", *in* BERNASCONI-OSTERWALDER/JOHNSON, *op. cit.*, p. 166.
[117] IISD/FES, Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements, IISD, Versoix, 2018, p. 3.
[118] David R. Aven and Others v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Award, 18 September 2018, paras. 732-735.

> "Member States and investors shall carry out Environmental Impact Assessment (EIA) in relation to investments".

Moreover, Article 13.1 SADC provides that investors:

> "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 laws of the Home State for such an investment, or the International Finance Corporation's performance standards on Environmental and Social Impact Assessment".

Therefore, where the domestic law may be insufficient, gaps can be made up by reference to the International Finance Corporation's standards or the law of the home State. However, the applicable domestic law remains the law of first recourse[119].

A breach of EIA has been the object of an ICSID case: *Cortec Mining v. Kenya*[120]. In this case, English investors (Cortec Mining) entered into a contract with Kenya under the Kenya – UK BIT (1999)[121]. The dispute concerned a mining project at Mrima Hill in Kenya[122]. On the one hand, the region has significant deposits of niobium and rare earth elements[123]. On the other hand, the area is a forest reserve, a national monument and a sacred place for the indigenous community[124]. The British investors sued Kenya because their investment was nationalised under a policy of "resource nationalism". At the same time, Kenya argued that Cortec Mining was never protected because the mining licence was obtained in violation of domestic law and was void *ab inito*[125]. Indeed, under Kenyan law, a mining licence is granted if the investors conduct a feasibility study and an EIA[126]. The Tribunal held that for an investment such as a licence, which is the creature of the laws of the Host State, to qualify for protection, it must be

[119] SADC with commentary, *op. cit.*, Article 13.
[120] Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29, Award, 22 October 2018.
[121] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya, signed and entered into force on 13 September 1999 (Kenya – United Kingdom BIT (1999)).
[122] COTULA Lorenzo/GATHII James T., "Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya", *American Journal of International Law*, Vol. 113, No. 3, 2019, p. 574.
[123] Cortec Mining v. Kenya, *op cit.*, para. 1.
[124] *Ibid.*, paras. 42-43.
[125] *Ibid.*, para. 4.
[126] *Ibid.*, paras. 112, 116-117, 121.

made under the laws of the host State, whether there is an explicit legality requirement in the applicable BIT[127]. Since the mining licence was void *ab initio*, there was no protected investment[128].

However, making the EIA requirement functional is challenging, given the need for an international body to conduct it. The EIA could be conducted by the government, which could increase the probability that the investment would not harm the environment, but this would not remove the possibility that the government might not have conducted it with due diligence[129].

3. Minimum Standards for Environmental Protection

Nevertheless, for the obligation to comply with international or domestic law to be meaningful, States would still need to develop robust environmental protection laws as required by Article 21.1 ECOWAS Supplementary Act on Investment:

> "Each Member State shall ensure that its laws and regulations provide for appropriate levels of environmental protection and shall strive to continue to improve those laws and regulations".

Nothing defines an appropriate level of environmental protection, but the interpretation can be inspired by the Supplementary Act relating to the ECOWAS Environmental Policy[130], which provides guidelines to harmonise and coordinate policies on environmental protection in the ECOWAS territory. We could also base our interpretation on the principles of international environmental law and the relevant treaties that States have signed as provided in Article 18.3 DRC – Rwanda BIT (2021)[131]:

> "Investors should not manage or operate investments in a manner that is inconsistent with international environmental obligations that are binding on the Host State or the Home State, whichever is more advantageous".

[127] *Ibid.*, para. 319; COTULA/GATHII, *op. cit.*, p. 577.
[128] *Ibid.*, para. 333.
[129] BJORKLUND, *op. cit.*, p. 53.
[130] ECOWAS, Supplementary ACT A/SA.4/12/08 relating to the ECOWAS Environmental Policy, signed on 19 December 2008.
[131] Accord entre le Gouvernement de la République Démocratique du Congo et le Gouvernement de la République du Rwanda sur la promotion et la protection de l'investissement, signed on 26 June 2021 (DRC – Rwanda BIT (2021)).

Rio Declaration on Environment and Development[132] establishes 27 Principles of international environmental law. We will not present these principles in full, but only those relevant in international investment law, i.e., the responsibility not to cause environmental damage, the precautionary principle, and the preventive action principle. Firstly, Principle 2 of the Rio Declaration provides that activities or investments carried out within their jurisdiction or under their control do not cause damage to the environment in other States or areas beyond national jurisdiction. Secondly, the principle of preventive action is closely related to Principle 2[133]. It requires the prevention of environmental damage, and otherwise to reduce, limit or control activities that might cause or risk such damage[134]. Finally, the precautionary principle (Principle 15) calls on States that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent, mitigate or eliminate environmental degradation[135]. Article 27.1(c) ECOWIC also obliges investors to apply the precautionary principle to their environmental and social impact assessments and decisions concerning a proposed investment. African States, as well as investors complying with international and national law, must respect these Principles.

Some treaties do include provisions that discourage lowering environmental standards by relaxing domestic environmental laws to encourage or protect environmentally damaging foreign investment. These clauses are intended to ensure that existing environmental standards are respected and to prevent States from competing to attract investment by lowering environmental standards[136]. These clauses respond to the fear, sometimes expressed, that stricter environmental standards would encourage companies located in countries with high standards to move to jurisdictions with lower environmental standards. As a result, States would have an incentive, in a continuous "race to the bottom", to relax their environmental standards in order to attract more foreign direct investment[137]. Modern African IIAs have included "not-lowering environmental standards" clauses. For instance, Article 23.2 DRC –

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[132] UNITED NATIONS, Rio Declaration on Environment and Development, adopted by the General Assembly, on 12 August 1992, A/CONF.151/26.

[133] SANDS Philippe/PEEL Jacqueline/FABRA Adriana/MACKENZIE Ruth, *Principles of International Environmental Law*, 4th ed., Cambridge University Press, Cambridge, 2018, p. 211.

[134] *Ibid.*, p. 211.

[135] *Ibid.*, p. 230.

[136] GORDON Kathryn/POHL Joachim, "Environmental concerns in international investment agreements: a survey", *in* OECD, *Working Papers on International Investment*, No. 1, 2011, p. 23.

[137] POTESTÀ Michele, "Mapping Environmental Concerns in International investment Agreements", *in* TREVES/SEATZU/TREVISANUT *op. cit.*, p. 204.

Rwanda BIT (2021) or Article 20 Côte d'Ivoire – Japan BIT (2020)[138] provide that it is inappropriate to encourage investment by relaxing domestic environmental measures and thus, States may not waive or otherwise derogate from, or offer to waive or otherwise derogate from, these measures in order to encourage the establishment, acquisition, expansion or retention of an investment in their territory. However, these clauses are hardly enforceable guarantees and result in more obligations of conduct rather than obligations of result[139]. Moreover, in Court, no party will invoke the breach of these clauses[140], except in rare areas where investors have high environmental protection expectations[141]. Thus, these clauses are mostly present for form's sake.

To meet these minimum standards of protection, some modern treaties include clauses that specify how these standards are to be achieved.

4. Environmental Management Clauses

Indeed, EMS can help ensure compliance with national environmental laws, but they go beyond that by requiring continuous environmental diligence and improvement[142]. Several approaches have emerged. Articles 14.1 et 14.4 SADC Model BIT (2012) provide that:

> "Investments shall, in keeping with good practice requirements relating to the size and nature of the Investment, maintain an environmental management system consistent with recognized international environmental management standards and good business practice standards", including "provision for the continued improvement of environmental management technologies and practices over the life of the Investment. Such improvements shall be consistent with applicable laws, but shall strive to exceed legally applicable standards and always maintain high levels of environmental performance consistent with best industry practice".

[138] Agreement between the Government of Japan and the Government of the Republic of Côte d'Ivoire for the reciprocal promotion and protection of investment, signed on 13 January 2020 and entered into force on 26 March 2021 (Japan – Côte d'Ivoire BIT (2020)).

[139] MBENGUE Makane Moïse/RAJU Deepak, "Energy, Environment and Foreign Investment", *in* DE BRABANDERE Eric/GAZZINI Tarcisio (eds.), *Foreign Investment in the Energy Sector. Balancing Public and Private Interests*, Martinus Nijhoff Publishers, Leiden, 2014, p. 183.

[140] *Ibid.*, p. 183.

[141] See for instance: Reinhard Hans Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/09 /20, Award, 16 May 2016; Marion Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, Award, 16 May 2016.

[142] SADC with commentary, *op. cit.*, Article 14.

By international environmental management standards, the BIT refers to the ISO 14001 standard, which defines the criteria for an effective EMS and grants certification to organisations that meet these criteria[143]. The Article 18.1 of the Nigeria – Morocco BIT (2016) directly mentions the ISO 14001 standards as a necessary EMS for investors.

Another approach is proposed by Article 124 of the COMESA treaty. Article 124.1 (a) and (b) states that:

> "The Member States undertake to co-operate in the management of the environment and agree to:
>
> (a) develop a common environmental management policy that would preserve the eco-systems of the Member States, prevent, arrest and reverse the effects of environmental and industrial pollution, declining biodiversity, loss of genetic diversity and land degradation;
>
> (b) develop special environmental management strategies to manage forests, terrestrial and marine resources, water resources, atmospheric emissions, water, and hazardous toxic substances".

Then, the treaty specifies these provisions. Article 124.2 provides, for example, that the Member States undertake to:

> "encourage the manufacture and use of biodegradable pesticides, herbicides and packaging materials" or "promote the use of ozone and environmental friendly chemicals".

As another example, Article 29.1 (i) ECOWIC provides that:

> "investors shall take the following amongst other necessary measures: i) increase the efficiency of resource utilisation, including increasing recycling and reducing waste discharge and especially by providing adequate knowledge and assistance".

We prefer the first approach. Indeed, the terms "promote", "encourage", or "manage" are indeterminate notions, subject to interpretation. Compliance with ISO 14001 standards is more

[143] For more details on ISO standards, see https://www.iso.org/iso-14001-environmental-management.html, accessed on 21 November 2022.

restrictive for investors. They must meet specific criteria, and are, therefore, it is more protective of the environment.

Nevertheless, Western States are still reluctant to stipulate the obligations of investors in IIAs[144]. As a result, the experience with investors' obligations is limited. At least, it provides a legal basis for host State claims against investors before arbitrators if the procedural rules of investment treaties are broad enough[145].

We have demonstrated how modern African IIAs are no longer focused on investment promotion and protection but include environmental and social considerations. Balanced treaties do, however, mean a balance between investors' rights and States' rights and obligations. This balance implies a conflict between investors' rights and their obligations to protect the environment. In the following section, we will see what these conflicts are and how modern African IIAs resolve them.

II. Conflicts between Standards of Treatment of Foreign Investors and Environmental Protection Obligations

We have chosen not to analyse all the protection clauses but only those that are the most problematic and create the most conflicts between the rights of foreign investors and the need to protect the environment. Thus, we will analyse the conflicts between the State's right to protect the environment with the expropriation clauses, then with the FET standard, and finally with the stabilisation clauses.

A. Environmental Expropriation: Investors' Property Rights versus the Right of States to Regulate Public Issues

In case of expropriation, there are two conflicting rights: the investor's right to his property and the State's right to regulate where there is a valid public interest. Environmental laws in the host State usually affect the fiscal and regulatory regime under which the investment was originally made, and, consequently, may adversely affect the investor's ability to continue its business, if not to preserve the value and significance of its assets[146]. Thus, this section aims to

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[144] NOWROT Karsten, "Obligations of Investors", *in* BUNGENBERG Marc/GRIEBEL Jörn/HOBE Stephan/REINISCH August, *International Investment Law*, Nomos, Baden-Baden, 2015, Chap. 10, N 13.
[145] VAN DER PLOEG POLACKOVA Klara, "Protection of regulatory Autonomy and Investor Obligations: Latest trends in Investment Treaty Design", *International Lawyer*, Vol. 51, No. 1, 2018, p. 117.
[146] VARGIU, *op. cit.*, p. 224.

demonstrate how modern African IIAs, and Courts resolve this conflict. To do so, we will separate two types of expropriation clauses: on the one hand, we will analyse the issues raised by the traditional approach of expropriation clauses[147]. On the other hand, we will examine the issues raised by the provisions that provide that non-discriminatory environmental regulation is not an expropriation. We will not distinguish between direct and indirect expropriation, as both are manifestations of the same concept: expropriation leading to compensation[148].

According to the traditional approach, a legal expropriation, even when the measure effectively protects the environment, does not release the State from its obligation to compensate the foreign investor for its loss[149]. Nevertheless, it is impossible to compensate foreign investors for every measure taken by the host State that has an adverse effect[150]. This would infringe on the State's right to regulate, a fundamental attribute of its sovereignty[151]. Conversely, it cannot automatically be accepted that a regulatory measure serving a legitimate public purpose leads to the fact that no expropriation has occurred[152]. Thus, facing a conflict of rights, the Tribunals are often required to decide whether a regulatory measure falls within the State's right to regulate or is an indirect expropriation. To resolve this conflict, the Tribunals can use several interpretive approaches.

1. The "Sole Effect" and the "Control Effect" Approach

First, the "sole effect" doctrine focuses on the impact of a government measure on investment[153]. An indirect expropriation occurs when the measure removes all benefits of ownership, renders the property virtually valueless, or becomes equivalent to the direct expropriation of a property right[154]. This interpretative approach is consistent with the objective of traditional IIAs to protect and promote the investment, and it is generally the approach used

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[147] By traditional approach, we mean a clause that only mentions the four conditions of a legal expropriation, already developed *supra* pp. 12-13.
[148] MOSTAFA Ben, "The sole effects doctrine, police powers and indirect expropriation under international law", *Australian International Law Journal*, Vol. 15, No. 15, 2008, p. 282.
[149] Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Award, 17 February 2000, para. 72.
[150] Telenor Mobile Communications A.S. v. The Republic of Hungary, ICSID Case No. ARB/04/15, Award, 13 September 2006, para. 64.
[151] For a deeper discussion, see *supra* pp. 15-17.
[152] KREIBAUM Ursula, "Standards of Protection", *in* BUNGENBERG/GRIEBEL/HOBE/REINISCH, *op. cit.*, Chap. 8, N 149.
[153] MOSTAFA, *op. cit.*, p. 279.
[154] *Ibid.*, p. 280.

by arbitral Tribunals[155]. For instance, in *Biwater v. Tanzania*, the Tribunal has admitted the approach whereby several Tribunals have recognised the principle that, when determining governmental conduct in indirect expropriation cases, Tribunals look at the effect of relevant acts rather than the intentions behind them[156]. The problem with this doctrine is that by only focusing on the impact of a measure, it overlooks the possible legitimate interest of the State in implementing it. As a result, this doctrine does not encourage States to regulate to protect the environment.

Then, the "control effect" doctrine focuses on an investor's control over his investment. Indirect expropriation occurs when the investor loses control over his investment[157]. For instance, in *LG&E v. Argentina*, the host State had breached the terms of the gas concession distribution. Nevertheless, the Tribunal did not recognise an indirect expropriation because the investor still had control over the investment, could direct day-to-day operations, and was making significant profits[158]. A physical occupation, or a takeover of management, constitutes an expropriation[159]. Although control is an essential aspect of the expropriation analysis, it is not the decisive criterion. Overall, an approach that focuses exclusively on control of the entire investment is unable to consider the expropriation of specific rights enjoyed by the investor[160].

2. Non-Discriminatory Environmental Regulation is not an Indirect Expropriation

The "police power" doctrine is the preferred method of interpretation to allow States to regulate environmental protection. If a measure has a legitimate purpose, is for the general welfare, is non-discriminatory, and falls within the general regulatory power of the State, the State is not required to compensate the investor[161]. This doctrine differs a lot from the two others, because,

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[155] Mr Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 53.
[156] Biwater v. Tanzania, *op. cit.*, para. 463.
[157] DOLZER Rudolf/KRIEBAUM Ursula/SCHREUER Christoph, *Principles of International Investment Law*, 3e ed., Oxford University Press, Oxford, 2022, p. 169.
[158] G&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras. 181, 191.
[159] Biwater v. Tanzania, *supra* note 8, paras. 503, 510.
[160] DOLZER/KRIEBAUM/SCHREUER, *op. cit.*, p. 170.
[161] HENCKELS Caroline, "Indirect expropriation and the right to regulate: revisiting proportionality analysis and the standard of review in investor-State arbitration", *Journal of International Economic Law*, Vol. 1, 2012, p. 225.

usually, a legitimate public purpose renders the expropriation legal but does not remove the obligation to compensate. This doctrine is well illustrated by *Methanex v. USA*.

Methanex is a Canadian manufacturer of methanol with a strong presence in the US market. Both Canada and USA are part of the NAFTA, a FTA. Following well-founded concerns by environmental groups, the State of California banned the use of methanol as a gasoline additive because it polluted surface and ground water. Methanex sued the United States, alleging violation of the investment chapter (Chapter Eleven) of NAFTA. The manufacturer believed that the US had violated the national treatment standard by favouring a domestic producer of ethanol, a substitute for methanol. Methanex has alleged several breaches of the NAFTA's Chapter Eleven, including unlawful expropriation. The Tribunal did not retain an unlawful expropriation. Indeed, according to its statements:

> "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 commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation"[162].

Thus, an environmental regulation that has an adverse impact on the investor is not an expropriation if the State takes this measure in a *bona fide* manner[163]. This is quite innovative for the regulation power of host States.

If they are not constrained, the Courts may, however, choose the method of interpretation that suits them. That is why modern African IIAs must add provisions mentioning the type of doctrine they want to be used in a dispute settlement. For instance, the COMESA Agreement opts for the "police power doctrine" in Article 20.8. It states that:

> "Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article".

[162] Methanex v. USA, *op. cit.*, Part IV, Chapt. D, para. 7.
[163] MANN Howard, "Methanex v. USA", *in* BERNASCONI-OSTERWALDER/JOHNSON, *op. cit.*, p. 87.

This Article has inspired the drafting of Article 6.7 of the SADC Model BIT (2012). These provisions are so common that failure to include them could lead the Tribunal to believe that the omission was voluntary, and that regulatory measures are indirect expropriation[164].

We show that some modern African IIAs tend to implement provisions which provide that non-discriminatory environmental regulation is not an indirect expropriation. However, this configuration creates a hierarchy between the different rights in tension, considering that the right to a healthy environment prevails over the property right. We agree that sustainable development should be a priority for every State. Nevertheless, excluding environmental matters from measures that can constitute indirect expropriation seems to be outside the protection of foreign investors, nor make the host State's territory attractive for foreign investment[165]. Therefore, the role of Courts is no longer to determine whether there is an indirect expropriation with the regulatory measure but rather to determine whether the measure taken by the host State has a genuine objective to protect the environment[166].

3. Proportionality between Host State's Right to Regulate and Foreign Investor's Right to Property

As it is impossible to predict with certainty which approach will be used in a particular case if it is not explicitly mentioned in the IIA, recent jurisprudence has indicated that host State measures will be assessed based on their primary expropriative effect, purpose, significance and other characteristics, as well as taking into account, through a balancing process, all relevant circumstances[167]. This approach is based on the principle of proportionality between the public interests and the impact of the measure on the investment and was developed in the *Tecmed v. Mexico* case[168]. To determine whether there is an expropriation, it is necessary to proceed in two steps. First, the Tribunal examined the effect of the measure. A measure would only be expropriatory if it permanently and irreversibly neutralized or destroyed the economic value of the use, enjoyment or disposition of the investor's assets or rights[169]. Then, if a measure has these effects, the Tribunal must assess whether the measure is proportional in light

[164] SADC with commentary, *op. cit.*, Article 6.
[165] VARGIU, *in* TREVES/SEATZU/TREVISANUT, *op. cit.*, p. 228.
[166] *Ibid.*, p. 228.
[167] HENCKELS, *op. cit.*, p. 226.
[168] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003.
[169] *Ibid.*, para. 116.

of the public interest at stake and the impacts on the protected investment[170]. In weighing these interests, the Tribunal was to give "due deference" to the State's identification of the issues it considered necessary and the appropriate means to protect and promote those interests and to the investor's legitimate expectations[171]. It is the first time that a Tribunal has used the proportionality approach[172]. It is the best approach to enable Tribunals to strike a better balance between investors' rights and domestic environmental concerns when interpreting and applying BIT provisions[173].

Thus, the resolution of the conflict between the host State's right to regulate and the property rights of investors depends on the interpretive approach that the Tribunal chooses to apply. The doctrines of "sole effect" and "control effect" are not advisable for addressing environmental concerns. The balance is tipped solely in favour of the economic interests of investors. The "power" or "*bona fide*" doctrine is the most likely to take environmental measures into account. However laudable, this approach needs to consider investors' interests. The risk is that foreign investors will leave countries with high environmental standards, as their interests will never be weighed in the balance. It is not the outcome of this doctrine that poses a problem but rather the method. We must keep in mind that the goal of IIA reform is to have more balanced treaties. Thus, the proportionality approach is the fairest as Contracting Parties and Courts balance interests. Moreover, in the presence of genuine environmental regulation and the context of the climate emergency, there is no doubt that environmental interests outweigh economic interests.

Nevertheless, due to its opaque language, one of the most famous standards in IIAs is the FET standard, which is known to allow the defence and promotion of foreign investments on almost any terms[174]. This particularly dangerous standard has almost always been invoked in investment cases[175] and used to challenge environmental protection measures[176]. In fact, many

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[170] *Ibid.*, paras. 118, 122.
[171] *Ibid.*, para. 122.
[172] JOHNSON, "Tecmed v. Mexico", *in* BERNASCONI-OSTERWALDER/JOHNSON, *op. cit.*, p. 143.
[173] *Ibid*., p. 143.
[174] KLÄGER Roland, "Fair and Equitable Treatment and Sustainable Development", *in* SEGGER CORDONIER/GEHRING/NEWCOMBE, *op. cit.*, p. 241.
[175] UNCTAD, International Investment Agreements Reform Accelerator, UNCTAD/DIAE/PCB/INF/2020/8, United Nations, 2020, p. 20; DE BRABANDERE Eric, "Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity", *Journal of World Investment and Trade*, Vol. 18, Brill Nijhoff, Leiden, Boston, 2017, p. 536.
[176] IISD/UN Environment, A Sustainability Toolkit for Trade Negotiators: Trade and investment as vehicles for achieving the 2030 Sustainable Development Agenda, Geneva, Winnipeg, 2016, accessed on 20 November 2022, available at: https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/about-us/#jump.

investor claims that have failed to establish a violation of the expropriation provision in IIAs have succeeded in a breach of the fair and equitable provision[177]. African IIAs must weigh up this standard with environmental protection obligations.

B. FET, a Dangerous Standard

This section will delimit the notion of FET as best as possible. These definitional difficulties will lead us to show that this norm is dangerous insofar as it undermines the sovereignty of the State, which becomes incapable of protecting its territory against environmental damage. Finally, we will show how modern African IIAs manage to reconcile this norm with environmental protection.

1. Notion

The original purpose of FET clauses was to protect investors from any injustice they might face, such as unjustified fines or arbitrary cancellation of licences[178]. Almost all IIAs refer to the FET standard[179]. The popularity of this standard is due to two elements. On the one hand, its wording is vague and open to different interpretations, which facilitates the conclusion of IIAs[180]. On the other hand, there are no exceptions limiting the applicability of the standard[181]. Furthermore, the term "fair" requires that the host State treats the investor in accordance with domestic and international law, while the term "equitable" requires that the interest of the different Parties involved be duly considered[182]. These definitions are vague and therefore do not greatly assist in determining fair and equitable treatment.

[177] MAHNAZ Malik, Bulletin #3: Fair and Equitable Treatment, IISD, Geneva, 2009, p. 18.
[178] UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012, pp. 6-7.
[179] OECD, Fair and Equitable Treatment Standard in International Investment Law, Working Papers on International Investment, 2004, p. 5.
[180] SORNARAJAH Muthucumaraswamy, *The International Law on Foreign Investment*, 5th ed., Cambridge University Press, Cambridge, 2021, p. 248; KLÄGER, *in* SEGGER CORDONIER/GEHRING/NEWCOMBE, *op. cit.*, p. 243.
[181] KLÄGER, *in* SEGGER CORDONIER/GEHRING/NEWCOMBE, *op. cit.*, p. 243.
[182] BERTOLI Paolo/CRESPI REGHIZZI Zeno, "Regulatory Measures, Standards of Treatment and the Law Applicable to Investment Disputes", *in* TREVES/SEATZU/TREVISANUT, *op. cit.*, p. 39.

The current state of the standard is also based on varying wording in the IIAs, which has led to considerable debate on how to interpret these clauses[183]. Variations in language may impact the outcome of the interpretation process, depending on the degree of generality or specificity of the formulation[184]. Four main approaches have been detected:

First, some States have decided to delete FET clauses. This is notably the case in Singapore's IIAs, and in some recent modern African IIAs, such as in the PAIC, though FET is still guaranteed by MFN clauses and by the existing norm of customary international law regarding the treatment of aliens[185].

Second, many IIAs use unqualified FET formulation, which only obliges a host State to provide FET to foreign investors[186]. This approach is mainly used in traditional IIAs, such as in Article 4.2 of Angola – South Africa BIT (2005)[187], which states that:

> "Investments and returns of investors of either Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Party."

As will be seen below, this type of brief formulation poses a problem for the Tribunals in interpreting the notion of "fair" and "equitable"[188].

Third, FET may be linked to international law, as in Article 4.3 of the Turkey – Ghana BIT (2016)[189], which provides that:

> "the concept of "fair and equitable treatment" […] means treatment that meets the minimum standard required by international law and does not require treatment in addition to, or beyond such a standard."

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183 LEVASHOVA Yulia, "Fair and Equitable Treatment and the Protection of the Environment: Recent Trends in Investment Treaties and Investment Cases", *in* LEVASHOVA Yulia/TINEKE LAMBOOY Ige Dekker (eds.), *Bridging the Gap Between International Investment Law and the Environment*, Eleven International Publishing, The Hague, 2016, pp. 58-59.
184 UNCTAD, Fair and Equitable Treatment, *op. cit.*, p. 17; MAHNAZ, *op. cit.*, p. 18.
185 UNCTAD, Fair and Equitable Treatment, *op. cit.*, p. 19-20; Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 155.
186 UNCTAD, Fair and Equitable Treatment, *op. cit.*, p. 20.
187 Agreement between the Government of the Republic of Angola and the Government of the Republic of South Africa for the reciprocal promotion and protection of investments, signed on 17 February 2005 (Angola – South Africa BIT (2005)).
188 *Infra* p. 34, to see the multitude of definitions developed by the Courts.
189 Agreement between the Government of the Republic of Turkey and the Government of the Republic of Ghana for the reciprocal promotion and protection of investments, signed on 1 March 2016 (Turkey – Ghana BIT (2016)).

This approach ensures that Tribunals use the principle of international law, including customary international law, and do not limit themselves to a purely semantic approach[190]. Traditional BITs between European and African States generally follow this approach[191]. However, some BITs explicitly refer to the MST of aliens under customary international law, as in Articles 5.1 and 5.2 of the Rwanda – United States of America BIT (2008)[192]. In *Neer v. Mexico,* the violation of the MST is characterised as an "amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency"[193]. Indeed, Article 5.2 of the SADC Model BIT (2012) specifies the MST under customary international law with the specific wording of this case. However, some Tribunals held that a broader interpretation might be warranted[194]. The extent to which the standard has evolved has also been debated[195]. In any case, these treaties explicitly link the FET obligation to the minimum standard of treatment, in order to prevent arbitral Tribunals from interpreting the FET standard too broadly[196]. The main limitations of this approach are that it presupposes the existence of a consensus on what constitutes the MST of aliens under customary international law, as well as the difficulty of determining the content of customary international law[197].

Finally, many modern African IIAs have used another approach by adding substantive content. This broadens the scope of protection of the FET standard. It includes the principles developed in *Neer v. Mexico*, but also prohibits arbitrary, unreasonable, or discriminatory measures, denial of justice, and treatment that does not respect the rule of law or fundamental principles of due process[198]. For instance, Article 14 of the COMESA Investment Agreement and Article 10 of

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[190] UNCTAD, Fair and Equitable Treatment, *op. cit.*, p. 28.
[191] DE BRABANDERE, *op. cit.*, p. 539.
[192] Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the encouragement and reciprocal protection of investment, signed on 19 February 2008, entered into force on 01 January 2012 (Rwanda – USA BIT (2008)).
[193] L. F. H. Neer and Pauline Neer (USA) v. United Mexican States, United States–Mexico Claims Commission, Decision of 15 October 1926, *in* Reports of International Arbitral Awards, United Nations, 2006, Vol. IV, pp. 61-62.
[194] Vento Motorcycles, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020, paras. 283-284; International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Arbitral Award, 26 January 2006, para. 194.
[195] ALVAREZ Borja, *Minimum Standard of Treatment*, 28 November 2022, accessed on 28 November 2022, available at: https://jusmundi.com/en/document/publication/en-minimum-standard-of-treatment-mst.
[196] UNCTAD, Fair and Equitable Treatment, *op. cit.*, p. 28.
[197] UNCTAD, Fair and Equitable Treatment, *op. cit.*, p. 28.
[198] ZAGEL, *op. cit.*, p. 38.

the Morocco – Nigeria BIT (2016) have chosen this option. These clarifications ensure that the adoption of sustainability policies per se cannot be challenged under the FET clause, unless the adoption or implementation of those policies violates the specified standards of fairness[199].

We have just demonstrated what a violation of a FET is, but not what fair and equitable treatment means. Unfortunately, many Courts have tried to delimit this notion and have interpreted the concept of FET very broadly. Indeed, a very flexible standard of treatment certainly gives much power to foreign investors, creating unbalanced IIAs. Indeed, the greatest danger of this standard is that it undermines the right of host States to regulate, thereby jeopardising the protection of the environment[200].

2. FET, a Danger to Host States' Sovereignty and Environmental Protection

Depending on how it is interpreted and applied by the Courts, the principle can reach further into the traditionally *domaine réservé* of the host State than any other treaty rules[201]. Moreover, the problem is amplified by short-hand definitions that can be interpreted even more widely[202].

The first element to raise is that a judgement of what fair and equitable is depends on the facts of the particular case[203]. Then the protection of the legitimate expectations of foreign investors that have been taken into account in the investment process plays a central role[204]. Foreign investors can legitimately expect that the host State's behaviour will meet standards such as due process, transparency in decision-making, compliance with contractual obligations, freedom from coercion and harassment of investors, and a stable and predictable legal and commercial framework[205]. The most comprehensive definition has been outlined in *Tecmed v. Mexico*[206].

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199 *Ibid.*, p. 38.
200 KLÄGER, *in* SEGGER CORDONIER/GEHRING/NEWCOMBE, *op. cit.*, p. 251.
201 DOLZER Rudolf, "The Impact of International Investment Treaties on Domestic Administrative Law", *Journal of International Law and Politics***,** Vol. 37, 2005, p. 964.
202 KLÄGER, *in* SEGGER CORDONIER/GEHRING/NEWCOMBE, *op. cit.*, p. 252.
203 Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 118.
204 UNCTAD, Fair and Equitable Treatment, *op. cit.*, p. 63; Tecmed v. Mexico, *op. cit.*, para. 154.
205 It should be noted that the concept of "legitimate expectations" is also subject to differing interpretations. UNCTAD, Fair and Equitable Treatment, *op. cit.*, p. 61-89; JACOB M/SCHILL S, "Fair and equitable treatment: content, practice, method, *in* BUNGENBERG/GRIEBEL/HOBE/REINISCH, *op. cit.*, p. 755.
206 DOLZER/KRIEBAUM/SCHREUER, *op. cit.*, p. 191.

Tecmed and the government of Mexico entered into a contract in February 1996, to purchase an existing hazardous waste landfill[207]. The applicable treaty was the Mexico – Spain BIT (2006)[208]. Tecmed obtained a one-year renewable operating permit from the Mexican Environmental Protection Agency[209]. Unfortunately, Tecmed breached certain conditions of the permit and domestic regulations[210], which led to protests from community groups because of the proximity of the landfill to dwellings[211]. In November 1998, the Environmental Protection Agency refused to renew the permit citing numerous environmental and other violations of the permit[212]. As a result, Tecmed sued Mexico for violations of the Mexico – Spain BIT (2006), and particularly of the FET standard[213]. Article IV.1 of this BIT states that:

> "Each Contracting Party shall give to the investments of investors of the other Contracting Party treatment in accordance with international customary law, including fair and equitable treatment, as well as full protection and security".

The Tribunal considered the ordinary meaning, the international law, the good faith principle, and the legitimate expectations of the foreign investor[214]. Thus, "the foreign investor expects the host State to act consistently, free from ambiguity and totally transparently in its relations with [him], so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations […] The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern [his] actions in conformity with the function usually assigned to such instruments, and not to deprive [him] of its investment without the required compensation"[215].

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[207] Tecmed v. Mexico, *op. cit.*, para. 35.
[208] Agreement on the Promotion and Reciprocal Protection of Investments between the United Mexican States and the Kingdom of Spain, signed on 10 October 2006, entered into force on 03 April 2008 (Mexico – Spain BIT (2006)).
[209] Tecmed v. Mexico, *op. cit.*, para. 36.
[210] *Ibid.*, para. 43.
[211] *Ibid.*, paras. 43, 106.
[212] *Ibid.*, paras. 39, 99.
[213] *Ibid.*, paras. 93-94.
[214] JOHNSON, "Tecmed v. Mexico", *in* BERNASCONI-OSTERWALDER/JOHNSON (eds.), *op. cit.*, p. 143.
[215] Tecmed v. Mexico, *op. cit.*, para. 154.

This case is particularly interesting regarding the broad interpretation of the FET standard by the Tribunal[216], and it finally gives a positive definition of the FET standard. This approach has been agreed upon and emphasized by some Courts[217], and criticized by others[218]. Many prefer to opt for a negative definition as in *Glencore v. Colombia*, where it is listed several factors as amounting to violations of the FET standard:

- "whether the host State has engaged in harassment, coercion, abuse of power, or other bad-faith conduct against the investor;

- whether the State made specific representations to the investor before the investment was made and then acted contrary to such representations;

- whether the State has respected the principles of due process, consistency, and transparency when adopting the measures at issue;

- whether the State has failed to offer a stable and predictable legal framework, in breach of the investor's legitimate expectations"[219].

These examples show that Tribunals have interpreted the FET standards very broadly. They illustrate the unprecedented intrusion into the sovereignty of host States of this standard, and interfere with the legislative, executive, and judicial branches[220]. With such a broad interpretation of this standard, it is almost impossible for the host State to adopt environmental measures. Every measure taken that has even the slightest adverse effect on the investor will be interpreted as a violation of the standard.

However, Tribunals and Contracting Parties have found solutions to reconcile the FET standard with environmental protection, through principles of interpretation or the drafting of IIAs.

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[216] JOHNSON, "Tecmed v. Mexico", *in* BERNASCONI-OSTERWALDER/JOHNSON (eds.), *op. cit.*, p. 143.
[217] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 113; Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, 17 March 2006 para. 309.
[218] MTD v. Chile, Decision on Annulment, 21 March 2007, para. 67.
[219] Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award, 27 August 2019, para. 1310; Waste Management, Inc. v. United Mexican States (No), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98; Alex Genin, Eastern Creds Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 367.
[220] KLÄGER, *in* SEGGER CORDONIER/GEHRING/NEWCOMBE, *op. cit.*, p. 252.

3. Bridging the Gap between the FET Standard and Environmental Protection Concerns

Investor-State arbitration has historically prioritized private economic interests in decision-making[221]. A traditional conception of BITs as instruments designed to protect foreign investments and investors was usually the basis of this presumption. A new interpretative approach has nevertheless emerged in the jurisprudence of investor-State arbitration that challenges this traditional presumption: the balanced approach[222].

There is an ever-increasing tendency among arbitral Tribunals to balance the host State's right to regulate and the investors' right to FET. The balanced approach is generally based on the interpretation of the purpose of BITs[223]. For instance, in *Saluka v. Czech Republic*, the Tribunal held that the protection of foreign investments is not the sole objective of the Czech Republic – Netherlands BIT (1991)[224], but rather a necessary element alongside the general objective of encouraging foreign investment and expanding and intensifying economic relations between the Parties[225]. Therefore, determining a breach of the FET standard requires balancing the legitimate and reasonable expectations of investors against the legitimate regulatory interests of the host State[226]. Likewise, in *El Paso v. Argentina*, the Tribunal has considered that a host State's regulatory needs constitute the limits of protecting the expectations of foreign investors[227]. Hence, a common feature of the balanced approach is the relevance of the notion of equity between the interests of foreign investors and the need for regulation to protect the environment [228].

In order to be sustainable in a particular case, the balancing process should strive to integrate norms of environmental protection into the FET, as enabled Article 31.3 (c) of the VCLT[229].

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[221] LIN Ying-Jun, "Achieving sustainable development objectives in international investment law through the lens of treaty interpretation", *in* GAMMAGE Clair/NOVITZ Tonia (eds.), *Sustainable Trade, Investment and Finance*, Edward Elgar Publishing, Northampton, 2019, p. 267.
[222] *Ibid.*, p. 267.
[223] *Ibid.*, p. 267.
[224] Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed on 29 April 1991, entered into force on 01 October 1992, and terminated on 10 December 2021 (Czech Republic – Netherlands BIT (1991)).
[225] Saluka v. Czech Republic, *op.* cit., para. 300.
[226] *Ibid.*, para. 306; Thunderbird v. Mexico, *op. cit.*, Separate Opinion of WÄLDE Thomas, 1 December 2015, para. 102.
[227] El Paso Energy Co. v Argentina, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 358.
[228] LIN, *in* GAMMAGE/NOVITZ, *op. cit.*, p. 269.
[229] KLÄGER, *in* SEGGER CORDONIER/GEHRING/NEWCOMBE, *op. cit.*, p. 256.

For example, in *Parkerings v. Lithuania*, the Tribunal accepted the argument concerning the potential environmental and cultural damage of the construction of parking facilities in the historical centre of Vilnius, thus justifying the difference in treatment between two investors[230]. As a result, the weakness and flexibility of the FET standard may not only pose a threat to environmental protection but may also be used to the host State's advantage in regulating public policy.

However, relying on Court interpretation is dangerous as there is no obligation to use the balanced approach. Contracting Parties in IIAs have found alternative solutions.

The difficulty in drawing a clear line between the appropriate level of investment protection and the necessary degree of regulatory space is directly related to the problem of the indeterminacy of the FET standard[231]. The indeterminacy of the FET standard has led to a questioning of the legitimacy of the standard as a legal norm, as it cannot guide governments on the treatment of foreign investors[232]. As a result, this standard is being removed from some BITs and replaced with a new approach that addresses issues in a more limited and conservative manner than the FET text[233]. For instance, Article 5 "option 2" SADC Model BIT proposes a Fair Administrative Treatment instead of a Fair and Equitable Treatment. Some keys elements in this approach include changing the focus of the language from investor rights to a focus on governance standards, reducing the scope of the standard, and setting a high standard of "arbitrary" conduct by a government agency, or conduct that amounts to "a denial" of procedural justice or due process[234]. Indeed, the Rwanda – CAR BIT (2019)[235] adopted the Fair Administrative Treatment.

Furthermore, the IPFSD contains a set of policy options to draft IIAs taking into account the protection and promotion of foreign investment, as well as sustainable development. In drafting FET clauses, the IPFSD proposes to specify which types of conduct amount to a breach of the

[230] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras. 30, 392.
[231] KLÄGER, *in* SEGGER CORDONIER/GEHRING/NEWCOMBE, *op. cit*., p. 253.
[232] *Ibid*., p. 253.
[233] SADC with commentary, *op. cit.*, Special Note, Article 5.
[234] *Ibid*., Article 5.
[235] Agreement between the Government of the Republic of Rwanda and the Government of the Central African Republic on the Promotion and Protection of Investments, signed on 15 October 2019, Article 6, (Rwanda – CAR BIT (2019)).

standard of treatment, but with no reference to investors' legitimate expectations[236]. For instance, Article 6.1 (a) of the Morocco Model BIT (2019)[237] provides that:

> "A Party breaches the obligation to provide fair and equitable treatment under paragraph 1 where a measure or series of measures constitutes:
>
> (i) a denial of justice in criminal, civil or criminal, civil or administrative proceedings; or
>
> (ii) a fundamental breach of the rights of the defence; or
>
> (iii) targeted discrimination on manifestly unjustified grounds, such as sex, race, or religious belief; or
>
> (iv) manifestly abusive treatment, such as harassment, coercion, and pressure".

To ensure the sustainability of the FET standard, the above measure cannot be taken in isolation from clear guidance for its interpretation and application. For example, States may consider setting a high threshold for claimants to prove an alleged breach of the standard as in Article 5.2 "option 1" of the SADC Model Treaty (2012)[238].

Finally, for greater certainty and to prevent (as much as possible) broader interpretations, governments should consider specifying what situations or measures do not constitute a breach of the standard. Two types of formulation can best be used cumulatively:

> "The mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result"[239].
>
> "A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article"[240].

To conclude, through the various solutions presented to reconcile this standard with environmental protection, the flexibility of FET can be used to the advantage of the States to

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[236] UNCTAD/DIAE/PCB/INF/2020/8, *op. cit.*, p. 20.
[237] Morocco Model BIT Template, June 2019.
[238] SARMIENTO Florencia/NIKIÈMA Suzy, "Fair and Equitable Treatment: Why it matters and what can be done", *IISD Best Practices Series*, IISD, 2022, p. 7.
[239] Morocco Model BIT Template, June 2019, Article 6.7.
[240] Morocco – Nigeria BIT (2016), Article 7.3.

protect the environment. However, the Parties should act within the conclusion of the IIAs, rather than relying on the uncertainty of arbitral decisions.

Furthermore, this standard often leads to the implementation of stabilisation clauses in investment contracts. It is relevant to mention them because they are quite common in investment contracts and constitute real obstacles to environmental protection by host States.

C. Stabilisation Clauses as an Obstacle to Environmental Protection

This section will follow the same structure as the previous one. We will begin by defining the notion of a stabilisation clause. Then, we will show that the very essence of these clauses, which is to stabilize a State's legal framework, leads to an impossibility for the host State to protect its environment. Finally, we will discuss the solutions found in modern African IIAs to reconcile these clauses with environmental protection.

1. Notion of Stabilisation Clause

In the nineties, African countries faced difficulties in making the sectors nationalised in the sixties profitable[241]. So, the World Bank and the IMF encouraged them to liberalise and privatise these sectors, particularly the energy sector, and to do so, promoted stabilisation clauses as one of the essential elements of legislative frameworks to attract FDI[242].

A stabilisation clause is a clause, usually contained in an investment contract between a host State and a foreign investor, which has the effect of freezing the legal framework of a specific host State or the economic equilibrium at a certain date[243]. This clause was originally used in long-term contracts in the natural resource sector (i.e., oil, gas, mining)[244]. Foreign investors do assume considerable financial risk in this sector and are particularly vulnerable to economic or political changes[245]. Nevertheless, in Africa, there is a significant disparity in the scope of stabilisation clauses or how they are drafted between countries or even between different

[241] FRANK Sotonye, "Stabilization clauses in long-term investment contracts in the energy sector in Africa", *in* MILES, *op. cit.*, p. 343.
[242] *Ibid.*, p. 343.
[243] GJUZI Jola, *Stabilization Clauses in International Investment Law: A Sustainable Development Approach*, Springer, Cham, 2018, p. 11; Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 101.
[244] SHEPPARD Audrey/CROCKETT Antony, "Are Stabilisation Clauses a Threat to Sustainable Development ?", *in* SEGGER CORDONIER/GEHRING/NEWCOMBE, *op. cit.*, p. 336.
[245] *Ibid.*, p. 335.

sectors in the same country[246]. Three main techniques can be identified: the freezing clauses, the economic equilibrium clauses, and the hybrid clauses[247].

The freezing clauses are part of a traditional approach to draft stabilisation clauses. These clauses contractually prohibit the host State from taking regulatory measures that modify the investment contract, usually effective for the investment duration[248]. Article 33.3 of the Production Sharing Contract (PSC) (2012) from Senegal[249] is an example of a freezing clause, which provides that no provision may be applied to the Contractor that would have the effect of increasing the charges and obligations arising from the system defined by the legislation in force on the date of signature of this contract, without the prior agreement of the Parties. They are an absolute block on the host State's legislative competence[250]. Then, non-application clauses and inconsistency clauses have the same effect as freezing clauses but are more moderate in their wording. Domestic law applies to the investor unless the subsequent new law conflicts with the investment contract and negatively impacts the investor[251]. An example can be found in Article 23.1 of the PSC (2005) from Tunisia[252]. It states that "no new regulation, modification or interpretation either in contradiction or incompatible with the provisions of this Agreement and/or the Convention will be applicable".

However, in the modern stabilisation clauses, the Parties mostly use economic equilibrium clauses. An economic equilibrium clause provides that if the economics of the investment contract is affected by any host State's unilateral action, the terms of the contract shall be readjusted automatically or otherwise renegotiated to keep the foreign investor in the same situation as he was before the action[253]. To facilitate the negotiations, the clause often adds an obligation on the host State to compensate the foreign investors for the additional financial

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246 *Ibid.*, p. 344.
247 Some authors categorise the stabilisation clauses differently. See for example, SHEPPARD/CROCKETT, *op. cit.*, pp. 336-338, FRANK, *op. cit.*, pp. 344-348, and GJUZI, *op. cit.*, pp. 27-54.
248 GJUZI, *op. cit.*, pp. 38-39.
249 PSC between Senegal and Petro-Tim Ltd., with Petrosen, relating to Cayar Offshore Profond, signed on 17 January 2012.
250 GJUZI, p. 39.
251 *Ibid.*, pp. 40-41.
252 PSC between Tunisia and Atlas Petroleum Exploration Worldwide, Ltd., with Eurogas International Inc, signed on 20 July 2005.
253 GJUZI, *op. cit.*, p. 46.

costs incurred in complying with changes in the law[254]. For instance, Article 28.17 of the Production Sharing Agreement (PSA) (2001) from Tanzania[255] states that:

> "If after the date of this Agreement there occurs a GOT Action or Inaction, Parastatal Action or Inaction, Lapse of Consent, Court Action or Change in Law that either adversely affects or enhances PanAfrican Tanzania's economic benefits under this Agreement, the Parties shall promptly meet for the purpose of making all necessary adjustments to the relevant provisions of this Agreement so as to maintain the economic benefits to PanAfrican Tanzania specified under this Agreement."

Article 27.1 of a Portfolio Gas Supply Agreement (2011) in Tanzania provides, in case of a change in law, an increase "to the Wellhead Charge component of the Contract Price up to an equivalent of 10% of the price each contract year"[256].

Finally, the hybrid clauses combine the characteristics of freezing and economic equilibrium clauses[257]. The government committed not to apply changes in the law to investors, but if the changes in the law adversely impact investors, they will be restored to the same economic position they were in before the changes[258]. There are rare in African investment contracts[259]. For instance, Article 56.2(b) of the PSA (2011) from Chad[260] provides that amendments to its law that have an adverse effect on the investor shall not be applied to the investors. However, where the law is applied and adversely affects the investor's economic position, the Parties shall agree to amend the contract to preserve the original economic equilibrium of the contract[261].

By freezing the legal framework for foreign investors or compensating them for any adverse effect a new regulation can cause, the regulatory power of the host State is emptied of its substance. Therefore, stabilisation clauses can be an obstacle to environmental protection.

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[254] FRANK, *op. cit.*, p. 342.
[255] PSA between the Government of the United Republic of Tanzania, with Tanzania Petroleum Development Corporation, and Panafrican Energy Tanzania Ltd., signed on 11 October 2001.
[256] Portfolio Gas Supply Agreement between Tanzania Petroleum Development Corporation with Panafrican Energy Tanzania Ltd., and Tanzania Electric Supply Company Ltd., signed on 17 June 2011.
[257] GJUZI, *op. cit.*, p. 69.
[258] FRANK, *op. cit.*, p. 348.
[259] *Ibid.*, p. 348.
[260] PSA between Chad and Griffiths Energy (DOH) Ltd., signed on 3 August 2011.
[261] *Ibid.*, Article. 56.2(c).

2. Obstacles to Environmental Protection

The strengthening of international environmental standards may require host States to take regulatory action to ensure that their domestic law is consistent with international law[262]. As discussed above, modern African IIAs require not only compensation for environmental damage but also prevention and minimisation of damage. However, host State environmental regulation may fall in the scope of stabilisation clauses, mainly when new regulatory measures raise the costs of an ongoing investment project[263]. As a result, a host State may be reluctant to adopt environmental protection obligations because compensation due to foreign investors is unbearable for it or because it knows that it will not affect investors, who often cause the environmental problem.

Two factors increase the obstacle to environmental protection. First, the often use of stabilisation clauses in investment projects, particularly in poorer developing countries[264]. Then, the usually long duration of investment contracts (over several decades)[265]. One famous example is the case of the Chad – Cameroon Pipeline Project (CCP).

Chad is one of the poorest countries in the world. Oil exploitation remains the only solution for the economic development of the country. Thus, supported by the World Bank, the goal of CCP was to develop oil fields at Doba in southern Chad by constructing a pipeline to oil-loading facilities off Cameroon's Atlantic coast[266]. The Cameroon Oil Transportation Company managed the portion of the pipeline owned by Cameroon (COTCO). The contract between Cameroon and COTCO guarantees the "stability of the legal tax, customs, and exchange control regime"[267]. It also includes a freezing clause which states that:

> "With regard to the activities undertaken under this Convention, the Republic of Cameroon shall not modify such legal, tax, customs and exchange control regime in such a way as to adversely affect the rights and obligations of COTCO, Shareholders,

[262] COTULA Lorenzo, "Reconciling regulatory stability and evolution of environmental standards in investment contracts: Towards a rethink or stabilisation clauses", *Journal of World Energy Law & Business*, Vol. 1, No. 2, 2008, p. 168.
[263] *Ibid.*, p. 169.
[264] *Ibid.*, p. 169.
[265] *Ibid.*, p. 170.
[266] CLAUSEN Fabian/ATTARAN Amir, "The Chad-Cameroon Pipeline Project—Assessing the World Bank's Failed Experiment to Direct Oil Revenues towards the Poor", *The Law and Development Review*, Vol. 4, No. 1, 2011, p. 32-33.
[267] Convention of Establishment between the Republic of Cameroon and the Cameroon Oil Transportation Company (COTCO), signed on 7 August 1997, (Cameroon – COTCO Convention), Article 24.1.

> Affiliates, Contractors, Sub-Contractors, Shippers or Lenders arising from this Convention and no legislative, regulatory or administrative measure contrary to the provisions of this Convention shall apply to the persons mentioned above without COTCO's prior written consent. Where COTCO is of the opinion that a legislative, regulatory or administrative measure which has been taken by the Republic of Cameroon adversely affects the rights and obligations of COTCO, Shareholders, Affiliates, Contractors, Sub-Contractors, Shippers or Lenders arising from this Convention, COTCO has the right to request that such measure not apply to the persons mentioned above with respect to activities undertaken under this Convention"[268].

Considering the risk of ecological and social disaster, this freezing clause was worrying. In 2000, many NGOs warned the World Bank of the harm it would do to human rights and the environment[269]. In Cameroon, the pipeline crosses major rivers 17 times, increasing deforestation, and the plan does not include an adequate oil spill response plan, despite the great dangers of spills. In 2000, Cameroon or Chad did not have strong environmental protection laws. Therefore, any post-contract regulations to protect the environment will be useless to oil companies. Stabilisation clauses can be quite dangerous for the environment of the host State.

3. Balancing Environmental Protection and a Stable Legal Framework

The broad wording of stabilisation clauses is probably due to the fact that it is difficult to identify in advance all the adverse effects of a change in law[270]. However, with this type of drafting, investors are exposed to the accusation of endangering the host State's environment[271]. Thus, reconciling stabilisation clauses with environmental protection obligations means that the Contracting Parties must eliminate environmental threats while preserving a stable and predictable legal framework for investors[272].

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[268] Cameroon – COTCO Convention, *op. cit.*, Articles 24.2 and 24.3.
[269] See for example, HEALY Sean, *Chad/Cameroon: World Bank's pipeline to disaster*, 7 June 2000, accessed on 5 December 2022, available at: https://www.greenleft.org.au/content/chadcameroon-world-banks-pipeline-disaster.
[270] CROCKETT Antony, "Stabilisation clauses and sustainable development: Drafting for the future", *in* BROWN Chester/MILES Kate (eds.), *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press, Cambridge, 2011, p. 531.
[271] *Ibid.*, p. 531.
[272] *Ibid.*, p. 531.

Limiting the scope of stabilisation clauses is one of the possible options to achieve this[273]. Host States may commit not to exercise their sovereign rights, but States cannot contractually commit themselves not to respect their international obligations[274]. On this basis, the scope of stabilisation clauses is limited by an exception to comply with international law.

Another option that may be used cumulatively with the "compliance with international law" exception is related to the interpretation and the content of stabilisation clauses. The goal is to focus on the types of provisions that can most easily adapt to changes in applicable standards and to interpret these clauses in an evolutionary approach. This approach provides that new legal development, such as the emergence of international environmental standards, must be considered when implementing existing contractual obligations, particularly by renegotiating the contract terms[275]. Stabilisation clauses are hence not absolute[276], and their legal effect is assessed on a case-by-case basis[277].

No investor may reasonably expect that the circumstances prevailing at the time of investment will remain completely unchanged[278]. Nevertheless, it is prohibited for a State to act unfairly, unreasonably or inequitably in exercising its legislative power[279], i.e., violating the FET standard[280]. As a result, investors are entitled to seek assurances that the host country will not introduce new laws that will fundamentally alter the legal framework in which their investments will be conducted[281]. It is, however, unlikely that an investor could legitimately claim to have expected that the host country's environmental policies would remain unchanged and that the government would not wish to adopt legislation to reflect changing international standards, particularly in cases where it is obliged to do so by its treaty or by international law[282].

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273 COTULA, *op. cit.*, p. 172.
274 *Ibid.*, p. 173
275 *Ibid.*, p. 176; Gabcikovo-Nagymaros Project (Hungary/Slovakia), International Court of Justice, Judgment of 25 September 1997.
276 The American Independent Oil Company (Aminoil) v. The Government of the State of Kuwait, Award, 24 March 1982, para. 100.
277 COTULA, *op. cit.*, p. 172.
278 Saluka v. Czech Republic, *op. cit.*, para. 305.
279 Parkerings v. Lithuania, *op. cit.*, para. 332.
280 *Supra* p. 33, for a discussion on what constitutes a breach of FET standard.
281 SHEPPARD/CROCKETT, *in* SEGGER CORDONIER/GEHRING/NEWCOMBE, *op. cit.*, p. 347.
282 *Ibid.*, pp. 347-348.

III. Africa as a Pioneer in Reforming the International Investment Regime

Revisiting policy priorities in the international investment law regime in light of environmental protection is one of the primary impulses behind current debates in the investment sphere[283]. Indeed, as the above developments show, in African IIAs, there is a greater focus on environmental protection at the national or multilateral level. In addition, African countries are becoming "investment treaty makers" and adopting investment policies that primarily reflect their preferences rather than "signing up" to models proposed by third Parties[284]. However, challenges remain.

A. Africanisation of the International Investment Regime

The Africanization of the international investment regime is spreading at all levels. Thus, we will show how this Africanization is reflected at the national, bilateral, and multilateral levels.

1. Domestic and Bilateral Levels

At the domestic level, African countries have adopted new laws governing FDI. Indeed, the modernisation of domestic investment codes is also part of the African reform of IIAs. For instance, South Africa has unilaterally terminated traditional BITs with several Northern countries, instead signing the Protection of Investment Act[285] in 2015. This investment law was introduced to address the restrictions of traditional BITs, which limited the ability of host States to pursue their economic and social policy agenda[286]. In lieu of this, it balanced the interests of States and investors, reaffirmed the right of the host State to regulate in the public interest and anchored the law in the Constitution[287].

As noted above, African States have concluded numerous BITs with other States. The content of most of these agreements follows the traditional unbalanced treaty approach, with the sole aim of protecting and promoting investment in the host State's territory. The Morocco – Nigeria BIT (2016), cited several times above, has, however, been a wind of change in BIT drafting.

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283 BJORKLUND, *op. cit.*, p. 50.

284 EL-KADY Hamed/DE GAMA Mustaqeem, "The Reform of the International Investment Regime: An African Perspective", *ICSID Review*, Vol. 34, No. 2, 2019, p. 483.

285 Protection of Investment Act of the Republic of South Africa, No. 22, signed on 15 December 2015 (Protection of Investment Act).

286 MBENGUE Makane, "Africa's Voice in the Formation, Shaping and Redesign of International Investment Law", *ICSID Review*, Vol. 34, No. 2, 2019, p. 464.

287 Protection of Investment Act, Section 4.

As demonstrated, this BIT is the most balanced in Africa. Investment protection standards are balanced by a range of obligations on investment, including protecting the environment. In 2019, Morocco even published a model BIT based on the Morocco – Nigeria BIT (2016).

Furthermore, there is also an Africanisation of the international investment regime at the multilateral level.

2. Multilateral Level

Besides domestic investment codes or BITs, regional investment agreements have emerged on the African continent. This regional integration is manifested in the RECs. We have already mentioned above some of the substantive provisions of ECOWAS, COMESA, or SADC. There are many other RECs[288]. Most of these RECs have adopted specific legal instruments concerning the regulation of foreign investment to enhance cooperation and harmonisation in foreign investment[289]. For instance, the ECOWAS has adopted the ECOWAS Supplementary Act on Investment, and in July 2018, the ECOWIC, a code to be applied to investors on the territory of the ECOWAS; the SADC has adopted the Protocol on Finance and Investment (2006)[290]. However, while regional economic integration is generally seen as beneficial to the economy and, therefore, conducive to foreign and domestic investment, multiple and overlapping commitments arguably render Africa's integration efforts ineffective in terms of investment harmonisation[291].

Another significant development at the continental level has been the development of the Pan African Investment Code (PAIC). The objective of the Code is to promote, facilitate and protect investments that foster the sustainable development of each African Union member State, and particularly the member State where the investment is located[292]. The PAIC is intended to be a balanced treaty with direct investors' obligations counterbalancing standards of treatment for investors. More importantly, this continental approach opens a new role for Africa: that of a pioneer in setting innovative investment standards that can be replicated outside the region[293]. Although the PAIC was originally intended to be designed to be ratified by all African Union member States, it is ultimately intended to serve as a guide for States in the subsequent

[288] To see the list of all RECs: MBENGUE/SCHACHERER, *in* CHAISSE/CHOUKROUNE/JUSOH, *op. cit.*, p. 11.
[289] MBENGUE/SCHACHERER, *in* CHAISSE/CHOUKROUNE/JUSOH, *op. cit.*, p. 12.
[290] Protocol on Finance and Investment 2006, signed on 18 August 2006 (Protocol on Finance and Investment).
[291] *Ibid.*, p. 12.
[292] MBENGUE, *op. cit.*, pp. 484-485.
[293] *Ibid.*, p. 471.

development of national investment laws[294]. In this way, its legal scope is limited. Nevertheless, the PAIC has been stated to be the principal document serving as the basis for negotiating the Investment Protocol to the AfCFTA[295].

In May 2019, 54 African States, members of the African Union, did, in fact, sign the AfCFTA[296], which aims to create a liberalised, single, and sustainable market for goods, services, capital and people in Africa[297]. It also reaffirmed the right of States to regulate within their territories and the need for States to have "flexibility to achieve legitimate policy objectives in areas of public health, safety, environment, public morals, the promotion and protection of cultural diversity"[298]. This Agreement is accompanied by three Protocols, including an investment Protocol. Negotiations ended in October 2022, but the final text has not yet been revealed. The protocol will have indirect benefits for non-African investors and investments through the MFN principle and improved governance within the AfCFTA, which will strengthen African economic relations with the rest of the world and attract more external investment[299].

Challenges do remain before the Africanisation of the international investment regime spreads worldwide.

B. Challenges for Africa

In this section, we will outline the various challenges that Africa must overcome in order to reform and spread its treaty-making process effectively. Three major challenges will be addressed: the considerable number of obsolete IIAs still in force, the disparities in the formulation and enforcement of IIAs in different African States, and finally, the severe lack of representation of African arbitrators in arbitral Tribunals.

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[294] SERRURIER Enguerrand, « Le code panafricain des investissements : Modèle imparfait d'un droit international économique au service du développement durable », *Revue africaine de responsabilité sociale et management durable*, Vol. 1, No. 1, 2019, accessed on: 12 December 2022, available at: https://www.revues.scienceafrique.org/ngabandibolel/texte/serrurier2019/.

[295] MBENGUE, *op. cit.*, p. 472.

[296] Agreement establishing the African Continental Free Trade Area, entered into force on 30 May 2019 (AfCFTA).

[297] *Ibid.*, Article 3.

[298] *Ibid.*, Article 7.

[299] RAGA Sherillyn/WILLEM TE VELDE Dirk/KIMOSOP Vincent/MAHIWA Maurice, AfCFTA Investment Protocol: issues and opportunities for Kenya, KNCCI, 30 March 2022, accessed on: 15 December 2022, available at: https://www.kenyachamber.or.ke/wp-content/uploads/2019/08/SITA_Kenya-KNCCI-investment-brief-AfCFTA-Investment-Protocol-issues-and-opportunities-for-Kenya.pdf, p. 9.

1. Outdated African BITs

Despite the desire of African States to promote environmental protection in their IIAs, many traditional IIAs are still in force, with outdated and broad standards that clearly limit the right of African host States to regulate environmental protection in their territories[300]. Outdated BITs continue to exist despite the growing international consensus to reform the international investment regime in favour of more balanced treaties[301]. Only a few African States have actually addressed their stock of obsolete BITs through negotiations, modifications or terminations (e.g. South Africa)[302]. There is thus a risk that recently adopted national investment laws of African countries, which include modern and balanced provisions, are rendered meaningless by the existence of old-generation BITs that investors can use to circumvent national laws to bring claims against African host States[303].

Moreover, there are many inequalities on the African continent in terms of how international investment law reform is spreading, in terms of enforceability and formalisation of the law.

2. Inconsistencies in Formulation and Enforcement of the Law of African Countries

Moreover, many of the reformed African IIAs have never been ratified or not yet entered into force, such as the Morocco – Nigeria BIT (2016), the COMESA Investment Agreement (2007), or the SADC Investment Protocol Amendment (2016). Generally, if African IIAs are ratified, it takes a long time[304]. In addition, many reformed African IIAs have only been adopted as non-binding instruments, such as the PAIC. The few who have been ratified have little effect on the ground. This is mainly due to the corruption of officials, the incompetence and lack of capacity of decision-makers and implementers, and the lack of resources for enforcement[305].

Furthermore, it is challenging for African States to achieve policy coherence when negotiating a BIT with another African State[306]. Innovative approaches developed at regional and

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[300] EL-KADY/DE GAMA, *op. cit.*, p. 485.
[301] See UNCTAD/DIAE/PCB/INF/2020/8, *op cit.*, or UNCTAD/DIAE/PCB/2015/5, *op. cit.*.
[302] EL-KADY/DE GAMA, *op. cit.*, p. 486.
[303] *Ibid.*, p. 488.
[304] ZAGEL, *op. cit.*, p. 45.
[305] LARYEA Emmanuel T./FABUSUYI Oladapo O., "Africanisation of international investment law for sustainable development: challenges", *Journal of International Trade Law and Policy*, Vol. 20, No. 1, 2021, p. 53.
[306] MBENGUE/SCHACHERER, *in* CHAISSE/CHOUKROUNE/JUSOH, *op. cit.*, p. 21.

continental levels should be implemented in an African bilateral relationship. However, there needs to be more coherence in African States' IIA policies[307]. For instance, the Morocco – Nigeria BIT (2016) was the most progressive BIT at the time. However, Morocco concluded another BIT with Congo in 2018[308], with almost no references to sustainable development. Moreover, Morocco and Japan concluded another BIT in 2020[309]. Many previously discussed tools to protect the environment have been dropped in this BIT, such as the absence of investor obligations or EIAs. The inconsistencies carry risks of overlaps and contradictions[310]. Therefore, a solid intra-African position necessary to develop regional principles of international investment law cannot develop[311].

Finally, the last challenge that prevents the representation of African States' interests in arbitration proceedings is the lack of African arbitrators.

3. Under-Representation of African Arbitrators

Arbitral awards are a significant source of international investment law[312]. However, there is no rule of precedent, which means that arbitrators are not bound by previous arbitral decisions[313]. Instead, arbitrators apply the laws and principles from their understanding of the legal context and perspective[314]. As a result, there are often severe disagreements on concepts and inconsistencies in decisions[315]. It should be noted that the percentage of African arbitrators is disproportionately low compared to the percentage of cases involving African States. It would thus be difficult for developing jurisprudence to reflect African perspectives and interests.

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307 ZAGEL, *op. cit.*, p. 45.

308 Accord entre le Gouvernement du Royaume du Maroc et le Gouvernement de la République du Congo sur la promotion et la protection réciproques des investissements, signed on 30 April 2018 (Morocco – Congo BIT (2018)).

309 Agreement between the Kingdom of Morocco and Japan for the promotion and protection of investment, signed on 08 January 2020, entered into force on 23 April 2022 (Morocco – Japan BIT (2020)).

310 MBENGUE/SCHACHERER, *in* CHAISSE/CHOUKROUNE/JUSOH, *op. cit.*, p. 22.

311 ZAGEL, *op. cit.*, p. 46.

312 LARYEA/FABUSUYI, *op. cit.*, p. 54.

313 NADAKAVUKAREN SCHEFER, *op. cit.*, p. 69.

314 LARYEA/FABUSUYI, *op. cit.*, p. 54.

315 *Ibid.*, p. 54.

Conclusion

In conclusion, modern African States are making significant efforts to include provisions to protect the environment. The willingness to include environmental protection provisions is reflected in the preambles of IIAs, as well as in the substantive provisions through investors' obligations and host States' rights. Through the combination of various tools and provisions, IIAs can become part of the solution to environmental destruction rather than part of the problem.

Nevertheless, our analysis shows that balancing environmental protection and the need for the State to maintain an attractive space for foreign investment through standards of protection is challenging. We thus found that one of the main levers for more balanced treaties is the development of the host State's right to regulate, combined with applying the proportionality principle by the Courts.

We are witnessing the spread of the way African IIAs are written outside the continent through what we can call an "Africanisation" of the IIAs regime. However, challenges remain, partly due to the economic development of Africa. We are confident that the continent will overcome these challenges, especially as the continent's valuable natural resources will increasingly attract foreign investors.

However, environmental protection is only one link in the chain of sustainable development. Indeed, foreign investments are often criticised for human rights violations. Therefore, for IIAs to be sustainable and to meet their commitment to Agendas 2030 and 2063, African States must also strive to ensure and promote the protection of human rights in their agreements.