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ARTÍCULOS

Reconciling International Investment Promotion and Environmental Protection in Africa and Latin America: A Comparative Study of the AfCFTA Investment Protocol and the USMCA, CPTPP, Pacific Alliance and MERCOSUR Protocol on Investment

Reconciliando los Estándares de la Promoción de la Inversión Extranjera y la Protección del Medio Ambiente en África y América Latina: Un estudio comparativo del Protocolo de Inversión de la AfCFTA y el T-MEC, el CPTPP, la Alianza del Pacífico y el Protocolo de Inversión del MERCOSUR

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ABSTRACT This article analyses the standards of international investment promotion and their reconciliation with the standards for promoting environmental protection contained in the Investment Protocol of the African Continental Free Trade Area of 2023, as well as the investment chapters or protocols of some of the most significant regional trade and investment agreements formed by Latin American countries: the United States, Mexico and Canada Agreement (USMCA), the Pacific Alliance (PA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and the Protocol for Cooperation and Facilitation of Intra-MERCOSUR Investments. This study aims to highlight the significant innovations proposed by the African continent under the auspices of the African Union (AU) regarding strengthening member states' sovereign power to establish regulatory measures in the public's interest, particularly in environmental protection. It also aims to compare these innovations with the regional investment agreements of Latin America, identifying successes, gaps, and common challenges for the future.

KEYWORDS International Investment Law, International Environmental Law, Regionalism, Sustainable Development.

RESUMEN Este articulo analiza los estándares de promoción de la inversión extranjera y su reconciliación con los estándares de protección del medioambiente contenidos en el Protocolo en Inversión de la Zona de Libre Comercio Continental Africana de 2023 y los capítulos o protocolos de inversión de algunos de los acuerdos regionales de comercio e inversión más importantes conformados por países de Latinoamérica: el Tratado entre México, Estados Unidos y Canadá (T-MEC), la Alianza del Pacifico (AP), el Tratado Integral y Progresista de Asociación Transpacífico (CPTPP, por sus siglas en inglés) y el Protocolo de Cooperación y Facilitación de Inversiones Intra-MERCOSUR. Con este estudio se pretende dar cuenta de las trascendentales innovaciones planteadas desde el continente africano bajo los auspicios de la Unión Africana

(UA) respecto al fortalecimiento de la potestad soberana de los Estados parte para establecer medidas regulatorias en aras del interés público, y, en particular, de la protección del medioambiente, y como su comparación con los acuerdos regionales de inversión de Latinoamérica plantean aciertos, brechas y desafíos comunes de cara al futuro.

PALABRAS CLAVE Derecho Internacional de las Inversiones, Derecho Internacional Ambiental, Regionalismo, Desarrollo Sostenible.

Introduction: New Generation of International Investment Agreements and Environmental Protection

International investment law (IIL), rooted in neoliberal principles, has traditionally prioritized investor protections over host state interests, severely limiting regulatory space (Fyock, 2022: 52; Subedi, 2016: 117; Sornarajah, 2006: 337). International investment agreements (IIAs) establish minimum standards of treatment shielding investors from state measures, even when these are based on regulations in public interest domains (Sauvé, 2006: 28). This imbalance has been widely criticised, particularly in the context of the environmental crisis, as investor-state dispute settlement (ISDS) cases have led to a "regulatory chill" on environmental commitments set out in landmark agreements such as the Paris Agreement and the United Nations (UN) 2030 Agenda for Sustainable Development, which are undermined by arbitration awards that, if enforced, would compensate foreign investors for the economic harm they cause (Milsom et al, 2021: 16; Tienhaara, 2018: 232).[1]

This tension is most acute in the global South, where economic reliance on resource extraction has historically led to weaker environmental regulations than in developed nations. Investors frequently exploit these regulatory gaps, exacerbating environmental degradation (Agarwal, 1979: 56; Brown et al., 2014: 255; Tigre, 2024: 262). In this sense, numerous studies confirm that economic liberalisation has intensified environmental harm in resource-dependent developing economies, particularly those reliant on fossil fuels (Koengkan et al., 2018; Waqih et al 2019, 305-14).

Recognising this imperative, since the 1990s, a shift has emerged in IIL towards acknowledging states' sovereignty and expanding regulatory powers to protect the environment (Odysseas, 2017: 326; Sornarajha, 2004: 259). This trend, which began with the Energy Charter Treaty (ECT) in 1992 and the North American Free Trade Agreement (NAFTA) in 1994 - within parameters set by Western countries - has gradually been reflected in most bilateral investment treaties (BITs), regional investment agreements (RIAs) and free trade agreements (FTAs) (Nadakavukaren, 2016: 11). Instruments such as the 2012 UNCTAD Investment Policy Framework and the 2012 US Model BIT reflect the global nature of this new orientation (Subedi, 2016: 125).

However, while modern IIAs recognise the need for greater regulatory flexibility, their effectiveness varies considerably. Most treaties rely on vague language that gives arbitrators

[1] For instance, in the *Rockhopper v Italy case,* the arbitral tribunal ruled that Italy had violated the Energy Charter Treaty by refusing to develop the oilfield development concession granted to the British company in 2005 as a result of a legislative ban phasing out oil and gas development activities in pre-existing projects in 2015. See Rockhopper Italia S.p.A. v. Italy, ICSID Case No. ARB/17/14, Award (August 23, 2022). In the *Lone Pine Inc. v Canada case*, a US company alleged a breach of NAFTA provisions due to the Quebec Government's revocation of all permits for oil and gas exploration in the St Lawrence River Basin. See Lone Pine Inc. v. Government of Canada, ICSID Case No. UNCT/15/2, Award (November 21, 2022).

wide discretion, while a few include clearer and enforceable environmental provisions (Ngobeni & Fagbayibo, 2017: 201). Furthermore, while discussions of investor obligations and corporate social responsibility (CSR) have gained traction, they remain largely aspirational rather than legally binding (Raftopoulos, 2017: 391). At the same time, many traditional IIAs with a strong pro-investor bias remain in force, creating legal uncertainty due to the unpredictability of arbitration outcomes and in some cases conflicting with global environmental goals (Van Harten, 2007: 122).[2]

In recent years, African states have pioneered a distinctive approach to IIL, prioritising sustainable development and state sovereignty over traditional investor protection (Akinkugbe, 2021: 17; Odysseas, 2017: 318). Through national, bilateral and regional reforms, and in turn in international policy deliberation spaces, these countries have sought to recalibrate the relationship between investment, trade and environmental protection (Mbengue & Schacherer, 2017: 117; Fukuda & Muchhaka, 2019: 4). «This Africanisation of international investment law» has been evident since the early 2000s, particularly following the adoption of the International Institute for Sustainable Development's 2005 Model BIT, in which African countries were heavily involved (Odysseas, 2017: 359). The most ambitious manifestation of this shift is the African Continental Free Trade Area Investment Protocol (AfCFTA Investment Protocol), which was adopted in 2023. This agreement significantly strengthens domestic regulatory space, improves environmental protection, and introduces investor obligations - offering a model that challenges conventional IIL frameworks.

Latin America, by contrast, has taken a different path. Historically, the region played a leading role in the emergence of the "Calvo Doctrine" and the struggle to establish a "New International Economic Order" in the mid-20th century, advocating for regulatory power and sovereignty over natural resources of the decolonised states. However, with the rise of neoliberalism in the 1980s, most Latin American states shifted towards investment-friendly policies aligned with Western norms, as exemplified by NAFTA and its successor agreements (Subedi. 2016: 98). Some resource-nationalist governments—such as Bolivia, Ecuador, and Venezuela—departed from this trend, withdrawing from IIAs and denouncing the ICSID Convention to prevent foreign investors from accessing international arbitration (Tejera. 2014: 429). Yet, overall, the region has not developed a cohesive alternative regulatory model for balancing foreign direct investment (FDI) promotion with environmental protection.

Against this backdrop, this article compares the environmental provisions of the AfCFTA Investment Protocol with those of major Latin American investment frameworks: the United States-Mexico-Canada Agreement (USMCA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Pacific Alliance, and the MERCOSUR Investment Protocol—collectively referred to here as LATAM RIAs. While these agreements differ in scope and ambition, they share at least one Latin American signatory, making them relevant for comparative analysis.

Examining these frameworks is particularly valuable given the historical, geopolitical, and economic similarities between Africa and Latin America. Both regions, shaped by colonial legacies and resource-based economies, face common challenges in balancing investment attraction with environmental sustainability. Yet, their approaches to IIL reform have diverged significantly. The AfCFTA Protocol offers a bold regulatory model that reinforces state

[2] The ambiguity in the value of the regulatory power of states in modern investment treaties is exemplified in the recent withdrawal of the EU (May 30, 2024) and the UK (February 22, 2024) from the ECT due to the difficulties posed by its regulation in the objective of effectively phasing out fossil fuels.

sovereignty in environmental matters, whereas Latin American agreements tend to reflect incremental adjustments within a largely investor-friendly paradigm. Their differences and the novelty proposed under the AfCFTA highlight the need for further comparative analysis.

This article aims to analyse and compare the AfCFTA Investment Protocol with the LATAM RIAs, assessing the extent to which their regulatory frameworks balance FDI promotion with environmental protection. Specifically, it seeks to determine how the investment and environmental provisions of the LATAM RIAs align with the AfCFTA Protocol's innovative approach to sustainable development in IIL.

To address this task, the article is structured as follows: Section I explores the role of RIAs in shaping contemporary IIL, assessing their contributions and challenges within the global investment landscape. Section II conducts a comparative analysis of the AfCFTA Investment Protocol and the LATAM RIAs, focusing on key provisions such as investment protection standards, sustainable development commitments, investor obligations, and dispute settlement mechanisms to determine how they enhance state regulatory autonomy. Section III evaluates the broader implications of these agreements, identifying strengths, limitations, and common challenges, particularly in the context of investment arbitration cases. Finally, the conclusion synthesises the findings, reflecting on the alignment between the LATAM RIAs and the AfCFTA Protocol, and considering their potential impact on the evolution of sustainable investment governance in IIL.

Regionalism, Regional Investment Agreements and Strengthening State Regulatory Space

The growing interdependence and interconnectedness of global economy has carried to an intensification of regional economic integration with a significant proliferation of regional trade and investment agreements, which is evident in the current count of 373 regional trade agreements notified to the World Trade Organization (WTO).[3] In this sense, governments have increasingly turned away from the bilateral mode of governance and have begun to negotiate and conclude regional treaties to regulate foreign investment (Alschner. 2014: 275; UNCTAD, 2012b: 37).

Distinguished from BITs, regional and inter-regional investment treaties encompass more than two countries and can manifest in various forms: among members of a regional grouping, between a regional bloc and a third country, or among like-minded countries (UNCTAD, 2013: 103). With multiple BITs and other types of RIAs coexisting in parallel, the current international investment regime is distinguished by its complexity, inconsistency, gaps and overlaps at the horizontal and vertical levels (UNCTAD, 2023: 73). In this sense, regionalism offers an opportunity to streamline the complex landscape of IIAs, as it brings with it the possibility to harmonise regulation within its spatial and membership scope.

Nevertheless, regionalism has not uniformly progressed in this trajectory; instead, it has often resulted in reinforcing layers of treaties, famously known as the "spaghetti bowl effect" (Estevadeordal and Suominen, 2005: 64). According to UNCTAD, most RIAs do not outline the gradual elimination of older BITs. Some reaffirm the rights and obligations from prior BITs, incorporate clauses reasserting commitments from existing agreements, and replace numerous earlier IIAs, while others remain silent on this matter (UNCTAD, 2023: 104). This

[3] See: World Trade Organization, "Regional trade agreements" *Trade topics*. Accessed on 19 December 2024 <https://shorturl.at/vA9d2>

aspect is crucial in ISDS, where foreign investors could use legal instruments in substantive and procedural rules (Estevadeordal and Suominen, 2005: 82).

This issue underscores the immense challenge of achieving a cohesive IIL without a comprehensive global agreement on international investment. The current scenario sees instances where RIAs intersect vertically with BITs and horizontally overlap with other regional agreements, necessitating harmonisation of domestic legislation with the provisions of these multifaceted instruments to prevent conflicting rules.[4]

Notwithstanding, the imperative of fostering regional economic integration remains paramount. Regionalisation yields important benefits for economic progress, fostering trade, optimising resource allocation, facilitating economies of scale and scope, and enabling knowledge transfer, among other things. (Ramos, 2016: 65). Furthermore, regional agreements often go beyond removing trade barriers to include broader objectives such as improved transparency, labour standards, and development cooperation. In this sense, regionalism is also important in environmental governance. It promotes harmonisation and coordination in addressing environmental challenges and provides a platform for resolving conflicts between stakeholders (Balsiger and Prys, 2016: 243), albeit with different nuances depending on the geopolitical and geo-economic context of each region.

African and Latin American countries play a minor role in global governance, so global agreements on international trade and investment and the environment have not historically followed the models proposed by these regions (Fukuda and Muchhaka, 2019: 4). Inter-regional agreements involving Western countries are unlikely to include provisions proposed by countries in the global South that may run counter to their interests. On the contrary, developing countries often must accept conditions imposed by the global North because of their less favourable political-economic power position.

By the same token, intra-regional agreements concluded within the framework of regional organisations in Africa and Latin America have been very important in addressing specific issues affecting these regions regarding environmental protection and foreign direct investment.

The Escazú Agreement, adopted by Latin American countries in 2018, serves as a significant milestone in international environmental law. It addresses the continent's particular vulnerabilities, including the lack of protection for environmental defenders and indigenous communities. The Agreement recognises the right to a healthy environment, which is a groundbreaking inclusion in international environmental treaties and is enforceable through mechanisms within the Agreement and the Inter-American Court of Human Rights (IACtHR) (Tigr,e 2024: 262). The IACtHR has also developed standards for reconciling investment and trade obligations with human rights, including the right to a healthy environment.[5] Although the Escazú Agreement is a regional environmental treaty rather than an investment agreement, its provisions directly influence international investment obligations in the region, reflecting its broader impact on balancing trade and environmental protection.

[4] Consider Mexico, a USMCA, CPTPP, and PA member. The potential for foreign investors to leverage multiple Regional Investment Agreements (RIAs), Bilateral Investment Treaties (BITs), or Free Trade Agreements is noteworthy. For instance, investors from Chile, Canada, or Peru have the opportunity to make use of more than one RIA. This circumstance adds further complexity and potential challenges to the investment landscape.

[5] The IACtHR has held that investment and trade obligations "should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among states" See Sawhoyamaxa Indigenous Community v Paraguay, Judgment of March 29 2006, IACtHR Series C No 146, para 140.

In Africa, the development of bilateral and regional investment agreements has introduced important exceptions and prerogatives for states that are absent from other global investment treaties. Key sub-regional instruments include the Southern African Development Community (SADC) Investment Protocol (2006), the Common Market for Eastern and Southern Africa (COMESA) Investment Agreement (2007), and the Economic Community of West African States (ECOWAS) Supplementary Act (2008). These agreements include provisions promoting labour participation of national populations, the optimal use of natural resources, environmental protection, anti-corruption measures, and preferential treatment based on states' developmental levels (Odysseas, 2017: 359). The SADC Protocol requires the exhaustion of local remedies before resorting to investor-state arbitration, a unique provision of its kind.[6] On the other hand, the 2012 SADC Model BIT went further by introducing civil liability for investors and allowing states to bring counterclaims in arbitration.[7] At the bilateral level, the Morocco-Nigeria BIT (2016) includes specific provisions on sustainable development as part of the foreign investment regime, setting a trend for future BITs globally (Fyock, 2022: 54).

Despite these advances, the regionalisation of international investment law in Africa faces challenges due to overlapping bilateral, multilateral, and intra-African regimes. These parallel frameworks risk undermining the consistency and effectiveness of the rules. In this context, the AfCFTA Investment Protocol, as the first regional agreement to include all African Union member states, marks a significant step forward. It represents a unique opportunity to harmonise investment standards across the continent, addressing the fragmentation and inconsistencies of the current system.

As a corollary, regionalism emerges as a critical dimension for states, extending beyond environmental treaties to encompass investment obligations. Analysing their specific importance concerning state regulatory space demands a nuanced examination, given their shared objectives beyond mere liberalisation and openness, albeit with varying scopes. Thus, fostering regionalisation while actively pursuing regulatory harmonisation with other legal instruments is a crucial challenge to mitigate potential gaps and overlaps.

New standards set by the AfCFTA Protocol on investment and the USMCA, the CPTPP, the Pacific Alliance and the MERCOSUR Protocol on environmental protection and investment promotion

This section first examines the AfCFTA Investment Protocol, followed by an analysis of the CPTPP, USMCA, Pacific Alliance, and MERCOSUR Investment Protocol. The AfCFTA Protocol marks a distinct shift in international investment law, promoting a regionalised approach that strengthens state sovereignty and investor obligations. In contrast, Latin American treaties remain closer to Western investment models, though with significant variations.

[6] Protocol on Finance and Investment of the Southern African Development Community, annex 1, Arts. 15, 28.

[7] Southern African Development Community 2012 Model BIT, Art 17.

AfCFTA Protocol on Investment

The African Continental Free Trade Area was launched on 21 March 2018 at an African Union summit in Kigali, Rwanda. This organisation joins a list of previous initiatives, such as the 2015 Tripartite Free Trade Agreement (TFTA) between the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC), and completes a process of African economic regionalisation by including, for the first time, all the countries of the continent (Nubong, 2021: 125). Based on the founding documents of the treaty, the objective of the AfCFTA is to create a single market for goods and services, facilitated by the movement of people, in order to deepen the economic integration of the African continent and in line with the pan-African vision of "an integrated, prosperous and peaceful Africa" enshrined in Agenda 2063.

The Protocol on Investment of the AfCFTA represents in turn a ground-breaking shift from conventional investment treaties (Chidede, 2019). This instrument was adopted by the 55 African states members of the African Union (including all the African states except Eritrea) on February 18/19, 2023, during the 36th African Union Summit in Addis Ababa, Ethiopia. It recognises relevant innovations from other previous IIAs on the continent, particularly those stemming from the 2006 SADC Investment Protocol, the 2007 COMESA Investment Agreement, the 2008 ECOWAS Supplementary Act and, more measuredly, the 2012 SADC Model BIT.

Despite these reforms, Africa remains marginal in global investment flows. According to UNCTAD's 2024 World Investment Report, FDI inflows to Africa stood at $53 billion in 2023, representing just 3.97% of global FDI, with a 3% decline from the previous year.

Preamble

The Preamble situates the Protocol within the framework of Agenda 2063 and the UN Sustainable Development Goals (SDGs), acknowledging the "significant contribution investment can make to the sustainable development of the state parties" while understanding that sustainable development requires "the fulfilment of its economic, social, and environmental pillars"; and reaffirming the "inherent rights of states parties to regulate in their territories and to introduce measures in order to achieve their national public policy objectives, promote sustainable development objectives, and protect legitimate public welfare objectives, such as (…) the environment", among others.

Article 2 sets out the objectives of the Protocol, which aims to promote intra-African investment flows to encourage, facilitate, retain, protect, and expand investments that support the sustainable development of the States Parties, taking into account the balanced interests of the states, investors, and —innovatively— local communities.

Definitions

The Protocol introduces key definitional shifts that shape its regulatory approach. Within these, Article 1 defines *Measures* as "any regulatory, administrative, legislative, judicial or policy decision that is taken by the host state, relating to or affecting an investment in the host state", *Sustainable Development* which "embodies, in accordance with relevant United

Nations documents and resolutions, the three interdependent and mutually reinforcing pillars that are economic development, social development and environmental protection", *Investment-related human rights* defined as "human rights directly related to investment activity, including in particular environmental, health and core labour rights".

Investment Protection Standards

The Protocol redefines states' substantive obligations, moving away from traditional customary international law principles. It eliminates Fair and Equitable Treatment (FET) and Full Protection and Security (FPS), replacing them with Administrative and Judicial Treatment (Article 17) and Physical Protection and Security (Article 18). This narrower scope curtails investor expectations, ensuring that host state regulations cannot be easily challenged under FET or FPS claims (Okechukwu, 2019:73).

Under these provisions, states may only breach the Protocol in cases that constitute a fundamental denial of justice in criminal, civil or administrative adjudicatory proceedings to foreign investors by the principle of due process embodied in the principal legal systems of the world,[8] or in cases where states fail to grant foreign investors and their investments physical protection and security, to the best of their ability and in a manner no less favourable than that which they grant to their own investors' investments.[9]

On the other hand, the Protocol marks a significant shift in the interpretation of National Treatment (NT) and Most-Favoured Nation Treatment (MFN), particularly concerning "like circumstances." Articles 12 and 14 mandate a case-by-case assessment, requiring consideration of an investment's local, regional, and national environmental impact when determining comparability.

Articles 13 and 15 introduce a new environmental protection standard, excluding from NT and MFN any measures aimed at safeguarding legitimate public policy objectives, including climate change mitigation and environmental protection. The explicit climate change exclusion is a novel feature in international investment treaties. While African sub-regional agreements have previously allowed exemptions for environmental protection, none have specifically recognised climate change mitigation as a justification for such exclusions. This provision aligns with global calls for states to reconsider investment treaties and ICSID membership to meet greenhouse gas reduction targets, as outlined in agreements like the Paris Agreement (Fukuda and Muchhala, 2020: 8).

Regarding expropriation, the Protocol addresses both direct and indirect cases while upholding the host state's right to expropriate foreign investments, provided specific preconditions are met. Article 19 rejects the sole effect doctrine, instead requiring a rational and proportional analysis to determine indirect expropriation. Article 20 further clarifies that non-discriminatory regulatory measures taken to protect legitimate public interests, such as safety and environmental protection, do not qualify as indirect expropriation.

Sustainable Development-Related Issues

Chapter 4 of the Protocol introduces a distinct framework for sustainable development within FDI regulation. Article 24 reinforces the right to regulate, permitting states to align

[8] Protocol to the Agreement establishing the African Continental Free Trade Area on Investment, Article 17.

[9] Protocol to the Agreement establishing the African Continental Free Trade Area on Investment, Article 18.

investments with sustainable development goals and national priorities, including environmental, health, climate, social, economic, and security policies. It further clarifies that measures adopted to fulfil international treaty obligations will not constitute a Protocol breach, nor can the exercise of regulatory authority serve as grounds for investor compensation claims.

Article 25 establishes states' obligation to ensure environmental protection, considering domestic policies, international best practices, and treaty commitments, while continuously enhancing national standards. Article 26 promotes investments that mitigate greenhouse gas emissions and support the transition to renewable energy and low-carbon technologies. Additionally, Articles 7 and 8 reinforce the duty to facilitate sustainable investments, particularly those advancing environmental and low-carbon development goals.

Investor Obligations

A key innovation of the Protocol is the imposition of specific obligations on foreign investors. States maintain the obligation to promote and enforce laws and policies that protect, among other things, the environment. They shall ensure that investors and their investments comply with domestic laws and regulations. Article 34 explicitly requires investors to respect and safeguard the environment, introducing obligations such as conducting environmental impact assessments and implementing measures to mitigate harm—requirements largely absent in previous IIAs.

Dispute Settlement

The Protocol's investor-state dispute settlement framework is outlined in an Annex, which governs dispute prevention and resolution. It allows investors to bring claims in international arbitration while also granting states the right to counterclaim for damages arising from investor breaches.[10] Additionally, the Protocol permits tribunals to appoint experts on environmental, health, or safety issues.[11]

A notable innovation is the introduction of an appeal mechanisms in cases where the claim has been submitted through the mechanisms established in the AfCFTA Protocol on Rules and Procedures for the Settlement of Disputes.[12] However, the decisions of the Appellate Body do not constitute precedents for other cases outside the complaint.[13]

The USMCA, CPTPP, Pacific Alliance and MERCOSUR Protocol

The United States, Mexico and Canada Agreement, which entered into force in 2020, is a mutually beneficial win for North American workers, farmers, ranchers, and businesses that seek to create more balanced, reciprocal trade supporting high-paying jobs for Americans and grow the North American economy.[14]

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[10] Annex 1 Rules and Procedures Governing the Management and Settlement of Disputes under the Protocol on Investment to the Agreement Establishing the AfCFTA, Article 10.

[11] Annex 1, Article 13.

[12] Annex 1, Article 18.1.

[13] Annex 1, Article 18.3.

[14] The USMCA substituted the North American Free Trade Agreement (NAFTA), which entered into force in 1994.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership is a comprehensive regional trade agreement for the Asia-Pacific region to promote regional economic integration and accelerate regional trade and investment liberalisation (CPTPP, Preamble), among other objectives.[15] It incorporates provisions from the TPP through a normative reference, except for some that were suspended.

The Pacific Alliance, officially established in 2011, represents a zone of profound economic integration designed to facilitate coordination, convergence, political dialogue, and advancement for Chile, Colombia, Mexico, and Peru within the Asia-Pacific region. Its goals include establishing a deeply integrated area, fostering increased growth, development, and competitiveness among the economies, and serving as a platform for articulation, integration, and projection, notably focusing on the Asia-Pacific region (Rodríguez, 2014).

MERCOSUR is an economic bloc in the South American region that was established in 1991. Its primary aim is to promote free trade and facilitate the movement of goods and people among its member countries: Argentina, Brazil, Paraguay, Uruguay, and Venezuela (currently temporarily suspended). Until 2017, MERCOSUR lacked a legal framework governing FDI.[16] Consequently, after seven years of negotiations, the Protocol of Cooperation and Facilitation of Intra-MERCOSUR Investment (MERCOSUR Protocol) was adopted that year, installing an innovative investment framework.

It is worth bearing in mind that the NAFTA triggered a proliferation of FDI protection rules, which is why the historical roots of the investment chapters of these treaties, and particularly the USMCA, CPTPP and the PA, are in NAFTA (Toro and Tijmes, 2016: 149). This is an important consideration to bear in mind as the analysis of the arbitral jurisprudence of LATAM RIAs must be closely linked to NAFTA precedents.

Preamble

The USMCA, CPTPP, and Pacific Alliance (PA) exhibit notable alignment in their preambles, particularly regarding environmental protection. Both the PA and CPTPP explicitly identify sustainable growth as a core objective within their respective economic integration frameworks. Across all three agreements, there is a strong reaffirmation of state sovereignty in regulation, ensuring that member states retain the flexibility to enact legislation prioritising public welfare objectives, including environmental conservation and the protection of finite resources. Furthermore, they promote sustainable development goals as an integral part of their investment framework.

In contrast, the MERCOSUR Protocol does not explicitly list environmental protection as a preamble objective. However, it does acknowledge investment's role in sustainable development and upholds state regulatory authority over public policy matters.[17]

[15] After the United States withdrew from the projected Trans-Pacific Partnership (TPP) in 2017, the remaining parties (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam) continued negotiations. They signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership on March 8, 2018.

[16] The Colonia Protocol, approved in 1993, aimed to establish the legal framework for intra-group investments within MERCOSUR. It outlined a traditional investment scheme. However, member states did not accept these provisions, and they were never implemented.

[17] Protocol on Intra-Mercosur Investment Cooperation and Facilitation, Article 1.

Definitions

The investment chapters of the Pacific Alliance (PA), CPTPP, and USMCA rely on standard definitions commonly used in IIL, without incorporating the novel terms introduced in the AfCFTA Protocol.[18] In contrast, the MERCOSUR Protocol includes a definition of "Measures" similar to that found in the AfCFTA but omits a definition of "Sustainable Development".[19]

Investment protection standards

The PA, CPTPP, and USMCA adopt traditional FET and FPS definitions, aligning with the minimum standard of treatment under customary international law.[20] However, a notable distinction exists: While the CPTPP and USMCA apply these protections to "covered investments", the PA extends them to "economic rights of foreign investors" (Annex 10.6 PA). This broader wording could create legal uncertainties, as "economic rights" may extend beyond investment as traditionally defined (Toro & Tijmes, 2016: 151).

By contrast, the MERCOSUR Protocol excludes the FET and FPS standards but mandates access to justice and procedural fairness in line with due process.[21] This exclusion has drawn criticism from UNCTAD, which, in its 2017 World Report, questioned the lack of explicit investor protections (UNCTAD, 2017: 113).

On the other hand, The PA, CPTPP, and USMCA define NT and MFN provisions in near-identical terms, adhering to customary international law.[22] However, there is a major divergence: the CPTPP and USMCA explicitly clarify that the "like circumstances" assessment must consider the totality of circumstances, including whether differential treatment is based on legitimate public welfare objectives. In contrast, the PA lacks a similar qualification, potentially leading to a more rigid interpretation of NT and MFN obligations.

The MERCOSUR Protocol, while aligning with the general approach, does not define "like circumstances" but allows states to impose new legal requirements on investors and their investments, provided these are non-discriminatory.[23]

By last, concerning expropriation, The PA, CPTPP, and USMCA follow the traditional principle of legality for expropriation, rooted in NAFTA Article 1110 and Article 6 of the 2012 US Model BIT.[24] However, again, a key difference exists: unlike the PA and CPTPP,

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[18] Additional Protocol to the Framework Agreement of the Pacific Alliance, Article 10.1; Chapter 14 Agreement Between the United States of America, The United Mexican States, and Canada, Article 14.1; Chapter 9 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Art. 9.1.

[19] Protocol on Intra-Mercosur Investment Cooperation and Facilitation, Article 3.

[20] Additional Protocol to the Framework Agreement of the Pacific Alliance, Article 10.6.1; Chapter 14 Agreement Between the United States of America, The United Mexican States, and Canada, Article 14.6.1; Chapter 9 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Art. 9.6.1.

[21] Protocol on Intra-Mercosur Investment Cooperation and Facilitation, Article 4.1 and 4.3.

[22] Additional Protocol to the Framework Agreement of the Pacific Alliance, Article 10.4.1 and Article 20.5; Chapter 14 Agreement Between the United States of America, The United Mexican States, and Canada, Article 14.5 and 14.6.1; Chapter 9 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Art. 9.5 and 9.6.

[23] Protocol on Intra-Mercosur Investment Cooperation and Facilitation, Article 5.1.

[24] Additional Protocol to the Framework Agreement of the Pacific Alliance, Article 10.12; Chapter 14 Agreement Between the United States of America, The United Mexican States, and Canada, Article 14.8; Chapter 9 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Art. 9.8.

the USMCA does not explicitly limit the scope of "public purpose", leaving room for broader interpretations by arbitral tribunals (Toro and Tijmes, 2016: 158). All three agreements explicitly exclude non-discriminatory regulatory measures aimed at public welfare objectives (such as environmental or health regulations) from being considered indirect expropriation. In contrast, the MERCOSUR Protocol only addresses direct expropriation, offering no provisions for indirect expropriation, potentially limiting investor protection in such cases.[25]

State right to regulate on environmental objectives and Corporate Social Responsibility

The PA, CPTPP, and USMCA recognize the state's right to regulate in areas like environmental protection, health, and other public policy objectives, aligning with contemporary trends in international investment law.[26] How these exceptions have been expressed, however, has undermined their actual utility.

All three agreements use nearly identical language to express this right. Article 14.16 of the USMCA states, for example: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure *otherwise consistent* with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives" (emphasis added).

This wording undermines the exception's utility, as the phrase "otherwise consistent" creates a tautology—meaning that regulatory measures must still comply with investment protection rules, effectively negating the state's ability to adopt policies that might conflict with investor protections (Tienhaara, 2018: 242).

Unlike the PA, CPTPP, and USMCA, Article 16 of the MERCOSUR Protocol provides a more robust exception for environmental regulatory measures without the tautological constraints found in the other agreements. However, the provision is not absolute – it explicitly states that this exception applies only if the measure is not implemented in a way that constitutes arbitrary or unjustifiable discrimination or a disguised restriction –. This preserves policy space for states while preventing potential misuse of environmental regulations as a tool for protectionism.

It is important to note that Article 10 of the PA and Article 16 of the MERCOSUR Protocol discourage competition through deregulation, as seen in Article 1114 of NAFTA. However, interestingly, the CPTPP and the USMCA do not include a comparable provision regarding this matter (Toro and Tijmes, 2016: 159).

On the other hand, all LATAM RIAs incorporate corporate social responsibility (CSR), encouraging businesses to voluntarily adopt internationally recognized standards on labor, environment, gender equality, human rights, indigenous rights, and anti-corruption. However, the provisions clearly state that compliance is voluntary.[27]

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[25] Protocol on Intra-Mercosur Investment Cooperation and Facilitation, Article 6.

[26] Additional Protocol to the Framework Agreement of the Pacific Alliance, Article 10.31; Chapter 14 Agreement Between the United States of America, The United Mexican States, and Canada, Article 14.16; Chapter 9 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Art. 9.16.

[27] Additional Protocol to the Framework Agreement of the Pacific Alliance, Article 10.30; Chapter 14 Agreement Between the United States of America, The United Mexican States, and Canada, Article 14.17; Chapter 9 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Art. 9.17; Protocol on Intra-Mercosur Investment Cooperation and Facilitation, Article 14.

The MERCOSUR Protocol goes further in Article 13 by imposing investor obligations, requiring compliance with host state laws, disclosure of information upon request, and a prohibition on corruption.

Settlement of Disputes

The USMCA, CPTPP, and PA follow the 2012 US Model BIT for standards of treatment but differ significantly in arbitration claim (Toro and Tijmes, 2016: 164). While the PA and CPTPP allow claims for any treaty breach, the USMCA restricts them to NT, MFN, and direct expropriation, excluding other protections and indirect expropriation.[28] However, it is worth noting that the CPTPP incorporates in Article 29.5 (in the chapter on exceptions) a carve-out provision that allows States Parties to prevent any ISDS lawsuit from challenging tobacco control measures.

Regarding domestic justice, the PA restricts access to international arbitration if an investor submits a claim to any binding dispute process, including national courts.[29] In the CPTPP, this provision applies to specific parties of the treaty, which includes all PA parties in the CPTPP.[30] Conversely, the USMCA mandates initiating claims in the host state's court before accessing international arbitration or waiting 30 months after the process begins.[31]

Another striking difference is that, unlike the PA and the USMCA, article 9.19.2 of the CPTPP allows states to file a counterclaim. This incorporation raises further questions if the treaty does not provide rules on investor obligations.

On the other hand, the MERCOSUR Protocol lacks rules for dispute resolution between foreign investors and host states, leaving this issue regulated by other BITs, RIAs, FTAs and national legislation.

Progress, gaps and common challenges regarding the reconciliation of promoting foreign direct investment and environmental protection

The AfCFTA Protocol, CPTPP, USMCA, PA, and MERCOSUR Protocol represent a modern wave of investment agreements that aim to balance investment protection with states' regulatory autonomy. However, their variations reflect the heterogeneous nature of commitments within this evolving framework, affecting the extent to which investment promotion and environmental protection are effectively reconciled. Normatively, these agreements integrate environmental considerations by modifying minimum standards of treatment, referencing environmental concerns in their preambles, introducing general and specific exceptions, and adjusting core investment protections (Levashova, 2016: 56). This section examines their defining features and challenges, particularly in interpreting sustainable development, delineating substantive obligations, and assessing how tribunals incorporate investor perspectives into legal reasoning.

[28] Additional Protocol to the Framework Agreement of the Pacific Alliance, Article 10.16.1; Chapter 14 Agreement Between the United States of America, The United Mexican States, and Canada, Article 14.D.3.1; Chapter 9 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Art. 9.19.1.

[29] Additional Protocol to the Framework Agreement of the Pacific Alliance, Article 10.18.4.

[30] Chapter 9 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Annex 9-J.

[31] Chapter 14 Agreement Between the United States of America, The United Mexican States, and Canada, Article 14.D.5.1.

The new interpretation above the state's regulatory space

In examining the preambles, objectives, and definitions of the AfCFTA Protocol, CPTPP, USMCA, PA, and MERCOSUR Protocol, it is evident that they align with the modern trend in IIAs, affirming states' regulatory rights while emphasizing sustainable development within the international trade and investment framework. This acceptance is clearly articulated in their statements, evident across all preambles, where these aspects are substantially considered. In this regard, the Preamble plays a crucial role in defining an agreement's objectives and guiding its interpretation as a whole (Laborías 2018, 136). This principle is reinforced by Article 31 of the 1969 Vienna Convention on the Law of Treaties, which underscores the relevance of the Preamble in shaping the understanding and application of the treaty over time.

In this context, the LATAM RIAs affirm states' inherent right to regulate public interest policies. Additionally, the USMCA, CPTPP, and PA explicitly commit to promoting high environmental protection standards. This emphasis on environmental compliance supports an interpretation that strengthens states' authority to enact regulatory measures, particularly those aimed at ecological protection.

Conversely, the AfCFTA Protocol marks a significant milestone by explicitly acknowledging the environment within its Preamble as a fundamental aspect of sustainable development. Furthermore, the inclusion of new definitions for "Measures" and "Sustainable Development" in both the AfCFTA and MERCOSUR Protocols is crucial. These definitions shape the interpretation of the treaties, reinforcing environmental protection as a core pillar of sustainable development.

Notably, the preambles of the AfCFTA Protocol and the MERCOSUR Protocol frame investment as a means to achieve sustainable development rather than an end in itself, aligning with the approach established by the United Nations decades ago (UN Agenda 21, Chapter 2, 1992). The AfCFTA Protocol takes this commitment further by explicitly recognizing the importance of incorporating other UN instruments that promote the attainment of the Sustainable Development Goals.[32]

These recognitions allow, in cases of ambiguity, an interpretation that prioritizes states' rights to enact regulatory measures for environmental protection, even when such measures affect foreign investors' interests (Dougherty, 2007: 751).[33] In this vein, Sornarajah underscores the importance of recognizing, as a treaty objective, that investments should contribute to the sustainable development of host states (Sornarajah, 2004: 259). This acknowledgment strengthens the legitimacy of rejecting investor claims if the investment does not align with this fundamental purpose.

Nonetheless, most doctrines and caselaw do not attribute binding effect solely to the content of preambular declarations (Batifort, 2023: 338; Klabbers, 2018: 182). The interpretative value of the Preamble in investment arbitration must be considered within the

[32] The Protocol refers to the 2030 Agenda for Sustainable Development (Resolution A/RES/70/1 of the United Nations General Assembly, and in particular, the 17 Sustainable Development Goals; the Investment Policy Framework for Sustainable Development of the United Nations Conference of Trade and Development; and other relevant UNCTAD instruments that support new generation investment policies for inclusive growth and sustainable development.

[33] For example, in the *Methanex Case*, the Tribunal incorporated the principles contemplated in the NAFTA preamble to resolve the dispute.

broader framework of the treaty's substantive provisions, especially those that establish exceptions to traditional investor protection standards.

Therefore, while it is difficult to derive substantive obligations solely from the Preamble, it plays a crucial role in interpreting the treaty's substantive provisions. In cases of ambiguity regarding a specific provision's scope, the treaty should be construed to favour states' rights to implement environmental protection measures, even when these measures impact foreign investors' interests. As a result, the right to compensation should be interpreted restrictively when provisions lack clarity. This interpretative approach is particularly relevant for the AfCFTA Protocol and the MERCOSUR Protocol, where the objective of achieving sustainable development is explicitly embedded in substantive provisions such as Article 2 and Article 1, respectively.

This conclusion, however, is ultimately undermined by the structural features of investor-state dispute settlement mechanisms. The inconsistency in arbitral awards, coupled with the absence of unifying criteria or a robust appellate system, diminishes the practical effectiveness of the intentions articulated in the Preamble. As a result, despite the recognition of states' regulatory space and sustainable development objectives, the unpredictable nature of arbitral decisions may limit the full realization of these principles in practice.

New standards for substantive obligations

The substantive obligations of states in IIL have been at the centre of claims brought by foreign investors against ISDS concerning environmental protection policies, having invoked a wide range of IIA obligations (Paine and Sheargold, 2023: 293).[34] Next, we will analyse how these RIAs regulate the investment treaty obligations that are most frequently claimed by investors linked to measures adopted by states to protect the environment: Fair and Equitable Treatment; National Treatment and Most-Favoured Nation; and Indirect Expropriations (Herreros and García-Millán, 2017: 20).

Fair and Equitable Treatment

The Fair and Equitable Treatment standard is one of the most significant and contentious provisions in IIL due to its broad scope and frequent invocation in ISDS cases (Subedi, 2016: 63; Dolzer, 2014: 14; Paparinskis, 2013: 4). Its relevance is particularly pronounced in environmental disputes, as arbitral tribunals' interpretations have created an ongoing tension between states' obligations under investment agreements and their right to regulate in the public interest, particularly in environmental matters (Di Benedetto, 2013: 104)

The UNCTAD's 2012 International Policy Framework for Sustainable Development introduced five approaches to clarify the FET clause in IIAs: (1) an unqualified commitment to treat foreign investors/investments "fairly and equitably"; (2) a link to international law or a minimum standard of treatment of aliens under customary international law or principles of international law; (3) a rule derived from compliance with an exhaustive list of obligations (e.g. denying justice in judicial or administrative proceedings or treating investors in a manifestly arbitrary manner flagrantly violating due process); (4) interpretative guidance to tribunals (e.g., stating that the FET clause does not prevent states from adopting bona fide regulatory measures that pursue legitimate objectives; that the level of development of the

[34] RWE AG v the Netherlands, ICSID Case N°ARB/21/4; Uniper SE v the Netherlands, ICSID Case N°ARB/21/22.

country is relevant in determining a breach of the FET clause; that a breach of another provision of the IIA or another agreement cannot establish a claim for breach of the FET clause; or that the significance of the investor's conduct is relevant in determining a breach of the FET clause); and (5) omitting reference to the FET clause (UNCTAD 2012a, 51).

Each formulation of FET clause provides varying degrees of protection to investors and regulatory flexibility to states. According to UNCTAD, an unqualified FET commitment offers maximum protection to investors but significantly reduces a state's policy space, increasing its exposure to investor claims and potential financial liabilities. This risk is primarily due to the ambiguity of the concept, as terms like "justice" and "fairness" lack a fixed legal definition and are open to subjective interpretation.

A particularly contentious issue is the protection of investors' "legitimate expectations" under the FET standard. This interpretation restricts a state's ability to introduce or modify policies, even when such changes pursue sustainable development goals but adversely affect foreign investors. This tension highlights the challenge of balancing investment protection with regulatory autonomy (UNCTAD, 2012a: 51).

The USMCA, CPTPP, and PA adopt the NAFTA approach by linking FET to the minimum standard of treatment under customary international law. According to the Organization for Economic Cooperation and Development (OECD), this approach provides a more restrictive scope compared to a self-contained FET clause, as it imposes a higher threshold for claims. Specifically, it requires compliance with "a set of principles which states, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property" (OECD, 2004: 9; see also Yannaca-Small, 2011: 388).

This criterion was established almost a century ago in international arbitral jurisprudence.[35] However, the conceptual construction and the conducts that form such principles are not frozen in time and have an evolutionary character, as observed in the NAFTA arbitral jurisprudence.[36]

In the context of NAFTA decisions under the customary international law approach,[37] the general trend for cases that concern state regulations in the field of public concerns, and in particular in areas of environmental measures, is "to apply a high threshold for establishing a violation of the FET clause in assessing state actions" (Levashova, 2016: 74). In other cases, tribunals have created a specific definition in the form of "unacceptable conducts".[38] The

[35] The Neer case of NAFTA is pivotal for the Fair and Equitable Treatment standard. It established a precedent powerfully shaping how FET is understood and applied in investment disputes. This case involved a claim against Mexico, where the Tribunal set a high bar for proving a breach, emphasising that regulatory actions or economic losses alone do not necessarily breach the standard and to be classified as a violation of the minimum standard it "should 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 recognise its insufficiency". This precedent guides future FET disputes, outlining the necessary threshold to prove a breach and impacting how investment arbitration tribunals evaluate fair and equitable treatment claims.

[36] For instance, ADF Group v. US, ICSID Case No. ARB (AF)/00/1 (NAFTA), Award (9 January 2003), para. 179 and Bilcon of Delaware et al. v. Government of Canada, Permanent Court of Arbitration (PCA) Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015), para. 435.

[37] For example, in the *Apotex Case,* the Tribunal stated that "the decisions by NAFTA and other international tribunals emphasise the need for international tribunals to recognise the special roles and responsibilities of regulatory bodies charged with protecting public health and other important public interests". Apotex Inc. v. United States, ICSID Case No. ARB(AF)/12/1, under Chapter 11 of NAFTA, Award (25 August 2014).

[38] For example, in the *Waste Management Case*, the Tribunal arrived at a definition of unacceptable state's conduct under international minimum standards summarising the discussion in previous cases (*S.D. Myers, Mondev, ADF*

foregoing clarifies how the minimum standard under customary international law approach extends the regulatory space of states, which has been followed even by tribunals when the applicable IIA does not contain reference to customary international law.[39] However, although this approach provides a certain degree of clarity regarding the limitation of an FET standard, it does not define it, so there remains significant disagreement on its scope in case law and among scholars (Levashova, 2016: 70).

Arbitral awards under the CPTPP and PA will likely adhere to the criteria set by NAFTA tribunals. Consequently, states' regulatory autonomy is expected to be interpreted broadly. Yet, the specific decisions in individual cases will ultimately rest with the tribunals formed under these agreements.

The exclusion of the FET and indirect expropriation analysis from arbitration tribunals' jurisdiction provided by the USMCA raises questions about rule application, likely to be assessed by other tribunals established by BITs or other IIAs and national courts. This aspect highlights the strengthened position of states versus foreign investors, as the latter are not entitled to bring a claim (and thus seek compensation) before an international arbitral tribunal due to a possible breach of these rules. Instead, they must justify a claim based on other rules that are considered to fall under the jurisdiction of these tribunals, narrowing the space for investor claims.

The AfCFTA Protocol and the MERCOSUR Protocol state that while they do not cover fair and equitable treatment, they solely guarantee that foreign investors cannot be subjected to treatment in administrative and judicial matters that constitute a fundamental denial of justice or an evident denial of due process. Furthermore, the AfCFTA Protocol specifies that investors cannot be subjected to manifest arbitrariness or discrimination based on gender, race, or religious beliefs.

According to the UNCTAD, replacing the general FET clause with an exhaustive list of more specific obligations may be arduous. However, its exhaustive nature would help avoid unintended and far-reaching interpretations by courts. At the same time, the omission of the FET standard would reduce states' exposure to investor claims, but foreign investors may perceive the country as not offering a sound and reliable investment climate (UNCTAD, 2012a: 51).

By excluding the FET clause from these protocols, states significantly enhance their ability to implement regulatory measures. Investors could only claim a breach based on issues related to access to justice and due process. Replacing or associating the FET clause with a detailed list of obligations gives states stronger authority to enforce environmental measures. This highlights the need to examine environmental protection provisions in an investment treaty—whether interpretative or substantive—in relation to the FET clause's regulatory standards. An unqualified FET clause, even with environmental protections, could still expose states to

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and Loewen cases) on the understanding that "the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the state and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involve lack of due process leading to an outcome which offends judicial propriety as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process" Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3, Final Award (30 April 2004).

[39] For example, in Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, 24 July 2008, para 597; Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/06, 24 July 2014, para. 877; and Hochtief AG v. Argentine Republic, ICSID Case No. ARB/07.31, 29 December 2014, para. 219.

investor claims over measures that affect their "legitimate expectations," potentially leading to compensation for policies that harm investors' economic interests.

National Treatment and Most Favoured National Clauses

Under the National Treatment clause, states guarantee foreign investors equal treatment with comparable domestic investors, while under the Most-Favoured-Nation clause, states ensure equal treatment between investors from the treaty's home country and comparable investors from any third country. These provisions are associated with the "good governance" standards promoted by organisations such as UNCTAD and the OECD, and they are based on the fundamental principle that all investments contribute equally to the development of host countries (UNCTAD 2012a, 50; Fyock 2022, 53).

Nevertheless, the limitations of NT and MFN clauses have attracted criticism similar to that directed at the FET clause due to their vague language and potential misuse, enabling "Treaty Shopping" by foreign investors (Faya, 2008: 89). In turn, the MFN clause may also lead to the unintended incorporation of stronger provisions of IIA investors with third countries and complicate the conscious design of the treaty. This issue has been of particular concern when the scope of the rule refers to access to dispute settlement mechanisms.[40]

Sustainable development strategies and environmental protection policies may involve preferential treatment for domestic investors, investors from specific regions, or sensitive industries and sectors without extending the same rights to foreign investors or unrelated industries. In this regard, UNCTAD has highlighted the importance of flexibly framing NT and MFN provisions to align with sustainable development objectives (UNCTAD, 2012a: 50).

In this context, the PA, CPTPP, USMCA, and MERCOSUR Protocol uphold established norms derived from customary international law. These provisions allow investors to file claims before international arbitral tribunals when regulatory discrepancies between foreign investors or industries allegedly breach NT and MFN clauses (Collins, 2017: 2).[41]

The qualification that the NT and MFN treatment obligations apply only to investments in 'like circumstances' serves as a restrictive element, narrowing the scope of these treatment standards. In this vein, The CPTPP and USMCA clarify that determining "like circumstances" considers all relevant factors, including whether distinctions are based on legitimate public welfare objectives. However, this language has been criticized as insufficient to prevent challenges to specific environmental protection measures, as each case could still question the legitimacy of such objectives (Tienhaara, 2018: 243).[42] The absence of a clear definition of

[40] By way of example, in *Maffezini v. Spain*, the Tribunal held that the MFN clause in the Spain-Argentina BIT could be invoked to grant the claimant access to the dispute settlement provisions of the Spain-Chile BIT. See Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award (13 November 2000).

[41] For example, SD Myers v Canada UNCITRAL, Partial Award (12 October 2002); United Parcel Service of America Inc v Government of Canada, UNCITRAL, Award (24 May 2007); and Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador, ICSID Case No ARB/06/11, Award (1 July 2004).

[42] For instance, in the case of *Bilcon v. Canada*, the Tribunal found that the decision of an independent environmental review panel constituted a breach of the national treatment standard, as a stricter environmental review standard was applied compared to other investments in similar circumstances. The Canadian government's defence, which argued that the other projects assessed were of a different scope, located in different areas, and raised distinct issues (and therefore were not in similar circumstances), was rejected by the Tribunal. See William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. Government of Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015).

'like circumstances' in both the PA and the MERCOSUR Protocol is particularly noteworthy, as it deepens the ambiguity that may arise in interpretative disputes before courts.

Unlike traditional approaches, the AfCFTA Protocol tackles these concerns by allowing states to adopt measures in crucial public interest areas like environmental protection and public health. On the debated issue of "like circumstances," Articles 12 and 14 mandate a thorough, case-specific evaluation of all investment factors, referencing a non-exhaustive list that considers impacts on the local, regional, or national environment, public health, and the global commons.

Additionally, Articles 13 and 15 establish a pivotal rule for environmental protection. These articles exclude measures adopted for legitimate public policy objectives, such as combating climate change and protecting the environment, from the NT and MFN treatment scope. This effectively limits the application of these clauses in regulatory measures aimed at environmental objectives, ensuring that such policies cannot be challenged solely based on discriminatory treatment.

The AfCFTA Protocol enhances regulatory space for environmental policies by excluding them from NT and MFN clauses. In contrast, the PA, CPTPP, USMCA, and MERCOSUR Protocol follow traditional interpretations based on international customary law, exposing them to broader investor claims. However, the AfCFTA Protocol omits the preferential treatment exception for least-developed countries found in Article 20 of the 2006 SADC Protocol, which could have bolstered regional development efforts by emphasizing the exceptional nature of NT and MFN clauses.

It should be noted that under the AfCFTA Protocol, investors can claim a breach arising from a discriminatory act, potentially broadening the scope of NT and MFN obligations. However, this provision aligns with universally recognised principles of International Law, acknowledged as norms of *jus cogens*, which remain applicable even without specific treaty provisions (Charlesworth and Chinkin, 1993: 63).

Indirect Expropriation

The issue of expropriation, particularly indirect expropriation, remains a critical point in investor-state disputes, where tribunals exercise significant discretion (Krajewski, 2020: 127). Historically, arbitral tribunals have relied on two main approaches to determine whether indirect expropriation has occurred due to host states' regulatory measures impacting foreign investments. The first is the "sole effect doctrine," which focuses solely on the economic impact and its duration, ignoring the measure's purpose (Dolzer and Bloch, 2003: 158). The second is the "police-powers doctrine," which considers the measure's context and intent (Brunetti, 2003: 151).

The modern approach in IIAs aligns with the "police-powers" doctrine, treating non-discriminatory regulatory measures aimed at legitimate public welfare objectives—such as public health, safety, and environmental protection—as exceptions to indirect expropriation, barring extraordinary circumstances. In its analysis, the tribunals have typically followed the US jurisprudential model based on examining two elements. The first assesses the proportionality of the measure by analysing its effects, nature, and the extent of interference with the investor's legitimate and reasonable interests. The second determines whether the measure occurs in "rare circumstances," ensuring that non-discriminatory actions are not classified as expropriation (Tienhaara, 2018: 246).

Nevertheless, determining whether a host state's actions amount to indirect expropriation requires a case-by-case, fact-specific analysis (Fortier and Drymer, 2004: 300). Each arbitral tribunal has the authority to assess whether the measure is discriminatory or aimed at safeguarding legitimate public interests, such as environmental protection.

The USMCA, CPTPP, and PA allow host states to indirectly expropriate foreign investments under specific conditions: (1) for a public purpose, (2) in a non-discriminatory manner, (3) with prompt, adequate, and effective compensation, and (4) following due process of law. These treaties permit non-discriminatory environmental measures to protect public interests without automatically triggering compensation for impacts on investors' property rights. However, tribunals must first determine if such measures are non-discriminatory and align with legitimate public objectives, leaving all cases open to ISDS debate. This framework maintains the possibility of compensation even when expropriation occurs within the scope of public policy regulation. It should be noted that the USMCA excludes indirect expropriation as grounds for bringing an ISDS claim to international arbitration. This exclusion significantly strengthens states' regulatory power. However, the ability to bring an indirect expropriation claim remains subject to the possibility of claims under domestic courts.

In contrast, the AfCFTA Protocol allows cases of indirect expropriation to be brought before arbitral tribunals, similar to the CPTPP and PA. Notably, it requires consideration of domestic law, state regulation, and non-discrimination when determining compensation. Thus, while this explicitly acknowledges states' regulatory authority, it still permits claims challenging such determinations.

Notwithstanding, the AfCFTA Protocol distinguishes itself by excluding regulatory measures from any investor claim. Thus, the arbitral Tribunal's analysis of a claim of indirect expropriation related to regulatory measures should be limited in the first instance to the possibility of not finding the claim admissible because it is a regulatory measure. This point will be discussed in more detail below.

Conversely, the MERCOSUR Protocol does not address indirect expropriation. The absence of such a reference in the IIAs does not empower adjudicators to create new laws or claim infringement under the Protocol's rules so that cases where states engage in acts that may have effects similar to expropriation cannot be subject to adjudication by these tribunals (Batifort, 2023: 339). This feature, therefore, gives states greater power to implement policies that may affect the interests and rights of foreign investors. However, without a rule on indirect expropriation, if a domestic court or an investment arbitration tribunal established by another BIT or RIA hears an investor's claim on this issue, that Tribunal will have a margin of interpretation outside the Protocol. Thus, an opportunity to provide greater certainty on indirect expropriation and its link to sustainable development policies has been lost.

The opening up of a "carve-out" clause for investor-state dispute settlement

As noted above, the high costs of investment arbitration often discourage states, particularly in developing countries with limited resources, from implementing regulatory policies in areas like health and the environment. This issue is exacerbated by the unpredictability of outcomes, stemming from inconsistencies between arbitral awards on similar issues and the ambiguous language in investment treaty provisions. Multinational companies recognize the power of ISDS, where the high costs for governments are often minimal for global industries involved in environmentally risky sectors like fossil fuels or tobacco. Lobbying for the inclusion of ISDS in IIAs has therefore been crucial in the negotiations of these agreements, with

favourable results for large corporations in most international law-making processes, as recognition of ISDS remains widespread (Tienhaara, 2018: 241). Thus, despite recognising states' regulatory power in standards of treatment, normative ambiguity and arbitral discretion remain a concern for states because of the possibility of compensating foreign investors for their economic losses.

Beyond exceptions to the minimum treatment standard, a more effective safeguard for state regulatory power is the carve-out, which exempts certain matters from ISDS claims. The CPTPP has been praised for including a carve-out for tobacco control measures, effectively excluding the tobacco industry from the investment protection provisions of the treaty.[43]

There is a broad consensus among critics of ISDS that, to address the challenges of climate change adequately, carve-outs should be extended to encompass environmental regulations (Tienhaara, 2018: 249). In this regard, Chapter 4 of the AfCFTA Protocol explicitly protects measures taken by a state Party to fulfil its international obligations under other treaties, ensuring such measures do not breach the Protocol.[44] Moreover, the Protocol explicitly prohibits the right to regulate from serving as grounds for an investor's compensation claim.[45]

In this author's opinion, these provisions effectively operate as carve-outs from regulatory measures, clearly delineating their role as limitations on the treaty's scope of application. As such, they should be a preliminary consideration in any potential ISDS process, allowing claims to be dismissed without engaging in a substantive analysis (Paine and Sheargold, 2023: 291).

States could significantly enhance their regulatory space by adopting this approach. Given the high economic costs of arbitration, addressing carve-out provisions early could expedite settlements, reducing both time and legal costs of ISDS cases. Additionally, investors would be deterred from filing claims due to the higher risks of unfavourable outcomes. If investment arbitration tribunals adopt this practice, the AfCFTA Protocol could represent a significant shift from previous treaties, enabling more regulatory measures focused on public interest and environmental protection.

Considerations above investors' obligations

Before adopting the AfCFTA Protocol, states hesitated to enforce direct investor obligations in IIAs. Consequently, most agreements referenced investor obligations using non-binding standards, such as best endeavour obligations (Krajewsi, 2020: 116). Nonetheless, many IIAs introduced this duty under the umbrella of corporate social responsibility.

The USMCA, CPTTP, PA, and the MERCOSUR Protocol adhere to this pattern, making investor obligations voluntary. These provisions also stipulate that these standards may encompass various areas, particularly highlighting principles for environmental protection.

The USMCA and PA specify that investors, albeit non-bindingly, commit to integrating international CSR standards endorsed by each state party, such as the OECD Guidelines for Multinational Enterprises. Similarly, the MERCOSUR Protocol aligns with the International Labour Organization Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the UN Global Compact, emphasising the voluntary nature of the rules (Laborías, 2018: 140). Furthermore, its wording, akin to the Brazilian Model BIT, suggests

[43] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Article 29.5.

[44] Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment, Article 24.2.

[45] Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment, Article 24.3.

that "investors and their investments shall endeavour to comply with the following voluntary principles and standards." In addition, "shall" in its redaction has sparked debates suggesting that while the agreement requires investors to attempt compliance, a violation only occurs if investors ignore or openly reject these standards. Yet, demonstrating a genuine effort to meet the standard would not violate the Protocol (Krajewsi, 2020: 117).

Regarding environmental protection, CSR encompasses responsible corporate conduct toward the environment (Gordon, 2021). Hence, efforts to develop environmentally conscious investment projects could be part of these agreements despite their voluntary nature. However, imagining an interpretation that would give a binding character to an "endeavour" obligation is difficult.

The AfCFTA Protocol on investment represents a substantive departure in the approach to investor obligations. Chapter 5 delineates a comprehensive set of rules to solidify genuine commitments to foreign investors as they invest within member countries. This reflects a growing trend in Africa, where states are bolstering their power, potentially signalling a new step in international investment practices (Moïse and Schacherer, 2017: 414).

The Protocol outlines an investor's duty to comply with national and international law broadly, encompassing Business Ethics, Human Rights, Labor Standards, Environmental Protection, Indigenous Peoples' and Local Communities' rights, Socio-Political Obligations, Anti-Corruption standards, Corporate Social Responsibility, Corporate Governance duties, Taxation, and Transfer Pricing obligations.

In relation to environmental protection, investors must adhere to several duties, including respecting the right to a clean, healthy, and sustainable environment as articulated in the African Charter of Human and Peoples' Rights and the United Nations General Assembly Resolution A/RES/76/300. They must also apply principles of prevention and precaution, conduct environmental impact assessments following international standards and domestic laws, and take steps to mitigate harm and restore impacted sites. Additionally, investors should not exploit natural resources to the detriment of the host state and local communities' rights and interests.

The issue of investor obligations is closely linked to states' ability to enforce them. Annex of the AfCFTA Protocol allows states to bring counterclaims against investor claims, discouraging investors from filing claims that may violate the Protocol's provisions. Similarly, the CPTPP permits states to make counterclaims, but the absence of substantive obligations for investors raises questions about its effectiveness and intent. In contrast, the MERCOSUR Protocol mandates that investors comply with all host state laws and regulations related to investments. However, as it lacks enforcement mechanisms at the international level, compliance is reliant on local law, limiting the regime's enforceability.

The AfCFTA Protocol nonetheless does not authorise states to bring claims directly against investors for breaches of the Protocol's rules. Thus, while these rules impose strict obligations on investors, the concrete means to enforce them directly, without waiting for an initial claim by an investor, remain unclear.

Cases in which states have directly challenged breaches of investor obligations in international investment tribunals have not yet occurred.[46] States will likely first use their

[46] The Urbaser v Argentina Case is considered the first investment case where a tribunal accepted the idea of the human rights obligations of investors. Then, the separate opinions in the Bear Creek v Peru case and the Aven v Costa Rica Case also stated that international investors could be subject to obligations in this area. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partuergoa v The Argentine Republic, ICSID Case No. ARB/07/26, Award (8 December 2016); Bear Creek Mining Corporation v Republic of Peru, ICSID Case No.

domestic courts. However, this approach could pave the way for future direct claims before international investment tribunals (Krajewski, 2020: 124).

Conclusions

The analysis presented highlights a significant divergence in the approach to reclaiming state sovereignty in establishing environmental policies affecting international investment between the AfCFTA Protocol and the LATAM RIAs and among some of the LATAM RIAs.

The USMCA, the CPTPP, and the PA, aligned with the NAFTA approach, recognise states' rights to pursue public interests, including regulating aspects related to environmental protection. However, the possibility of bringing claims before international investment tribunals remains open, subjecting the state's actions to scrutiny regarding their regulatory intent and non-discriminatory character. This scenario disincentivises regulatory action in environmental matters due to high litigation costs, ambiguity of standards and potential conflicting rulings.

Notably, the USMCA excludes cases against the fair and equitable treatment standard and indirect expropriation from investment tribunal jurisdiction, diminishing the chilling effect of regulatory measures. Similarly, the MERCOSUR Protocol favours the state's regulatory space by sidestepping reference to ISDS and indirect expropriation and limiting Fair and Equitable Treatment. Still, it neglects the opportunity to provide interpretative guidelines for tribunals set by national law or other IIAs.

The AfCFTA Protocol introduces a substantial change by directly excluding or "carving out" regulatory measures as a basis for ISDS claims. This provision could prompt international investment tribunals to dismiss cases without examining the merits, fostering potential savings in economic resources. This is a substantial driver for developing sustainable development policies, especially concerning environmental protection in developing countries.

Nevertheless, economic considerations remain paramount. The USMCA, the CPTTP and the PA aim to promote economic integration in the Asia-Pacific region by balancing efforts to achieve growth and improve economic prospects with efforts to encourage state policy space. These agreements attempt to reconcile the establishment of environmental protection policies with the promotion of FDI on economically balanced terms, following the traditional Western neo-liberal approach that IIL has adopted, derived mainly from the roots of NAFTA, in the ingrained belief that more rights for investors means more investment. (Toro and Tijmes, 2016: 174).

In contrast, the MERCOSUR Protocol's omission of ISDS-related standards and lack of substantive reference to key IIL standards have been criticised by proponents of further investment promotion for its lack of foreign investors' protection and transparent criteria for balancing investment protection standards and states' regulatory power to establish sustainable development measures. Ad hoc ISDS tribunals based on other BITs and domestic courts will be the ones to incorporate interpretive criteria that limit the right of the state to establish sustainable development measures in terms that are balanced with economic growth.

Finally, the AfCFTA Protocol poses a transformative question about reconciling state sovereignty in establishing regulatory measures for environmental protection and encouraging foreign investment for economic growth. Africa aims to enhance its global investment

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ARB/14/21, Award (30 November 2017), Separate Opinion of Philippe Sand; David R Aven and Others v Republic of Costa Rica, ICSID Case No. UNCT/15/3, Award (18 September 2018).

attractiveness, departing from the traditional colonialist model of international investment. While the empirical basis for assuming that IIAs attract more investors is debatable, incorporating investor obligations marks a departure from the traditional model. The concrete impact of this change will be seen in the future application of this instrument by arbitral tribunals and its adoption in new IIAs around the world, particularly other regions of the global South, such as Latin America and the Caribbean.

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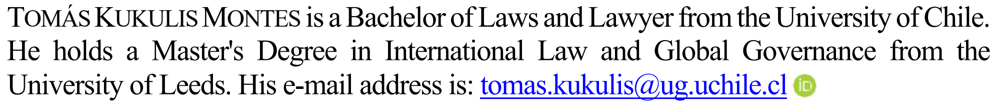

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