LEGITIMACY CHALLENGES OF TRADE AND INVESTMENT AGREEMENTS FROM A DEVELOPING COUNTRY'S PERSPECTIVE

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Introduction

As has beeen observed over the last few years, free trade agreements have gained momentum More and more of these agreements also include investment chapters. According to UNCTAD, there exist today 3.324 international investment agreements (IIAs)[1], including 2.957 bilateral investment treaties (BITs) and 367 treaties with investment provisions (TIP)[2].

Many African countries as well as other developing countries have opened up their economies and dismantled regulatory barriers to foreign investors through bilateral investment agreements and regional trade agreements. However, the international investment regime poses legitimate challenges to most developing countries in areas such as government regulatory policy, governance and the rule of law as well as balancing investment protection and the ability of the state to regulate in the public interest. This article will examine these challenges as well as the investor-state disputes settlement mechanism (ISDS) and its deficiencies in the interpretation of. This article will look at these issues from a developing country's perspective, focusing in particular on Africa.

Situation in Developing Countries

Many African countries, similar to most developing countries, rely heavily on their natural resources for economic growth, and in order to increase their export earnings, they often resort to excessive exploitation of their natural resources without any value added. This contributes too little to their industrial development and their capacity to supply the growing internal and external demands. Moreover, the industries that are mostly regionally integrated are those dealing in agro-processing. However, further development and upscaling of the regional value chains in this industry remain difficult as long as intra-African investments are within the local market and are between countries with the same comparative advantage in production. There are also infrastructure problems such as inadequate transportation support, energy and telecommunication networks. Most domestic companies in Africa face numerous barriers such as cumbersome administrative procedures, complex fiscal systems, unfair trade policies favouring imports at the expense of local producers, poor logisitics, high energy pric-

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1 IIAs will be used to refer to the overall group of bilateral and regional investment treaties, including bilateral investment treaties (BITs) and preferential trade and investment agreements (PTIAs), which established rules for protection, promotion and liberalisation of foreign investment flows.

2 UNCTAD, World Investment Report 2017, Investment and the Digital Economy, United Nations, New York and Geneva, 2017, p. 111.

es, lack of proper governance and the rule of law. It is largely up to policy makers to develop new initiatives to support local businesses by providing linkages with foreign investors, with the aim to boost value-added products. It can be argued that any new intiatives should attempt to co-opt businesses as partners for development, by defining the roles of public and private partnerships, supporting domestic investment as well as and foreign direct investment as part of a development strategy.

In view of that, South-South investment cooperation through regional trade arrangements would be an ideal situation to link African businesses together to share technology skills and know-how. However, the recent negotiations of South-South regional trade agreements with investment and service chapters are either not concluded or are still at their implementation stage. It is also difficult to obtain up-to-date data in order to determine how many investors from African countries are investing in Africa or in other developing countries (new research is needed in this area).

However, we know that African states are rule takers in North-South Regional Trade Agreements. These are demonstrated through the signing of economic partnership agreements with Europe and other developed countries with investment chapters and investment treaties[3]. These chapters have moved from exclusively covering trade in goods and services and now include a wider set of areas such as intellectual property rights, movement of business persons, and investment.

This has influenced developing countries that traditionally maintained state-controlled regimes to reconsider enacting new national investment legislation that deregulate investment procedures, bringing down controls on foreign direct investment. By and large we see foreign investment laws in developing countries especially in Africa reflecting a market-oriented approach to enable foreign investment to enter their markets. This is based on the principles of most favoured nation treatment (MFN), national treatment (NT), and fair and equitable treatment (FET) as well as guarantees on matters such as compensation for expropriation and the right to transfer capital, profits and income from the host state. These rights are often embodied in International Investment Agreements (IIA). On the other hand, performance requirements, which oblige investors to, for example, achieve a specific level of local jobs, engage in trainig programs for the workforce or transfer technology to the country, are rare.

The principles of state responsibility for the treatment of aliens under international law expects the host states to act consistently to protect foreign investors, thus respecting international minimum standards. There are legitimate expectations in that regard that domestic policies and judiciary reforms will have to meet international min-

[3] See in UNCTAD, World Investment Report 2017, Investment and the Digital Economy, United Nations, New York and Geneva, 2017 p 113 and that spells out the developments at the regional and continental levels on negotiations of investment treaties and reforms. In particular: (a) North America Free Trade Agreement (NAFTA) (b) Regional Comprehensive Economic Partnership (RECEP) (c) Mercado Comun del Sur (Mercosur) (d) Southern African Development Community (SADC) (e) Continental Free Trade Agreement (CEFTA), (f) COMESA -EAC-SADC Tripartite Free Trade Area (TFTA) (g) Pan African Investment Code (PAIC) (h) African, Caribbean and Pacific Group of States (ACP) Guiding Principles for Investment Policy (i) Asia-Pacific Economic Cooperation (APEC) Lima Declaration (j) Africa-EU Principles on Investment (k) Trade in Services Agreement (TISA)

imum standards. Therefore, the reform or creation of commercial courts to fast track commercial and private sector cases is vital.

However many developing countries face problems with regard to the judiciary processes and reforms. Judge Kofi Date-Bah[4], identified the following problems relating to the judiciary system in Ghana:

- the time taken by judiciary processes has been a source of complaint by business people in most developing countries, Ghana being a case in point;
- this perception is not held by business people alone but also by many others from all walks of life who have sought the assistance of the courts for the resolution of their commercial disputes;
- the persistent complaint is over delays in the dispensation of justice;
- the causes of dissatisfaction are many and various: examples are the operation (and, in some cases the substance) of the procedural rules, especially the opportunities they give for obstruction and adjournment;
- the inability of court bailiffs, sometimes in incredible circumstances, to serve writs or other court process on parties to court actions;
- the manual recording of court proceedings, especially evidence at a hearing;
- the number of judicial officers staffing the courts; the lack of specialised knowledge by the judges of the world of business;
- judicial working hours and the length of the legal term; the time judges take over the writing of their judgments; the quality and numbers of support staff; and the lack of appropriate equipment and their users for expedition of the judicial process [5].

These problems affect many developing countries and can lead to foreign investors sidelining the domestic courts and resorting to the ISDS mechanism. The South Africa Investment Protection Act offers an alternative route through the recourse to alternative dispute resolution to resolve investment disputes[6].

[4] Kofi Date-Bah, Developing a New Commercial Court in Ghana, Taxes International Law Journal, Vol 42, No. 3, Summer 2007.

[5] Kofi Date-Bah, Developing a New Commercial Court in Ghana, Taxes International Law Journal, Vol. 42, No. 3, Summer 2007.

[6] See Government Gazette, Republic of South Africa Act No. 22 of 2015: Protection of Investment Act, 2015, Vol. 606, Cape town, 15 December 2015, No 39514: The Act stipulates that:
(1) An investor that has a dispute in respect of action taken by the government, which action affected an investment of such foreign investor, may within six months of becoming aware of the dispute request the Department to facilitate the resolution of such dispute by appointing a mediator.
(2) The Department must maintain a list of qualified mediators of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment and who are willing and able to serve as mediators.
(3) The mediator must be appointed by agreement between the government and the foreign investor (hereinafter referred to as the parties) from the list contemplated, in the absence of a list, from individuals proposed by either party.
(4) In the event of the Department being party to the dispute, the parties may jointly request the Judge President of one of the divisions of the High Court to appoint a mediator.
(5) Recourse to mediation must be governed by the prescribed rules and any prescribed time limit may be adjusted by agreement between the disputing parties.

There are also legitimate expectations that regulatory agencies should be free from political pressure. They should have significant independence, be subject to clear reporting guidelines and the elected officials or respresentatives should be accountable. This applies to courts and judiciary systems as well as regulatory agencies regulating sectors such as electricity, transport, telecommunciations, banking, customs, tax administration, and revenue authorities, investment promotion agencies and licensing bodies. This would give more clearity to investors in general.

Regulatory Problems

Each country has the sovereign right to regulate. Regulations include both the general legal administrative framework of a country as well as sector or industry specific rules. It also entails effective implementation of the said rules, including enforcement rights. Regulation is not only a right, but also a necessity. Without an adequate regulatory framework, a country will not be attractive for foreign investors, because investors seek clarity, stability and predictability of investment conditions in a host country. The authority to regulate can, under certain circumstances, be ceded to an international body, which makes rules for the group of states. The authority to regulate can be subject to international obligations that countries undertake; with regard to the treatment of foreign investors this often takes place at bilateral or regional level. International commitments can, therefore, reduce “policy space”. However, it has been argued that countries need to maintain sufficient policy space to regulate for the public good[7].

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(3) In order to facilitate a resolution of a dispute contemplated the following information and prescribed form must be submitted by the foreign investor:

(a) Contact details of the foreign investor, including a physical address in the Republic or territory where the investor is predominantly resident, or where it is incorporated, its email address, facsimile number and telephone number;

(b) a summary of the claim, including the measures giving rise to the investment dispute;

(c) the specific organ, agency, province or other subdivision of the Republic allegedly responsible for the measures which the foreign investor alleges constitute a breach of any of the investment protection contained in this Act;

(d) the provisions of this Act that the foreign investor alleges have been breached; and

(e) the relief sought.

(4) Subject to applicable legislation, an investor, upon becoming aware of a dispute as referred above, is not precluded from approaching any competent court, independent tribunal or statutory body within the Republic for the resolution of a dispute relating to an investment.

(5) The government may consent to international arbitration in respect of investments covered by this Act, subject to the exhaustion of domestic remedies. Consideration of a request for international arbitration will be subject to the administrative processes set out in section 6 of the Act. Such arbitration will be conducted between the Republic and the home state of the applicable investor.

[7] UNCTAD, World Investment Report “Towards a New Generation of Investment Policies”, United Nations, 2012, p. 109.

Investment policies of a host State need to serve two potentially conflicting purposes. On the one hand, they need to create attractive conditions for foreign investors and on the other hand, they need to ensure that future regulatory measures are possible since future regulation may be warranted to find an appropriate response to crises such as a financial crisis, food crisis, problems related to climate change or the protection of public health. These are measures which need to be balanced when there are foreign investment interests involved. The challenge is to strike a balance between preserving policy space to regulate for the public good and putting in place regulatory measures that can attract and assure foreign investors.

All international economic treaties limit national policy space: governments may be legally required to take some regulatory measures, and may no longer be allowed to take other measures. Therefore, negotiation of investment treaties involves a delicate balancing act between committing to protect foreign investments on the one hand and preserving policy space on the other.

Insofar as investment protection promotes investments that produce positive social, environmental and economic outcomes, it is an important ingredient of efforts to promote sustainable development. But if not carefully framed, investment protection can significantly restrict policy space in host countries. A recurrent feature of investment treaties is that the language used is often unspecific, and lends itself to multiple interpretations. When called upon to adjudicate investment disputes, several arbitral tribunals have interpreted the standards of investment protection in expanded ways. It has been argued, in the main, that investment arbitration leads to a shift away from the host states' position of ultimate control over national affairs, since investment arbitration often scrutinizes domestic legislation and practices in the light of treaty rules. This scrutiny covers sensitive domestic measures, including environmental protection, conservation of resources, public health, banking reforms, tax reforms, revocation of permits, measures adopted in response to economic crises in regulatory reform, termination of concessions by domestic courts, and others[8].

A central requirement of fair and equitable treatment standards is to respect the legitimate expectations that the investor had when making the investment. This includes, for example, consistency and transparency of government conduct, and stability and predictability of the regulatory framework. Through a country's unqualified promise to treat investors "fairly and equitably", the country provides a maximum of protection for investors but also risks posing limits on its policy space, raising its exposure to foreign investors' claims and resulting in financial liabilities. Most international investment treaties include a guarantee of Full Protection and Security (FPS), which is generally regarded as codifying customary international law obligations to grant certain levels of police protection and physical security. However, some tribunals may interpret the FPS obligation so as to cover more than just police protection. If FPS is understood to include economic, legal and other protection and security, it can constrain government regulatory prerogatives including sustainable development objectives. It is advised that policy makers follow a recent trend to qualify the FPS standard by explicitly

[8] Dominic N Dagbanja, The Limitation on Sovereign Regulatory Autonomy and Internationalization of investment Protection by Treaty: African Perspectives, Journal of African Law, , SOAS, University of London, 2015, UK.

linking it to customary international law or including a definition of standards clarifying that it is limited to physical security. It is assumed that this would provide predictability and prevent expansive interpretations that would constrain regulatory prerogatives[9].

The Issue of Clarification of Investment Treaties

According to UNCTAD there are growing concerns with regard to investor-state dispute settlement (ISDS) mechanisms, as investors continue using ISDS mechanisms to challenge host countries. Those claims can affect regulatory measures in the public interest of the host country, such as policies for promoting labour and human rights, protecting public health or preserving the environment[10].

The Republic of Argentina in responding to its economic crisis enacted a number of measures that were later challenged in investment proceedings. During those proceedings, tribunals and subsequent ICSID ad hoc committees disagreed on the proper reading of the scope and content of Argentina's necessity defense, pursuant to Article XI of the Argentina-United States Bilateral Investment Treaty (BIT) and its relationship to customary rules on state responsibility[11]. Moreover, the Republic of Argentina explains that many of these measures are transitory in nature and are currently being subject to renegotiation with investors in the privatization program and do not entail an expropriation of the investment carried out[12].

This and many other cases are the reason why the international investment regimes have come under scrutiny. Countries like Bolivia, Ecuador and Venezuela have, for example, withdrawn from the International Centre for the Settlement of Investment Disputes. Indonesia, Morocco and South Africa have announced their decision to terminate many or all of their International Investment Agreements (IIA). These countries are conducting a comprehensive review of the whole IIA regime, which proves to be very challenging. These challenges are technical in nature, because of the survival clauses which are normally included in investment treaties. They are designed to extend treaty application for a further period of 10 to 20 years after its termination. Both parties can apply these clauses either unilaterally or jointly. Survival clauses allow thus for investment claims to be brought even after the treaty has been terminated. Even in the absence of such clauses, Article 31(3) (a) of the Vienna Convention on the Law of Treaties (VCLT) obliges State Parties to take into account, together with context, "any subsequent agreement between the parties regarding the interpretation of the treaty".

Below are some of the main guarantees that can be found in virtually all investment agreements which provide some form of assurance for investors to invest in host States:

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[9] UNCTAD, World Investment Report "Towards a New Generation of Investment Policies, United Nations, 2012, pp. 147-149.

[10] UNCTAD, Interpretation of IIAs: What States Can Do, United Nations, No. 3, December 2011.

[11] UNCTAD, Interpretation of IIAs: What States Can Do, United Nation No. 3, December 2011.

[12] International Centre for Settlement of Investment Disputes (ICSID; CMS GAS Transmission Company v Republic of Argentina, see 42 ILM p. 788, 2003.

Non-Discriminatory Treatment of Investors. This is a protection against discrimination. Under the principle of non-discriminatory treatment of investors, a State Party to the agreement commits itself to treat foreign investors from the other Party in the same way in which it treats its own investors (national treatment) as well in the same way in which it treats investors from other countries (Most-Favoured Nation treatment (MFN)). These principles ensure a level playing field between foreign investors and local investors or foreign investors from different countries. For example, if a chemical substance were proven to be toxic to health and the State took a decision that it should be prohibited, the state should not impose this prohibition only on foreign companies, while allowing domestic ones to continue to produce and sell that substance — that would amount to discrimination.

Fair and Equitable Treatment (FET), and Full Protection and Security for investors. The obligation to grant foreign investors fair and equitable treatment is one of the key investment protection principles in most international investment agreements. It ensures that investors and investments are protected against treatment by the host State involving arbitrary, unfair, or abusive practices. This principle has given arbitral tribunals significant room for interpretation. It has been argued that the lack of clarity of the fair and equitable principle has fuelled a large number of ISDS claims by investors, some of which have raised concern with regard to the host State's right to regulate. In some cases, this principle is even understood to encompass the legitimate expectations of investors. Full Protection and Security for the investor is an obligation on the host state to protect investments, generally interpreted as covering physical protection for the investor and its investment, but also covering legal protecton as well as, thus somehow overlapping with the Fair and Equitable Treatment.

Protection against expropriation without proper compensation: The legality of a measure of expropriation is at first instance a question for the internal law of the host state. An act of expropriation is generally taken in pursuit of a statutory or other legal authority of the host state. There is a general rule that expropriation is lawful when it is in the public interest. However, it requires adequate and effective compensation. That means the expropriated property must be valued to ascertain the actual economic loss sustained by the property owner and the extent to which the owner is entitled to be compensated for the economic loss suffered[13].

Deficiencies and Challenges of the ISDS mechanism

The ISDS mechanism was designed to depoliticise investment disputes. It aims at creating a forum that would offer investors a fair hearing before an independent, neutral and qualified tribunal. It was seen as a mechanism for rendering final and enforceable decisions through a swift, cheap, and flexible process. However, concerns regarding the current ISDS system include among others things, the issue of transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; questions about the independence and impartiality of arbitrators; and concerns

[13] P.T. Muchlinski, Multinational Enterprise and the Law, Blackwell, Oxford UK, 1995, p.506.

relating to costs and time of arbitral procedures[14]. ISDS provisions also allow for delocalisation of dispute resolution and allow foreign investors to bypass the local court of host states without having to exhaust local remedies.

Most developing countries maintain that investor-state disputes should be resolved through their national courts. This means that foreign investors ought not, in principle, to have the option to pursue investor-state disputes through internationalised methods of dispute settlement. Article 2 (2) of the United Nations Charter on Economic Rights and Duties of States (1974) emphasizes that each state has the right to regulate and exercise authority over foreign investments within their national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No state shall be compelled to grant preferential treatment to foreign investment. It also states that, in case of disputes concerning compensation as a result of nationalisation or expropriation, such disputes should be settled under the domestic law of the nationalising state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of the sovereign equality of states and in accordance with the principle of choice of means (Article 2.2 (a) and (c)[15]. This means that states are given the freedom to use other means to resolve investment disputes. Thus, the Charter certainly cannot be interpreted as prohibiting the use of internationalised measures but merely as not advocating them.

In this regard, the Chilean BIT model[16] offers a way out by stating that investors and the host country should enter into consultations in respect of any dispute, but, if consultations fail, the investor may submit the dispute either: (1) to the competent tribunal of the contracting party in whose territory the investment was made; or (2) to international arbitration (ICSID). Section 13(5) of the Protection of Investment Act (2015) of the Republic of South Africa also stipulates that the government may consent to international arbitration in respect of investments subject to the exhaustion of domestic remedies. Consideration of a request for international arbitration will be subject to the administrative processes and such arbitration will be conducted between the Republic of South Africa and the home State of the applicable investor[17]. Similarly, Model B of the Asian-African Legal Consultative Committee Revised Draft of Model Agreements for Promotion and Protection of Investments (1985) states that "if any dispute or difference should arise between a Contracting Party and a national, company or State entity of the other Contracting Party, which cannot be resolved within period of _______ through negotiations, either party to the dispute may initiate proceedings for conciliation or arbitration after the local remedies have been exhausted"[18].

[14] UNCTAD, Reforming of Investor-State Dispute Settlement: In Search of Roadmap, United Nations, No. 2, 26 June 2013 .

[15] See Ian Brownlie, ed, Basic Documents in International Law, Third Edition, Clarendon Press, Oxford pp. 239-240.

[16] See UNCTAD "Dispute Sttlement: Investor-State", UNCTAD/ITE/IIT/ 30, United Nations, 2003, p.29.

[17] See Government Gazette, Republic of South Africa Act No. 22 of 2015: Protection of Investment Act, 2015, Vol. 606 Cape Town, 15 December 2015, No 39514.

[18] UNCTAD "Dispute Sttlement: Invetsor-State", UNCTAD /ITE/IIT/ 30, Dispute Settlement, United Nations, 2003, p.29.

The Cooperation and Facilitation Investment Agreement (CFIA) of Brazil offers the possibility of dispute prevention as a core element in an effort to facilitate and promote foreign direct investment. "The objective of this Agreement is to promote cooperation between the Parties in order to facilitate and encourage mutual investment, through the establishment of a an institutional framework for the management of an agenda for further investment cooperation and facilitation, as well as through mechanisms for risk mitigation and prevention of disputes, among other instruments mutually agreed on by the parties". The Agreement provides for the creation of joint committees, composed of both parties to an investment treaty, in order to promote investment and prevent disputes. Such a joint committee establishes a high-level venue to prevent investment-related disputes and to share investment opportunities between the two parties. It seeks to resolve any issues or disputes between the parties in an amicable manner. Once this procedure under the dispute prevention has been exhausted, then the Parties may choose, by mutual agreement, to submit the dispute to a permanent arbitration institution for the settlement of the investment dipute[19].

Gabriel Bottini[20] argues that international investment agreements (IIAs) are generally one-way instruments. They are enforced through strong investor-state dispute-resolution mechanisms (ISDS). Thus, IIAs can considerably limit the host country's regulatory powers, without imposing substantive responsibilities on foreign investors. At best, IIAs may make the exercise of certain rights by foreign investors conditional upon compliance with national law through so-called "legality" or "compliance" clauses. IIA provisions, not least those defining protected investments, have allowed a remarkable expansion of potential beneficiaries of rights over the same investment. Several related entities forming a corporate chain may be entitled to bring claims, even for the same loss. And, in addition to the absence of investor obligations in IIAs, these treaties do not make such related entities liable for any illegality committed in relation to an investment except when any of the foreign entities is a party to the investment instruments. As a general matter only the local company may be held liable for illegalities committed in a host country's territory. Further, host countries generally will not be able to use the dispute-resolution mechanism in IIAs against such local companies or indeed even against protected investors. In the case of shareholder claims, investment tribunals consider that shareholders hold a protected investment under IIAs.

Reassessment and Renegotiation of Contracts

The renegotiation and reassessment of international contracts could be seen as a good technique to avoid disputes and to ensure that the relationship between foreign investors and host states remains viable in the face of changes and circumstances that might occur in the host state. The United Nations Code of Conduct on Transnational Corporations stipulates that contracts between governments and transnational corporations should be negotiated and implemented in good faith. In such contracts,

[19] Please see: Investment Policy, policyhub.unctad.org/IIA/Country/CountryBITs/treaty file 14746

[20] Gabriel Bottini, Using Investor-State Dispute Settlement to enforce Investor Obligations, Investment Issues, No 173, May 9, Colombia University, USA.

especially long-term ones, review or renegotiation clauses should normally be included. In the absence of such clauses and where there has been a fundamental change of the circumstances on which the contract or agreement was based, transnational corporations, acting in good faith, should co-operate with governments for the review or renegotiation of such contracts or agreements. Review or renegotiation of such contracts or agreements should be subject to the laws of the host country, relevant national laws and international legal principles[21]. It is my opinion that rule takers who negotiate international investment agreements should insist on including a review and renegotiation clause in their contracts taking into consideration the duration of the investment in their countries.

Conclusion

Many developing countries including African countries have continued signing BITs and also entered into regional trade agreements with investment chapters. However, there are legitimate challenges with regard to regulatory policy reforms and investment guarantees such as the most favoured nation treatment (MFN), the national treatment principle (NT), fair and equitable treatment, umbrella clauses and survival clauses. There are three basic explanations for these challenges: firstly, many developing countries including African countries were not fully aware of the obligations emanating from these agreements (or their interpretation) at the time they signed them, nor the financial implications of violating them; secondly, change of government, political instability, and elements of conflict in the African region have made it impossible for some countries to uphold their obligations to protect investors and investments, hence triggering disputes; and thirdly, provisions in these investment agreements are sometimes worded in such a loose and general manner that they increase the potential liability of the state, opening the door for the filing of investment disputes on almost any account by investors.

Each nation State has the sovereign right to regulate under its domestic law in the interest of public good. Within Africa there are some good regulatory practices, both at national and regional level. The African regional economic communities, for example, have put forward a number of principles to minimise disputes and create a favourable investment atmosphere. This implies, for example, that investments shall not be nationalised or expropriated except for public purposes and subject to the payment of prompt, adequate and effective compensation. Treatment of foreign investments should be fair and equitable treatment, and the most favoured nation-treatment should apply. In the case of a dispute, between a foreign investor and the host state, local remedies should be exhausted first before they are submitted to international arbitration.

Developing countries including African countries will need to consider their policy options to find the right degree of state regulation, which must be based on the public interest and take into account international legal obligations. Host states need to take

[21] Commission on Transitional Corporations, Report on the Special Session (7—18 March and 9—21 May 1983) Official Records of the Economic and Social Council, 1983, New York, United Nations.

into consideration that investors reasonably expect that the circumstances prevailing at the time the investment was made remain unchanged. Foreign investors, on the other hand, need to be aware that the host state has the legitimate right to regulate domestic matters in the public interest.

Increased regional regulation, combined with regionalisation of regulatory bodies and agencies, could assist developing countries in overcoming national limits in sourcing technical expertise and to enhance national capacity to make credible commitments to stable regulatory policy space. This will improve the efficiency of infrastructure industries by allowing them to grow without respecting economically artificial national boundaries, and thus ultimately increase infrastructure investments. The harmonisation of the regulatory framework at the regional level will also minimise investment disputes.