3 Covid-19 related claims

The final nail in the coffin for international investment law?

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Abstract

International investment law has increasingly been criticised over the use thereof by investors to challenge regulations in the public interest. Amid the COVID-19 pandemic, there has also been growing concern that investment arbitration will be used to challenge measures implemented by states to curb the spread of the virus. These concerns have seen growing calls for the dismantling of investor-state dispute settlement or the acceleration of reform efforts. This contribution reflects on the most problematic aspects of contemporary international investment law before critically analysing the effectiveness of various model reform treaties in rebalancing the rights of investors and host states. This chapter ultimately seeks to make suggestions on what investment law should look like in a post-COVID-19 society.

1 Introduction

International investment law is facing an unprecedented legitimacy crisis. Internationally, there has been growing concern over its ability to undermine regulations by the state implemented in the public interest.[1] Investment arbitration has already been used to challenge a range of government measures implemented in the public interest. These include black economic empowerment (BEE) legislation implemented by South Africa,[2] climate change mitigation measures implemented by

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1 Akinkugbe "Africanization and the Reform of International Investment Law" 2021 *Case Western Reserve Journal of International Law* 7 8.

2 *Piero Foresti v Republic of South Africa*, ICSID Case no. ARB (AF)/07/1.

the Netherlands and Canada,[3] the polluter-pays principle in Ecuador and Nigeria[4] as well as the minimum wage implemented by Egypt.[5] Investors' high success rate in disputes decided on the merits,[6] and substantial inconsistency in the interpretation of the legal principles underlying international investment law by tribunals have only added fuel to the fire.[7] These concerns have resulted in a series of reforms led by the United Nations Conference on Trade and Development (UNCTAD) and a significant multinational reform effort through the United Nations Commission on International Trade Law (UNCITRAL) Working Group III.

However, civil society has increasingly shifted from calling for reform to calling for a complete dismantling of investment arbitration.[8] These calls have been growing louder as investors threaten states with investment disputes over COVID-19 related restrictions.[9] There is also growing concern that even if a COVID-19 vaccine intellectual property (IP) waiver is obtained under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, pharmaceutical companies could still claim in investment law. These concerns arise because investment tribunals have already asserted jurisdiction over patents, as seen

3 *Westmoreland Mining Holdings LLC v Government of Canada*, ICSID Case no. UNCT/20/3, Notice of Arbitration and Statement of Claim, 12 August 2019 par 30; RWE AG and *RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case no. ARB/21/4); *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v Kingdom of the Netherlands*, ICSID Case no. ARB/21/22.

4 *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v Republic of Ecuador I*, PCA Case no. 2007-02/AA277; *Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited v Federal Republic of Nigeria*, ICSID Case no. ARB/21/7.

5 *Veolia Propreté v Arab Republic of Egypt*, ICSID Case no. ARB/12/15.

6 UNCTAD Review of ISDS Decisions in 2019: Selected IIA Reform Issues (2021) 3 at https://unctad.org/system/files/official-document/diaepcbinf2021d1_en.pdf (accessed 25 January 2022).

7 Forere "New developments in international investment law: A need for a multilateral investment treaty?" 2018 *PELJ* 1 18.

8 A group of civil society organisations had, for example, launched a petition for the termination of the Energy Charter Treaty. This petition garnered 1 million signatures within two weeks.

9 The case of *ADP International S.A. and Vinci Airports S.A.S. v Republic of Chile*, ICSID Case no. ARB/21/40 is the first investment law claim arising from COVID-19 related measures to be registered. Several other notices of arbitration have also been served on states and could see further proceedings being brought.

from the case of *Eli Lilly* and Company *v The Government of Canada*.[10] A TRIPS waiver may not automatically exclude states' liability under international investment law.

Serious concerns over investment disputes concerning COVID-19 restrictions also led the African Union (AU) to adopt the AU Declaration on the Risks of Investor-State Arbitration Relating to COVID-19 Measures. The declaration aims to raise awareness among African governments on the risk of investment disputes and encourages states to explore all available options under international law to mitigate the risks of such claims.[11] Importantly, it reflects the need to ensure that public budgets are directed towards responding to the pandemic and not towards expensive investor disputes.[12] This heightened awareness may accelerate efforts at reforming international investment law or see an ever greater number of countries withdrawing from investment law treaties.

This contribution aims to analyse some of the core reforms needed in international investment law to ensure that it does not undermine human rights, labour standards and urgently needed climate action in a post-COVID-19 society. It does so by analysing the key challenges presented by international investment law and the interplay between these challenges and COVID-19. It then critically analyses the current reform efforts and comments on the slow pace of reform and weak language used in many so-called reformed treaties.

2 The problematic existing international investment law framework

The inconsistent interpretation of the standards relating to indirect expropriations has been a key contributor to the concern of states over investment law claims arising from measures implemented to curb the spread of COVID-19. An indirect expropriation may occur where a regulatory intervention by a state results in a decreased value in an

10 *Eli Lilly and Company v Government of Canada*, ICSID Case no. UNCT/14/2, Final Award, 16 March 2017; Lentner "Litigating patents in investment arbitration: *Eli Lilly v Canada*" 2017 *Journal of Intellectual Property Law & Practice* 815 816.

11 par 12(i) of the AU Declaration on the Risks of Investor-State Arbitration Relating to COVID-19 Measures.

12 par 9 of the AU Declaration on the Risks of Investor-State Arbitration Relating to COVID-19 Measures.

investment.[13] The extent to which COVID-19 related measures would amount to an indirect expropriation will at least partially turn on which of the two competing doctrines—the sole effects doctrine or the police powers doctrine—the tribunal applies. The sole effects doctrine is a school of thought in investment tribunals that assesses indirect expropriation solely with reference to the effect that a measure has on the investor.[14] In terms of this doctrine, the state's reason for implementing the measure is entirely irrelevant.[15] The police powers doctrine, in contrast, holds that *bona fide* general regulations, which fall within the state's police powers, can exclude a state's liability to compensate a foreign investor.[16]

If the sole effects doctrine was applied to a claim for indirect expropriation, the question would accordingly be whether the measures have resulted in a permanent or near total deprivation of the investor's investment. Notably, some tribunals have held that a permanent deprivation does not require the laws or regulations to be in place for an extended period of time, but rather that it is their effect on the investor that should be permanent.[17] This means that even legislation with a short lifespan can amount to an indirect expropriation if its adverse consequences endure for the investor after its repeal,[18] such as instances where the business became insolvent when the regulations restricted its activities. Therefore, the temporary nature of COVID-19 restrictions does not mean that these measures cannot amount to indirect expropriation. This approach makes it particularly difficult for states to know beforehand which regulations will amount to a compensable indirect expropriation as it ultimately

13 Shirlow "Deference and indirect expropriation analysis in international investment law: observations on current approaches and frameworks for future analysis" 2014 29(3) *ICSID Review: Foreign Investment Law Journal* 595 595.

14 Malakotipour "The chilling effect of indirect expropriation clauses on host states' public policies: A call for a legislative response" 2020 *International Community Law Review* 235 239.

15 Mostafa "The sole effects doctrine, police powers and indirect expropriation under international law" 2008 *Australian International Law Journal* 267 268.

16 Ranjan "Police powers, indirect expropriation in international investment law and article 31(3)(c) of the VCLT: a critique of Philip Morris v. Uruguay" 2018 9(1) *Asian Journal of International Law* 1 17.

17 *Inmaris Perestroika Sailing Maritime Services GmbH v Ukraine*, Excerpts of Award, March 1 2012 par 300.

18 the *Inmaris* case (n 17) par 300.

depends on the impact of the regulations on any one of many investors operating within its territory.

If the police powers doctrine was to be applied to a claim for indirect expropriation, public health measures may not require the state to compensate the investor provided that due process was followed in adopting the regulations. However, the police powers doctrine has also been applied inconsistently. In *Methanex Corporation v United States of America*,[19] for example, the tribunal adopted one of the broadest formulations of the police powers doctrine to date. It held that—

> "... as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."[20]

The *Methanex* approach is, therefore, directly opposite to the sole effects doctrine. Compensation is not due where investors suffer harm as a result of non-discriminatory regulations that are enacted in the public interest and which have followed due process.[21] The state only needs to pay compensation where it has given a specific undertaking to refrain from passing such regulations.[22] Nevertheless, the *Methanex* approach has rarely been followed by other tribunals.[23] Several tribunals have indicated that allowing an absolute exception to the rules in respect of indirect expropriation for regulations that are adopted in the public interest would "create a gaping hole in international protection against expropriation".[24] These tribunals generally hold that where

19 *Methanex Corporation v United States of America*, UNCITRAL, Final Award, 3 August 2005.
20 the *Methanex* case (n 19) Part D (IV).
21 Ranjan (n 16) 17.
22 Ranjan (n 16) 17.
23 Ranjan and Anand "Determination of indirect expropriation and doctrine of police power in international investment law: a critical appraisal" in Choukroune (ed) *Judging the State in International Trade and Investment Law* (2016) 142–145.
24 *Pope and Talbot v Canada*, Ad hoc Tribunal (UNCITRAL), Interim Award, 26 June 2000 par 99; *Azurix Corporation v The Argentine Republic*, ICSID Case no ARB/01/12, Award, 23 June 2006 par 310; *Compania de Aguas del*

general regulations are unreasonable, arbitrary, discriminatory, disproportionate or otherwise unfair, they would still amount to an indirect expropriation if they result in a neutralisation of the foreign investor's property rights.[25]

The substantial uncertainty over which measures amount to a compensable indirect expropriation is but one of the problem areas of investment law. Tribunals have also interpreted other standards of treatment, such as the fair and equitable treatment (FET) standard, inconsistently. Zhu argues that some of this inconsistency has come about due to varying approaches being taken in the formulation of FET clauses in bilateral investment treaties (BITs).[26] FET clauses that are not explicitly linked to the international minimum standard of treatment,[27] have been interpreted as far-reaching self-standing obligations. By contrast, FET clauses that are restricted to the international minimum standard of treatment usually do not include protection of an investor's legitimate expectations.[28]

Where FET clauses are not linked to the minimum standard of treatment and are interpreted as a self-standing obligation

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Aconquija SA and Vivendi Universal v Argentine Republic, ICSID Case no ARB/97/3, Award, 20 August 2007 par 7.5.21.

25 *El Paso Energy International Company v Argentine Republic*, ICSID Case no. ARB/03/15, Award, 31 October 2011 par 241.

26 Zhu "Fair and equitable treatment of foreign investors in an era of sustainable development" 2018 58(2) *Natural Resources Journal* 319 321.

27 The most authoritative statement on the content of the international minimum standard was set out in the *Neer Claim (United States v Mexico)* (1926) 4 R.I.A.A. 60, wherein the tribunal held that a state's treatment of foreign nationals will only be internationally wrongful if its conduct amounts "to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency". The breach of the international minimum standard of treatment is accordingly subject to a high threshold where only particularly egregious acts by the state could result in a breach. There has been some debate as to whether the standard has evolved since the *Neer Claim* but this debate ultimately falls outside of the scope of this contribution. Suffice it to say that most commentators agree that what is considered "egregious" or "outrageous" would have evolved since the *Neer Claim*.

28 However, as some authors correctly note, certain tribunals who suggest that the minimum standard of treatment has evolved substantially since the *Neer Claim* do include legitimate expectations as part of the minimum standard of treatment. See in this respect Mach "Legitimate expectations as part of the FET standard: An overview of a doctrine shaped by arbitral awards in investor-state claims" 2018 *ELTE Law Journal* 105 112.

which includes the protection of investors' legitimate expectations, tribunals have relied heavily on the purpose of BITs in guiding their interpretation of the FET standard. Zhu notes that some tribunal's focus on a BIT's objective of investment protection has resulted in "a one-sided interpretation of the FET and over-protection of foreign investors".[29] She argues that the approach formulated in the *Tecmed* case, sets a very low threshold for a breach of the FET standard. This is because as in the *Tecmed* case and in a line of cases that follow its approach, any frustration of investors' legitimate expectations will amount to a breach of the FET standard.[30]

The overly broad interpretation of standards of treatment and the substantial limitations this poses for the right of states to regulate has seen the UNCTAD increasingly encouraging states to reform their existing BITs. The UNCTAD has recommended that states pay special attention to eight key provisions when reforming their treaties. These provisions are: (i) the definition of an investment; (ii) the definition of an investor; (iii) national treatment (NT); (iv) most-favoured-nation (MFN) treatment; (v) FET; (vi) full protection and security (FPS); (vii) indirect expropriation; and (viii) public policy exceptions.[31] The UN Working Group on the issue of human rights and transnational corporations has also recommended that states should "[t]erminate or reform urgently all existing international investment agreements in line with the recommendations made by UNCTAD and in the present report".[32] Certain reformed treaties have already been adopted in line with the UNCTAD recommendations and are considered in the following section.

3 Reforms to second-generation investment treaties

States from the global south, and African states in particular, have been leaders in the reform of investment treaties.[33] These reformed treaties, which aim to preserve the states right to regulate and promote

29 Zhu (n 26) 324.

30 *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, ICSID Case no. ARB (AF)/00/2, Award, 29 May 2003; Zhu (n 26) 328–330.

31 UNCTAD International Investment Agreement Reform Accelerator (2020) 4 at https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf (25-01-2022).

32 United Nations High Commissioner for Human Rights 'Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' available online https://www.ohchr.org/EN/Issues/Business/Pages/IIAs.aspx (25-01-2022).

33 Akingkugbe (n 1) 9.

sustainable development, are second-generation treaties.[34] These treaties usually contain provisions on the state's right to regulate environmental and labour matters.[35] They also use more restrictive definitions of an investor and include provisions that excludes measures taken pursuant to the TRIPS agreement. These agreements also require investors to exhaust local remedies, restrict the most-favoured nation (MFN) clause to measures taken, and define indirect expropriation more narrowly or exclude it from the treaty altogether. However, there exists substantial variation in reform efforts within different treaties.

The Morocco-Nigeria BIT is often presented as an excellent model for reforming investment treaties.[36] The treaty certainly contains several important reforms, including the recognition that investments must contribute to sustainable development.[37] The definition of an "investment" has also been clarified to exclude portfolio investments and sovereign debt.[38] However, the term "investor" remains relatively broad by including all entities incorporated in a member state.[39] This definition does not accordingly address concerns over treaty shopping adequately. The definition of an investor also covers entities that are not incorporated in the treaty counterparty, but which is directly or indirectly controlled by a natural person from the treaty counterparty.[40] The BIT clarifies that an entity would be controlled directly by an investor if "he owns more than 50% of the share capital of the entity and 'controlled indirectly' by an investor means that the [i]nvestor has the power to appoint the majority of directors of the corporation or legally supervise its activities."[41] The denial of a benefits clause serves to address some of these concerns by permitting the state to deny treaty benefits to an investor who has no substantial business interests in the territory of the treaty counterparty.[42]

The treaty is also unique in how it has clarified the scope of the MFN clause. When addressing the reform of investment treaties, MFN

34 Akingkugbe (n 1) 9.
35 Akingkugbe (n 1) 9.
36 Nwankwo "Balancing international investment law and climate change in Africa: assessing vertical and horizontal norms" 2020 *Manchester Journal of International Economic Law* 48 61.
37 a 1(3) of the Morocco-Nigeria BIT.
38 Ibid.
39 a 1(2) of the Morocco-Nigeria BIT.
40 Ibid.
41 Footnote 1 of the Morocco-Nigeria BIT.
42 a 22(2) of the Morocco-Nigeria BIT.

clauses are often neglected by states.[43] Ashgarian has warned that neglecting the MFN clause when negotiating reforms could undermine the very essence of the reform efforts by allowing investors to rely on more favourable treatment contained in another treaty which does not include these carve-outs.[44] The Morocco-Nigeria BIT restricts MFN treatment to investors in "like circumstances".[45] The inclusion of the limitation providing that MFN treatment only applies to investors in like circumstances is not in itself unique or unusual. A similar clause was interpreted by the tribunal in the case of *İçkale İnşaat Limited Şirketi v Turkmenistan*,[46] as requiring a fact-based comparison between the claimant investor and another similarly situated investor to determine if the latter had been accorded more favourable treatment.[47]

However, the tribunal in *Guris Construction and Engineering Inc. and others v Arab Republic of Syria*,[48] rejected this approach and holds that such provisions require no more than the proper application of the *eiusdem generis* principle.[49] In terms of the latter approach, one only needs to determine if the area to which the MFN principle applies is broad enough to include the specific type of treatment on which the claimant seeks to rely.[50] The Morocco-Nigeria BIT clarifies that:

> "...references to 'like circumstances' in paragraph 2 requires an overall examination on a case-by-case basis of all the circumstances of an investment including, but not limited to:
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> a) its effects on third person and the local community;
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> b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
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> c) the sector in which the investor is in;
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> d) the aim of the measure concerned;
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> f) the regulatory process generally applied in relation to the measure concerned; the examination referred to in this

43 Ashgarian "The relationship between international investment arbitration and environmental protection: charting the inherent shortcomings" 2020 27(2) *Eastern and Central European Journal on Environmental Law* 5 39.
44 Ashgarian (n 43) 39.
45 a 6(2) of the Morocco-Nigeria BIT.
46 ICSID Case no ARB/10/24, Award, 8 March 2016.
47 the *İçkale* case (n 46) par 329.
48 ICC Case no. 21845/ZF/AYZ, Final Award, 31 August 2020.
49 the *Guris* case (n 48) par 255.
50 the *Guris* case (n 48) par 255.

> paragraph shall not be limited to or be biased toward anyone factor."[51]

However, the clarification of like circumstances technically applies to national treatment and not MFN treatment. The provision on MFN is contained in Article 6(4) of the agreement which does not similarly clarify the meaning of "like circumstances".

Furthermore, the MFN provisions in the war clause does not seem to be reformed at all. Zrilic notes that the term "war clause" is a misnomer as these clauses generally cover an entire range of events beyond a war.[52] These clauses frequently make provision for events such as insurrections, revolutions, riots and civil disturbances, i.e. events that fall well below the threshold of war.[53] Therefore, the term "war clause" should not be interpreted as confining the scope of this clause to the occurrence of war. It is generally accepted that there are two different types of war clauses, a conventional non-discrimination clause and an extended war clause. Conventional war clauses are the most commonly occurring war clauses in BITs. They merely provide for equality in treatment where compensation is paid for any losses arising during an armed conflict.[54] Extended war clauses appear less frequently in BITs and provide investors with a right to receive compensation for losses resulting from an armed conflict if certain conditions are met.[55]

The Morocco-Nigeria BIT contains both a classical non-discrimination war clause as well as an extended war clause.[56] The non-discrimination war clause provides that:

> "Investors of one Party whose investments in the territory of the other Party suffer losses due to war, armed conflict, revolution, state of national emergency, insurrection, civil disturbances or other similar events, shall be accorded by the latter Party treatment, as regards restitution, indemnification,

51 a 6(3) of the Morocco-Nigeria BIT.
52 Zrilic The Protection of Foreign Investment in Times of Armed Conflict (2019) 106.
53 Zrilic (n 52) 106.
54 Ryk-Lakham "The genealogy of extended war clauses: requisition and destruction of property in armed conflicts" in Ackermann & Wuschka *Investments in Conflict Zones The Role of International Investment Law in Armed Conflicts, Disputed Territories, and 'Frozen' Conflicts* (2021) 54.
55 Ryk-Lakham (n 54) 54.
56 a 9 of the Morocco-Nigeria BIT.

> compensation or other settlement, no less favourable treatment than that which the latter Party accords to its own investors or to investors of a third State."[57]

This clause uses the broad term of "treatment" and does not subject it to "measures taken". In terms of existing investment law jurisprudence, clauses using the broader term of treatment without subjecting it to measures taken, would include all treatment legally owed to the investors of any third state.[58] This would include compensation to which nationals from a third country are legally entitled to under a strict liability war clause.[59] The Italy-Nigeria BIT contains such an unqualified extended war clause,[60] and could be imported into the Morocco-Nigeria BIT by Moroccan investors who suffer losses as a result of a listed event. Nigeria's failure to pay attention to the wording of the war clause could mean that the carefully negotiated balance sought in the treaty can be disrupted by importing strict liability from another treaty.

The formulation of the environmental provisions in the treaty are also weak. The BIT provides that it must not be interpreted "to prevent a [p]arty from adopting maintaining, or enforcing, in a non-discriminatory manner, any measure otherwise consistent with this [a]greement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental and social concerns."[61]

The state's right to adopt environmental regulations is subject to a significant provision that it must be "otherwise consistent" with the investment treaty. A virtually identical provision was interpreted by the tribunal in *Aven v Republic of Costa Rica*,[62] who held that such provisions affords the state a margin of appreciation and gives "preference to the standards of environmental protection that were stated to be of interest to the Treaty Parties at the time it was signed".[63] However, it does not constitute an exception to the investment protection provisions in the treaty and still limits the way "a [p]arty may implement and enforce its own environmental laws".[64] The tribunal also emphasises that such

57 a 9(1) of the Morocco-Nigeria BIT.
58 the *Guris* case (n 48) par 255.
59 the *Guris* case (n 48) par 255.
60 a 4 of the Italy-Nigeria BIT.
61 a 13(4) of the Morocco-Nigeria BIT.
62 ICSID Case no. UNCT/15/3, Final Award, 18 September 2018.
63 the *Aven* case (n 62) par 412.
64 the *Aven* case (n 62) par 413.

provisions "do not -in and of themselves" create any obligations for investors.[65]

Investors' obligations are particularly important from the perspective of potential state counterclaims. It has been argued that counterclaims can serve as an important tool for host states in counterbalancing "the procedural privilege of investors in investment arbitration".[66] Commentators advancing such arguments have urged international tribunals to permit counterclaims to ensure the accountability of multinational corporations at an international level.[67] Bose has argued that the cases of *Aven v Costa Rica and Urbasser v Argentina*[68] make it apparent that a failure to impose specific obligations on an investor within the investment agreement itself does not mean that an investor does not have obligations under international law.[69] Where investors breach these obligations, a state may validly bring a counterclaim against the investor for any harm suffered.[70]

However, the tribunal in *Aven* displayed a clear preference for the obligations to arise from the treaty itself.[71] The tribunal in *Sunlodges Ltd (BVI) v United Republic of Tanzania*,[72] additionally holds that "just as an investor may only bring claims arising under the [t]reaty, the respondent State may only bring counterclaims arising under the [t]reaty."[73] The lack of clear environmental obligations imposed on the investor in the Morocco-Nigeria BIT could accordingly pose a significant barrier to a successful counterclaim against an investor for any environmental harm caused by the investor. From this perspective, the provision in the agreement imposing specific labour obligations on the investor should be welcomed.[74]

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65 the *Aven* case (n 62) par 413.
66 Shao "Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law" 2021(24) *Journal of International Economic Law* 157 158.
67 Shao (n 66) 159.
68 *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case no. ARB/07/26, Award, 8 December 2016.
69 Bose "David R Aven v Costa Rica: The Confluence of Corporations, Public International Law and International Investment Law" 2020(35) *ICSID Review* 20 28.
70 Bose (n 69) 28.
71 the *Aven* case (n 62) par 743.
72 PCA Case no. 2018-09, Award, 20 December 2019.
73 the *Sunlodges* case (n 72) par 521.
74 a 18(3) of the Morocco-Nigeria BIT.

However, the labour obligations imposed on the investor in the treaty itself is limited to the "core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998."[75] The core labour standards recognises the rights to: "freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation".[76] These rights, although necessary, represent only a fraction of the obligations contained in the corpus of international labour standards. Additionally, a state can only succeed on a counterclaim if it can quantify its claim. This may present challenges in as far as the core labour standards are concerned, how does one after all quantify a claim against an investor over its use of child labour? The other labour provisions in the agreement also only imposes obligations on the state and merely recognises that the state has an obligation to enforce its labour laws and should not lower labour standards in order to attract investments.[77]

4 The Pan African Investment Code as a model for future reforms

The AU adopted the Pan African Investment Code (PAIC) in 2016. It is not a binding treaty but serves to guide member states in their investment policy and may also guide negotiations for the investment protocol in terms of the African Continental Free Trade Agreement (AfCFTA).[78] The code has been praised for its innovative provisions to balance investors' rights and the host state's right to regulate in the public interest.[79] The code adopts an approach that is similar to the Morocco-Nigeria BIT in defining an investment. Like the Morocco-Nigeria BIT, it specifically excludes sovereign debt and portfolio investments from its scope of protection.[80] It also requires an enterprise to have substantial business activities in the treaty counterparty's territory to qualify as a national of that state.[81] This provision more effectively prevents incidences of

75 See n 74.
76 Koen & Rammila "The EU-Korea Panel Peport: a watershed moment for the trade-labor nexus or mere symbolic victory?" 2021 *Journal of International Trade, Logistics and Law* 53 54.
77 a 15 of the Morocco-Nigeria BIT.
78 Nkwankwo (n 36) 54.
79 Nkwankwo (n 36) 54.
80 a 4(4) of the PAIC.
81 a 4(1) of the PAIC.

treaty shopping, where shell companies are incorporated in a specific jurisdiction with the sole intention of obtaining treaty protection.[82]

The code's definition of "like circumstances" is virtually identical to that contained in the Morocco-Nigeria BIT.[83] However, unlike the Morocco-Nigeria BIT this definition of "like circumstances" applies to the MFN clause and is not restricted to the national treatment clause. This should avoid any confusion as to the meaning of "like circumstances" and makes it clear that the inclusion of the term does not merely entail the application of the *eiusdem generis* principle as suggested in the *Guris* case.[84] The MFN clause also makes it clear that the term "treatment" does not generally include substantive provisions contained in other treaties.[85] This provision is particularly important in light of the concerns raised by Ashgarian,[86] and reduces the risk of the MFN clause being used to subvert the carefully negotiated balance of rights contained in the reformed treaty.

The concern raised in this contribution concerning the war clause in the Morocco-Nigeria BIT is also addressed adequately by the code.[87] The war clause only offers MFN treatment in relation to measures taken by the state to compensate the investor for losses arising from a listed event. Where a clause is subject to "measures taken", the investor would only be entitled to compensation where the state provides another investor with compensation.[88] The mere existence of a legal right to demand compensation by any other investor does not amount to a measure taken even though it constitutes treatment.[89]

The expropriation clause also represents a codification of the police powers doctrine. The code provides that "(a) non-discriminatory measure of a Member State that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute an indirect expropriation under this [c]ode."[90] The police powers doctrine as codified here accords with the broad understanding of the police powers doctrine formulated in the *Methanex* case.[91] This clause

82 Baumgartner Treaty Shopping in International Investment Law (2017) 10.
83 a 7(3) of the PAIC.
84 the *Guris* case (n 48) par 255.
85 a 7(4) of the PAIC.
86 See paragraph 3 above in respect of the concerns raised by Ashgarian.
87 a 13 of the PAIC.
88 the *Guris* case (n 48) par 244.
89 the *Guris* case (n 48) par 244.
90 a 11(3) of the PAIC.
91 *Methanex* case (n 19) Part D (IV).

then further clarifies that the revocation or restriction of intellectual property rights would not constitute an expropriation provided that the measures are consistent with the TRIPS agreement and any other relevant conventions on intellectual property rights.[92] This provision represents an important recognition of the clear balance required between intellectual property rights and public health. While this need for balance has long been recognised within the field of international intellectual property law in the aftermath of the Doha declaration,[93] it has, thus, far been absent from the field of investment law. The UNCTAD has noted that in the midst of the COVID-19 pandemic, there has been a marked increase in the number of new treaties containing references to the need to balance investors' rights and public health.[94] In 2020, almost 90% of newly concluded investment treaties contained such references to public health.[95]

From the perspective of counterclaims, the PAIC also contains several innovations. Firstly, while the state's right to bring a counterclaim in investment law is generally implied, the PAIC explicitly sets out this right.[96] In accordance with this clause, a tribunal must consider the effect of an investors failure to comply "with its obligations under this [c]ode or other relevant rules and principles of domestic and international law" on the merits of the claim or on any damages awarded.[97] While this first section is included under the "Counterclaims by Member States" section, it more accurately represents a codification of the doctrine of contributory fault in international investment law.[98] This is because the clause is principally concerned with "mitigating or off-setting effects" and not really an avenue for the state to obtain compensation. The section that follows represents a more traditional understanding of a counterclaim and provides that "(a) Member State may initiate a counterclaim against the investor before any competent body dealing with a dispute under

92 a 11(4) of the PAIC.
93 Bradford-Kerry & Lee "TRIPS, the Doha declaration and paragraph 6 decision: what are the remaining steps for protecting access to medicines?" 2007 *Globalization and Health* 1 2.
94 UNCTAD Recent Developments In The IIA Regime: Accelerating IIA Reform (2021) 8.
95 UNCTAD Recent Developments (n 94) 8.
96 a 43 of the PAIC.
97 a. 43(1) of the PAIC.
98 See *Yukos Universal Limited (Isle of Man) v Russia* PCA Case no. 2005-04/AA227 Final Award (18 July 2014) par 1637 in respect of a discussion of contributory fault in international investment law.

this [c]ode for damages or other relief resulting from an alleged breach of the [c]ode."[99]

In contrast to paragraph 1, this section does not, per se, include breaches of domestic law and instead restricts the right to bring a counterclaim to damages arising from a breach of the code. In this way, the code codifies the interpretation by tribunals such as that in the *Sunlodges* case.[100] The effect thereof is that an investor's breach of domestic law may be relevant to determining an investor's contributory fault but would only be relevant to a counterclaim if the breach of domestic law also amounts to a breach of the code. Therefore, the extent to which the code imposes substantive obligations on the investor is no less important than in the context of an implied right to bring a counterclaim.

To this end, the code imposes several substantive obligations on the investor. The code provides that "(i)nvestors shall comply with international conventions and existing labor (sic) policies and, in particular, not use child labor (sic) and shall support efforts for the elimination of all sort of child labor (sic), including forced or compulsory labor (sic) within Member States."[101] This provision departs from the Morocco-Nigeria BIT in that it imposes substantive labour obligations on the investor beyond the core labour standards. However, the broad usage of "international conventions" can also create some ambiguity as it is not clear if this refers to those conventions to which the host state is a party or the entire range of ILO Conventions. If the latter, the treaty may create an unusual situation where the investor is not bound by the labour standards in question as a matter of domestic law but is nevertheless bound thereby at the international level. Applying the *eiusdem generis* principle may also lead to a more restrictive reading of the clause considering the generality of the clause followed by a specific emphasis on child labour and forced labour.[102]

The code also imposes a general obligation on investors to protect the environment and take appropriate remedial measures where their activities harm the environment.[103] This obligation to implement remedial measures could well be the basis for a counterclaim when

99 a 43(2) of the PAIC.
100 the *Sunlodges* case (n 72) par 521.
101 a 34(3) of the PAIC.
102 It is by now axiomatic that the *eiusdem generis* is applicable in investment law as seen from cases such as *Gas Natural SDG, S.A. v Argentine Republic*, ICSID Case no. ARB/03/10, decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005 par 46.
103 a 37(3) of the PAIC.

the investor has damaged the environment. The wording of the clause is also capable of being interpreted in line with the polluter pays principle i.e. the obligation to take remedial measures arises whenever the investor's activities cause harm to the environment irrespective of whether the investor was negligent. The code also requires investors to perform an environmental impact assessment before starting with its activities.[104] Where investors fail to conduct an environmental impact assessment, their investment will not enjoy protection in terms of the code.[105]

The code also contains several clauses relating to transparency and eliminating bribery and corruption. The code bars investors from influencing the appointment of specific public officials and prohibits the funding of political parties by investors.[106] The code also restricts an investor's ability to give government officials and their relatives gifts or any "undue pecuniary" advantage.[107] The restriction on the funding of political parties is somewhat unique to the code while the remainder of the provisions represent a partial codification of certain restrictions on bribery that have been developed in international investment law as a matter of transnational public policy.[108] Regrettably, the code leaves some of the most controversial issues surrounding corruption in investment arbitration unanswered. In particular, there is no accepted approach in investment arbitration concerning the burden of proof surrounding allegations of corruption while the code adds nothing to clarify the position.[109]

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104 a 37(4) of the PAIC.

105 *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*, ICSID Case no. ARB/15/29, Award, 22 October 2018 par 154–155.

106 a 20(2) of the PAIC.

107 a 21(1) of the PAIC.

108 See *World Duty Free Company Limited v Republic of Kenya*, ICSID Case no. ARB/00/07, Award, 4 October 2006 par 141–144 in respect of the development of a prohibition of bribery and influence peddling as a matter of transnational public policy.

109 For example, in *Metal-Tech Ltd. v Republic of Uzbekistan*, ICSID Case no. ARB/10/3, Award, 4 October 2013 the tribunal held that is sufficient for the state to establish a prima facie case of corruption whereafter the burden shifts to the investor to rebut the presumption of illicit activities. In contrast, the tribunal in *Lao Holdings N.V. v Lao People's Democratic Republic I*, ICSID Case no. ARB(AF)/12/6, Award, 6 August 2019 par 109-110 held that "An assessment must therefore be made of which elements of the alleged act of corruption have been established by clear and convincing evidence, and which elements are left to reasonable inference, and on the whole whether the alleged act of corruption is established

5 Conclusion

From this chapter, it has become apparent that the pandemic has already accelerated reform in some areas of international investment law. As noted in this contribution, approximately 90% of newly concluded investment agreements now explicitly reference the need to balance investors' rights and public health. However, so far, there has also not been a mass exodus from the system of investor-state dispute settlement, making predictions of its demise premature. Nevertheless, the increased carve-outs for protection of public health, labour standards and the environment is likely to continue in treaties concluded post-pandemic.

This chapter has also reflected on two innovative African models to be used to reform international investment law. The Morocco-Nigeria BIT has certain flaws that are more appropriately addressed in the PAIC. States relying on the Morocco-Nigeria BIT as a model for their own reformed treaties should pay particular attention to these weaker provisions to avoid repeating the same mistakes. Defining "like circumstances" in relation to national treatment but not in relation to MFN treatment is particularly problematic. This could well perpetuate the practice whereby tribunals find a breach of non-discrimination provisions even in the absence of a comparator.

Nevertheless, states guided by the PAIC also need to pay particular attention to some of the more ambiguous provisions. This is particularly true concerning those provisions where the code imposes obligations on investors to comply with "international conventions". States also need to determine the extent to which breaches of domestic law should be justiciable as part of any counterclaims. This may be particularly valuable in relation to environmental counterclaims, albeit that the general duty to protect the environment contained in the code partially addresses these concerns.

to a standard higher than the balance of probabilities but less than the criminal standard of beyond reasonable doubt."