Report

INVESTMENT PROTECTION TREATY PORTFOLIO REVIEW

Beneficiary: Eswatini Investment Promotion Authority

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EXECUTIVE SUMMARY

This Report examines Eswatini's current investment treaty framework. It analyses the key investment protection obligations under Eswatini's international investment agreements (**'IIAs'**), and compares them to the equivalent provisions of the AfCFTA Investment Protocol (**'AIP'**). The Report examines bilateral investment treaties (**'BITs'**) and other treaties with investment provisions (**'TIPs'**) in force for Eswatini as of the time of writing.

The Report covers: the scope of protected investments and investors, core substantive standards of investment protection (notably Fair and Equitable Treatment (**'FET'**), Full Protection and Security (**'FPS'**), National Treatment (**'NT'**), Most-Favoured Nation (**'MFN'**) treatment, Expropriation, Transfer of Funds, Umbrella Clauses), general exceptions, investors' obligations, and termination provisions.

The Report's conclusions are summarised below by topic.

Scope of Protection

Eswatini's IIAs in force use broad, asset-based definitions of 'investment' and similarly broad definitions of 'investor'. Essentially, any form of economic asset or interest owned by foreign nationals of a Contracting State can qualify as an 'investment' under Eswatini's IIAs making the owner of it an 'investor'. Such definitions present a higher risk of investor claims. In contrast, the AIP adopts a narrower enterprise-based definition of investment that only protects assets attached to an active enterprise with substantial business activities in the host State. The definition of investor is similarly narrow. The AIP further polices the scope of Eswatini's investment protection obligations through a wide denial of benefits clause to prevent treaty abuse. The AIP excludes government actions in the areas of taxation, sovereign debt, and state subsidies from being subject to investment protection obligations (scope carve-outs).

Fair and Equitable Treatment

The FET standard has become the most frequently litigated (and thus most important) investment protection standard in IIAs. Eswatini's IIAs in force contain vaguely drafted and unqualified FET provisions that risk broad and inconsistent interpretations. Tribunals have construed such FET provisions widely to encompass investors' legitimate expectations, good faith, transparency, and regulatory stability.

This can hold the State to unrealistic standards of governance that few (if any) States are able to meet, thereby increasing the risk of liability. Among Eswatini's IIAs in force, only the Kuwait-Eswatini BIT qualifies its FET clause by referring to 'recognized principles of International Law'. While this arguably restricts the FET standard under that BIT to less generous protections under general principles of law, or even customary international law, arbitral practice is mixed and suggests that such qualifications may not be effective in preventing expansive interpretations.

The AIP takes a novel approach by explicitly defining the minimum standard of treatment (**'MST'**) under customary international law (**'CIL'**) rather than adopting a general FET clause. Article 17 AIP provides a closed list of specific duties that Contracting Parties commit to: namely, protections against denial of justice, manifest arbitrariness, and serious procedural and due process violations. The provision also limits this protection to the judicial and administrative treatment of foreign investors, as opposed to covering all government action that may affect a foreign investor. While the reference to the MST under CIL could still afford tribunals some interpretive flexibility, the language used in Article 17 AIP is more likely to limit overall the scope of interpretations reached by an arbitral tribunal (and consequently limit an over-expansive scope of FET protection).

Full Protection and Security

FPS obligations generally require host States to protect investors and investments from physical harm. However, the FPS provisions in Eswatini's IIAs in force are broad and ambiguous, and risk expansive interpretations that may include obligations of 'legal protection'. The Kuwait-Eswatini BIT is an exception as it qualifies FPS by referring to principles of international law. Such reference can limit the obligation to ensuring the physical protection and security of investments or investors.

In contrast, the FPS provision in the AIP explicitly restricts FPS to *physical* protection. Moreover, it conditions a host State's obligation on its 'capabilities', thus arguably introducing a resource-based limitation on liability. This approach offers greater clarity and potentially less onerous obligations for host States compared to Eswatini's existing IIAs.

National Treatment / Most-Favoured Nation Treatment

Non-discrimination obligations, comprising NT and MFN standards, require the host State to treat a foreign investor as favourably as it treats its own nationals or nationals of other States. The non-discrimination obligations in Eswatini's IIAs in force are broadly similar. They (1) only protect investments *post*-establishment, (2) omit to define the term 'in like circumstances' (leaving wider discretion to tribunals), (3) do not clarify the meaning of 'treatment', and (4) contain only very basic exceptions.

The AIP, on the other hand, introduces important improvements on specificity, clarity and the safeguarding of regulatory space. In particular, the AIP: lists factors for determining which investors and investments must be treated alike; limits the term 'treatment' such that investors cannot 'import' substantive and procedural rights from other treaties; and explicitly provides for exceptions to NT and MFN treatment (notably, for the pursuance of national developmental objectives as well as for the protection and enhancement of other legitimate public policy objectives).

Expropriation

All of Eswatini's IIAs in force prohibit uncompensated expropriations. However, other conditions required for an expropriation to be lawful are expressed differently in Eswatini's various IIAs. This is the case for the criterion of due process and, especially so, for the criterion of non-discrimination (which is absent in most of Eswatini's IIAs in force). Nevertheless, it is possible that these conditions can still be implied into these IIAs even where absent, as some tribunals have on occasion decided. Moreover, Eswatini's IIAs do not offer guidance about identifying indirect expropriations. In the absence of such guidance, many tribunals have focused principally on the economic effects of a measure, neglecting other relevant factors such as the government's duty to regulate in the public interest. Eswatini's IIAs in force also do not specify how to assess compensation for expropriation. In cases involving similar expropriation provisions, on occasion tribunals have awarded high amounts of compensation by: relying solely on fair market value; allowing recovery of lost profits and other incidental expenses for unlawful expropriation under the full reparation standard and the use of valuation methods like DCF; and awarding compound interest.

In contrast, the AIP utilises current investment treaty drafting practices and introduces novel provisions of its own to tackle the issues discussed above. In line with current investment treaty drafting practices, the AIP clarifies the content of indirect expropriation by disallowing sole reliance on the effects of a measure, and by including factors that tribunals must take into account in their assessment (such as the duration and character of the measure at issue). The AIP also includes a wide exception for non-discriminatory regulatory actions taken in the pursuance of a legitimate public policy objective. Rather innovatively, the AIP further introduces a list of factors for assessment of payable compensation, making fair market value just one of many factors (such as investor's behaviour) to be considered in determining 'fair and adequate' compensation. The AIP also makes it explicit that the same standard of compensation applies to both lawful and unlawful expropriations, and that simple (rather than compound) interest should be awarded. Overall, the AIP's provisions on expropriation represent a significant improvement over Eswatini's existing IIAs.

Transfer of Funds

All of Eswatini's IIAs in force require Eswatini to allow foreign investors and investments to freely transfer investment-related funds, though the scope of this obligation varies slightly across Eswatini's IIAs. One consistent trend, however, is that none of Eswatini's IIAs in force provide for exceptions from the free transfer of funds obligations.

In contrast, the AIP includes extensive exceptions to the free transfer of funds obligation, which grant Contracting Parties greater control over capital flows on public policy grounds and in response to financial crises.

Umbrella Clauses

Umbrella clauses elevate breaches of an investment contract, and possibly of any other obligation assumed by a State towards investors under domestic law, to an IIA breach. Umbrella clauses are present in all of Eswatini's BITs currently in force, although their exact scope of application varies. In recent years, umbrella clauses have been controversial among States because of the far-reaching risks they pose in terms of State liability. In line with modern treaty drafting practices, all of Eswatini's TIPs in force, and the AIP, do not include umbrella clauses.

General Exceptions

Most of Eswatini's existing IIAs do not contain exceptions, which is problematic given the broad investment protection obligations under its existing IIAs. This exposes Eswatini to greater risk of investors' claims.

The AIP takes a 'belt-and-braces' approach to exceptions, weaving broad exceptions into each standard of investment protection, as well as having a broad general exceptions clause in Article 24 ('Right to Regulate'). While this is an improvement from Eswatini's existing IIAs, it should be noted that the AIP's approach may come with interpretive difficulties.

Investors' Obligations in the AIP

Eswatini's existing IIAs do not contain provisions on investors' obligations. Although investors' obligations have been contemplated since the SADC Model BIT, the AIP is the first IIA (entering into force) to incorporate investors' obligations.

Investors' obligations are one of the most innovative features of the AIP, but host States should not overestimate their impact. Investors' obligations in the AIP exhibit recurring issues: (1) vague and often ineffective references to 'international law' and 'international standards', (2) heavy reliance on domestic law for the implementation of investors' obligations, (3) general uncertainty and indeterminacy surrounding the content of investors' obligations.

Enforcement of investors' obligations are also best understood as a last, and costly, resort. Domestic law will remain the first and best avenue for regulating investors. That said, investors obligations may strengthen States' bargaining position in numerous ways (e.g. through the possibility of denial of benefits) and may make it easier to settle investor-State disputes.

Survival clauses

All of Eswatini's BITs in force contain 'survival clauses', which extend protection for investments (made prior to termination) for a period of 20 years following the treaty's termination. However, ambiguity exists in the BITs' texts as to whether these clauses apply solely in cases of unilateral termination or whether they also apply in instances of termination by mutual agreement. Moreover, even if the latter is the case, there is no clear position in arbitral caselaw whether States, upon mutual termination, can specifically agree to shorten or entirely remove the survival clause (although, the practice of EU Member States seems to support this view). Given the uncertainty, the better approach for future treaty drafting might be to specify that survival clauses are terminated following the treaty's termination by mutual agreement or the replacement of an older treaty with a new one.

Neither of Eswatini's TIPs provide survival clauses specific to investment protection. Termination of investment protections under these TIPs is governed by the provisions on withdrawal from the SADC Protocol and the COMESA Treaty.

OVERALL ASSESSMENT AND RECOMMENDATIONS

Article 49(1) of the AIP requires all intra-African BITs to be terminated within five years from its entry into force. Because none of Eswatini BITs with African States are currently in force, Eswatini's BIT portfolio will not be affected by the AIP. This means that Eswatini's BITs in force with non-African States will continue to provide for the same (generally higher compared to the AIP) level of investment protection to non-African investors. It may thus be advisable to consider renegotiating these BITs as part of a wider harmonisation of Eswatini's foreign investment policies. The AIP can serve as a focal point for this effort.

Article 49(3) further obliges States Parties to 'make best endeavours' to gradually align the intra-African TIPs in force (in the case of Eswatini, the SADC Protocol Annex 1 and the COMESA Treaty) with the AIP within five to ten years from the AIP's entry into force. These TIPs will therefore continue to co-exist with the AIP. This will result in multiple overlapping regimes of investment protection for African investors, which poses risks, as investors may seek to avail themselves of the treaty regime more favourable to them. Given this, it is important to align these overlapping treaty regimes to the greatest extent possible in order to minimise such risks. In particular, it is advisable to consider aligning the CCIA October 2024 Draft (currently under negotiation) more closely with the AIP. The current CCIA October 2024 Draft and the AIP contain some drafting differences that may have legal consequences. For example, the CCIA October 2024 Draft does not require the same level of compensation for lawful and unlawful expropriations, which may mean a higher level of protection for the investor than under the AIP.

Aligning Eswatini's IIAs in force with the AIP will help Eswatini modernise its investment framework, mitigate risks from investor claims, and ensure a more structured approach to investment protection. Eswatini's IIAs in force, in particular extra-African BITs, tend to leave ample room for arbitral discretion, due to their often vaguely worded and open-ended provisions. Conversely, the AIP's approach provides a clearer text on the whole, is consistent with current treaty drafting trends, and incorporates regulatory carve-outs to balance investor protection with national policy priorities. Overall, the AIP tends to reduce interpretive uncertainties while still offering meaningful protection to foreign investors/investments.

When renegotiating IIAs in force or aligning TIPs currently under negotiation, the following amendments would align with the AIP's approach.

Scope of Covered Investors and Covered Investments

1. Limit the Use of Broad Definitions

Eswatini may consider using narrow, precise definitions for covered investments and investors, so as to align with the AIP's definitions. To prevent treaty misuse, Eswatini in its treaty scope can rely on qualifying characteristics and exceptions to investment, the need for substantial business activity and a triple test for determining a juridical investor as seen in the AIP.

2. Include Denial of Benefits Clauses and Substantive Carve-Outs

To align with the AIP, Eswatini should incorporate Denial of Benefit clauses and substantive carve-outs in its future investment treaties, to guard against treaty shopping and abuse of treaty protections.

Fair and Equitable Treatment (FET)

1. Adopt a CIL MST-based FET Clause with a Closed List

Eswatini may consider expressly limiting FET to the CIL MST and defining its content through a closed list of actionable breaches (e.g., denial of justice, manifest arbitrariness, among others). This mirrors the AIP's approach and helps clarify obligations while reducing interpretive risks.

2. Exclude Legitimate Expectations Based on General Legislation from the Scope of FET

To preserve regulatory flexibility, Eswatini can clarify in the treaty text that changes in *general legislation* do not give rise to a breach of FET, even if they affect investor expectations. This avoids expansive interpretations of FET like those found in *Tecmed v Mexico* or *National Grid v Argentina*.

3. Confine the FET Standard to Administrative and Judicial Conduct

As done in the AIP, Eswatini can consider limiting the scope of FET obligations to specific areas of State conduct, such as judicial or administrative decisions, and expressly excluding policy or legislative changes from scrutiny under this standard.

Full Protection and Security (FPS)

1. Limit FPS to Physical Protection and Link it to the Host State's Capabilities

In future treaties, Eswatini could define FPS narrowly to cover only 'physical protection and security', tied explicitly to the host State's capabilities. This reflects the AIP's more context-sensitive approach to the FPS standard.

2. Link FPS Obligations to the National Treatment and Most-Favoured Nation Standards

Eswatini can also clarify that FPS must be accorded on a non-discriminatory basis, thus ensuring that foreign investors are not treated less favourably than domestic or third-State investors. Doing this avoids the imposition of an absolute FPS standard on Eswatini and shifts the focus to equitable treatment.

Non-Discrimination (Most-Favoured Nation and National Treatment)

1. Qualify 'In Like Circumstances/Situations'

Treaties that do not specify that their non-discrimination obligations apply to investors and investments 'in like circumstances/situations' should do so explicitly. Further, an open-ended list of factors may also be added to guide or restrict the application of the likeness test.

2. Exclude Substantive and ISDS Provisions from the Scope of 'Treatment'

Eswatini should clarify what constitutes 'treatment' for the purposes of non-discrimination obligations (NT and MFN protections). In particular, contemporary treaty drafting practice excludes substantive rights and dispute resolution procedures in other IIAs from the scope of 'treatment' under MFN protection.

3. Develop a Comprehensive List of Exceptions

Eswatini may consider increasing the comprehensiveness of the applicable exceptions to non-discrimination. Specific exceptions to be added should depend on the host State's pressing concerns in particular circumstances, which may include, e.g., environmental protection, human rights, and other national development goals and public policy objectives.

Expropriation

1. Provide a Clear Definition of Direct and Indirect Expropriation.

Eswatini's future treaties should reject the 'sole effects' doctrine (under which only the effect of the measure is considered when determining if indirect expropriation has occurred) and expressly require considering other factors in addition to a measure's effects, such as the character or purpose of the measure. Eswatini could also consider expressly recognising in its treaties that a State's regulatory action taken in exercise of its police powers does not constitute indirect expropriation.

2. Reconsider the Standard of Compensation for Expropriation

Eswatini's treaties could require that the assessment of compensation is done not only with regard to the fair market value of the investment but also with regard to other factors, such as the investor's behaviour or the duration of the investment, among others ('fair and adequate compensation'). Eswatini's treaties may also stipulate that the same standard of compensation would apply to both lawful and unlawful expropriation.

3. Specify that Only Simple Interest May Be Awarded

Among the factors accounting for the large amounts of compensation due in cases of expropriation has been the practice of tribunals to award compound interest. In line with the AIP, Eswatini's treaties could thus mandate that only simple interest may be awarded on the compensation due for an expropriation.

Transfer of Funds

1. Cover Both Inward and Outbound Transfers

Eswatini could consider modifying its treaties that only cover outbound transfers so as to cover both inbound and outbound transfers, thus providing greater certainty for investors and promoting investment.

2. Develop a Comprehensive List of Exceptions

Eswatini should consider modifying any treaty references to 'unrestricted' transfers into 'free' transfers instead. Eswatini should further consider subjecting its free transfers obligation to exceptions (e.g., subject to compliance with certain domestic laws, balance of payments difficulties or financial safeguard measures, or public policy purposes) to reserve greater regulatory space for host States.

3. Clarify the Meaning of Transfers Made 'Without Delay'

Eswatini may also consider defining the term 'without delay' in relation to transfers. This may be more relevant when there are specific procedural requirements under domestic law that need to be fulfilled before a transfer can be made.

Other Investment Protection Provisions

1. Remove Umbrella Clauses

Eswatini may consider removing umbrella clauses from its treaties so as to prevent breaches of investment contracts, among potentially other failures to meet commitments, from being elevated into treaty violations.

2. Remove Survival Clauses or Shorten Their Duration

If Eswatini terminates or renegotiates an older BIT, Eswatini may consider adopting the EU's practice of specifically providing that survival clauses are terminated or shortened following mutual termination or the replacement of an older BIT with a new one. Eswatini may also consider not including survival clauses at all in its newer treaties, or, instead, may consider significantly shortening their duration (e.g., to 3–5 years).

General Exceptions

1. Include a 'Self-Judging', General Exceptions Clause in Future Treaties

Most of Eswatini's IIAs do not have general exceptions. Coupled with the broad investment protection obligations under these IIAs, this exposes Eswatini to greater risk of investor claims and State liability. Including a well-drafted, self-judging exceptions clause will reduce this risk significantly.

2. Align General Exceptions in Regional Treaties with the Grounds of Exception found in the AIP

The CCIA October 2024 Draft and SADC Model BIT do not share the same grounds of exceptions found in the AIP. For ease of treaty management, Eswatini may wish to align the grounds of exceptions found in its treaties, especially those that may overlap (such as the CCIA and AIP).

Investors' Obligations

1. Keep Investors' Obligations as Consistent as Possible Across All Treaties

Eswatini should, as far as possible, keep investors' obligations consistent across all its treaties. This will enhance certainty and compliance with investors' obligations. For now, this will mean aligning the investors' obligations contained in the SADC Model BIT and the CCIA October 2024 Draft, as much as possible in light of negotiating realities.

2. Use Domestic Laws to Apply the Same Obligations to All Foreign Investors

Although investors' obligations in the AIP make many references to international law and international standards, the latter often only set out very general obligations. The details of such obligations are then subject to domestic implementation in each State, and according to the needs and circumstances of each State. Further, Eswatini's different agreements contain different investors' obligations (whether in text, in substance, or both).

> The common denominator (and solution) is ultimately Eswatini domestic law. Having detailed and comprehensive domestic laws and regulations for specific issues raised by investment activities (e.g., environmental impact assessments, corporate governance, labour rights etc.) will ensure greater certainty and uniformity than relying exclusively on the investors' obligations contained in international agreements.

Still, even if alignment with the AIP is desired, it bears noting that two kinds of risks may persist. First, perfect alignment may not be possible as divergences in language may arise during negotiations due to the necessity to give concessions. Second, even assuming the treaties are fully aligned, there is still a risk that tribunals will interpret what is thought to be identical provisions in a different manner because, ultimately, tribunals are not bound by prior precedents and have to give effect to the specific treaty in question, rather than its counterpart.

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TABLE OF ABBREVIATIONS

General Abbreviations

BEPS	Base Erosion and Profit Shifting
BIT(s)	Bilateral Investment Treaty(-ies)
CIL	Customary International Law
DCF	Discounted cash flow
ETIPA Draft	Eswatini Trade and Investment Promotion Act, January 2025 Draft
IIA(s)	International Investment Agreement(s)
IP rights	Intellectual property rights
ISDS	Investor-State Dispute Settlement
TIP(s)	Treaties with Investment Provision(s)

Abbreviations for Eswatini's International Investment Agreements

AfCFTA Agreement	Agreement Establishing the African Continental Free Trade Area (2018)
AIP	Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area (2023)
Annex on Disputes	Annex on the Rules and Procedures for the Prevention, Management and Resolution of Disputes under Part VII of the AfCFTA Protocol on Investment
CCIA October 2024 Draft	Revised Investment Agreement for the COMESA Common Investment Area (version as of October 2024; confidential document provided by the beneficiary)
Eswatini-Germany BIT	Treaty between the Federal Republic of Germany and the Kingdom of Swaziland concerning the Encouragement and Reciprocal Protection of Investments (1990)
Eswatini-Kuwait BIT	Agreement between the Government of the State of Kuwait and the Government of the Kingdom of Swaziland for the Encouragement and Reciprocal Protection of Investments (2009)

SADC Model BIT	SADC Model Bilateral Investment Treaty Template with Commentary (2012)
SADC Protocol	SADC Protocol on Finance and Investment (2006)
SADC Protocol, Annex 1	SADC Protocol on Finance and Investment, Annex 1: Cooperation on Investment (2006)
COMESA Treaty	Treaty Establishing the Common Market for Eastern and Southern Africa (1993, as amended in 2009)
Eswatini-United Kingdom BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Swaziland for the Promotion and Protection of Investments (1995)

Abbreviations for Other Treaties Mentioned in the Report

ACIA	ASEAN Comprehensive Investment Agreement (2019)
AfCHPR	African Charter on Human and Peoples' Rights (1981)
CETA	Canada-European Union Comprehensive Economic and Trade Agreement (2016)
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018)
ECT	Energy Charter Treaty (1994)
NAFTA	North American Free Trade Agreement (1992) (superseded by the USMCA)
RCEP	Regional Comprehensive Economic Partnership (2020)
USMCA	Protocol Replacing the North American Free Trade Agreement with the Agreement Between Canada, the United States of America, and the United Mexican States (2019)
VCLT	Vienna Convention on the Law of Treaties (1959)

Abbreviations for Investment Provisions

CSR	Corporate Social Responsibility
FET	Fair and Equitable Treatment
FPS	Full Protection and Security

MFN	Most-Favoured Nation
MST	Minimum Standard Treatment
NT	National Treatment
PPS	Physical Protection and Security

Abbreviations for International and Regional Organizations

AU	African Union
CCIA	COMESA Common Investment Area
COMESA	Common Market for Eastern and Southern Africa
EU	European Union
OECD	Organisation for Economic Co-operation and Development
SADC	Southern African Development Community
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation

INTRODUCTION

1. This Report was prepared for the Eswatini Investment Promotion Authority by the International Economic Law Clinic at the NUS Faculty of Law. The Report reviews Eswatini's investment treaty portfolio and compares Eswatini's international investment agreements (**'IIAs'**) in force with the draft AfCFTA Investment Protocol (**'AIP'**). The comparison principally focuses on provisions relating to the scope of application of each treaty, on the core standards of investment protection, as well as on provisions relating to investors' obligations.[1] The analysis aims to identify Eswatini's obligations towards foreign investors under its various IIAs and highlight areas of particular risk.

2. Among the standards of investment protection in Eswatini's IIAs in force, the Report focuses on fair and equitable treatment (**'FET'**), full protection and security (**'FPS'**), the non-discrimination standards of national treatment (**'NT'**) and most-favoured nation (**'MFN'**) treatment, expropriation, transfer of funds and umbrella clauses.

3. The Report proceeds as follows. Chapter 1 reviews Eswatini's existing IIAs in force, including bilateral investment treaties (**'BITs'**) and broader treaties with investment provisions (**'TIPs'**). Five IIAs in total are reviewed (as listed in the table below).

	International investment agreement	Date of signature	Date of entry into force
	Bilateral Investment Treaties		
1.	Eswatini-Germany BIT	5 April 1990	7 August 1995
2.	Eswatini-United Kingdom BIT	5 May 1995	5 May 1995
3.	Eswatini-Kuwait BIT	23 July 2009	19 September 2013
	Chapters in Treaties with Investment Provisions		
4.	COMESA Treaty, Chapter 26	5 November 1993	8 December 1994
5.	SADC Protocol on Finance and Investment, Annex 1	18 August 2006	16 April 2010

[1] The comparison does not address provisions on investment promotion and investment facilitation, or provisions on investor-State dispute settlement (**'ISDS'**).

4. Chapter 2 of the Report focuses on the provisions of the AIP. As the AIP is intended to be a new reference point for intra-African investment protection, the chapter also identifies broad points of convergence or divergence with two regional African instruments: (1) the SADC Model BIT (2012) (**‘SADC Model BIT’**); and (2) the Revised Investment Agreement for the COMESA Common Investment Area, version as of October 2024 (**‘CCIA October 2024 Draft’**). We also briefly comment on the Eswatini Trade and Investment Promotion Act, version as of January 2025 (**‘ETIPA Draft’**).

5. Chapter 3 concludes the Report by presenting a consolidated and summarised version of the comparison between Eswatini’s IIAs in force and the AIP.

1. A REVIEW OF ESWATINI'S EXISTING TREATY PORTFOLIO

1.1. Scope of Application

1.1.1. Background

6. Provisions addressing an IIA's scope of application are of critical importance as they determine *who* and *what* is protected under an IIA. Provisions on scope define the persons and entities protected as 'investors', and the types of transactions or assets protected as 'investments' under each IIA.[2] Provisions on scope may also stipulate additional *conditions* under which the treaty's protection is granted, such as, for instance, *when* the investment was made (temporal scope). Each IIA will have its own definitions of 'investment' and 'investor', and its own provisions on temporal scope. Differences in treaty language may thus have significant effects on the extent of a host State's investment protection obligations across its IIA portfolio.

1.1.2. Covered Investments

7. The definition of 'investment' determines the categories of economic assets or transactions that are protected as 'investments' under the IIA. There are typically two approaches to defining investments. An asset-based approach defines a covered investment in terms of a non-exhaustive list of protected assets. This type of definition tends to be broad and is found in most IIAs.[3] In contrast, an enterprise-based approach defines a covered investment in terms of an enterprise (which may possess assets) and only protects assets attached or linked to the enterprise. This type of definition is less frequent in practice, and it is the approach followed by the AIP.

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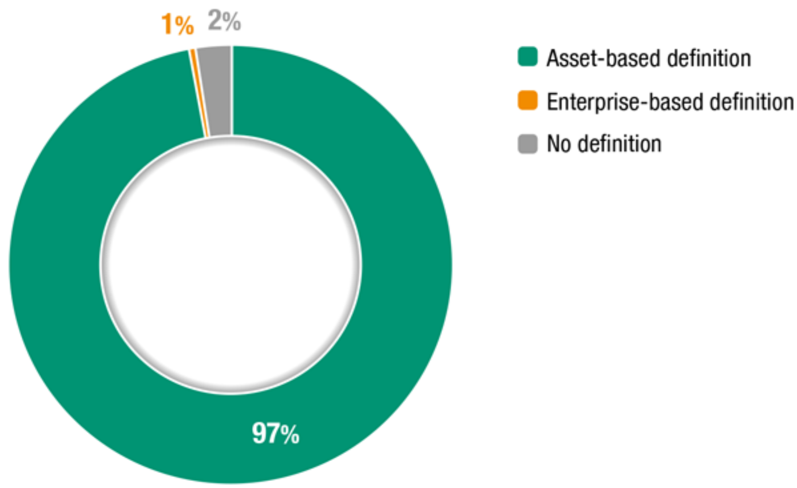
[2] Jeswald W Salacuse, *The Law of Investment Treaties* (3rd edn, Oxford University Press 2021). See also Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (3rd edn, Oxford University Press 2022).

[3] 'Mapping of IIA Content' (*UNCTAD Investment Policy Hub*) ('UNCTAD Mapping of IIA Content') <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> accessed 11 February 2025.



[4]

1.1.2.1. <u>Eswatini's BITs</u>

8. All of Eswatini's BITs in force have a broad, asset-based definition of 'investment', including a non-exhaustive list of protected assets. Despite minor drafting variations across treaties, the effect in all three treaties is the same.

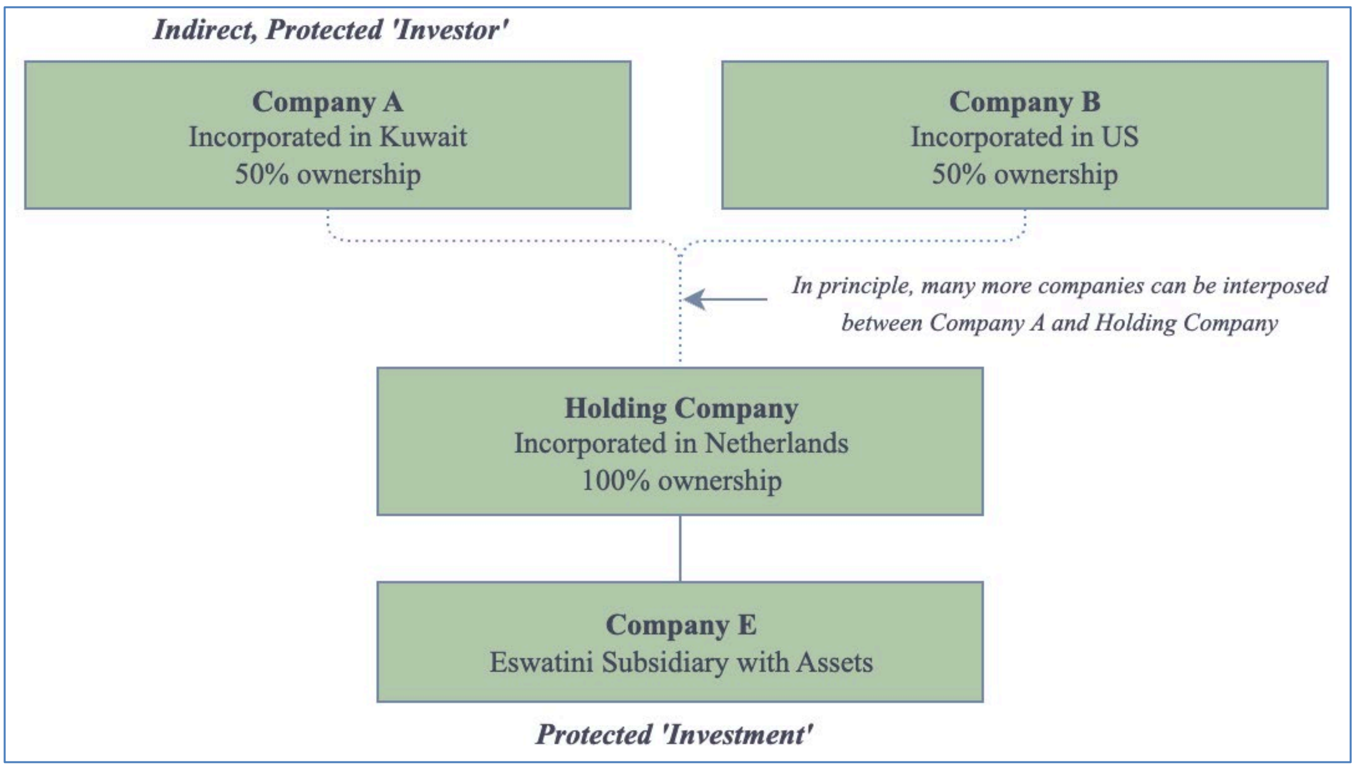
Example from Eswatini-Kuwait BIT, Article 1(1) ('Definitions')
…**all kinds of assets** located in the territory of a Contracting State which are owned or controlled by the property of the other Contracting State **directly or indirectly**, and **include** assets or rights consisting of or taking the form of... [list from Article 1(1)(a)–(e)] (emphasis added)

9. ***Non-exhaustive list of assets.*** The list of protected assets is non-exhaustive in all three BITs (i.e., it is possible for other, not listed, economic assets to be protected 'investments'). In the Eswatini-Kuwait BIT this is clear from the combination of the phrases 'all kinds of assets … and include …'. In the other two BITs, equivalent wording has the same effect.[5]

[4] *ibid*.

[5] Article 1(1) Eswatini-Germany BIT: 'every kind of asset, in particular: ...'; and Article 1(a) Eswatini-United Kingdom BIT: 'every kind of asset and in particular, though not exclusively, includes: …'.

10. ***Indirect investments.*** The Eswatini-Kuwait BIT explicitly provides that both direct and indirect ownership or control of an asset-investment are protected as 'investment'. In practice, a Kuwaiti national can have an investment in Eswatini: (1) where the Kuwaiti national *directly* owns or controls an asset in the territory of Eswatini (e.g., shares in an Eswatini company); and (2) where the Kuwaiti national *indirectly* controls an asset in the territory of Eswatini (e.g., through owning an intermediary company in a third State which, in turn, directly owns shares in an Eswatini company). Moreover, in the absence of specific treaty language stating otherwise, there is in principle no limitation to the number of corporate intermediaries that a Kuwaiti national may be able to interpose and still be considered as having an investment in Eswatini.



11. Although the Eswatini-Germany BIT and the Eswatini-United Kingdom BIT do not mention direct or indirect ownership of an investment, this silence does not necessarily mean that these treaties limit their protection only to direct ownership of an investment. Absent clear language to the contrary, tribunals have interpreted such silence as allowing for indirect ownership of investment.[6]

[6] See, e.g., *Siemens A.G. v The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, para 137.

1.1.2.2. Eswatini's TIPs

SADC Protocol, Annex 1, Article 1(2) ('Definitions')
[Investment] means the purchase, acquisition or establishment of productive and portfolio investment **assets,** and **in particular, though not exclusively**, includes…
COMESA Treaty, Article 159(2) ('Investment Promotion and Protection')
For the purposes of investment protection, **the following activities** shall be considered as investment ... [list from Article 159(2)(a)–(e)]… (f) **and such other activities that may be declared by the Council as investments**.

12. Eswatini's TIPs in force both use a similar asset-based approach to defining 'investment'. Although the COMESA Treaty uses the term 'activities' rather than 'asset', the list that follows (Article 159(2)(a)–(e)) still defines investment in terms of assets. The COMESA Treaty is also rather unique among IIAs in that it introduces a closed list ('the following activities shall be considered as investment'). However, the last item in Article 159(2), item (f), expressly allows for more assets to be declared as covered investments by a decision of the Council of Ministers of the Common Market.

13. In contrast, SADC Protocol Annex 1 includes a clearly non-exhaustive list of assets. The SADC Protocol's protections explicitly apply to both 'productive and portfolio investment assets'.[7] The SADC Protocol also has a proviso in Article 1(2), which allows Contracting States to exclude certain kinds of investments (e.g., short-term portfolio investments of a speculative character) from the Protocol's scope of protection. However, this exclusion is not automatic but must be actively exercised by the host State.

[7] According to the UNCTAD IIA Mapping project, if a treaty excludes 'portfolio investment' (which involves passive ownership of financial assets like foreign stocks or bonds without active involvement in managing), then such investments are not covered by the treaty. This usually applies when an investor owns less than 10% of a company's shares. Some treaties may exclude portfolio investments indirectly by specifically including only foreign direct investments in their definitions.

1.1.3. Covered Investors

14. The definition of ‘investor’ determines the persons and entities who are protected under the IIA. Investors are typically defined as (1) natural persons who are nationals of a Contracting State to an IIA, according to that State’s laws and regulations;[8] and (2) legal persons (often corporations but sometimes also not-for-profit entities) that are nationals of a Contracting State to an IIA. In the case of legal persons, different IIAs may use different criteria to determine corporate nationality, including looking at the place of incorporation, the place of a corporation’s management (seat), or a combination of both.[9]

1.1.3.1. Eswatini’s BITs

Example from Eswatini-Kuwait BIT, Article 1(2) (‘Definitions’)
The term ‘investor’ for a Contracting State means: (a) **a natural person who has the nationality of that Contracting State** in accordance with its applicable laws; (b) **the government of that Contracting State**; (c) Any **legal person or any other entity legally incorporated under the laws and regulations of that Contracting State**, such as institutes, trusts, agencies, charitable and scientific institutions, **legal and governmental institutions**, and companies. (emphasis added)

15. The definition of an investor in all three BITs is similar in scope, applying to both natural and legal persons. Although the BITs with Germany and the United Kingdom use and define the terms ‘nationals’ and ‘companies’ rather than the term ‘investor’, the effect is nevertheless the same.

16. ***Natural persons.*** All three BITs have similar definitions of natural persons as investors, extending to ‘nationals’ or ‘citizens’ of a Contracting State, according to that State’s domestic laws and regulations.

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[8] Some IIAs also include permanent residents of a Contracting State as ‘investors’.

[9] APEC and UNCTAD, *International Investment Agreements Negotiators Handbook: APEC/UNCTAD MODULES (IIA Handbook)* (APEC Committee on Trade and Investment Experts Group 2012) (‘APEC/UNCTAD IIA Negotiators Handbook’) 23 <https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_APEC%20Handbook.pdf> accessed 21 February 2025.

17. ***Legal persons.*** The three BITs differ in the way they define legal persons as investors. The BITs with Kuwait and the United Kingdom use incorporation, requiring only that a company be duly incorporated under the laws of a Contracting State. Unusually, the BIT with Germany uses an asymmetrical clause (i.e., different criteria of corporate nationality are used for German companies compared to Swazi companies). Thus, the Eswatini-Germany BIT uses the seat approach for German companies and the incorporation approach for Swazi companies. A further asymmetry is present in the type of legal persons that are protected. For Swazi legal persons, the scope of protection is limited to incorporated 'corporations, firms, or associations'. In comparison, broader protection is granted to German legal persons who may be 'any juridical person as well as any commercial or other company or association with or without legal personality'.

18. ***Government and State-owned enterprises.*** A unique feature of the Eswatini-Kuwait BIT is that it explicitly includes the Government of a Contracting State under the definition of an 'investor', thereby extending treaty protections to State organs or persons/entities 'exercis[ing] elements of the governmental authority'.[10] In the absence of such a reference (as in the BITs with Germany and the United Kingdom), State entities and State-owned enterprises are only protected as investors if or when they act in a commercial capacity (i.e., they are not exercising governmental authority).[11]

1.1.3.2. Eswatini's TIPs

SADC Protocol, Annex 1, Article 1(2) ('Definitions')
'investor' … means a person that has been admitted to make or has made an investment; 'company' … means any **entity constituted or organised** under the applicable laws of any State, **whether or not for profit**, and whether **privately or governmentally owned or controlled**, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association, or other such organisation;

[10] See Article 5 ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) A/56/10 ('ARSIWA with Commentaries').

[11] For example, see *Ceskoslovenska Obchodini Banka A.S. v The Slovak Republic ('CSOB')*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, paras 20, 84–88; *Beijing Urban Construction Group Co. Ltd. v Republic of Yemen ('BUCG')*, ICSID Case No. ARB/14/30, Decision on Objections to Jurisdiction, 31 May 2017, para 34.

> 'person' … means a natural person or a company;
>
> (emphasis added)

19. The SADC Protocol, Annex 1 defines 'investor' as 'a person that has been admitted to make or has made an 'investment'. The term 'person' is itself defined as 'a natural person or a company'. Although the SADC Protocol does not make it explicit, the treaty likely only applies to natural persons with the nationality of a State Party. The SADC Protocol does define the term 'company', and employs the incorporation approach. It includes private, as well as State-owned or State-controlled entities, whether or not for profit.

20. In contrast, the COMESA Treaty has no definition of the term 'investor' even though it uses the term. Given the lack of a definition, it is likely that 'investor' will be interpreted broadly, to include both natural and legal persons (employing the incorporation approach). It is unclear whether 'investor' under the COMESA Treaty includes non-profits and government entities.

1.1.4. Temporal Scope

21. An IIA's temporal scope refers to when investments must have been made or 'established', in order to enjoy the IIA's protection. In general, an international treaty (such as an IIA) only applies prospectively—that is, to facts or situations that take place after the treaty enters into force.[12] In the case of IIAs, this means that only investments established after the IIA entered into force would be protected.

22. However, it is not uncommon for IIAs to provide that they will protect investments established before entry into force as well. This is the approach followed by all of Eswatini's IIAs in force.

Example from Eswatini-Kuwait BIT, Article 12 ('Scope of the Agreement')
This Agreement shall apply to all investments, **whether existing on the date of entry into force of this Agreement or made after that date**, by investors of either Contracting State in the territory of the other Contracting State. (emphasis added)

[12] See Article 28 VCLT.

Example from SADC Protocol, Annex 1, Article 5 (‘Investment Protection’)
This Treaty shall **also apply to investments made prior to its entry** into force by nationals or companies of either Contracting Party… (emphasis added)

23. Although stated generally, the extension of these IIAs’ coverage to pre-existing investments is subject to two implicit conditions that can be inferred from the logic of IIAs and general international law: (1) the prior investment must be active at the time the IIA enters into force; and (2) the IIA’s protection will apply to prior investments, but only with respect to measures, acts or facts that took place after the IIA’s entry into force.[13]

1.2. Fair and Equitable Treatment

1.2.1. Background

24. The fair and equitable treatment (**‘FET’**) standard is among the core standards of investment protection. It is found in 95% of all IIAs,[14] and is the most frequently invoked standard by investors. It is also the standard on which investors most often succeed.[15] One can identify two principal formulations of the FET standard in treaty drafting practice:

    a. The first approach is the so-called unqualified FET clause. Unqualified FET clauses simply state that investments shall be accorded ‘fair and equitable treatment’. Terse and deceptively simple, the unqualified FET standard lacks a clear definition of its three main components—

[13] An exception to this might be when measures, acts or facts that began before the IIA’s entry into force continue after the IIA’s entry into force, thus giving rise to a continuous breach.

[14] ‘UNCTAD Mapping of IIA Content’ (n 3).

[15] UNCTAD, ‘Pink Series Sequel: Fair and Equitable Treatment’ (‘UNCTAD Series on FET’) 1 <https://investmentpolicy.unctad.org/publications/44/pink-series-sequel-fair-and-equitable-treatment> accessed 24 February 2025.

fairness, equity and treatment—making it subject to varied interpretations.[16] Unqualified FET clauses are found in nearly 80% of all FET provisions.[17]

b. The second approach is the so-called qualified FET clauses, where the content of the standard is linked to '(principles of) international law',[18] 'customary international law' (**'CIL'**),[19] or the 'minimum standard of treatment under customary international law' (**'CIL MST'**).[20] Some qualified FET clauses also provide an open or closed list of elements that either exemplify or exhaust its content, as the case may be.[21] As explained in Chapter 2, the AIP follows this latter approach.

25. Regardless of the drafting approach used, both qualified and unqualified FET clauses exhibit various degrees of vagueness. While vague language allows for adaptability and flexibility, it also carries indeterminacy.[22] This has been highlighted by many arbitral decisions applying FET clauses.[23] As a consequence, the content of FET has been gradually developed on a case-by-case basis, and in sometimes inconsistent ways, by arbitral decisions.

[16] Dolzer, Kriebaum and Schreuer (n 2) 186.

[17] OECD, '"Fair" and "Equitable" Treatment Provisions in Investment Treaties' (11 April 2023) 13 <https://www.oecd.org/en/publications/fair-and-equitable-treatment-provisions-in-investment-treaties_af86f128-en.html> accessed 5 April 2025.

[18] In this variation, FET is associated with 'international law' or 'principles of international law'. In a sample of over 2,300 agreements, the association with 'international law' is seen in 115 agreements and 'principles of international law' is seen in 140 agreements. See *ibid*.

[19] See, 'UNCTAD Mapping of IIA Content' (n 3). Per the UNCTAD Mapping project, only 20 out of 2,592 mapped treaties have an FET clause qualified by reference to CIL. Out of these 20, only 13 treaties are in force. CIL refers to an evolving body of international law, formed by State practice and *opinio juris*. Currently, CIL on FET is widely understood to refer to the minimum standard of treatment. The difference between referring to CIL and CIL MST is that a reference to CIL leaves open a possibility that CIL may evolve to embrace a different standard in the future.

[20] This drafting approach was first seen in the Notes of Interpretation issued by the NAFTA Free Trade Commission on 31 July 2001. As of March 2023, 155 treaties link 'fair' and 'equitable' treatment to the minimum standard of treatment under customary international law. See '"Fair" and "Equitable" Treatment Provisions in Investment Treaties' (n 17) 17, 18.

[21] UNCTAD (n 2) para xiv; See also, UNCTAD Mapping Project (n 1); For example, Article II(4)(b) Colombia-United Kingdom BIT (2010): '"Fair and equitable treatment" includes the prohibition against the denial of justice in criminal, civil, or administrative proceedings in accordance with the principle of due process embodied in the main legal systems of the world'.

[22] Roland Klager, *'Fair and Equitable Treatment' in International Investment Law* (1st edn, Cambridge University Press 2011) 3.

[23] *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005 ('*CMS v Argentina*'), para 273; *Mamidoil Jetoil Greek Petroleum Products Societe SA v Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 ('*Mamidoil*'), para 599; *Flemingo DutyFree Shop Private Limited v the Republic of Poland*, UNCITRAL, Award, 12 August 2016 ('*Flemingo*'), para 530.

1.2.2. Eswatini's BITs

26. All three of Eswatini's BITs in force include an FET clause. The FET clauses in the BITs with Germany and the United Kingdom are unqualified, whereas the FET clause in the BIT with Kuwait is qualified with a reference to 'recognized principles of International Law'.

1.2.2.1. Unqualified FET

Example from Eswatini-United Kingdom BIT 1995, Article 2(2) ('Promotion and Protection of Investment')
Investments of nationals or companies of one Contracting Party shall **at all times** be accorded **fair and equitable treatment** and shall enjoy full protection and security in the territory of the other Contracting Party... (emphasis added)

27. The quoted provision from the Eswatini-United Kingdom BIT is a typical example of an open-ended, unqualified FET clause. The FET clause in the Eswatini-Germany BIT is substantially the same. The use of the phrase 'at all times' also suggests that a wide spectrum of actions could fall under the clause's ambit (including, potentially, changes in general legislation).[24]

28. Tribunals interpreting unqualified FET clauses have approached them as 'autonomous' provisions, not tied to CIL MST. While some tribunals have taken a balanced approach,[25] the general trend has been for tribunals to interpret unqualified FET provisions more generously in favour of investors thereby expanding the risk of liability for host States. The most expansive understanding of an unqualified FET provision can be seen in the alarming passage below from the *Tecmed v Mexico* award.

[24] A similar phrase in Article 2(1) Eswatini-Germany BIT ('in any case') is similarly suggestive.

[25] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016 ('*Philip Morris v Uruguay*'), para 310.

***Técnicas Medioambientales Tecmed, SA v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para 154**
The Arbitral Tribunal considers that [the FET standard]… requires the Contracting Parties to provide… treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in **a consistent manner, free from ambiguity and *totally transparently* in its relations with the foreign investor, so that it may know beforehand *any and all rules and regulations* that will govern its investments**, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. (emphasis added)

29. Building on that broad statement, tribunals have over time identified the following acts as capable of breaching the FET standard:

    a. Fundamental changes in the law that are contrary to an investor's legitimate expectations. See, e.g., *National Grid v Argentina*,[26] *Teinver v Argentina*;[27]

[26] *National Grid plc v The Argentine Republic*, UNCITRAL, Award, 3 November 2008 ('*National Grid v Argentina*'), para 179.

[27] *Teinver SA, Transportes de Cercanías SA and Autobuses Urbanos del Sur SA v Argentine Republic,* ICSID Case No. ARB/09/1, Award, 21 July 2017 ('*Teinver v Argentina*'), para 668.

b. Reneging on specific representations made to the investor, that the investor had relied upon in making the decision to invest. See, e.g., *Crystallex v Venezuela*,[28] *Agility v Iraq*;[29]

c. Denial of due process. See e.g., *ECE v Czech Republic*,[30] *Orazul v Argentina*;[31]

d. Denial of justice. See, e.g., *Agility v Iraq*;[32]

e. Absence of transparency in legal processes or in the State's actions vis-à-vis the investor. See, e.g., *Lemire v Ukraine (II)*;[33]

f. Harassment, coercion, abuse of power or bad faith conduct towards the investor. See, e.g., *Glencore v Colombia (I)*,[34] *Orazul v Argentina*;[35]

g. Arbitrary, disproportionate or inconsistent actions by the host State. See, e.g., *Rumeli v Kazakhstan*,[36] *Saluka v Czech Republic*;[37]

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[28] *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 ('*Crystallex v Venezuela*'), para 575.

[29] *Agility Public Warehousing Company KSC v Republic of Iraq*, ICSID Case No. ARB/17/7, Award, 22 February 2021 ('*Agility v Iraq*'), para 172.

[30] *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtungsechzigste Grundstücksgesellschaft mbH & Co v The Czech Republic,* PCA, Case No. 2010-05, Award, 19 September 2013, para 4.805.

[31] *Orazul International España Holdings SL v Argentine Republic*, ICSID Case No. ARB/19/25, Award, 14 December 2023 ('*Orazul v Argentina*'), para 732.

[32] *Agility v Iraq* (n 29) paras 209–211.

[33] *Joseph Charles Lemire v Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, para 284.

[34] *Glencore International AG and CI Prodeco SA v Republic of Colombia,* ICSID Case No. ARB/16/6, Award, 27 August 2019, para 1310.

[35] *Orazul v Argentina* (n 31) para 793.

[36] *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan,* ICSID Case No. ARB/05/16, Award, 29 July 2008, para 609.

[37] *Saluka Investments BV v The Czech Republic*, PCA, Case No. 2001-04, Partial Award, 17 March 2006 ('*Saluka v Czechia*'), para 307.

1.2.2.1. Qualified FET

Eswatini-Kuwait BIT, Article 2(2) ('Promotion and Protection of Investments')
Investments of investors of each Contracting State shall at all times be accorded **fair and equitable treatment** [...] **in a manner consistent with recognized principles of International Law** and the provisions of this Agreement. (emphasis added)

30. The Eswatini-Kuwait BIT contains a qualified FET clause which states that FET must be accorded to investments 'in a manner consistent with recognized principles of International Law'. This reference to 'principles of International Law' can be understood as referring to all formal sources of international law: international treaties, customary international law, and the general principles of law recognised by the community of nations.[38] This then raises the question as to whether 'principles of International Law' implicitly means the CIL MST.

31. If so, this would be significant as FET clauses qualified with a reference to the CIL MST are much harder to breach than unqualified FET clauses. The passage below from the *Waste Management v Mexico II* award (applying the NAFTA's FET clause which was qualified by a reference to the CIL MST) summarises the commonly accepted content of the standard.

***Waste Management, Inc. v United Mexican States ('Number 2')*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para 98**
[T]he 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 involves a 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. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant. (emphasis added)

[38] See Article 38(1)(a)–(d) ICJ Statute.

32. While this reading of the Eswatini-Kuwait BIT is more favourable to the State, such a reading is unlikely, given the terms used by the BIT and in light of current arbitral caselaw. First, a review of treaty practice shows that the two main variations of FET clauses referring to '(principles of) international law' are:

   a. '[FET] … *no less* … *than* international law'; and

   b. '[FET] … *in accordance with* … international law'.[39]

33. The former formulation suggests a minimum level of protection, and is thus more similar to the CIL MST (which itself represents a minimum floor of protection). In contrast, the latter formulation does not have a similar connotation, making a link to the CIL MST more tenuous. The Kuwait-Eswatini BIT's use of the phrase 'in a manner consistent with' is closer to the meaning of 'in accordance with', as compared to 'no less … than'.

34. Second, an overwhelming majority of tribunals have held that the CIL MST cannot be inferred from a mere reference to '(principles of) international law'.[40] The passage below from the *Vivendi v Argentina* award demonstrates this.

***Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para 7.4.7**
The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment. First, the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone. Second, the wording of Article 3 requires that the fair and equitable treatment conform to the principles of international law, but the requirement for conformity can just as readily set a floor as a ceiling on the Treaty's fair and equitable treatment standard. Third, the language of the provision suggests that one

[39] Patrick Dumberry, 'The Cost of Inaction: Arbitral Practice in Respect of Earlier Generation FET Clauses and Current Approaches to FET Clauses, Report, OECD' (21 May 2024) 12 <https://papers.ssrn.com/abstract=4872672> accessed 24 April 2025.

[40] *ibid* 39.

should also look to contemporary principles of international law, not only to principles from almost a century ago. (footnotes in original omitted)

35. In conclusion, although it is qualified, the FET clause of the Eswatini-Kuwait BIT is more likely to be interpreted as providing protection more akin to an unqualified FET clause.[41]

1.2.3. Eswatini's TIPs

COMESA Treaty 1993, Article 159(1)(a) ('Investment Promotion and Protection')	SADC Protocol, Article 6 ('Investors of the Third State')
1. In order to encourage and facilitate private investment flows into the Common the Market, Member States shall: (a) **accord fair and equitable treatment to private investors; …**	1. Investments and investors shall **enjoy fair and equitable treatment** in the territory of any State Party. 2. Treatment referred to in paragraph 1 shall be **no less favourable than** that granted to **investors of the third State**. (emphasis added)

36. Eswatini's TIPs in force contain unqualified FET provisions. The only noteworthy difference is Article 6(2) of the SADC Protocol, Annex 1, which extends FET protection to SADC investors on a most-favoured nation (**'MFN'**) basis. For the avoidance of doubt, this is *not* an independent MFN standard of protection, but a qualification to FET (the MFN treatment standard as an independent standard is analysed in Section 1.4 below). For present purposes, suffice to say that this provision allows SADC investors to rely on potentially more favourable FET clauses contained in other IIAs to which a SADC Contracting State and a third State are parties.

[41] *ibid*.

1.3. Full Protection and Security

1.3.1. Background

37. The standard of full protection and security (**'FPS'**) requires the host State to exercise vigilance and due diligence vis-à-vis the physical (and, according to some tribunals, also the legal) protection of investors and their investments. The host State must: (1) not harm investors and investments through acts or omissions of State organs or through acts or omissions otherwise attributable to the State; and (2) protect investors and investments against actions taken by private parties (e.g., during civil unrest).[42]

38. Tribunals have found breaches of the FPS standard in a variety of situations, including:

   a. Acts of insurgents or rioting groups causing harm to foreign investments. See, e.g., *Eastern Sugar v Czech Republic*;[43]

   b. The involvement of government forces, like police authorities or military units. See, e.g., *OI European Group v Venezuela*;[44]

   c. Most recently (and controversially), governmental regulatory acts that disturb the legal stability surrounding the investor's business. See, e.g., *National Grid v Argentina*;[45]

[42] Jus Mundi, 'Wiki Note: Full Protection and Security (FPS)' ('Wiki Note') <https://jusmundi.com/en/document/publication/en-full-protection-and-security-fps> accessed 7 April 2025. On State 'action' and 'inaction' leading to violation of FPS, see *CME Czech Republic BV v The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, para 613; *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 ('*Wena Hotels v Egypt*'), para 85.

[43] *Eastern Sugar BV v The Czech Republic*, SCC, Case No. 088/2004, Partial Award, 27 March 2007, para 203.

[44] *OI European Group BV (OIEG) v Bolivarian Republic of Venezuela*, Award, Case No. ARB/11/25, ICSID Case No. ARB/11/25, 10 March 2015, para 580.

[45] *National Grid v Argentina* (n 26) paras 187–189.

d. Where there are multiple attacks on the investor or the investment, although the State may not be liable for an unprecedented first attack, it must nevertheless exercise due diligence and anticipate subsequent attacks. See, e.g., *Ampal v Egypt*;[46]

e. Protection beyond physical protection and security ensured by the police to also encompass the stability afforded by a secure investment environment as being important from an investor's point of view. See, e.g., *Azurix v Argentina*.[47]

39. The FPS standard is not a standard of absolute protection. It does not place the State under strict liability to prevent damage to an investment or an investor. Rather, FPS only requires due diligence. States are only required to exercise due diligence and take reasonable measures to protect foreign investment.[48] What is reasonable under the circumstances is a contextual and fact-based examination that will depend on factors such as the host State's level of economic development,[49] the availability of appropriate resources,[50] and the existence of an armed conflict or other state of emergency.[51]

1.3.2. Eswatini's BITs

Example from Eswatini-Germany BIT, Article 4(1)
Investments by nationals or companies of either Contracting Party **shall enjoy full protection and security** in the territory of the other Contracting Party. (emphasis added)

[46] *Ampal-American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Award, 21 February 2017.

[47] *Azurix Corp v The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 ('*Azurix v Argentina*'), paras 406–408.

[48] *Orazul v Argentina* (n 31) para 869; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para 325; Dolzer, Kriebaum and Schreuer (n 2) 232.

[49] *Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania*, ICSID Case No. ARB/07/21, Award, ('*Pantechniki v Albania*'), paras 81–84; Ursula Kriebaum, 'The Relevance of Economic and Political Conditions for Protection under Investment Treaties' (2011) 10 The Law & Practice of International Courts and Tribunals 383.

[50] *Pantechniki v Albania* (n 49) paras 76, 77.

[51] *Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, para 72; Dolzer, Kriebaum and Schreuer (n 3) 233.

40. The quoted provision from the Eswatini-Germany BIT is a typical formulation of the FPS standard found in most IIAs, mentioning 'full' protection and security for investments. The wording in the BITs with Kuwait and the United Kingdom is identical.

41. While many tribunals have limited FPS to the physical protection of investments (reflecting customary international law),[52] some tribunals have extended that scope to include legal protection as well, such that FPS is breached even if no physical violence or damage has occurred.[53] That said, even where legal protection is included in FPS, some tribunals have noted that a reasonable exercise of the State's right to regulate will not violate legal protection under the FPS standard.[54]

42. So far, legal protection has been understood as access to effective judicial recourse.[55] In taking this view, these tribunals have relied upon (1) the ordinary meaning of the adjective 'full',[56] (2) the fact that IIAs typically define protected investments also in terms of intangible assets (for which the notion of physical protection is inapposite),[57] (3) and the FPS standard's contextual (and historical) proximity to the FET standard.[58]

43. Given their broad wording, the FPS clauses in Eswatini's BITs present a risk of similarly broad interpretations.

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[52] *Gabriel Resources Ltd and Gabriel Resources (Jersey) v Romania (I)*, ICSID Case No. ARB/15/31, Award, 8 March 2024, para 874.

[53] See, e.g., *Azurix v Argentina* (n 47) para 406.

[54] *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para 13.3.2; *Belenergia SA v Italian Republic*, ICSID Case No. ARB/15/40, Award, 28 August 2019, para 620.

[55] *AMF Aircraftleasing v Czech Republic*, PCA Case No. 2017-15, Final award, 11 May 2020, para 661; *Marion Unglaube v Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012, para 281; *Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011 ('*Roussalis v Romania*'), paras 320–321.

[56] *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para 354; *Frontier Petroleum Services Ltd v The Czech Republic*, Final Award, PCA Case No. 2008-09, 12 November 2010, para 260.

[57] *Siemens AG v The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 ('*Siemens v Argentina*'), para 303.

[58] The ICJ in its *ELSI* judgment analysed the full protection and security standard in the context of domestic proceedings before Italian courts, i.e., in an inherently 'legal' context. See *Elettronica Sicula S.pA (ELSI) (United States of America v Italy)*, International Court of Justice, Judgement, 20 July 1989, para 109; See also 'Wiki Note' (n 42).

1.3.3. Eswatini's TIPs

44. Neither the COMESA Treaty nor the SADC Protocol, Annex 1 contain FPS provisions.

1.4. Non-Discrimination (Most-Favoured Nation Treatment and National Treatment)

1.4.1. Background

45. National treatment (**'NT'**) and most-favoured nation (**'MFN'**) treatment are the two non-discrimination standards commonly found in IIAs. They require host States to treat foreign investors and their investments in a manner no less favourable than similarly situated domestic investors/investments (NT) or other foreign investors/investments (MFN) that may be present in the host State's territory.

1.4.2. Eswatini's BITs

Example from Eswatini-Kuwait BIT, Article 3 ('Treatment of Investments')
1. With respect to the **use, management, conduct, operation, expansion and sale or other disposition of investments** made in its territory by investors of the other Contracting State, each Contracting State shall accord treatment no less favorable than that it accords, in like situations, to investments of its own investors or investors of any third state, whichever is more favorable to those investments. 2. However, the provisions of this Article shall not be construed so as to oblige one Contracting State the benefit of any treatment, preference or privilege resulting from: (a) any customs union, economic union, free trade area, monetary union, or other form of regional economic arrangement or other similar international agreement, to which either of the Contracting States is or may become a party; (b) any international, regional or bilateral agreement or other similar arrangement or any domestic legislation relating wholly or mainly to taxation. (emphasis added)

46. All three of Eswatini's BITs in force contain NT and MFN protections which are combined in the same article. Below are the key features, commonalities and differences of these provisions.

47. ***Post-establishment protection.*** All three BITs limit the NT and MFN protection to investments after their establishment. This means that host States may impose more stringent regulatory scrutiny on foreign investors and investments at the stage of market entry or establishment of an investment, such as subjecting them to specific local laws or licensing requirements that are not applied to domestic investors or investors from any third State.[59] While none of the three BITs explicitly state this limitation, they all use language that clearly implies it. All three BITs use phrases like 'use, management, conduct, operation, expansion and sale or other disposition of investments' (Eswatini-Kuwait BIT, Article 3(1) above).[60] These phrases describe operations that can only take place after an investment has been made.

48. ***Establishing the comparator.*** Treating different investors or investments differently does not in itself amount to a breach of the MFN or NT obligations, provided that the difference in treatment is justifiable. For example, it may be reasonable in principle to impose different environmental requirements on an extractive investment (e.g., oil or gas production) and a manufacturing investment (e.g., packaging industry). Therefore, it is very important to establish a suitable comparator (i.e., a similarly situated domestic or foreign investor), since this determines the benchmark against which the treatment is assessed, and ultimately whether the differential treatment constitutes unjustifiable discrimination. The BITs with Germany and the United Kingdom are silent on how to determine an appropriate comparator for NT and MFN treatment. In contrast, the Eswatini-Kuwait BIT provides that any comparison must be between investors or investments that are in 'like situations'. Regardless, the absence of similar phrasing in the BITs with Germany and

[59] This can be understood as a logical consequence of the State's (relatively absolute) sovereign right to decide which foreigners may enter its territory. IIAs that extend the scope of non-discriminatory treatment to an investment's pre-establishment stage effectively guarantee equal treatment at the stage of market entry or establishment of an investment. To the extent that NT is granted at the pre-establishment stage, a treaty effectively guarantees market access for foreign investors. IIAs that extend this kind of protection are rare.

[60] Similarly, in Article 3(2) Eswatini-United Kingdom BIT: 'management, maintenance, use, enjoyment or disposal of their investments…'; Article 3(2) Eswatini-Germany BIT ('activity in connection with investments…') read with paragraph 3(a) of the Protocol ([activity means] 'management, maintenance, use and enjoyment of an investment').

the United Kingdom is not determinative. Tribunals have implicitly applied the likeness requirement even in IIAs without such language.[61] Factors frequently examined to determine likeness include:

a. Whether the investors operate in the same business or economic sector;[62]

b. The competitive relationship between investors;[63] or

c. Whether the investors are subject to a comparable legal regime or regulatory requirements.[64]

49. Additional factors that have been looked at on occasion include pricing strategies,[65] consumer preferences,[66] the regional location of the investment,[67] the business portfolio and relative size of the investors,[68] and the relative economic circumstances of the industries.[69]

50. ***'Treatment'.*** None of Eswatini's BITs explain or clarify the meaning of 'treatment' in the context of non-discrimination. Whereas regulatory measures affecting investors or investments undoubtedly fall under the ambit of 'treatment',[70] the mere existence of more favourable provisions in other IIAs have sometimes also been considered 'treatment' that can violate the MFN obligation. In addition, MFN clauses have often been used by foreign investors to 'import' more favourable investor-State dispute settlement (**'ISDS'**) provisions from other treaties to litigate claims under the basic treaty.

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[61] See, e.g., *Occidental Exploration and Production Co. v Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, para 170; *Consortium RFCC v Royaume du Maroc,* ICSID Case No. ARB/00/6, Arbitration Award, 22 December 2003, para 53. The likeness requirement is arguably inherent in NT and MFN protection standards, insofar as NT and MFN express the basic principle that like things must be treated alike.

[62] See, e.g., *Archer Daniels Midland Co. v Mexico (No 5)*, ICSID Case No. ARB (AF)/04/5, Award, 21 November 2007, para 198; *Marvin Roy Feldman Karpa v Mexico*, ICSID Case No. ARB (AF)/99/1, Award, 16 December 2002, paras 171–172; *Grand River Enters. Six Nations Ltd. v United States*, UNCITRAL, Award, 12 January 2011, para 165.

[63] See, e.g., *S.D. Myers v Canada,* UNCITRAL, Partial Award, 13 November 2000, paras 250–251.

[64] See, e.g., *Apotex Holdings Inc. v United States*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para 8.15; *Pope & Talbot v Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, paras 83–95.

[65] See, e.g., *Champion Trading Co. v Egypt*, ICSID Case No. ARB/02/09, Award, 27 October 2006, para 154, which held that there was no 'likeness' between selling at a fixed price in a government scheme and selling on the open market.

[66] See, e.g., *Corn Prods. Int'l Inc. v Mexico*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility, 15 January 2009, para 126, which established 'likeness' between products that were 'indistinguishable from the point of view of the end-users'.

[67] See, e.g., *Merrill & Ring Forestry L.P. v Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, para 91, which held that there was no 'likeness' between operators in different regions.

[68] See, e.g., *Renee Rose Levy de Levi v Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, para 398.

[69] See, e.g., *Cargill v United Mexican States*, ICSID Case No ARB(AF)/05/2, Award, 18 September 2009, para 204.

[70] See, e.g., *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No. ARB/05/08, Award, 11 September 2007.

The practice is controversial and tribunal decisions have been split on whether this is permitted. None of the three BITs clearly prohibit such use of the MFN clause, although this is not surprising, given that these treaties were concluded before MFN clauses had ever been used in this way.

51. ***Standard exceptions to MFN treatment.*** All three BITs contain the standard exceptions to MFN treatment, namely: (1) preferential treatment accorded on the basis that a Contracting State is a member of a customs or economic union, free trade area, or (2) by virtue of any tax-related agreements and legislation.[71]

52. ***Non-standard exceptions.*** The Eswatini-United Kingdom BIT exempts the Contracting States from granting NT with respect to land ownership (Article 3(3)). More interestingly, although the Eswatini-Germany BIT dates back to 1990, it permits the use of discriminatory measures on certain public policy grounds (third sentence of Paragraph 3(a) of the BIT's Protocol), which is a feature more commonly found in more recent IIAs, such as the AIP (See Sections 2.4.2 and 2.4.3 below).[72]

1.4.3. Eswatini's TIPs

53. Neither the COMESA Treaty nor the SADC Protocol contain a standalone NT or MFN protection standard. Though MFN-style language is seen in Article 6(2) of the SADC Protocol, Annex 1, it is merely a qualification to the Protocol's FET clause (see Section 1.2.3 above).

1.5. Expropriation

1.5.1. Background

54. CIL and most investment treaties recognise a State's sovereign right to expropriate property in its territory.[73] However, for expropriation to be lawful, CIL and prevailing IIA practice require that

[71] For the Eswatini-United Kingdom BIT, these standard MFN exceptions are found in a separate article (Article 7).

[72] The full provision reads: 'Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of Article 3.'

[73] UNCTAD, *Expropriation: A Sequel – UNCTAD Series on Issues in International Investment Agreements II* (UN Publications 2012) 1, 5, 27 ('UNCTAD Study on Expropriation') <https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf> accessed 7 April 2025; Johanne M Cox, *Expropriation in Investment Treaty Arbitration* (Oxford University Press 2019) paras 4.01, 4.54; Dolzer, Kriebaum and Schreuer (n 2) 147; August Reinisch and

expropriation must be carried out: (1) for a public purpose (in some IIAs the equivalent terms 'public interest' or 'public benefit' are used); (2) in accordance with due process; (3) on a non-discriminatory basis; and (4) against payment of compensation (usually under the so-called Hull formula of 'prompt, adequate, and effective' compensation).[74]

55. Expropriation can take two principal forms: direct and indirect.[75] Direct expropriation means outright seizure of legal title to property, or physical possession of the investment.[76] Indirect expropriation occurs when no direct legal transfer of title or physical seizure has taken place, but when State measures nonetheless substantially deprive an investor of its investment.[77] A variety of regulatory measures can give rise to indirect expropriation, such as the revocation of a license,[78] the denial of a necessary permit,[79] the compulsory sale of an investment,[80] the levying of excessive or arbitrary taxation,[81] or the prohibition of distribution of dividends in a company.[82] Claims of indirect expropriation have been made in about 70% of all ISDS cases to date, with investors succeeding in nearly a third of them.[83] This makes (indirect) expropriation the second most litigated IIA protection, right after FET.[84]

Christoph Schreuer, *International Protection of Investments: The Substantive Standards* (Cambridge University Press 2020) 5, paras 1–2; Salacuse (n 2) 71, 178.

[74] 'UNCTAD Study on Expropriation' (n 73) 27; Salacuse (n 2) 178.

[75] 'UNCTAD Study on Expropriation' (n 73) 7–8.

[76] *Metalclad Corporation v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 ('*Metalclad v Mexico*'), para 103; *Técnicas Medioambientales Tecmed, SA v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 ('*Tecmed v Mexico*'), para 113; 'UNCTAD Study on Expropriation' (n 73) 7–8.

[77] Reinisch and Schreuer (n 73) 47, paras 202–203; 'UNCTAD Study on Expropriation' (n 73) 7.

[78] *Tecmed v Mexico* (n 76) para 151.

[79] *Metalclad v Mexico* (n 76) para 128.

[80] Reinisch and Schreuer (n 73) 49, para 214.

[81] *ibid*; Draft Convention on the Protection of Foreign Property, Text with Notes and Comments, OECD, 12 October 1967 ('OECD Draft Convention'), Notes and comments to Article 3.

[82] OECD Draft Convention (n 81) Notes and comments to Article 3.

[83] UNCTAD, 'International Investment Agreements' (2024) IIA Issues Note No. 3, 8 ('UNCTAD Statistics on IIAs 2024') <https://unctad.org/publication/facts-and-figures-investor-state-dispute-settlement-cases> accessed 10 March 2025.

[84] *ibid*.

1.5.2. Eswatini's BITs

56. Expropriation clauses are found in all of Eswatini's BITs in force. An example from the BIT with Kuwait is reproduced below.

Example from Eswatini-Kuwait BIT, Article 5 ('Expropriation')
1. (a) Investments made by investors of one Contracting State in the territory of the other Contracting State shall not be nationalized, expropriated, dispossessed or subjected to direct or indirect measures having effect equivalent to nationalization, expropriation or dispossession (hereinafter collectively referred to as 'expropriation') by the other Contracting State except for a public purpose related to the internal needs of that Contracting State and against prompt, adequate and effective compensation and on condition that such measures are taken on a non-discriminatory basis and in accordance with due process of law of general application. (b) Such compensation shall amount to the actual value of the expropriated investment and shall be determined and computed in accordance with internationally recognized principles of valuation on the basis of the fair market value of the expropriated investment at the time immediately before the expropriatory action was taken or the impending expropriation became publicly known, whichever is the earlier (hereinafter referred to as the 'valuation date'). Such compensation shall be calculated in a freely convertible currency to be chosen by the investor, on the basis of the prevailing market rate of exchange for that currency on the valuation date and shall include interest at a commercial rate established on a market basis, however, in no event less than the prevailing LIBOR - rate of interest or equivalent, from the date of expropriation until the date of payment. […] 3. For the purposes of this Agreement, the term 'expropriation' shall also include interventions or regulatory measures by a Contracting State that have a de facto expropriatory effect, in that their effect results in depriving the investor in fact from his ownership, control or substantial benefits over his investment or which may result in loss or damage to the economic value of the investment, such as the freezing or blocking of the investment, levying of arbitrary or excessive taxes on the investment, compulsory sale of all or part of the investment, or other comparable measures.

1.5.2.1. <u>Existence of Expropriation</u>

57. All Eswatini's BITs in force recognise that expropriation can be direct and indirect, as is clear from the use of 'expropriation' and 'measures tantamount [or equivalent] to expropriation' to indicate, respectively, direct and indirect expropriation.[85] Consistent with treaty drafting practice at the time, Eswatini's BITs in force do not provide any additional guidance as to how to determine whether an expropriation (especially an indirect expropriation) has in fact taken place. The BIT with Kuwait is a partial exception, as Article 5(3) provides a standard definition of indirect expropriation (with some illustrative examples) but otherwise offers no further clarifications on how to determine its occurrence in practice.

58. The lack of such clarifications means that tribunals enjoy considerable latitude in deciding whether indirect expropriation has occurred.[86] This is significant. Whereas direct expropriation is more straightforward and easier to identify,[87] indirect expropriation raises difficult questions with respect to the State's right to regulate, such as determining whether and when a regulatory measure crosses the threshold to become equivalent to a compensable taking.[88] Tribunals have developed two competing approaches to answer these questions: sole effects and police powers.[89]

[85] See *Tecmed v Mexico* (n 76) para 114, holding that it is generally understood that terms 'equivalent' or 'tantamount' to expropriation mean indirect expropriation. Numerous subsequent tribunals have held in the same vein. See, e.g., *Fireman's Fund Insurance Co v United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, 17 July 2006, para 176; *SD Myers, Inc v Government of Canada*, UNCITRAL, First Partial Award, 13 November 2000, paras 286–286; *Hulley Enterprises Ltd (Cyprus) v Russian Federation*, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014, para 1580; *Yukos Universal Ltd (Isle of Man) v Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, para 1580; *Veteran Petroleum Ltd (Cyprus) v Russian Federation*, PCA Case No. 2005-05/AA228, Final Award, 18 July 2014, para 1580, among many others.

[86] Salacuse (n 2) 389; Cox (n 73) 4.02.

[87] Chin Leng Lim, Jean Ho and Martins Paparinskis, *International Investment Law and Arbitration: Commentary, Awards and Other Materials* (2nd edn, Cambridge University Press 2021) 410; Salacuse (n 2) 395–396; Cox (n 73) para 4.08.

[88] Dolzer, Kriebaum and Schreuer (n 2) 154; Salacuse (n 2) 407.

[89] Global Arbitration Review, *The Guide to Investment Treaty Protection and Enforcement* (2nd edn, 2024) ch 'Substantive Protections: Expropriation' <https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/second-edition>; Ben Mostafa, 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) 15 Australian International Law Journal 267, 267.

Sole Effects vs Police Powers

Tribunals applying the **sole effects** approach look primarily at the measure's effect to determine whether indirect expropriation has occurred. If the effect of the measure is one of substantial deprivation of the investment (i.e., total or near-total destruction of its value, rather than a mere depreciation), then a finding of indirect expropriation is warranted. Other considerations, such as the measure's intent, context and purpose, are deemed irrelevant or of secondary relevance at best. See, e.g., *Roussalis v Romania* and *Siemens v Argentina*.[90]

Tribunals applying the **police powers** approach look also at the purpose, nature and context of the regulatory measure as relevant factors in determining whether indirect expropriation has occurred. Traditional domains of the State's so-called 'police powers' include taxation, public order and morality, the protection of human health and the environment. Measures taken in good faith within the State's police powers are deemed not expropriatory, even if they cause significant loss of value to the investment. See, e.g., *Chemtura v Canada* and *Methanex v USA*.[91]

It is clear that the sole effects approach makes a finding of indirect expropriation easier since the approach does not permit a State to justify its measures as a legitimate exercise of the sovereign right to regulate in the public interest.

1.5.2.2. Legality of Expropriation

59. An expropriation must meet four conditions to be lawful under CIL: public purpose, due process, non-discrimination, and the payment of compensation. This section examines the conditions of public purpose, due process and non-discrimination in the context of Eswatini's BITs in force. The standard of compensation is considered separately in Section 1.5.2.3.

[90] *Roussalis v Romania* (n 55) para 330; *Siemens v Argentina* (n 57) 270.

[91] *Chemtura Corporation (formerly Crompton Corporation) v Government of Canada*, PCA Case No. 2008-01, Award, 2 August 2010 ('*Chemtura v Canada*'), paras 265–266; *Methanex Corporation v United States of America*, UNCITRAL, Award, 3 August 2005 ('*Methanex v USA*'), Part IV, Chapter D, Page 7, para 15.

60. Determining whether the requirements of public purpose, due process and non-discrimination are fulfilled is a fact-intensive and case-by-case exercise. Still, the following common themes can be seen in arbitral practice:

a. The reference to public purpose is broad enough to encompass a wide range of policy objectives that a State may wish to pursue. Tribunals recognise States' wide discretion in determining a legitimate public purpose and, as a result, tend to defer to States' assessments in this regard.[92]

b. The due process condition will generally be met where the expropriation 'is carried out in accordance with the domestic law, in a non-arbitrary manner and with an opportunity for the investor to have the measure reviewed'.[93]

c. The non-discrimination condition will be violated if the State expropriates an investment by reason of the investor's nationality.[94]

61. Eswatini's BITs in force are not uniform in their descriptions of the three legality conditions mentioned above.

62. ***Missing legality conditions.*** The BITs with Germany and the United Kingdom omit the non-discrimination condition. The BIT with the United Kingdom does not explicitly mention 'due process' but it does refer to the investor's 'right … to prompt review, by a judicial or other independent authority' of the decision to expropriate, including the expropriated investment's valuation. Similar references to a right to review have on occasion, though not always, been considered as a manifestation of the general due process requirement.[95] The BIT with Germany also

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[92] See Cox (n 73) para 4.64; Lim, Ho and Paparinskis (n 87) 415–416; Dolzer, Kriebaum and Schreuer (n 2) 183.

[93] 'UNCTAD Study on Expropriation' (n 73) 40.

[94] *ibid* 34; Dolzer, Kriebaum and Schreuer (n 2) 183.

[95] For views in favour, see Reinisch and Schreuer (n 73) 214, para 1025. For views against, see *Guaracachi America, Inc and Rurelec PLC v The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award (corrected), 31 January 2014, para 439, holding that, unlike Article III(1) Bolivia-United States BIT, Article 5(1) Bolivia-United Kingdom BIT expressly provides only for the right to review 'by due process of law' (the same formulation as in the Germany-Eswatini BIT) but not for the due process requirement. There was thus no right to participate in the valuation process.

mentions the right to review the legality of the expropriation but expressly links this right to the due process requirement ('subject to review by due process of law').

63. The practical effect of the omission of any of the legality conditions is debatable. One view, based on a literal reading of the text, is that the omitted legality conditions (e.g., non-discrimination) are simply not required. This view was taken in the consolidated cases *Bernhard von Pezold v Zimbabwe* and *Border Timbers v Zimbabwe*, where the tribunals contrasted the two applicable BITs, noting that one contained the non-discrimination condition while the other did not, and acknowledging that the difference could lead to different outcomes (although the difference was not material for these two cases).[96] The other view states that expropriation provisions in treaties must, in any case, be read in light of CIL.[97] On this view, a tribunal may still imply any missing legality conditions into the treaty, if they are conditions that also form a part of CIL. This view was followed in *Siag v Egypt*, albeit with respect to the condition of prompt compensation. In that case, Egypt's 12-year delay in paying compensation was found to violate the promptness requirement, even though such a requirement was not expressly stated in the treaty.[98]

64. ***Modified legality conditions.*** The BITs with Kuwait and the United Kingdom formulate the public purpose condition in a modified manner, although such modifications are unlikely to change the applicable test in any meaningful way. The two BITs state that any expropriation shall be for a 'public purpose *related to the internal needs of [the State]*' (emphasis added). This wording is typical of the United Kingdom's BITs: it appears to bar reliance on foreign policy reasons (as opposed to domestic needs) and thus targets the use of expropriation as a foreign policy tool.[99] It is

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[96] *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Award, 28 July 2015 ('*Bernhard von Pezold v Zimbabwe*'), para 492; *Border Timbers Limited, Border Timbers International (Private) Limited and Hangani Development Co (Private) Limited v Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Award, 28 July 2015 ('*Border Timbers v Zimbabwe*'), para 492.

[97] Reinisch and Schreuer (n 73) 15, para 45.

[98] *Siag v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 ('*Siag v Egypt*'), paras 434–435; See also Reinisch and Schreuer (n 73) 14–17, for a discussion on the issue.

[99] 'Investment Treaty Arbitration: United Kingdom - England & Wales' ('Investment Treaty Arbitration') <https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/united-kingdom> accessed 12 February 2025.

Generally, see Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (1st edn, Kluwer Law International 2009) 370. One suggested explanation for the emergence of this variation is that it is a response to Egypt's nationalization of the Suez Canal, which was for public purpose but, as the drafters might have thought, unrelated to Egypt's internal needs. When negotiating with the United Kingdom, some countries objected to the inclusion of this doubtful that tribunals interpreting Eswatini's BITs will attach this very specific meaning to the same phrase. At least four tribunals that have considered identical language did not attach any significance to the 'internal needs' wording.[100]

1.5.2.3. Standard of Compensation

65. All three of Eswatini's BITs in force require the payment of compensation as part of lawful expropriation. All BITs adopt the same standard of compensation, where compensation must be prompt, adequate, and effective:

   a. **'Prompt'** means 'without delay'.[101] Thus, even though the BIT with Germany uses the phrase 'without delay' (as opposed to the word 'prompt'), the effect is the same.

   b. **'Adequate'** is usually taken to mean the fair market value of the investment.[102] The adequateness of compensation is expressed in different ways under Eswatini's BITs in force. The BIT with the United Kingdom uses the phrase 'market value'; the BIT with Kuwait provides that the 'actual value' of the investment shall be compensated, which should be based on the investment's 'fair market value' and determined 'in accordance with internationally recognized principles of valuation'; whereas the single word 'value' is used in the BIT with Germany. These minor variations are ultimately not determinative, since tribunals have held that phrases such as 'value', 'market value' and 'actual value' are equivalent to 'fair market value'.[103]

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formulation either because it was meaningless or because it unnecessarily restricted a State's right to expropriate. See Paul Peters, 'Recent Developments in Expropriation Clauses of Asian Investment Treaties' in Swan Sik Ko, Jacob JG Syatauw and Moragodage CW Pinto (eds), *Asian Yearbook of International Law, Volume 5 (1995)* (Brill Nijhoff 1995) 59.

[100] See *British Caribbean Bank Ltd v Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award, 19 December 2014, paras 241–247; *Vestey Group Ltd v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, paras 293–300; *Nachingwea UK Limited, Ntaka Nickel Holdings Limited and Nachingwea Nickel Limited v United Republic of Tanzania*, ICSID Case No. ARB/20/38, Award, 14 July 2023, paras 189, 273–280; *Border Timbers v Zimbabwe* (n 96) 490–492, 502, 521; *Bernhard von Pezold v Zimbabwe* (n 96) 490–492, 502, 521.

[101] Salacuse (n 2) 428; 'UNCTAD Study on Expropriation' (n 73) 40–41, 47–48.

[102] World Bank, 'Legal Framework for the Treatment of Foreign Investment (Vol. 2 of 2): Guidelines' (1992), Report No. 11415, 41, Guideline IV(3) <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/955221468766167766>.

[103] See, e.g., *Siemens v Argentina* (n 57) para 353, holding that the term 'value' need not 'further qualification to mean not less than the full value of the investment' and in this sense means fair market value; *CME Czech Republic BV v The Czech Republic*,

c. **'Effective'** means that compensation must be realisable. In practice, this means payment in a currency that can be freely exchanged and transferred.[104] The BIT with Kuwait goes a step further by giving the investor a choice of its desired freely convertible currency.

66. ***Lawful vs unlawful expropriations.*** The BITs do not clarify whether the standard of compensation provided applies to both lawful and unlawful expropriations, or only to lawful expropriations. Where the treaty is silent, tribunals overwhelmingly take the view that the treaty's standard of compensation applies only in cases of lawful expropriations.[105] For unlawful expropriations, in contrast, tribunals apply the CIL standard of *full reparation*. The full reparation standard seeks to 'wipe out all the consequences of the illegal act and reestablish [sic] the situation which would, in all probability, have existed if that act had not been committed'.[106] The application of the full reparation standard often leads to higher awards as it allows for the recovery of lost profits and other incidental expenses which may be greater than the original value of the investment.[107] It also invites the use of speculative valuation methods like discounted cash flow (**'DCF'**) analysis.

Discounted Cash Flow Analysis
The DCF method predicts future investment profits and then discounts them with reference to such factors as the time value of money, inflation, or other associated risks.[108] The method can be highly speculative,[109] and can lead to significantly higher awards as compared to other valuation methods,

UNCITRAL, Final Award, 14 March 2003, paras 496–497, finding that terms like 'market value', 'genuine value' and 'equivalent of the investment affected' all refer to full compensation, which, in turn, means fair market value; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para 8.2.10, holding that 'actual value' also means fair market value (the relevant BIT in that case did not refer to the fair market value).

[104] Salacuse (n 2) 428; Dolzer, Kriebaum and Schreuer (n 2) 185.

[105] 'UNCTAD Study on Expropriation' (n 73) 111–112; Cox (n 73) para 12.17.

[106] *Chorzów Factory*, PCIJ, Judgement (Merits), PCIJ Series A, No 17, 13 September 1928, 47.

[107] Cox (n 73) para 12.18. 'UNCTAD Study on Expropriation' (n 1) 114.

[108] 'UNCTAD Study on Expropriation' (n 73) 118–120; Cox (n 73) para 13.05.

[109] Article 36 'ARSIWA with Commentaries' (n 10) para 26.

especially where it is applied to a new project with no proven track record of profitability (as was done in the *Crystallex v Venezuela* case,[110] where the award amount totalled more than US$1.2 billion).

67. ***Interest.*** The BITs do not specify whether the interest payable on the compensation should be simple or compound. Where the treaty is silent, tribunals have generally preferred to award compound interest, resulting in higher award amounts.[111]

1.5.2.4. Other Features: Shareholders Claims

Example from Eswatini-Kuwait BIT, Article 5(2) ('Expropriation')

…For further certainty, expropriation shall include situations where a Contracting State expropriates the assets of a company or enterprise that is incorporated or established under the laws in force in its own territory in which an investor of the other Contracting State has an investment, including through the ownership of shares, stocks, debentures or other rights or interests.

68. All of Eswatini's BITs in force include an additional safeguard for the protection of the rights of shareholders, as seen in the quoted example above.[112] Contrary to most domestic laws, these provisions allow shareholders to claim for reflective loss—i.e., loss of share value following the expropriation of company assets.[113] Similar provisions in other treaties have been interpreted in this way. In *Renergy v Spain*, the tribunal found that the applicable treaty allowed reflective loss claims as the treaty's provision on expropriation contemplated situations where the State expropriates the assets of a company 'in which an Investor … has an Investment, including through the ownership of shares'.[114]

[110] *Crystallex v Venezuela* (n 28) para 877.

[111] 'UNCTAD Study on Expropriation' (n 73) 47; Salacuse (n 2) 430.

[112] Note that in the Eswatini-Germany BIT, this safeguard is found in paragraph 4 of the Protocol.

[113] Anuki Suraweera, 'Shareholder Claims for Reflective Loss in Investor-State Dispute Settlement: Proposing Reform Options for States' (2023) 38 ICSID Review 595, 598–599, stating that the prohibition is found in most domestic laws and referring to such major jurisdictions as Australia, Canada, France, Germany, Hong Kong, the People's Republic of China, the Netherlands, the United Kingdom, and the United States.

[114] *RENERGY Sà r.l v Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022 ('*Renergy v Spain*'), paras 436–438.

1.5.3. Eswatini's TIPs

SADC Protocol, Annex 1, Article 5 ('Investment Protection')
Investments shall not be nationalised or expropriated in the territory of any State Party except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation.

COMESA Treaty, Article 159 ('Investment Promotion and Protection')

3. The Member States agree that part of the conducive climate to investment are measures aimed at protecting and guaranteeing such investment. To this end, the Member States shall:
   a. subject to the accepted principle of public interest, refrain from nationalising or expropriating private investment; and
   b. in the event private investment is nationalised or expropriated, pay adequate compensation.
4. For the purposes of paragraph 3 of this Article, expropriation shall include any measures attributable to the government of a Member State which have the effect of depriving an investor of his ownership or control of, or a substantial benefit from his investment and shall be interpreted to include all forms of expropriation such as nationalisation and attachment as well as creeping expropriation in the form of imposition of excessive and discriminatory taxes, restrictions in the procurement of raw materials, administrative action or omission where there is a legal obligation to act or measures that frustrate the exercise of the investors rights to dividends, profits and proceeds of the right to dispose of the investment.

69. ***Existence of expropriation.*** Article 159(4) of the COMESA Treaty provides for direct and indirect expropriation, per its reference to measures 'which have the effect of depriving an investor of his ownership or control of, or a substantial benefit from his investment'. The same provision also mentions four forms of so-called 'creeping expropriation', which is a subtype of indirect expropriation that occurs through a series of regulatory measures, each of which non-expropriatory in isolation, that nevertheless have an expropriatory effect when applied over a long duration.

70. In contrast, Article 5 of the SADC Protocol, Annex 1 does not expressly distinguish between direct and indirect expropriation, and simply states that '[i]nvestments shall not be nationalised or expropriated[.]' The absence of an explicit reference to indirect expropriation (or any equivalent phrasing) does not necessarily mean that the SADC Protocol excludes protection against indirect expropriations. Tribunals will likely construe generic references (such as the one in the SADC Protocol) to encompass both direct and indirect expropriation,[115] on the basis that, absent clear indications in the text, States are presumed to not have agreed to a provision contrary to the prevailing position under international law.[116] Indeed, at the time the SADC Protocol was drafted, it was already well-established that expropriation can be both direct and indirect.[117] A clear indication to the contrary would likely be needed to reach the opposite conclusion (e.g., referring only to direct expropriation, as Brazil has done in its agreements since 2015).[118]

71. ***Legality of expropriation.*** Among all of Eswatini's IIAs in force, the SADC Protocol, Annex 1 is the only one that expressly states all four legality conditions. Conversely, the COMESA Treaty omits the non-discrimination and due process conditions. Moreover, the COMESA Treaty does not even mention a right to review (see para 62 above).

72. ***Standard of compensation.*** The SADC Protocol, Annex 1 adopts the common standard of prompt, adequate and effective compensation. Conversely, the COMESA Treaty only requires compensation to be 'adequate'. However, recalling the analysis of the standard of compensation under Eswatini's BITs in force (see para 65 above), the lack of a reference to promptness and effectiveness might not make a difference in practice, since promptness and effectiveness are standards recognised under CIL. Further, as the COMESA Treaty and the SADC Protocol are both silent on the standard of

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115 APEC/UNCTAD IIA Negotiators Handbook (n 9) 58–59; UNCTAD Study on Expropriation (n 73) 8; See also Wei Shen, 'Conceptuality or Textuality? Understanding the Notion of Expropriation in the Context of Tza Yap Shum v. the Republic of Peru' (2014) 7 Journal of East Asia and International Law 379, 381–383.

116 *AAP v Sri Lanka* (n 51) para 41; See also Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (Oxford University Press 2022) 177–178.

117 See Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) paras 8.46, 8.50, noting that this may not be the case for older BITs, such as the Germany-Pakistan BIT dating back to 1959, which also does not distinguish between direct and indirect expropriation (or measures having an effect that is equivalent or tantamount to the latter).

118 Salacuse (n 2) 422–423, citing Article 6 Brazil-India CFIA as an example. See also Article 7(1),(5) Cooperation and Facilitation Investment Agreement, Brazilian Model BIT ('Brazil Model CFIA').

compensation for unlawful expropriation and interest, tribunals are likely to apply a full reparation standard for unlawful expropriation and award compound interest (see paras 66–67 above).

1.6. Transfer of Funds

1.6.1. Background

73. Transfer of Funds clauses guarantee the free flow of payments in connection with foreign investments, including, among others, sums invested, returns on investment, royalties received, and proceeds from the sale of the investment, including any compensation received in the event of nationalisation or expropriation.

1.6.2. Eswatini's BITs

Example from Eswatini-Kuwait BIT, Article 6 ('Transfer of Payments Related to Investments')
1. Each Contracting State shall guarantee to investors of the other Contracting State the free transfer of investments and payments in connection with them into and out of its territory. 2. Transfers of payments under paragraph 1 shall be effected without delay or restrictions and, except in the case of payments in kind, in a freely convertible currency. In case of such delay in effecting the required transfers, the investor affected shall be entitled to receive interest for the period of such delay.

74. All three of Eswatini's BITs in force contain a Transfer of Funds provision that allows foreign investors to transfer investments, returns or other payments in connection with an investment at the applicable rate of exchange and without delay. Key features, commonalities and, differences of the Transfer of Funds provisions across the three BITs are presented below.

75. ***Inward transfers vs Outward transfers.*** The BITs with Germany and Kuwait extend the scope of application of the Transfer of Funds clause to both inward and outwards transfers. The BIT with Kuwait does so explicitly ('into and out of [the Contracting State's] territory'), whereas the BIT with Germany does the same in a more implied manner (see the reference to 'principal and additional

amounts to maintain or increase the investment', under Article 5(a), which seems to contemplate inward transfers to 'maintain' or 'increase' an investment; references to other payments in connection with an investment, such as 'returns' under Article 5(b) indicate that outward transfers are also covered by the provision). In contrast, the Transfer of Funds provision in the Eswatini-United Kingdom BIT only covers outwards transfers as evidenced by the phrase '… the unrestricted transfer of … investments and returns' in its Article 6. The term 'returns', as defined in Article 1 of that treaty, means 'the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties or fees'. This clearly refers to sums to be transferred out of the host State.

76. ***'Without delay'.*** All three BITs require transfers to be made 'without delay'. The term is not defined in the BITs with Kuwait and the United Kingdom, but the BIT with Germany offers more guidance. Paragraph 7(a) of that treaty's appended Protocol clarifies that a transfer is made 'without delay' if it is 'effected within such period as is normally required for the completion of transfer formalities'. The same provision further imposes a strict maximum period of two months for completing these formalities.

77. ***'Free' transfers vs 'Unrestricted' transfers.*** The three BITs differ on whether any exceptions can apply to Transfer of Funds obligations. On one end of the spectrum, the Eswatini-United Kingdom BIT is the strictest in that it mandates the 'unrestricted transfer' (as opposed to the more commonly used phrase of 'free transfer') of investments and returns. In the middle, the Eswatini-Kuwait BIT provides for the 'free transfer' of investments and payments, yet it does not include any exception to this obligation that host States may rely on to restrict transfers even temporarily. On the other end of the spectrum, paragraph 7(b) of the Protocol to the Eswatini-Germany BIT permits some restrictions on free transfers in cases of 'extreme balance of payments difficulties'. However, this exception is narrow and probably difficult to invoke in practice, since: (1) the use of the word 'extreme' suggests a particularly high threshold of financial difficulties; (2) any restrictions can only remain in place for 'a limited period'; (3) any restrictions apply only to 'the transfer of the proceeds of liquidation' from the sale of an investment; and (4) the host State in any event guarantees an annual transfer of 20% of the proceeds.

1.6.3. Eswatini's TIPs

SADC Protocol, Annex 1, Article 9 ('Repatriation of Investment and Returns')
Each State Party shall ensure that investors are allowed facilities in relation to repatriation of investments and returns in accordance with the rules and regulations stipulated by the Host State.
COMESA Treaty, Article 159(5) ('Investment Promotion and Protection')
The benefits to private investors include the right to: (a) repatriate investment returns…; (b) repatriate royalties…; (c) repatriate funds for repayment of loans; (d) repatriate proceeds from the liquidation or sale of the … investment …; (e) payments for maintaining or developing the investment project, such as funds for acquiring raw or auxiliary materials, semi-finished products as well as replacing capital assets; (f) remit the earnings of expatriate staff of the investment project; […]

78. Eswatini's TIPs in force also contain Transfer of Funds provisions. They do not specify that transfers must be made 'without delay'. The COMESA Treaty covers both inward and outward transfers (Article 159(5)(e): 'payments for maintaining or developing the investment project'). In contrast, the SADC Protocol, Annex 1 covers outward transfers only.[119] The SADC Protocol also contains a domestic law caveat, requiring that repatriation of investment and return be conducted 'in accordance with the rules and regulations stipulated by the Host State', which may make the scope of the obligation narrower.

[119] Article 9 SADC Protocol, Annex 1, read with Article 1(2) SADC Protocol, Annex 1 ('returns' means 'amounts yielded by an investment and in particular, though not exclusively, includes profits, interests, capital gains, dividends, royalties, and fees').

1.7. Umbrella Clause

1.7.1. Background

79. Umbrella clauses elevate violations of an investment contract by the State, and possibly breaches of any other obligation assumed by a State towards investors under domestic law, to a violation of the IIA in which the umbrella clause is found.[120] Umbrella clauses thus offer significant benefits to foreign investors since, in their absence, the default position under international law is that a mere breach of contract or other commitment under domestic law does not in and of itself give rise to violation of international law or a violation of investment treaty standards.[121]

80. The application of umbrella clauses has proven controversial. Different tribunals have interpreted umbrella clauses differently, with no uniformity emerging.[122] Four principal approaches are seen in arbitral decisions:[123]

    a. **Giving full effect to umbrella clauses.** This appears to be the most popular view.[124] Tribunals taking this view hold that umbrella clauses elevate any ordinary or commercial breach of contract to the level of a treaty breach. See, e.g., *SGS v Philippines* and *Eureko v Poland*.[125]

    b. **Umbrella clauses covering only sovereign breaches of contract.** Tribunals taking this view attempt to strike a balance by holding that umbrella clauses cover only investment contracts the State has entered into in its capacity as a sovereign rather than as a commercial actor (*acta*

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[120] See generally Dolzer, Kriebaum and Schreuer (n 2) 274–282.

[121] *Noble Ventures, Inc v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 ('*Noble Ventures v Romania*'), para 54; Dolzer, Kriebaum and Schreuer (n 2) 274; Salacuse (n 2) 265–266.

[122] Dolzer, Kriebaum and Schreuer (n 2) 274–275.

[123] J Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 Arbitration international 351, 367–370.

[124] Salacuse (n 2) 375; Newcombe and Paradell (n 99) 470.

[125] *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 ('*SGS v Philippines*'), paras 119, 128, 155; *Eureko BV v Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005 ('*Eureko v Poland*'), paras 246, 248, 250.

jure imperii, as opposed to *acta jure gestionis*). See, e.g., *El Paso v Argentina* and *Sempra v Argentina*.[126]

c. **Looking at the treaty parties' intent.** Tribunals with this view hold that umbrella clauses cover ordinary contractual breaches only if the States Parties had specifically intended for the treaty to cover such ordinary contractual breaches.[127] This is the narrowest approach to the scope of umbrella clauses. See, e.g., *SGS v Pakistan* and *Joy Mining v Egypt*.[128]

d. **Umbrella clauses as an independent basis for a treaty claim.** Some tribunals have taken the additional view that umbrella clauses provide a basis for a treaty claim even if the applicable treaty contains no provisions on ISDS,[129] yet the effect of the umbrella clause is not to transform ordinary contract breaches into treaty breaches or to supersede the dispute settlement and applicable law provisions of the investment contract in question.[130]

81. Given the uncertainty regarding umbrella clauses' scope and their implications, newer IIAs tend not to include umbrella clauses.[131]

1.7.2. Eswatini's BITs

Eswatini-Germany BIT, Article 8(2)
Each Contracting Party shall observe any other obligation it has assumed under any agreement with regard to investments in its territory by nationals or companies of the other Contracting Party.

[126] *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 ('*El Paso v Argentina*'), paras 62, 70, 74, 77; *Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 ('*Sempra v Argentina*'), paras 305–314.

[127] Dolzer, Kriebaum and Schreuer (n 2) 278; Crawford (n 123) 367.

[128] *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003 ('*SGS v Pakistan*'), paras 167–172; *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 ('*Joy Mining v Egypt*'), paras 80, 81.

[129] Crawford (n 123) 368, citing *SGS v Philippines* (n 125) and *CMS v Argentina* (n 23).

[130] Crawford (n 123) 368.

[131] See Raul Pereira de Souza Fleury, 'Closing the Umbrella: A Dark Future for Umbrella Clauses?' (*Kluwer Arbitration Blog*, 13 October 2017) <https://arbitrationblog.kluwerarbitration.com/2017/10/13/closing-umbrella-dark-future-umbrella-clauses/> accessed 11 February 2025.

Eswatini-United Kingdom BIT, Article 2(2) ('Promotion and Protection of Investment')
[…] Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.
Eswatini-Kuwait BIT, Article 2(2) ('Promotion and Protection of Investments')
[…] Each Contracting State shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting State.

82. All of Eswatini's BITs in force contain an umbrella clause. This is unsurprising, considering when these treaties were concluded. Although the three clauses are largely similar, the uncertainty around umbrella clauses means that even small textual differences may result in different and unexpected interpretations.

83. The BITs with Kuwait and the United Kingdom share common language ('shall observe *any obligation* it *may have entered into* with regard to investments' (emphasis added)). It is not clear what obligations these umbrella clauses cover. On one hand, they could be interpreted to cover only specific undertakings as regards a particular investor (e.g., by way of contract or unilateral representations). On the other hand, the clauses are also broad enough to cover general undertakings found in the host State's legislation (e.g., to provide a tax exemption if certain legislative conditions are met).

84. Tribunals have taken different approaches vis-à-vis such umbrella clauses. Some tribunals[132] have held that the phrases 'any obligation' and 'may have entered into' indicate that the clause covers only specific undertakings (whether contractual or unilateral), because States do not 'enter into' legislation with investors.[133] In contrast, other tribunals have not given the same weight to the phrase

[132] Particularly in the cases involving the roll-back of renewable energy subsidies in Spain.

[133] See, e.g., *9REN Holding SÀRL v Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019, para 342; *BayWa re Renewable Energy GmbH and BayWa re Asset Holding GmbH v Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions for Quantum, 2 December 2019, para 444. The tribunals in the Spanish cases interpreted the umbrella clause in the ECT, Article 10(1) stating: '[e]ach Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party'.

'enter into', and thus have interpreted similarly worded umbrella clauses as also including general undertakings or commitments found in the host State's legislation.[134]

85. Further, where specific non-contractual undertakings (e.g., a representation made to an investor) are covered by umbrella clauses, this can overlap with the protection of an investor's 'legitimate expectations' under the FET standard.[135] As a result, investors may be able to bring the same claim under multiple legal bases and under potentially different legal thresholds.

86. The umbrella clause in the Eswatini-Germany BIT is phrased differently: each Contracting State 'shall observe any other obligation it has *assumed under any agreement* with regard to investments' (emphasis added). Since this clause expressly stipulates that it covers only contractual obligations, the interpretative issues discussed above are unlikely to arise.

1.7.3. Eswatini's TIPs

87. Neither of Eswatini's two TIPs in force have umbrella clauses. This is in line with contemporary treaty drafting practice to omit umbrella clauses altogether.

1.8. General Exceptions

1.8.1. Background

88. 'General exceptions' are provisions that *justify* or *excuse* a State's violation of its investment protection obligations, such that no State liability arises. Unlike scope carve-outs or denial of benefits clauses (see Section 2.1.3 'Denial of Benefits'), where certain investors/investments are simply not protected under the treaty, general exceptions apply *after* a treaty violation is established. General exceptions can also be contrasted with specific exceptions to particular standards of

[134] *SGS Société Générale de Surveillance SA v The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012, para 77; *Noble Ventures v Romania* (n 121) para 51.

[135] Ian A Laird and others, *Investment Treaty Arbitration and International Law: Volume 7* (JurisNet 2014) 144.

protection,[136] as general exceptions in principle apply with respect to all investment protection obligations contained in a treaty.

89. General exceptions seek to remove State liability for *bona fide* regulatory measures, even if such measures hurt the interests of investors/investments.

1.8.2. Eswatini's BITs

90. None of Eswatini's BITs in force contain a general exceptions provision.

1.8.3. Eswatini's TIPs

SADC Protocol, Annex 1, Article 14 ('Right to Regulate')
Nothing in this Annex shall be construed as **preventing** a State Party from exercising its right to regulate in the public interest and to adopt, maintain, or enforce any measure that **it considers appropriate** to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns. (emphasis added)

91. Among Eswatini's TIPs in force, only SADC Protocol, Annex 1 contains a general exceptions clause. Article 14 ('Right to Regulate') is a simpler version of a GATT-style general exceptions provision.

92. The phrase 'any measure that *it considers appropriate*' (emphasis added) indicates that the provision incorporates a so-called 'self-judging' standard. Tribunals interpreting 'self-judging' exceptions clauses have generally deferred to the State's assessment of public interest relating to 'health, safety or environmental concerns', as well as the State's choice of measures 'appropriate' to secure such interests.[137] Such 'self-judging' clauses have generally been effective.

93. That said, they are not bulletproof. In a number of (highly criticised) arbitral decisions, similarly worded clauses in Canadian FTAs were interpreted literally and arguably implausibly, with the

[136] For instance, the customs union/FTA exceptions in MFN clauses, discussed at Section 1.4.1, para 51.

[137] See, e.g., *Philip Morris v Uruguay* (n 25) 399, 418.

effect of negating the exception altogether. These tribunals found that the words '[n]othing… shall prevent' meant only that the investor could not ask for restitution (i.e., for the State to reverse or rescind its measures)—in other words, the investor was still entitled to compensation from the State.[138]

1.9. Termination Provisions and Survival Clauses

1.9.1. Background

94. States may wish to reform their existing investment treaty obligations by renegotiating or terminating their IIAs.[139] If the Contracting States do not mutually agree to terminate their treaty, rules for unilateral termination (found in the IIA itself) will usually apply.[140]

95. Even though IIAs can be unilaterally terminated, many IIAs also contain so-called 'survival' or 'sunset' clauses, which provide that investment protection provisions shall continue to apply ('survive') for a specified period of time (often 10–20 years). As a result, investors may continue to bring claims even after the treaty's termination.[141] That said, only investments made before the IIA was terminated are protected during this survival period.[142]

[138] *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017 ('*Bear Creek v Peru*'), paras 471–477; *Eco Oro Minerals Corp v Colombia,* ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, paras 829–831; *Montauk Metals Inc (formerly known as Galway Gold Inc) v Republic of Colombia*, ICSID Case No. ARB/18/13, Award, 7 June 2024, paras 972–982.

[139] Nathalie Bernasconi-Osterwalder and others, 'Terminating a Bilateral Investment Treaty' (IISD 2020) IISD Best Practices Series 1 <https://www.iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf>.

[140] Article 54(a)–(b) VCLT.

[141] Karsten Nowrot, 'Termination and Renegotiation of International Investment Agreements' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press 2016) 242; 'Terminating a Bilateral Investment Treaty' (n 139) 4.

[142] Nowrot (n 141) 242; 'Terminating a Bilateral Investment Treaty' (n 139) 4.

1.9.2. Eswatini's BITs

Example from Eswatini-United Kingdom BIT, Article 15 ('Duration and Termination')
This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that **in respect of investments made whilst the Agreement is in force**, its provisions shall **continue in effect** with respect to such investments **for a period of twenty years** after the date of termination and without prejudice to the application thereafter of the rules of general international law. (emphasis added)

96. All three of Eswatini's BITs in force contain termination provisions that allow for unilateral termination, as well as survival clauses.

97. ***Current status.*** Having exceeded their initial period of time, the BITs with Germany and the United Kingdom will remain in force unless and until they are terminated, whether unilaterally or by mutual agreement. In contrast, the BIT with Kuwait is still within its initial period of force, which will expire in 2043. Thereafter, the BIT with Kuwait will be automatically prolonged in subsequent periods of 30 years each, unless either Contracting State gives notice of termination at least one year before the treaty renews.

98. ***Survival clauses.*** All three BITs have survival clauses that protect investments (made before termination) for 20 years after termination. It is less clear whether the survival clause applies in all cases of termination (unilateral as well as by mutual agreement); and whether Contracting States terminating or replacing an IIA by mutual agreement can also at the same time agree to disapply the IIA's survival clause. The wording in the three BITs does not clearly dispose of these questions. Moreover, arbitral tribunals have taken divergent views on the matter. For instance, the tribunal in *Mohamed Abdel Raouf Bahgat v Egypt (I)*, applying a termination clause similar to the one found in the Eswatini-Germany BIT, read the provision literally and thus refused to disapply the survival clause to a replacement of a BIT with a newer one by mutual agreement.[143] By contrast, the tribunal in *UP and CD Holding Internationale v Hungary* seemed in principle willing to accept the

[143] *Mohamed Abdel Raouf Bahgat v Egypt (I)*, PCA Case No. 2012-07, Decision on Jurisdiction, 30 November 2017, para 313.

Contracting State's specifically negotiated agreement to modify or shorten an IIA's survival period.[144]

99. At the same time, State practice seems to resist the view adopted by the tribunal in *Mohamed Abdel Raouf Bahgat v Egypt (I)*. For instance, EU Member States have considered it possible to mutually terminate their intra-EU investment treaties and the survival clauses they contained by specifically stating that the survival clauses in these treaties have no legal effect following termination.[145] In line with this State practice, it may be preferable for States contemplating the renegotiation or mutual termination of their IIAs to explicitly point out that any survival clauses in their treaties are terminated, or that the period of protection they specify is reduced.

1.9.3. Eswatini's TIPs

SADC Protocol, Annex 1, Article 31 ('Withdrawal')
1. Any State Party may withdraw from this Protocol upon the expiration of twelve (12) months from the date of giving written notice to the Executive Secretary to that effect.
COMESA Treaty, Article 191 ('Withdrawal')
1. Any Member State wishing to withdraw from the Common Market shall give to the Secretary-General one year's written notice of its intention to withdraw and at the end of such year shall, if such notice is not withdrawn, cease to be a Member State of the Common Market.

100. It does not appear to be possible to withdraw exclusively from the investment protection obligations found in the SADC Protocol, Annex 1 or the COMESA Treaty (Chapter 26). The SADC Protocol and COMESA Treaty do, however, contain procedures for withdrawal from the SADC Protocol (as a whole) and COMESA membership, respectively. The procedure for doing so is largely similar under both instruments. Neither instrument contains a survival clause.

[144] *UP and CD Holding Internationale v Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, para 265.

[145] Claudia Annacker, 'Operation and Termination of Sunset Clauses in Bilateral Investment Treaties' (2023) 10 National Law School Business Law Review 9, 11–12, 26.

2. AFCFTA INVESTMENT PROTOCOL

2.1. Scope of Protection

101. Compared to Eswatini's IIAs in force, the AIP takes a far more sophisticated approach in defining the scope of protected investors and investments. Through the use of detailed definitions, a denial of benefits clause, and numerous carve-outs, the AIP makes it clear that it seeks to attract and protect investments that contribute to sustainable development in the host State.

2.1.1. Covered Investments

AIP, Article 1 ('Definitions')
Investment means an **enterprise or company**, as defined in this Article, which is established, acquired or expanded in conformity with the laws and regulations of a Host State by an investor which **maintains substantial business** in the territory of that Host State… For greater certainty, the **investment must have the following characteristics**: commitment of capital or other resources, the expectation of gain or profit, a certain duration, assumption of risk, and **a significant contribution to the Host State's sustainable development**… For greater certainty, **investment does not include**: a. debt securities issued by a government or loans to a government or government- owned or controlled enterprise; b. portfolio investments, that is, investment that does not give the investor the possibility to exercise effective management or influence in the management of the enterprise; c. claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a State Party to an enterprise in the territory of another State Party, or the extension of credit in connection with a commercial transaction; or d. claims arising from an order or judgment rendered in any judicial, administrative or arbitral proceeding; (emphasis added)

102. The AIP uses an enterprise-based definition and defines ‘investment’ as an ‘enterprise or company’. In turn, an ‘enterprise’ may possess ‘assets’. This effectively means that the AIP only protects ‘assets’ if they are part of an active enterprise/business activity. This is in stark contrast to Eswatini’s IIAs in force which (using asset-based definitions) protect assets as investments even if there is no business activity associated with such assets. This reflects the AIP’s desire to protect and promote investment and business, and not merely the foreign ownership of assets.

103. The AIP’s definition of ‘investment’ also incorporates three additional features.

104. First, an enterprise is an ‘investment’ only if it exhibits the following cumulative characteristics: ‘commitment of capital or other resources, the expectation of gain or profit, a certain duration, assumption of risk, *and* a significant contribution to the host State’s sustainable development’ (emphasis added). In other words, enterprises that do *not* contribute to sustainable development are *not* protected under the AIP. This not only reduces the scope of the State’s investment protection obligations, but also very clearly expresses the AIP’s objective of attracting quality investments.

105. Second, to qualify as an ‘investment’, enterprises must maintain ‘substantial business in the territory of [the] host State’. This seeks to prevent holding, shell, or mailbox companies from being protected as ‘investments’, as such companies generally do not bring business or beneficial economic activity for the host State. At the same time, this also reduces the risk of treaty shopping (where foreign investors incorporate holding companies in multiple jurisdictions to enjoy protection under multiple IIAs).

106. Notably, ‘substantial business activity’ must be determined on an ‘overall examination of all the circumstances on a case-by-case basis, by a State Party’. This presumably allows States to rely on criteria relevant to their domestic economic and social needs. A wide range of relevant factors are listed in the AIP, including the nature, size, scope, and sector of the business, the amount of investment, effects on the local community, and the duration of the investment. The AIP also provides a representative example, by stating that the requirement will generally be satisfied if the enterprise (1) conducts ‘core and relevant income-generating activities’, (2) employs ‘a reasonable number of suitably qualified persons’, and (3) has a level of expenditure proportionate to its activities.

AIP, Article 1 ('Definitions')

'Substantial business activity' requires **an overall examination of all the circumstances on a case-by-case basis, by a State Party**, of all the circumstances [sic], including, among other factors: (i) the nature, size, scope and sector of business, (ii) the amount of investment brought into the territory of a State Party, (iii) the effect of the investment on the local community and (iv) the length of time the investment has been in operation;

Generally, an investment shall be taken to have substantial business activities in the territory of a State Party where it conducts its core and relevant income generating activities, through the employment of a reasonable number of suitably qualified persons and by having a minimum level of expenditure which is proportionate to its level of the relevant activities in the territory of that State Party;

(emphasis added)

107. Third, the AIP excludes certain assets from protection. These reflect commonly excluded assets (portfolio investments and claims to money from contracts for the sale of goods), as well as assets that have been the subject of controversial treaty claims by investors such as government debt securities (e.g., Argentinian sovereign debt crisis cases) and orders or judgments rendered in the context of judicial, administrative or arbitral proceedings (e.g., *Saipem v Bangladesh*).

2.1.2. Covered Investors

AIP, Article 1 ('Definitions')

'Investor' means:

a. a natural person, who is a national of a State Party in accordance with its laws and regulations, who has made an investment in the territory of another State Party. For greater certainty, **a natural person who holds dual nationality** shall be deemed to be exclusively a national of the country of **her or his effective nationality or where she/he ordinarily or permanently resides**;

b. a legal or juridical person, **in accordance with the definition of the legal or juridical person of the Home State** in this article, that has made an investment in the territory of the Host State;

'Home State' means, in relation to:

a. a natural person, the State Party of **nationality or citizenship** of the investor in accordance with the laws and regulations of that State Party;

b. a legal or juridical person, the State Party of **incorporation or registration** of the investor in accordance with the laws and regulations of that State Party, and where that legal or juridical person **maintains its statutory seat together with substantial business**;

(emphasis added)

108. The AIP includes both natural persons and legal persons as possible 'investors'. With respect to natural persons as investors, the natural person must be (1) a national of an AIP State Party, (2) who has made an investment in the territory of another AIP State Party. The definition also provides that dual nationals shall be deemed to be *exclusively* nationals of the country of their effective nationality or of the country where they ordinarily or permanently reside.

109. With respect to legal persons as investors, the AIP imposes a triple requirement: (1) incorporation in an AIP State Party, (2) statutory seat in the territory of the same AIP State Party, and (3) substantial business activities in the territory of the same AIP State Party.

2.1.3. Denial of Benefits Clause

AIP, Article 5(1) ('Denial of Benefits')
1. A State Party **may at any time deny** an investor of another State Party and the investment of such investor **the benefits of this Protocol if**: a. an investment [sic] has **no substantial business activity** in the territory of the **Home State**;

> b. an investment has been established or restructured with the **primary purpose of gaining access to the dispute settlement mechanism under this Protocol**;
>
> c. an investor or investment is engaged in activities prejudicial to the essential and national interests of the Host State;
>
> d. an investment is owned or controlled, directly or indirectly, by natural or juridical persons of a Third Party with which the denying Party does not maintain a diplomatic relationship or toward which it prohibits transactions;
>
> e. an investment is **owned or controlled, directly or indirectly, by natural or legal persons of the denying Host State**;
>
> f. an investment is **owned or controlled, directly or indirectly, by natural or juridical persons of a non-State Party** that has no substantial business in the territory of a State Party; or
>
> g. an investor or investment has committed a **breach of a specific binding obligation under Chapter 5** of this Protocol. (emphasis added)

110. Denial of benefits clauses are generally meant to prevent the abuse of treaty benefits. Article 5(1) of the AIP establishes seven distinct grounds for denying protection to a foreign investor, each reflecting common policy concerns in relation to IIAs. Of note are:

a. Investments that were established or restructured with the primary purpose of gaining access to the AIP's planned dispute settlement mechanism (guarding against treaty shopping; see e.g., *Philip Morris Asia v Australia*);[146]

b. Investments owned or controlled, directly or indirectly, by natural or legal persons of the denying host State (guarding against the practice of 'round-tripping', where a domestic investor brings an international claim against his own State);

c. Investments owned or controlled, directly or indirectly, by natural or legal persons of a non-State Party that has no substantial business in the territory of a State Party (guarding against

[146] *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction, 17 December 2015, paras 501–505.

abuse of the AIP by non-African investors and by way of indirect ownership structures channelled through the establishment of intermediary holding, shell, or mailbox companies in an African State).

d. Investors or investments that have breached the investors' obligations in Chapter 5 of the AIP (thus giving teeth to the investors' obligations).

111. Critically, the words 'may at any time' also make it clear that host States can deny benefits to investors and investments at any time, including *after* a concrete dispute has arisen between the investor and the host State. This is a response to arbitral decisions like *Plama v Bulgaria*,[147] where the tribunal held that the host State could only invoke the denial of benefits clause *before* the dispute materialises, thus severely limiting the clause's usefulness.

2.1.4. Substantive Carve-outs to the AIP's Scope of Application

AIP, Article 1 ('Definitions')
For avoidance of doubt, establishment, acquisition and expansion under this Protocol **only apply to the post-establishment phase**.

112. Article 1 of the AIP clarifies that the AIP only applies to investments *post*-establishment. This means that investments and investors will only enjoy protection after they have successfully established a presence in the territory of the host State. In effect, this means that a host State does not owe obligations to investors seeking to enter their markets but rather has complete freedom to decide what foreign investments it will allow into its territory. In contrast, treaties which cover investments *pre*-establishment effectively guarantee market access to foreign investors on equal competitive conditions.

113. Article 3(4) of the AIP also includes several substantive carve-outs to its scope of application, each with specific rationales and contexts. These include:

[147] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, paras 154–165.

a. Art 3(4)(a): Excludes any investment dispute that arose or any claim that was settled before the entry into force of the AIP.

b. Art 3(4)(b): Excludes any government procurement.

c. Art 3(4)(c): Excludes subsidies and grants provided by a State Party, including government-supported loans, guarantees, and insurance under national development programs. This exclusion aims to protect State-led development initiatives.

d. Art 3(4)(d): Excludes investments made with capital or assets of illegal origin. This provision aligns with international instruments addressing illegal assets and capital, thus ensuring that the AIP does not inadvertently protect illicit financial activities.

e. Art 3(4)(e): Excludes taxation measures taken in accordance with the host State's laws.

f. Art 3(4)(f): Excludes any special advantages accorded in the Host State by finance institutions for the purpose of development assistance or the development of small and medium businesses or new industries.

g. Art 3(4)(g): Excludes operations of public debt and State enterprise debt restructuring. This carve-out seeks to safeguard AIP Contracting States against cases such as *Abaclat v Argentina*,[148] *Ambiente Ufficio v Argentina*,[149] or *Poštová v Greece*,[150] all of which dealt with the restructuring of sovereign bonds following financial crises.

h. Art 3(4)(h): Excludes real estate or other property other than acquired for the purpose of economic benefit or other business purposes.

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[148] *Abaclat and Others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, paras 316, 318, 321, 323–325, 476–479.

[149] *Ambiente Ufficio v Argentina,* ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013 paras 488–495, 543–549.

[150] *Poštová Banka, a.s. and ISTROKAPITAL SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, paras 364–371.

Equivalent Provisions in the SADC Model BIT, CCIA October 2024 Draft and ETIPA Draft

Investment

The CCIA October 2024 Draft, like the AIP, uses an enterprise-based definition and shares key requirements such as 'substantial business activity' and 'significance for the host State's [sustainable] development'. The SADC Model BIT provides three options: an enterprise-based definition, an exhaustive asset-based definition, and a non-exhaustive asset-based definition. For purposes of alignment with the AIP and easier treaty management, the enterprise-based definition should be preferred. Finally, although the ETIPA Draft adopts what looks like an asset-based definition, it also prescribes that the investment must have certain characteristics. Yet, overall, the definition in the ETIPA Draft is closer to the definition contained in Eswatini's existing BITs, than it is to the AIP.

Investor

As discussed above, the AIP imposes a triple requirement of incorporation, statutory seat, and substantial business activity in the same AIP State Party. The CCIA October 2024 Draft essentially mirrors the AIP's definition. The SADC Model BIT provides multiple options combining incorporation and substantial business activity, but does not use the requirement of statutory seat. Finally, the ETIPA Draft adopts the widest definition, identifying investors primarily on the basis of foreign nationality or foreign incorporation, without requiring any business activity. This inconsistency with the AIP may be a point of concern.

Denial of Benefits

The CCIA October 2024 Draft currently has only two grounds in its denial of benefits clause, compared to the AIP's seven grounds. The CCIA October 2024 Draft targets 'round-tripping' (Article 3(a)) and the circumventing of economic sanctions (Article 3(b)). The SADC Model BIT is even narrower and only targets the circumventing of economic sanctions (Article 26.1(a)–(b)). However, both the SADC Model BIT and the CCIA October 2024 Draft explicitly allow for denial of benefits to be exercised at any time. The ETIPA Draft does not contain a denial of benefits clause, and probably does not need to, as denial of benefits operates at the level of international law.

Substantive Carve Outs

Like the AIP, the CCIA October 2024 Draft includes carve-outs that narrow the scope of investment protection obligations. While they share some common carve-outs (e.g., for government procurement or national development subsidies/grants), the two agreements otherwise differ quite markedly. The AIP adopts a more traditional approach of excluding various areas of government action such as taxation measures, sovereign debt restructuring, and development financing. In contrast, the CCIA October 2024 Draft currently seems to take a wider approach by excluding from its scope of application government action taken to support essential public services, small and medium enterprises, as well as women and youth entrepreneurs. The difference between the AIP and the CCIA October 2024 Draft may mean that, even if an investor is outside the scope of protection under the CCIA, they may nevertheless enjoy protection under the AIP, or vice-versa—this could render any carve-outs ineffective. The SADC Model BIT does not contain substantive carve-outs. The ETIPA Draft similarly does not contain substantive carve-outs.

2.2. Administrative and Judicial Treatment

AIP, Article 17 (‘Administrative and Judicial Treatment’)

1. Each State Party shall ensure that, in administrative and judicial matters, investors and investments of another State Party are not subject to treatment which constitutes a **fundamental** denial of justice in criminal, civil and administrative adjudicative proceedings, an **evident** denial of due process, a **manifest** arbitrariness, a discrimination based on gender, race or religious beliefs, or an abusive treatment in administrative and judicial proceedings.
2. For greater certainty, Paragraph 1 shall not be interpreted as equivalent to fair and equitable treatment. For further certainty, Paragraph 1 includes the minimum standard of treatment under customary international law and does not allow for an interpretation and application of such a standard that would go beyond the elements contained in Paragraph 1. (emphasis added)

114. The AIP replaces traditional FET with the protections included in its Article 17. In many respects, this is a provision with novel elements. First, Article 17 clarifies that it does not prescribe the FET standard but only the CIL MST. In creating a clear conceptual division between the two standards, the AIP drafting departs from other treaties (such as the Eswatini-Kuwait BIT), which use the FET standard but qualify it with reference to the CIL MST. Second, it is apparent from the article heading itself that it applies to administrative and judicial matters only. This excludes general legislation

from its scope, thus alleviating concerns that changes to the regulatory framework through general legislation can be construed as frustrating investors' legitimate expectations which may lead to the host state's liability. The AIP's protection applies only in specific cases of treatment of investors and investments stipulated in the AIP through a closed list.[151]

115. Moreover, as evident from paragraph 1, the threshold for violation is generally very high: it is for '*fundamental*' denial of justice, '*manifest*' arbitrariness, and '*evident*' denial of due process, that AIP Contracting States will be found liable under Article 17 in their judicial and administrative treatment towards foreign investors.

116. Given the above features, Article 17 of the AIP is a provision prescribing the CIL MST all the while attempting to make that standard even more restrictive. However, the extent to which this goal will be achieved in practice may be contingent.

117. First, there is some tension between, on the one hand, the first sentence in paragraph 2 of Article 17, which clarifies that paragraph 1 is not to be treated as equivalent to the FET standard, and, on the other hand, the elements of denial of justice, arbitrariness and denial of due process, discrimination and abusive treatment contained in paragraph 1. As seen in Section 1.2.2 above, all these are elements that arbitral tribunals have consistently considered to be critical in giving meaning to the FET standard in both its unqualified and CIL MST-qualified versions. This tension was attempted to be resolved by way of the last sentence in Article 17(2) clarifying that it 'does not allow for … a standard that would go beyond the elements contained in Paragraph 1.'

118. Second, although the last sentence of Article 17(2) does not allow for the expansion of the list, the explicit prescription of the CIL MST may still allow scope for tribunals to take into consideration prior arbitral awards on what could constitute breach of the CIL MST in determining whether the AIP's applicable thresholds of fundamental denial of justice, manifest arbitrariness, and evident denial of due process are met. This would be in keeping with a principal way through which arbitral tribunals tend to reason, which is to say by reference to prior arbitral awards that have dealt with similar treaty provisions or legal issues. Such discretion, which is not unlike the discretion possible

[151] The closed list in Article 17(1) AIP is: '… *fundamental* denial of justice in criminal, civil and administrative adjudicative proceedings, an *evident* denial of due process, a *manifest* arbitrariness, a discrimination based on gender, race or religious beliefs, or an abusive treatment in administrative and judicial proceedings.' (emphases added)

under unqualified and qualified FET provisions, could thus mean that the threshold of liability for AIP Contracting States' administrative and judicial treatment towards foreign investors may end up not being very different from other instances where the application of CIL MST-qualified FET provisions was at issue.

Equivalent Provisions in the SADC Model BIT, CCIA October 2024 Draft and ETIPA Draft

Article 5 of the SADC Model BIT provides two options with regards to FET. Option 1 is an unqualified FET provision similar to the FET provision in the Eswatini-United Kingdom BIT. Option 2 refers to 'Fair Administrative Treatment' which is not a standard equivalent to FET. However, unlike the closed list of the standard of treatment found in Article 17(1) of AIP, the SADC Model BIT's Option 2 is limited to State conduct that '... is arbitary or that denies administrative and procedural [justice][due process]…'. This formulation suggests an active departure from any possible application of the FET standard.

Article 16 of the CCIA October 2024 Draft is currently worded very similarly to Article 17 of the AIP in that both constitute a closed list of specific instances of treatment that are protected. Article 16(4) currently clarifies that the applicable standard is not FET but the CIL MST and that its content may not be construted beyond the closed list elements in Article 16(1)(a)–(d). Section 50 of the ETIPA Draft also follows Article 17 of the AIP in wording, scope and interpretation.

2.3. Physical Protection and Security

AIP, Article 18 ('Physical Protection and Security')

1. A State Party shall, subject to its capabilities, accord to investors and their investments physical protection and security no less favourable than that which it accords to the investments of its own investors or to the investments of the investors of any other State Party or Third Party.

   For greater certainty, the expression 'subject to its capabilities' refers to the obligation of due diligence that a State Party shall exercise on its territory in accordance with customary international law and does not allow for an interpretation and application of such a standard that would go beyond the elements contained in this Paragraph.

2. Investors of one State Party whose investments in the territory of the other State Party suffer losses as a result of a failure of the Host State to comply with Paragraph 1, owing to war or other

> armed conflict, revolution, revolt, insurrection or riot in the territory of the Host State shall, as regards restitution, indemnification, compensation or other settlement, be accorded by the Host State treatment no less favourable than that which the Host State accords to investments of its own natural and legal persons or to investments of investors of any other State Party or Third Party.

119. Article 18 of the AIP provides for ‘physical’ protection and security as opposed to the ‘full’ protection and security standard found in Eswatini’s BITs. The explicit reference to ‘physical’ protection makes it clear that Article 18 does not provide legal protection (see analysis above at paras 41ff).

120. The obligation to provide physical protection and security is ‘subject to its [i.e., the host State’s] capabilities’. The second sentence of Article 18(1) makes it clear that this is no more than the State’s existing obligation of due diligence under CIL.

121. Notably, Article 18(1) provides for a *relative* standard of physical protection and security, rather than an absolute one. A host State is required to provide foreign investors with physical protection and security that is *no less favourable* than the physical protection and security it provides to its own investors or to the investments of investors of any other AIP Contracting State or third State. This may seem to imply that, even if a host State provides physical protection and security *below* the level of due diligence required by CIL, it will only violate Article 18 if it had provided better physical protection and security to other investors, or had discriminated among investors or investments in providing physical protection and security (see Section 2.4 of the Report for MFN/NT).

122. However, this link between physical protection and security, on the one hand, and MFN/NT treatment, on the other, may create tension with the standard of due diligence incorporated in Article 18 of the AIP, as due diligence is typically understood to be a minimum standard (see para 39 above on the standard of due diligence applicable in FPS).

Equivalent provision in the SADC Model BIT, CCIA October 2024 Draft and ETIPA Draft

Article 9 of SADC Model BIT provides for 'protection and security', deliberately excluding the word 'full' and not limiting the scope of the provision to physical protection and security. This is different from the AIP. Other than this, Article 9 of SADC Model BIT is similar to the AIP in that the protection is linked with the NT and MFN standards.

The CCIA October 2024 Draft currently does not have an analogous FPS provision.

Section 54 of the ETIPA Draft follows Article 18 of AIP in wording, scope and interpretation.

2.4. Non-Discrimination (National Treatment and Most-Favoured Nation Treatment)

123. While the AIP's NT and the MFN protection standards are drafted as two separate provisions (in contrast to the single omnibus provision found in Eswatini's BITs), the NT and MFN protections in the AIP share some similarities to those in Eswatini's BITs, in terms of scope of coverage and conditions of application. The most significant difference in the AIP's NT and MFN protection standards are the extensive exceptions to NT and MFN protections.

2.4.1. Scope of Application

AIP, Article 12 ('National Treatment')

1. Each State Party shall accord to investors of another State Party and their investments treatment no less favourable than it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, use, expansion and sale or other disposition of their investments.
2. In assessing 'in like circumstances' an overall examination is required on a case by-case basis, of all the circumstances of an investment, including, among others:
    a. the effects of the investment on third persons and the local community;
    b. the effects of the investment on the local, regional or national environment, the health of the populations, or on the global commons;

c. the sector in which the investor is active;

d. the aim of the measure in question;

e. the regulatory process generally applied in relation to a measure in question; and

f. any other factor directly relating to the investment or investor in relation to the measure in question.

The examination referred to in this paragraph shall not be limited to or biased towards any one of the factors.

AIP, Article 14 ('Most-Favoured Nation Treatment')

1. Each State Party shall accord to investors of another State Party and their investments treatment no less favourable than it accords, in like circumstances, to investors of any other State Party or Third Parties with respect to the management, conduct, operation, use, expansion and sale or other disposition of their investments.

2. The provisions of Article 12, paragraph 2 of this Protocol on assessing 'in like circumstances' shall apply mutatis mutandis to this Article.

3. For greater certainty, the 'treatment' referred to in paragraphs 1 and 2 of this Article does not include dispute settlement procedures, including, but not limited to, those related to admissibility and jurisdiction, provided for in other treaties. Substantive obligations in other investment treaties, do not in themselves constitute 'treatment', and cannot give rise to a breach of this Article.

124. NT and MFN protection under the AIP is limited to investments at the post-establishment stage. This is clear from the phrase 'management, conduct, operation, use, expansion, and sale or other disposition' of investments' in Articles 12(1) and 14(1) of the AIP. The upshot is that the AIP does not mandate non-discriminatory treatment in granting market access as between domestic and foreign investor, or among foreign investors from other AIP Contracting States. This interpretation is further confirmed by Article 4 of the AIP which specifies that AIP Contracting States shall admit investment 'in accordance with [their] domestic laws and regulations.' Overall, the AIP gives host States greater flexibility to develop their own national laws and policies for investment screening and admittance based on their developmental or security needs.

125. Articles 12 and 14 of the AIP also clarify that, for purposes of determining whether foreign investors are accorded NT and MFN treatment, one needs to undertake a comparison of investors 'in like circumstances'. As tribunals have used a variety of criteria on a case-by-case basis to determine whether like circumstances exist, the AIP has taken the rare step among IIAs to provide for an extensive, open-ended list of factors that a tribunal should examine in those situations. This list covers several of the criteria that tribunals have relied upon in determining like circumstances, while also including novel criteria such as the effects on third persons and local communities, and the effects on the environment (at a local, regional or national level), the health of the host State's population or the global commons. Both of these criteria closely align with the sustainable development focus of the AIP.[152] While there is no strict obligation for tribunals to apply all of these factors in a given situation, the practical effect of the inclusion of such a list is that it provides concrete criteria for the host State to address in a dispute and for tribunals to consider, assess, and weigh.

126. One additional feature of the AIP's Article 14 on MFN treatment is a clear understanding of what the term 'treatment' does not include, namely, dispute settlement procedures and substantive obligations found in other IIAs. The practical effect of this clarification is that investors will not be able to use the AIP's MFN clause to import more favourable dispute settlement mechanisms or substantive protections from other treaties,[153] thereby limiting the risk of treaty shopping and ensuring that any disputes are resolved strictly under the terms of the AIP. This is in line with contemporary treaty drafting practices and a feature that further distinguishes the AIP from Eswatini's IIAs in force.

[152] Noting that the AIP's Preamble expressly reminds the Contracting States of the 2030 Agenda for Sustainable Development, as outlined in Resolution A/RES/70/1 of the United Nations General Assembly, as well as UNCTAD's Investment Policy Framework for Sustainable Development.

[153] See, e.g., *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, para 56, which permitted, subject to conditions, the use of the MFN provision as a basis to import more favourable dispute settlement clauses from a third-party treaty (in that case the absence of a need to resort to domestic courts prior to accessing ISDS). The MFN provision has also been used to import substantive rights from other treaties, such as: the FPS standard in *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v Republic of India (I)*, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, para 496; and an umbrella clause in *EDF International SA and others v Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012, paras 925–934.

2.4.2. Exceptions to National Treatment

AIP, Article 13 ('Exceptions to National Treatment')
1. Measures taken by a State Party that are designed and applied to protect or enhance legitimate public policy objectives such as, but not limited to, public morals, public health, prevention of diseases and pests in animals or plants, climate action, essential security interests, safety and the protection of environment shall not be construed as a breach of Article 12. 2. Preferential treatment granted by State Parties to national investments and investors, in accordance with domestic laws and regulations, in order to achieve national development objectives or address the internal needs of designated disadvantaged persons, groups, or regions shall not be construed as a breach of Article 12. 3. Each State Party reserves the right to adopt or maintain certain exceptions to the standard of national treatment provided by Article 12 to investments made by investors of another State Party in its territory if those exceptions fall within one of the sectors or geographical regions that represent strategic importance for the Host State in accordance with its laws and regulations. 4. For greater certainty, discriminatory measures taken by a State Party to comply with its obligations under other regional or international agreements shall not be construed as a breach of Article 12.

127. Paragraph 1 of Article 13 is an example of an emerging treaty drafting trend of eschewing general and essential security exceptions clauses in favour of exceptions that are specific to each standard of investment protection. Article 13(1) of the AIP provides that discriminatory measures that are 'designed and applied to protect or enhance' legitimate public policy objectives shall not be construed as a breach of the AIP's NT obligation. The indicative list of public policy objectives in Paragraph 1, which may include, among others, public morals and health, the prevention of diseases and pests, the protection of the environment, essential security interests as well as climate action, is reminiscent of the list of policy objectives one finds in general and essential security exceptions clauses in other IIAs.

128. Two additional elements of Article 13(1) are worth mentioning. First, the nexus required between the measure(s) at issue and the public policy objective pursued is not especially demanding.

Measures must be 'designed and applied' with a policy objective in mind. This term consists of two parts: design and application. The former refers to the measure itself, while the latter concerns how the measure is implemented. Although there is limited guidance from ISDS tribunals on these terms, WTO jurisprudence has established that the 'design' element involves examining whether the measure at issue is capable of contributing to the public policy objective pursued.[154] This requires an assessment of the 'content, structure, and expected operation' of the measure.[155] The 'application' element has been interpreted to concern the 'substantive content of legal instruments that regulate the application or implementation of laws, regulations, decisions, and administrative rulings'.[156] The nexus between 'designed' and 'applied' in turn could imply that there has to be '*continuous* furtherance of the [S]tate's public welfare objective following the adoption of the measure'.[157] Second, the phrase 'to protect or enhance' signifies that the AIP's exception does not apply only when the host State wishes to safeguard a public policy objective from harm but also when it wishes to expand and improve upon the level of protection that is currently available.

129. Paragraphs 2 and 3 of Article 13 further align with the sustainable development focus of the AIP in that they allow for: (1) preferential treatment for national investments and investors to achieve the host State's national development objectives or to support disadvantaged groups or regions within the host State; (2) reservations to NT against foreign investors provided that those exceptions fall within sectors or geographical regions that are of strategic importance to the host State and have been designated as such in the host State's domestic laws.

130. Lastly, Paragraph 4 of Article 13 allows a host state to provide preferential treatment to its own investors provided that this is in compliance with 'its obligations under other regional or international agreements'. This provision takes into account the multiple regional organisations and free trade areas one finds in the African continent.

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[154] Panel Report, *Brazil-Certain Measures Concerning Taxation and Charges*, WT/DS472/R, WT/DS497/R, 11 January 2019, para 7.5.19.

[155] Appellate Body Report, *Colombia-Measures Relating to the Importation of Textiles, Apparel and Footwear,* WT/DS461/AB/R, 22 June 2016, para 5.69.

[156] Appellate Body Report, *European Communities-Selected Customs Matters*, WT/DS315/AB/R, 11 December 2006, para 210 (emphasis added).

[157] Christian Riffel, 'Indirect Expropriation and the Protection of Public Interests' (2022) 71 Int'l & Comp LQ 945.

2.4.3. Exceptions to Most-Favoured Nation Treatment

AIP, Article 15 ('Exceptions to Most-Favoured Nation Treatment')
1. Measures taken by a State Party that are designed and applied to protect or enhance legitimate public policy objectives, such as, but not limited to, public morals, public health, prevention of diseases and pests in animals or plants, climate action, essential security interests, safety and the protection of environment, shall not be construed as a breach of Article 14. 2. Nothing in Article 14 shall oblige a State Party to extend to the investors and their investments the benefit of any treatment, preference or privilege contained in: a. any existing or future free trade area, customs union, common market agreement or any similar international agreements or arrangements to which the investor's Home State is not a Party; or b. any existing or future international agreement or domestic legislation relating wholly or mainly to taxation.

131. The AIP provides for fewer exceptions to its MFN provision compared to its NT provision. Article 15(1) of the AIP includes substantially the same exception on public policy grounds as the one examined in the context of Article 13(1) above. The second MFN-related exception, in Article 15(2) of the AIP, is the standard exception for free trade areas, customs unions or common market arrangements, as well as double taxation treaties and regulations, one finds in most IIAs including Eswatini's IIAs in force.

Equivalent Provisions in the SADC Model BIT, CCIA October 2024 Draft and ETIPA Draft

It is noted at the outset that the NT and the MFN clauses in the ETIPA Draft are identical to the AIP's provisions. Therefore, the textual analysis and interpretation of the non-discrimination standards in the ETIPA Draft would mirror that of the AIP.

It should also be noted that the SADC Model BIT only contains a NT provision as the SADC Drafting Committee 'recommended against including an MFN provision'.[158] The rationale behind this choice is

[158] SADC Model BIT, Commentary to Article 4, 21.

the fact that the SADC Model seeks to serve as a negotiating template for *bilateral* treaties and such treaties 'should not establish unintended multilateralization through the MFN provision'.[159]

Post-establishment protection. Similar to the AIP, the SADC Model BIT and the CCIA October 2024 Draft provide for post-establishment protection as they cover 'the management, operation and disposition of investments'.

Parameters of 'in like circumstances'. Similar to the AIP, the SADC Model BIT and the CCIA October 2024 Draft also provide for an extensive open-ended list of qualifications for the term 'in like circumstances'. The qualifications in all cases are largely identical to those found in the AIP, ranging from factors that tribunals traditionally take into account (e.g., the sector the investor is in, among others) to newly developed factors such as effects on the environment.

'Treatment'. Like the AIP, the CCIA October 2024 Draft clarifies that dispute settlement procedures and substantive obligations in other IIAs do not constitute 'treatment' that would be covered by the MFN provision. However, the SADC Model BIT does not expressly state so.

Exceptions. Unlike the AIP, which applies slightly different exceptions to the NT and MFN provisions, the CCIA October 2024 Draft currently adopts a single, uniform set of exceptions for both standards of treatment. These exceptions are similar to those in the AIP in that they cover public policy objectives, including national development programs and measures to address historical economic disparities. However, the CCIA October 2024 Draft also introduces additional exceptions not found in the AIP (e.g., relating to government grants). In contrast, the exceptions provided in the SADC Model BIT are more traditional, carving out preferential treatment arising from free trade agreements and other regional investment-related agreements from the scope of NT. Notably, it also allows for sector- or subsector-specific exemptions from the NT obligation on a State-by-State basis. One common feature found in the CCIA October 2024 Draft and the SADC Model BIT is that both specify that the non-discrimination standards do not apply retrospectively. Existing discriminatory measures in place at the time each treaty enters into force are not subject to these obligations. Moreover, both treaties permit such measures to be modified in the future, provided that the modifications do not reduce their level of conformity with the non-discrimination obligations.

[159] *ibid* 22.

2.5. Expropriation

2.5.1. Background

132. The AIP's provisions on expropriation span three articles: (1) Article 19, which sets out the definition of expropriation and the conditions for its legality; (2) Article 20, which establishes exceptions to expropriation, i.e., instances where the protection may not be accorded; (3) Article 21, which provides a detailed framework for the assessment of compensation due for a committed expropriation. These articles generally follow contemporary treaty drafting approaches codifying existing arbitral practices,[160] while at the same time also departing from some aspects of contemporary treaty drafting (e.g., eschewing 'investment-backed expectations' as a determinant of indirect expropriation), as well as introducing new standards (e.g., 'fair and adequate compensation').

2.5.2. Existence and Legality of Expropriation

AIP, Article 19 ('Expropriation')
1. State Parties shall not, directly or indirectly, expropriate or nationalise investments in their territory except: a. for a public purpose; b. in accordance with due process pursuant to the procedure established by the laws of the State Party; c. in a non-discriminatory manner; and d. against a fair and adequate compensation paid within a reasonable period of time in accordance with Article 21, and taking into account that the assessment of the reasonable

[160] See, e.g., Article 14 and fn 9, read together with Annex 2 ACIA; Article 8.12, read together with Annex 8-A CETA; Article 9.8 and fn 16, read together with Annex 9-B CPTPP; Article 10.13 and fn 25, read together with Annex 10-B RCEP; Article 14.8 and fn 8, read together with Annex 10-B USMCA. According to 'UNCTAD Study on Expropriation' (n 73) 58–62, all these treaties are, in turn, largely based on the language found in the 2004 Model BITs of the United States and Canada, which were the first to include similar in style clarifications to their expropriation provisions.

period of time shall be made on a case-by-case basis in accordance with the domestic laws and regulations of the State Party and on a non-discriminatory basis.

2. For the purposes of this Protocol:

    a. direct expropriation occurs when an investment is nationalised or expropriated directly, through a formal transfer of ownership or outright seizure;

    b. indirect expropriation results from a measure or a series of measures having an equivalent effect of direct expropriation without formal transfer of title or outright seizure. The sole fact that a measure or a series of measures has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; and

    c. the determination of whether a measure or a series of measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, that takes into consideration among others:

        i. the duration of the measure or series of measures of a State Party; and

        ii. the character of the measure or series of measures, notably their object, context and intent.

133. ***Legality of expropriation***. Unlike some of Eswatini's IIAs in force, Article 19(1)(a)–(d) of the AIP includes all four classical requirements for the legality of an expropriation. However, the requirements of due process and compensation are worded differently from the manner in which they are typically worded in most other IIAs. As the requirement of compensation is analysed in detail in Section 2.5.4 below, the focus here is only on the due process requirement.

134. Article 19(1)(b) of the AIP stipulates that an expropriation must be 'in accordance with due process pursuant to the procedure established by the laws of the State Party'. This formula puts emphasis on the need to comply with domestic legal procedures.[161] On its face, it is not entirely clear whether

[161] See Reinisch and Schreuer (n 73) 214, para 1028, citing Article 4(1) Russia-Thailand BIT (2002) as an example ('in accordance with the procedure established by the laws of the Contracting Party'). Cf the more common drafting of the due process requirement, e.g., in: Article 14(1)(d) ACIA; Article 8.12(1)(b) CETA; Article 9.8(1)(d) CPTPP; Article 14.8(1)(d) USMCA; Article 10.13(1)(d) RCEP.

this is meant to supplement an international standard of due process (i.e., both international and domestic due process rules should be complied with) or, rather, to curtail it (i.e., due process only as guaranteed by domestic law).

135. In similarly worded provisions, tribunals seem to have adopted the former approach absent more express language in favour of the latter approach. In *Tenaris v Venezuela*, the two relevant BITs required compliance only with 'legal procedures' and with 'the legislation in force'.[162] The tribunal found that these formulations will render a breach of domestic law procedure a violation of the applicable BIT,[163] but, relying on *ADC v Hungary*,[164] also proceeded to add that the affected investor had not had 'a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard'.[165] As such, the *Tenaris v Venezuela* tribunal seemed to ultimately base its finding upon a violation of both domestic and international due process requirements. Similarly, according to Wei Shen's account of the *Tza Yap Shum v Peru* award, the tribunal there examined both international and domestic rules on due process, despite the fact that the applicable treaty clearly stated that an expropriation had to be done in accordance with 'domestic legal procedure'.[166]

136. ***Existence of Expropriation*.** Like almost all of Eswatini's IIAs in force (with the sole exception of the SADC Protocol, Annex 1), the AIP expressly recognizes that expropriation can occur both directly and indirectly. However, unlike those IIAs, Article 19(2) of the AIP contains more detailed and clear guidelines on how to determine whether expropriation has occurred. Some of these guidelines are simply a restatement of the way tribunals have understood the overall scope of expropriation provisions under older BITs. This is the case, for instance, for Articles 19(2)(a) and

[162] *Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal Lda v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016 ('*Tenaris v Venezuela*'), paras 494–495.

[163] *ibid*.

[164] *ibid* para 496, citing *ADC Affiliate Limited and ADC & ADMC Management Limited v Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 ('*ADC v Hungary*'), para 435 (referring to, and explaining 'due process of law' in the expropriation context). The *ADC v Hungary* case is an often-cited case on due process as understood in international investment law. It was based on a treaty that required 'due process', rather than domestic legislation, to be complied with. The cited paragraph clearly discussed the former and not the latter.

[165] *Tenaris v Venezuela* (n 162) para 496, citing *ADC v Hungary* (n 164) para 435.

[166] See *Señor Tza Yap Shum v The Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, as per Shen (n 115) 391 (this award is only available in Spanish, and we could thus only rely on the article's account).

19(2)(b), first sentence, of the AIP.[167] Moreover, the reference to 'a measure or a series of measures' in Article 19(2)(b), first sentence, of the AIP makes clear that both de facto and creeping expropriations are included in the AIP's definition.[168] However, as regards indirect expropriation in particular, there are important elements of Articles 19(2)(b) and 19(2)(c) of the AIP that, in line with contemporary treaty drafting practices, clarify the Contracting States' position on expropriation.

137. Article 19(2)(b) states that '[t]he sole fact that a measure or a series of measures has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred'. This has two effects. First, that a mere loss of value (save for near-total deprivation of the investment),[169] is not enough to constitute an indirect expropriation. As seen in Section 1.5.2.1, this is generally in line with how tribunals have construed expropriation. Second, read together with Article 19(2)(c), Article 19(2)(b) of the AIP effectively rejects the sole effects doctrine as the principal test for determining whether an indirect expropriation has occurred.[170] As seen in Section 1.5.2.1, arbitral practice on this issue (especially when interpreting older BITs) has been mixed with some applying the sole effects doctrine exclusively, while others rejecting it in favour of a more balance approach based on the police powers doctrine.

138. Article 19(2)(c) of the AIP then directs tribunals to undertake a 'case-by-case, fact-based inquiry' to the finding of indirect expropriation while considering two principal (but non-exhaustive) factors: (1) the duration of the measure(s) at issue; and (2) the character of the measure(s) at issue, including 'their object, context and intent'. No specific timespan is mentioned as regards the duration factor and arbitral practice is not uniform on this question.[171] While a long deprivation of critical aspects of the right to property is more likely to constitute an indirect expropriation, relatively short or temporary deprivations have also been found to be expropriatory, especially when they had caused

[167] See also Marc Bungenberg and August Reinisch (eds), *CETA Investment Law: Article-by-Article Commentary* (Nomos/Hart 2022), paras 1041, 1061, reaching similar conclusion as regards Annex 8-A, para 1(a) CETA, which has the wording almost identical to that of the AIP.

[168] See also Moritz Keller, *EU Investment Protection Law: Chapter Eight of CETA, the Vietnam and Singapore Free Trade Agreements and EU Regulations 1219/2012, 912/2014 and 2019/452: Article-by-Article Commentary* (Beck 2023) 237, paras 62–64, interpreting the same language in Annex 8-A, para 1 CETA.

[169] See Bungenberg and Reinisch (n 167) 312, para 1063, interpreting an equivalent provision in Annex 8-A, para 2(a) CETA.

[170] See Keller (n 168) 240, para 79, interpreting an equivalent provision in Annex 8-A, para 2(a) CETA.

[171] *ibid* 241, paras 82–83.

permanent loss,[172] or when there was no immediate prospect of the situation being reversed.[173] With respect to the element of intent as a factor, intent could mean either specific intent to expropriate or enquiry as to whether a State pursued one of the legitimated public policy objectives, such as the ones listed in Article 20(2) of the AIP. It is likely that the latter interpretation is true considering that the former approach has been systematically rejected by the tribunals.[174]

139. Notably, AIP Article 19(2)(c) of the AIP omits one factor often found in contemporary IIAs, that is, the extent to which a measure interferes with reasonable, investment-backed expectations.[175] The significance of this omission is unclear. On the one hand, it may suggest that the AIP intends to bar expropriation claims based on expectations an investor might have had. On the other hand, the AIP expressly indicates that the list of factors is not exhaustive which means that a tribunal may still consider the investor's expectation as an appropriate factor to rely on.

140. Combined, Articles 19(2)(b) and 19(2)(c) underscore the fact that indirect expropriations can take many forms and that there is 'no magic formula from which the existence of an indirect expropriation can be deduced.'[176]

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[172] See *ibid*, citing, among others, *Wena Hotels v Egypt* (n 42) para 99 (while the hotels were handed back to the investor after less than a year of dispossession, they were returned stripped of their furniture and fixtures).

[173] See 'UNCTAD Study on Expropriation' (n 73) 70, referring to Iran-US Claims Tribunal cases (appointment of 'temporary' managers found to be expropriation because, in light of the revolution, there was no prospect that the business could be resumed).

[174] See Bungenberg and Reinisch (n 167) 318, paras 1089–1090, interpreting an equivalent provision under Annex 8-A, para 2(d) CETA.

[175] See equivalent provisions in: Annex 2, para 3 ACIA; Annex 8-A, para 2 CETA; Annex 9-B, para 3(a) CPTPP; Annex 14-B, para 3(a) USMCA; Annex 10-B, para 3(a) RCEP. Some other modern BITs do, however, also omit some of the factors: Annex 1.2 EU-Singapore IPA (omitting duration and investment-backed expectations); Annex 4.2 EU-Viet Nam IPA (omitting investment-backed expectations). As a side note, Article 19(2)(c) AIP also omits the factor of the economic impact of the measure on the investment. However, this omission is likely of no significance because the economic effect of the measure on the investment features in the definition of indirect expropriation under Article 19(2)(b) AIP.

[176] See Bungenberg and Reinisch (n 167) 311, para 1059; Keller (n 168) 240, para 78, interpreting an equivalent provision in Annex 8(A), para 2 CETA. See also *Chemtura v Canada* (n 91) para 249 ('[o]ne important feature of fact-sensitive assessments is that they cannot be conducted on the basis of rigid binary rules').

2.5.3. Exceptions to Expropriation

AIP, Article 20 ('Exceptions to Expropriation')
1. Nothing in Article 19 shall prevent the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation, or creation of intellectual property rights, in accordance with international obligations and other relevant Protocols under the Agreement, where applicable. 2. Non-discriminatory regulatory actions by a State Party designed to protect legitimate public policy objectives, such as public morals, public health, prevention of diseases and pests in animals or plants, climate action, essential security interests, safety and the protection of the environment, labour rights or to comply with other international obligations, shall not constitute indirect expropriation.

141. Unlike Eswatini's IIAs in force, Article 20 of the AIP contains two exceptions to the protection from expropriation concerning, respectively, (1) intellectual property (**'IP'**) rights and the issuance of compulsory licences, and (2) the recognition of the State's police powers. Both exceptions are in line with current treaty drafting practices.

142. ***Exceptions concerning IP rights.*** Article 20(1) of the AIP seeks to exclude two situations from the protection against expropriation. The first situation concerns the granting of compulsory licenses, for instance under the WTO TRIPS Agreement. This is a relatively common exception often seen in IIAs, even older ones.[177] Granting a compulsory license may result in the reduction of the value of the respective IP right which, if it qualifies as a protected asset under an IIA, may give rise to an expropriation claim.[178] The second situation concerns more generally the 'revocation, limitation, or creation' of IP rights.[179] The AIP's exception seeks to exclude both situations from the scope of Article 19, provided that the issuance of a compulsory license or the interferences with IP rights, as

[177] See 'UNCTAD Mapping of IIA Content' (n 3). As of 15 March 2025, searching for treaties with a compulsory licenses carve-out yields 98 IIAs, 39 of which were signed before 2010 (almost 40%).

[178] See Keller (n 168) 235, para 47, interpreting an equivalent provision under Article 8.12(5),(6) CETA.

[179] See Bungenberg and Reinisch (n 167) para 1167, interpreting an equivalent provision under Article 8.12(6) CETA.

the case may be, are done 'in accordance with international obligations and other relevant Protocols under the [AfCFTA] Agreement[.]'

143. A potential weakness of the Article 20(1) exception may lie in the opening phrase '[n]othing in Article 19 shall prevent […]'. Some tribunals interpreting GATT-style general exceptions provisions, notably in *Beer Creek v Peru*[180] and *Eco Oro v Colombia*,[181] have considered that this formulation merely indicates that a State can adopt the relevant measure but it does not waive the obligation to pay compensation for a committed breach of an investment protection standard because such payment of compensation 'does not prevent [the State] from adopting or enforcing measures […]'.[182] As such, while it is in principle correct that Article 20(1) of the AIP intends to harmonise investment protection with other international commitments by preventing a finding of expropriation (including the payment of compensation as its natural consequence), a tribunal may still construe the wording differently. Given this, it may have been preferable for the AIP to follow the drafting approach used in other IIAs, such as CETA, Article 8.12(5)–(6) of which provides that CETA's expropriation provision 'does not apply' to the issuance of compulsory licences and that the revocation, limitation or creation of IP rights 'do not constitute expropriation'.

144. ***The police powers exception.*** Article 20(2) of the AIP codifies the police powers doctrine under CIL,[183] stating that '[n]on-discriminatory regulatory actions … designed to protect legitimate public policy objectives, … shall not constitute indirect expropriation.' Compared to the IP rights exception above, the AIP's police powers exception is much clearer with respect to its practical effect. The express statement that State actions falling under the exception 'shall not constitute indirect expropriation' leaves no doubt that no compensation would be due to foreign investors (because there would not be an expropriation in the first place). With respect to its drafting, the exception is

[180] *Bear Creek v Peru* (n 138) paras 477–478.

[181] *Eco Oro Minerals Corp v Republic of Colombia*, ICSID Case No. ARB/16/41, Award on Damages, 15 July 2024 ('*Eco Oro v Colombia*'), paras 367, 370. In this case, this conclusion was reached despite that fact that both parties to the relevant BIT (Canada and Columbia) submitted their opinion on the matter, concurring that the provision intends to exclude payment of compensation.

[182] *ibid* para 367.

[183] Keller (n 168) 242–243, para 91, analysing Annex 8-A, para 3 CETA, which contains an equivalent provision.

at a general level similar to what one sees in other treaties.[184] However, there are some differences in Article 20(2) that set the AIP apart from other treaties.

145. First, the AIP's non-exhaustive list of legitimate public policy objectives is more expansive, mentioning public morals, the prevention of diseases and pests in animals or plants, labour rights, climate action, essential security interests and compliance 'with other international obligations', in addition to the more commonly found objectives of public health, safety and the environment.[185] The inclusion of 'essential security interests', in particular, is yet another instance of the AIP drafters' decision to eschew GATT-style general and essential security exceptions in favour of targeted exceptions which are applicable to specific substantive standards of protection.

146. Second, in contrast to the more common drafting approach, Article 20(2) of the AIP does not include the proviso 'except in rare circumstances'.[186] The inclusion of this proviso in other treaties seems to create a rebuttable presumption that the police powers exception would normally apply unless the case at hand is one where 'rare circumstances' prevail. By contrast, the exclusion of the proviso in the AIP may be seen as not permitting reliance on 'rare circumstances' to prevent the application of the police powers exception.

147. Finally, the police powers exception under Article 20(2) AIP applies to 'regulatory actions' (in line with the approach in the CPTPP, USMCA, and RCEP).[187] This may suggest that the exception

[184] See, e.g., equivalent provisions in: Annex 2, para 4 ACIA; Annex 8-A, para 3 CETA; Annex 9-B, para 3(b) CPTPP; Annex 14-B, para 3(b) USMCA; Annex 10-B, para 4 RCEP.

[185] Annex 2, para 4 ACIA; Annex 8-A, para 3 CETA; Annex 9-B, para 3(b) CPTPP; Annex 14-B, para 3(b) USMCA. Annex 10-B, para 4 RCEP is an exception here to the extent that it also adds 'public morals' (like the AIP) and 'real estate price stabilisation' (not found in the AIP's list of examples).

[186] Contrast, e.g., Annex 9-B, para 3(b) CPTPP (emphasis added):

> 'Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, *except in rare circumstances*.'

For similarly drafted treaties, see: Annex 8-A, para 3 CETA; Annex 9-B, para 3(b) CPTPP; Annex 14-B, para 3(b) USMCA.

For other treaties that, like the AIP, exclude the proviso, see: Annex 2, para 4 ACIA; Annex 10-B, para 4 RCEP.

[187] Annex 9-B, para 3(b) CPTPP; Annex 14-B, para 3(b) USMCA; Annex 10-B, para 4 RCEP.

applies only to regulations, narrowing its scope as opposed to treaties under which the police powers exception applies more generally to 'measure(s)' (see, e.g., ACIA and CETA).[188]

2.5.4. Compensation for Expropriation

AIP, Article 21 ('Compensation for Expropriation')
1. Fair and adequate compensation shall be assessed on a case-by-case basis in relation to the fair market value of the expropriated investment, and in a reasonable period of time, in accordance with domestic laws and regulation. 2. The assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard for all relevant circumstances and taking account of the current and past use of the investment, the history of its acquisition, the fair market value of the investment, the purpose of the expropriation, the extent of previous profit made by the investor through the investment, the previous behaviour of the investor, and the duration of the investment. 3. Compensation shall be assessed based on the fair market value of the expropriated investment at the date immediately before the expropriation took place ('date of expropriation') or before the measure became publicly known, whichever is earlier. For greater certainty, the fair and adequate compensation standard also applies in case of unlawful expropriation. 4. The computation of the fair market value of the expropriated property shall exclude any consequential losses or speculative or windfall profits claimed by the investor. 5. Any payment of compensation according to this Article shall be made in a freely convertible currency. Payment shall include simple interest at the applicable commercial rate in the Host State from the date of expropriation until the date of actual payment. On payment, compensation shall be freely transferable.

[188] Annex 2, para 4 ACIA; Annex 8-A, para 3 CETA; see Bungenberg and Reinisch (n 167) para 1097 (interpreting Annex 8-A, para 3 CETA).

148. Article 21 of the AIP must be read together with Article 19(1)(d). The two articles contain standards and detailed guidelines on the assessment of compensation due for an expropriation which are novel, setting the AIP apart not only from Eswatini's IIAs in force but from other contemporary treaties as well. The key novel features of the AIP's provisions on compensation are examined below.

149. ***Standard of compensation.*** The AIP departs from the common standard of 'prompt, adequate and effective' compensation in favour of compensation that is within 'a reasonable period of time', 'fair and adequate' as well as 'effective'.

150. ***Prompt compensation vs Compensation within a reasonable period of time*.** Article 19(1)(d) of the AIP substitutes the requirement that the payment of compensation must be 'prompt' (i.e., without delay) with the requirement that compensation must be 'paid' within a reasonable period of time. The same provision clarifies that the assessment of the reasonableness of the timing shall be made (1) on a case-by-case basis, (2) in accordance with the host State's domestic laws, and (3) on a non-discriminatory basis. The AIP thus grants greater flexibility to host States by introducing a lower standard than promptness. At the same time, Article 21(1) of the AIP seems to introduce an additional 'reasonable period of time' requirement for the host State's *assessment* of the amount of compensation that corresponds to the 'fair and adequate' standard.

151. ***'Adequate compensation' vs 'Fair and adequate compensation'*.** Articles 19(1)(d) and 21 of the AIP provide for a standard of 'fair and adequate' compensation (as opposed to 'adequate' compensation), with detailed guidelines on how to assess it. In particular, Article 21(1) of the AIP clarifies that the assessment of the amount of compensation should be conducted on a case-by-case basis, in relation to the investment's fair market value and in accordance with the host State's domestic laws and regulations. According to Article 21(2), that assessment should also be based on an equitable balance between the public interest and the interest of the affected investor. Seeking to give further guidance on the matter, Article 21(2) of the AIP states that the balancing exercise should have regard for 'all relevant circumstances' and provides for a non-exhaustive list of factors to be taken into account, in which 'fair market value' is only one factor among many.[189] In other words,

[189] The full, non-exhaustive, list of factors to be considered includes the current and past use of the investment, the investment's fair market value, the purpose of the expropriation, the profits that the investment may have generated, the investor's past conduct, and the investment's duration.

under the AIP, there is no rule or even presumption that the compensation due for an expropriation must be equal to the investment's fair market value. Rather, fair market value is just one of the factors a tribunal should consider on an equal basis with other relevant factors.

152. ***Effective compensation.*** The only limb of the standard of compensation that the AIP retains is that compensation must be effective. The term 'effective' is not found in the AIP, but it can be inferred from Article 21(5), which states that any payment of compensation shall be made 'in a freely convertible currency' and that compensation shall be 'freely transferable'.[190]

153. ***Same compensation standard for unlawful expropriations.*** Article 21(3), second sentence, of the AIP requires that the same standard of fair and adequate compensation must apply irrespective of whether the expropriation was lawful or unlawful. This is a departure from the prevailing arbitral practice of applying the 'full reparation' standard of compensation to unlawful expropriations, which often leads to higher awards.

154. ***No speculative losses.*** Article 21(4) of the AIP requires exclusion of any consequential losses or speculative/windfall profits when determining what the expropriated investment's fair market value is. This clarification possibly seeks to curtail the use of the speculative DCF valuation method,[191] which is often employed by valuation experts and followed by tribunals.

155. ***Simple interest.*** Article 21(5), second sentence, of the AIP provides for the inclusion of simple interest as part to the awarded compensation. This is a departure from the prevailing arbitral practice of frequently awarding compound interest, which leads to higher awards.

Equivalent Provisions in the SADC Model BIT, CCIA October 2024 Draft and ETIPA Draft

Existence of expropriation. As compared to the AIP, the SADC Model BIT does not include any definition or clarifications as regards direct or indirect expropriation. In contrast, currently, Article 22(10) of the CCIA October 2024 Draft largely follows the language found in the AIP except for two differences. First, the CCIA October 2024 Draft links the definition of indirect expropriation to substantial or permanent deprivation of the 'fundamental attributes of property in [the] investment, including the right

[190] These phrases are in line with the understanding of 'effective' compensation as seen in Section 1.5.2.3.

[191] Cf Article 36 'ARSIWA with Commentaries' (n 10) para 26.

to use, enjoy and dispose of [the] investment.' Second, unlike the AIP, but in line with other treaties, Article 22(10)(b) of the CCIA October 2024 Draft expressly includes investment-backed expectations in the list of factors to be considered when determining if indirect expropriation has occurred. Section 55 of the ETIPA Draft contains no mention of the difference between direct and indirect expropriation.

Legality of expropriation. In contrast with the AIP, Article 22(1)–(2), (9) of the CCIA October 2024 Draft omits the non-discrimination requirement but mentions all other three requirements and the right to review. Article 6.1 of the SADC Model BIT also contains all the classic legality requirements but for non-discrimination. The Commentary to the provision suggests that the exclusion of this requirement was intentional and recommended 'because, in many instances, expropriations are specific and targeted, and thus in a strict legal sense could be defined as being discriminatory by their very nature'.[192] Section 55 of the ETIPA Draft seems to require only due process and the payment of compensation.

Exceptions to expropriation. Like the AIP, the CCIA October 2024 Draft contains both the IP rights exception (covering both situations discussed above) and the police powers exception. However, it also contains a third exception relating to debt security and loans. The SADC Model BIT does not contain exceptions specific to expropriation, but it provides for general exceptions in Article 25, which, according to the commentary, are broadly drawn from WTO law. Section 56 of the ETIPA Draft contains exceptions equivalent to those in the AIP.

Compensation for expropriation. The SADC Model BIT contains two options in Article 6.2, among which Option 1 is almost identical to the AIP's wording on the assessment of fair and adequate compensation. The other option is progressively more investor-friendly. The CCIA October 2024 Draft currently contains formulations largely similar to those found in Option 1 in the SADC Model BIT and, accordingly, the AIP. Similar to Article 21(5) of the AIP, Article 22(4)–(5) of the CCIA October 2024 Draft also allows awarding only simple interest to the investor. However, unlike Article 21 of the AIP, Article 22 of the CCIA October 2024 Draft does not substitute the requirement of 'prompt' payment with that of payment 'within reasonable period of time', nor does it require that the same standard apply to unlawful expropriations. Section 55 of the ETIPA Draft requires compensation to be fair and adequate, effective, and prompt (rather than 'within a reasonable period of time').

[192] SADC Model BIT, Commentary to Article 6.1, 24–25.

2.6. Transfer of Funds

156. The AIP's Transfer of Funds provisions differ from the same provisions in Eswatini's IIAs in force in that, while the AIP establishes a robust treaty commitment for host States (in Article 22) it also includes a detailed list of exceptions (in Article 23). In that respect, the AIP is in line with contemporary treaty drafting practices.

2.6.1. Scope of the Obligation

AIP, Article 22 ('Transfer of Funds')
1. State Parties shall, in accordance with national laws and regulations, permit all transfers relating to an investment to be made freely and without delay in and out of the territory after payment of the respective taxes and duties. Such transfers may include: [...]   2. The Host State, subject to the choice of the investor, shall allow transfers to be made in the currency of the host economy, or in a freely convertible currency recognised by the International Monetary Fund (IMF), at the market rate of exchange prevailing on the date of the transfer, in accordance with the laws and regulations of the Host State.

157. Article 22(1) of the AIP recognises foreign investors' right to freely effect inbound and outbound transfers ('in and out of the territory'), provided that the host State's laws regarding the payment of relevant taxes and duties have been complied with first. This comes in stark contrast with some of Eswatini's IIAs in force, and especially the Eswatini-United Kingdom BIT which provides for the 'unrestricted' transfer of funds. Further, under the AIP, the host State must allow transfers to be made 'without delay'. While the AIP does not define the term, a reasonable interpretation of it may be that transfers must be allowed once all relevant administrative requirements have been fulfilled.[193]

[193] See, e.g., Eswatini-Germany BIT, Protocol, para (5)(a).

158. Article 22(2) of the AIP provides that the AIP Contracting States must allow transfers to be made in their own currency or in another freely convertible currency at the choice of the investor.

2.6.2. Exceptions to Transfer of Funds

AIP, Article 23 ('Exceptions to Transfer of Funds')
1. A State Party may apply non-discriminatory restrictions on transfers of funds relating to investments made in its territory in accordance with its domestic laws and regulations where applicable and in particular, relating to: a. fulfilment of tax obligations to the Host State; b. bankruptcy, insolvency, or the protection of the rights of creditors; c. issuing, trading or dealing in securities, futures, options or derivatives; d. criminal or penal offences and the recovery of the proceeds of crime; e. financial reporting or record keeping of transactions when necessary to assist law enforcement or financial regulatory authorities; f. ensuring compliance with orders or judgments in judicial or administrative proceedings; g. social security, public retirement or compulsory savings schemes; h. severance entitlements of employees; or i. anti-money laundering and financing of terrorism. 2. A State Party may adopt or maintain non-discriminatory measures not conforming with its obligations relating to the free transfer of funds: a. in the event or threat of serious balance-of-payments deficits or external financial difficulties; or b. in exceptional circumstances where movements of capital cause or threaten to cause serious economic or financial difficulties in the State Party concerned.

3. Subject to the reservations of each State Party under the IMF Articles of Agreement, nothing in Article 22 shall affect the rights and obligations of a State Party that is a member of the IMF, including the right to apply safeguard measures at the request of the IMF.

4. The State Party applying a safeguard measure contemplated in paragraphs 1 and 2 of this Article shall promptly notify the AfCFTA Secretariat and provide a schedule for its removal within a reasonable period of time. For greater certainty, these safeguard measures shall:

a. avoid unnecessary damage to the economic and financial interests of investors and other State Parties;

b. be proportionate in the circumstances; and

c. be temporary and phased out progressively as the situation necessitating the safeguard measure improves.

159. Article 23 of the AIP provides for three types of exceptions to the Transfer of Funds obligation and, in so doing, carves out significant regulatory space for host States.

160. The first type of exception is based on the host State's routine application of its laws and regulations of general application. Article 23(1) includes a long list of reasons for restricting transfers, covering, among others, the fulfilment of tax obligations, the commission of criminal or penal offences and the recovery of the proceeds of crime, contributions to social security, public retirement or compulsory savings schemes, as well as laws against money laundering and the financing of terrorism. To prevent host State's from using these reasons as a disguised barrier to free capital flows, Article 23(1) specifies that any restrictions on transfers must be non-discriminatory and in accordance with the host State's laws and regulations. Further, according to Article 23(4), any such restrictive measures must be promptly notified to the AfCFTA Secretariat, be temporary and proportionate, and not cause unnecessary damage to investors' and other AIP States' financial interests. This means that the measures should be limited in scope and duration, and should be applied only to the extent necessary to address the underlying economic or financial issues, while also seeking to minimise the adverse impact on the affected parties.

161. The second type of exception, under Article 23(2) of the AIP, is in response to the occurrence or threat of occurrence of financial crises, including serious balance-of-payments deficits, external

financial difficulties, and exceptional circumstances where capital movements may result in serious economic or financial difficulties for the host State. The conditions of Article 23(4) apply in these situations as well.

162. The third type of exception, under Article 23(3) of the AIP, is a without prejudice exception. It seeks to prevent conflicts that may otherwise emerge with an AIP Contracting State's rights and obligations arising from its membership in the IMF, particularly with respect to the right to apply financial safeguard measures at the IMF's request.

Equivalent Provisions in the SADC Model BIT, CCIA October 2024 Draft and ETIPA Draft

Both the SADC Model BIT and the CCIA October 2024 Draft provide for the repatriation of assets or the transfer of funds. The scope of the obligation under the SADC Model BIT is broadly similar to that of the AIP, though not entirely identical (e.g., the SADC Model BIT does not require that transfers must be made 'without delay'). The CCIA October 2024 Draft currently aligns more closely with the AIP's provision on the transfer of funds.

A transfer of funds-equivalent obligation is also provided in the ETIPA Draft. Articles 57 and 58 of the ETIPA Draft largely align with the scope of coverage and the exceptions set out under the AIP, but further mandate regulatory approval for inward transfers. The clarification that these two articles are '[s]ubject to any other written law relating to entry of funds' suggests that the AIP's standards on transfers (e.g., that they must be made 'without delay') may be used to add to the ETIPA's provisions (by way of the ultimate incorporation of the AIP into Eswatini's domestic legal system).

2.7. Investors' Obligations

2.7.1. Background

163. It is often difficult, if not impossible, to hold foreign investors directly responsible for harm caused by their business activities. Although operating subsidiaries located in the host State are subject to the host State's domestic law, the foreign owners/investors themselves are not directly subject to

host State law.[194] And yet, being the ultimate owners or controllers of investment, foreign investors are uniquely placed to ensure that their business activities are carried out responsibly. Chapter 5 of the AIP ('Investor Obligations') seeks to close this accountability gap by creating direct international legal obligations for foreign investors. In principle, this would allow an AIP host State to hold a foreign investor directly responsible under international law, in addition to holding the that investor's company/investment vehicle responsible under domestic law.

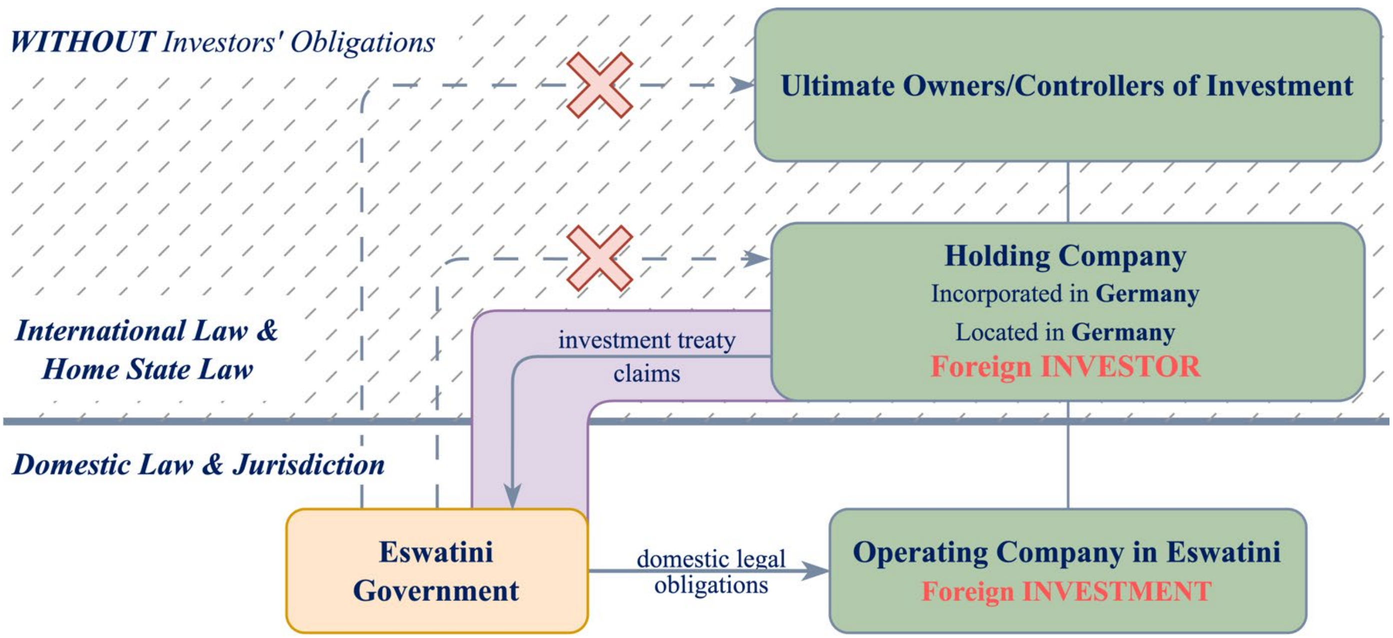

Figure 1 – Without Investors' Obligations

[194] Modern corporate structures mean that foreign investors are almost always legally distinct from the business/legal entities that comprise their 'investment'. As owners/shareholders, foreign investors are not subject to host State law and cannot be held directly responsible for the acts of their companies.

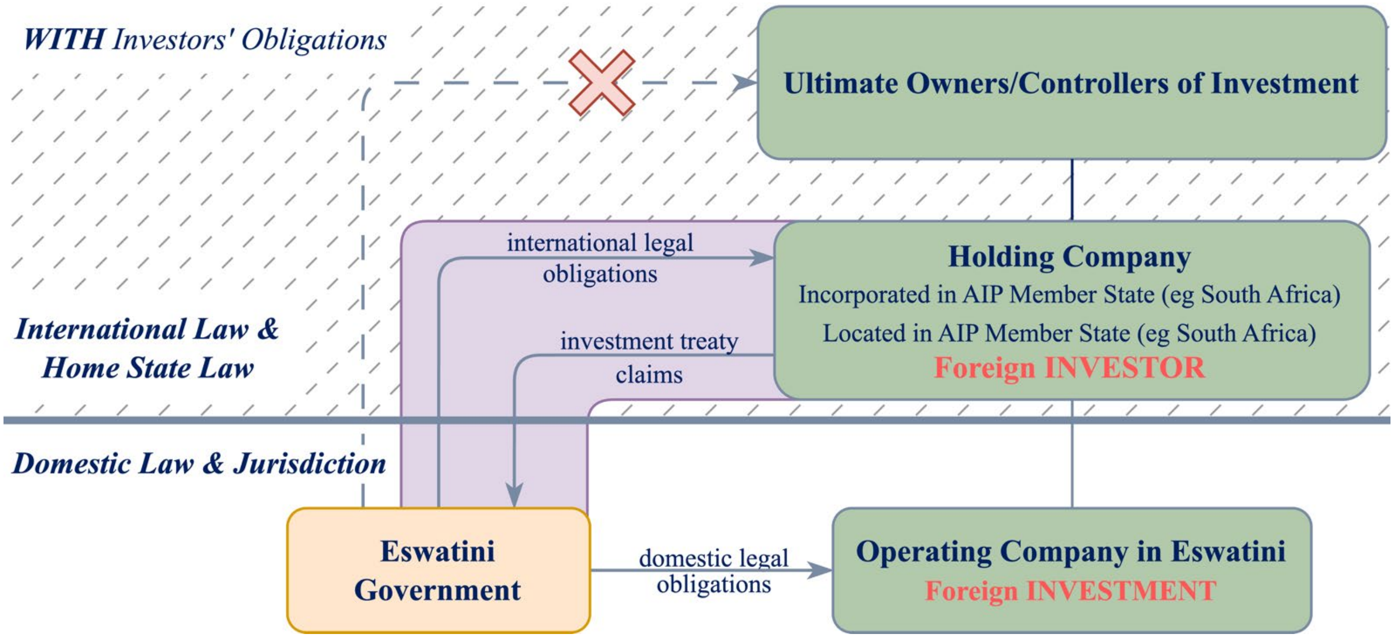

Figure 2 – With Investors' Obligations

164. The sections that follow will (1) analyse the various investors' obligations contained in Chapter 5 of the AIP, (2) offer context for certain drafting choices, and (3) explain their expected legal implications. Where relevant, investors' obligations in the SADC Model BIT, CCIA October 2024 Draft, and ETIPA Draft will also be briefly evaluated.

2.7.2. Relation to State Party Obligations

AIP, Article 31 ('Relation to State Party Obligations')
1. Notwithstanding the investor obligations set out in this Chapter, the provisions in this Chapter are **without prejudice to the obligations of the State Parties** to promote and enforce, among others: a. laws and policies to protect investment-related human rights, labour rights and the environment; or

> b. anti-corruption, anti-money laundering, anti-terrorism financing and anti-bribery measures; or
>
> c. laws and policies to protect the rights of indigenous peoples and local communities.
>
> 2. **State Parties shall ensure** that investors and their investments comply with their domestic law and regulations and international law. (emphasis added)

165. Despite being the first Article under Chapter 5 ('Investor Obligations'), Article 31 reaffirms *States'* obligations. Article 31 underscores that primary responsibility remains always with the State to promote and enforce various standards and laws. That is, Article 31 makes it clear that investors' obligations do not displace, replace, or otherwise change the State's own obligations. For example, even if a foreign investor violates human rights standards in operating its investment, a State Party could nevertheless be concurrently responsible under international law for failing to prevent such violations, as the State remains the primary guarantor of human rights.

Equivalent Provisions in the SADC Model BIT and CCIA October 2024 Draft

There is no equivalent to Article 31 in the SADC Model BIT and the CCIA October 2024 Draft, even though both agreements contain investors' obligations (many of which mirror the investors' obligations in the AIP).

The difference is likely to be inconsequential. As a matter of general international law, the legal position will remain the same under both agreements, even without an equivalent to Article 31. States remain the primary guarantors of international law and international standards, and investors' obligations do not change States' obligations.

2.7.3. Compliance with National and International Law

AIP, Article 32 ('Compliance with National and International Law')

Investors and their investments shall carry out their operations in compliance with all relevant domestic laws and regulations, **administrative guidelines** as well as **applicable international law**.

(emphasis added)

166. Despite its brevity, Article 32 is arguably the most important among investors' obligation in Chapter 5. Article 32 catches any and all host State laws that an investment must follow, and transposes that responsibility directly onto the foreign investor. By turning the obligation to follow domestic law into a direct international obligation, it attaches to and 'follows' overseas owners or controllers of investment across jurisdictions and across layers of corporate ownership.[195]

167. Particular attention should be paid to the phrases 'administrative guidelines' and 'applicable international law' in Article 32.

168. First, 'administrative guidelines' may not be mandatory under domestic law. For instance, central banks often issue guidelines that describe best practices. Such guidelines typically do not have the force of law, and non-compliance with them does not carry legal penalties. While the plain reading of Article 32 suggests that foreign investors must comply with 'administrative guidelines' regardless of whether they have the force of law in Eswatini, it is unclear whether Article 32 was truly intended to supersede domestic law in such a way. It would arguably be unfair for an investor to be in breach of Article 32 for failing to do something that was not required under domestic law. In light of this, States could consider clarifying whether, and if so which, domestic 'administrative guidelines' have the force of law.

169. Second, there is generally no 'applicable international law' that is directly applicable to foreign investors as non-State entities. Although there are several international instruments and guidelines which are addressed to foreign investors, businesses, and corporations (e.g., the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights), these instruments are not legally binding but take the form of so-called 'soft law'. Currently, the reference to 'applicable international law' does not seem to have a precise legal effect. Nevertheless, it can be understood as an attempt to future-proof the AIP by capturing future developments in international law on foreign investors.

[195] In practice, more sophisticated chains of corporate ownership may complicate the issue.

<u>Equivalent Provisions in the SADC Model BIT and CCIA October 2024 Draft</u>

Article 11 of the SADC Model BIT refers to 'administrative guidelines and policies'. Article 27 of the CCIA October 2024 Draft refers to 'all applicable domestic… *measures*' (emphasis added), with 'measures' defined as 'any legal, administrative, judicial or policy decision…directly relating to and affecting an investment'. Like Article 32 of the AIP, these references potentially include instruments that may not have the force of law domestically.

Article 11 of the SADC Model BIT does not refer to international law and 'does not go beyond what would be in the domestic law of the Host State'.[196] On the other hand, Article 27 of the CCIA October 2024 Draft refers to 'any applicable *norms* of international law' (emphasis added). Although the wider reference to 'norms' (as opposed to 'law') arguably includes the soft law instruments referred to above, it is unlikely that the use of the word 'norms' alone would make these soft law instruments obligatory. Clearer language (such as a specific reference to the instruments) would likely be needed to modify the general understanding that these instruments are not legally binding on investors and businesses.

2.7.4. Business Ethics, Human Rights, and Labour Standards

AIP, Article 33 ('Business Ethics, Human Rights, and Labour Standards')

Investors and their investments **shall comply** with **high standards of business ethics, investment-related human rights and labour standards**, and **in particular shall:**

a. **support and respect the protection** of internationally recognised human rights;

b. ensure that they are not complicit in human rights **abuses**;

c. comply with the **International Labour Organisation (ILO) standards**, including the ILO Declaration on Fundamental Principles and Rights at Work, and **domestic labour legislations**;

d. not use child labour or forced and compulsory labour;

e. eliminate discrimination in respect of employment and occupation;

[196] SADC Model BIT, Commentary to Article 11, 33

f. refrain from discriminatory or disciplinary action against employees who submit reports to the company's board or to the competent public authorities about practices that violate domestic laws, this Protocol, or other standards of corporate governance to which the company is subject; and

g. act in accordance with **fair business, marketing and advertising practices** when dealing with consumers and must ensure the **safety and quality of goods and services** they provide. (emphasis added)

170. Article 33 sets out investors' general obligation to 'comply with high standards of business ethics, investment-related human rights and labour standards'. This general obligation is then particularised by a list of seven specific obligations (Article 33(a)–(g)).

171. The phrase 'in particular' may suggest that letters (a)–(g) are not exhaustive, such that other obligations may be included in Article 33 if they fall under 'high standards of business ethics, investment-related human rights and labour standards'. However, the rather vague language of the general obligation ('high standards') may make it difficult to identify specific obligations beyond those identified in Article 33(a)–(g). Thus, Article 33(a)–(g) could be regarded as practically exhaustive of the conduct required under Article 33.

2.7.4.1. Investment-Related Human Rights

172. Article 33(a)–(b) relates to 'high standards of… investment-related human rights'. Notably, Article 33(a) does not oblige investors to support, respect, or protect human rights. Rather, it obliges investors to '*support and respect the protection* of human rights' (emphasis added). This deliberate formulation draws on specific terminology used by international human rights law.[197] As a result, Article 33(a) should be understood as requiring investors to support and respect *the State's*

[197] OHCHR, 'Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation', 2006, 2. There are three kinds of obligations in international human rights law: to respect, to protect, and to fulfil human rights. To *respect* human rights means to refrain from interfering with the exercise of human rights. To *protect* human rights means to ensure that third parties do not interfere with the exercise and enjoyment of human rights. To *fulfil* human rights means to take progressive steps to develop the effective exercise of human rights. Article 33(a) AIP only refers to 'protection of human rights', which is principally a State obligation.

protection of human rights. That is, investors must not prejudice or interfere with the State's protection of human rights (a negative obligation).[198]

Example from the Case of *Urbaser v Argentina*
In *Urbaser v Argentina*, the investor was operating a concession for water and sewage services in Buenos Aires. Under the concession contract, the investor was to provide and expand drinking water and sewage services to a vulnerable population. When a dispute arose, Argentina counterclaimed that the investor had breached its obligation to provide water and sanitation by consistently failing to secure funding for the project infrastructure. In rejecting the counterclaim, the tribunal stated that, under international law, investors have no positive obligation to provide water and sanitation, but only a negative obligation to 'abstain [from] commit[ting] acts violating human rights'.[199] Crucially, the tribunal added that no 'corresponding obligation on behalf of the [investor]' could arise because Argentina itself had not made the human right to water a 'governmental primary focus'.[200]

173. Article 33(b) is more straightforward by comparison. Article 33(b) requires an investor to conduct effective human rights due diligence, possibly across its entire supply chain, so as to ensure that no business is done with entities engaging in human rights abuses (thereby becoming 'complicit').[201] The use of the word 'abuses' suggests that an investor's human rights due diligence does not need to encompass all forms of human rights violations, but only serious or widespread violations that rise to the level of 'abuses'. Although comparable national laws may place stricter obligations on investors (e.g., the German Supply Chain Act 2021 requires companies to identify 'risks' of human

[198] Article 33(a) AIP also refers to investors 'support[ing]' the State's protection of human rights. This language could plausibly require some form of positive action from the investor, but thus far, investors have only been required to refrain from interference with human rights.

[199] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, paras 1207, 1210.

[200] *ibid* para 1219.

[201] Cf Principle 17 UN Guiding Principles on Business and Human Rights (2011) 18–19.

rights 'violations'),[202] such national laws typically only apply to large enterprises.[203] By contrast, given that Article 33(b) of the AIP applies to all investors, regardless of size, it may not be practicable to require all investors to scrutinise all its suppliers, contractors, and business partners for rigorous human rights compliance. That said, AIP investors can fairly be expected to avoid doing business with notorious violators of human rights.

<u>Equivalent Provisions in the SADC Model BIT and CCIA October 2024 Draft</u>

Article 15.1 of the SADC Model BIT is drafted quite differently to the AIP, stating that investors have a 'duty to respect human rights in the workplace and in the community and State'. However, the Commentary makes it clear that this does not impose direct human rights obligations, but rather is a reference to the Second Pillar of the UN Guiding Principles on Business and Human Rights, i.e., the corporate responsibility to respect human rights.[204] The scope and practical effect of Article 15.1 of the SADC Model BIT is thus likely to be the same as that of Article 33(a)–(b) AIP.

Article 31(2)(a)–(b) of the CCIA October 2024 Draft uses almost identical language as Article 33(a)–(b) of the AIP. However, Article 31(1) of the CCIA October 2024 Draft currently adds a specific reference to the UN Guiding Principles on Business and Human Rights, thus making it legally binding on investors under the CCIA (albeit 'with modifications necessary for local circumstances'). This goes further than the language used in the AIP and gives more clarity to investors' obligations under the CCIA October 2024 Draft.[205]

[202] Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (Lieferkettensorgfaltspflichtengesetz – LkSG).

[203] For instance, the German Human Rights Supply Chain Duty of Care Act only applies to enterprises with at least 3,000 employees.

[204] SADC Model BIT, Commentary to Article 15, 36.

[205] The Commentary to the UN Guiding Principles on Business and Human Rights provides many clearly elaborated obligations and recommendations for businesses. Since publication in 2011, the Guiding Principles have also been elaborated in numerous follow-on documents, resources, and scholarship, which can provide more certainty in terms of what is expected of businesses.

2.7.4.2. Labour Standards

174. Article 33(c)–(e) of the AIP exemplify the high labour standards that the AIP envisages. The specific content of Article 33(c)–(e) will be largely dependent on domestic labour legislation.

175. Article 33(c) refers to ILO standards.[206] However, most ILO standards are addressed to States, not private individuals or investors. It is thus unclear what specific conduct is required of investors under ILO standards (beyond broad prohibitions on e.g., child labour or workplace discrimination). In practice, ILO standards are likely to be of relevance to investors' obligations only insofar as these standards have been incorporated into domestic labour legislation.[207]

176. By contrast, Article 33(d)–(e) is less ambiguous and describes fairly specific labour obligations. In practice, Article 33(d)–(e) is also likely to substantially overlap with (more detailed) domestic labour legislation on child, forced, and compulsory labour, and workplace discrimination.

Equivalent Provisions in the SADC Model BIT and CCIA October 2024 Draft

Article 15.2 of the SADC Model BIT refers to 'core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of [sic] Work'. For the same reasons set out above, it is unlikely that this adds any obligations beyond those already set out in domestic labour legislation.

Unlike the SADC Model BIT and the AIP, Article 31 of the CCIA October 2024 Draft does not currently reference ILO standards, but instead refers to the UN Guiding Principles on Business and Human Rights. However, the UN Guiding Principles are relatively silent on specific labour standards. The scope of labour obligations under Article 31 of the CCIA October 2024 Draft is thus likely to also be determined by reference to domestic labour legislation.

[206] For reference, 'ILO standards' are understood to comprise the 191 ILO Conventions and numerous Protocols (legally binding of States Parties to these agreements), and the 208 ILO Recommendations (non-legally binding guidelines). Like most States, Eswatini is not party to all ILO Conventions.

[207] Or in the few cases where ILO standards are addressed directly to employers.

2.7.4.3. Business Ethics

177. Article 33(f)–(g) exemplifies the high standards of business ethics that the AIP envisages. Article 33(f) describes investors' obligations not to discriminate against, or discipline, whistle-blowers.[208] Although such an obligation may not be present a country's under domestic law, the obligation in Article 33(f) is sufficiently specific to constitute a freestanding investor obligation under the AIP.[209]

178. Article 33(g) requires investors to 'act in accordance with fair business, marketing and advertising practices' and 'ensure the safety and quality of goods and services they provide'. The wording of Article 33(g) is almost identical to Chapter VIII of the OECD Guidelines for Multinational Enterprises, which elaborates on 'fair business, marketing and advertising practices' across eight specific obligations.[210] However, Article 33(g) does not purport to incorporate the OECD Guidelines by reference, or to make them directly binding on investors.[211] The main source of specific obligations for investors will thus likely be domestic law on fair business practices and consumer protection. Nevertheless, given the similar language used, the OECD Guidelines can provide valuable notice to investors on what may be expected or desired behaviour under Article 33(g) of the AIP.

<u>Equivalent Provisions in the SADC Model BIT and CCIA October 2024 Draft</u>

The SADC Model BIT is silent on 'fair business, marketing and advertising practices'.

Article 32(2) of the CCIA October 2024 Draft uses the non-mandatory expression that investors '*should* act in accordance with fair business, marketing and advertising practices' (emphasis added), whereas Article 33(g) AIP uses the mandatory words 'shall' and 'must'. The difference is unlikely to have practical impact, as the scope of Article 32(2) of the CCIA October 2024 Draft is likely to be determined by

[208] Article 33(f) AIP also refers to other standards of corporate governance, which will be discussed below in Section 2.7.9 on 'Corporate Social Responsibility and Corporate Governance'.

[209] In contrast, as discussed above, the considerably broader and vaguer reference to 'administrative guidelines' in Article 32 AIP may not be sufficient to confer obligatory character on otherwise non-mandatory instruments.

[210] OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD Publishing 2023) 51 ('OECD Guidelines for Multinational Enterprises').

[211] This is unlike Article 31(1) CCIA October 2024 Draft, which explicitly refers to the UN Guiding Principles on Business and Human Rights.

domestic law on fair business practices and consumer protection (see analysis above). An investor would be obliged to comply with such domestic laws under Article 27 of the CCIA October 2024 Draft ('Compliance with Domestic and International Laws').

2.7.5. Environmental Protection

AIP, Article 34 ('Environmental Protection')

1. Investors and their investments **shall**, in carrying out their business activities, **respect and protect** the environment, and, **in particular shall**:

   a. **respect the right to a clean, healthy and sustainable environment**, as reflected in **Article 24 of the African Charter of Human and Peoples' Rights**, and the Resolution of the United Nations General Assembly A/RES/76/300 (**'The human right to a clean, healthy and sustainable environment'**);

   b. comply with the **principles of prevention and precaution** when conducting their business activities to anticipate and prevent any risk of significant harm to the environment;

   c. carry out an **environmental impact assessment**, in accordance with the **best international standards and practices and as required by domestic law**;

   d. apply the **precautionary principle** to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approaches to the investment, or precluding the investment if necessary; and

   e. where their business activities cause or may cause harm to the environment, **take steps to mitigate the harm**, to **restore impacted sites** and ensure a clean, healthy and sustainable environment.

2. Investors shall not exploit or use natural resources to the detriment of the rights and interests of the Host State and local communities. (emphasis added)

179. Article 34(1) begins with the general obligation for investors to 'respect and protect the environment' in 'carrying out their business activities', and then provides for five specific

obligations in Article 34(1)(a)–(e). As with Article 33, the words 'in particular' may suggest that the specific obligations in letters (a)–(e) are not exhaustive. However, the text of Article 34 provides no indications as to what obligations may be applicable beyond letters (a)–(e). For practical purposes, Article 34(1)(a) –(e) can be regarded as exhaustive.

180. Article 34(1)(a) imposes a *direct* human rights obligation on the investor to 'respect the right to a clean, healthy and sustainable environment'.[212] That is, even where domestic environmental laws are lax or ineffective, investors are still subject to an independent international obligation not to pollute. Moreover, Article 34(1)(a) specifically refers to Article 24 of the AfCHPR.[213] This links the investors' obligation to the developing caselaw on Article 24 of the AfCHPR, which will help to clarify the scope of investors' obligation under the AIP.[214] Although the caselaw of Article 24 AfCHPR addresses State obligations, these obligations are largely transposable onto investors, as Article 24 of the AfCHPR 'largely [entails] non-interventionist conduct'.[215]

181. Article 34(1)(b)–(e) seeks to operationalise core principles of international environmental law: prevention, precaution, mitigation, and environmental impact assessments.[216] These principles have been extensively developed over time, with many soft law instruments building on these principles to provide detailed recommendations for businesses.[217]

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[212] This is a stronger formulation than Article 33(a) AIP. As discussed above, Article 33(a) AIP imposes an obligation to 'support and respect [the State's] protection' of human rights, which can be interpreted as rendering the investors' obligation contingent on the State's primary responsibility to protect human rights.

[213] Article 34(1)(a) AIP also refers to UNGA Resolution A/RES/76/300, 'The Human Right to a Clean, Healthy and Sustainable Environment'. The resolution asserts the right to a healthy environment as a human right under CIL. However, it does not elaborate on the specific content of that right. Given the international divergence in views on the human right to a healthy environment, the reference to the resolution may be best understood as simply leaving Article 34(1)(a) AIP open to future developments in human rights law.

[214] For instance, as articulated in decisions such as: Communication 155/96*, Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria,* 26 October 2001; *ECOWAS Court of Justice, SERAP v Federal Republic of Nigeria*, Judgment No. ECW/CCJ/JUD/18/12, 14 December 2012.

[215] *SERAC and CESR v Nigeria* (2001) (African Commission) para 52.

[216] See Principles 2 (prevention), 15 (precaution), 17 (environmental impact assessment) 1992 Rio Declaration. See also the principle of mitigation reflected in Article 3(3) 1992 UN Framework Convention on Climate Change, as one of the main dimensions of climate action.

[217] For instance, the OECD Guidelines for Multinational Enterprises (n 210) provide detailed environmental actions for businesses in Chapter VI. Do note, however, that these soft law instruments often do not explicitly invoke 'the principles of prevention and precaution' (cf Article 34(1)(b) AIP) or 'the precautionary principle' (cf Article 34(1)(d) AIP). Despite this lack of an explicit link, these soft law instruments are nevertheless understood to express these core principles of environmental law and are likely to influence the content of these investors' obligations under the AIP.

182. Lastly, Article 34(2) specifies that investors 'shall not exploit or use natural resources to the detriment of the rights and interests of the host State and local communities'. Although phrased as a prohibition, Article 34(2) more likely seeks to ensure that, where the two come into conflict, the host State's and local communities' interests take precedence over investors' business interests.[218]

Equivalent Provisions in the SADC Model BIT and CCIA October 2024 Draft

The SADC Model BIT and the CCIA October 2024 Draft differ from the AIP with respect to investors' environmental obligations. There are four points of note.

First, under the SADC Model BIT, there is no general obligation to 'respect and protect the environment' (cf Article 34(1) of the AIP). The closest equivalent is found in Article 15.3 of the SADC Model BIT ('[investments shall not be operated] in a manner inconsistent with international environmental…obligations binding on the Host State or the Home State, whichever obligations are higher.'). By contrast, the formulations in the AIP and the CCIA October 2024 Draft are considerably stronger.[219]

Second, unlike the AIP, the SADC Model BIT and the CCIA October 2024 Draft do not specifically tie investors' environmental obligations to the human right to a clean, healthy and sustainable environment. They only refer obliquely to 'human rights' in the environmental and social impact assessments that investors must carry out.[220] As a matter of interpretation, this suggests that the environmental obligations in the AIP could be different from those in the SADC Model BIT and the CCIA October 2024 Draft.

Third, the SADC Model BIT and the CCIA October 2024 Draft both include detailed obligations to maintain 'environmental management system[s]'.[221] There is no equivalent provision in the AIP. The

[218] This more forceful statement in favour of the host State's interests can be contrasted with Article 23(2) Morocco-Nigeria BIT (2016), which states that 'a host State's pursuit of its right to regulate shall be understood as embodied within a balance of the rights and obligations of Investors and Investments and Host States'.

[219] Article 33 CCIA October 2024 Draft sets out the general obligation for investors to 'protect the environment'. The slight difference between Article 33 CCIA October 2024 Draft and Article 34 AIP is unlikely to be legally significant, but does present a risk of extraneous interpretation.

[220] Article 13.2 SADC Model BIT; Article 33(3) CCIA October 2024 Draft.

[221] Article 14 SADC Model BIT; Article 34 CCIA October 2024 Draft.

absence of this provision in the AIP can be managed by incorporating these environmental management system obligations into domestic law.

Finally, the CCIA October 2024 Draft includes an obligation for the investor to 'ensure fair compensation is paid to those impacted by…environmental damages'.[222] This is not included in the SADC Model BIT or the AIP. However, the obligation to pay compensation for environmental damages is arguably implicit in the investors' liability provisions of the SADC Model BIT (Article 17) and the AIP (Article 47).

2.7.6. Indigenous Peoples and Local Communities

AIP, Article 35 ('Indigenous Peoples and Local Communities')

1. Investors and their investments **shall respect the rights and dignity of indigenous peoples and local communities** in accordance with relevant domestic laws and regulations, international law, norms and best practices, including the right of indigenous peoples, and local communities where applicable, **to free, prior and informed consent and to participate in the benefit of the investment**.

   For greater certainty, the reference to the right to free, prior and informed consent of indigenous peoples, does not imply any obligation for investors and their investments to conclude agreements with those groups before conducting or operating their investment in the territory of State Parties which do not recognise indigenous peoples, taking into account applicable and relevant domestic laws and regulations.

2. Investors and their investments shall respect legitimate tenure rights to land, water, fisheries, and forests in accordance with **relevant laws and regulations**.

3. Investors, **in accordance with relevant domestic law and regulations**, shall submit their **environmental and social impact assessments** to the competent authorities, and make them available and accessible to local communities and indigenous peoples and to any other stakeholder in the territory of the Host State. (emphasis added)

[222] Article 33(1) CCIA October 2024 Draft.

183. The main obligation of investors under Article 35(1) is to 'respect the rights and dignity of indigenous peoples and local communities'. What this will require from an investor in practice is not entirely clear.[223] At a minimum, Article 35(1) clearly requires investors to obtain 'free, prior and informed consent' of indigenous peoples and local communities.[224] Articles 35(2)–(3) are straightforward provisions, imposing clear and specific obligations on investors to respect legitimate tenure rights, and to share environmental and social impact assessments with local communities, indigenous peoples, and other stakeholders.

184. Notably, the obligations in Article 35 are dependent on whether the State's domestic law recognises the presence of indigenous peoples or local communities. The second paragraph of Article 35(1) provides that investors do not need to obtain the consent of indigenous peoples in the territory of those States which do not recognise indigenous peoples. This conclusion is also reinforced by Article 3(6) of the AIP, which states that 'references to "indigenous people", "local communities"… in this Protocol do not apply on the territory of State Parties which do not recognise those groups under their domestic laws and regulations'.

Equivalent Provisions in the SADC Model BIT and CCIA October 2024 Draft

The SADC Model BIT and the CCIA October 2024 Draft lack equivalent provisions on indigenous peoples and local communities. This has the potential to create problematic differences between different classes of investors. Non-African foreign investors under the Model BIT would not be required to obtain consent of indigenous peoples and local communities. Even as between intra-African investors, there may be confusion as to whether the CCIA October 2024 Draft or the AIP applies.[225]

[223] A key determinant will likely be the State's 'relevant domestic laws and regulations', and the extent to which they legally protect the 'rights and dignity of indigenous peoples and local communities'. Although reference is also made to 'international law, norms and best practices', there is far less consensus on the conduct required of investors vis-à-vis local communities and indigenous peoples. Thus, for instance, there are very few mentions of indigenous peoples in the UN Guiding Principles on Business and Human Rights.

[224] Article 35(1) AIP also provides for the right of indigenous peoples and local communities to 'participate in the benefit of the investment'. However, the exact content of this right is not articulated in the AIP. To clarify this right, Eswatini could promulgate guidance or regulations (e.g., mandating employment opportunities related to the investment or the collection of dues for the lease of tenured land).

[225] As a matter of law, the broader requirements of the AIP are likely to apply, since all CCIA States Parties will also be AIP States Parties. However, as a practical matter, investors may be confused by this difference.

As a host State, Eswatini can manage this by enacting domestic laws which mirror the requirements of Article 35 of the AIP. This would also obviate the need to negotiate an indigenous peoples provision in each and every future IIA that Eswatini concludes with non-African partners.

2.7.7. Socio-Political Obligations

AIP, Article 36 ('Socio-Political Obligations')
Investors shall **refrain from any interference in the internal affairs of State Parties and in their intergovernmental relations**, in particular to influence the appointment of persons to public office, finance political parties or undermine the political stability or security of the Host State or to influence public opinion in a manner contrary to this Article. (emphasis added)

185. Article 36 provides for a broad general obligation to 'refrain from *any* interference in the internal affairs of State Parties and in their intergovernmental relations' (emphasis added). This is further concretised with four specific examples of unacceptable interference: (1) influencing public office appointments; (2) financing political parties; (3) undermining the political stability or security of the host State; and (4) influencing public opinion in a manner contrary to the Article.

186. The obligation in Article 36 goes further than existing international standards. For instance, the UN Guiding Principles on Business and Human Rights do not mention any such socio-political obligations on investors to refrain from corporate political activity.[226] The OECD Guidelines for Multinational Enterprises only directs corporations to '[a]bstain from any *improper* involvement in political activities',[227] and to '[n]ot make *illegal* contributions to candidates for public office or to political parties or to other organisations linked to political parties or political candidates'[228] (emphases added). In contrast, Article 36 AIP is arguably a broader prohibition on corporate political activity in general, even if such activities are permitted under domestic law.

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[226] 'Corporate political activity' is the general term used in the literature to refer to 'corporate attempts to shape government policy'. See Amy J Hillman, Gerald D Keim and Douglas Schuler, 'Corporate Political Activity: A Review and Research Agenda' (2004) 30 Journal of Management 837, 837.

[227] OECD Guidelines on Multinational Enterprises, Chapter II: 'General Policies' 15.

[228] OECD Guidelines on Multinational Enterprises, Chapter VII: 'Combating Bribery and Other Forms of Corruption' 40.

187. The latter two examples in Article 36 (i.e., undermining political stability or security and influencing public opinion in a manner contrary to the Article) are broadly worded and somewhat vague. Their exact content will likely depend on a case-by-case examination, taking into account domestic laws and regulations on political speech and political activities by foreigners.

Equivalent Provisions in the SADC Model BIT and CCIA October 2024 Draft

There is no equivalent provision in the SADC Model BIT.

Article 29 of the CCIA October 2024 Draft shares many elements with Article 36 of the AIP, including (1) non-interference with internal political affairs and intergovernmental relations,[229] (2) refraining from influencing public office appointments,[230] and (3) refraining from financing political parties.[231]

However, outside of these narrow prohibitions, Article 29 of the CCIA October 2024 Draft currently adopts an markedly different description of socio-political obligations. Whereas Article 36 AIP prohibits undermining political stability or security, and influencing public opinion in a manner contrary to the Article, Article 29 of the CCIA October 2024 Draft requires investors to 'refrain from all acts that may be prejudicial to public order, morals or to the public interest'[232] and to 'refrain from exercising restrictive business practices…and from trying to achieve gains through unlawful means'.[233] Broad catch-all provisions such as these are already inherently uncertain,[234] and drastic differences in wording may add to the confusion such that an investor may not know exactly what conduct is prohibited.

[229] Article 29(1)(c)–(d) CCIA October 2024 Draft.

[230] Article 29(2) CCIA October 2024 Draft.

[231] *ibid*.

[232] Article 29(3) CCIA October 2024 Draft.

[233] Article 29(3) CCIA October 2024 Draft.

[234] Undermining political stability or security, and influencing public opinion in a manner contrary to the Article (Article 36 AIP), on the one hand, versus 'all acts that may be prejudicial to public order, morals, or to the public interest' (Article 29 CCIA October 2024 Draft), on the other.

2.7.8. Anti-Corruption

AIP, Article 37 ('Anti-Corruption')
1. Investors and their investments shall not offer, promise or give any unlawful or undue pecuniary or other advantage or present, whether directly or through intermediaries, to a public official of a State Party, or to a member of an official's family or business associate or other person in order to obtain a favour or that the official or other person act or refrain from acting in relation to the performance of official duties. 2. Investors shall cooperate with State Parties in preventing and eliminating corruption in public governance and shall not **encourage, incite, aid, abet or conspire** with any official or another person or any entity to **commit or authorise the commission** of **an act of corruption, taking into account** applicable and relevant domestic laws and regulations, **the African Union Convention on Preventing and Combatting Corruption, the United Nations Convention against Corruption and other applicable international legal instruments**. 3. **Notwithstanding relevant international obligations of State Parties regarding anti-corruption, a breach of this Article by an investor is deemed to constitute a breach of the domestic laws and regulations of the Host State** concerning the establishment and operation of an investment. (emphasis added)

188. Article 37(1) sets out a standard definition of bribery,[235] which is independent of domestic laws and regulations. Article 37(1) thus prohibits bribery even if even if domestic laws define/treat bribery less stringently.

189. Article 37(2) prohibits any and all contribution to corruption, by providing that investors 'shall not encourage, incite, aid, abet, or conspire…to commit or authorise the commission of an act of corruption'. It also comprehensively covers all kinds of acts of corruption, by referring to 'domestic laws and regulations, the African Union Convention on Preventing and Combatting Corruption, the United Nations Convention against Corruption and other applicable international legal instruments'.

[235] Cf Article 15 UN Convention Against Corruption, which defines bribery as '[t]he promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties'.

The listed international instruments do not provide a single definition of corruption, but rather identify specific *acts* of corruption.[236] Article 37(2) should therefore be understood to prohibit the acts defined in these Conventions.[237]

190. Lastly, Article 37(3) deems a breach of Article 37 to be a breach of a State's domestic laws on the establishment and operation of an investment. The 'relevant international obligations of State Parties regarding anti-corruption' mentioned therein mainly refer to the obligations to criminalise the various acts of corruption defined in international agreements. Article 37(3) thus makes it clear that '[n]otwithstanding' the fact that a host State may not have criminalised a specific act of corruption, the commission of such an act will nevertheless be deemed a breach of domestic law by a foreign investor. As the Commentary to the SADC Model BIT explains (with respect to identical language found therein), the intent is to exclude investment achieved by corruption from the scope of a protected investment.[238]

Equivalent Provisions in the SADC Model BIT and CCIA October 2024 Draft

The SADC Model BIT and the CCIA October 2024 Draft differ from the AIP in two ways.

First, the SADC Model BIT and the CCIA October 2024 Draft only define and prohibit the offence of bribery.[239] Unlike the AIP, they do not refer broadly to acts of corruption, nor to the main international instruments defining corrupt acts.[240] This is a major deficiency which risks an interpretation that other

[236] For example, the African Union Convention on Preventing and Combatting Corruption lists 9 acts of corruption in Article 4(1)(a)–(i). Similarly, the UN Convention against Corruption lists 13 acts of corruption in Articles 15–27. This approach can be explained by the 'inherent difficulty of determining a comprehensive definition of corruption due to its diverse manifestations at the national, regional and global levels'. See UN Office of Drugs and Crime, 'What is Corruption?' <https://www.unodc.org/corruption/en/learn/what-is-corruption.html> accessed 19 March 2025.

[237] Notably, Eswatini is only Party to the UN Convention Against Corruption and not the African Union Convention on Preventing and Combatting Corruption. Nevertheless, this is unlikely to change the scope of Article 37(2) AIP, given the specific reference to the African Union Convention on Preventing and Combatting Corruption. Even if not criminalised under domestic law, acts falling under the African Union Convention will breach Article 37(2) AIP.

[238] SADC Model BIT, Commentary to Article 10, 32. The definition of 'investment' in Article 1 AIP provides that an investment must be 'in conformity with the laws and regulations of a host State'.

[239] Article 10.1 SADC Model BIT; Article 30(1) CCIA October 2024 Draft.

[240] In other words, there is no equivalent to Article 37(2) AIP in the SADC Model BIT or the CCIA October 2024 Draft.

forms of corruption (e.g., trading in influence) are not captured under the SADC Model BIT and the CCIA October 2024 Draft.

Second, the SADC Model BIT and the CCIA October 2024 Draft are more ambiguous on the relationship between State obligations and investors' obligations. Both treaties provide explicit obligations for States Parties to take measures to prevent and combat corruption.[241] Both treaties also provide that a breach of the relevant Article is 'deemed to constitute a breach of the domestic law of the host State'.[242] However, unlike Article 37 of the AIP, there is no '[n]otwithstanding' proviso to make it explicit that investors' anti-corruption obligations are independent of State obligations.[243] This difference may risk an interpretation that investors' anti-corruption obligations under the SADC Model BIT or the CCIA October 2024 Draft are dependent on States Parties first criminalising specific acts of corruption in their domestic law.

2.7.9. Corporate Social Responsibility and Corporate Governance

AIP, Article 38 ('Corporate Social Responsibility')

1. Investors and their investments **shall endeavour** to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, in accordance with the principles and standards set out in Paragraph 2 of this Article.
2. Investors and their investments **shall endeavour** to:

   (… [*list of desired CSR outcomes*])

3. State Parties **undertake to encourage** investors operating within their territories or subject to their jurisdiction to incorporate into their internal policies internationally recognised standards, guidelines and principles of corporate social responsibility including those set out in Paragraph 2 of this Article. (emphasis added)

AIP, Article 39 ('Corporate Governance')

[241] Article 10.4 SADC Model BIT; Article 30(3) CCIA October 2024 Draft.

[242] Article 10.3 SADC Model BIT; Article 30(4) CCIA October 2024 Draft.

[243] See also Article 31 AIP, which uses a similar 'notwithstanding' proviso to make it clear that State obligations are independent of investors' obligations in the context of the obligations of investors as a whole.

1. Investors and their investments shall meet national, regional and internationally accepted standards of corporate governance, in particular in respect of transparency and accounting practices.
2. Investors and their investments shall, in accordance with domestic laws and regulations:

   (… [*list of corporate governance principles*])
3. State Parties are encouraged to improve their regulatory and institutional framework for corporate governance in support of the requirements of this Article.
4. State Parties shall put in place measures enhancing transparency in financial reporting, disclosure, accounting, and audit practices in support of the requirements of this Article in accordance with domestic laws, regulations and applicable international standards and obligations. (emphasis added)

191. The obligations under Articles 38 and 39 share the same object and purpose—ethical and beneficial corporate activity—and can be analysed together. Broadly, Article 38 ('Corporate Social Responsibility') describes the desired *outcomes*, whereas Article 39 ('Corporate Governance') describes the *methods* by which to reach these desired outcomes.

192. The key takeaway from Article 38 is that it sets out so-called 'best-endeavour' obligations of conduct, as can be seen from the use of the phrases 'shall endeavour' or 'undertake to encourage'. Rather than imposing strict legal obligations, Article 38 may be better understood as a signalling device on desired behaviour. AIP Contracting States that are specifically interested in any of the aspects described in Article 38(2)(a)–(i) should consider using domestic laws and regulations to articulate specific obligations for investors.

193. Article 39(1) uses stronger language, providing that investors '*shall* meet national, regional and internationally accepted standards of corporate governance, in particular in respect of transparency and accounting practices' (emphasis added). However, Article 39(1) does not refer to any particular instruments or documents. To improve compliance and enforceability, AIP Contracting States may wish to give notice to investors in their domestic laws as to which regional and international

standards will be applicable under Article 39(1).[244] In a similar vein, Article 39(2) sets out four obligations that will require further elaboration from domestic law and authorities.

Equivalent Provisions in the SADC Model BIT and CCIA October 2024 Draft

The SADC Model BIT does not have a provision equivalent to Article 38 of the AIP ('Corporate Social Responsibility'). Article 32 of the CCIA October 2024 Draft provides that investors 'shall [operate] in ways that do not conflict with the social and economic development of host countries'.[245] This is starkly different from Article 38 of the AIP, which sets out a detailed list of outcomes in Article 38(2)(a)–(i).

Although the corporate social responsibility (**'CSR'**) obligations in the AIP and the CCIA October 2024 Draft are similarly vague and are of limited 'legal' utility, Article 38 of the AIP communicates a far more fleshed out vision of CSR to prospective investors. Put another way, although Article 38 of the AIP is legally vague and difficult to enforce, it is still far more descriptive than the equivalent provision in the CCIA October 2024 Draft and is, therefore, a more effective signalling device than the latter.

With respect to the provisions in Article 39 of the AIP ('Corporate Governance'), the SADC Model BIT and the CCIA October 2024 Draft take an almost identical approach to the AIP. Both agreements refer to 'internationally accepted standards of corporate governance'.[246] Article 28(3)(a)–(d) of the CCIA October 2024 Draft also sets out the same four obligations as Article 39(2) of AIP. Thus, the analysis above applies equally here.

[244] Notable instruments in this area include the OECD Principles of Corporate Governance (first published in 1999 and updated in 2023), and the newly published African Principles and Guidelines on Corporate Governance (2025).

[245] Article 32(1) CCIA October 2024 Draft.

[246] Article 16.1 SADC Model BIT; Article 28(1) CCIA October 2024 Draft.

2.7.10. Taxation and Transfer Pricing

AIP, Article 40 ('Taxation and Transfer Pricing')
1. Investors and their investments shall: a. **ensure that all transactions with related or affiliated companies are arm's length transactions at fair market price** in accordance with the domestic regulations of the Host State and relevant international best practices; b. conduct their operations in a manner that fully complies with all applicable domestic tax laws and **international rules and principles relating to base erosion and profit shifting practices**; and c. **provide all information required by the Host State** to ensure compliance with the applicable laws relating to taxation. 2. State Parties shall, in accordance with the applicable international legal instruments, cooperate in the detection and prevention of transfer pricing manipulation by investors, including in the **provision of information necessary** to identify and prevent such practices and providing opportunities for Joint Audits within the framework of mutual administrative assistance in tax matters. (emphasis added)

194. Article 40 seeks to tackle base erosion and profit shifting (**'BEPS'**) practices, where companies exploit gaps in tax laws to move profits from high-tax jurisdictions to low-tax jurisdictions.[247] Generally speaking, BEPS reforms require States to reform and coordinate their domestic tax laws and regulations. Although Article 40(1)(b) refers to 'international rules and principles relating to [BEPS] practices', such rules are typically not directly applicable to investors.

195. In contrast, the obligations in Article 40(1)(a) and (c) are directly applicable to investors.

196. Article 40(1)(a) seeks to tackle transfer pricing, a practice where affiliated companies buy and sell goods at artificially inflated prices to reduce the amount of taxable profit on the books.

[247] More information can be found in the OECD Action Plan on Base Erosion and Profit Shifting (2013), as well as the documents produced by the OECD/G20 Inclusive Framework on BEPS, of which Eswatini is a member.

197. Article 40(1)(c) seeks to ensure that investors cooperate fully with BEPS reforms. In order to coordinate the fair taxation of a single economic entity across multiple tax jurisdictions, it is essential that each tax jurisdiction have tax information not only on entities located in its territory, but also tax information on related or affiliated companies.

Equivalent Provisions in the SADC Model BIT and CCIA October 2024 Draft

Article 16.2 of the SADC Model BIT and Article 28(2) of the CCIA October 2024 Draft only prohibit transfer pricing practices. They do not refer to international standards on BEPS, nor do they include express obligations to provide tax information. The lack of a reference to BEPS is not too problematic, given the issues with trying to incorporate international standards on BEPS directly as investors' obligations. More problematic is the absence in these treaties of an obligation on investors to provide the necessary tax information of affiliates, which as described above, is an essential element to the success of wider BEPS reforms.

2.7.11. Investor Liability and Enforcement

AIP, Article 47 ('Investor Liability')

1. Investors and their investments shall, where applicable and in accordance with domestic laws and regulations, **be subject to civil actions for liability in the judicial process of their Home State** for the acts, decisions or omissions made in the Host State in relation to the investment where such acts, decisions or omissions lead to damage, personal injuries or loss of life in the Host State.
2. State Parties **shall develop rules and procedures that allow for, or do not prevent or unduly restrict, the bringing of court actions relating to the civil liability of investors in the territory of their Home States**, taking into account rules governing conflict of laws and the recognition and enforcement of foreign judgments.
3. For greater certainty, this Article does not exclude the possibility to bring **civil actions against investors and their investments before the domestic courts of the Host State**.

(emphasis added)

198. The first and best avenue for a State wishing to enforce investors' obligations is under its own domestic law and before its own domestic courts. This is also recognised by Article 47(3) of the AIP.

199. Article 47(1)–(2) of the AIP innovates by making foreign investors liable in civil suits before the courts of their *home* States, for harm caused in the *host* State. Civil actions in the home State have the notable advantage of allowing the host State to enforce claims against assets and persons of the investor located in the home State. However, the possibility of such civil actions in the home State will be dependent on AIP Contracting States developing the required rules and procedures described in Article 47(2). It remains to be seen whether AIP Contracting Parties will undertake the necessary reforms to allow Article 47(1) to become an effective means of enforcing investors' obligations.

200. Investors' obligations may also be 'enforced' through the denial of benefits clause in Article 5 of the AIP. In practice, this may be the most effective way of ensuring compliance with investors' obligations, as the prospect of being denied investment protection is likely to motivate investors to behave responsibly *ex ante*. The possibility of denial of benefits may also strengthen the State's hand in negotiating settlements to investor-State disputes.[248]

Equivalent Provisions in the SADC Model BIT and CCIA October 2024 Draft

Whether under the SADC Model BIT or the CCIA October 2024 Draft, domestic enforcement of investors' obligations will remain the most effective avenue of enforcement.

Article 17 of the SADC Model BIT and Article 35 of the CCIA October 2024 Draft similarly provide for the possibility to bring civil suits before the courts of the home State of the investor. The analysis above (and caveat on necessary reforms) applies equally here.

Notably, neither the SADC Model BIT (in Article 26) nor the CCIA October 2024 Draft (in Article 3) allow for the denial of treaty benefits where the investor breaches its obligations. This has problematic implications. First, in the case of the SADC Model BIT, non-African investors would not be subject to

[248] The current draft of the AIP's Annex on Disputes does not include ISDS procedures. It does, however, provide for contentious State-to-State dispute settlement, where the home State takes up the claim of the investor against the host State. In such proceedings (or if the Annex on Disputes eventually includes ISDS), investors' obligations will undoubtedly be relevant as counterclaims.

denial of benefits for investors' obligations, whereas intra-African investors would be under the AIP. Second, in the case of the CCIA October 2024 Draft, if an investor falls under both it and the AIP, it is possible for protection to be denied under the AIP but not under the CCIA October 2024 Draft. This may effectively render any denial of benefits under the AIP ineffective, since the same investor would be protected under the CCIA October 2024 Draft.

2.7.12. Investors' Obligations and the ETIPA Draft

Investors' Obligations in the AIP	Equivalent Provision in the ETIPA Draft
Article 31 ('Relation to State Party Obligations')	Section 66 ('Relation to Kingdom of Eswatini's Obligations')
Article 32 ('Compliance with National and International Law') Article 33 ('Business Ethics, Human Rights, and Labour Standards') Article 34 ('Environmental Protection') Article 35 ('Indigenous Peoples and Local Communities') Article 37 ('Anti-Corruption') Article 40 ('Taxation and Transfer Pricing')	Section 67 ('Compliance with National and International Law)
Article 36 ('Socio-Political Obligations')	Section 68 ('Socio-Political Obligations')
Article 38 ('Corporate Social Responsibility')	Section 69 ('Corporate Social Responsibility')
Article 39 ('Corporate Governance')	Section 70 ('Corporate Governance')
Article 47 ('Investor Liability')	Section 74 ('Investor Liability')

201. Equivalent investor's obligations provisions found in the ETIPA Draft are discussed here due to the unique way that the ETIPA Draft incorporates the AIP investors' obligations.

202. Section 66 of the ETIPA Draft reproduces Article 31 of the AIP. Insofar as Article 31 relates to the State's *international* obligations, it is arguably unnecessary to enact Article 31 into domestic law. Further, directly enacting Article 31 (which was drafted as an international treaty) into domestic law may have unintended consequences—for instance, a domestic court could conceivably use Section 66(2) ETIPA Draft to reason that investors' obligations are contingent on the Government's responsibility to enforce domestic law.

203. Section 67 of the ETIPA Draft is an omnibus provision that combines six Articles of the AIP (as seen in the table above). Section 67 of the ETIPA Draft removes all of the specific references to international instruments present in the AIP's investors' obligations, and instead makes general reference to 'applicable international law such as but not limited to public health, business ethics, human rights, labour standards, environmental laws, taxation laws, prevention of corrupt activities…'.

204. As discussed in the analysis above (Sections 2.7.2–2.7.10), the AIP's repeated references to international law or to specific international instruments may not always be effective due to differences in how each Article is drafted as well as the state of international law in each area of concern. By extension, the general language used in Section 67 of the ETIPA Draft makes it even more difficult to predict how 'international law' will influence investors' obligations and, therefore, further elaboration in domestic law on specific international instruments, rules or standards may be advisable.

205. With regards to Sections 68–70 of the ETIPA Draft, which reproduce Articles 36, 38 and 39 of the AIP, the ETIPA Draft largely uses language identical to the AIP. While this means that the ETIPA Draft is at least *prima facie* consistent with the AIP, it also means that the ETIPA Draft shares the same difficulties as the AIP (detailed above, at Sections 2.7.7 and 2.7.9). Notably, Section 70 of the ETIPA Draft omits the detailed investors' obligations listed in Article 39(2) of the AIP. This could give rise to a presumption that Eswatini does not require investors to follow Article 39(2) of the AIP.

206. Finally, Section 74 of the ETIPA Draft reproduces the AIP's Article 47. However, in reproducing Article 47(1) of the AIP, Section 74(1) of the ETIPA Draft purports to make an investor liable to civil actions in their *home* State. Being domestic law, Section 74(1) of the ETIPA does not have the power to subject investors to another State's judicial process. Thus, this provision may lack legal effect and could be reconsidered.

2.8. The Right to Regulate and General Exceptions

AIP, Article 24 ('Right to Regulate')
1. In accordance with customary international law and other general principles of international law, **each State Party has the right to regulate**, including to take measures to ensure that investment in its territory is consistent with the goals and principles of sustainable development, and with other national environmental, health, climate action, social and economic policy objectives and essential security interests.
2. For greater certainty, measures taken by a State Party to comply with its international obligations under other relevant treaties shall not constitute a breach of this Protocol.
3. For avoidance of doubt, **the exercise of the right to regulate under Paragraphs 1 and 2 cannot give rise to any claim by an investor for compensation**. (emphasis added)

207. Article 24 is the AIP's catch-all, general exceptions provision. Article 24(1) uses a 'right to regulate' formulation that is found in many investment treaties. Strictly speaking, the 'right to regulate' formulation (on its own) is not an 'exception', as the language does not suggest that liability is avoided or excused whenever the State exercises its right to regulate. At general international law, a State always has the right to regulate, and the typical 'right to regulate' formulation only restates this well-established fact. To avoid this ambiguity, many States have added clarifications in the style of Article 24(2)–(3) of the AIP, to make it explicit that the exercise of the right to regulate does not give rise to a claim for compensation.

208. However, in addition to the general exception in Article 24, the AIP also weaves broad exceptions into each particular standard of investment protection (i.e., Articles 13(1), 15(1), 20(2), 23(1)).[249] Notably, the formulation of the exceptions in each standard of investment protection differs significantly from the 'right to regulate' found in Article 24(1). For instance, Articles 13(1) and 15(1) of the AIP provide that '[m]easures… designed and applied to protect or enhance legitimate

[249] Notably, Article 17 AIP ('Administrative and Judicial Treatment') and 18 AIP ('Physical Protection and Security') do not contain broad exceptions. This is because Articles 17 and 18 AIP were modified to offer lower standards of protection than before. As a result, broad exceptions were likely unnecessary. In any case, Articles 17 and 18 AIP are still subject to the catch-all general exceptions clause in Article 24 AIP.

public policy objectives…shall not be construed as a breach of [Article 12/Article 14]'; and Article 20(2) of the AIP states that '[n]on-discriminatory regulatory actions…designed to protect legitimate public policy objectives…shall not constitute indirect expropriation'.

209. This 'belt and braces' drafting approach to exceptions was likely done out of an abundance of caution, as some tribunals have interpreted exceptions clauses in such a way that these clauses were deprived of any practical effect.[250] However, a drawback of including exceptions in each standard of investment protection is that it may create a rather strong interpretative presumption that: (1) where exceptions are listed, they were intended as being exhaustive; and (2) where exceptions are not listed, no exceptions whatsoever were intended by the drafters. A further issue to note is that it is currently unclear how Article 24 of the AIP should interact with the specific exceptions listed in each standard of protection.

Equivalent Provisions in the SADC Model BIT and CCIA October 2024 Draft

Article 25 of the SADC Model BIT and Article 24 of the CCIA October 2024 Draft adopt a more conventional approach of having a single well-defined general exceptions clause, with several narrow and standard-specific exceptions that do not overlap with the general exceptions clause.

Equivalent Provisions in the ETIPA Draft

Section 61 of the ETIPA Draft reproduces Article 24 of the AIP in its entirety. Thus, some of the interpretative difficulties surrounding the latter may apply with respect to Section 61 of the ETIPA Draft as well.

[250] For instance, in *Eco Oro v Colombia* (n 181), the relevant exception provided that 'nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary [to secure policy objectives]'. The tribunal interpreted the clause literally to mean that, although a State is not prevented from taking those regulatory measures, the State is not exempted from the obligation to pay compensation as a result. The decision has been highly criticised.

3. OVERALL COMPARISON WITH ESWATINI’S IIAS IN FORCE

3.1. General

3.1.1. Investment

210. The AIP’s definition of investment is in line with modern treaty drafting practices but also innovates in some aspects (e.g., with respect to the factors determining substantial business activity). As such, it is notably more comprehensive than the definitions found in Eswatini’s IIAs in force and in principle better able to safeguard States’ sustainable development objectives.

3.1.2. Investor

211. In a similar vein to its definition of investment, the AIP’s definition of investor is notably more comprehensive than the definitions found in Eswatini’s IIAs in force. The AIP’s narrow definition of covered investors, particularly the triple requirement of incorporation, statutory seat and substantial business activity in the same AIP State Party, significantly curtails the risk of treaty shopping and the use of intermediary holding or mailbox companies in a corporate chain to initiate investment claims.

3.1.3. Denial of Benefits

212. The inclusion of a denial of benefits provision in the AIP marks a notable difference with Eswatini’s IIAs in force. The latter lack similar provisions, thereby making them more susceptible to treaty shopping and reducing Eswatini’s ability to adequately respond to potential misuses of the system by foreign investors.

3.1.4. Temporal scope

213. Like Eswatini’s IIAs in force, the AIP extends its protections to pre-existing investments, albeit under stricter conditions: such investments must have met the AIP’s definition of ‘investment’ at

the time of their establishment and must still be extant when the AIP enters into force. In contrast, the IIAs in force presume coverage of prior investments so long as the investment continues after the treaty enters into force.

3.1.5. Carve-Outs

214. Substantive carve-outs mark a notable difference between the AIP and Eswatini's IIAs in force. The absence of similar carve-outs from existing IIAs exposes Eswatini to a wider ambit of ISDS claims.

3.2. Fair and Equitable Treatment

215. Eswatini's IIAs in force present varied approaches to the FET standard, with older BITs, such as those with Germany and the United Kingdom, using unqualified FET clauses. These broadly worded clauses grant tribunals significant discretion, often leading to expansive interpretations. In cases like *Tecmed v Mexico*, tribunals have emphasized investor expectations, transparency, and regulatory stability. Such readings could expose host States to claims arising even from general legislative changes or inconsistent administrative conduct, as seen in *Crystallex v Venezuela* and *National Grid v Argentina*.

216. The FET clause in the Eswatini-Kuwait BIT, while qualified by reference to 'recognized principles of International Law,' likely offers protection similar to an unqualified FET clause. As the tribunal in *Vivendi v Argentina* noted, references to 'international law' do not automatically equate to the CIL MST.

217. Eswatini's TIPs—specifically the COMESA Treaty and the SADC Protocol—also adopt unqualified FET clauses. Notably, Article 6(2) of the SADC Protocol introduces a most-favoured nation (MFN) clause in its FET provision, which allows investors to import more favourable standards from third-party treaties. This can significantly expand investor protection.

218. In contrast, the AIP adopts a restrictive approach. Article 17 of the AIP does not use the FET term and instead offers a closed list of actionable breaches: fundamental denial of justice, manifest arbitrariness, evident denial of due process, and discriminatory or abusive treatment. The provision applies only to administrative and judicial matters, explicitly excluding general legislation, thereby

shielding States from liability for regulatory reforms enacted by legislation. Moreover, Article 17(2) emphasises that its protections align strictly with the CIL MST and cannot be interpreted more broadly.

219. Despite this effort to limit State liability, the listed elements mirror those found in FET interpretations generally. This creates a risk that tribunals may still draw upon prior FET jurisprudence when interpreting AIP provisions, potentially diluting its restrictive intent. While the AIP aims to clarify and limit the scope of investor protections, its success will depend on whether tribunals respect these limitations.

220. In essence, Eswatini's BITs and TIPs reflect a traditional, investor-centric approach to FET, characterized by vague drafting and wide interpretive leeway. The AIP, on the other hand, offers a more disciplined, State-oriented framework that prioritizes legal certainty and regulatory autonomy. This contrast illustrates the broader shift in African investment policy toward more balanced treaty drafting that limits arbitral discretion and focuses on essential due process guarantees.

3.3. Full Protection and Security

221. The FPS standard is addressed differently across Eswatini's BITs, TIPs, and the AIP. Eswatini's BITs with Germany, Kuwait and the United Kingdom provide for 'full' protection and security. This language has been interpreted expansively in arbitral jurisprudence. While initially understood to concern only physical safety, some tribunals (e.g., in *Azurix v Argentina*) have broadened the standard's scope to include legal and regulatory stability. This evolution has brought FPS closer to the FET standard, enabling investors to claim violations based on disruptions to the legal environment.

222. Despite this expansive trend, FPS is not a strict liability standard. Instead, tribunals typically apply a due diligence test, considering whether the State took reasonable measures to prevent harm. For example, in *Ampal v Egypt*, repeated attacks on an investor's infrastructure led the tribunal to conclude that Egypt should have anticipated and responded more effectively to ongoing threats. By not qualifying the FPS standard, Eswatini's BITs in force risk broad interpretations that may overlook contextual limitations like resource constraints.

223. Eswatini's TIPs in force, namely the COMESA Treaty and the SADC Protocol, do not include FPS provisions.

224. By contrast, the AIP articulates a narrower standard. Article 18 of the AIP refers specifically to 'physical' protection and security, explicitly excluding legal or regulatory aspects of security. This represents a deliberate narrowing of scope. Furthermore, the obligation is 'subject to [the State's] capabilities', thus embedding a context-sensitive due diligence standard within the text. The State's responsibility is further limited by linking the obligation to the NT and MFN standards, making violations contingent on discriminatory conduct.

225. In summary, Eswatini's BITs in force reflect a broad and investor-friendly FPS standard, susceptible to wide-ranging interpretation. The AIP, on the other hand, takes a measured approach that aligns with contemporary efforts to balance investor protection with host State sovereignty and development concerns. This evolving model signals a regional shift toward more realistic and equitable investment governance.

3.4. Non-Discrimination (Most-Favoured Nation Treatment and National Treatment)

226. Eswatini's TIPs in force do not include non-discrimination standards (Note: the reference to MFN in the SADC Protocol, Annex 1 functions merely as a qualifier to the FET standard). By contrast, all three of Eswatini's BITs in force do provide for duties of non-discrimination and all have the following general features: (1) they apply only to the post-establishment phase of investments; (2) they make no reference to, or do not define, the term 'like circumstances'; (3) they do not clarify what constitutes 'treatment'; and (4) they provide only for the traditional, limited exceptions to MFN treatment.

227. The AIP shares with the BITs the feature of applying only to the post-establishment phase of investments. Beyond that, the AIP represents significant progress in terms of specificity and clarity. First, it provides an extensive, open-ended list of factors that a tribunal may consider when determining the likeness of two investors or investments. It should be noted, however, that tribunals are not strictly required to apply all the listed factors. Second, the AIP clarifies that 'treatment' excludes dispute settlement clauses and other substantive rights found in third-party treaties, thereby preventing the MFN clause from being used to import more favourable procedural or substantive

provisions from other IIAs. Third, the AIP contains extensive exceptions to both its NT and MFN treatment provisions, by preserving regulatory space for host States to adopt discriminatory measures in pursuit of broader public policy and strategic objectives, and their national interest.

3.5. Expropriation

3.5.1. Existence of Expropriation

228. Eswatini's IIAs in force typically do not define expropriation. This gives tribunals wider discretion in determining whether expropriation has occurred. The problem is more acute in cases of indirect expropriation, the definition of which is not settled under arbitral jurisprudence (in particular, whether to apply the 'sole effects' or the 'police powers' approach).

229. In contrast, the AIP expressly rejects the sole effects approach, specifying that the mere fact that a measure has a negative economic impact on the investment does not establish an (indirect) expropriation. The AIP instead mandates that one must also take into account the character and the duration of a measure. This approach is generally preferred in contemporary treaty drafting as it provides appropriate protection to the investor while allowing the State to regulate its internal affairs when the need arises.

3.5.2. Legality of Expropriation

230. Eswatini's IIAs in force are not uniform when it comes to their specification of the conditions determining the legality of expropriation: they may omit some of them (typically, due process and non-discrimination) or modify their wording (e.g., by requiring that public purpose should relate to the internal needs of a State). The practical relevance of these omissions and modifications can be debated as a number of tribunals did not attach weight to similar omissions or wording in other treaties (in the case of omissions, by implying the missing requirements as being part of CIL; in the case of modifications, by ignoring minor language variations).

231. The AIP contains all four classic legality requirements but, like Eswatini's IIAs in force, it also purports to modify the due process requirement by stipulating that it should be pursuant to domestic

legal procedure. In a similar vein, it is unclear whether this will be interpreted as guaranteeing due process only as determined under domestic law, as there have been tribunals that disregarded similar language variations and applied due process requirements under international law.

3.5.3. Exceptions to Expropriation

232. Eswatini's IIAs in force do not envisage any exceptions to the protection from expropriation. Conversely, the AIP expressly provides that non-discriminatory regulatory actions designed to protect legitimate public policy objectives do no constitute indirect expropriation (in effect incorporating the 'police powers' approach). The AIP also stipulates that the issuance of compulsory licenses as well as the revocation, limitation, or creation of IP rights shall not be precluded by the operation of the expropriation provision.

3.5.4. Compensation for Expropriation

233. Eswatini's IIAs in force require compensation to be prompt, adequate and effective. Tribunals applying this standard of compensation often rely solely on the fair market value of an investment to determine the amount of compensation payable in the event of a lawful expropriation. With respect to unlawful expropriations, tribunals tend to apply the full reparation principle which allows for the recovery of lost profits and incidental expenses that may be greater than the original value of the investment (and further invites the use of speculative valuation methods, such as DCF analysis). Moreover, absent specific guidance in the treaty, tribunals tend to order the payment of compound interest on the amount of compensation awarded.

234. The AIP counters all these practices. First, it adopts a 'fair and adequate' standard of compensation and makes fair market value only one of several factors to be taken into account when assessing the amount of compensation payable. Second, the same fair and adequate standard applies to both lawful and unlawful expropriation, and the recovery of incidental expenses is expressly prohibited. Third, the AIP only allows simple interest to be awarded on the amount of compensation payable. In addition, the AIP also seemingly gives more time for the State to assess and pay the compensation: instead of requiring compensation to be 'prompt' (meaning 'without delay'), it mandates payment 'within a reasonable period of time'.

3.6. Transfer of Funds

235. Eswatini's IIAs in force as well as the AIP contain Transfer of Funds provisions, but notable variations exist regarding the scope of protection and permissible exceptions. In general, the AIP is more comprehensive, more specific and reserves more regulatory space for host States.

3.6.1. Inward transfers vs Outward transfers

236. There is no consistent pattern in the types of transfers covered by the IIAs reviewed. Of Eswatini's three BITs in force, two cover both inbound and outbound transfers, while the Eswatini-United Kingdom BIT covers only outbound transfers. Among Eswatini's TIPs in force, the COMESA Treaty covers both inward and outward transfers, while the SADC Protocol, Annex 1 only covers outward transfers. The AIP covers both inward and outward transfers.

3.6.2. 'Without delay'

237. All three BITs in force require that transfers be made 'without delay', but only the Eswatini-Germany BIT defines the term in its Protocol to mean 'within such period as is normally required for the completion of transfer formalities', which, however, may not exceed two months. In contrast, neither of Eswatini's two TIPs in force requires that transfers be made without delay. The approach adopted by the AIP is similar to that of the Eswatini-United Kingdom BIT and the Eswatini-Kuwait BIT, where transfers are required to be made 'without delay' yet the term itself is not further defined.

3.6.3. Exceptions

238. The extent of host States' discretion to limit transfers differs across the three BITs. The Eswatini-United Kingdom is the most limited, as it requires 'unrestricted' transfers with no exceptions. The Eswatini-Kuwait BIT adopts a more middle-ground approach, by allowing 'free transfers' but similarly including no explicit exceptions, thus leaving no flexibility for temporary restrictions. In contrast to these two BITs, the Eswatini-Germany BIT reserves some regulatory space to host States. It permits limited exceptions in cases of extreme balance of payment difficulties, though this is narrowly framed and applies only to liquidation proceeds, with a guaranteed minimum annual

transfer of 20%. While neither of Eswatini's TIPs in force expressly provide for exceptions for the transfer obligation, the SADC Protocol does contain a domestic law caveat which requires the repatriation of investment and return to be conducted 'in accordance with the rules and regulations stipulated by the Host State'. This may give the host State some regulatory flexibility. The AIP includes much more extensive exceptions to the Transfer of Funds provision, which can be broadly categorised into three types—host States' routine application of their laws and regulations, responses to the occurrence or threat of occurrence of financial crises, and a without prejudice exception which serves to prevent conflicts with a State's rights and obligations as a member of the IMF (especially its rights to implement safeguard measures at the IMF's request).

3.7. Umbrella Clause

239. All three of Eswatini's BITs in force contain umbrella clauses, which elevate violations of an investment contract by the State, and possibly, also breaches of any other obligation assumed by a State towards investors under domestic law, to a violation of the respective BIT. In line with contemporary treaty drafting practice, the AIP does not include an umbrella clause.

3.8. Investors' Obligations

240. Investors' obligations in the AIP are very much informed by the content of domestic law and regulations. In the absence of robust domestic laws and regulations, it will be difficult to derive independent or freestanding investors' obligations purely from the AIP. On the flipside, where domestic laws and regulations are robust, very little needs to be done to enjoy the benefits of international investors' obligations. Focus should therefore remain on developing comprehensive domestic regulations that are compatible with the standards described in the AIP.

241. As a practical matter, the primary tool to manage the behaviour of foreign investors will remain proactive domestic regulation and enforcement, not least because suing a foreign investor is often cost-prohibitive and time-consuming. Although Article 5 of the AIP allows host States to deny investment protection and benefits to investors that breach their obligations under the AIP, an argument from fairness (or perhaps proportionality) may suggest that it is unlikely that any and all breaches of investors' obligation will allow Eswatini to deny investment protection and benefits.

Enforcing the AIP's investors' obligations is best understood as a last resort for host States to hold foreign investors accountable.

242. Finally, it is important to remember that investors' obligations are uncharted territory in international law, and it may take years before investors' obligations see judicial application. In the meantime, States can influence the development and interpretation of investors' obligations through State practice. In this regard, it may be worthwhile for States to adopt considered positions as to the precise content of investors' obligations and to espouse these positions consistently in the years to come.

3.9. General Exceptions

243. Eswatini should stay alive to the fact that most of its IIAs in force do not have general exceptions. The regulatory space preserved by the AIP, the CCIA October 2024 Draft, and the SADC Model BIT may not be available under the BITs with Germany, Kuwait and the United Kingdom.

244. The absence of a general exceptions provision in the 1993 COMESA Treaty is less problematic, as the CCIA October 2024 Draft will supersede the investment provisions of that treaty. Similarly, although SADC Protocol, Annex 1's general exceptions clause is not as robust as that found in the AIP, it will also be effectively superseded by the AIP (as all SADC members are also AIP members).

3.10. Survival Clauses

245. All three of Eswatini's BITs in force have survival clauses lasting for 20 years from the date of each treaty's termination, thus providing continued protection to investments made prior to that date. The BITs are ambiguous as to whether their survival clauses apply only to unilateral termination or also termination by mutual agreement. Moreover, arbitral jurisprudence is unclear on whether States may, upon mutual termination, agree to eliminate or shorten the duration of survival clauses. At its worst, this may mean that, if Eswatini decides to renegotiate its BITs with Germany, Kuwait or the United Kingdom these BITs may well continue to afford the same level protection to existing investors for another period of 20 years after their termination. Still, emerging State practice from EU Member States seems to resist the view that this is the case, at least where States specifically agree to remove or shorten survival clauses. Hence, while the uncertainty still exists as regards the

applicability of survival clauses in cases of mutual termination or replacement of a BIT, the better approach might be to follow the EU's practice and specifically point out that the BIT's survival clauses are terminated following mutual termination or the replacement of an older BIT with a new one.

3.11. Interaction between the AIP and Eswatini's BITs In Force

246. Once in force, the AIP will be the first instrument regulating investment protection across the whole of Africa for Eswatini, whereas at the moment Eswatini only has regional African investment protection regimes in place through its membership in COMESA and SADC. It also has few BITs with African States, none of which are currently in force (i.e., Mauritius-Eswatini BIT; Egypt-Eswatini BIT). After the AIP is in force, its Article 49(2) will prohibit the conclusion of new BITs between the AIP parties.

247. Eswatini's BITs with extra-African parties are not affected by the AIP. In practical terms, this means that they will continue to provide for the same (generally higher) level of protection for non-African foreign investors. This is true for the investors from Germany, Kuwait and the United Kingdom (accounting for the BITs that are currently in force). It may thus be worth considering renegotiation of these BITs so as to align them with the AIP and contemporary treaty practices. Indeed, Article 49(4) of the AIP envisages that States may do so by stating that 'State Parties may take into account the requirements of this Protocol when negotiating international investment agreements and when reviewing existing international investment agreements concluded with Third Parties'. As noted above, were Eswatini to terminate or renegotiate an older BIT, an uncertainty may exist as to whether that BIT's survival clause will apply even in the event of the mutual termination or replacement of a BIT. In an attempt to prevent this from happening, the better approach might be to follow the EU's practice and specifically point out that the BIT's survival clauses are terminated or shortened following mutual termination or the replacement of the older BIT with a new one.

3.12. Interaction between the AIP and Eswatini's TIPs In Force

248. Eswatini's TIPs in force (the COMESA Treaty and the SADC Protocol, Annex 1) do not automatically terminate following the AIP's entry into force. However, Article 49(3) of the AIP

obliges parties to 'make best endeavours' to gradually align their intra-African TIPs with the AIP within 5 to 10 years from the AIP's entry into force.

249. The African investment protection regime comprises multiple, largely overlapping regimes. This fragmentation poses a risk of treaty shopping by investors, who may strategically invoke treaties where provisions are more favourable to them. Hence, alignment of intra-African TIPs with the AIP is essential to ensure a uniform regime as far as possible. Still, even if alignment of those treaties with the AIP is desired, two kinds of risks may persist.

250. First, there is a negotiating risk. Perfect alignment may not be possible as divergences in language may arise due to the necessity to give concessions during negotiations. This could result in potentially different treatment across regimes in regional African instruments as compared to the AIP (governing whole of Africa). For example, the current CCIA October 2024 Draft, which is still being negotiated, is not always in line with the AIP (e.g., it does not require that the amount payable for unlawful expropriation be equal to 'fair and adequate' compensation, which may mean higher level of protection for an investor than under the AIP).

251. Second, there is an interpretative or judicial risk. Even assuming the treaties are fully aligned, there is still a risk that tribunals will interpret what is thought to be identical provisions in a different manner. Ultimately, tribunals are bound to interpret the treaty actually invoked in the dispute before them, not a parallel instrument with similar language, and have to give effect to the intentions of the contracting parties to the treaty they are applying. Thus, while jurisprudence emerging from the interpretation and application of comparable treaties may offer a degree of persuasive authority, it is not a binding authority.

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ANNEX: CORRESPONDENCE OF ARTICLES WITHIN THE ESWATINI IIAS ANALYSED

Treaty	**Eswatini-Germany BIT**	**Eswatini-UK BIT**	**Eswatini-Kuwait BIT**	**SADC Protocol, Annex 1**	**COMESA Treaty**	**SADC Model BIT**	**CCIA October 2024 Draft**	**AIP**
Scope of application	Art 1	Art 1	Art 1	Art 1	Art 159(2)	Art 2, 26	Art 1-3	Art 1, 3, 4, 5
FET	Art 2	Art 2(2)	Art 2(2)	Art 6	Art 159	Art 5	Art 16	Art 17
FPS	Art 4(1)	Art 2(2)	Art 2(1)	NA	NA	Art 9	NA	Art 18
MFN	Art 3, 4(4)	Art 3, 7	Art 3	Art 6(2)	NA	NA	Art 20, 21	Art 14, 15
NT	Art 3	Art 3, 7	Art 3	NA	NA	Art 4	Art 19, 21	Art 12, 13
Expropriation	Art 4(2), Protocol (4) Ad Art 4	Art 5	Art 5	Art 5	Art 159(3)-(4)	Art 6	Art 22	Art 19-21
Transfer of funds	Art 5, 7	Art 6	Art 6	Art 9	Art 159(5)	Art 8	Art 17	Art 22-23
Umbrella clause	Art 8(2)	Art 2(2)	Art 2(2)	None	None	None	None	None

General Exceptions	NA	NA	NA	Art 14	NA	Art 25	Art 24	Art 24
Termination	Art 14(2)	Art 15	Art 14(1)	Art 31 (in the main body, concerns the Protocol as a whole)	Art 191 (withdrawal from COMESA as a whole)	Art 34	Art 51	Art 49 AIP (interaction with other IIAs), Art 27 AfCFTA Agreement (withdrawal from the AfCFTA as a whole)
Survival clause	Art 14(3)	Art 15	Art 14(2)	None	None	Art 34.4	Art 51(2)	None