

**THE THREAT OF STATE-SOVEREIGNTY AND STATE-CONSENT**

**ON**

**INTERNATIONAL INVESTMENT LAW, GLOBAL DEVELOPMENT AND MUTUAL**

**SURVIVAL**

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## **Declaration**

I, Nation Bobo declare that the thesis that I herewith submit for Doctor Legum (LL.D) Degree at the University of the Free State, is my independent work, and that I have not previously submitted it for any qualification at another institution of higher education.

## **Acknowledgement**

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## Abstract

This thesis adopts a three-stage test anchored on models constructed using existing literature to enable analytical investigation of the effect of state-sovereignty on international investment law (IIL), global development and mutual survival. The threat of state sovereignty on IIL forms the bedrock of the study. IIL is effective when it realises its purpose.<sup>1</sup> The primary purpose of IIL, as informed by international investment treaties (IITs), is to attract investment.<sup>2</sup> The other purposes of IIL are to stimulate development and encourage international cooperation.<sup>3</sup>

The first stage test investigated the effect of giving away state-sovereignty on IIL purpose of attracting international investment, in form of, foreign direct investment (FDI). At this stage, a regression model was developed and used to analyse data extracted from IITs of 25 nation-states. The results showed that on average state-sovereignty given away by a restrictive IIT provision takes two years to attract FDI amounting to about US\$33million. The findings confirmed that giving away of state-sovereignty improves effectiveness of IIL in realising its principal purpose.

The second stage test focused on investigating the effect of restricting state-sovereignty on human development. A regression model was developed and used to analyse data obtained from 168 countries. The results from the analysis revealed that giving away of state-sovereignty by 1% improved human development by 0.13%. The findings confirmed that giving away of state-sovereignty improves human development.

The third stage test involved development of an explanatory model using rational choice theory. A model developed at third stage utilises findings of first and second stages to explain the influence of giving away state-sovereignty on global development and mutual survival. The findings of the study confirmed that giving away of state-sovereignty warrants effectiveness of IIL, global development and mutual survival. Such findings insinuates that reluctance to give away state-sovereignty threatens IIL, global development and mutual survival.

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<sup>1</sup> Sornarajah 2010 *The International Law On Foreign Investment* 33

<sup>2</sup> Sauvart and Sachs 2009 *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* 225: “The preambles of the thousands of existing BITs state that the purpose of BITs is to promote the flow of FDI ...”

<sup>3</sup> Cotula 2014 *Do investment treaties unduly constrain regulatory space?* 22: “... states conclude investment treaties to promote economic cooperation and encourage cross-border investments”. See Table 11 of Annexure I.

## **Key Words**

International investment law, investment treaties, state-sovereignty, state-consent, right to development, international cooperation, global development, mutual survival, globalisation, foreign direct investment, mega-free trade agreement

## Acronyms

ASEAN	-	Association of Southeast Asian Nations
BIT	-	Bilateral Investment Treaty
CBA	-	Cost and Benefit Analysis
CETA	-	Comprehensive Economic and Trade Agreement
CIA	-	Comprehensive Investment Agreement
CPTPP	-	Comprehensive, Progressive Agreement for Trans-Pacific Partnership
CRIPs	-	Cumulative Restrictive IITs Provisions
DRtD	-	Declaration of Right to Development
EU	-	European Union
FET	-	Fair and Equitable Treatment
FDI	-	Foreign Direct Investment
FCN	-	Friendly, Commerce and Navigation
FTA	-	Free Trade Agreement
GDP	-	Gross Domestic Product
HDI	-	Human Development Index

ICID	-	Independent Commission on International Development
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ICJ	-	International Court of Justice
ICL	-	International Customary Law
ICSID	-	International Centre for Settlement of Investment Disputes
IIA	-	International Investment Agreement
IIL	-	International Investment Law
IITs	-	International Investment Treaties
ISDS	-	Investor-State Dispute Settlement
ITL	-	International Trade Law
MDGs	-	Millennium Development Goals
MIA	-	Multilateral Investment Agreement
MFN	-	Most Favoured Nation
NAFTA	-	North Atlantic Free Trade Agreement
NT	-	National Treatment
NW	-	Net Wealth

ODA	-	Official Development Assistance
OECD	-	Organization for Economic Cooperation and Development
OIC	-	Organization of Islamic Conference
PTA	-	Preferential Trade Agreements
PTIA	-	Preferential Trade and Investment Agreements
RCEP	-	Regional Comprehensive Economic Partnership
RtD	-	Right to Development
SADC	-	Southern Africa Development Corporation
SDGs	-	Sustainable Development Goals
TPP	-	Trans-Pacific Partnership
TTIP	-	Transatlantic Trade and Investment Partnership
UDHR	-	Universal Declaration of Human Rights
UN	-	United Nations
UNCTAD	-	United Nations Conference on Trade and Development
USA	-	United States of America

## Table of Contents

Declaration .....	i
Acknowledgement.....	ii
Abstract .....	iii
Key Words.....	iv
Acronyms.....	v
Tables .....	xiii
CHAPTER 1.....	1
1. THE GROUND SETTING CONTEXT .....	1
1.1 Introduction .....	1
1.2 Background .....	5
1.3 State-sovereignty and State-consent doctrines of International Investment Law .....	12
1.3.1 State-sovereignty .....	12
1.3.2 State-consent .....	13
1.4 International Investment Law .....	15
1.4.1 Evolution of International Investment Law.....	18
1.4.2 History of Investment Rules in Trade and Regional Agreements .....	23
1.4.3 Arguments for inclusion of Investment Rules in Trade Agreements .....	25
1.4.4 Uncertainty on future inclusion of Investment Rules in Trade Treaties.....	27
1.4.5 Heterogeneous PTIAs.....	28
1.4.6 Difference between Investment rules and trade rules.....	29
1.5 International Investment Participants .....	30
1.5.1 Interest of Capital Exporting (Home to Investor) State.....	31
1.5.2 Capital Importing (Host) State .....	31
1.5.3 Foreign Investors.....	32
1.6 Global Development and Mutual Survival.....	33
1.6.1 Global Development.....	33

1.6.2	Mutual Survival .....	35
1.6.3	Right to Development (RtD) .....	37
1.7	Problem Statement .....	40
1.8	Research Questions .....	42
1.9	Aim of the study .....	42
1.10	Structure of the Thesis.....	43
CHAPTER 2.....		44
2.	LITERATURE REVIEW .....	44
2.1	Introduction .....	44
2.2	State-sovereignty and Consent in International Investment Law Making.....	45
2.2.1	State-consent in International Investment Law Making.....	45
2.2.2	State-sovereignty in International Law Making .....	46
2.2.3	State-sovereignty as a Controversial Principle.....	47
2.3	State-sovereignty questioned in other branches International Law.....	48
2.4	Incompatibility between State-sovereignty on International Trade Law .....	49
2.5	State-sovereignty given away through IIT Provisions .....	51
2.5.1	Investor-state dispute settlement (ISDS) .....	51
2.5.2	Fair and Equitable Treatment .....	52
2.5.3	Most Favoured Nation.....	53
2.5.4	National Treatment.....	54
2.5.5	Umbrella Clause .....	55
2.5.6	Scope of Application .....	55
2.5.7	Duration.....	56
2.5.8	Other Provisions .....	56
2.6	Threat of State-sovereignty and State-consent on international investment law.....	57
2.6.1	Unrestricted State-consent reduce effectiveness of International investment law .....	57
2.6.2	Unrestricted State-sovereignty weakens IIL's ability to resolve conflict of Interest .....	58
2.6.3	State-sovereignty destabilise IIL .....	59
2.6.4	Conflicting effects of State-sovereignty given away on IIL purpose.....	60
2.6.5	Countries Experiences with Restrictive Investment Provisions .....	61
2.6.6	Evaluation of threat of State-sovereignty and state-consent on IIL .....	65
2.7	Threat of State-sovereignty on Global development and Mutual Survival .....	67

2.7.1	Sovereignty of nation-state derived from People .....	67
2.7.2	Global Development and Mutual Survival.....	69
2.7.3	Determinants of global development and mutual survival.....	70
2.7.4	State-sovereignty impact on determinants of Global Development and Mutual Survival	76
2.7.5	Positive influence of giving away State-sovereignty on development.....	81
2.7.6	Evaluation of State-sovereignty influence on global development and Survival.....	82
CHAPTER 3.....		84
3.	CONCEPTUAL AND THEORETICAL FRAMEWORK.....	84
3.1	Introduction .....	84
3.2	Gaps in literature Review .....	85
3.3	Theoretical link between state-sovereignty and international investment law .....	86
3.3.1	Overview .....	86
3.3.2	Purpose of International Investment law .....	87
3.3.3	State-sovereignty in international investment law.....	88
3.3.4	Theoretical Relationship between State-sovereignty and IIL.....	89
3.4	Theoretical association between state-sovereignty and human development .....	93
3.4.1	Overview .....	93
3.4.2	Globalisation as proxy for State-sovereignty given away .....	93
3.4.3	Theoretical relationship between State-sovereignty and Development.....	94
3.5	State-sovereignty given away encourages State cooperation for mutual survival.....	96
3.5.1	Overview .....	96
3.5.2	Objective function for mutual development and survival .....	97
3.5.3	Developed State conditional function for assistance under expropriation or donation .	103
3.5.4	Restriction of State-sovereignty encourages developed States to assist developing States	103
CHAPTER 4.....		104
4.	RESEARCH METHODOLOGY .....	104
4.1	Introduction .....	104
4.2	Research Philosophy and Approach.....	105
4.2.1	Research Philosophy .....	105
4.2.2	Research approach.....	106
4.2.3	Research Strategy .....	107

4.3	Data collection for two models.....	109
4.3.1	Data collection on relationship between state-sovereignty and IIL.....	109
4.3.2	Dependent Variable.....	109
4.3.3	Independent variable of interest.....	110
4.3.4	Data collection on relationship between state-sovereignty and development.....	125
4.3.5	Dependent Variable.....	125
4.3.6	Independent variable of interest.....	126
4.3.7	Control Variables.....	126
CHAPTER 5.....		128
5.	DATA ANALYSIS AND RESULTS.....	128
5.1	Introduction.....	128
5.2	Influence of state-sovereignty on international investment law.....	128
5.2.1	Expected relationship of FDI and all its known determinants.....	129
5.2.2	Regression Analysis.....	130
5.2.3	Interpretation of Regression Model results.....	131
5.2.4	Findings.....	132
5.3	Influence of state-sovereignty on human development.....	132
5.3.1	Expected relationship of HDI and all its traditional determinants.....	132
5.3.2	Regression Analysis.....	133
5.3.3	Interpretation of model results.....	134
5.3.4	Findings.....	134
5.4	State-sovereignty given away encourages State cooperation for mutual survival.....	135
5.4.1	Spill-over rate as measure of state-sovereignty given away.....	135
5.4.2	Restriction of State-sovereignty encourages State survival.....	135
5.4.3	Developed state motivated to give investment assistance as a donation.....	136
5.4.4	State-sovereignty given away encourages global development and mutual survival....	136
5.5	General Findings of the Research.....	137
5.5.1	Effect of State-sovereignty on International Investment Law.....	137
5.5.2	Effect of State-sovereignty on development.....	137
5.5.3	State-sovereignty causes enmity between IIL and development.....	138
5.5.4	State-sovereignty obstruct international cooperation in development assistance.....	138
5.5.5	Effect of State-sovereignty on global development and mutual survival.....	139

5.6	Policy and Academic Recommendations .....	139
5.6.1	Adoption of development as an objective concept in international investment law .....	139
5.6.2	Encourage Development Assistance through restriction of State-sovereignty.....	140
5.6.3	Developing countries should consent to IITs with restrictive provisions.....	141
5.6.4	Donor funds should be utilised to ensure development of developing states.....	141
5.6.5	Shift sovereignty from Nation-State to a global International Agency in IIL making ..	141
5.6.6	Transition from IIL of co-existence to IIL of co-operation.....	142
5.6.7	Use of an Objective function model.....	142
	Annexure I.....	180
	Annexure II .....	182
	Annexure III .....	183
	Annexure IV .....	188

## Tables

Table 1: Constitutions of States reveal Sovereignty belongs to people .....	68
Table 2: Econometrics Equations adopted by other Researchers .....	91
Table 3: Econometric Models specified by other Authors.....	95
Table 4: Score Sheet of restrictive IITs provisions in a IIT .....	120
Table 5: Sources of data for Model 1 variables .....	124
Table 6: Data source for Model variables .....	127
Table 7: Expected Relationship.....	129
Table 8: Regression Results for Model 1 .....	130
Table 9: Expected Relationship between dependent and Independent Variables.....	132
Table 10: Regression Results for Model 2.....	133
Table 11: Objectives of International Investment Treaties .....	180
Table 12: Data for 25 Countries.....	182
Table 13: Data for 168 Countries.....	183
Table 14: International Investment Treaties.....	188



## CHAPTER 1

### 1. THE GROUND SETTING CONTEXT

#### 1.1 Introduction

This thesis presents a three-staged analytical study on threat of state-sovereignty and state-consent on international investment law (IIL), global development and mutual survival. The first stage of analysis, on which the study is predicated, explores the threat of state-sovereignty on IIL. The threat of state-sovereignty on IIL was inferred by examining the effect of giving away state-sovereignty on realising the purpose of IIL.<sup>4</sup> The primary purpose of IIL can be deduced from the purpose of international investment treaty (IIT) given that IIL is predominantly made by IITs.<sup>5</sup> In that regard, the primary purpose of IIL, as informed by IITs, is to attract international investment.<sup>6</sup> The other purposes of IIL, which have a feedback loop relationship with the primary purpose of IIL, are to stimulate development and encourage international cooperation.<sup>7</sup> In an interdependent world, international cooperation for development among nation-states is crucial for the realisation of global development and mutual survival.<sup>8</sup>

The study begun by reviewing the literature that was then used to develop conceptual and theoretical framework. The conceptual and theoretical framework was employed to construct a model at each of the three stages of analysis. The hypothesis testing at first stage and second

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<sup>4</sup> Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law 2: "... accepted view of sovereignty in IIL emphasizes legal limitations above sovereign power in order to achieve the aims of the IIL regime."

<sup>5</sup> Cotula 2015 Democratising international investment law: Recent trends and lessons from experience 3: "...investment treaties are the backbone of international investment law."

<sup>6</sup> Sachs and Sauvant 2009 The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows lii "Given the principal purpose of BITs—to protect investment and hence encourage investment flows ..."

<sup>7</sup> Sachs and Sauvant 2009 The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows 34: "The preambles to IIAs set down the general objects and purposes of such treaties". see preambles of a sample of international investment treaties in table 11.

<sup>8</sup> Mastanduno et al 1989 Towards a Realist Theory of State action 462: "... International goal of any state is the acquisition of power and wealth. Power and wealth are valued because they provide the means to insure both the State's survival and to pursue other goals..."

stage of analysis were specified and the tests were carried out accordingly. At third stage of analysis, an explanatory model was constructed with insights and findings from first and second stages of analysis.

In exploring the relationship between IIT and Foreign Direct Investment (FDI), scholars commonly use regression analysis.<sup>9</sup> In that respect, a regression model was constructed at first stage of analysis to explore the effect of giving away state-sovereignty on attracting FDI. FDI was specified as a dependent variable of the model.<sup>10</sup> That was against the background that the classic role of IITs is to promote FDI.<sup>11</sup> The independent variable of special interest was state-sovereignty, which nation-states consent to give away, as they create IIL through IITs.<sup>12</sup> Other independent variables, which are determinants of FDI, were included in the model as control variables.

Nation-states give away sovereign rights by ratifying IITs which enshrines restrictive provisions.<sup>13</sup> In that respect Cumulative Restrictive IITs Provisions (CRIPs) metric, which is an aggregate number of restrictive provisions of all IITs ratified by a nation-state, was introduced to estimate state-sovereignty given away by each nation-state.<sup>14</sup> A model was then used to determine the effect of giving away state-sovereignty on the effectiveness of IIL on realising its primary purpose of attracting FDI.<sup>15</sup>

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<sup>9</sup> Regression models by Wadhwa, Bellak, Min Neumayer & Spess presented on table 2

<sup>10</sup> Min 2011 Bilateral Investment Treaties and Foreign Direct Investment 81

<sup>11</sup> Segger *et al* 2011 Sustainable Development in World Investment Law 9-10

<sup>12</sup> Salacuse 2007 The Treatification of International Investment Law 164: “The treatification of international investment law represents an important stage in the development of international investment law”

<sup>13</sup> Norooz 2015 Responsibility to Protect and its applicability in Libya and Syria 10: “...state-sovereignty is also restricted by customary and treaty obligations under international law...In fact, the only restrictions which states have to face are those limits of the international law to which the states have agreed.”

<sup>14</sup> Colen and Guariso 2012 What Type of FDI Is Attracted by Bilateral Investment Treaties? 9

<sup>15</sup> Hathaway 2008 International Delegation and State-sovereignty 119: “...international law that is effective necessarily impinges on state sovereignty.”

The second commonly stated purpose of IIL as informed by IITs is development.<sup>16</sup> The concept of development had become human centered as supported by discourse on Right to Development (RtD).<sup>17</sup> Preamble extracts from twenty-five IITs on Table 11 depict development as an objective of IIL. Development is considered an ultimate objective of IITs because international investment is attracted to stimulate development.<sup>18</sup> SADC Model BIT affirmed that view by noting that the importance of investment is to advance human development.<sup>19</sup> Therefore, restriction of state-sovereignty to attract investment is crucial for the realisation of human development.<sup>20</sup> Literature on IIL as it relates to development and state-sovereignty was used to develop a theoretical framework. The theoretical framework was used to specify the second regression model.

The second regression model was used to investigate the influence of state-sovereignty on human development. Human Development Index (HDI) was specified as a dependent variable in the regression model. The independent variable of special interest was state-sovereignty. At this stage, state-sovereignty was estimated by globalisation index, on the basis that globalisation erodes state-sovereignty.<sup>21</sup> Globalization had been argued to be a reality that eliminates

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<sup>16</sup> Cotula 2014 Do investment treaties unduly constrain regulatory space? 24: “The preamble of some recent investment treaties ties investment promotion to a wider set of ultimate policy goals, including sustainable development”.

<sup>17</sup> Feyter 2013 The declaration on the right to development revisited. Journal of National Law University, Delhi, 1(1), 18: “The human person is the central subject of Development...”

<sup>18</sup> Dagbanja 2017 The Paradox of International Investment Law: Trivializing The Development Objective Underlying International Investment Agreements In Investor-State Dispute Settlement 1: “International investment agreements (IIAs) are justified on the presupposition that they attract foreign investment which is sine qua non for development”

<sup>19</sup> SADC Model Bilateral Investment Treaty Template with Commentary “...important contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development”

<sup>20</sup> Romson 2012 Environmental Policy Space and International Investment Law 62: “International investment agreements have been assumed to attract such investments and therefore to be crucial for development in developing states.”

<sup>21</sup> Pendleton 1998 A New Human Right-the Right to Globalisation 2055: “Interdependence has meant that the boundary between domestic and foreign affairs is gradually being eroded .... The erosion of state-sovereignty through interdependence...”

sovereignty of nation-states.<sup>22</sup> This means the more globalised a nation-state is or become, the more sovereignty it gives away. In that case, globalisation index estimate state-sovereignty given away by each nation-state. Other traditional determinants of human development were included in the analysis as control variables of the model. Statistical tools were then used to determine the effect of state-sovereignty on human development.

In theory, the more sovereignty a nation-state gives away, the more it is likely to realise development.<sup>23</sup> In that respect, development would be negatively affected by failure of nation-states to give away their sovereignty. In an interdependent world, the failure of human development in any country has negative spillover effects on other countries. The study by World Bank revealed that cost of failure of a nation-state is borne by neighbouring nation-states.<sup>24</sup> That supports the argument that failed human development in one nation-state can negatively affect human development in other nation-states. Subsequently, failure by nation-states to consent in giving away their sovereignty threatens human development world-over. Consequently, failure of global development will ultimately affect mutual survival of peoples.

The third commonly identified purpose of IIL, as provided in various IITs, is to promote international cooperation.<sup>25</sup> Countries pursue international cooperation to ensure their own survival. In an interdependent world, nation-states can survive by assisting the survival of other nation-states. This motivates countries to pursue international cooperation, which ultimately ensure mutual survival. The literature on IIL and international cooperation discourse was used to construct a third model to investigate the influence of state-sovereignty on international cooperation and mutual survival of nation-states. The third model assists in explaining the effect

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<sup>22</sup> Ku and Yo 2013 Globalization and Sovereignty 210

<sup>23</sup> Romson 2012 Environmental Policy Space and International Investment Law 62 “International investment agreements have been assumed to attract such investments and therefore to be crucial for development in developing states.”

<sup>24</sup> Patrick 2006 Weak States and Global Threats: Assessing Evidence of “Spillovers” 23: “World Bank shows that most of the cost of state failure, in terms of lost growth, is actually borne by neighboring countries.”

<sup>25</sup> The preambles of a sample of international investment treaties in table 11 shows common purpose of attract investment, stimulate development and encourage international cooperation.

of state-sovereignty in ensuring international cooperation that ensures mutual survival of nation-states in an interdependent world.

The thesis adopts an objective ontological and positivist epistemological philosophies to guide the investigation of cause-effect of state-sovereignty on IIL, global development and mutual survival. These philosophies influenced the adoption of a deductive research approach that requires theoretical and conceptual framework in formulating corresponding hypothesis. The hypothesis was tested using statistical data. The results confirmed findings on threat of state-sovereignty on IIL, global development and mutual survival.

## **1.2 Background**

State-sovereignty and state-consent as doctrines of international investment law are inextricably connected together as they both reflect the will of the nation-state at their core. In Rousseau's view, state-sovereignty is the exercise of the will of the nation-state<sup>26</sup> while Meltzer defines state-consent as an expression of the will of the nation-state.<sup>27</sup> These doctrines of state-sovereignty and state-consent form the backbone and basic constitutional doctrine of international investment law.<sup>28</sup> Therefore, state-sovereignty and state-consent are controlling principles of world order that shapes contents of international investment law.<sup>29</sup> These doctrines have same influence on formation of international investment law as they reinforce each other in formation of international investment agreements and can be used interchangeably.<sup>30</sup> This is supported by the

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<sup>26</sup> Stone 2013 Rousseau's General Will: Totalitarian Perception of a Virtuous Ideal 86: "Legitimate sovereignty, according to Rousseau, is simply 'the exercise of the general will.'"

<sup>27</sup> Meltzer 2005 State-sovereignty and the Legitimacy of the WTO 693

<sup>28</sup> Schrijver 1997 Sovereignty over natural resources: Balancing rights and duties 2

<sup>29</sup> Bhalla and Chowla 2014 Sovereignty in the Modern Context: How Far Have We Come? 147; Hathaway 2008 International Delegation and State-sovereignty 122 "...principle of sovereign consent continues as a central principle of international law."

<sup>30</sup> Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law 2:"In IIL, sovereignty is exercised when host states consent to investment protection standards contained in international investment agreements (IIAs)"

argument that nation-states exercise their sovereignty by expressing their consent in getting membership to international investment agreements.<sup>31</sup>

State-sovereignty had been considered sacrosanct in international law since the Treaty of Augsburg of 1555 and the Peace of Westphalia of 1648.<sup>32</sup> In recent years, the forces of globalisation and interdependence of nation-states, tends to make state-sovereignty and state-consent a threat to international investment law, global development and mutual survival. The sacrosanctity of state-sovereignty had been questioned in international law branches of international trade law, international environment law, international human rights law and international criminal law.<sup>33</sup> State-sovereignty had already been argued to be an obstacle in the field of international environmental law and international human rights law.<sup>34</sup> Furthermore, international criminal lawyers also considered state-sovereignty to be an enemy of international criminal law.<sup>35</sup>

In consistence with the above, state-sovereignty may be a threat obstacle to international investment law following an observation that nation-states, that once gave away their sovereignty through IITs, later terminated IITs in-order to regain their sovereignty.<sup>36</sup> Nation-states, which terminated some of their IITs include Venezuela, Ecuador, India, Bolivia, South Africa and

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<sup>31</sup> Meltzer 2005 State-sovereignty and the Legitimacy of the WTO 693: "...state consent can also be considered legitimate because they reinforce states' Legal Sovereignty."

<sup>32</sup> Schrijver 1997 Sovereignty over natural resources: Balancing rights and duties 2: "Ever since the Treaty of Augsburg (1555) and the Peace of Westphalia (1648) sovereignty has served as the backbone of international law or as Brownlie phrases it as 'the basic constitutional doctrine of the law of nations...'"

<sup>33</sup> Roth 2004 The enduring significance of state sovereignty 1017: "...denounce state sovereignty as an obstacle to international legality ..."

<sup>34</sup> Masahiro 2013 Sovereignty and International Law 4

<sup>35</sup> Cryer 2006 International Criminal Law vs State-sovereignty: Another Round? 980: "...international criminal law scholars see sovereignty as the enemy."

<sup>36</sup> Hamzah 2018 Bilateral Investment Treaties (BITs) In Indonesia: A Paradigm Shift, Issues and Challenges 4

Indonesia.<sup>37</sup> The practices by these countries may negatively affect effectiveness of IIL, given that IIL is largely IIT law.<sup>38</sup>

Nation-states give away their sovereignty by consenting to restrictive investment provisions of IITs.<sup>39</sup> They give away sovereignty in order to attract foreign investments.<sup>40</sup> The more sovereignty nation-states give away through IITs, the more they are likely to attain the purpose of IITs of attracting international investment.<sup>41</sup> Therefore, nation-states may have to trade away state-sovereignty so as to attract investment. In that respect, ratification of IITs that gives away state-sovereignty may improve the effectiveness of IIL.<sup>42</sup> On the other hand, IITs restrict the ability of nation-states to freely regulate their territories, as treaties subject nation-states to external authorities like international tribunals.<sup>43</sup> Some countries had been worried of giving away their sovereignty through IITs. As a result, they terminated IITs or revised the restrictive provisions of IITs in order to regain their sovereignty.<sup>44</sup>

State-sovereignty is argued of having conflicting effect on development. On one hand, countries give away their sovereignty by entering into international investment agreements (IIAs) that contain restrictive provisions so as to attract investment so as to stimulate development.<sup>45</sup> In such a case, the giving away of state-sovereignty facilitates development of host countries. Therefore,

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<sup>37</sup> Traidcraft 2015 International Investment Agreements Under Scrutiny 19

<sup>38</sup> Sauvant and Sachs 2009 The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows 112: “For all practical purposes, BIT law has become the fundamental source of international law in the area of foreign investment”

<sup>39</sup> Ranjan 2014 India and Bilateral Investment Treaties—A Changing Landscape 446

<sup>40</sup> Singh and Ilge 2016 Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices 104

<sup>41</sup> Singh and Ilge 2016 Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices 119

<sup>42</sup> Frenkel and Walter 2017 Do Bilateral Investment Treaties Attract Foreign Direct Investment? The Role of International Dispute Settlement Provisions 21: “... the higher is the effectiveness of BITs in attracting FDI”

<sup>43</sup> Cotula 2014 Do investment treaties unduly constrain regulatory space? 20: “...investment treaties, as interpreted and applied by arbitral tribunals, are unduly restricting regulatory space, or even causing a ‘regulatory chill’”

<sup>44</sup> Singh and Ilge 2016 Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices 264 : “Several states have reclaimed sovereign space and terminated some of their investment treaties.”

<sup>45</sup> Mossallam 2015 Process Matters: South Africa’s Experience Exiting its BITs 3

it can be deduced that giving away of state-sovereignty is development friendly. Such findings implies that reluctance to give away state-sovereignty is unfriendly to development.

On the other hand, restriction of state-sovereignty hinders the country`s ability to realise development. International investment agreements that limit state-sovereignty are accused of limiting the host state`s policy space required to facilitate national development.<sup>46</sup> Restrictive investment provisions of IITs constrain the ability of countries to exercise their sovereign rights to regulate their territories.<sup>47</sup> It is argued that nation-states require policy space to design appropriate developmental policies to pursue their peculiar developmental requirements.<sup>48</sup> In that regard, IITs which give away state-sovereignty, restrain the ability of nation-states to pursue their own developmental goals.<sup>49</sup> In other words, giving away of state-sovereignty is not good for human development of host states.<sup>50</sup>

The above arguments give rise to conflicting conclusions on the effect of state-sovereignty on development.<sup>51</sup> On one hand, giving away of state-sovereignty is considered good for development, while on the other hand, giving away of state-sovereignty is considered not good for development. That raised questions on what is the actual effect of giving away of state-sovereignty on development. The effect of state-sovereignty on human development can be confirmed or refuted using econometric techniques.

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<sup>46</sup> Schutter et al 2013 Foreign Direct Investment and Development 47

<sup>47</sup> Cotula 2014 Do investment treaties unduly constrain regulatory space? 20: “Critics argue that investment treaties could undermine the sovereign right of states to regulate activities within their jurisdiction...”

<sup>48</sup> Schill et al 2017 International Investment Law and Development: Friends Or Foes? 29: “...Inclusion of exception clauses in order to grant host States sufficient policy space to pursue their development strategies..”

<sup>49</sup> Ofodile 2013 Africa-China Bilateral Investment Treaties: A Critique 147

<sup>50</sup> Lester and Mercurio 2017 Safeguarding Policy Space in Investment Agreements 1: “...investment rules will prevent governments from adopting domestic legislation or regulations designed to promote policies that are in the public interest...”

<sup>51</sup> Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law 1: “For example, a state can construe sovereignty so as to justify state conduct, whilst another state will refer to sovereignty to denounce the same act.”

Nation-states tend to take refuge in state-sovereignty arguments in defending their reluctance to pursue development-oriented policies.<sup>52</sup> There are also instances where state-sovereignty is used to implement ineffective and detrimental industrial policies that negatively affect national development.<sup>53</sup> State-sovereignty is a shield that can be used by nation-states to ward-off external pressure from other nation-states to pursue development.<sup>54</sup> A nation-state can use state-sovereignty to justify a certain conduct and the other nation-state use state-sovereignty to denounce the same act.<sup>55</sup> In that regard, unbound state-sovereignty can negatively affect countries in realising sustainable development. Therefore, state-sovereignty may be the cause of persistent underdevelopment in some countries.

The concept of development is increasingly human centered.<sup>56</sup> This is supported by the United Nation (UN) Declaration on Right to Development (DRtD) of 1986, which defines development as a comprehensive process that aims at improving the well-being of all human persons based on their participation in development and fair distribution of realised development benefits.<sup>57</sup> The human centered dimension of development requires humans' participation in development, as well as, allowing same humans to benefit from that development.<sup>58</sup> It is appreciated that development is not an end in itself but a means to attainment of improved human welfare in

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<sup>52</sup> Masahiro 2013 Sovereignty and International Law 7

<sup>53</sup> Knorich and Berger 2014 Friends or Foes? Interactions between Indonesia's International Investment Agreements and National Investment Law 12

<sup>54</sup> Oji and Ozioko Effect of Globalization on Sovereignty of States 256

<sup>55</sup> Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty In International Investment Law 1: "For example, a state can construe sovereignty so as to justify state conduct, whilst another state will refer to sovereignty to denounce the same act."

<sup>56</sup> Rich 1985 The right to development: right of peoples. Bulletin of the Australian Society of Legal Philosophy, 9(2), 130: "...full development of the human being is the ultimate aim of development."

<sup>57</sup> Bunn 2000 The Right to Development: Implications for International Economic Law; American University International Law Review; Volume 15 | Issue 6 Article 8; 1434

<sup>58</sup> Bunn 2000 The Right to Development: Implications for International Economic Law; American University International Law Review; Volume 15 | Issue 6 Article 8 1445

nation-states.<sup>59</sup> This link between development and human welfare motivates the pursuit of development as an integral part of the survival of peoples.

Interdependence of nation-states demands global development, as isolated development will not be sustainable due to negative spillover effects from underdeveloped nation-states.<sup>60</sup> In a global world, failure of development in a given nation-state have negative consequences in form of mass migration, borderless behaviour of infectious diseases and the ignitive nature of political violence that can engulf the entire region and leap across the globe; making underdevelopment of countries more destructive than ever before.<sup>61</sup> According to Patrick failure of a nation-state can destroy developmental achievements done by other nation-states.<sup>62</sup> Negative effects of terrorism from underdeveloped nation-states like Somalia and Afghanistan had negatively affected human development of other nation-states.

In the modern world characterised by sovereign equality of nation-states, development is a nation-state-led process that is affected by international policies and development of other nation-states.<sup>63</sup> These sovereign nation-states are interdependent and interconnected due to technological advancement in communication and transportation that led to increase in mass migration of people, rapid transfer of information, ideas and goods.<sup>64</sup> The technological outcome increased global awareness of the living standards, lifestyles, opportunities and dangers across the globe.<sup>65</sup> In that context, development of a given nation-state affects global development as development

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<sup>59</sup> Choudhury 2013 International Investment Law as a Global Public Good, Lewis & Clark Law Review [Vol. 17:2 2013] 483

<sup>60</sup> Tadeg 2010 Reflections on the right to development: Challenges and prospects, African Human Rights Law Journal, 10(2), 329: “The increasing interdependence among nations as a result of globalisation makes unilateral development endeavours fruitless unless backed by international co-operation.”

<sup>61</sup> Patrick 2006 Weak States and Global Threats: Assessing Evidence of “Spillovers” 3

<sup>62</sup> Patrick 2006 Weak States and Global Threats: Assessing Evidence of “Spillovers” 23

<sup>63</sup> Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 37, 2016 Frequently Asked Questions on the Right to Development 12

<sup>64</sup> Shangquan S. 2000 Economic Globalization: Trends, Risks and Risk Prevention 1

<sup>65</sup> Conley 2000 Defining and Understanding Economic Globalisation 104, Policy, Organisation and Society, 19:1, 87-115, DOI: 10.1080/10349952.2000.11876720

status of each nation-state affect development of other nation-states.<sup>66</sup> In an interdependent world, global development and mutual survival can be realised by adoption of right to development (RtD). RtD can be realised through international cooperation for development by nation-states.<sup>67</sup>

State-sovereignty had been an obstacle in the collective strategy for the implementation of RtD for realisation of global development.<sup>68</sup> Since the recognition of RtD as a universal and inalienable human right by UN General Assembly in 1986, there had been little progress in its full implementation at global level. There had been less cooperation by developed world and developing world for the realisation of right to development due to state-sovereignty.<sup>69</sup> Developed and developing countries rely on state-sovereignty in defending their self-centered positions, which inhibit the realisation of RtD.<sup>70</sup> The negative impact of state-sovereignty on development of one country has negative consequences on global development due to interdependence of nation-states<sup>71</sup>. Such interconnectedness of challenges collectively facing nation-states makes international cooperation for development a precondition for mutual survival of peoples.<sup>72</sup>

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<sup>66</sup> Puvimanasinghe 2013 International solidarity in an interdependent world 189

<sup>67</sup>Office of the United Nations High Commissioner for Human Rights 2016, Frequently Asked Questions on the Right to Development 9: "...implementation of the right to development requires effective development policies at the national level as well as international cooperation..."

<sup>68</sup> Allgood 2003 United Nations Human Rights "Entitlements": The Right to Development Analyzed Within the Application of the Right of Self-Determination 338

<sup>69</sup> Samaan 2011 Enforcement of International Environmental Treaties: At Analysis 264: "Infringement upon state sovereignty is a major stumbling block in treaty negotiations and enforcement efforts."

<sup>70</sup> Masahiro 2013 Sovereignty and International Law 7

<sup>71</sup> Ku and Yo 2013 Globalization and Sovereignty 231-232

<sup>72</sup> Puvimanasinghe 2013 International solidarity in an interdependent world 184: "...But our interdependence, and the interconnectedness of the challenges we face collectively, makes international solidarity a precondition for the survival and well-being of both people and the planet"

## 1.3 State-sovereignty and State-consent doctrines of International Investment Law

### 1.3.1 State-sovereignty

State-sovereignty refers to the supreme authority of a nation-state to freely make its own laws, control all that happens on its territory and determine its relations with other nation-states independent of any authority.<sup>73</sup> State-sovereignty entails three presumptions which are: firstly, a presumption that a nation-state is only obligated to the extent of its constructive or actual consent; secondly, there is a presumption that international obligations have a direct legal effect in a nation-state to the extent such obligations are incorporated in the domestic law; and thirdly, there is a presumption that the inviolability of a nation-state's independence and territorial integrity against use of force also withstand the violation of international legal norms by a nation-state.<sup>74</sup> The above definition and presumptions reveals key features of state-sovereignty that can be sub-divided into internal state-sovereignty and external state-sovereignty.<sup>75</sup> Both internal state-sovereignty and external state-sovereignty have an influence on international investment law.

Internal feature of state-sovereignty is the inalienable right of the nation-state to freely make its laws; decide the character of its institutions; exercise authority over its economic systems, investment and people within its territory, independent of any authority.<sup>76</sup> This feature is associated with the concept of giving away policy space that Romson defined as a constrain on national authorities due to obligations in international investment law.<sup>77</sup> In that respect, restriction

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<sup>73</sup> Ferreira-Snyman 2006 The Evolution of State-sovereignty: A Historical Overview 5

<sup>74</sup> Roth 2004 The Enduring Significance of State Sovereignty 1026

<sup>75</sup> Ferreira-Snyman 2006 The Evolution of State-sovereignty: A Historical Overview 4

<sup>76</sup> McBean 2019 In honor of human rights: Revaluating the current framework of state sovereignty 285: "...sovereignty-foreign recognition of the domestic state's exclusive right to govern without interference from outside forces..."; UN Charter of Economic Rights and Duties of States 1974 Article 1: "Every State has the sovereign and inalienable right to choose its economic system ... without outside interference, coercion or threat in any form whatsoever"

<sup>77</sup> Romson 2012 Environmental Policy Space and International Investment Law 35

of internal state-sovereignty can be regarded as restriction on policy space. In other words, the more policy space a nation-state has the more freedom it has of exercising its internal sovereignty.

The external feature of state-sovereignty is a nation-state's right to freely determine its relations with other nation-states or bodies without restraint from any authority.<sup>78</sup> Exercising of external state-sovereignty affects the country's internal sovereignty. The nation-state can exercise its external sovereignty to consent to an international investment agreement that can limit both its internal and external sovereignty. A country can consent to an investment treaty that can constrain its external sovereignty by subjecting itself to external tribunals in resolving investment disputes.<sup>79</sup> The investment treaties usually contain investment provisions that limit the flexibility of countries to regulate. Therefore, nation-states diminish their sovereignty when they enter into international investment law.<sup>80</sup>

### ***1.3.2 State-consent***

Meltzer defined state-consent as an expression of a nation-state's free will.<sup>81</sup> This definition of state-consent relates to the definition of law by Canivez who regarded law as an expression of the general will.<sup>82</sup> The similarity in the definition of law and consent is reinforced by a concept of *consensus facit legem*, which means that, "consent makes law".<sup>83</sup> However, Meltzer argued that state-consent should be present before a nation-state is bound by international treaty

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<sup>78</sup> Gey 2002 The myth of state sovereignty 1608: "...sovereignty that afforded to each sovereign virtually exclusive control over matters within its designated jurisdiction."

<sup>79</sup> Fauchald 2008 The Legal Reasoning of ICSID Tribunals – An Empirical Analysis 307

<sup>80</sup> Movsesia 1999 Sovereignty, Compliance, and the World Trade Organization: Lessons from the History of Supreme Court Review, Michigan Journal of International Law Volume 20 | Issue 4 794: "All treaties diminish sovereignty to some extent, they observe; for a country to accept some international-law restraint in pursuit of important national interests is neither new nor objectionable"

<sup>81</sup> Meltzer 2005 State-sovereignty and the Legitimacy of the WTO 1

<sup>82</sup> Canivez 2004 Jean Jacques Rousseau's Concept of People 5

<sup>83</sup> Goel 2014 International Arbitration with Special Focus on Bahrain 1: "...intrinsic beliefs of law can be expressed through the legal maxim, consensus facit legem, that is "consent makes the law""

obligations.<sup>84</sup> Therefore, international legal obligation is created through state-consent. In other words, nation-states use their state-consent to create international investment law. State-consent can be deduced from a written instrument on one hand, and state practice, on the other.<sup>85</sup>

The concept of state-consent is inextricably linked to the concept of state-sovereignty. This is supported by the view that state-consent is an expression of a nation-state's legal sovereignty.<sup>86</sup> The relationship between these two concepts is made clear by Meltzer and Stone who defined state-consent and state-sovereignty using general will, respectively. Meltzer held that state-consent is an expression of the nation-state's general will<sup>87</sup> and Stone in reference to Rousseau defined state-sovereignty as the exercise of the nation-state's general will.<sup>88</sup> A nation-state expresses its will by consenting to a particular treaty, thereby allowing itself to be bound by treaty obligations.

In consenting to a treaty, the nation-state transfers its general will, which is its sovereignty. This implies that when a nation-state enters into a treaty or recognizes an international custom it consents to give away its sovereignty.<sup>89</sup> In the same reasoning, when a nation-state exit a treaty, it impliedly regains its sovereignty.<sup>90</sup>

In III, state-sovereignty is exercised when a nation-state consent to investment protection provisions enshrined in international investment treaties.<sup>91</sup> That reveals a close association

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<sup>84</sup> Meltzer 2005 State-sovereignty and the Legitimacy of the WTO 5

<sup>85</sup> Rich 1983 The right to development as an emerging human right, Virginia Journal of International Law 295

<sup>86</sup> Meltzer 2005 State-sovereignty and the Legitimacy of the WTO 1

<sup>87</sup> Meltzer 2005 State-sovereignty and the Legitimacy of the WTO 693

<sup>88</sup> Stone 2013 Rousseau's General Will: Totalitarian Perception of a Virtuous Ideal 86: "Legitimate sovereignty, according to Rousseau, is simply 'the exercise of the general will.'"

<sup>89</sup> Movsesia 1999 Sovereignty, Compliance, and the World Trade Organization: Lessons from the History of Supreme Court Review, Michigan Journal of International Law Volume 20 | Issue 4 794: "All treaties diminish sovereignty to some extent..."

<sup>90</sup> Singh and Ilge 2016 Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices 264 : "Several states have reclaimed sovereign space and terminated some of their investment treaties."

<sup>91</sup> Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law 2

between state-sovereignty and state-consent in IIL, which renders a temptation to use them interchangeably as they have the same influence on IIL. Therefore, state-consent reflects state-sovereignty.<sup>92</sup> In that regard, state-consent will be impliedly estimated when state-sovereignty is estimated as state sovereignty is given away in the creation of IIL through consent of nation-states<sup>93</sup>.

#### **1.4 International Investment Law**

International investment law refers to rules, norms and principles, which govern investment relations among international legal persons in order to serve purposes of the international community.<sup>94</sup> International legal persons are nation-states and international organizations and in some instances, individuals.<sup>95</sup> Nation-states are primary international legal persons as they make international law that establishes the international legal status of international organizations and individuals.<sup>96</sup> The modern conventional source of international investment law is international investment treaties.<sup>97</sup>

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<sup>92</sup> Henkin 1995 Human rights and state sovereignty 35: "...At bottom, it has been assumed, both depend on state consent, a strong reflection of state autonomy, "sovereignty." "

<sup>93</sup> Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law 2: "In IIL, sovereignty is exercised when host states consent to investment protection standards contained in international investment agreements (IIAs)"

<sup>94</sup> Ryan 2009 Discerning the Compliance Calculus: Why States Comply with International Investment Law 66 "International Law is a 'construct of norms, standards, principles, institutions and procedures' that serves the purposes of the international community."

<sup>95</sup> Besson and Tasioulas 2010 The Philosophy of International Law 164

<sup>96</sup> Rich 1983 The right to development as an emerging human right, Virginia Journal of International Law 291

<sup>97</sup> Omar 2011 Sources of International law In the light of the Article 38 of the International Court of Justice 1 "International conventions and treaties are amongst the most important formal sources of modern international law, also termed as conventional sources."

An authoritative statement on sources of international law is provided in Article 38 of the Statute of the International Court of Justice (ICJ).<sup>98</sup> According to Article 38 of ICJ, the sources of international law are treaties, international custom, general principles of law recognized by civilized nations, as well as, judicial decisions and the teachings of the most highly qualified publicists as subsidiary means for the determination of the rule of law.<sup>99</sup> Treaties and custom are major sources of international law.<sup>100</sup> Other sources are regarded as a residual reservoir of legal rules that fill gaps in areas where no applicable international customary rule or investment treaty provision exists.<sup>101</sup> Treaty and custom, at times co-exist as equals and at times complement each other.<sup>102</sup> An ensuing treaty can codify a custom or clarifies a custom or displaces previous custom, while, an ensuing custom can change a treaty.<sup>103</sup> The binding effect of treaties is derived from customary international rule *pacta sunt servanda* that requires all nation-states to honour their treaties.<sup>104</sup> Therefore, the legal obligation of treaties comes from customary international law.

In spite of the equality, complementarity and interdependence of customary investment law and investment treaty law, there has been a natural progression by international investment legal system both in jurisprudence and in practice, towards investment treaties and away from customary law. The rise of treaties was partially driven by positivistic trends and the written nature of investment treaties, which explicitly expresses state-consent. When a nation-state ratifies a treaty, it expressly consents to give away its sovereignty by accepting to be bound by a treaty. State-consent is express and explicit in investment treaties. On the other hand, state-

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<sup>98</sup> Omar 2011 Sources of International Law in the Light of the Article 38 of the International Court of Justice 1: “For any study of the sources of international law Article 38 of the Statute of the International Court of Justice is always the starting point, which is recognized as a definitive statement of the sources of international law.”

<sup>99</sup> Omar 2011 Sources of International law In the light of the Article 38 of the International Court of Justice 2

<sup>100</sup> Omar 2011 Sources of International law In the light of the Article 38 of the International Court of Justice 13  
“...treaties, customs and general principles as the major formal sources; providing general principles as filling the gaps between customary rules and treaties; and as subsidiary means providing judicial decisions...”

<sup>101</sup> Hirsch 2011 Sources Of International Investment Law 13

<sup>102</sup> Sands 1998 Treaty, Custom and the Cross-fertilization of International Law 94

<sup>103</sup> Dellapenna. 2001 The customary international law of transboundary fresh waters 268

<sup>104</sup> Yackee 2008 Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality 1597

consent is implicit in customary international law as nation-states implicitly consent to international custom when they recognize a custom.<sup>105</sup> Given that treaties explicitly express state-consent, international investment law has prominence as a source of international investment law when compared to customary international law.<sup>106</sup>

It is generally agreed that IITs forms the cornerstone of international investment law.<sup>107</sup> Schill *et al* put it pithily that international investment law had been gradually constructed treaty by treaty, often referred to as BIT-by-BIT (where BIT refers to Bilateral Investment Treaty).<sup>108</sup> Importance of investment treaties in IIL mainly hinges on the explicit consent associated with the written nature of treaties.<sup>109</sup> The written nature of treaties is crucial given controversies associated with international investment hence the need of a clear expression upfront on treatment of investments. In treaties, countries express consent to be bound by various investment promotion and protection provisions, which restrict state-sovereignty.

In post-colonial era, BITs increasingly became a predominate source of international investment law.<sup>110</sup> Later on, a number of trade agreements, economic and regional agreements started incorporating investment chapters in their corpus.<sup>111</sup> Some of the treaties with investment provisions, other than BITs, include Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), North Atlantic Free Trade Agreement (NAFTA), Energy Charter

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<sup>105</sup> Orakhelashvili 2008 Natural Law and Customary Law 80: "...customary law based on tacit consent ..."

<sup>106</sup> Crootof 2016 Change Without Consent: How Customary International Law Modifies Treaties 240: "Given that explicit consent is superior to tacit consent, consent theorists tend to prioritize treaty law over customary international law."

<sup>107</sup> Omar 2011 Sources of International law In the light of the Article 38 of the International Court of Justice 1 "International conventions and treaties are amongst the most important formal sources of modern international law, also termed as conventional sources."

<sup>108</sup> Schill et al 2013 International Investment Law and Development: Bridging the Gap 11

<sup>109</sup> Crootof 2016 Change Without Consent: How Customary International Law Modifies Treaties 240: "...practitioners and judges tend to favor the *lex scripta*"

<sup>110</sup> Newcombe and Paradell 2009 Law and Practice of Investment Treaties: Standards of Treatment 44-49

<sup>111</sup> UNCTAD 2013 Regional integration and foreign direct investment in developing and transition economies 3 "Regional investment agreements, such as the Association of Southeast Asian Nations (ASEAN) Investment Agreement, and investment provisions in free trade agreements and other treaties are also emerging."

Treaty, Investment Agreement of the Organization of Islamic Conference (OIC) and Association of Southeast Asian Nations Comprehensive Investment Agreement (ASEAN CIA). Therefore, IIL is now characterised by overlapping bilateral, regional and multilateral treaties.<sup>112</sup> In this thesis, the term International Investment Treaties (IITs) refers to overall group of bilateral, regional and multilateral treaties, including trade agreements, which enshrined substantive rules for liberalization, promotion and protection of investment.<sup>113</sup>

#### ***1.4.1 Evolution of International Investment Law***

Prior to the twentieth century, international investment relations among nation-states were mainly governed by international diplomacy on protection of investment. The heavy reliance on international diplomacy reveals the weakness of international customary investment rules of the time that lacked adequate international investment remedies to manage international investment relations.<sup>114</sup> The weak customary international investment rules were however complimented by treaties of general relations.<sup>115</sup> During that time, diplomatic protection and treaties of general relations governed international investment law.

International investment law at the time was inadequate to cope with continued expansion of foreign investments. Diplomatic protection rules on protecting foreign investments increasingly became unfriendly to investors. Under diplomatic protection, investors were supposed to persuade their home country to espouse their claims against a host country that unfairly interfered with their investments. Individuals who were shareholders in a foreign company could not be protected by IIL as witnessed in the Barcelona Traction case.<sup>116</sup> In Barcelona Traction case, it

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<sup>112</sup> Alschner 2013 Regionalism and Overlap in Investment Treaty Law –Towards Consolidation or Contradiction? 5

<sup>113</sup> Berger 2015 Developing countries and the future of the international investment regime 5

<sup>114</sup> Schreuer 2007 Investment Protection and International Relations 345

<sup>115</sup> Choudhury 2013, International Investment Law as a Global Public Good, Lewis & Clark Law Review [Vol. 17:2 2013], 486

<sup>116</sup> Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 3

was held that individual investors could not bring a claim against a nation-state as they lack authority unless a special treaty gives them such authority.<sup>117</sup>

In the absence of a treaty, individuals relied on home country to espouse their investment claim. The home country of an investor had control over how such investment claims would be handled. The home country had also discretion to espouse or not to espouse the claims. In cases where home country espoused the claim and succeeded, there was no guarantee for investors to receive proceeds from successful claims, as there was a legal fiction that the wrong was committed against the home-state.<sup>118</sup> In other cases, a home-state could abandon a claim for its national's injury, if it judged the injury to be justified by other security or broader economic concerns.<sup>119</sup> In such cases, injured investors were often left with no redress either against offending host-state or against its unsympathetic home-state.<sup>120</sup>

International customary law on protecting investments was later complemented by treaties that contained investment provisions limited in scope. These treaties were treaties of general relation like Friendly, Commerce and Navigation (FCN) treaties. The FCN treaties were limited in scope on protecting foreign investments. The treaties of general relations covered a number of areas including human rights, intellectual property, trade, immigration, investment protection, shipping and taxation in a single legal text.<sup>121</sup> These treaties of general relations covered broad aspects with limited cover on international investment.

In the twentieth century, IIL's inadequacy as an international investment protection mechanism was exposed by international developments. These international developments were the rise of socialism and the spread of decolonization in most parts of the world. Both developments raised incidences of expropriation. Nation-states that pursued communist ideology refused to recognize

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<sup>117</sup> Case Concerning The Barcelona Traction, Light And Power Company, Limited (Belgium v. Spain) I.C.J. Reports 1964

<sup>118</sup> Salacuse 2015, The Law of Investment Treaties, Second Edition 63

<sup>119</sup> Salacuse 2015, The Law of Investment Treaties, Second Edition 63

<sup>120</sup> Salacuse 2015, The Law of Investment Treaties, Second Edition 63

<sup>121</sup> Coyle 2013 The Treaty of Friendship, Commerce and Navigation in the Modern Era 304

international obligation concerning aliens` property.<sup>122</sup> Throughout the 1920s, Soviet Union in particular, refused to recognize the duty of a nation-state to compensate expropriated foreign property as a principle of customary international law.<sup>123</sup>

In a similar socialist movement, the revolutionary government of Mexico during the period 1911-1934, expropriated land that belonged to United States of America (USA) nationals and redistributed it to Mexican peasants under the agrarian land reform program. This expropriation gave rise to diplomatic correspondence between Cordell Hull, the then USA Secretary of State, and Mexican Ministry of Foreign Affairs. In the correspondence, Secretary Hull argued that an expropriating country was obliged to pay “prompt, adequate and effective compensation” to foreign investors in the event of expropriation. The requirements to pay prompt, adequate and effective compensation to expropriated investors became known as the Hull formula. On the other hand, Mexico relied on ‘Calvo Doctrine’ that repudiates the Hull formula of having attained the status of IIL.<sup>124</sup> It was argued that in case of expropriation, Calvo Doctrine do not impose obligation on a country against aliens. The Calvo Doctrine was argued to subject aliens to the same law applied on domestic nationals and it rejected international standards of treatment of foreign investors. There was no consensus in the diplomatic exchange which casted a shadow on the standard of treatment of foreign investment in face of expropriation. These debates exposed the inadequacies of the then IIL on dealing with expropriation.

In the post-colonial era, the newly independent nation-states started criticising traditional principles of IIL. The newly independent nation-states challenged the legitimacy of international customary investment law (ICIL).<sup>125</sup> Newly independent nation-states raised concerns for not being involved in the formation and evolution of ICIL as they were under imperialist domination. In that regard, they argued that international customary investment law was exclusively shaped by western countries. Newly independent nation-states considered international responsibility of nation-states on injuries to investors as outdated and an obstacle to their own development. They

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<sup>122</sup> Wouters *et al* 2012 International Investment Law: The Perpetual Search For Consensus? 6

<sup>123</sup> Salacuse 2015, The Law of Investment Treaties, Second Edition 73

<sup>124</sup> Wouters *et al* 2012 International Investment Law: The Perpetual Search For Consensus? 6

<sup>125</sup> Henkin 1995 Human rights and state sovereignty 36

further argued that the IIL requirement for protection of investors prolonged their continued dependence on western countries.

In an effort to address the inadequacies of international investment law that favoured western countries, developing countries took advantage of their numerical superiority at the UN to shape IIL that incorporate their interests.<sup>126</sup> Developing countries pressured UN General Assembly to adopt Resolution 1803 on Permanent Sovereignty over Natural Resources that affirms the right of nation-states to dispose of their natural resources in accordance with their national interests.<sup>127</sup> In a related development, in 1974, United Nations adopted a Charter of Economic Rights and Duties of nation-states. The Charter provided for the right of every nation-state to expropriate foreign property as well as the payment of appropriate compensation. The stance taken by developing countries increased the risk of expropriation.

In the post-colonial era, western countries found themselves failing to obtain settlement of various claims and counter claims against incidences of expropriations by communist nation-states and newly independent nation-states. Those cases motivated individual western governments to pursue new investment protection devices in form of bilateral investment agreements. Western countries entered into bilateral investment treaties (BITs) with developing nation-states to access their markets at reduced risk.<sup>128</sup> BITs provided a better mechanism of protecting foreign investments as they were drafted in a complete, clear, uncontestable and enforceable way, making them more preferable in comparison with traditional IIL protection mechanism. The first BIT was signed in 1959 between Germany and Pakistan. Since then, there was widespread treatification of international investment law through BITs.<sup>129</sup>

The increase in BITs motivated the need for nation-states to further develop IIL through multilateral investment treaties. An earlier attempt to create multilateral investment treaty regime

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<sup>126</sup> Salacuse 2015 *The Law of Investment Treaties*, Second Edition 78

<sup>127</sup> Ng'ambi 2015 *Permanent Sovereignty Over Natural Resources and the Sanctity of Contracts*, From the Angle of *Lucrum Cessans* 155

<sup>128</sup> Salacuse 2015 *The Law of Investment Treaties*, Second Edition 74

<sup>129</sup> Salacuse 2015 *The Law of Investment Treaties*, Second Edition 88

were proposals for the 1948 Havana Charter and the 1949 International Chamber of Commerce International Code of Fair Treatment of Foreign Investment.<sup>130</sup> However, the efforts to create multilateral investment treaties with the intention of reinforcing BITs, could not prevail.<sup>131</sup> By the 1960s, for all practical purposes, BITs became the main source of international investment law.<sup>132</sup>

In the late 1980s, there was an emergence of preferential trade agreement (PTA) and regional agreements with investment provisions.<sup>133</sup> In 1994, NAFTA set a new trend of incorporating the investor-state dispute settlement (ISDS) mechanism and investment protection standards, which was previously within the competence of BITs.<sup>134</sup> The entry into force of NAFTA ignited the practice of merging trade and investment under one roof.<sup>135</sup> In 1998, Energy Charter Treaty came in force and it accorded investment protection with text traditionally found in BITs.<sup>136</sup> There was also an emergency of free trade agreements (FTA) with investment provisions similar to those found in BITs.<sup>137</sup> There are now intra-regional agreements with investment rules like ASEAN CIA that came into force in 2013.<sup>138</sup> Investment rules are also included in mega-FTAs such as European Union (EU)-Canada Comprehensive Economic and Trade Agreement (CETA) and CPTPP.

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<sup>130</sup> Wong 2006 Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes 142

<sup>131</sup> Salacuse 2015, *The Law of Investment Treaties*, Second Edition 87

<sup>132</sup> Salacuse 2015 *The Law of Investment Treaties* 4: “For all practical purposes, treaties have become the fundamental source of international law in the area of foreign investment”

<sup>133</sup> Alschner 2017 *The Investment Component of Trade Agreements*, *Routledge Handbook in International Trade Agreements* 4 “In 1988, the United States and Canada signed a comprehensive economic agreement (CUSFTA) that not only lowered tariff, but also protected investment ...”

<sup>134</sup> Usynin and Gáspár-Szilágyi 2017 *The Growing Tendency of Including Investment Chapters in PTAs*, *Netherlands Yearbook of International Law* 2017 pp 267-304, 268 “

<sup>135</sup> Usynin and Gáspár-Szilágyi 2017 *The Growing Tendency of Including Investment Chapters in PTAs*, *Netherlands Yearbook of International Law* 2017 pp 267-304, 270

<sup>136</sup> Halle and Peterson 2005 *Investment Provisions in Free Trade Agreements and Investment Treaties Opportunities and Threats for Developing Countries*, *Asia-Pacific Trade and Investment Initiative UNDP Regional Centre in Colombo* 11

<sup>137</sup> Usynin and Gáspár-Szilágyi 2017 *The Growing Tendency of Including Investment Chapters in PTAs*, *Netherlands Yearbook of International Law* 2017 pp 267-304, 272

<sup>138</sup> Alschner 2013 *Regionalism and Overlap in Investment Treaty Law –Towards Consolidation or Contradiction?* 3

The inclusion of investment rules in regional and trade treaties resulted in parallelism and overlap in investment treaty law.<sup>139</sup> In that case, an investor can now be protected by investment rules in regional or trade treaties and BITs.<sup>140</sup> The recent publication on UNCTAD website as of May 2019 revealed that international investment agreements in force are made up of 2346 BITs and other 313 treaties with investment provisions.<sup>141</sup>

#### ***1.4.2 History of Investment Rules in Trade and Regional Agreements***

The so-called Preferential Trade and Investment Agreements (PTIAs) emerged following the growing practice of including investment rules in PTAs.<sup>142</sup> The practice of mixing investment rules and trade rules in the corpus of one agreement is not a new phenomenon. As far back as 1859, USA signed a FCN treaty with Paraguay that combined investment rules with trade rules.<sup>143</sup> Inclusion of investment rules in those FCN treaties motivated some scholars to consider them as first BITs.<sup>144</sup> The inclusion of both trade and investment provision in the corpus of FCN treaties reveals that trade and investment rules have a common origin. Over time, the practice of combining various commercial areas within a single treaty became inadequate. From the 1960s onwards trade and investment regulations started following different paths. USA, which was the main proponent of FCN treaties, also abandoned it and followed the European nation-states strategy of negotiating specialized treaties.

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<sup>139</sup> Alschner 2013 Regionalism and Overlap in Investment Treaty Law –Towards Consolidation or Contradiction? 4

<sup>140</sup> Alschner 2013 Regionalism and Overlap in Investment Treaty Law –Towards Consolidation or Contradiction? 4

<sup>141</sup> <https://investmentpolicyhub.unctad.org/IIA>

<sup>142</sup> Alschner 2013 Regionalism and Overlap in Investment Treaty Law –Towards Consolidation or Contradiction? 5

<sup>143</sup> Alschner W 2017 The Investment Component of Trade Agreements, Routledge Handbook in International Trade Agreements 4 “The Friendship, Commerce and Navigation (FCN) Treaty signed between Paraguay and the United States in 1859, ... that citizens in the territory of the other party “shall enjoy full and perfect protection for their persons and property, ...” Over time the protection of property of foreigners abroad became an ever-more important feature of trade agreements.”

<sup>144</sup> Alschner 2017 The Investment Component of Trade Agreements, Routledge Handbook in International Trade Agreements 4 “Predating the first BITs by almost a decade, these post-war FCN agreements have consequently been referred to as the “first” investment treaties.”

Nation-states started making investment rules bilaterally in form of BITs, while trade rules shifted to the multilateral level. The regulation of international investment remained bilateral through freestanding investment treaties while trade regulation was multilateralised in 1947 through General Agreement on Tariff and Trade.<sup>145</sup> In late 1980s, there was re-convergence of trade and investment rules in a single treaty. In 1988, USA and Canada signed a comprehensive economic agreement (CUSFTA) with trade and investment provisions. NAFTA that came into effect in 1994 also followed the same practice but broadened the scope of investment protection beyond provisions that were provided in CUSFTA.<sup>146</sup>

Though trade and investment provisions were once combined in a single agreement, they continued taking different paths. International investment continued to be mainly regulated by BITs while a multilateral treaty through World Trade Organisation regulated trade in 1995. The successful regulation of trade at multilateral level was followed by an attempt by Organization for Economic Cooperation and Development (OECD) countries to elevate investment treaties to multilateral level. The negotiations for a Multilateral Investment Agreement (MIA) failed in 1998.<sup>147</sup> The failed negotiations of a MIA meant that investment protection had to continue bilaterally and through PTIAs.

In the late 2000s, there was an emergency of successive negotiations of the so-called mega-FTAs with investment provisions.<sup>148</sup> These mega-FTAs included the Trans-Pacific Partnership (TPP),

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<sup>145</sup> Alschner W 2017 *The Investment Component of Trade Agreements*, Routledge Handbook in International Trade Agreements 4 Therefore investment and trade were regulated through different instruments and on different levels

<sup>146</sup> Alschner 2017 *The Investment Component of Trade Agreements*, Routledge Handbook in International Trade Agreements 5 “In short, NAFTA marked the beginning of a new breed of deep economic agreements that covered both trade and investment through ambitious commitments turning PTAs into PTIAs – Preferential Trade and Investment Agreements.”

<sup>147</sup> Correa 2004 *Investment Protection in Bilateral and Free Trade Agreements: Implications for the Granting of Compulsory Licenses*, Michigan Journal of International Law Volume 26 | Issue 1 333 “OECD countries attempted to develop a Multilateral Agreement on Investment (MAI) in the 1990's, but after significant divergences among OECD countries and opposition from civil society, the initiative collapsed.”

<sup>148</sup> Chia 2015 *Emerging Mega-FTAs: Rationale, Challenges, and Implications*, Singapore Institute of International Affairs 1 “...simultaneous negotiation of three mega-trade blocs, namely, the Regional Comprehensive Economic

the Transatlantic Trade and Investment Partnership (TTIP), the Regional Comprehensive Economic Partnership (RCEP) and EU-Canada Comprehensive Economic and Trade Agreement (CETA).<sup>149</sup> TPP proceeded without USA and enter into force as Comprehensive, Progressive Agreement for Trans-Pacific Partnership (CPTPP). CETA provisionally entered into force on 21 September 2017. The negotiations for RCEP are going on while TTIP negotiations were suspended. Despite some protracted negotiations in some mega-FTA, there are various treaties, other than BITs, with investment provisions.<sup>150</sup>

### ***1.4.3 Arguments for inclusion of Investment Rules in Trade Agreements***

There are various factors which motivated the inclusion of investment rules in international trade agreements which includes the rising importance of global value chains (GVCs).<sup>151</sup> The importance of GVCs in development was a result of an advancement in technology which permitted unbundling of production.<sup>152</sup> The technological advancement in communication and transportation system made it possible for production done in one region to be efficiently exported to other regions. These developments improved the relationship between investment and trade transactions.<sup>153</sup> This made both investment protection and trade liberalisation jointly key in the GVC.<sup>154</sup> That motivated a joint regulation of trade and investment in the same agreement.<sup>155</sup>

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Partnership of East Asia (RCEP), the Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP)”

<sup>149</sup> Chia 2015 Emerging Mega-FTAs: Rationale, Challenges, and Implications, Singapore Institute of International Affairs 1

<sup>150</sup><https://investmentpolicyhub.unctad.org/IIA>

<sup>151</sup> Araujo 2017 Setting the Rules of the Game: The Rise (and Fall) of Mega-Regionals, Deep Integration and the Role of the WTO, 21 UCLA J. Int'l L. Foreign Aff. 151, 168

<sup>152</sup> Bruhn 2014 Global value chains and deep preferential trade agreements: promoting trade at the cost of domestic policy autonomy? 1

<sup>153</sup> Shangquan 2000 Economic Globalization: Trends, Risks and Risk Prevention 1: “... ‘time and space compression effect’ of technological advancement greatly reduced the cost of international trade and investment, thus making it possible to organize and coordinate global production.”

<sup>154</sup> OECD, WTO and UNCTAD 2013 Implications of Global Value Chains for Trade, Investment, Development and Jobs, G-20 Leaders Summit

It was also more efficient to negotiate both investment and trade rules in one agreement given their joint related importance.

The inclusion of investment provisions in trade agreement is also argued to have been caused by similar norms found in both international trade law (ITL) and IIL.<sup>156</sup> The common norms shared by these legal systems include most-favored nation treatment and national treatment. There is also an investment and trade dimension to a transactional dispute as witnessed in Australian`s plain cigarette dispute. The dispute in relation to Australia`s plain cigarette packaging was simultaneously brought before investment tribunals and WTO panels.<sup>157</sup> In that case, trade dispute settlement mechanism and investment dispute settlement mechanism, used different means to pursue similar ends. Therefore, such a normative convergence of the two regimes made trade agreement a natural place to situate investment rules.<sup>158</sup>

The court-like system in CETA has a design, which mimics the WTO Appellate Body quasi-judicial system of dispute settlement.<sup>159</sup> The first instance and appeal stage provided in CETA is

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Saint Petersburg 6 “Global value chains (GVCs) have become a dominant feature of world trade and investment, encompassing developing, emerging, and developed economies”

<sup>155</sup> Bruhn 2014 Global value chains and deep preferential trade agreements: promoting trade at the cost of domestic policy autonomy? , Deutsches Institut für Entwicklungspolitik 1 “The last decade was characterised by both the rising importance of global value chains (GVCs) in international trade and the parallel proliferation of preferential trade agreements (PTAs)”

<sup>156</sup> Alschner 2017 The Investment Component of Trade Agreements, Routledge Handbook in International Trade Agreements 6-7

<sup>157</sup> Alschner 2017 The Investment Component of Trade Agreements, Routledge Handbook in International Trade Agreements 6-7

<sup>158</sup> Alschner 2017 The Investment Component of Trade Agreements, Routledge Handbook in International Trade Agreements 7

<sup>159</sup> Puccio and Harte 2017 From arbitration to the investment court system (ICS): The evolution of CETA Rules, European Parliamentary Research Service 14 “The investment court system proposed draws inspiration from the quasi-judicial system of dispute settlement created for the WTO Appellate Body”

similar to the Appellate Body of WTO.<sup>160</sup> Those similar designs of CETA court-like system and WTO dispute settlement mechanism are argued to have motivated combining of trade and investment regimes.<sup>161</sup> Furthermore, Article 3 of the proposed TTIP which provided for a voluntary mediation process was also modeled after WTO Dispute Settlement Understanding on Article 5.<sup>162</sup>

Some scholars argued that investment rules that are mixed with trade rules are more effective in attracting foreign investment than freestanding investment treaties.<sup>163</sup> The reason for such a claim being different attentions that are paid in the negotiations of freestanding FTA and freestanding investment treaties. FTA negotiations are argued to be given higher public attention than negotiations of freestanding investment agreements.<sup>164</sup> In that regard, investors are more likely to be aware of investment provisions in FTA than similar provisions in BITs. This is also argued to have motivated combining both investment and trade rules in a single treaty.

#### ***1.4.4 Uncertainty on future inclusion of Investment Rules in Trade Treaties***

There is uncertainty on the continuous inclusion of investment rules in international trade agreements. Opinion 2/15 issued by Court of Justice of the European Union (CJEU) on 16 May 2017 raised questions on the future mixing of investment rules with trade rules. In the Opinion

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<sup>160</sup> Puccio and Harte 2017 From arbitration to the investment court system (ICS): The evolution of CETA Rules, European Parliamentary Research Service 15 “The proposals for both tribunals (First Instance and Appeal) are, in this respect, very similar to the WTO AB.”

<sup>161</sup> Alschner 2017 The Investment Component of Trade Agreements, Routledge Handbook in International Trade Agreements 7

<sup>162</sup> First, Article 3 of the draft proposal provides for a voluntary mediation process, which seems modeled after Article 5 of the WTO’s Dispute Settlement Understanding (“DSU”)

<sup>163</sup> Jonathan Bonnitcha 2017 Assessing the Impacts of Investment Treaties: Overview of the evidence, The International Institute for Sustainable Development 13 “For example, Berger, Busse, Nunnenkamp and Roy (2013) find that investment chapters of FTAs that contain investment liberalization provisions are more effective in promoting FDI than free-standing BITs that contain equivalent liberalization provisions.”

<sup>164</sup> Jonathan Bonnitcha 2017 Assessing the Impacts of Investment Treaties: Overview of the evidence, The International Institute for Sustainable Development 13

2/15, CJEU held that EU is not endowed with exclusive competence in the area of non-direct foreign investment and the regime governing ISDS mechanism.<sup>165</sup> Therefore, EU lacks full competence on a trade agreement that contains investment rules. The opinion meant that it might be preferable to negotiate and conclude investments agreements separately from trade agreements.<sup>166</sup> In that regard, EU Commission may have to exclude investment rules from FTA to ensure accelerated ratification process.<sup>167</sup>

The inclusion of investment rules in CETA and TPP had already caused some challenges.<sup>168</sup> The opposition to the investment chapter in CETA by the regional parliament of Wallonia almost prevented the conclusion of that treaty. In a similar situation, the opposition by New Zealand to investment arbitration clause nearly led to the collapse of the TPP negotiations.<sup>169</sup> In that respect, investment rules caused a lot of controversy in FTAs. These experiences may motivate the exclusion of investment rules in trade agreement to avoid jeopardizing FTAs. Some of these observations points that the two regimes may separate in future.

#### ***1.4.5 Heterogeneous PTIAs***

International investment treaties contain investment provisions, which are heterogenously constructed. There are IITs with rudimentary investment provisions while other IITs have substantive investment provisions similar to those found in typical BITs.<sup>170</sup> PTIAs with

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<sup>165</sup> Advocate General's Sharpston Opinion in case 2/15, EU-Singapore Free Trade Agreement, ECLI:EU:C:2016:992

<sup>166</sup> [https://www.vbb.com/media/Insights\\_News/VBB\\_Memorandum\\_-\\_Opinion\\_2-15.pdf](https://www.vbb.com/media/Insights_News/VBB_Memorandum_-_Opinion_2-15.pdf) 8

<sup>167</sup> Alschner 2017 The Investment Component of Trade Agreements, Routledge Handbook in International Trade Agreements 7

<sup>168</sup> Alschner 2017 The Investment Component of Trade Agreements, Routledge Handbook in International Trade Agreements 6 "... the inclusion of investment rules in trade agreements has become a sticky political issue at a time when trade agreements are already becoming increasingly controversial."

<sup>169</sup> Nottage 2016 Investor-State Arbitration Policy and Practice in Australia, Investor-State Arbitration Series Paper No. 6, 4: "Yet Australia and New Zealand have signed side letters to exclude ISDS bilaterally under the ASEAN and TPP agreements..."

<sup>170</sup> Alschner 2017 The Investment Component of Trade Agreements, Routledge Handbook in International Trade Agreements 3 "... trade agreements with rudimentary investment provisions put in place a framework for discussion

rudimentary investment provisions encouraged the need of negotiating separate free-standing-IIT. Other PTIAs enshrines investment provisions, which are substantively, and procedurally equivalent to those of BITs.<sup>171</sup> Rudimentary investment provisions are less restrictive on state-sovereignty while substantive provisions are more restrictive.

It had already been noted that investment provisions, which were traditionally under the purview of BITs had since NAFTA, found their way in the corpus of various trade agreements.<sup>172</sup> Investment provisions in NAFTA are closely related to the investment provisions in US Model BIT. It is argued that EU entered into TTIP and CETA agreements with an intention of developing the EU *acquis* for investment protection to replace more than 1,400 BITs that had been concluded by EU member nation-states.<sup>173</sup> In that regard, all the agreements whether BITs or FTA with substantive or restrictive investment provisions will be of interest to this study. The state-sovereignty given away through restrictive investment provisions shall be determined in freestanding Investment Treaties and PTIAs.

#### ***1.4.6 Difference between Investment rules and trade rules***

Though trade and investment rules may be contained in the same treaty, in effect, they regulate two distinct normative regimes. Similar norms found in trade and investment treaties like non-discrimination, can be interpreted and applied differently depending on their legal and structural context. The disputes may overlap factually, but they may differ legally. In trade disputes only nation-states can bring cases before WTO panels while under investment disputes private investors can enforce investment rules.

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on investment promotion and facilitation but leave the substantive and procedural protection and facilitation of foreign investment to parallel investment treaties”

<sup>171</sup> Alschner 2017 The Investment Component of Trade Agreements, Routledge Handbook in International Trade Agreements 3 “ ... the majority of modern PTIAs devotes a lengthy chapter on the protection of foreign investment and creates a framework that is substantially and procedurally equivalent to that of BITs.”

<sup>172</sup> Usynin and Gáspár-Szilágyi 2017 The Growing Tendency of Including Investment Chapters in PTAs, Netherlands Yearbook of International Law 2017 pp 267-304, 268 “

<sup>173</sup> Griller, Obwexer and Vranes Mega-Regional Trade Agreements, New Orientation for EU External Relations? 9

Furthermore, the remedies offered under both regimes are very different. Investment tribunals can award monetary damages, but cannot overturn a national law; in contrast, trade panels, can ask a country to change its law to bring it into compliance with trade obligations.<sup>174</sup> The existence of these different points of view, however, underlines that trade and investment rules, even if formally integrated in PTIAs, are still sufficiently distinct. It is not clear whether trade and investment rules will continue to converge or there shall be a separation. Currently, IIL is dominantly governed by BITs and other treaties with investment provisions.<sup>175</sup>

## 1.5 International Investment Participants

The main participants in international investment relations are capital importing (host) states, capital exporting (home) state and investors. These participants have different investment interests that are at times conflicting. State-sovereignty related arguments are at the center of investment controversy.<sup>176</sup> Both developed countries (as traditional capital exporters) and developing countries (as traditional capital importers) take turns in relying on state-sovereignty arguments to defend their interests. IIL have been developed to resolve conflict of interest in international investment relations just as all law is developed to resolve conflict of interest.<sup>177</sup> Furthermore, IIL should bring with it certainty in international investment relations, as certainty

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<sup>174</sup>Whitsitt and Bankes 2013 *The Evolution Of International Investment Law and Its Application To The Energy Sector* 209: International investment law "...comprised of a large number of bilateral investment treaties (BITs) ... and a much smaller number of regional free trade agreements (FTAs), such as the North American Free Trade Agreement, that contain investment chapters (chapter 11 in the case of NAFTA)"

<sup>175</sup>Whitsitt and Bankes 2013 *The Evolution Of International Investment Law and Its Application To The Energy Sector* 209: International investment law "...comprised of a large number of bilateral investment treaties (BITs) ... and a much smaller number of regional free trade agreements (FTAs), such as the North American Free Trade Agreement, that contain investment chapters (chapter 11 in the case of NAFTA)"

<sup>176</sup> Guntrip 2016 *Self-Determination and Foreign Direct Investment: Reimagining Sovereignty In International Investment Law* 1: "For example, a state can construe sovereignty so as to justify state conduct, whilst another state will refer to sovereignty to denounce the same act."

<sup>177</sup> Sornarajah 2010 *The International Law On Foreign Investment* 33

is the principal virtue of every legal system.<sup>178</sup> State-sovereignty principle influences IIL making and its effectiveness in realising its purpose.

### ***1.5.1 Interest of Capital Exporting (Home to Investor) State***

Capital exporting countries have direct interest in the performance of investments made by its nationals world over. At times, home countries assist their nationals to invest abroad. They provide financial assistance through Export Credit Agencies' facilities among other facilities. In return, home country receives taxes on profits made abroad which forms part of its national revenues. In that regard, expropriations of foreign investors by host States can directly affect the revenue base of capital exporting nation-states. The interest of capital exporting nation-state is directly aligned with interests of the foreign investors. The more returns an investor receive, the more revenues the home state is likely to receive.

There are secondary consequences a home state would also realise following successful investment by its nationals in a less developed host-state. The secondary consequences can be either benefits or costs. In an interdependent world, the development of a less developed nation-state, as stimulated by investment, will result in secondary benefits in the form of reduced budget of dealing with illegal immigrants and refugees from under developed countries. On the other hand, failure to develop in an interdependent world may result in secondary costs on other states in the form of cost of dealing with terrorism and refuges from less developed states.

### ***1.5.2 Capital Importing (Host) State***

Capital importing nation-states tend to subject themselves to restrictive international investment treaties that restrict its sovereign rights but at the same time giving much investment protection to foreign investors. IITs with restrictive provisions limit the right of a nation-state to regulate foreign investors.<sup>179</sup> The restrictive IITs provisions are attractive to investors hence will attract

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<sup>178</sup> Hudson 2007 Understanding Equity & Trusts, Third Edition xvii

<sup>179</sup> Dolzer 2006 The Impact of International Investment Treaties on Domestic Administrative Law 953

international investment.<sup>180</sup> During pre-establishment of investment, foreign investors have more bargaining power relative to host States. At that stage, investors tend to secure strong legal protection for their investments against all possible risk.

Once investors make their investments, host States have their legislative monopoly power at their disposal to directly or indirectly expropriate foreign investments. In certain instances, once host countries benefited from foreign investments, they cancel or revise their investment treaties. Host States tend to use sovereignty related arguments to justify their actions.<sup>181</sup> It is however appreciated that foreign investments tend to improve development of host-states. The development of a host state will also benefit home-state through taxes on remittance of its foreign nationals and other secondary benefits.

### ***1.5.3 Foreign Investors***

The word investor is defined by some IITs as, “government of any contracting party or natural corporate person, who is a national of a contracting party and who owns the capital and invests it in the territory of another contracting party”.<sup>182</sup> A rational investor aims to maximise return on investment. In that regard, investors take all measures to ensure that they realise maximum return and make any claims against actions that reduce their returns. From time to time countries change their policies to pursue peculiar developmental needs.<sup>183</sup> Some of the developmental policies may have a negative effect on returns of foreign investors. In such a situation, investors will pursue actions to recover expected returns or potential profits affected by host countries’ policies.

Investors usually take advantage of favorable investment provisions in investment treaties to get remedies. IITs may allow investors to claim compensation from host-states for actions which

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<sup>180</sup> UNCTAD 2009 The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries 90

<sup>181</sup> Masahiro 2013 Sovereignty and International Law 7

<sup>182</sup> General Secretariat of the Organisation of Islamic Conference (1981) Agreement on Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference 2

<sup>183</sup> Schill *et al* 2017 International Investment Law and Development: Friends Or Foes? 29: “...Inclusion of exception clauses in order to grant host States sufficient policy space to pursue their development strategies..”

investors consider harmful not only to their investments but also to potential lost profits. Most investment treaties give foreign investors power to directly file lawsuits with international tribunals, without even going through the local courts.

The reliance by investors on restrictive IITs provisions motivates foreign investors to prefer investing in host states that would have ratified restrictive IITs with their home-state. The benefits of foreign investment to an investor will be directly related to the benefits the home state will get. The home state will benefit from taxes on returns received by their nationals who invested abroad. Therefore, the more benefits an investor gets, the more benefits a home country is likely to get.

## **1.6 Global Development and Mutual Survival**

### ***1.6.1 Global Development***

The behavior and conduct by nation-states at international stage reveals the world's shared aspiration of realising development. This shared aspiration is revealed by:- inclusion of development provisions in international investment treaties; adoption of Sustainable Development Goals (SDGs); and recognition of Right to Development (RtD) as an inalienable human right by United Nations General Assembly in 1986.<sup>184</sup> Nation-states can realise this shared interest of development through attainment of global development. The pursuit of global development is motivated by the recognition of unsustainability of isolated development of nation-states.<sup>185</sup> Development of a nation-state is estimated by human development.<sup>186</sup>

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<sup>184</sup> Frankovits 2002 Introduction: Rights-Based Approach to Development and the Right to Development. Human Rights in Development Yearbook, 3

<sup>185</sup> Economic Commission for Africa Transition Report 2016 MDGs to Agenda 2063/SDGs MDGs to Agenda 2063/SDGs: Towards an integrated and coherent approach to sustainable development in Africa 7: "The new global development goals, the SDGs, call for the pursuit of sustainable means of production, consumption and redistribution of wealth in order to eradicate poverty"

<sup>186</sup> Arisman 2018 Determinant of Human Development Index in ASEAN Countries 114

Global development refers to development which is on an international scale and which is sustainable<sup>187</sup>. The interest for global development is affirmed by the adoption of SDGs, which focuses on international development.<sup>188</sup> This is why SDGs are regarded as new global goals.<sup>189</sup> SDGs are global in nature because they are uniformly applicable to all nation-states of the world, and they done away with developed-developing divide, which was a weakness of Millennium Development Goals (MDGs).<sup>190</sup> The human rights approach in the implementation of SDGs was adopted to address the unfinished business of MDGs on achieving sustainable development.<sup>191</sup> SDGs expect all nation-states whether rich or poor to work towards realising SDGs.<sup>192</sup> This is opposed to MDGs which had a focus on poor nation-states pursuing development getting funding from rich nation-states.

In an interdependent world, development can only be sustainable if it involves development of all countries, as isolated development will not sustainably persist for long. Failure of development of a nation-state has destructive consequences, which can leap across regions and engulf the entire

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<sup>187</sup> Verles and Vellacott 2018 Business and The Sustainable Development Goals: Best practices to seize opportunity and maximise credibility 2: “The Sustainable Development Goals (SDGs), also known as the ‘Global Goals’, lay out a roadmap to end poverty, reduce inequality, and tackle climate change, among other ambitions.”; Catholic Development Agency for England and Wales 2015 Sustainable Development Goals: Actions towards 2030 4: “The MDGs galvanised unprecedented efforts to address global development challenges and shaped the tone and direction of development over the last decade.”

<sup>188</sup> Woodbridge 2015 From MDGs to SDGs: What are the Sustainable Development Goals?, ICLEI Briefing Sheet - Urban Issues, No. 01 2

<sup>189</sup> The MDGs were a result of the United Nations Millennium Declaration which was adopted by UN General Assembly at the UN Millennium Summit in 2000.

<sup>190</sup> Woodbridge 2015 From MDGs to SDGs: What are the Sustainable Development Goals?, ICLEI Briefing Sheet - Urban Issues, No. 01 2

<sup>191</sup> United Nations Regional Coordination Mechanism 2017 Building More Inclusive, Sustainable and Prosperous Societies In Europe And Central Asia: From Vision to Achievement of the Sustainable Development Goals Call for Action from the Regional UN System, Europe and Central Asia, 8: “A human rights-based approach to implementing the SDGs, normatively based on international human rights standards and operationally directed towards promoting and protecting human rights, will seek to redress discriminatory practices and unjust distributions of power that impede development progress..”

<sup>192</sup> Kumar et al 2016 Millennium Development Goals (MDGs) to Sustainable Development Goals (SDGs): Addressing Unfinished Agenda and Strengthening Sustainable Development and Partnership 3

world.<sup>193</sup> These destructive consequences of failed development in a single country can spillover into other countries in form of refugee flows, mass migration, organized crimes and terrorism.<sup>194</sup> That is why Patrick claimed that failing countries inflict significant economic hardship on their regions by destroying all developmental achievements done by other countries.<sup>195</sup> In a related debate, World Bank revealed that the cost of failure by a nation-state is endured by other nation-states.<sup>196</sup> These arguments insinuate that global development can only be realised if all countries develop.

### **1.6.2 Mutual Survival**

According to Aristotle, a nation-state originated from economic needs of human persons.<sup>197</sup> In that respect, nation-states reflect human person needs as they came into reality from the human needs.<sup>198</sup> Consequently, since 1945 there had been a movement from nation-state values to human person values.<sup>199</sup> Nation-states as rational institutions, which stem from needs of rational human persons pursue material wealth to ensure their survival just as other rational beings.<sup>200</sup> Mastanduno *et al* argued that the international goal of nation-states is to acquire wealth for their own survival had reinforced that view.<sup>201</sup> The above claims support the conclusion that the principal goal of every nation-state is survival.<sup>202</sup> In that view, nation-states pursue development not as an end in itself but a means to an end, the end being their own survival. Therefore, nation-states aspire to develop for their own survival.

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<sup>193</sup> USAID 2003, Foreign Aid in the National Interest: Promoting Freedom, Security and Opportunity

<sup>194</sup> Salama 2005 The Right to development: Towards a New Approach?

<sup>195</sup> Patrick 2006 Weak States and Global Threats: Assessing Evidence of “Spillovers” 23

<sup>196</sup> Patrick 2006 Weak States and Global Threats: Assessing Evidence of “Spillovers” 23

<sup>197</sup> Leka 2017 Challenges of state sovereignty in the age of globalization 62: “...according to Aristotle, the origin of the state is a reflection of the economic needs of the person and the state stems on these needs.”

<sup>198</sup> Leka 2017 Challenges of state sovereignty in the age of globalization 62

<sup>199</sup> Henkin 1995 Human rights and state sovereignty 34

<sup>200</sup> Pendleton 1998 A New Human Right—the Right to Globalization 2057

<sup>201</sup> Mastanduno et al 1989 Towards a Realist Theory of State action 462: “... International goal of any state is the acquisition of power and wealth. Power and wealth are valued because they provide the means to insure both the State’s survival and to pursue other goals...”

<sup>202</sup> Slaughter 2011 International Relations, Principal Theories 1

The constraint nation-states face in pursuit of their survival in an interconnected world is the development of other nation-states. The failure of development in a given nation-state imposes significant economic hardship on other nation-states.<sup>203</sup> In that case, nation-states should pursue development for their survival and survival of other nation-states. In such a case, global development is a necessary condition for mutual survival of nation-states. This is supported by Independent Commission on International Development Report<sup>204</sup> which states that: "... nations of both the South and the North have become far more interdependent and actions taken by one country can seriously affect countries at the other side of the world".

Mutual survival is an important and critical world outcome. In that respect, countries should cooperate and assist each other in order to realise mutual survival. Increasing interdependence of nation-states has resulted in spillover benefits or costs of development among nation-states. The spillover effects would mean that a country could maximise its self-interest by assisting development of another country.<sup>205</sup> Borrowing the words from Adam Smith it can be stated that it is not the benevolence of a nation-state to assist the development of another nation-state but it is with regard to its own survival.<sup>206</sup> Therefore, nation-states should have moral obligation to support each other's survival as survival of each nation-state has direct spillover effects on its survival and the survival of other nation-states.

Importance of global development to mutual survival should motivate nation-states to adopt Right to Development (RtD). Professor Arjun Sengupta who was contracted as an independent

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<sup>203</sup> Patrick 2006 Weak States and Global Threats: Assessing Evidence of "Spillovers" 23

<sup>204</sup> Independent Commission on International Development Issues Report 2002 A programme for survival 195

<sup>205</sup> Piron 2002 The Right to Development :A Review of the Current State of the Debate for the Department for International Development 35 "Instead, UK development assistance is grounded on two premises: (i) a moral duty to alleviate poverty and social exclusion at home and abroad; and (ii) enlightened self-interest derived from the interdependence of the world..."

<sup>206</sup> Adam Smith 1776 An Inquiry into the Nature and Causes of the Wealth of Nations "It is not from the benevolence of the butcher the brewer, or the baker that we expect our dinner, but from their regard to their own interest"

expert on RtD claimed that both the human person and nation-states are holders of RtD.<sup>207</sup> In that view, nation-states should cooperate with each other for their development, for their own survival. Therefore RtD may be pursued as a means for realisation of global development and ultimately, for mutual survival.<sup>208</sup>

### **1.6.3 Right to Development (RtD)**

RtD is regarded as a third generation human right or part of solidarity rights. The DRtD defines RtD as an inalienable human right in which all human persons are entitled to participate in development, contribute to, and enjoy development in which all human rights are fully achieved.<sup>209</sup> This is consistent with Oji and Ozioko who proclaimed that RtD is not only a claim on the outcomes of development but also the process of achieving development outcomes.<sup>210</sup>

RtD expanded the concept of development beyond economic focus of a nation-state. The concept recognises every human person as a central subject of development entitled to actively participate in development.<sup>211</sup> Therefore, development can only be sustainable if it promote human prosperity and dignity.<sup>212</sup> Piron identified core less contestable elements of RtD.<sup>213</sup> These elements are that: (i), human persons should be at the center of development (ii), the development process should respect all human rights including the right to participation (iii), social justice should be promoted by development; and (iv) nation-states have the primary responsibility of

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<sup>207</sup> Nwauche and Nwobike 2005 Implementing the Right to Development, International Journal on Human Rights 97

<sup>208</sup> Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 37, 2016 Frequently Asked Questions on the Right to Development 22 : “The right to development aims at the constant improvement of human well-being ...”

<sup>209</sup> Sengupta 2002 On the theory and practice of the right to development, Human Rights Quarterly 846-847

<sup>210</sup> Oji and Ozioko 2011 Effect of Globalization on Sovereignty of States 264

<sup>211</sup> Bunn 200 The Right to Development: Implications for International Economic Law, American University International Law Review Volume 15 | Issue 6 Article 8 1445

<sup>212</sup> Nilsson et al 2017 A Framework For Understanding Sustainable Development Goal Interactions, <https://council.science/cms/2017/03/SDGs-interactions-framework.pdf> 19

<sup>213</sup> Piron 2002 The Right to Development :A Review of the Current State of the Debate for the Department for International Development 7

achieving RtD at national level and through formulation of international policies and international co-operation.<sup>214</sup> These elements guide appreciation of the conceptual meaning of RtD.

RtD was first introduced in 1972 by Keba M'Baye, Senegalese jurist a former chairperson of the ICJ, in his address at the International Institute of Human Rights, in France. It was then given legal recognition in the African Charter on Human and Peoples` Rights in 1981. In 1986, UN General Assembly on its adoption of the DRtD, formally recognised the RtD as “an inalienable human right”.<sup>215</sup> Following receiving global recognition in 1986, it was then reaffirmed in the 1993 Vienna Declaration.<sup>216</sup> Furthermore, Durban Declaration and Programme of Action followed suit and reaffirmed RtD as an inalienable and universal human right in 2001.

DRtD in itself is not internationally legally binding but some of its provisions are enshrined in other legally binding instruments such as the Charter of the United Nations, International Covenant on Economic, Social and Cultural Rights (ICESCR) and Universal Declaration of Human Rights (UDHR).<sup>217</sup> The provisions of DRtD that are of interest to this study and binding in other international instruments are articles which relates to improvement of human well-being and articles which relate cooperation among nation-states. Articles 1-4 and 8 of DRtD on improvement of human well-being are binding in international instruments such as Charter of the UN, UDHR article 25 and ICESCR among others. Articles 3-4 and 6 of DRtD on cooperation of nation-states are binding in international instruments such as Charter of the UN, ICESCR article 2 and Convention on the Rights of the Child articles 4 and 23 among others.

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<sup>214</sup> Piron 2002 The Right to Development :A Review of the Current State of the Debate for the Department for International Development 7

<sup>215</sup> Bunn 2000 The Right to Development: Implications for International Economic Law, American University International Law Review; Volume 15 Issue 6 Article 8, 1434

<sup>216</sup> Piron 2002 The Right to Development A Review of the Current State of the Debate for the Department for International Development 7

<sup>217</sup> Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 37, 2016 Frequently Asked Questions on the Right to Development 5

The rights holders under RtD are human persons just as in general approach to human rights<sup>218</sup>. Article 1 of DRtD notes that human persons are entitled to participate in development.<sup>219</sup> This entitlement insinuates that human persons are beneficiaries of RtD.<sup>220</sup> Nation-states are, as well, beneficiaries of RtD as Article 2(3) of DRtD declares that nation-states have a right and a duty to design appropriate development policies.<sup>221</sup> According to Hohfeld theory, every right must have a correlative duty.<sup>222</sup> The primary duty bearers of RtD are nation-states that should be supported by the international community.<sup>223</sup>

Article 4(1) of DRtD recognises that all nation-states have a duty to take steps, individually and collectively, to formulate development policies to facilitate the realization of RtD.<sup>224</sup> In other words, the duty bearer of RtD at national level is the nation-state and duty bearer at international level is the international community.<sup>225</sup> The human persons are also considered duty bearers for the requirement of their participation in the process of development. Their participation duty is provided in article 2(1) and article 2(2) of DRtD, which declares that, a human person has a duty individually and collectively, to actively participate in the realisation of RtD.<sup>226</sup>

International co-operation or obligation of nation-states to co-operate is crucial for implementation of RtD in an interdependent world.<sup>227</sup> According to Article 3 of DRtD, nation-

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<sup>218</sup> Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 37, 2016 Frequently Asked Questions on the Right to Development 3-4

<sup>219</sup> <http://www.un.org/documents/ga/res/41/a41r128.htm>

<sup>220</sup> Declaration on the Right to Development 1986 Article 2(1) “The human person is the central subject of development and should be the active participant and beneficiary of the right to development”

<sup>221</sup> <http://www.un.org/documents/ga/res/41/a41r128.htm>

<sup>222</sup> Schlag 2015 How to do things with Hohfeld [Vol. 78:185 Nos. 1 & 2 2015] 188

<sup>223</sup> Broberg and Sano 2018 Strengths and weaknesses in a human rights-based approach to international development – an analysis of a rights-based approach to development assistance based on practical experiences 667: “In practice the duty-bearer will almost always be a public authority, that is, the state”

<sup>224</sup> Marks 2008 Implementing the Right to Development The Role of International Law 19

<sup>225</sup> Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 37, 2016 Frequently Asked Questions on the Right to Development 3-4

<sup>226</sup> Piron 2002 The Right to Development A Review of the Current State of the Debate for the Department for International Development 12

<sup>227</sup> Sengupta 2000 Realizing the Right to Development 570

states should respect international law and cooperate in order to realise RtD.<sup>228</sup> The implementation of RtD is necessary for realisation of global development and ultimately mutual survival. Therefore, nation-states have collective obligation to cooperate in order to warrant development and eliminate development obstacles, given that isolated development is unsustainable due to the increasingly interdependent world.<sup>229</sup> Nation-states can however cooperate by giving away some of their sovereign rights. As a result, the giving away of state-sovereignty is necessary for attainment of RtD as well as for ensuring global development and mutual survival.

## 1.7 Problem Statement

Firstly, there are ambiguous arguments advanced by nation-states in entering and exiting investment treaties. Nation-states tend to ratify IITs with restrictive investment provisions that erode their sovereignty so as to attract investment.<sup>230</sup> Foreign investment is attracted in order to stimulate national development. In this case, state-sovereignty is traded away for development. Countries, which ratify restrictive treaties, later terminated such treaties. The countries, which terminated investment treaties include Venezuela, Ecuador, India, Bolivia and Indonesia among others.

Countries terminated IITs with restrictive provisions so as to regain their policy space to enable them to pursue locally adaptive and peculiar development policy needs in order to meet their own developmental goals.<sup>231</sup> This give rise to an inconsistent conclusion that nation-states ratify IITs with restrictive provisions to stimulate development while on the other hand they terminate IITs with restrictive provisions in order to realise development. These arguments indicate some

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<sup>228</sup> Declaration on the Right to Development, World Bulletin: Bulletin of the International Studies of the Philippines 13, no. 1-2 (January-April 1997): 215-220

<sup>229</sup> Bunn 200 The Right to Development: Implications for International Economic Law, American University International Law Review Volume 15 | Issue 6 Article 8 1440

<sup>230</sup> UNCTAD 2009 The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries 90

<sup>231</sup> Schill et al 2013 International investment law and development: Friends or foes? 9

problems of state-sovereignty in IIL and, in particular, two antagonistic actions are expected to give the same result.

Secondly, there has been an argument that international investment law and development are irreconcilable enemies, yet foreign investment is promoted and protected on the belief that it guarantees development.<sup>232</sup> The inconclusive debate on the relationship between IIL and development might be due to differing levels of state-sovereignty given away in making of IIL. Most IITs are heterogeneous as some have more restrictive investment provisions than others. This means, nation-states tend to give away different levels of sovereign rights as they make IIL through IITs. In that respect, the level of sovereign rights given away may have a bearing on the level of development to be realised. In that regard, level of state-sovereignty given away may have a different impact on development through its effect on IIL. An analytical approach gives more insight on why IIL is at times a friend and at times an enemy of development.<sup>233</sup>

Thirdly, in an interdependent world, human development in each nation-state is crucial for global development and mutual survival of nation-states. In that regard, the international community for its survival should take human development as sacrosanct. These arguments, resonates with requirement to fully implement RtD as a fundamental right of every nation-state. Since the recognition of RtD as an inalienable human right by UN General Assembly in 1986 there has been less progress in its implementation.<sup>234</sup> Nation-states have a tendency of interpreting RtD in light of their self-interests. Developing countries interpret RtD in a way that allows them to be given financial assistance by developed countries in a bid to finance their development.<sup>235</sup> On the other hand, developed countries interpret RtD in a way that would compel developing countries

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<sup>232</sup> Schill et al 2013 International investment law and development: Friends or foes? 29

<sup>233</sup> Schill *et al* 2013 International investment law and development: Friends or foes? 29

<sup>234</sup> Declaration on the Right to development recognise Development as: “comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and the fair distribution of benefits resulting therefrom”.

<sup>235</sup> Marks 2008 Implementing the Right to Development The Role of International Law 105: “Numerous industrialized countries fear that a right to development may constitute the legal basis for monetary claims by developing countries against them...”

to implement investment friendly policies in order to achieve development.<sup>236</sup> Therefore, the research postulates that the main obstacle to successful implementation of RtD is state-sovereignty, as it tends to inhibit international cooperation that is crucial for global development and mutual survival. Hence the need to assess the threat of state-sovereignty and state-consent on IIL, global development and mutual survival.

## **1.8 Research Questions**

The main question of the thesis is; what is the effect of state-sovereignty and state-consent on international investment law, global development and mutual survival. In other words, what is the effect of limiting state-sovereignty on international investment law, global development and mutual survival? In answering the main question, the following sub-questions were answered:

- (i) How does state-sovereignty given away influences international investment law purpose of attracting foreign investment?
- (ii) What is the influence of unbound state-sovereignty on human development?
- (iii) How does state-sovereignty affect nation-state cooperation for realisation of global development and mutual survival?

## **1.9 Aim of the study**

The thesis is aimed:

- (a) To identify key literature on the influence of state-sovereignty and state-consent on international investment law, global development and mutual survival.
- (b) To build a conceptual and theoretical framework from literature, to ascertain the influence of state-sovereignty on international investment law.
- (c) To find insight into the association between state-sovereignty and globalisation so as to infer the influence of state-sovereignty on human development.

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<sup>236</sup> Marks 2008 Implementing the Right to Development The Role of International Law 105: "...many developing countries are suspicious of concepts focusing on the duty of the territorial state to fulfil the right to development. They worry that this approach serves to deny the responsibility of developed states,...and to permit interferences with the internal affairs of the territorial state."

- (d) To use statistical techniques to confirm or refute the hypothesis on the influence of state-sovereignty on IIL and human development as informed by literature and theory.
- (e) To use the rational choice theory on international investment law to develop a model for explaining the influence of state-sovereignty on nation-state cooperation in development assistance.
- (f) To assess the significance of reducing state-sovereignty and state-consent on IIL, global development and mutual survival.

### **1.10 Structure of the Thesis**

This thesis is divided into five chapters. Chapter 1 presents a general background of the research, conceptual meaning of state-sovereignty and state-consent, IIL, global development and mutual survival. The chapter also outlined problem statement, research questions and aim of the study. Chapter 2 reviews the literature around the research topic and evaluated existing literature that was then used to inform the conceptual and theoretical framework. In Chapter 3, a conceptual and theoretical framework was developed using insights from literature review. The theoretical linkages were identified and appropriate hypothesis were ascertained. Chapter 4 outlines the research philosophies, research approaches, research strategies and data collection. Chapter 5 involves data analysis, hypothesis testing, data interpretation, utilisation of the research findings and recommendations.

## CHAPTER 2

### 2. LITERATURE REVIEW

#### 2.1 Introduction

This chapter reviewed literature on threat of state-sovereignty and state-consent on IIL, global development and mutual survival. The threat of state-sovereignty and state-consent on international investment law forms the foundation of this thesis. In that regard, this chapter begun by exploring the influence of state-sovereignty and state-consent on international investment law making. The literature showed that both state-consent and state-sovereignty are the bedrock of IIL. It was found that international legal obligations arise when countries consent to give away sovereignty through ratification of international investment agreements. Literature by Corwin, Canivez and Meltzer among others, affirms that state-sovereignty and state-consent influences IIL in nearly the same way. The literature findings revealed that giving away of state-sovereignty is synonymous with giving state-consent.<sup>237</sup> Such findings motivated this thesis to use state-sovereignty and state-consent interchangeably though their conceptual meaning in international law is different.

The findings of the threat of state-sovereignty and state-consent on IIL assist on explaining the relationship between IIL and development. There had been some debates by Schill *et al* on the relationship between IIL and development. Their studies found out that IIL and development are friendly at times while on other times they are irreconcilable enemies. Such conflicting conclusions are explained by the findings on the influence of state-sovereignty on IIL and development. The literature revealed that IIL, which is predominantly IITs law, is established to stimulate development. In that regard, state-sovereignty will influence both IIL and development. This chapter presents an interesting relationship between state-sovereignty, IIL and development. State-sovereignty directly affects development and it also indirectly affect development through its effect on IIL.

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<sup>237</sup> Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law 2

This chapter acknowledges that the concept of development is increasingly human centered as sovereignty belongs to people as supported by extracts from Constitutions of nation-states provided in table 1 below. In an interdependent world, human development in each country affects development of other nation-states. In that regard, isolated development is not sustainable in an interdependent world due to spillover effects hence development should be global. The increasing interdependence of nation-states makes global development a necessary condition for mutual survival of nation-states. This close relationship of global development and mutual survival motivated their joint use as doublets, which is a common practice in law. Literature by Sornarajah, Bunn, Sampath, Oji and Ozioko identified determinants of global development and mutual survival to include IIL, human development and cooperation of nation-states. All these determinants are negatively affected by state-sovereignty. In that regard, the influence of state-sovereignty on global development and mutual survival can be observed through its effect on IIL, human development and international cooperation.

## **2.2 State-sovereignty and Consent in International Investment Law Making**

### ***2.2.1 State-consent in International Investment Law Making***

International investment law is established through consent of international legal persons entitled to create rules of international law. The primary international legal persons are nation-states hence their consent forms the principal basis of international legal obligations. The law creating powers of nation-states can be traced from the ancient Roman notion that the will of the Prince have force of law.<sup>238</sup> In the present day, the Prince can be represented by a nation-state given that a nation-state is regarded as a ‘person of great size’.<sup>239</sup> This insinuates that the will of nation-states has force of law. Such a perspective relates to Canivez’s notion that law is an expression of

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<sup>238</sup> Corwin 1928 The "Higher Law" Background Of American Constitutional Law 165

<sup>239</sup> Leka 2017 Challenges of state sovereignty in the age of globalization 62: “Aristotle considered the state as a person of great size,...”; Head J. W. 2019 Addressing global challenges through pluralistic sovereignty: critique of state sovereignty as centerpiece of international law 748: “Sovereignty of the abstract entity of the State had [with the rise of "nation-states"] been substituted for the Sovereignty of the king ...”

the will of nation-states.<sup>240</sup> The expression of general will of nation-state is the same as state-consent. This reinforces the view that state-consent makes law that is in accord with the concept of *consensus facit legem* which means that, “consent makes law”.

State-consent is a common denominator in all sources of international investment law. State-consent is traceable in both international investment agreement and international customary law. In international investment agreements, state-consent is expressed through ratification of IIAs. In international customary law, states consent is tacitly given away when a nation-state implicitly consent to a custom by following a certain practice on the belief that it has force of law.<sup>241</sup> The express state-consent in a treaty has similar effect as tacit state-consent in a custom.<sup>242</sup> Nation-state that grants privileges to another nation-state by tacit consent and later revokes the privileges without cause commits an injury just as if it broke a treaty. In that respect, tacit consent and express consent have same effect on IIL.<sup>243</sup> Consequently, state-consent legitimizes international investment law.

### ***2.2.2 State-sovereignty in International Investment Law Making***

State-sovereignty is inextricably connected to state-consent and they have same effect on IIL. The expression of state-sovereignty is referred to as state-consent.<sup>244</sup> In that case, IIL is created through an expression of state-sovereignty or through state-consent.<sup>245</sup> State-sovereignty is regarded as the only structural principle of IIL that shapes the content of nearly all rules of IIL.<sup>246</sup>

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<sup>240</sup> Canivez 2004 Jean Jacques Rousseau’s Concept of People 5

<sup>241</sup> Woolsey 1860 Lecture notes on Introduction to the Study of International Law 29

<sup>242</sup> Orakhelashvili 2008 Natural Law and Customary Law 76: “treaties and custom are similar in character, only different in form, one being expressly consented and the other based on tacit consent...”

<sup>243</sup> Woolsey 1860 Lecture notes on Introduction to the Study of International Law 31

<sup>244</sup> Meltzer 2005 State-sovereignty and the Legitimacy of the WTO 1

<sup>245</sup> Bhalla and Chowla 2014 Sovereignty in the Modern Context: How Far Have We Come? 147: “...international legal order is merely an expression of the uniform principle of external sovereignty...”

<sup>246</sup> Bhalla and Chowla 2014 Sovereignty in the Modern Context: How Far Have We Come? 147

Therefore, state-sovereignty just as state-consent is the backbone and principal basis of the constitutional doctrine of international investment law.<sup>247</sup>

### ***2.2.3 State-sovereignty as a Controversial Principle***

State-sovereignty is argued to be the most controversial concept in doctrine, practice and history of international investment law.<sup>248</sup> The controversies of the doctrine had been made clear by Henkin who argued that “it means many things, some essential, some agreed, some insignificant, some controversial, some are not warranted and should not be accepted”.<sup>249</sup> In a related argument, Fassbender claimed that sovereignty is a highly adaptable concept that indicates the rights and duties conferred on a nation-state by international law at a given time.

Concepts of greater importance are usually controversial. State-sovereignty being such an important concept, which is agreed to be a constitutional doctrine of the international legal system, faces the same challenge. The sacrosanctity status of state-sovereignty in IIL had been the main cause of the controversy in its meaning. Re-defining and/or overstretching the meaning of state-sovereignty may be the only way academics and international legal experts could adopt to avoid its unintended consequences.<sup>250</sup> Developing countries had been terminating investment treaties using sovereignty defenses, in which, sovereignty is given a contextual meaning that would address their issue at hand.<sup>251</sup> Sornarajah predicted that developed countries are likely to

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<sup>247</sup> Schrijver 1997 Sovereignty over natural resources: Balancing rights and duties 2: “Ever since the Treaty of Augsburg (1555) and the Peace of Westphalia (1648) sovereignty has served as the backbone of international law or as Brownlie phrases it as ‘the basic constitutional doctrine of the law of nations...’”

<sup>248</sup> Schrijver 1997 Sovereignty over natural resources: Balancing rights and duties 2

<sup>249</sup> Nagan and Hammer 2005 The Changing Character of Sovereignty in International Law and International Relations 142

<sup>250</sup> Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law 2: “As legal terms like sovereignty do not have a specific meaning, international lawyers seek to achieve political aims through varied interpretations of these terms”

<sup>251</sup> Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law 2: “International lawyers create legal arguments using the vocabulary of public international law to justify or criticize state conduct”

backtrack on investment treaty provisions that once saved them well in the past and will use sovereignty-based defenses to redraw boundaries on investment protection.<sup>252</sup>

### **2.3 State-sovereignty questioned in other branches International Law**

State-sovereignty principle in its absolute sense is regarded as a hindrance to the existence of a meaningful system of international law.<sup>253</sup> State-sovereignty presents challenges, both on ‘establishment of new international norms and to the implementation of existing norms’.<sup>254</sup> State sovereignty is argued to be a deterrent to international legality.<sup>255</sup> The doctrine had been disapproved in various branches of international law such as international criminal law, international environmental law, international human rights law and international trade law.

According to Gardner state-sovereignty remains the greatest hindrance to environmental international law especially on its response to international environmental threats.<sup>256</sup> Romson further considered state-sovereignty counterproductive in handling new global environmental challenges.<sup>257</sup> Miyoshi perceived state-sovereignty to be an obstacle in the field of international human rights law.<sup>258</sup> This view motivated Delbruck to propose a restriction of state-sovereignty

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<sup>252</sup>Sornarajah 2010 *The International Law On Foreign Investment* 4

<sup>253</sup> Turner State-sovereignty, International Law, and the Use of Force in Countering Low-Intensity Aggression in the Modern World 53: “In an absolute form, sovereignty would clearly preclude the existence of a meaningful system of international law.”

<sup>254</sup> Roth 2004 *The Enduring Significance of State Sovereignty* 1026

<sup>255</sup> Roth 2004 *The enduring significance of state sovereignty* 1017: “...denounce state sovereignty as an obstacle to international legality ...”

<sup>256</sup>Gardner 2011 *Respecting Sovereignty* 133: “National sovereignty has been (and will continue to be) the greatest obstacle to attempts to respond to international environmental threats in a comprehensive and effective manner.” “...national sovereignty is, of course, the cornerstone of international law.”

<sup>257</sup> Romson 2012 *Environmental Policy Space and International Investment Law* 35 “Further, some writers in environmental law earlier projected state-sovereignty to erode, as it is seen almost as counterproductive in handling global environmental challenges.”

<sup>258</sup> Masahiro 2013 *Sovereignty and International Law* 4

in order to effectively protect human rights.<sup>259</sup> Furthermore, international criminal lawyers also perceived state-sovereignty to be an enemy of international criminal law.<sup>260</sup>

Sacrosanctity of state-sovereignty is argued to have subdued the development of international law from international law of coexistence to international law of cooperation. According to Fitzgerald state-sovereignty is considered an obstacle against movement of international law from international law of coexistence to international law of cooperation.<sup>261</sup> Fitzgerald regarded international law of cooperation, as a law, which governs citizens of the world and not a law governing particular nation-states.<sup>262</sup> Fitzgerald in his reference to Friedman conceived sovereignty to be outdated, because if the focus of law is on world citizens, state-sovereignty should be less applicable.<sup>263</sup> These insights suggested that state-sovereignty is no longer compatible with international law. This motivated the study of influence of state-sovereignty and state-consent on IIL.

## **2.4 Incompatibility between State-sovereignty on International Trade Law**

International Trade Law (ITL) is predominantly treaty based just as IIL.<sup>264</sup> However, ITL is less fragmented as it is primarily World Trade Organisation (WTO) law supported by an increasing

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<sup>259</sup> Delbruck 1993 A More Effective International Law or A New "World Law"?: Some Aspects of the Development of International Law in a Changing International System 715: "...indicate an increased willingness to accept even far-reaching restrictions on state-sovereignty to make international human rights protection more effective".

<sup>260</sup> Cryer 2006 International Criminal Law vs State-sovereignty: Another Round? 980: "...international criminal law scholars see sovereignty as the enemy."

<sup>261</sup> Fitzgerald 1997 Trade-based Constitutionalisms: The Framework for Universalizing Substantive International Law? 117-118: "...the move from process to substance became problematic; because it ventured deeper into the heart of sovereign autonomy..."

<sup>262</sup> Fitzgerald 1997 Trade-based Constitutionalisms: The Framework For Universalizing Substantive International Law? 120

<sup>263</sup> Fitzgerald 1997 Trade-based Constitutionalisms: The Framework For Universalizing Substantive International Law? 118: "...Friedmann to suggest that sovereignty was a thing of the past."

<sup>264</sup> Regan 2017 Sources of ITL: Understanding What the Vienna Convention Says About Identifying and Using 'Sources For Treaty Interpretation' 1: International trade law is overwhelmingly treaty-based."

number of preferential agreements.<sup>265</sup> Nation-states become members of WTO through a trade treaty.<sup>266</sup> Membership of nation-states to an international organisation undermines state-sovereignty<sup>267</sup> as nation-states give away their sovereignty when they enter into an international agreement.<sup>268</sup> Every international agreement reduces the sovereignty of the parties to the treaty.<sup>269</sup>

Member countries of WTO are required to alter their domestic laws so as to comply with adverse the Appellate Body rulings giving the WTO authority over nation-states' decision making processes.<sup>270</sup> An adoption of reports by WTO Appellate Body affects nation-states' sovereignty. In that situation, nation-states give away their sovereignty by transferring their rights to WTO in order to realise important policy objectives.<sup>271</sup> It had been acknowledged that nation-states can only reap the benefits of ITR by giving up some sovereignty.<sup>272</sup> Despite the benefits traded with state-sovereignty, some member countries of WTO are pushing for a review of WTO agreement

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<sup>265</sup> Mestral and Vanhonnaeker 2017 How Best to Protect the Right to Regulate: The WTO or ISA?, CIGI Papers No.145 3: "Besides the WTO agreements, an increasing number of preferential and regional trade agreements have been concluded, making trade law hardly less fragmented than international investment law."

<sup>266</sup>Hainsworth 1995 Sovereignty, Economic Integration, and the World Trade Organization Volume 33, Number 3 Article 5: "...World Trade Organization represents a move towards a more legalistic international trade order, entailing a transfer of sovereignty from the state to the international level"

<sup>267</sup> Meltzer 2005 State-sovereignty and the Legitimacy of the WTO, U. Pa. J. Int'l Econ. L. [Vol. 26:4], 695: "While membership in an international organization is an expression of states' Legal Sovereignty, membership may nevertheless undermine states' Westphalian Sovereignty"

<sup>268</sup> Movsesia 1999 Sovereignty, Compliance, and the World Trade Organization: Lessons from the History of Supreme Court Review, Michigan Journal of International Law Volume 20 | Issue 4 794: "All treaties diminish sovereignty to some extent, they observe; for a country to accept some international-law restraint in pursuit of important national interests is neither new nor objectionable"

<sup>269</sup> Dolzer 2006 The Impact of International Investment Treaties on Domestic Administrative Law 953

<sup>270</sup> Meltzer 2005 State-sovereignty and the Legitimacy of the WTO, U. Pa. J. Int'l Econ. L. [Vol. 26:4], 700

<sup>271</sup> Jung 2013 A State's Sovereign Rights and Obligations in the WTO To Harmonize Environmental Policies, Michigan State International Law Review [Vol. 21:2 ] 466: "WTO Member States' rights also are constrained because they gave up some of their sovereignty by conferring their rights to the WTO to achieve important policy results"

<sup>272</sup> Ezeoba 2016 The Rhetoric of Sovereignty in the WTO: How Sovereignty can Impact State Conduct in the Dispute Settlement Framework, Creighton International and Comparative Law Journal, Volume 7 Issue 1 183

with an interest of regaining their sovereignty.<sup>273</sup> This reflects a conflict between state-sovereignty and IITL.

## **2.5 State-sovereignty given away through IIT Provisions**

There are investment provisions found in IITs that constrain the sovereign right of nation-states to regulate.<sup>274</sup> The investment provisions restrict the sovereignty of countries that are party to such treaties. Therefore, treaties which contain restrictive investment provisions gives away state-sovereignty. Some countries such as Venezuela, Ecuador, India, Bolivia and Indonesia among others had responded by terminating treaties with restrictive investment provisions.<sup>275</sup> Countries terminated investment treaties with an aim of reviewing restrictive investment provisions. Common restrictive investment provisions found in most IITs are provided below.

### ***2.5.1 Investor-state dispute settlement (ISDS)***

ISDS provision in its restrictive construction permits investors to bring cases against host states whenever they believe that their investments have been negatively affected by a host country's sovereign regulatory measures.<sup>276</sup> ISDS provisions usually authorise corporations to bypass national courts and sue governments at international tribunals.<sup>277</sup> The ISDS provision exposes the nation-states to external dispute settlement measures of international tribunals.<sup>278</sup> ISDS at

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<sup>273</sup> Bruhn D 2014 Global value chains and deep preferential trade agreements: promoting trade at the cost of domestic policy autonomy? 27

<sup>274</sup> Lester and Mercurio (2017) Safeguarding Policy Space in Investment Agreements, IIEL ISSUE BRIEF 12/2017, Institute of International Economic Law 1

<sup>275</sup> Traidcraft 2015 International Investment Agreements Under Scrutiny 19

<sup>276</sup> Ranjan and Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 2

<sup>277</sup> López 2014 Bolivia denounces its Bilateral Investment Treaties and attempts to put an end to the Power of Corporations to sue the country in International Tribunals 4

<sup>278</sup> Ranjan and Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 4

international tribunal restrain the right of nation-states to regulate their economies.<sup>279</sup> This motivated some countries to denounce the ISDS system.<sup>280</sup> Countries which includes Bolivia, Ecuador, and Venezuela had already denounced ICSID convention that enshrine ISDS mechanism.<sup>281</sup> The responses by countries to ISDS provision reveals that such provisions restrict state-sovereignty. Nation-states, which ratify an IIT with ISDS provision, give away their sovereign rights to freely regulate investments within their jurisdiction.

### ***2.5.2 Fair and Equitable Treatment***

The fair and equitable treatment (FET) provision had emerged as a prominent ground for finding breaches of IITs by host countries.<sup>282</sup> In the case of *Tecmed v. Mexico*, a tribunal found out that a breach of the investor's expectations to be subject to FET rule.<sup>283</sup> Such a broad interpretation of FET provision by arbitral tribunals make the provision a catchall provision capable of restricting various legislative, regulatory and administrative actions of host states.<sup>284</sup> FET motivates corporations to litigate government against environmental and public health regulation measures when regulating mining and tobacco industries, respectively.<sup>285</sup> India noted FET investment provisions unduly compromised its exercise of regulatory powers.<sup>286</sup> In addressing restrictive

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<sup>279</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 15

<sup>280</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 5

<sup>281</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 5

<sup>282</sup> UNCTAD 2005 Investor-State Disputes Arising From Investment Treaties: A Review 37

<sup>283</sup> UNCTAD 2005 Investor-State Disputes Arising From Investment Treaties: A Review 39

<sup>284</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 26

<sup>285</sup> Lester and Mercurio 2017 Safeguarding Policy Space in Investment Agreements IIEL ISSUE BRIEF 12/2017, Institute of International Economic Law 2

<sup>286</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 16

consequences of FET, India reviewed FET in its BITs that relates to an undefined fair and equitable treatment provision.<sup>287</sup> FET therefore restrict state-sovereignty of nation-states.

### 2.5.3 *Most Favoured Nation*

Most-favoured-nation (MFN) treatment typically requires a foreign investor to be accorded the highest standard of treatment available to an investor from any other foreign country.<sup>288</sup> The provision intends to level the playing field for all foreign investors by eliminating discrimination of investors from different countries.<sup>289</sup> MFN provision can broaden the scope of an investor's procedural and substantive rights beyond those provided in IITs of concern.<sup>290</sup> Investors had been borrowing ISDS provisions that were investor friendly from secondary BITs with varying degrees of success.<sup>291</sup> In the case of *Maffezini v. Spain*, an Argentine investor in Spain, filed a claim against the Argentina-Spain BIT but used a more beneficial provision on time requirement in the arbitration process found in Chile-Spain BIT.<sup>292</sup> In that case, the tribunal accepted application of the MFN principle, subject to the limitation of not overriding public policy considerations by parties to negotiations.<sup>293</sup> MFN provision was also used in *White Industries v. India case* and this motivated India to revise MFN provisions in its 2016 Model BIT.<sup>294</sup> In that respect, MFN in their restrictive construction give away state-sovereignty.

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<sup>287</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 16

<sup>288</sup> UNCTAD 2005 Investor-State Disputes Arising From Investment Treaties: A Review 34-35

<sup>289</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 23

<sup>290</sup> UNCTAD 2005 Investor-State Disputes Arising From Investment Treaties: A Review 35

<sup>291</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 22

<sup>292</sup> UNCTAD 2005 Investor-State Disputes Arising From Investment Treaties: A Review 35

<sup>293</sup> UNCTAD 2005 Investor-State Disputes Arising From Investment Treaties: A Review 35

<sup>294</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 23

#### 2.5.4 National Treatment

The national treatment (NT) provision protects foreign investors against nationality-based discrimination. The NT requires foreign investors and their investment to be treated in the same way the host-country would treat its domestic investors and their investments.<sup>295</sup> The provision guarantees investors of an equal level playing field with their comparable domestic investors. NT provision protects foreign investors against discriminatory treatment by the host-state either through legal or administrative measures.<sup>296</sup> The scope of a national treatment obligation may span across pre-establishment, management, operational and winding-up stages of an investment.<sup>297</sup> In the case of *Marvin Roy Feldman v The United Mexican States*, the tribunal used national treatment principle on protection against discrimination of foreign status of the investor.<sup>298</sup>

National treatment provision restrict sovereignty of a nation-state to develop peculiar policies which differentiate between domestic investors and foreign investors.<sup>299</sup> For example, nation-states may need to accord favorable treatment to economically disadvantaged minorities or ethnic groups.<sup>300</sup> In that regard, NT constrain a country's right to give a justified preferential treatment to certain class of domestic investors. Some countries addressed the negative impact of NT by excluding sensitive policy areas from NT obligation and other countries omitted the provision altogether as in United Arab Emirates–Viet Nam BIT (2003).<sup>301</sup> The deliberate exclusion of such a provision by nation-states supports the view that national treatment provision restricts state-sovereignty.

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<sup>295</sup> Hamzah 2018 Bilateral Investment Treaties (Bits) In Indonesia: A Paradigm Shift, Issues And Challenges 3

<sup>296</sup> UNCTAD 2005 Investor-State Disputes Arising From Investment Treaties: A Review 32

<sup>297</sup> UNCTAD 2005 Investor-State Disputes Arising From Investment Treaties: A Review 32

<sup>298</sup> UNCTAD 2005 Investor-State Disputes Arising From Investment Treaties: A Review 33

<sup>299</sup> World Investment Report 2015 Reforming International Investment Governance 144

<sup>300</sup> World Investment Report 2015 Reforming International Investment Governance 144

<sup>301</sup> World Investment Report 2015 Reforming International Investment Governance 144

### 2.5.5 Umbrella Clause

An umbrella provision in IITs requires a host-state to respect any obligation that it assumes with regard to a specific investment such as obligations undertaken in an investment contract.<sup>302</sup> The provision elevates contractual obligations, for example, in concession agreement to an IIA, meaning that breach of a contract can become a violation of the IIT.<sup>303</sup> The *SGS v. Philippines case*, which involved an umbrella provision in Swiss – Philippines BIT elevated the contractual claim to a treaty claim.<sup>304</sup> Such elevation of a commercial contract to a treaty expands the obligation of nation-states to far-reaching legal consequences by subjecting it to various potential claims. That motivated some countries to avoid potentially negative consequences of an umbrella clause by limiting its application to conduct that constitutes an exercise of sovereign powers by a country and not an ordinary breach of contract by a nation-state.<sup>305</sup> There had been a growing number of nation-states omitting the umbrella clause in their IITs as a way of safeguarding their right to regulate.<sup>306</sup>

### 2.5.6 Scope of Application

A broad definition of ‘investment’ in IITs broadens the scope of rights and obligations under a treaty.<sup>307</sup> Investment definition that broadens obligations of nation-states will broaden the restriction on a country’s regulatory space. Asset-based definition of ‘investment’ provides a broad meaning of investment that includes all kind of assets with economic value acquired or established by a foreign investor. In the 2016 Model BIT, India migrated away from a broad

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<sup>302</sup> World Investment Report 2015 Reforming International Investment Governance 144

<sup>303</sup> World Investment Report 2015 Reforming International Investment Governance 144

<sup>304</sup> Nishith Desai Associates 2018 *Bilateral Investment Treaty Arbitration and India : With special focus on India Model BIT*, 2016 41

<sup>305</sup> World Investment Report 2015 Reforming International Investment Governance 144

<sup>306</sup> World Investment Report 2015 Reforming International Investment Governance 133

<sup>307</sup> Prabhash Ranjan and Pushkar Anand 2017 *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction* Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 19

asset-based meaning of investment to an enterprise-based meaning.<sup>308</sup> Enterprise-based definition requires only those investors legally constituted in a given country to bring a BIT claim against the host-state.<sup>309</sup> In that case, migrating away from an asset-based approach to an enterprise-based approach narrows the scope of international investments to be protected and reduces the number of BIT claims that can be brought against a country.<sup>310</sup> In that regard, a broad definition of state sovereignty restrict state-sovereignty.

### ***2.5.7 Duration***

The duration and termination provisions specify the period IITs will be effective. These provisions can lock a nation-state for a long period with restrictions on opting out or terminating the treaty.<sup>311</sup> The provisions on duration and termination may be constructed in a way that a host state will give away the right to terminate or opt out of a treaty at any given time upon reasonable notice.<sup>312</sup>

### ***2.5.8 Other Provisions***

There are other restrictive provisions that are commonly found in IITs in addition to those explained above. The provisions include free transfer, performance requirements, nationalization

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<sup>308</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 19

<sup>309</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 20

<sup>310</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 20

<sup>311</sup> Hamzah 2018 Bilateral Investment Treaties (BITS) in Indonesia: A Paradigm Shift, Issues and Challenges, Journal of Legal, Ethical and Regulatory Issues Volume 21, Issue 1, 9

<sup>312</sup> Hamzah 2018 Bilateral Investment Treaties (BITS) in Indonesia: A Paradigm Shift, Issues and Challenges, Journal of Legal, Ethical and Regulatory Issues Volume 21, Issue 1, 9

and expropriation, top managerial personnel, entry and sojourn of foreign nationals, transparency, and compensation for damages by war and similar events and subrogation.<sup>313</sup>

The investment provisions, which are restrictive in their construction, restrict state-sovereignty despite fewer claims raised against them. This is revealed by MFN provision, which was once unpopular as far as litigation was concerned but, in recent years, it got prominence in numerous ISDS claims.<sup>314</sup> Investment provisions that restrict state-sovereignty are also stated and explained in Chapter 4.

## **2.6 Threat of State-sovereignty and State-consent on international investment law**

### ***2.6.1 Unrestricted State-consent reduce effectiveness of International investment law***

The prevailing practice of seeking consensus in adopting an international agreement has not only led to protracted negotiations, but also to empty clauses, undermining necessary provisions which ensure an effective international legal regime.<sup>315</sup> The requirement of state-consent has inherent challenges as it make treaty negotiations cumbersome and slow. Treaty negotiation processes often create endless bottlenecks, provide many veto points, and invites strategic holdout behavior, all of which making agreements very difficult.<sup>316</sup> According to Guzman, state-consent is usually reached after weakening the content of agreements undermining what is actually needed to ensure the establishment of an effective international investment law.

Guzman in a paper titled ‘The consent Problem in International Law’, regarded state-consent as a main problem of international legal system which thwart all efforts to use IIL as a tool to assist in dealing with world`s investment problems.<sup>317</sup> Guzman further alleged that the practice of seeking

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<sup>313</sup> Hamzah 2018 Bilateral Investment Treaties (BITS) in Indonesia: A Paradigm Shift, Issues and Challenges, Journal of Legal, Ethical and Regulatory Issues Volume 21, Issue 1, 3

<sup>314</sup> UNCTAD 2005 Investor-State Disputes Arising From Investment Treaties: A Review 35

<sup>315</sup> Guzman 2011 Against Consent 751

<sup>316</sup> Guzman 2011 Against Consent 751

<sup>317</sup> Guzman 2011 The Consent Problem in International Law 7

near consensus in adoption of an international agreement have led to ambiguous and empty provisions which have reduced the effectiveness of international legal regime.<sup>318</sup> IIL that results after compromises can be ineffective in addressing complex international investment issues.<sup>319</sup> It is also wearisome that the empty or compromised provisions are achieved at high cost. The above argument by Guzman affirms that state-consent poses a threat to the effectiveness of IIL.

### ***2.6.2 Unrestricted State-sovereignty weakens IIL's ability to resolve conflict of Interest***

Developing and developed countries take measures to protect their interests and justify their actions using sovereignty-centered arguments.<sup>320</sup> Nation-states tend to cancel or revise their investment treaties in the name of sovereignty whenever international investment agreements are perceived to be incompatible with their interests. In periods when investments outcome is unfavorable state sovereign arguments can be used to defend expropriatory actions, of which, in normal business arrangement there is a possibility of one party benefiting at the expense of the counterpart. In most international agreements, nation-states retain the power or right to exit treaties whenever they want to exit due to their own reasons which maybe selfish at times.<sup>321</sup> Once a treaty is terminated, a nation-state ceases to be controlled by provisions of the treaty upon expiry of sunset clause.<sup>322</sup>

It should be noted that preference of countries change from time to time especially with change in governments. Hence, benefits from treaties change from time to time and with change of governments. Such a swing in benefits of treaties may destabilise IIL, as nation-states tend to exercise their sovereignty in-order to follow their self-interests by terminating investment

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<sup>318</sup> Guzman 2011 The Consent Problem in International Law 7

<sup>319</sup> Samaan 2011 Enforcement of International Environmental Treaties: At Analysis 277 "...the less sovereignty a treaty sacrifices, the more likely it is to gain assent, but the more likely the agreement will fail to accomplish significant ... goals."

<sup>320</sup> Sornarajah 2010 The International Law On Foreign Investment 34

<sup>321</sup> Hathaway 2008 International Delegation and State-sovereignty 122

<sup>322</sup> Hathaway 2008 International Delegation and State-sovereignty 122

treaties, even though maintaining investment agreements may be good for the rest of the world.<sup>323</sup> These realities support the view by Sornarajah that state-sovereignty arguments tend to be central in deepening conflict of interest in international investment disputes.<sup>324</sup>

Newly industrialized economies such as Brazil, India and China are now exporting capital through sovereign wealth funds and other vehicles to developed countries.<sup>325</sup> Therefore, the provisions that were once favorable to developed countries will soon become favorable to emerging countries at the expense of developed economies. On that note, Sornarajah predicted that developed countries are more likely to backtrack on rules or provisions, which once saved them well in the past using sovereignty defenses to redraw boundaries on investment protection.<sup>326</sup> These practices stifle the effectiveness of international investment law in resolving conflict of interest even though all laws are developed to resolve conflict of interest.<sup>327</sup> When law fails to resolve conflict of interest, its virtue disappears. This supports Hathaway's argument that state-sovereignty conflicts with treaty based IIL.<sup>328</sup>

### ***2.6.3 State-sovereignty destabilise IIL***

Besson and Tasioulas argued that state-sovereignty promotes opposing outcomes of investment treaties as it demands both 'the power to enter into treaties' and power 'to rule out the binding force of treaties'.<sup>329</sup> The pursuit of opposing outcomes was considered by Besson and Tasioulas

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<sup>323</sup> Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty In International Investment Law 2: "...in public international law, terms such as sovereignty are used to pursue political aims which decision-makers endorse when deciding disputes."

<sup>324</sup> Sornarajah 2010 The International Law On Foreign Investment 34: "It demonstrates that governments of both developed and developing countries take measures which are protective of their own economic interests and take refuge in sovereignty-centred arguments in order to justify them"

<sup>325</sup> Sornarajah 2010 The International Law On Foreign Investment 4

<sup>326</sup> Sornarajah 2010 The International Law On Foreign Investment 4

<sup>327</sup> Sornarajah 2010 The International Law On Foreign Investment 33

<sup>328</sup> Hathaway 2008 International Delegation and State-sovereignty 117: states that international delegation "bring the perceived conflict between state-sovereignty and international law to the fore".

<sup>329</sup> Besson and Tasioulas 2010 The Philosophy of International Law 245

to be a paradox. Investment agreements are constructed with exit clauses to encourage countries to consent to such investment agreements. Exit clauses allow nation-states to end treaty-based cooperation when an agreement becomes costly to a nation-state. In periods when investment outcomes are unfavorable, nation-states use state-sovereignty arguments to exit investment treaties.<sup>330</sup> Exit clauses in investment treaties motivate nation-states to take self-saving and opportunistic behavior of entering and exiting investment agreements. The practice of entering and exiting investment treaties causes uncertainty of IIL. Uncertainty negatively affects IIL, as certainty is a virtue of any law.

#### ***2.6.4 Conflicting effects of State-sovereignty given away on IIL purpose***

The studies on the impact of IITs on attracting foreign investments arrived at conflicting conclusions. This is affirmed by Sasse who revealed some studies that confirmed that investment agreements have a strong correlation with FDI while other studies found weak or no correlation at all.<sup>331</sup> IITs with restrictive provisions are more likely to have stronger positive correlation or association with Investment flows when compared to IITs with less restrictive provisions.<sup>332</sup> These insights reveal lack of consensus on effects of state-sovereignty given away, on achieving the purpose of IIL of attracting international investment. The opposing conclusions mean that: (i) international investment law is impossible when nation-states maintain their sovereignty or (ii) state-sovereignty should be impossible for international investment law to exist.<sup>333</sup>

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<sup>330</sup> Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty In International Investment Law 2: "... in public international law, terms such as sovereignty are used to pursue political aims which decision-makers endorse when deciding disputes."

<sup>331</sup> Sasse 2011 An Economic Analysis of Bilateral Investment Treaties 69

<sup>332</sup> UNCTAD 2009 The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries 39-40

<sup>333</sup> Besson and Tasioulas 2010 The Philosophy of International Law 245

### ***2.6.5 Countries Experiences with Restrictive Investment Provisions***

Substantive investment provisions in IITs that are aimed at protecting investors also constrain host-state`s right to regulate its economy in public interests.<sup>334</sup> International commitments made through restrictive investment provisions encroach upon a nation-state policy space.<sup>335</sup> That would mean that nation-states give away their sovereignty when they enter into IIA.<sup>336</sup> Therefore, the adoption of international investment rules results in loss of state-sovereignty.<sup>337</sup> Restrictive investment provisions which gave away state-sovereignty, motivated nation-states to recalibrate their international investment treaties.<sup>338</sup>

The early movers in calibration of investment treaties included USA and Canada which were at the receiving end of numerous arbitration cases initiated in the context of NAFTA.<sup>339</sup> The recalibration of IITs re-addressed excessive giving away of state-sovereignty through restriction of regulatory space.<sup>340</sup> The quest by nation-states to regain their sovereignty had motivated countries such as India, Indonesia and Bolivia among others to terminate some of their investment treaties. These countries terminated treaties in order to regain their policy space. The termination of investment treaties by countries was then followed by renegotiation of investment treaties with less restrictive provisions.<sup>341</sup> The practice of terminating and reviewing IITs reveals that IITs are not homogenous. Below are experiences of some countries that were affected by restrictive investment provisions and took measures to mollify the lost sovereign rights.

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<sup>334</sup> Cotula 2014 Do investment treaties unduly constrain regulatory space? 24:

<sup>335</sup> Cho and Dubash 2003 Will Investment Rules Shrink Policy Space for Sustainable Development? Evidence from the Electricity Sector World Resources Institute 4: “By construction, international commitments encroach upon domestic policy autonomy; hence arguments that multilateral investment rules may infringe upon “policy space””

<sup>336</sup> Meltzer 2005 State-sovereignty and the Legitimacy of the WTO, U. Pa. J. Int'l Econ. L. [Vol. 26:4], 698

<sup>337</sup> Cho and Dubash 2003 Will Investment Rules Shrink Policy Space for Sustainable Development? Evidence from the Electricity Sector World Resources Institute 7

<sup>338</sup> Cotula 2014 Do investment treaties unduly constrain regulatory space? 24:

<sup>339</sup> Cotula 2014 Do investment treaties unduly constrain regulatory space? 24:

<sup>340</sup> Cotula 2014 Do investment treaties unduly constrain regulatory space? 25:

<sup>341</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 17

## India

In 2011, India encountered her first publicly known investment treaty arbitral challenge in *White Industries v. India case* where India was found to have violated her obligations provided in India-Australia BIT.<sup>342</sup> Following the White Industries award, more corporations slapped India with ISDS notices against India, challenging her against a wide range of regulatory measures including imposition of retrospective taxes, revocation of telecom licenses and cancellation of spectrum licenses.<sup>343</sup> IITs arbitral awards against India were criticised by the Parliament of India as a direct attack on its Judiciary sovereignty.<sup>344</sup> The threat of BIT arbitrations was argued to have a chilling effect on the ability of the Government of Indian to regulate its economy.<sup>345</sup>

The White Industries award and various ISDS notices that followed called for a rethinking on BITs in India and motivated the review of BITs.<sup>346</sup> Civil society organisations, academia and parliamentarians demanded India to recalibrate her BITs so that she regains her policy space.<sup>347</sup> The review process which was launched in 2012 led India to the adoption of 2016 Model BIT.<sup>348</sup> In the New Model BIT, India revised provisions like MFN and ISDS mechanism clause. India's concern on broad interpretation of MFN provisions directly came from the White Industries case.<sup>349</sup> Subsequent to her adoption of the 2016 Model BIT, India issued notices on termination of BITs with 58 countries. The termination of treaties was followed by review of BITs in line

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<sup>342</sup> Ranjan and Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction 14

<sup>343</sup> Ranjan and Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction 14

<sup>344</sup> Ranjan and Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction 15

<sup>345</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 15

<sup>346</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 16

<sup>347</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 14

<sup>348</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 17

<sup>349</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 17

with the 2016 Model BIT.<sup>350</sup> The review was necessitated by the realisation that IITs that contain broad and vague provisions are susceptible to broad and ambiguous provisions would encroach upon her regulatory powers.<sup>351</sup>

## Indonesia

Indonesia raised concerns on excessive corporate rights provided in IIAs that were incompatible with state-sovereignty.<sup>352</sup> Indonesia's prevailing investment treaties were interpreted in a way that restricted its sovereign right to regulate its own economy.<sup>353</sup> Indonesia was subjected, for example, to arbitrations brought under its BIT with the United Kingdom and a multilateral investment treaty among 55 Islamic nation-states, the OIC. The country also faced expropriation claims by foreign investors in cases of *Churchill Mining PLC v Indonesia* and *Planet Mining Pty Ltd vs. Indonesia*, which were brought under the UK-Indonesia and Australia-Indonesia BITs respectively.<sup>354</sup>

It was argued that arbitral tribunals interpreted IITs scope and jurisdictional provisions beyond what was intended or contemplated by Indonesia when it executed such treaties.<sup>355</sup> Indonesia found it difficult to maintain her sovereign power to regulate its economy as tribunals favoured investors while overlooking domestic interests as well as the sovereignty of Indonesia.<sup>356</sup>

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<sup>350</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 17

<sup>351</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 17

<sup>352</sup> Hamzah 2018 Bilateral Investment Treaties (BITS) in Indonesia: A Paradigm Shift, Issues and Challenges, Journal of Legal, Ethical and Regulatory Issues Volume 21, Issue 1, 12

<sup>353</sup> Hamzah 2018 Bilateral Investment Treaties (BITS) in Indonesia: A Paradigm Shift, Issues and Challenges, Journal of Legal, Ethical and Regulatory Issues Volume 21, Issue 1, 8

<sup>354</sup> Hamzah 2018 Bilateral Investment Treaties (BITS) in Indonesia: A Paradigm Shift, Issues and Challenges, Journal of Legal, Ethical and Regulatory Issues Volume 21, Issue 1, 9

<sup>355</sup> Hamzah 2018 Bilateral Investment Treaties (BITS) in Indonesia: A Paradigm Shift, Issues and Challenges, Journal of Legal, Ethical and Regulatory Issues Volume 21, Issue 1, 6

<sup>356</sup> Hamzah 2018 Bilateral Investment Treaties (BITS) in Indonesia: A Paradigm Shift, Issues and Challenges, Journal of Legal, Ethical and Regulatory Issues Volume 21, Issue 1, 4

Indonesia resolved to review provisions of restrictive BITs.<sup>357</sup> Subsequently, it terminated 26 BITs out of total 71 BITs as part of its strategy of reviewing its treaties.<sup>358</sup>

## **South Africa**

South Africa terminated several investment treaties and adopted a piece of domestic legislation as a replacement to investment protections of terminated treaties.<sup>359</sup> The decision by South Africa to terminate its BITs followed *Piero Foresti v. Republic of South Africa* case, in which, investors from Luxembourg and Italy filed a suit with the International Convention for the Settlement of Investment Disputes (ICSID) on expropriation of their mineral rights.<sup>360</sup> The investors relied on BITs provisions in challenging South Africa. This motivated South Africa to do away with restrictive provisions like Fair and Equitable Treatment (FET).

## **Bolivia**

In 2000, after the ‘Water War’ in Cochabamba, Bolivia witnessed how the system of investment rules and arbitration tribunals was used to enforce the interests of international corporations, over and above, the popular will.<sup>361</sup> In response to such experiences, the people of Bolivia mandated their government to withdraw from investment treaties that made up such a system.<sup>362</sup> In 2007,

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<sup>357</sup> Hamzah 2018 *Bilateral Investment Treaties (BITS) in Indonesia: A Paradigm Shift, Issues and Challenges*, *Journal of Legal, Ethical and Regulatory Issues* Volume 21, Issue 1, 1

<sup>358</sup> Prabhash Ranjan and Pushkar Anand 2017 *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction* *Northwestern Journal of International Law & Business*, Volume 38, Issue 1 Fall 6

<sup>359</sup> Gazzini 2017 *Rethinking the Promotion and Protection of Foreign Investments: The 2015 South Africa’s Protection Investment Act* 1

<sup>360</sup> Reed 2014 *South African Revolutionizing Foreign Investment Protection System* 298

<sup>361</sup> López 2014 *Bolivia denounces its Bilateral Investment Treaties and attempts to put an end to the Power of Corporations to sue the country in International Tribunals* 1

<sup>362</sup> López 2014 *Bolivia denounces its Bilateral Investment Treaties and attempts to put an end to the Power of Corporations to sue the country in International Tribunals* 1

Bolivia denounced the ICSID convention that provides for ISDS mechanism.<sup>363</sup> She also terminated 10 BITs out of total 23 BITs.<sup>364</sup>

## **Ecuador**

Ecuador faced a similar challenge on the negative effect of investment treaties on its policy space. She reacted to such unintended consequences by denouncing the ICSID convention that provides for ISDS mechanism.<sup>365</sup> Ecuador also terminated 11 investment treaties out of total 29 investment treaties.<sup>366</sup> She terminated investment treaties with Cuba, Dominican Republic, El Salvador, Finland, Germany, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay.<sup>367</sup>

### ***2.6.6 Evaluation of threat of State-sovereignty and state-consent on IIL***

According to Sasse, “IITs are obviously international investment law”<sup>368</sup> and, this has motivated the conclusion that IIL had been treatified. The principal purpose of investment agreement as provided in preambles of most IITs is to attract international investments. That is supported by Sachs and Sauvant who argued that the principal purpose of IITs is to attract international investment.<sup>369</sup> In that view, IIL is effective if it realises its purpose of attracting international investment. This motivated several scholars to study the impact of IITs on attracting international

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<sup>363</sup>Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 5-6

<sup>364</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 6

<sup>365</sup>Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 5-6

<sup>366</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 6

<sup>367</sup> Prabhash Ranjan and Pushkar Anand 2017 The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction Northwestern Journal of International Law & Business, Volume 38, Issue 1 Fall 6

<sup>368</sup> Sasse 2011 An Economic Analysis of Bilateral Investment Treaties 65

<sup>369</sup> Sachs and Sauvant 2009 The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows lii

investment.<sup>370</sup> However, such studies arrived at different conclusions on the effect of IITs on FDI.

Researches arrived at different conclusion on the effect of IITs on attracting international investment.<sup>371</sup> Some researchers found a weak or a considerable impact of IITs on FDI, while other studies found no impact at all.<sup>372</sup> Such different research findings had been influenced by the philosophy underpinning the researches. These researchers examined the effect of IITs on FDI, in which, IITs were assumed to be homogenous. The assumption of homogenous IITs was criticised in the UNCTAD report of 2005.<sup>373</sup> The argument in termination of IITs shows that IITs are not homogenous as some have stronger restrictive provisions than others. IITs with more restrictive provisions give away more state-sovereignty than IITs with less restrictive provisions. The literature had not adequately explored the impact of state-sovereignty given away on attracting international investment. This motivated the need to assess effectiveness of IIL by analysing the impact of state-sovereignty given away in IIAs on attracting international investment.

Researches by Hathaway, Sornarajah, Miyoshi, and Fitzgerald among others, insinuated that state-sovereignty and international investment law are incompatible. However, these researches<sup>374</sup> were not conclusive in explaining on which of the two, thus, state-sovereignty and international investment law, threatens the other. On one hand, research by Turner, Cryer, Gardner and Romson indicated that state-sovereignty poses a threat on IIL. On the other hand Floriani, Mann and Yannis inferred that IIL is a threat to state-sovereignty. There had been a number of legal scholars who held the same position view that international law poses a threat to

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<sup>370</sup> Sasse 2011 *An Economic Analysis of Bilateral Investment Treaties* 69

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<sup>372</sup> UNCTAD 2009 *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* xiii

<sup>373</sup> UNCTAD 2009 *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* 32

<sup>374</sup> Turner, Cryer, Gardner and Romson had been of the view that state-sovereignty threatens international law while Floriani, Mann and Yannis regarded international law to be a threat to state-sovereignty.

state-sovereignty.<sup>375</sup> Therefore the debate as to which of the two variables threatens the other cannot be complete without employing research approaches which adopts use of analytical and statistical techniques. The next chapter presents the conceptual and theoretical frameworks developed to enable analysis of the influence of state-sovereignty on IIL.

## **2.7 Threat of State-sovereignty on Global development and Mutual Survival**

### ***2.7.1 Sovereignty of nation-state derived from People***

Sovereignty as a concept of international investment law is a compound doctrine that is understood by examining the relationship between sovereignty of people and sovereignty of nation-states.<sup>376</sup> It is generally appreciated that sovereignty belongs to people who then transfer their sovereignty to nation-states.<sup>377</sup> Sovereignty rests in the people through operation of general will.<sup>378</sup> In that view, state-sovereignty can be regarded as a derivative concept that is derived from sovereign people in a given nation-state. Despite the compound meaning of sovereignty, it is state-sovereignty that shapes international investment law and, luminary in development discourse.

Examination of the sovereignty of people and its interface with sovereignty of nation-state is important. An appreciation of such an interface is important because modern approaches to development are human centered as the interest of nation-states is to protect of human persons.<sup>379</sup>

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<sup>375</sup> Hathaway 2008 International Delegation and State-sovereignty 116: “Beginning in the 1990s, a series of legal scholars criticized international law as posing a threat to state sovereignty.”

<sup>376</sup> Araujo 2000 Sovereignty, Human Rights, and Self-Determination: The Meaning of International Law 1482: “To be properly understood within the framework of international law, sovereignty is a compound doctrine that is best understood by examining the relationship between the sovereignty of a State and the sovereignty of peoples”

<sup>377</sup> Onwe and Nwogbaga 2015 Conceptual Issues and Theoretical Analysis of Sovereignty 21: “...People transfer their sovereignty to the sovereign...”

<sup>378</sup> Head 2019 Addressing global challenges through pluralistic sovereignty: critique of state sovereignty as centerpiece of international law 747: “...sovereignty rested in "the people" through the operation of that "General Will." ”

<sup>379</sup> 2009 Changing Concepts of State Sovereignty 418

This is supported by Marks who argued that human person is the central subject of development.<sup>380</sup> According to Sengupta, peoples as collective of human persons are entitled to full sovereignty over their natural resources and wealth.<sup>381</sup> In that regard, nation-states should exercise their sovereignty with recognition that their sovereignty is derived from the human person. The notion that sovereignty belongs to people is supported by extracts from Constitutions of various nation-states provided in Table 1 below.

The argument that sovereignty of nation-states comes from people legitimizes the recognition of development as a human right. This motivates not only recognition of RtD but also its implementation. Therefore, the appreciation of the concept of state-sovereignty in its relation to sovereignty of people is crucial in analysing the influence of state-sovereignty on global development and mutual survival.

**Table 1: Constitutions of States reveal Sovereignty belongs to people**

Country	Text	Legal Source
Albania	“Sovereignty in the Republic of Albania belongs to the people”	Constitution of the Republic of Albania Article 2 <sup>382</sup>
Brazil	“All power emanates from the people...”	Constitution of the Federative Republic of Brazil Article 1 <sup>383</sup>
China	“All power in the People's Republic of China belongs to the people”	Constitution of the People's Republic of China Article 2(1) <sup>384</sup>
Croatia	“Power in the Republic of Croatia derives from the people and rests with the people ...”	Constitution of the Republic of Croatia Article 1 <sup>385</sup>
Finland	“Sovereign power in Finland shall belong to the people ...”	Constitution of Finland section 2 <sup>386</sup>
Italy	“Sovereignty belongs to the people and is exercised by the people ...”	Constitution of the Italian Republic Article 1 <sup>387</sup>
Japan	“The Emperor shall be the symbol of the State and of the	Japan's Constitution Article 1 <sup>388</sup>

<sup>380</sup> Marks 2004 The Human Right to Development: Between Rhetoric and Reality Harvard Human Rights Journal / Vol. 17 151

<sup>381</sup> Sengupta 1999 Realizing the Right to Development 11

<sup>382</sup> [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2016\)064-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)064-e)

<sup>383</sup> <http://english.tse.jus.br/arquivos/federal-constitution>

<sup>384</sup> <http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn147en.pdf>

<sup>385</sup> [https://www.usud.hr/sites/default/files/dokumenti/The\\_consolidated\\_text\\_of\\_the\\_Constitution\\_of\\_the\\_Republic\\_of\\_Croatia\\_as\\_of\\_15\\_January\\_2014.pdf](https://www.usud.hr/sites/default/files/dokumenti/The_consolidated_text_of_the_Constitution_of_the_Republic_of_Croatia_as_of_15_January_2014.pdf)

<sup>386</sup> <http://www.refworld.org/docid/3ae6b53418.html>

<sup>387</sup> [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf)

	unity of the People, deriving his position from the will of the people with whom resides sovereign power”	
Nepal	“The sovereignty and state authority of Nepal shall be vested in the Nepalese people.”	The Constitution of Nepal Part 2 <sup>389</sup>
Nigeria	“sovereignty to belong to the people of Nigeria ...”	Constitution of the Federal Republic of Nigeria Section 14(2)(a) <sup>390</sup>
Portugal	“Sovereignty shall be single and indivisible and shall lie with the people ...”	Constitution of the Portuguese Republic Article 3(1) <sup>391</sup>
Russia	“The bearer of sovereignty and the only source of power in the Russian Federation shall be its multinational people”	Constitution of the Russian Federation Article 3(1) <sup>392</sup>
Spain	“National sovereignty belongs to the Spanish people, from whom all state powers emanate”	Spanish Constitution Section 1(2) <sup>393</sup>
Sweden	“All public power in Sweden proceeds from the people”	Constitution of Sweden Article 1(1) <sup>394</sup>
Zimbabwe	“Respect for the people of Zimbabwe, from whom the authority to govern is derived”	Constitution of Zimbabwe Section 3(2)(f)

Sources: Extracts from Constitutions of Countries available on internet

### 2.7.2 Global Development and Mutual Survival

A report by the Independent Commission on International Development (ICID) defined development as interdependence. The report further noted that both development and interdependence are preconditions of human survival.<sup>395</sup> The concept of development is human centered as revealed in RtD discourse.<sup>396</sup> Since 1945 there had been recognition of transition from nation-state values to human values.<sup>397</sup> Nation-states act as trustees of human persons in

<sup>388</sup> [https://www.constituteproject.org/constitution/Japan\\_1946.pdf?lang=en](https://www.constituteproject.org/constitution/Japan_1946.pdf?lang=en)

<sup>389</sup> <http://www.lawcommission.gov.np/en/documents/2016/01/constitution-of-nepal-2.pdf>

<sup>390</sup> <http://www.wipo.int/edocs/lexdocs/laws/en/ng/ng014en.pdf>

<sup>391</sup> <http://www.tribunalconstitucional.pt/tc/conteudo/files/constituicaoingles.pdf>

<sup>392</sup> <http://www.constitution.ru/en/10003000-02.htm>

<sup>393</sup> [http://www.lamoncloa.gob.es/lang/en/espana/leyfundamental/Paginas/titulo\\_preliminar.aspx](http://www.lamoncloa.gob.es/lang/en/espana/leyfundamental/Paginas/titulo_preliminar.aspx)

<sup>394</sup> <http://www.wipo.int/edocs/lexdocs/laws/en/se/se137en.pdf>

<sup>395</sup> Independent Commission on International Development Issues Report 2002 A programme for survival 16

<sup>396</sup> Beukes 2000 Development: right to development to drive the African renaissance. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)* 46: “The human person is the central subject of development and should be the active participant and beneficiary of the right to development.”

<sup>397</sup> Henkin 1995 Human rights and state sovereignty 34

enforcement of RtD.<sup>398</sup> In that regard, nation-states espouse human survival as their own survival just as they espouse investors' claims as their own claims.<sup>399</sup> Therefore, the survival of humans can be transposed to the survival of nation-states just as sovereignty of people can be transposed to sovereignty of nation-state.

In an interdependent world, development of a nation-state affects its own survival and survival of other nation-states. Guerrero claimed that China and USA are economically interconnected such that they depend on each other for development and mutual survival.<sup>400</sup> Bello further regarded interdependence between China and USA as chain-gang economics.<sup>401</sup> In general, each nation-state's development affects the survival of other nation-states. Therefore, global development ensures mutual survival of nation-states. This close connection between global development and mutual survival motivates their joint use as doublets. International investment law, globalisation, RtD, human development and international cooperation, directly affects global development and mutual survival. These factors are not only interrelated, interconnected and overlapping in concepts but they are all affected by state-sovereignty.

### ***2.7.3 Determinants of global development and mutual survival***

#### ***International Investment Law (IIL)***

International investment law is one of the major determinant of global development and mutual survival. Nation-states create IIL through international investment agreements as it is argued that nation-states gradually construct IIL treaty by treaty (or 'BIT by BIT').<sup>402</sup> The principal purpose

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<sup>398</sup> Green 1984 Right to Development - Notes toward an Operational Approach," Third World Legal Studies 11: "At the global level, therefore, the right to development must be struggled for/enforced by states as representatives (trustees?) of the human beings and peoples of the states."

<sup>399</sup> Ryan M.C, 2009 Discerning the Compliance Calculus: Why States Comply with International Investment Law [Vol. 38:63] 73

<sup>400</sup>Guerrero 2014 China Rising: A New World Order or An Old Order Renewed? 14, Transnational Institute, [https://focusweb.org/system/files/shifting\\_power-china\\_0.pdf](https://focusweb.org/system/files/shifting_power-china_0.pdf)

<sup>401</sup> [https://fpif.org/chain-gang\\_economics/](https://fpif.org/chain-gang_economics/)

<sup>402</sup> Schill *et al* 2017 International Investment Law and Development: Friends Or Foes?9

of IIL is to attract foreign investment in order to meet development goals of nation-states.<sup>403</sup> IIL reduces investment risk through its protection measures that would attract international investment.<sup>404</sup> Foreign investment that is encouraged and promoted by IIL stimulates development of a host nation-state.<sup>405</sup> In light of the above, IIL is effective if it attracts and encourage international investment.<sup>406</sup>

FDI had been recognised as an innovative financing mechanism to complement the traditional official development assistance (ODA).<sup>407</sup> ODA used to be the main source of financing for development of developing nation-states.<sup>408</sup> In the recent years, most developed countries had been failing to achieve ODA targets. In the face of dwindling ODA, it is therefore crucial to cover the gap with FDI. International investment now plays a crucial role in an effort to realise global development and mutual survival.<sup>409</sup> The required international investment can be attracted by international investment law that ensures flow of international investment especially to developing countries.

The flow of international investment around the globe ensures diversification of international investment.<sup>410</sup> Diversification of investment throughout the world reduces world investment risk because if one region is affected by a natural disaster, investments in other regions will be available to sustain human-persons.<sup>411</sup> Reduction in global investment risk reduces the negative

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<sup>403</sup> Schill et al 2017 International Investment Law and Development: Friends Or Foes?19

<sup>404</sup>Yackee 2014 Political Risk and International Investment Law 494: "...BITs are associated with large increases in FDI, suggesting that the treaties are very effective reducers of risk"

<sup>405</sup> Sornarajah 2010 The International Law on Foreign Investment 65

<sup>406</sup> Segger et al 2011 Sustainable Development in World Investment Law 9-10

<sup>407</sup> Puvimanasinghe 2013 International solidarity in an interdependent world 191

<sup>408</sup> Ketkar S. and Ratha D. 2009 Innovative Financing for Development 2: "In 1970, for instance, it accounted for roughly 48 percent of total net capital flows, including grants, to all developing countries. Bank loans were a distant second at 22 percent, while foreign direct investment (FDI) made up another 19 percent."

<sup>409</sup> Puvimanasinghe 2013 International solidarity in an interdependent world 191

<sup>410</sup> Gottschalk 2003 Why It Can Be Economically and Morally Rewarding to Invest in Developing Countries 7: "...investing in developing countries have clear diversification benefits..."

<sup>411</sup> Simpson 2016 Is International Investment Diversification Prudent to Either the Individual or Corporate Investor? 392: "...International Investment Diversification (IID) allows investors to reduce the total risk..."

effects of global misfortunes and disasters. In an increasingly interdependent world, national misfortunes and/or disasters do not respect national boundaries or borders. Encouragement of international investments in all nation-states that is facilitated by IIL is crucial for global development and mutual survival.<sup>412</sup> Advanced technology, improved transport system and communication, makes it feasible to transport goods across the globe in case one of the regions is faced with scarcity/need.<sup>413</sup> In that regard, investment should be allowed to flow to all nation-states to ensure realisation of global development and mutual survival. IIL plays a crucial role in facilitating and encouraging flow of international investments.

### ***Development***

The increasing interdependence among nation-states through globalisation makes it imperative for the world to pursue global development rather than isolated development. Given that the level of development of a nation-state is reflected by human development, therefore development and human development will be used interchangeably in this study.<sup>414</sup> Failed development in one region can negatively affect many other regions. According to Potter, failing nation-states can “fall prey to and spawn a host of transnational security threats, including terrorism, weapons proliferation, infectious disease, environmental degradation and civil conflicts that spill over borders”.<sup>415</sup> The experiences of 11 September 2001 made America and other nation-states realise that threat to international security can come from any of the world’s weakest nation-states.<sup>416</sup>

The requirement of development has been given prominence in RtD discourse. The Vienna Declaration and Programme of Action declared that RtD and development to be interdependent

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<sup>412</sup> Segger et al 2011 Sustainable Development in World Investment Law 9

<sup>413</sup> Shangquan 2000 Economic Globalization: Trends, Risks and Risk Prevention 1: “The advancement of science and technologies has greatly reduced the cost of transportation and communication, making economic globalization possible. Today’s ocean shipping cost is only a half of that in the year 1930, the current airfreight 1/6, and telecommunication cost 1%.”

<sup>414</sup> Arisman 2018 Determinant of Human Development Index in ASEAN Countries 114

<sup>415</sup> Rice and Patrick 2008 Index of State Weakness In the Developing World 3

<sup>416</sup> Rice and Patrick 2008 Index of State Weakness In the Developing World 3

and mutually reinforcing.<sup>417</sup> Implementation of RtD addresses economic imbalances between developing and developed worlds.<sup>418</sup> Therefore, there is a feedback loop between implementing RtD and development. In such a case, RtD influences development of a nation-state, which through interdependence of nation-states, influences development of other nation-states. The influence of RtD to global development might have motivated Sampath to deliberately replace RtD with Right to Global Development.<sup>419</sup> Therefore, development in each nation-state plays a central role in the realisation of global development and mutual survival.

Nation-states like Afghanistan and Somalia demonstrated the dangers of ignoring failing nation-states. Both nation-states became bases from which large-scale terrorist attacks have been launched from.<sup>420</sup> In addition, world's experiences such as the 2008 global financial crisis, Ebola outbreak of 2014 in Africa and nuclear disasters in Japan have already affected many other countries. These misfortunes started in one region and spilt over into other regions. Therefore, a weak nation-state may motivate the rise of an entire bad neighborhood.<sup>421</sup> In that regard, Kofi Annan<sup>422</sup> declared that, "If states are fragile, the peoples of the world will not enjoy the security, development, and justice that are their right". This is why Ghani *et al* argued that global security cannot be ensured when other regions of the world are mired in misfortunes.<sup>423</sup>

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<sup>417</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>

<sup>418</sup> Bunn 2000 The Right to Development: Implications for International Economic Law 1426

<sup>419</sup> Sampath 2015 The Idea of the Nation-State as an Obstacle to the Right to Global Development. IAFOR Journal of Arts & Humanities, 3

<sup>420</sup> Potter 2004 State Responsibility, Sovereignty, and Failed States 3

<sup>421</sup> Patrick 2006 Weak States and Global Threats: Assessing Evidence of "Spillovers" 22: "...collapsed states are often adjacent to countries with similar characteristics that possess few defences against spillovers. Weaknesses in one state can encourage the rise of an entire "bad neighbourhood." Such a pattern emerged in West Africa during the 1990s, as the conflict in Liberia under Charles Taylor poured across national borders."

<sup>422</sup> The former United Nations secretary-general captured this new collective concern in his 2005 report

<sup>423</sup> Ghani, et al 2005 titled Closing the Sovereignty Gap: an Approach to State-Building 4

## *International Cooperation*

International co-operation for development is crucial in the realization of global development and mutual survival.<sup>424</sup> That position is affirmed by the Constitution of the United Nations Industrial Development Organization (UNIDO), which describes “international cooperation for development” as “the shared goal and common obligation of all countries”<sup>425</sup>. International cooperation for development by all nation-states is crucial because the cost of nation-state failure to develop is borne by neighboring countries.<sup>426</sup> This is due to the fact that in an interdependent world misfortunes in a single nation-state can spread all over the world.<sup>427</sup> Therefore, there is need of strong commitment to partnership and cooperation for the achievement of sustainable development.<sup>428</sup> This supports the view by ICID that survival of people no longer depends only on military balance, but also on global cooperation.<sup>429</sup> In that consideration, nation-states must cooperate to eliminate obstacles to development to ensure their mutual survival.<sup>430</sup>

It is argued that an obligation for international cooperation for development is a principle of international law.<sup>431</sup> In that regard, nation-states should cooperate for development for the realisation of development. Therefore, a duty to cooperate for development should be imposed on nation-states in order to facilitate comprehensive development.<sup>432</sup> Despite the requirement for cooperation in development, developed countries have been failing to meet the ODA target of

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<sup>424</sup> Marks 2008, Implementing the Right to Development, The Role of International Law

<sup>425</sup> Rich 1983 The right to development as an emerging human right, Virginia Journal of International Law 299: “...Constitution describes "international cooperation for development" as "the shared goal and common obligation of all countries.””

<sup>426</sup> Patrick 2006 Weak States and Global Threats: Assessing Evidence of “Spillovers” 23

<sup>427</sup> Puvimanasinghe 2013 International solidarity in an interdependent world 181

<sup>428</sup> United Nations 2017 The Sustainable Development Goals Report 54: “A stronger commitment to partnership and cooperation is needed to achieve the SDGs.”

<sup>429</sup> Independent Commission on International Development Issues Report 2002 A programme for survival 89

<sup>430</sup> Declaration on Right to Development 1986 Article 3

<sup>431</sup> Rich 1983 The right to development as an emerging human right, Virginia Journal of International Law 299: “It depicts this obligation as a principle of international law ...”

<sup>432</sup> Bunn 2000 The Right to Development: Implications for International Economic Law 1453

0.7% of Gross Domestic Product (GDP) on assisting developing countries.<sup>433</sup> In that respect, UN General Assembly once appealed to developed countries to mobilize their development assistance to reach the ODA target.<sup>434</sup> An obligation to provide ODA, is considered to be part of international law, which forms an important part of RtD.<sup>435</sup> Development assistance provides developing countries with means to realise their development that should positively affect development of other nation-states.<sup>436</sup>

ODA is accepted as a crucial public resource for sustainable development.<sup>437</sup> In addition to ODA, international investment, in form of FDI, had been identified as an innovative way of raising finance for development. It had been estimated that about US\$4.5 trillion per year worthy of investment is required in developing nation-states between 2015 and 2030 in sectors critical to the attainment of SDGs.<sup>438</sup> However, in 2018 the level of investment amounted to about US\$1.3 trillion meaning that an investment gap was about US\$3 trillion per year.<sup>439</sup> The investment gap had been high since 2015. The investment gap cannot be sufficiently funded by ODA because, at its pick in 2017, real ODA reached only US\$126 billion.<sup>440</sup> Therefore, the investment gap cannot be funded by ODA hence the need for more FDI.<sup>441</sup> The international development community had since recognised the private sector as critical in filling the investment gap.<sup>442</sup>

FDI had been increasing as a source of international private finance for development of developing countries. Since the 2002 Monterrey Consensus on Financing for Development,

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<sup>433</sup> Bunn 2000 The Right to Development: Implications for International Economic Law 1454

<sup>434</sup> Bunn 2000 The Right to Development: Implications for International Economic Law 1454

<sup>435</sup> Rich 1983 The right to development as an emerging human right, Virginia Journal of International Law 305-306

<sup>436</sup> Bunn 2000 The Right to Development: Implications for International Economic Law 1453

<sup>437</sup> Tomlinson B. 2018 Trends in the Reality of Aid 2018: Growing diversions of ODA and a diminished resource for the SDGs 1

<sup>438</sup> Blended Finance Vol. 1: A Primer for Development Finance and Philanthropic Funders 2015, An overview of the strategic use of development finance and philanthropic funds to mobilize private capital for development 6

<sup>439</sup> Blended Finance Vol. 1: A Primer for Development Finance and Philanthropic Funders 2015, An overview of the strategic use of development finance and philanthropic funds to mobilize private capital for development 6

<sup>440</sup> Tomlinson B. 2018 Trends in the Reality of Aid 2018: Growing diversions of ODA and a diminished resource for the SDGs 2: "Real ODA (discounting in-donor costs for refugee support and students) has grown by only 2% annually since 2010, from \$109 billion to \$126 billion in 2017"

<sup>441</sup> Blended Finance Vol. 1: A Primer for Development Finance and Philanthropic Funders 2015, An overview of the strategic use of development finance and philanthropic funds to mobilize private capital for development 6

<sup>442</sup> Blended Finance Vol. 1: A Primer for Development Finance and Philanthropic Funders 2015, An overview of the strategic use of development finance and philanthropic funds to mobilize private capital for development 6

private international capital flows in form of FDI, had been vital in complementing development efforts funded through ODA.<sup>443</sup> In support of that view, UNDP estimated that developing nation-states attracted FDI of more than US\$646billion in 2016 alone, in comparison to US\$140 billion in ODA in the same year.<sup>444</sup> In that respect, there would be need for cooperation by nation-states to ensure increased flow of international investment from developed world to developing world. Therefore, international cooperation in international investment is crucial for realisation of global development and mutual survival. Nation-states should cooperate in creation of IIL that encourages flow of international investment to facilitate sustainable development.

#### ***2.7.4 State-sovereignty impact on determinants of Global Development and Mutual Survival***

##### ***Unrestricted State-sovereignty threatens International Investment Law***

International investment law is weakened by state-sovereignty on encouraging flow of international investment.<sup>445</sup> State-sovereignty had been argued to be stumbling block that must be mastered.<sup>446</sup> Sovereign nation-states that are in need of international investment cannot be compelled to adopt appropriate investment treaties that can attract sound investment.<sup>447</sup> There is no law that compels countries to adopt investment friendly policies.<sup>448</sup> The sovereignty of nation-states makes them hostile to any force or cohesion to compel them to enter into international

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<sup>443</sup> Blended Finance Vol. 1: A Primer for Development Finance and Philanthropic Funders 2015, An overview of the strategic use of development finance and philanthropic funds to mobilize private capital for development 6

<sup>444</sup> Innovative Finance: Putting your money to (decent) work, Paper No. 75, [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/documents/genericdocument/wcms\\_655563.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/genericdocument/wcms_655563.pdf) 12

<sup>445</sup> Dolzer 2005 The Impact of International Investment Treaties on Domestic Administrative Law 953

<sup>446</sup> Samaan 2011 Enforcement of International Environmental Treaties: At Analysis 281

<sup>447</sup> Mosoti 2005 Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between 130: "...the obvious principle that no State can be compelled to grant preferential treatment to foreign investors ..."

<sup>448</sup> Island of Palmas case (United States v. The Netherlands) 1928 "Sovereignty in the relations between States signifies independence"

investment agreements that meaningfully protect international investment.<sup>449</sup> The current international investment law which respects state-sovereignty encourages nation-states to reverse their positions, at times, for their hostility reasons.<sup>450</sup> The reversal of investment agreements through termination is motivated by exit clauses that are common in most BITs and are considered necessary clauses that encourage nation-states to enter into investment agreements.<sup>451</sup> It had already been discussed in section 2.3 above that state-sovereignty poses a threat to IIL. The weakness caused by state-sovereignty on IIL reduces effectiveness of IIL in attracting investment.<sup>452</sup>

### ***State-sovereignty used by Nation-states to defend underdevelopment***

Developing countries are at times reluctant to adopt policies that attract foreign investment. This is due to the fact that investment friendly policies that attract investors may not be politically expedient. Consequently, such investment friendly policies are ignored at the expense of development. If these developing countries are criticized of their reluctance, they usually come up with a rebuttal, taking refuge in the principle of non-intervention in domestic affairs.<sup>453</sup> Such behavior that inhibits international investment flow is nourished and supported by the doctrine of state-sovereignty.<sup>454</sup> Yet as already discussed, an underdeveloped country is a threat to global

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<sup>449</sup> Samaan 2011 Enforcement of International Environmental Treaties: At Analysis 281: “Treaties are the accepted vehicle for addressing international solutions to problems; unfortunately, state sovereignty often precludes ratification of some treaties.”

<sup>450</sup> Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty In International Investment Law 1: “International investment law (IIL) can be criticized for its understanding of sovereignty.”

<sup>451</sup> Samaan 2011 Enforcement of International Environmental Treaties: At Analysis 277 “...the less sovereignty a treaty sacrifices, the more likely it is to gain assent, but the more likely the agreement will fail to accomplish significant environmental goals.”

<sup>452</sup> Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law 8: “...the sovereign powers of a host state should be minimized as sovereignty is the origin of conduct that might have a detrimental effect on the investment.”

<sup>453</sup> Masahiro 2013 Sovereignty and International Law 7

<sup>454</sup> Roth 2004 The Enduring Significance of State Sovereignty 1018: “Sovereignty, thus operates as a set of legal limitations on the establishment and enforcement of international norms.”

development especially in the modern interdependent world. This is the reason why state-sovereignty threatens global development and mutual survival.

### ***Trade-off between State-sovereignty given away and Globalization***

State-sovereignty is given away through globalisation.<sup>455</sup> Globalisation is a process of growing interdependence and interaction of factors, nation-states and non-state actors on a global scale to the extent that events happening in one place have an impact on societies that are far away.<sup>456</sup> Globalisation results in development of a homogeneous world where all human needs are interrelated.<sup>457</sup> In other words, globalization pushes towards unification of all nation-states at the expense of their national sovereignty. That is why Ku and Yo claimed that globalization erodes and eliminates the sovereignty of nation-states.<sup>458</sup> The above view is supported by Simonovic who affirmed that globalisation imposes limitations on state-sovereignty.<sup>459</sup>

### ***State-sovereignty undermines realisation of Right to Development (RtD)***

State-sovereignty obstructs the possibility of nation-states to meaningfully realise the RtD.<sup>460</sup> Nation-states possess sovereign rights of formulating peculiar national development policies independent of any external constraint.<sup>461</sup> Countries use sovereign arguments to defend their

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<sup>455</sup> Piccin and Pusterla 2010 Defending eroded states' sovereignty the European Union humanitarian aid policy 9: "...Interdependence and globalization brought new economic and political opportunities and states may be prompted to partially or totally give up their sovereignty..."

<sup>456</sup> Oji and Ozioko 2011 Effect of Globalization on Sovereignty of States 258

<sup>457</sup> Pendleton 1998 A New Human Right—the Right to Globalization 2054

<sup>458</sup> Ku and Yo 2013 Globalization and Sovereignty 210

<sup>459</sup> Simonovic 2000 State-sovereignty And Globalization: Are Some States More Equal? 403

<sup>460</sup> Sampath (2015). The Idea of the Nation-State as an Obstacle to the Right to Global Development. IAFOR Journal of Arts & Humanities, 1. <http://iafor.org/archives/journals/iafor-journal-of-arts-and-humanities/10.22492.ijah.3.1.02.pdf>

<sup>461</sup> Marks 2008 Implementing the Right to Development The Role of International Law 18; Zucca L. 2015 A Genealogy of State Sovereignty 412: "...state sovereignty means freedom from external interference ..."

reluctance of implementing RtD. There is a debate between developed countries and developing states in the implementation of RtD.<sup>462</sup> Developed states require developing states to embrace national laws that warrant development<sup>463</sup>. In that respect, developing countries are expected to formulate policies favorable to investors and change their internal structures to realise RtD.<sup>464</sup> However, developed countries cannot compel sovereign developing countries to formulate developmental friendly policies to realise RtD to satisfy the expectations of developed nation-states. On the other hand, developing nation-states interpret RtD as a right to receive development assistance from developed countries.<sup>465</sup> Sovereign developed countries cannot be compelled to meet demands of developing countries. Therefore, the main obstruction to RtD remains state-sovereignty as it is used by nation-states to assuage any pressure for them to assist each other to develop.<sup>466</sup> Persistence of an illusory idea of ‘the sovereign nation-state’ prevents effective realisation of the right to global development.<sup>467</sup> That would mean that attributes of state-sovereignty should be depreciated for the attainment of RtD.<sup>468</sup> Therefore, nation-states must give away some of their sovereign rights to eliminate obstacles to development in order to realise RtD.<sup>469</sup>

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<sup>462</sup> Nwauche and Nwobike 2005 Implementing the Right to Development. *Sur International Journal on Human Rights*, 2, 93: “While the developing nations in the South argued for resource transfer as the basis of the right to development, the developed countries representing the North denied the existence of such a right.”

<sup>463</sup> Irish 2005 The right to development versus rights-based approach to development. *International Journal of Civil Society Law*, 3(3), 7: “...developing states have an obligation to adopt national laws and policies that assure development.”

<sup>464</sup> Kirchmeier 2006 The Right to development -Where do We Stand 10

<sup>465</sup> Piron 2002 The Right to Development :A Review of the Current State of the Debate for the Department for International Development 5

<sup>466</sup> Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty In *International Investment Law* 1: “For example, a state can construe sovereignty so as to justify state conduct, whilst another state will refer to sovereignty to denounce the same act.”

<sup>467</sup> Sampath (2015). The Idea of the Nation-State as an Obstacle to the Right to Global Development. *IAFOR Journal of Arts & Humanities*, 1. <http://iafor.org/archives/journals/iafor-journal-of-arts-and-humanities/10.22492.ijah.3.1.02.pdf>

<sup>468</sup> Obiora 1996 Beyond the Rhetoric of a Right to Development, *Law & Policy* 18, no. Issues 3 & 4, 383

<sup>469</sup> Marks 2008 Implementing the Right to Development The Role of International Law 564

### *State-sovereignty obstructs international cooperation*

Despite the importance of development assistance to global development, nation-states have not been cooperating in assisting each other.<sup>470</sup> Failure to cooperate with development assistance requirement has been constantly sustained by the doctrine of state-sovereignty. Nation-states have the sovereign right to implement policies of their choice without being constrained by any ‘extra-nation-state’ authority.<sup>471</sup> As a result, developed countries have been failing to meet the UN target of providing official development assistance of 0.7% of their total GDP to developing countries.<sup>472</sup> The volume of development assistance by developed countries to developing countries declined steadily from around early 1990s. By 1997, it had declined to 0.22% of annual GDP and that was lowest since the target was set in the 1960s.<sup>473</sup> Through the 1999 resolution, UN General Assembly expressed concern over the general decline in ODA flows.<sup>474</sup>

The decline in ODA, which is public resource, should be complemented by private international capital, in form of, FDI. In that regard, nation-states should adopt deliberate policy decisions to attract FDI to complement ODA for development. The required investment can be attracted through appropriate IITs. It had already been discussed that IITs with restrictive provisions attract investment at the expense of giving away state-sovereignty. In such a case, nation-states should cooperate in giving away state-sovereignty to attract FDI for the attainment of SDGs. In spite of the requirement to give away state-sovereignty for development, nation-states had been cancelling IITs they considered to give away sovereignty.

IITs tend to reduce risk of investing in a given country which will improve the sovereign rating of a nation-state.<sup>475</sup> The improvement in sovereign rating attracts FDI in a given country. BITs

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<sup>470</sup> Rich 1983 The right to development as an emerging human right, Virginia Journal of International Law 304

<sup>471</sup> Roth 2004 The Enduring Significance of State Sovereignty 1026: “Sovereignty thus presents hurdles, both to the establishment of new international norms and to the implementation of existing norms”

<sup>472</sup> Does foreign aid contribute to or impeded economic growth? 23

<sup>473</sup> Bunn 2000 The Right to Development: Implications for International Economic Law 1454

<sup>474</sup> Bunn 2000 The Right to Development: Implications for International Economic Law 1454

<sup>475</sup> Ketkar and Ratha 2009 Innovative Financing for Development 126

improve sovereign ratings.<sup>476</sup> In addition, the reduced investment risk affects ODA as multilateral agencies aid allocations and bilateral donors are affected by sovereign creditworthiness of a country.<sup>477</sup> In a developing country, creditworthiness of a country is affected by sovereign rating which is affected by IITs. In that regard, IITs would attract both FDI and ODA. In that regard, international cooperation on ODA and FDI is crucial for realisation of global development and mutual survival. In that regard FDI, just as ODA, is a phenomenon in international practice, which is expected to transform international law from a law of coexistence to a law of cooperation.<sup>478</sup>

Modern successful investment cooperation has been realised in the EU through sacrificing member countries' state-sovereignty and state-consent. According to Guzman, EU presents the single largest example of international cooperation on various areas the world has ever seen.<sup>479</sup> EU delegated its significant authority to European institutions namely the European Commission, Council of the European Union and European Parliament. This delegated authority allows some decisions to take place despite some objections of individual nation-states and this has allowed the EU project to move forward.<sup>480</sup>

### ***2.7.5 Positive influence of giving away State-sovereignty on development***

The principles of state-sovereignty and state-consent are, at times, considered necessary for countries to advance their peculiar policies for their own development.<sup>481</sup> It is argued that countries should have the policy space to advance appropriate development policies. Policy space relates to the flexibility of nation-states to independently pursue their policy measures to

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<sup>476</sup> Arias et al 2015 Leader Survival, Regime Type and Bilateral Investment Treaties 4

<sup>477</sup> Ketkar and Ratha 2009 Innovative Financing for Development 126

<sup>478</sup> Rich 1983 The right to development as an emerging human right, Virginia Journal of International Law 303

<sup>479</sup> Guzman 2011 Against Consent 751

<sup>480</sup> Guzman 2011 The Consent Problem in International Law 4

<sup>481</sup> Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty In International Investment Law 1

effectively support their development.<sup>482</sup> Policy space is more of internal sovereignty of a country to regulate and flexibility to pursue their own policies. A country increases its policy space if it refuses to give away its sovereignty.

The requirement of state-consent in the creation of international rules is aimed at increasing global well-being.<sup>483</sup> According to Guzman state-consent promotes friendly agreements as nation-states can only consent to rules which are favourable to their national interest.<sup>484</sup> Therefore, state-consent encourages development of rules beneficial to concerned countries while harmful rules are avoided. In that regard, Guzman insinuates that state-consent motivate international investment agreements which are development friendly. The arguments by Guzman postulates that state-consent will protect nation-states against treaty changes that seek to reduce joint development.<sup>485</sup> Therefore, the argument by Guzman implies that nation-states should not give away their sovereignty and consent so as to positively influence development.

### ***2.7.6 Evaluation of State-sovereignty influence on global development and Survival***

Arguments by Knorich and Berger, Sampath and Simonovid above indicated that unrestricted state-sovereignty poses a threat to global development and mutual survival. According to Knorich and Berger unbound sovereignty of nation-states is not always appropriately used.<sup>486</sup> Nation-states had been using sovereignty-centered arguments to protect their selfish interests that may not be compatible with global development.<sup>487</sup> State-sovereignty also reduces effectiveness of IIL on realising development as discussed above. Therefore, state-sovereignty may be the reason why international investment law and development are, at times, irreconcilable

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<sup>482</sup> Knorich and Berger 2014 Friends or Foes? Interactions between Indonesia's International Investment Agreements and National Investment Law 22

<sup>483</sup> Guzman 2011 The Consent Problem in International Law 13

<sup>484</sup> Guzman 2011 The Consent Problem in International Law 13-14

<sup>485</sup> Guzman 2011 The Consent Problem in International Law 14: "Consent, then, protects states and international system from changes that will reduce the joint welfare of states"

<sup>486</sup> Knorich and Berger 2014 Friends or Foes? Interactions between Indonesia's International Investment Agreements and National Investment Law 23

<sup>487</sup> Sornarajah 2010 The International Law On Foreign Investment 34

antagonists.<sup>488</sup> In that perspective, state-sovereignty conflicts with development directly and indirectly through its effect on international investment law.

On the other hand, Masahiro, Schutter *et al* and Guzman held a contrary view that nation-states retain unbound sovereignty in order to realise development. Investment treaties are accused of limiting sovereignty of host states in protecting their public interests, inhibiting their chances of achieving peculiar developmental needs. This insinuates that unbound state-sovereignty is required by nation-states to develop. In that regard, nation-states require unrestricted sovereignty so as to realise development. This implies that in an interdependent world, unrestricted state-sovereignty is required for realisation of global development and ultimately mutual survival.

The above inconclusive debate on the effect of state-sovereignty on development exposes need for further investigation into this issue taking into account statistical analysis to ascertain the influence of state-sovereignty on global development and mutual survival.

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<sup>488</sup>Schill et al 2013 International investment law and development: Friends or foes? 29

## CHAPTER 3

### 3. CONCEPTUAL AND THEORETICAL FRAMEWORK

#### 3.1 Introduction

This chapter constructs a conceptual and theoretical framework from literature reviewed in chapter 2. Three conceptual and theoretical associations were developed. The first conceptual and theoretical association relates to the influence of giving away state-sovereignty on international investment law. Literature had shown that giving away of state-sovereignty through ratification of IITs improves the effectiveness of IIL. IIL is regarded effective if it realises its principal purpose of attracting investments. In theory, the more state-sovereignty is given away, the more IIL will be able to fulfil its principal purpose. In this Chapter, the conceptual and theoretical association is provided in the first regression model that specified the relationship between state-sovereignty given away and investment received in form of FDI.

The second conceptual and theoretical framework presents an association between state-sovereignty and human development. Literature discussed in the previous chapter indicated that giving away state-sovereignty increases the likelihood of a nation-state to meaningfully realise human development. In an interdependent world, development of each country ultimately affects global development. Reviewed literature had shown that globalisation erodes state-sovereignty. Therefore, globalisation can be used as a proxy for state-sovereignty given away by each nation-state. In theory, state-sovereignty given away as estimated by globalisation has been found to be positively related to human development. The conceptual and theoretical association was then used to specify a second regression model on the relationship between state-sovereignty given up and human development.

The third theoretical framework was developed using the *rational choice theory* that is used in international economic law and international relations to explain behavior of nation-states. The cost and benefit analysis tools were employed to augment the rational choice theory in

developing an objective function of a nation-state in an international community. The developed objective model was then used to assess the behavior of a rational nation-state in assisting another nation-state. The model was used to investigate the effects of state-sovereignty on discouraging cooperation of nation-states in development.

### **3.2 Gaps in literature Review**

Researches by UNCTAD,<sup>489</sup> Sasse,<sup>490</sup> Sornarajah<sup>491</sup> and Romson mainly focused on the influence of IITs on foreign investment. These researches arrived at different conclusions on the effects of IITs on the attainment of principal purpose of IIL. Sasse noted that some researchers found a strong correlation between conclusion of investment agreements and FDI, while other studies reported a weak or no correlation.<sup>492</sup>

The UNCTAD report (2009) noted that some empirical studies on the impact of IITs on FDI flows were ambiguous.<sup>493</sup> The same report further revealed that some studies found a weak or a considerable impact of IITs on FDI, while other studies found no impact at all.<sup>494</sup> Other researchers also found evidence of IIAs promoting FDI flows to developing countries.<sup>495</sup> These inconsistent conclusions might have been caused by the error of investigating the relationship between homogenous IITs and FDI. The common weakness of the researches had been treating IITs as homogeneous without taking into account the effects of state-sovereignty given away in each ratified investment treaty.

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<sup>489</sup> UNCTAD 2009 The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries 32

<sup>490</sup> Sasse 2011 An Economic Analysis of Bilateral Investment Treaties 69

<sup>491</sup> Sornarajah 2010 The International Law On Foreign Investment 187

<sup>492</sup> Sasse 2011 An Economic Analysis of Bilateral Investment Treaties 69

<sup>493</sup> UNCTAD 2009 The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries xiii

<sup>494</sup> UNCTAD 2009 The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries xiii

<sup>495</sup> Berger 2015 Developing countries and the future of the international investment regime 10

Therefore, investigation of the influence of homogenous IITs on FDI where all IITs give away identical state-sovereignty presents a gap in literature. The literature reviewed above acknowledged that IITs are not homogenous as some have more restrictive provisions than others. There are nation-states that had terminated some of their investment treaties which they claimed to have restrictive investment provisions.<sup>496</sup> Despite the acknowledgment, fewer attempts have been made to explicitly investigate the relationship between state-sovereignty given away in IITs and FDI. Furthermore, fewer attempts have been made by researchers in RtD debates to develop a theoretical model that can be used in advancing international cooperation of nation-states, crucial for realising global development and mutual survival. This thesis therefore identified gaps in literature and used statistical techniques to undertake an analytical investigation of the threat of state-sovereignty on IIL, global development and mutual survival.

### **3.3 Theoretical link between state-sovereignty and international investment law**

#### **3.3.1 Overview**

It is deduced from reviewed literature that state-sovereignty varies inversely with effectiveness of international investment law.<sup>497</sup> Giving away state-sovereignty enhances the likelihood of a nation-state to realise international investment that is the principal purpose of IITs. Effectiveness of international investment law is inferred from the effectiveness of investment treaties in achieving their principal intended purpose.

International investment law is predominantly international investment treaties based.<sup>498</sup> In that case, purpose of the international investment treaties can be used as a proxy for the purpose of IIL. Rios-Morales *et al* in reference to UNCTAD considered international investment agreements

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<sup>496</sup> Carska-Sheppard 2009 Issues Relevant to the Termination of Bilateral Investment 755

<sup>497</sup> Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty In International Investment Law 1: “International investment law (IIL) can be criticized for its understanding of sovereignty.”

<sup>498</sup> Sasse 2011 An Economic Analysis of Bilateral Investment Treaties 65

as building blocks and most important pillars of IIL.<sup>499</sup> It has also been argued that IIL had been treated as it has been made BIT by BIT.<sup>500</sup> In that regard, the effectiveness of IIL is measured by effectiveness of international investment agreements in achieving their principal purpose.

### ***3.3.2 Purpose of International Investment law***

The purpose of IIL is inferred from the purpose of IITs, since IITs forms the cornerstone of IIL.<sup>501</sup> The principal purpose of IITs is to attract foreign investment.<sup>502</sup> This encouraged several researchers to evaluate the extent to which IITs fulfil their purpose of attracting FDI.<sup>503</sup> Rios-Morales *et al* argued that “BITs are scrutinized for their impact over foreign direct investment flows”.<sup>504</sup> In addition, Sornarajah further argued that treaties boost investor confidence in the host state, which will result in more investment flows in a host state.<sup>505</sup> These findings lead to the conclusion that IIL aims at encouraging or stimulating flow of investment. In that regard, IIL is effective if it can effectively fulfill its purpose of attracting international investments in the form of FDI.<sup>506</sup>

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<sup>499</sup> Rios-Morales et al 2014 The Impact of Bilateral Investment Treaties on Foreign Direct Investment in Switzerland, Vol. 9, No. 1, (2014), 5

<sup>500</sup> Schill et al 2013 International Investment Law and Development: Bridging the Gap 11

<sup>501</sup> Sachs and Sauvant 2009 The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows “For all practical purposes, BIT law has become the fundamental source of international law in the area of foreign Investment”; Guntrip 2016 Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law 2: “... accepted view of sovereignty in IIL emphasizes legal limitations above sovereign power in order to achieve the aims of the IIL regime.”

<sup>502</sup> Frenkel and Walter 2017 Do Bilateral Investment Treaties Attract Foreign Direct Investment? The Role of International Dispute Settlement Provisions 21: “Stricter international dispute settlement provisions in BITs are better suited to fulfil their purpose in attracting FDI”

<sup>503</sup> Sasse 2011 An Economic Analysis of Bilateral Investment Treaties 69

<sup>504</sup> Rios-Morales et al 2014 The Impact of Bilateral Investment Treaties on Foreign Direct Investment in Switzerland, Vol. 9, No. 1, (2014), 1-18

<sup>505</sup> Sornarajah 2010 The International Law On Foreign Investment 65

<sup>506</sup> Frenkel and Walter 2017 Do Bilateral Investment Treaties Attract Foreign Direct Investment? The Role of International Dispute Settlement Provisions 20: “...the effectiveness of BITs in attracting FDI ...”

### 3.3.3 *State-sovereignty in international investment law*

State-sovereignty can be deduced from sovereignty given away by nation-states as they enter into international investment treaties. When a nation-state enters into a treaty, it gives away some sovereign rights to another authority.<sup>507</sup> “Giving away of sovereign rights through a treaty” can be used as a proxy for “giving away of state-sovereignty”.<sup>508</sup> Sornarajah argued that all treaties constrain sovereignty; therefore, once nation-states enter into investment treaties they lose their state-sovereignty.<sup>509</sup> According to Norooz, state-sovereignty is restricted by treaty obligations under international law.<sup>510</sup> In that respect, nation-states transfer their sovereignty whenever they consent to ratify IITs with restrictive provisions.<sup>511</sup> Therefore, the restrictive provisions in IITs can be used to estimate the sovereignty each nation-state gives away to attract international investment.

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<sup>507</sup> Hathaway 2008 *International Delegation and State-sovereignty* 121: “To be sovereign, a state must be independent, which means that the state cannot be put under a duty or obligation by those external to it.”

<sup>508</sup> Sornarajah 2010 *The International Law on Foreign Investment* 231: “Investment treaties constrain sovereign rights of control over the intrusive process of foreign investment which takes place entirely within the territory of the host state. To this extent, the erosion of sovereignty in such treaties is considerable”

<sup>509</sup> Sornarajah 2010 *The International Law On Foreign Investment* 231

<sup>510</sup> Norooz 2015 *Responsibility to Protect and its applicability in Libya and Syria* 10: “...state-sovereignty is also restricted by customary and treaty obligations under international law...In fact, the only restrictions which states have to face are those limits of the international law to which the states have agreed.”

<sup>511</sup> Hathaway 2008 *International Delegation and State-sovereignty* 119: “...a state grants authority to an international body by ratifying an international treaty.”

### ***3.3.4 Theoretical Relationship between State-sovereignty and IIL***

International investment law is created through IIA for the realisation of its principal purpose of attracting foreign investment.<sup>512</sup> This means that effectiveness of international investment law can be approximated by effectiveness of IITs in attracting FDI that is attracted following ratification of IITs. Restrictive provisions in IITs can be used to approximate sovereignty a nation-state gives away in attracting foreign investment. This thesis estimate state-sovereignty given away by aggregating restrictive provisions of all IITs ratified by each nation-state. The cumulative restrictive provisions are preferred as opposed to the investigation of cumulative number of IITs on FDI as other researchers have been doing.<sup>513</sup>

Studying the impact of a cumulative number of IITs had been giving conflicting results due to the assumption that IITs are homogenous yet, in actual fact, some treaties have more restrictive provisions than others. These studies, which assume homogeneity of all IITs had already been criticized as black box studies that, examine the effect of nation-state membership to an investment agreement on FDI without looking into the content of the investment provisions.<sup>514</sup> Some researchers have however redressed such criticisms by assessing the impact of investment provisions in investment agreements on FDI flows.<sup>515</sup> Researches, which recognised IITs as heterogeneous, found out that IITs with more restrictive provisions were more effective in attracting FDI when compared to IITs with less restrictive provisions.<sup>516</sup> In that regard, this thesis estimated state-sovereignty given away by a nation-state using Cumulative Restrictive IITs

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<sup>512</sup> Sornarajah 2010 *The International Law on Foreign Investment* 173: “The assumption is that developing countries, competing with each other to attract investment, make investment treaties in order to ensure that they recognise the same standards of protection as other developing states similarly placed.”

<sup>513</sup> Sasse 2011 *An Economic Analysis of Bilateral Investment Treaties* 70

<sup>514</sup> UNCTAD 2009 *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* 76

<sup>515</sup> UNCTAD 2009 *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* 76

<sup>516</sup> UNCTAD 2009 *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* 90

Provisions (CRIPs). CRIPs is an aggregate of restrictive provisions enshrined in all IITs ratified by each nation-state at an identified cut-off date.

Nation-states have to give up their sovereignty in order to attract international investment.<sup>517</sup> The nation-states that grant strong legal protection to foreign investors would receive greater inflows of FDI in exchange of giving away state-sovereignty.<sup>518</sup> Frenkel and Walter found out that investment treaties with strong provisions are better suited to fulfill their purpose of attracting FDI.<sup>519</sup> The first regression model (1) below specifies the theoretical relationship of the impact of state-sovereignty given away through IITs on attracting FDI. The regression techniques had already been used in other studies to investigate the impact of IITs on FDI.<sup>520</sup>

Table 2 below shows some examples of regression models used in related studies. These studies had tested the impact of cumulative IITs on FDI while holding other determinants of FDI like GDP growth, GDP and population as control variables.<sup>521</sup> In the same way, this thesis uses similar techniques in examining the impact of state-sovereignty as estimated by CRIPs on attracting FDI.

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<sup>517</sup> Kirayoglu 2014 *The Bilateral Investment Treaty: Its Origins and Effects* 8: “The evidence presented in this chapter highlights the trade-off the host country faces: in order to attract more investment, it must be willing to give up its sovereignty”

<sup>518</sup> Carim 2015 *International Investment Agreements and Africa’s Structural Transformation: A Perspective from South Africa* 2-3

<sup>519</sup> Frenkel and Walter 2017 *Do Bilateral Investment Treaties Attract Foreign Direct Investment? The Role of International Dispute Settlement Provisions* 21: “Stricter international dispute settlement provisions in BITs are better suited to fulfil their purpose in attracting FDI”

<sup>520</sup> UNCTAD 2009 *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* 31

<sup>521</sup> Sasse 2011 *An Economic Analysis of Bilateral Investment Treaties* 70

**Table 2: Econometrics Equations adopted by other Researchers**

Examples of Econometric Models	Author/s
$\text{LnFDI}_{it} = \alpha_i + \beta_1 \text{Ln GDP}_{it} + \beta_2 \text{PopGrowth}_{it} + \beta_3 \text{Exports}_{it} + \beta_4 \text{Imports}_{it} + \beta_5 \text{Roadspaved}_{it} + \beta_6 \text{Internetusers}_{it} + \beta_7 \text{Mobilesub}_{it} + \beta_8 \text{Inflation}_{it} + \sum D_i$ <p>Where            FDI is FDI inflows; PopGrowth is annual population growth; Exports as percentage of GDP; Imports as a percentage of GDP; Internetusers is internet users variable; Mobilesub is mobile cellular subscriptions; Roadspaved is roads paved as a percentage of total roads; and Inflation is annual inflation rate.</p>	Kavita Wadhwa <sup>522</sup>
$FDI = \alpha + \beta BIT + \delta X + \varepsilon$ <p>where            FDI represents the dependent variable; BIT is the variable of interest; <math>\beta</math> is estimated coefficient; <math>X</math> is a matrix of the other independent variables that have an influence on FDI; <math>\delta</math> is a vector of coefficients that belong to the variables of matrix; and <math>\varepsilon</math> is the error term</p>	Christian Bellak (2015) <sup>523</sup>
$FDI = f(\text{Cumulative number of BITs, GDP, Inflation, population size etc.})$ <p>Where            Cumulative BITs is the variable of interest, all other variables being control variables.</p>	Neumayer and Spess (2005) <sup>524</sup>
$\text{Inward FDI} = f(\text{BITs, GDP per capita, inflation, population etc.})$	Min S.B. (2011) <sup>525</sup>

Sources: Wadhwa, Bellak, Min Neumayer & Spess

Models in Table 2 above were used in developing a first regression model specified below. The dependent variable of the specified model is inward stock of FDI. The independent variable of greater interest is state-sovereignty given away as estimated by CRIPs. The control variables are already known determinants of FDI. The control variables borrowed from other studies are population size, GDP, consumer price index as a measure of inflation, number of internet users and number of cellular subscribers. These control variables can be categorised into market seeking factors, efficiency seeking factors and resource seeking factors. Market seeking factors are GDP and population size. The efficiency-seeking factor is inflation. Resource seeking factors

<sup>522</sup> Wadhwa 2011, Foreign Direct Investment into Developing Asian Countries: The Role of Market Seeking, Resource Seeking and Efficiency Seeking Factors 222

<sup>523</sup> Bellak 2015 Economic Impact of Investment Agreements 10-11, Department of Economics Working Paper No. 200

<sup>524</sup> Neumayer and Spess 2005 Do bilateral investment treaties increase foreign direct investment to developing countries 37, [http://eprints.lse.ac.uk/627/1/World\\_Dev\\_%28BITs%29.pdf](http://eprints.lse.ac.uk/627/1/World_Dev_%28BITs%29.pdf)

<sup>525</sup> Min 2011 Bilateral Investment Treaties and Foreign Direct Investment 81

are the number of internet users and mobile cellular subscriptions. In that respect, the first regression model is specified as follows:

$$FDI_i = \alpha_0 + \alpha_1 \text{Sov\_CRIP}_i + \alpha_2 \text{GDP}_i + \alpha_3 \text{Pop}_i + \alpha_4 \text{Internetusers}_i + \alpha_5 \text{Mobilsu}_i + \alpha_6 \text{CPI\_Infl}_i + \varepsilon \quad (1)$$

Where:

$FDI_i$  refers to inward foreign direct investment for country i.

$\text{Sov\_CRIP}_i$  refers to state-sovereignty given away by country i as estimated by CRIP.

CRIPs refers to cumulative Restrictive IITs Provisions.

$\text{GDP}_i$  refers to gross domestic product for country i.

$\text{Pop}_i$  refers to population size of country i.

$\text{Internetusers}_i$  refers to number of internet users for country i.

$\text{Mobilsu}_i$  refers to mobile cellular telephones subscriber base for country i.

$\text{CPI\_Infl}_i$  refers to consumer price index as a measure of inflation for country i.

$\alpha_0$  is the intercept.

$\alpha_1, \alpha_2, \alpha_3, \alpha_4, \alpha_5$  and  $\alpha_6$  refers to co-efficiency of corresponding independent variables.

$\varepsilon$  is the error term of the model.

### **Hypothesis Testing for a variable of interest**

$H_0 : \alpha_1 = 0$  Or State-sovereignty given away has no influence on IIL purpose of attracting foreign investment

$H_1 : \alpha_1 \neq 0$  Or State-sovereignty given away influences purpose of IIL of attracting foreign investment

The expected hypothesis for each independent variable is informed by theory. Data on all the variables specified in regression equation (1) were obtained and used to test the hypothesis. The hypothesis can be rejected or accepted. The results are used to confirm or refute the theoretical influence of sovereignty given away on international investment.

### **3.4 Theoretical association between state-sovereignty and human development**

#### ***3.4.1 Overview***

Literature in the previous chapter had shown a positive relationship between state-sovereignty given away and human development. Nation-states, which give away their sovereignty, are more likely to realise development. Following recognition of RtD as a human right, the concept of development is now human centered. In the previous chapter, literature shows that nation-states give away their sovereignty in order to develop, as a precondition for their survival. In that regard, nation-states give away sovereignty for their own survival and in theory, nation-states can realise human development by giving away their sovereignty.

#### ***3.4.2 Globalisation as proxy for State-sovereignty given away***

State-sovereignty is eroded through interdependences of nation-states.<sup>526</sup> Nation-states become more interdependent through globalisation. In such a case, globalisation is a reality that erodes or even eliminate sovereignty of nation-states.<sup>527</sup> Globalisation subject nation-states to external restrictions and constraints, causing them to lose sovereignty.<sup>528</sup> In that perspective, nation-states sacrifice their sovereignty by embracing globalisation.<sup>529</sup> Therefore, globalisation is positively related to state-sovereignty given away. In that regard globalisation can be used as proxy for state-sovereignty a country gives away in general.

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<sup>526</sup> Pendleton 1998 A New Human Right-the Right to Globalisation 2055: “Interdependence has meant that the boundary between domestic and foreign affairs is gradually being eroded .... The erosion of state-sovereignty through interdependence...”

<sup>527</sup> Ku and Yo 2013 Globalization and Sovereignty 210

<sup>528</sup> Shah 2014 International Law and Drone Strikes in Pakistan: The Legal and Socio-political Aspects 71: “...sovereignty can be compromised through intervention as well as through invitation, for instance, where a state voluntarily subjects its internal authority structures to external constraints”.

<sup>529</sup> Piccin and Pusterla 2010 Defending eroded states' sovereignty the European Union humanitarian aid policy 9: “...Interdependence and globalization brought new economic and political opportunities and states may be prompted to partially or totally give up their sovereignty...”

### ***3.4.3 Theoretical relationship between State-sovereignty and Development***

Studies have shown that nation-states realise development when they give away their sovereignty through globalisation. Studies by Marks: 2008; Oji and Ozioko: 2011; and Salama: 2005, revealed that development and globalisation are positively related. Furthermore, Pendleton in his paper titled: “*A New Human Right-the Right to Globalisation*” considered globalisation as important as development. This leads to a conclusion that the more a nation-state gives away its sovereignty the more it will realise development. In view of the above, this study investigated the influence of state-sovereignty given away on human development. State-sovereignty given away by a country is estimated by the globalisation index of a country. The theoretical findings on the relationship between state-sovereignty given away and human development are specified by a regression model.

There are regression models which were developed in other studies where determinants of human development were specified. Table 3 below shows regression models where human development is specified as a dependent variable while traditional determinants of human development are included as control variables. Control variables are traditional determinants of human development. They include population size, GDP per capita and unemployment.

**Table 3: Econometric Models specified by other Authors**

Examples of Econometric Models	Significant Variables	Author/s
$HDI_{it} = \alpha + \beta_1 \ln_{Pop}_{it} + \beta_2 \ln_{Inf}_{it} + \beta_3 \ln_{Unemp}_{it} + \beta_4 \ln_{GDP}_{it} + \varepsilon_{it}$ Where <i>Pop</i> is population of country; <i>Inf</i> is Inflation rate of country; <i>Unemp</i> is unemployment rate of country; <i>GDP</i> is GDP per capita of country	Population; and GDP per capita.	Arisman (2018) <sup>530</sup>
$Y = \alpha + \beta_1 ECO\_GROWTH + \beta_2 EXPENDITURE + \beta_3 POP\_GROWTH + \beta_4 DEP\_RATIO + \beta_5 UNEMPLOYE + \beta_6 EDUCATION + \beta_7 HEALTH + \beta_8 FACILITIES + e_{it}$ Where: Y is HDI, ECO_GROWTH is Economic growth, EXPENDITURE is the average growth of per capita expenditure, POP_GROWTH is population growth, DEP_RATIO is dependency ratio, UNEMPLOY is unemployment rate, EDUCATION is education budget, HEALTH is health budget, FACILITIES is housing and public facilities budget, i : Cross data, t : Time series, e : Error	Economic growth; Unemployment rate; Education budget; Health budget; and Housing and public facilities budget.	Eleonora Sofilda , Putri Hermiyanti, Muhammad Zilal Hamzah <sup>531</sup>
$HDI = b_0 + b_1 * \ln GDP + b_2 * \ln LifeExpectancy + b_3 * \ln LiteracyRate + b_4 * \ln Gini + b_5 * \ln FertilityRate + b_6 * \ln Co2 + b_7 * \ln InflationRate$	GDP per capita; literacy rate; life expectancy; Co2 emission; fertility rate; and Gini Index.	Smit Shah (2016) <sup>532</sup>

Sources: Arisman, Shah and Sofilda et al

Drawing from models in table 3 above this thesis specified the second regression equation. The regression model by Arisman was adopted with minor modifications. The dependent variable of the model is human development, which is the status it was given by other researchers as shown in table 3 above. The modification had been made on the composition of independent variables where inflation variable had been replaced with the state-sovereignty variable. Inflation variable was not significant in Arisman`s model hence it was reasonable to replace it with a variable of interest to this study. The variable of interest in the model is state sovereignty and is proxied by the globalisation index. The resultant second regression equation was specified as follows:

$$\ln HDI = \beta_0 + \beta_1 \ln Sov\_Globindex_i + \beta_2 \ln GDP_i + \beta_3 \ln Pop_i + \beta_4 \ln Unemp_i + \varphi \quad (2)$$

Where:

HDI refers to human development index

<sup>530</sup> Arisman 2018 Determinant of Human Development Index in ASEAN Countries 114

<sup>531</sup> Sofilda et al 2015 Determinant Variable Analysis of Human Development Index in Indonesia 17

<sup>532</sup> Shah 2016 Determinants of Human Development Index: A Cross-Country Empirical Analysis 45, <http://www.internationaljournalsrsg.org/IJEMS/2016/Volume3-Issue5/IJEMS-V3I5P106.pdf>

Sov\_Globindex<sub>i</sub> refers to state-sovereignty given away by country i as estimated by globalisation index.

Pop<sub>i</sub> refers to population size of country i.

Unemp<sub>i</sub> refers to unemployment rate of country i.

GDP<sub>i</sub> refers to GDP per capita of country i.

$\beta_0$  refers to intercept.

$\beta_1, \beta_2, \beta_3, \beta_4$  refers to coefficient corresponding to respective independent variables.

$\varphi$  is error term.

### **Hypothesis Testing for variable of interest**

$H_0$  :  $\beta_1 = 0$  or State-sovereignty is not related to human development

$H_1$  :  $\beta_1 \neq 0$  or State-sovereignty is related to human development

## **3.5 State-sovereignty given away encourages State cooperation for mutual survival**

### **3.5.1 Overview**

The behavior of interdependent nation-states can be explained through an objective function. The explanatory objective function of a nation-state is developed using the rational choice theory, which is commonly used in international economic law and international relations, in explaining nation-states' behaviors. According to the rational choice theory, nation-states are assumed to be rational, self-interested and able to identify and pursue their interests.<sup>533</sup> The interests of nation-states are also assumed to be given, exogenous and stable.<sup>534</sup> The motive of nation-states according to Realists and Institutionalists is to maximise wealth for survival.<sup>535</sup> The movement within nation-states from 'the liberal state' to 'the welfare state' affirms that motive.<sup>536</sup> In that regard, nation-states pursue their interests with an aim of creating wealth or prosperity for their own survival.

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<sup>533</sup>Suleiman 2011 Towards the Rational Choice Theory in the Asian Approach to International Law 573

<sup>534</sup> Suleiman 2011 Towards the Rational Choice Theory in the Asian Approach to International Law 573

<sup>535</sup> Slaughter 2011 International Relations, Principal Theories 3

<sup>536</sup> Henkin 1995 Human rights and state sovereignty 34

The explanatory objective model can be used to explain the behavior of nation-states in an interdependent world. Nation-states become interdependent through international investment agreements and globalisation. Interdependence encourages nation-states to cooperate because failure by any nation-state will inflict significant hardship on its neighbours, therefore undoing development efforts of other nation-states.<sup>537</sup> It had already been discussed that interdependence of nation-states erodes their sovereignty.<sup>538</sup> In that regard, nation-states have to give away their sovereignty through cooperation as they pursue their interests.

The construction of a model at this stage will be guided by discourse in RtD that relates the requirement of nation-states to fulfill their duties in a way that promotes a new international economic order, which takes into account mutual interest, interdependence, sovereign equality and cooperation among all states.<sup>539</sup> The development status of nation-states should also be taken into account in assignment of rights and duties of nation-states in consonant with a given situations.<sup>540</sup> Nation-states takes into account their short-term gains and self-interest as they make their decisions.<sup>541</sup>

### ***3.5.2 Objective function for mutual development and survival***

Rational choice theory and CBA were used to develop an objective model of a nation-state as it interacts with international community. In developing an explanatory objective model, nation-states are assumed to be rational actors that aim to maximise their objective function. The literature had already shown that the aim of every nation-state, just as living things and institutions, is to survive. Therefore, every nation-state acts in the best possible way that

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<sup>537</sup> Patrick 2006 Weak States and Global Threats: Assessing Evidence of “Spillovers” 23

<sup>538</sup> Pendleton 1998 A New Human Right-the Right to Globalisation 2055: “Interdependence has meant that the boundary between domestic and foreign affairs is gradually being eroded .... The erosion of state-sovereignty through interdependence...”

<sup>539</sup> Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 37, 2016 Frequently Asked Questions on the Right to Development 4

<sup>540</sup> Puvimanasinghe 2013 International solidarity in an interdependent world 183

<sup>541</sup> Puvimanasinghe 2013 International solidarity in an interdependent world 184

maximises its likelihood for continuous existence.<sup>542</sup> Nation-states increase their chances of survival by creating more wealth. A developed country can avail investments to less developed countries only if it can increase its net wealth from such investments.<sup>543</sup> Therefore, a rational developed country can assist a developing country with investments if it can maximise its net wealth from such investment assistance.

Nation-states are considered to have obligations at three levels, which are (i) internally, through formulation of national development policies; (ii) internationally, through adoption and implementation of policies beyond their borders; and (iii) collectively through regional and global cooperation.<sup>544</sup> A nation-state have self-interests, however in an interdependent world, every nation-state should pursue its interests taking into account interests of other nation-states.<sup>545</sup> In an interdependent world, interests of a country are subject to developments in other countries. A country can pursue benefits subject to costs of realisation such benefits and some costs comes from other nation-states.

There are costs and benefits of investing or providing investment assistance to another country. A developed country can invest in a developing country directly or through its nationals. There are net benefits and costs of investing in a less developed country. Net benefits are a sum of active benefits of investing plus secondary consequences of investing. Active benefits are made up of taxes realised from repatriated profits and ready resources from the host state.<sup>546</sup> Secondary consequences are spillover consequences from a developing country that are related to human development in that developing country. In that regard, secondary consequences can be a benefit or a cost. Positive value of secondary consequences will be a benefit and negative value of secondary consequences will be a cost to a developed state.

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<sup>542</sup> Slaughter 2011 International Relations, Principal Theories 1

<sup>543</sup> Sornarajah 2010 , Third Edition, The International Law on Foreign Investment 222

<sup>544</sup> Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 37, 2016 Frequently Asked Questions on the Right to Development 4

<sup>545</sup> Puvimanasinghe 2013 International solidarity in an interdependent world 181

<sup>546</sup> Sornarajah 2010 , Third Edition, The International Law on Foreign Investment 222

Positive secondary consequences or benefits take the form of the variety of goods received from improved economy of a developing country, reduced budget on dealing with illegal immigrants from a developing country and reduced cost of combating terrorism from a developing country. Positive secondary consequences increase wealth of a home country. Negative secondary consequences or costs will take the form of rise in cost of combating terrorism, diseases and huge numbers of immigrants that emanate from a deteriorating situation in less developed countries. Negative secondary consequences destroy wealth in the home country.

### *Specifying an objective function of a home State*

The above conceptual analysis is specified into an objective function of a nation-state. A nation-state faces an Objective Function where costs are subtracted from benefits. The *benefits* in this case are more of ‘net benefits of assisting another country’ and *costs* are ‘active costs of assisting another country’. The functional form of the objective function is specified in equation (3) below:

$$\text{Net benefits of assisting a developing state} - \text{Active cost of assisting such a state} = \text{net wealth} \quad (3)$$

Net benefit of assisting a nation-state is made up of active benefits and secondary consequences. The other important component of the function is active costs of assisting another country. Active costs of assisting takes the form of value of investment invested or donated to a country. The objective function equation (3) above will be expanded into the following equation (4):

$$[\text{Active benefits of assisting} + \text{Secondary Consequences}] - \text{Active cost of assistance} = \text{Net Wealth} \quad (4)$$

A developed country will assist a less developed country if it can maximise its net wealth specified in equation (4). Active benefits to home (developed) country of assisting other country would be in the form of taxes on repatriated profits by investors and interest received on loans. In 2012, the profits, which were repatriated by international investors from developing countries, amounted to US\$486 billion.<sup>547</sup> The interest income, which was received in developed countries

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<sup>547</sup> Griffiths 2014 The State of Finance for Developing Countries, An assessment of the scale of all sources of finance available to developing countries 5-6

from developing countries in the same year, amounted to US\$188 billion.<sup>548</sup> Those huge financial flows from developing countries to developed countries would translate into direct benefit to home (developed) countries of investors. Active benefits are realised in the short term while secondary consequences are realised in the longer term. Equation (4) can be further reduced into equation (5) below by assuming a simplified world where State **X** is developed while State **Y** is less developed.

***Objective function of developed State X***

State **X** is assumed to be developed and State **Y** is a developing country. In specifying the objective function, it is assumed that State **X** provides investment assistance (IA) of value of  $IA_X$  to State **Y**. Investment assistance can take the form of foreign direct investments, concessionary loans, developmental assistance or grants.<sup>549</sup> As consequences of the assistance, State **X** can receive positive consequences (wealth created) or negative consequences (wealth destroyed) with a spillover rate represented by( $s$ ). The spillover rate is multiplied by change in development of Country Y ( $s\Delta D_Y$ ) as a result of investment by country X in country Y. Therefore, the secondary consequence variable will be  $s\Delta D_Y$ . The spillover rate ( $s$ ) is higher when nation-states are interdependent. Spillover rate ( $s$ ) estimates state-sovereignty given away. It had already been noted that interdependence erodes state-sovereignty. Therefore, spillover rate increases as a country gives away more sovereignty. Active benefits ( $IA_X$ ) from assisting country Y is assumed to have a return factor ( $R$ ) from assisting State **Y** as a direct benefit to State **X**. In that regard, equation (4) above is reduced into functional equation (5) as follows:

$$(RIA_X+s\Delta D_Y) - IA_X = NW_X \quad (\text{in which } IA_X \geq 0 \text{ and } R \geq 0) \tag{5}$$

Where:

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<sup>548</sup> Griffiths 2014 The State of Finance for Developing Countries, An assessment of the scale of all sources of finance available to developing countries 5-6

<sup>549</sup> Aluko and Arowolo 2010 Foreign aid, the Third World’s debt crisis and the implication for economic development: The Nigerian experience 120-127: “Foreign aid can also be in form of economic assistance such as: 1. Investment in the economy of the needy country. 2. Loan. 3. Infrastructural development, etc. State Cooperation...”

$(RIA_X + s\Delta D_Y)$  is the net benefit of assisting a developing state.

$RIA_X$  refers to active benefit received by State **X** following investment assistance to State **Y**.

$s\Delta D_Y$  refers to secondary consequences of investment assistance to State **Y**.

$IA_X$  refers to investment assistance by State **X** to State **Y**.

$NW_X$  refers to net wealth realised by State **X** resulting from investment assistance to State **Y**.

$\Delta D_Y$  refers to change in development in State **Y** as a result of investment assistance by State **X**.

$s$  refers to the spillover rate to State **X** as a result of a change in development of State **Y**.

$R$  refers to returns factor received by State **X** from its investment assistance to State **Y** which takes form of taxes on dividends, interest and income from investment assistance to State **Y**.

### *Spillover rate (s)*

Interdependence of nation-states means that if a nation-state assists another, it will realise secondary consequences or spillover benefits or spillover costs. If State **X** assists State **Y**, the development of State **Y** increases from  $D_Y$  to  $D'_Y$  while wealth of State **X** ( $W_X$ ) will increase or decrease proportionately to change in development of State **Y**.

Therefore:  $W'_X = W_X + s(D'_Y - D_Y)$ . (6)

Rearranging we get:  $(W'_X - W_X) = s(D'_Y - D_Y)$  where  $(D'_Y - D_Y) = \Delta D_Y$  (7)

That means, the wealth of State **X** will change when development of State **Y** changes. Further rearrangement of equation (7) will result in equation (8) below.

$$s = \frac{W'_X - W_X}{D'_Y - D_Y} ; \quad (8)$$

In that case, spillover rate ( $s$ ) measures the change in the wealth of State **X** with respect to change in development of State **Y**. The spillover rate between the nation-states is high if the countries are highly interdependent. Spillover rate is positively related to state-sovereignty given away by nation-states. The higher the sovereignty given away the higher the spillover rate.

Objective function equation (5) above is therefore used to explain the impact of state-sovereignty on global development and survival. A rational nation-state can give investment assistance to another nation-state only if it can maximise its net wealth. The model assists in explaining the cooperative behaviour of nation-states in the international community.

***Condition for Investment assistance***

A developed country can give investment assistance if it can realise positive net wealth by doing so. In that case net wealth should be greater than zero. In functional terms  $(RIA_X + s\Delta D_Y) - IA_X > 0$  that can be rearranged to give  $(RIA_X + s\Delta D_Y) > IA_X$ . In that case, a rational developed state can assist a less developed state if its net benefit of assistance is greater than investment assistance it gives away. A further rearrangement of the conditional function will give functional form (9) below which can be used for analysis of nation-state behavior.

$$s\Delta D_Y > IA_X - RIA_X \tag{9}$$

Functional condition (9) mean that a developed country can assist a less developed country if its secondary consequences are more than the difference between investment assistance given away and active benefit from such an investment.

Conditional function (9) can be rearranged to:

$$s\Delta D_Y > IA_X(1 - R) \tag{10}$$

Conditional functional equation shows that a developed State X can assist another nation-state if its positive secondary consequences are high. Secondary consequences increase with the increase in spillover rate, as well as increase in development of an assisted nation-state. Spillover rate is directly related to state-sovereignty as it measures interdependence between nation-states. Change in development can be positive if nation-states give away their sovereignty. Therefore, conditions for nation-states to cooperate in investment assistance require giving away of state-sovereignty.

### ***3.5.3 Developed State conditional function for assistance under expropriation or donation***

The expropriation of investments invested in a host country will result in a home country not getting any returns. In that case, a home country will not get any active benefits. Expropriation can be direct or indirect. Indirect expropriation may have an effect of reducing returns to a developed country. In case of indirect expropriation or partial expropriation, the size of investment return of (R) will go down. In a situation of full expropriation, return (R) will be zero. The return is also zero when an assisting nation-state gives a donation and not gets any active return. In that case, the condition for assisting under expropriation or pure donation will be as provided in condition equation (11) below:

$$s\Delta D_Y > IA_X \quad (11)$$

In case of full expropriation, a developed country can assist a developing country if its secondary consequences are higher than the value of assisting. This explains why developed countries can rationally donate to developing countries. The most important factors for countries to assist is spillover rate and change in development of an assisted country. Giving away of state-sovereignty increases spillover rate between a developed country and a less developed country.

### ***3.5.4 Restriction of State-sovereignty encourages developed States to assist developing States***

Secondary consequences increase with increase in spillover rate that estimates state-sovereignty given away and change in development of assisted nation-state. Secondary consequences encourage developed states to assist developing states if spillover rate between the nation-states is high. A failure by a developed country to assist a less developed country may give rise to negative consequences. In reference to equation (5) if investment assistance is zero, net wealth may be negative due to negative secondary consequences. Every rational nation-state would avoid negative net wealth. Secondary consequences increase with increase in state-sovereignty given away and change in human development. The findings on effect of state-sovereignty on human development will assist in explaining the condition for investment assistance between nation-states and ultimately mutual survival.

## CHAPTER 4

### 4. RESEARCH METHODOLOGY

#### 4.1 Introduction

This chapter outlines the research process, specifies the research philosophies, approach and strategies adopted. The research objectively ascertained the cause-effect of state-sovereignty on IIL, global development and mutual survival. The research process was guided by objective ontological and post-positivist epistemological philosophical beliefs. These philosophical assumptions motivated use of the deductive research approach on the focal theory, data theory and ultimately the utilisation theory. The adopted research methodology follows a process model developed by Phillips and Pugh.<sup>550</sup> The research process model is enhanced through use of aspects outlined in the research onion by Saunders *et al.*<sup>551</sup>

In consistence with Saunders' research process, the study started by defining the research problem and specifying research questions. Subsequently, literature on the subject matter was reviewed and evaluated. Literature review, informed the focal theory that involves the formulation of conceptual and theoretical frameworks. The conceptual and theoretical frameworks identified specific concepts that assisted in the identification of key variables and their relationships. Variables are defined according to the way they are measured and observed in the study. Defining the variables enables other researchers to replicate or verify the results of this thesis. The relationships of variables as explained by theory were used to develop the hypothesis.

The hypothesis developed under focal theory was used to inform data theory. The data theory, which followed focal theory, involved data collection, data analysis and validation of relations specified in the focal theory. Then the cause and effect relationship between state-sovereignty and IIL is determined; as well as the cause and effect between state-sovereignty and human development. The strength of the relationship among the variables was also ascertained. The data theory was then followed by utilisation theory. The utilization theory involves validation and use

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<sup>550</sup> Phillips and Pugh 2005 How to get a PhD

<sup>551</sup> Saunders *et al* 2012 Research Methods for Business Students, Sixth edition 128

of the research findings. The research findings are useable in informing international legal persons on what should be done to improve effectiveness of IIL as well as realise global development and mutual survival.

## **4.2 Research Philosophy and Approach**

### **4.2.1 Research Philosophy**

This thesis adopted objective ontological philosophical assumptions that hold that there is a single and tangible reality, that is, constant across time and setting.<sup>552</sup> The philosophy takes the view that reality can be broken into variables that are measurable.<sup>553</sup> In that respect, this research identified and specified variables that measured state-sovereignty, IIL effectiveness and human development. These variables allowed the research to objectively identify a single reality on the threat of state-sovereignty on international investment law, global development and mutual survival. This ontological assumption of reality influenced adoption of the positive epistemology philosophy that recommends the use of scientific methods in establishing an objective reality where the end product will be predictable law-like generalisations.<sup>554</sup>

The positive epistemology philosophy holds the view that the techniques and methods used in natural sciences offers best framework on investigating the reality.<sup>555</sup> This philosophy assumes that reality can be objectively investigated using hypothesis testing developed from existing theory. In that case, the philosophy involved development of generalized theoretical models that were used to explain the cause and effect relationship among variables. In that view, the thesis developed a three stage theoretical relationship. The first stage involved identification of a conceptual and theoretical relationship between state-sovereignty given up and effectiveness of international investment law measured by international investment flows. The second stage involves identification of a theoretical relationship between state-sovereignty and human

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<sup>552</sup> Chilisa 2012 *Indigenous Research Methodologies* 27

<sup>553</sup> Chilisa 2012 *Indigenous Research Methodologies* 27

<sup>554</sup> Chilisa 2012 *Indigenous Research Methodologies* 26

<sup>555</sup> Chilisa 2012 *Indigenous Research Methodologies* 26

development. This research analysed, evaluated and framed the literature in a way to develop the theoretical and conceptual frameworks. The theoretical framework and hypothesis developed on the relationships between variables was then tested using statistical tools. The third stage is an explanatory objective model. The model was developed using rational choice theory and CBA techniques. The model utilises findings in first and second stage. The model had been used to explain behaviour of a nation-state as it interacts with international community. The model assists in explaining the influence of state-sovereignty on global development and mutual survival.

#### **4.2.2 Research approach**

The thesis used the deductive approach that relates to research philosophies adopted above. Saunders *et al* stated that a deductive approach involves development of a theory that is then subjected to a rigorous test through a series of propositions.<sup>556</sup> The deductive approach involves development of a causal relationship between variables as found in existing literature. This enabled specification of theoretical relationships between variables. After specifying the theory, testable propositions that informed the hypothesis was formulated. Then data was collected for the identified dependent variable, independent variable of interest and control variables.

At first stage, a narrow perspective of state-sovereignty was adopted in investigating the causal effect of state-sovereignty on international investment law. The variable of state-sovereignty given away was approximated using numerical scores derived from aggregating restrictive provisions of all ratified IITs. The purpose of IITs approximates the purpose of international investment law as affirmed by most researchers that international investment law is mainly investment treaty based. This is supported by Sasse who argued that IITs forms the cornerstone of international investment law.<sup>557</sup> The sovereignty given away by each of the nation-state in the sample was determined. Then, the corresponding investment flows which resulted from nation-state giving away sovereignty, were determined. Relevant control variables as informed by literature were also obtained accordingly.

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<sup>556</sup> Saunders et al 2012 Research Methods for Business Students Sixth edition 145

<sup>557</sup> Sasse 2011 An Economic Analysis of Bilateral Investment Treaties 67

In the second stage, a broader perspective of state-sovereignty was adopted so as to investigate the causal-effect of state-sovereignty on human development. State-sovereignty was approximated using globalisation index data. Data on human development index of countries to be investigated was collected. Data of relevant control variables was also collected accordingly. Statistical tools were then used to evaluate the specified hypothesis. The findings from data analysis confirmed causal and effect which was consistent with the theoretical relationship. In case, the results of the analysis were inconsistent with the hypothesis; the causal relationship would be considered not true and the null hypothesis was not to be accepted.

The third stage, involved development of an objective function informed by the rational choice theory and cost-benefit analysis theory. The model utilised findings from the other models to explain the behaviour of rational nation-states in an interdependent world. The model explained conditions necessary for international cooperation in development, which is good for survival. Giving away of state-sovereignty was found to be crucial for cooperation of states.

### **4.2.3 Research Strategy**

Triangulation of strategies was adopted in this research. These strategies are the archival research strategy, survey research strategy and experimental strategy. Archival research strategy uses administrative records and documents as principal source of data.<sup>558</sup> The survey research strategy involves a structured collection of data from a large population through a structured observation.<sup>559</sup> These strategies were then used to obtain data that was used in the two econometric models specified.

Experimental strategy was then used to allow determination of the relationship of data obtained through other strategies. This strategy was applied at first and second stages. The experimental research strategy involves investigating the change of an independent variable causing a change in a dependent variable after taking into account the effects of control variables.<sup>560</sup> The strategy

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<sup>558</sup> Saunders *et al* 2012 Research Methods for Business Students Sixth edition 178

<sup>559</sup> Saunders *et al* 2012 Research Methods for Business Students Sixth edition 682

<sup>560</sup> Saunders *et al* 2012 Research Methods for Business Students Sixth edition 670

involved defining the null hypothesis and alternative hypotheses. Control variables in each model were specified accordingly. The theoretical proposition was validated by the data that was consistent with theoretical proposition. The statistical tools were used to confirm the theoretical proposition.

Regression techniques were used in investigating the influence of state-sovereignty on IIL and human development. The first regression model specified in equation (1) was used to investigate the influence of state-sovereignty on effectiveness of IIL. The model had seven (7) variables namely FDI, state-sovereignty as estimated by CRIP, GDP, population size, internet users, mobile cellular phone subscribers and consumer price index. FDI was the dependent variable of the model. The independent variable of interest was state-sovereignty given away as estimated by CRIP. The other five independent variables were control variables as they are traditional determinants of inward FDI.

The second regression model specified in equation (2) was used to investigate influence of state-sovereignty on human development. The model had five (5) variables that are human development index, state-sovereignty estimated by globalisation index, GDP per capita, population size and unemployment rate. The dependent variable of the model is human development index. The independent variable of interest was state-sovereignty as estimated by globalisation index. The other three independent variables are control variables, which are traditional determinants of human development index. Data was collected on all variables to enable statistical analysis.

The third stage involved construction of a third model that was used to explain the behaviour of nation-states in international cooperation in relation to investment assistance. The model showed the effects of state-sovereignty on ensuring mutual survival. No data was collected for the third model as it used findings from two models to explain influence of state-sovereignty on development and mutual survival.

### 4.3 Data collection for two models

#### 4.3.1 Data collection on relationship between state-sovereignty and IIL

The first regression model specified in chapter 3 required data collection of seven variables specified in the model. A sample of 25 nation-states was identified. In statistical analysis, a sample size of at least 25 is generally considered appropriate.<sup>561</sup> The names and number of countries selected were determined by the availability of all their international investment treaties in English language and accessible at UNCTAD website which were effective as at 31 December 2014. Data was collected for all variables for each country in the sample. The data collected is cross section data. The use of cross-sectional data has been previously undertaken by other researchers.<sup>562</sup> The regression model that was used in data analysis is as follows:

$$FDI_i = \alpha_0 + \alpha_1 \text{Sov\_CRIP}_i + \alpha_2 \text{GDP}_i + \alpha_3 \text{Pop}_i + \alpha_4 \text{Internetusers}_i + \alpha_5 \text{Mobilsub}_{it} + \alpha_6 \text{CPI\_Infl}_i + \varepsilon$$

#### 4.3.2 Dependent Variable

##### *Foreign Direct Investment (FDI)*

The main purpose of treaty based international investment law is to attract international investment in form of FDI. This is supported by extracts of preambles from twenty one (23) IITs and two (2) model IITs depicted in Annexure I below, which prescribes attraction of foreign investment as a common objective. In that case, international investment law can only be considered effective if it achieves its principal purpose of attracting FDI. Therefore, failure by IIL to achieve its principal purpose makes IIL less effective. Anything that reduces the effectiveness of IIL in achieving its purpose threatens IIL. In that regard, FDI is considered an important variable in the study and was specified as a dependent variable in regression model (1) above. Other scholars had previously treated FDI as a dependent variable.<sup>563</sup>

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<sup>561</sup> Hogg *et al* 2015 Probability And Statistical Inference, Ninth Edition 202

<sup>562</sup> Sasse 2011 An Economic Analysis of Bilateral Investment Treaties 69: "...authors also conduct a cross-sectional regression for 133 countries for the year 1995."

<sup>563</sup> Sasse 2011 An Economic Analysis of Bilateral Investment Treaties 69

FDI variable used in the analysis was average FDI inward stock for years 2016 and 2017 obtained from UNCTAD website. That average FDI corresponded with the cut-off date of 31 December 2014 that was adopted in estimating state-sovereignty given away through IIT ratification. FDI takes two years to respond to its determinants. That was supported by Sasse who claimed that FDI takes two years to significantly respond to state-sovereignty given away following ratification of identified IITs.<sup>564</sup> A two-year average was used to smoothen fluctuations of inward FDI stock.<sup>565</sup> The average FDI data for 25 countries is provided in table 12 of Annexure II.

### ***4.3.3 Independent variable of interest***

#### ***CRIP as a proxy for state-sovereignty given away in IITs***

Cumulative Restrictive IITs Provisions (CRIPs) variable is a synthetic metric, which was used as a proxy for state-sovereignty given away by a nation-state by ratifying IITs. The IITs ratified by each of the countries in the sample were identified.<sup>566</sup> The cut-off date adopted for all ratified IITs was 31 December, 2014. Each restrictive provision in IITs was awarded a score and all scores were aggregated for each IIT.<sup>567</sup> The aggregate scores of restrictive provisions of all IITs ratified by each country were then combined to get the CRIPs. Other researchers who investigated the impact of cumulative IITs on FDI motivated the adoption of cumulative restrictive provisions of IITs.<sup>568</sup> The resultant CRIPs was used as a proxy for state-sovereignty

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<sup>564</sup> Sasse 2011 An Economic Analysis of Bilateral Investment Treaties 69: “A consistent time lag between the signature of the BIT and the effect on FDI cannot clearly be defined, but is most likely two years”

<sup>565</sup> UNCTAD 2009 The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries 49: “To smooth annual fluctuations of FDI flows, FDI data are presented as three-year averages.”

<sup>566</sup> UNCTAD 2009 The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries 49: “Concerning the BIT variable, only ratified treaties are taken into account.”

<sup>567</sup> UNCTAD 2009 The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries 86-87: “Indexes for individual provisions are given equal weight and aggregated for each PTIA, resulting in the ranking of the PTIAs according to the coverage of investment provisions...”

<sup>568</sup> Sasse 2011 An Economic Analysis of Bilateral Investment Treaties 70

given away by a country ratifying IITs. CRIPs was treated as an independent variable of interest in the model as it was treated in that way by other authors.<sup>569</sup>

Romson noted that ratified IITs contained provisions, which restrict sovereign rights or policy space of host states.<sup>570</sup> IITs are not homogeneous as some contain more restrictive provisions than others. Those IITs with more restrictive provisions give away more sovereignty relative to IITs with less restrictive provisions. These provisions include most favored nation clause, national treatment clause, full protection and security, umbrella clause, direct expropriation, indirect expropriation and transfer of funds.<sup>571</sup> This thesis identified IITs provisions provided below as restrictive.

### ***Restrictive IITs Provisions***

A score sheet was formulated to record all restrictive provisions in each identified IIT. The restrictive provisions are as follows:

*Investment Protection Objective in Preamble:* The objective of promotion and protection of investment is usually set out in preambles of IITs. The preambles of treaties do not establish legally binding rights and obligations but they assist in the interpretation of a treaty as provided in Article 31 of the 1969 Vienna Convention on the Law of Treaties.<sup>572</sup> Arbitral tribunal tends to interpret provisions of IITs in consistent with the objective of investment protection enshrined in preambles of IITs. In that regard, the investment protection and promotion objective in the preamble motivates investor friendly interpretations of IITs provisions. Investor friendly

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<sup>569</sup> Sasse 2011 *An Economic Analysis of Bilateral Investment Treaties* 69

<sup>570</sup> Romson 2012 *Environmental Policy Space and International Investment Law* 209: “The provision of fair and equitable treatment also risks constraining policy space”

<sup>571</sup> Romson 2012 *Environmental Policy Space and International Investment Law* 336: “Investment protection provisions of the IIAs definitely have the potential to constrain environmental policy space for host states”

<sup>572</sup> United Nations Conference on Trade and Development (2007) *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* 3

interpretations of IITs can give more investment rights to investors.<sup>573</sup> More investment rights to investors grants more obligations to host states. The increase in state obligation restricts the sovereign rights of host states to freely regulate foreign investment. The giving away of rights to freely regulate investments is synonymous to giving away of state-sovereignty. A provision on promotion and protection in IIT preamble as an objective in IITs was awarded a score.

*Scope of Application:* broad scope of application of IITs expands coverage of the agreement on investments in a host state. This tends to broaden the host state's obligations on investments in her territory. The increased nation-state obligations created by a treaty, estimate the sovereignty given away. In that regard, all IITs provisions that broaden the scope of application of IITs gives away commensurate state-sovereignty. Provisions, which broaden scope of application, are provisions, which broaden meaning of investment, investor and duration of the treaty.

- *Broad asset based definition of investment* gives expansive meaning of investment. This gives an open-ended meaning of investment that expands the assets to be claimed as investments. The broad asset based definition of investment imposes excessive strain on the regulatory space of a nation-state.<sup>574</sup> This definition restricts rights of host states to exclude some assets from IITs protection. In that regard, IITs provisions, which broaden definition of investment, will be awarded a point to estimate sovereignty given away.
- *Broader meaning of Investor:* The natural person definition of investor is broad if it includes either citizens or individuals who qualify as permanent residents under national laws. A point is assigned when there is a broader meaning of an investor.
- *Investment duration and termination:* The increase in duration of IITs effectiveness and enforcement expands obligations of host state in protecting rights of investors and rights

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<sup>573</sup> Southern African Development Community (2012) SADC Model Bilateral Investment Treaty Template with Commentary 5

<sup>574</sup> Law Commission of India 2015, Report No.260, Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty 9

of home states. The larger the duration the more sovereignty given away. The provision with unlimited duration or duration above the usual ten year limit will be awarded a point.

*Admission and establishment:* There are IITs provisions, which give investors rights of admission and establishment. Such IITs have an effect of restricting the sovereign right of a host country of restricting entry of foreign investment or discriminating admission of investment. IITs provisions on NT and MFN have an effect of restricting states' sovereign rights for the benefit of investors.

- *Pre-entry National Treatment* : provides foreign investors with same right of entry and establishment of investment as nationals of the host state. This provision results in a host state giving away sovereign right of controlling the entry of foreign investment.<sup>575</sup> National treatment at pre-entry stage creates rights to investors to enter and establish business in a host state unhindered by screening laws of a host state.<sup>576</sup> This provision reduces the sovereign rights of host state to restrict or exclude entry of foreign investments. Therefore, host state gives away its sovereign right over admission of foreign investments. In that respect, pre-entry national treatment provision which grants right of admission to investors gives away state-sovereignty. A point was awarded to such a restrictive provision.
- *Pre-entry Most Favoured Nation (MFN)* : States have sovereign rights to exclude or differentiate entry and admission of foreign investment from different countries.<sup>577</sup> However, states may give away such rights by ratifying IITs with pre-entry MFN provision. MFN provision restricts the right of host state to discriminate investments from third party nation-states. In that respect, MFN provision gives away the host state's sovereign right to regulate or exclude admission of foreign investment from certain countries. IITs with pre-entry MFN provision are awarded a point to estimate sovereignty given away.

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<sup>575</sup> Sornarajah 2010 Third Edition, The International Law on Foreign Investment 88

<sup>576</sup> Sornarajah 2010 Third Edition, The International Law on Foreign Investment 335

<sup>577</sup> Sornarajah 2010 Third Edition, The International Law on Foreign Investment 88

*Post-Establishment - Most Favored Nation (MFN):* Most-favoured-nation treatment provisions in IITs grant rights to investors of contracting nation-states to benefit from favourable treatment that may be given to investors of third nation-states by either contracting nation-state.<sup>578</sup> The provision permits foreign investors to take advantage of any favourable treatment provided in the past or future treaties.<sup>579</sup> The provision encourages a foreign investor to import more favorable protection provisions contained in other IITs signed by the host state and use them to bring claims before arbitral tribunals.<sup>580</sup> This clause restricts the right of a nation-state to treat investors or investment from different nation-states differently. In that regard, the clause restricts the sovereignty of a country towards treating investors from different countries differently. Therefore, IITs with post establishment MFN clause are awarded a point to estimate sovereignty given away.

*Post-Establishment - National Treatment (NT):* National treatment after investment entry and establishment confers advantages to foreign investors, as it grants them same privileges enjoyed by domestic investors or nationals of host state.<sup>581</sup> In such a case, foreign investors are treated equally with host state`s national entrepreneurs.<sup>582</sup> National treatment standard can be used to prohibit imposition of performance requirements like export quotas or local purchase requirements on foreign investors.<sup>583</sup> The clause relieves the host state of its rights to discriminate treatment between domestic investors and foreign investors on established investments. Giving away of nation-state rights through national treatment provisions in IITs was awarded a point to capture sovereignty given away.

*Fair and equitable treatment (FET):* This provision as a standalone standard goes beyond the minimum standard international law principles. The provision has become more of a catch-all

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<sup>578</sup> Sornarajah 2010 Third Edition, The International Law on Foreign Investment 204

<sup>579</sup> Sornarajah 2010 Third Edition, The International Law on Foreign Investment 204

<sup>580</sup> Singh and Ilge 2016 Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices 90

<sup>581</sup> Sornarajah 2010 Third Edition, The International Law on Foreign Investment 202

<sup>582</sup> Sornarajah 2010 Third Edition, The International Law on Foreign Investment 336

<sup>583</sup> Sornarajah 2010 Third Edition, The International Law on Foreign Investment 202

provision with an effect of constraining regulatory and administrative actions of host states.<sup>584</sup> FET provision includes the protection of legitimate expectations of investors, freedom from harassment and coercion, due process and procedural propriety as well as good faith.<sup>585</sup> In *Saluka Investment v. Czech Republic* case, the tribunal described legitimate expectation as the dominant element of fair and equitable treatment.<sup>586</sup> Broad interpretation of the clause, especially the notion of legitimate expectation, gives more rights to investors and imposes more obligations on host states.<sup>587</sup> FET provisions limited by customary international law standards give away lesser rights.<sup>588</sup> The provisions with autonomous FET received a point to estimate sovereignty given away.

*Full protection and security:* The provision obliges host states to adopt measures to protect investor interests against adverse effects on their investment.<sup>589</sup> The adverse effects on investment and investors may stem from private parties such as business partners, employees or demonstrators or from actions of the host country and its organs including her armed forces.<sup>590</sup> The standard provides security against physical damage that may occur to investment of foreign investors arising from war and/or civil unrest in a host state.<sup>591</sup> War and civil strife are exceptional situations often excluded from coverage by insurance contracts that investors may have concluded, hence the need for investors to be protected against damages caused on them.<sup>592</sup> The clause on full protection and security do also cover damages caused by natural disasters

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<sup>584</sup> Law Commission of India 2015, Report No.260, Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty 15

<sup>585</sup> Sasse 2010 An Economic Analysis of Bilateral Investment Treaties 51

<sup>586</sup> Sasse 2010 An Economic Analysis of Bilateral Investment Treaties 51

<sup>587</sup> Singh and Ilge 2016 Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices 124

<sup>588</sup> United Nations Conference on Trade and Development (2007) Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking 30

<sup>589</sup> Schreuer 2010 Full Protection and Security 1

<sup>590</sup> Schreuer 2010 Full Protection and Security 1

<sup>591</sup> Collins 2011 Applying the Full Protection and Security Standard of International Investment Law to Digital Assets 1

<sup>592</sup> United Nations Conference on Trade and Development (2007) Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking 52

rather than cases of violence attributable to humankind.<sup>593</sup> The full protection and security clause is also interpreted to include guaranteeing of investor's legal security to effectively pursue their rights. The clause restricts state-sovereignty as it obligates host state to protect investors on wider aspects. In that regard, IIT provisions with such an absolute or autonomous clause was awarded a point to estimates sovereignty given away.

*Full expropriation:* This clause restricts the right of a host state to expropriate foreign investment. Expropriation is considered legitimate if it serves a public purpose, conducted in a non-discriminatory manner, followed by prompt, adequate and effective compensation and when it is in accordance with due process of the law.<sup>594</sup> These requirements are restrictive hence consenting to such restrictions will restrict state-sovereignty. This restriction on expropriation imposed on a host state by a IIT is awarded a point to estimate sovereignty given away.

*Indirect expropriation:* Indirect expropriation is at times referred to as regulatory expropriation or regulatory takings. It refers to a situation where the host state deprives investors of their interest in investment through regulatory measures.<sup>595</sup> The clause forbids a host state from undertaking regulatory measures that may interfere with their investments. Two main doctrines are used to determine whether measures by host-state constitute regulatory takings. These are the *sole effects doctrine* and the *police powers doctrine*. *Sole effects doctrine* considers whether a regulatory measure expropriate or adversely affect the value of an investment.<sup>596</sup> In that situation, indirect expropriation is realised if the effect of the measure exceeds a certain threshold in terms of value lost.<sup>597</sup> The *police powers doctrine* requires a number of conditionality for indirect expropriation to be recognised. The conditions for expropriation require the value of investment to be affected, the purpose of expropriation to be determined and the condition that the measure should not be discriminatory. All conditions should be considered first for indirect expropriation to be recognised. The Police Powers doctrine does not only look at the effects on the investment but

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<sup>593</sup> United Nations Conference on Trade and Development (2007) *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* 53

<sup>594</sup> Sasse 2010, *An Economic Analysis of Bilateral Investment Treaties* 55

<sup>595</sup> Sasse 2010 *An Economic Analysis of Bilateral Investment Treaties* 55

<sup>596</sup> Sasse 2010 *An Economic Analysis of Bilateral Investment Treaties* 55

<sup>597</sup> Sasse 2010 *An Economic Analysis of Bilateral Investment Treaties* 55

also at the purpose of the measure. To put it differently, no expropriation would occur when the government measure was non-discriminatory and in the public interest category.<sup>598</sup> The sole effects approach is investor-friendly whilst the police powers doctrine tests favour nation-states' rights to regulate.<sup>599</sup> A score was awarded once a treaty contain a provision that assumed sole effect approach in indirect expropriation.

*Transfer of funds:* Transfer of funds provisions in IITs give rights to investors to freely transfer funds. This clause gives foreign investors more rights if they are allowed to promptly transfer funds realised from their investment using a convertible currency at a specified exchange rate. Such rights take away the sovereignty of a nation-state to freely make its monetary policy. This clause restricts the ability of a country to deal with balance of payments crisis. A score was awarded once IIT contained such a provision, which gave away the right to restrict transfer of funds. The requirement of convertible currency and exchange rate also restricts state-sovereignty.

*Prohibition of Performance Requirements:* Performance requirements are usually imposed by host states in order to ensure that foreign investors hires nationals of the host state, use locally produced raw materials and, exports a portion of the finished product.<sup>600</sup> These performance requirements may be used in exchange of certain fiscal incentives or certain advantages.<sup>601</sup> However, other IITs prohibit performance requirements.<sup>602</sup> The prohibitions of performance requirements restrict the sovereign rights of host states. Generally, host states should be free to require certain performance requirements in pursuing their peculiar developmental objectives. If a host state accepts prohibition of performance requirements in IITs, it gives away its sovereignty. Hence, a score was awarded to every provision that restricted the performance requirement.

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<sup>598</sup> Sasse 2010 *An Economic Analysis of Bilateral Investment Treaties* 55

<sup>599</sup> Mostafa 2008 *The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law* 267

<sup>600</sup> United Nations Conference on Trade and Development (2007) *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* 64

<sup>601</sup> United Nations Conference on Trade and Development (2007) *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* 64

<sup>602</sup> Sornarajah 2010 *Third Edition, The International Law on Foreign Investment* 342

*Entry and sojourn of foreign nationals:* This provision in IITs may or may not establish legally binding obligations for contracting nation-states to allow entry and sojourn of covered investors or investment related personnel.<sup>603</sup> Granting rights of entry to the investors or investment related personnel restricts the sovereign rights of host states to regulate entry of foreign nationals. IITs, which grant entry rights to investors, restrict the sovereignty of a country to regulate entry of foreigners. Such a provision was awarded a score to estimate sovereignty given away.

*Top managerial personnel:* Host countries rely on this clause to compel investors to employ nationals of a host state in top management of foreign investments.<sup>604</sup> The IITs provision on top managerial personnel can also be constructed in a way that prohibit such requirement and permit investors to employ top management from any country. Giving rights to investors to bring top managerial personnel of any country will restrict the host country`s sovereignty to give preference to domestic personnel on appointment on managerial posts.<sup>605</sup> A score was awarded to IIT provisions in which the country gave away such right to restrict appointment of top management from abroad.

*Umbrella clause:* An umbrella clause obliges the host state to assume any other investment obligations it has with investors of the other contracting party.<sup>606</sup> The clause gives obligations to a host state to comply with contractual obligations of any investment contract.<sup>607</sup> In that clause, a simple commercial contractual obligations will receive an extra protection under the bilateral treaty. An umbrella clause would mean that violation of an investment contract between an investor and a host state would be elevated to violation of IIT. This conversion of contract claim

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<sup>603</sup> United Nations Conference on Trade and Development (2007) *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* 69

<sup>604</sup> United Nations Conference on Trade and Development (2007) *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* 72

<sup>605</sup> United Nations Conference on Trade and Development (2007) *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* 72

<sup>606</sup> United Nations Conference on Trade and Development (2007) *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* 73

<sup>607</sup> Sasse 2010, *An Economic Analysis of Bilateral Investment Treaties* 144

into a treaty claim restricts the nation-state rights. In that situation, such clause in an IIT was awarded a point to estimate sovereignty given away.

*Transparency:* This provision imposes obligations on contracting nation-states to exchange information that relates to laws and regulations that govern investment in their respective territories.<sup>608</sup> Transparency tends to extend beyond the traditional notion of publication of laws and regulations as it also allows interested stakeholders to participate in rulemaking of related investment.<sup>609</sup> This clause gives rights to investors to receive investment information and be given the right to comment on legislation drafted in a contracting nation-state. Nation-states are also given an obligation to share information that relates to investment. The clause that imposes an obligation on nation-state to share information was awarded a score to estimate sovereignty given away.

*Investor-State Dispute Settlement:* This provision grants foreign investors rights to present a dispute to a neutral forum for settlement, when it arise between an investor and the host state.<sup>610</sup> The investor-state dispute settlement provision gives rights to investors, to unilaterally initiate proceedings before an international tribunal, which increases the level of certainty and predictability they need.<sup>611</sup> Such a provision protects foreign investors against the arbitrary behavior of host states.<sup>612</sup> The provision imposes obligations on host states to be sued by an investor in an external tribunal. A host state loses its right to have a dispute settled in its jurisdiction. In that case, the nation-state gives away its sovereign rights for the benefit of investors. A score was therefore awarded to an IIT provision with such a provision that restricts its sovereign right.

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<sup>608</sup> United Nations Conference on Trade and Development (2007) *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* 77

<sup>609</sup> United Nations Conference on Trade and Development (2007) *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*

<sup>610</sup> Sornarajah 2010 Third Edition, *The International Law on Foreign Investment* 216

<sup>611</sup> United Nations Conference on Trade and Development (2007) *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* 99

<sup>612</sup> Singh and Ilge 2016 *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices* 94

*State-State Dispute Settlement (SSDS)*: State–state dispute settlement clause may require a foreign authority to adjudicate investment disputes between nation-states rather than using their domestic courts or tribunals. State–state dispute settlement clause was a common norm in early FCN treaties.<sup>613</sup> In such a situation, nation-states give away their right to adjudicate investment disputes in their domestic courts. A score was awarded to such a provision that restrict the sovereignty of a country.

### ***Estimation of CRIPs***

The restrictive IITs provisions explained above were used to develop a score sheet on Table 4 below. The score sheet was then used to determine CRIPs that estimated state-sovereignty given away through ratification of IITs. This thesis assumed the time lag of two years between ratification of IITs and FDI response to the ratification. In that regard, the selected cut-off date of estimating CRIPs was 31 December 2014. In such a case the CRIPs was an estimate of state-sovereignty given away through IIT ratification as at 31 December 2014. In that case, the effect of IITs ratification had full effect on FDI after two years. A sample of 25 countries was selected to determine their respective CRIPs. These countries were selected because they had all their ratified IITs available in English language as at 31 December 2014. The IITs were obtained from UNCTAD website. The data of CRIPs for 25 countries is provided in **Annexure II**.

**Table 4: Score Sheet of restrictive IITs provisions in a IIT**

<b>Provisions coverage</b>	<b>Comment</b>	<b>Maxim Score</b>
<b>Investment protection objectives in IITs preambles</b>		
Protection and promotion of Investment and favorable conditions for investment.	It encourages investor friendly interpretation of IITs to the detriment of host state rights.	1
<i>Alternatively: objective to respect public policy on health, safety, environment and Labour rights</i>	<i>This gives away some rights to host states hence diminish rights given away above. This discounts sovereignty given away.</i>	0.5
<b>Scope of application</b>		
Protection covering investments made before a treaty enters into force.	Expands nation-state obligations on investment on larger investment coverage.	1
Broad Asset-based definition of investment including every kind of asset	Nation-state gives more rights as obligations are on wider investments	1
Investor by either place of incorporation or	Requirement of either three of the	1

<sup>613</sup> Bernasconi-Osterwalder 2014 State–State Dispute Settlement in Investment Treaties 1

<b>Provisions coverage</b>	<b>Comment</b>	<b>Maxim Score</b>
location of company seat or nationality of ownership or control. Require either of the two.	requirements for a company to be a national of a given country gives away more rights to investors	
Duration and termination periods of above 10 years or indefinite period	The longer the duration the more restrictive the treaty	1
<i>Closed list definition of investment and enterprise definition or exclusion of certain assets and transactions from investments</i>	<i>The nation-state partially gives away rights in certain areas.</i>	0.5
<b>Admission and establishment of investment</b>		
Requirement for national treatment of investment standard on admission and establishment	Host state gives away right to discriminate investment admission of foreign and domestic investment	1
Requirement for national treatment investors standard on admission and establishment	Host state gives away right to discriminate investment admission of foreign and domestic investors	1
Most favored nation for investment on establishment and admission	Gives away the right to discriminate investments from different countries.	1
Most favored nation for investors on establishment and admission	Gives away the right to discriminate investors from different countries.	1
<i>Existence of non-conforming measures on admission and establishment of investment or reservations and exceptions.</i>	<i>The host state partially retains some rights of some investments</i>	0.5
<b>National Treatment (NT)-Post-establishment)</b>		
Requirement for nation treatment of investment post establishment	Nation-states gives away rights to discriminate between domestic and foreign investors	1
Requirement for nation treatment of investors post establishment	Host state gives away right to discriminate between foreign and domestic investors	1
<b>Most Favored Nation(MFN) -Post-establishment</b>		
Requirement of most favored nation treatment of investment post establishment	Nation-state gives away rights to discriminate investment from different nation-states	1
Requirement for most favored nation treatment of investors post establishment	Host state gives away right to discriminate between foreign and domestic investors	1
<b>Fair and equitable treatment</b>		
Autonomous or unqualified fair and equitable treatment	Makes legitimate expectation an integral part of the provision, making it more restrictive as investors gets more rights against the nation-state	1
<i>Fair and equitable treatment in accordance with customary international law</i>	<i>Standard is partially restricted by being subjected to international law</i>	0.5
<b>Full protection and security</b>		
Protection of investors against disturbances attributable to mankind like riots, war and demonstrations in form of compensation or indemnity to affected investors.	More obligations are assumed by a host state in protecting investors from damages caused on investors. Such obligations restrict state-sovereignty.	1
<b>Expropriation</b>		

<b>Provisions coverage</b>	<b>Comment</b>	<b>Maxim Score</b>
Expropriation should be on non-discriminatory basis, for a public purpose and under due process of law	Requirement of non-discriminatory restricts host country's rights to expropriate foreign investors	1
Hull formula in compensation: prompt, adequate and effective payment	Restrict rights of host state to expropriate	1
<b>Indirect Expropriation</b>		
Investors are protected against indirect expropriation.	This restricts policy space of a host state against free regulation of its territory.	1
Indirect expropriation under sole effect doctrine	Further restricts rights of a host state by broadening cases of indirect expropriation	1
<b>Transfer of Funds</b>		
Investors granted right to freely transfer their capital, profit, interest etc.	Unrestricted inflow and outflow restricts host state's rights to regulate inflows and outflows of funds	1
Investors' funds to be transferred using free convertible currency	Less discretion is given to host state as it is obligated to use its reserves to convert its domestic currency to the free convertible one.	1
Transfer subject to specific exchange rate to be used or market rate	Host state is restricted to use a specified exchange rate	1
Transfer of funds without delay	Shorter transfer periods are more restrictive on host state than longer periods	1
<i>Investor's rights to freely transfer funds is restricted in the administration of monetary, financial policies, macroeconomic management, BOP management, compliance to tribunals, bankruptcy, trade in securities, criminal acts and other restrictions.</i>	<i>Nation-state is granted some rights to restrict transfer of funds.</i>	0.5
<b>Prohibition of Performance Requirements</b>		
Host state prohibited or prevented from imposing performance requirements on investors	Restricts host state's right to control of investment.	1
<b>Entry and sojourn of foreign nationals</b>		
Requirement for nation-states to facilitate international movement of investments or investors related personnel.	Imposes some obligations on a nation-state and right to personnel related to investors or investment.	1
<b>Top Managerial Personnel</b>		
IITs gives right to investors to employ managerial personnel of their choice regardless of nationality, without being subjected to laws of host state	Nation-state grants rights to investors, to employ personnel of their choice.	1
<b>Umbrella Clauses</b>		
IITs obliges nation-states to observe any obligations or commitments.	Nation-state gives away rights by allowing protection in IITs to be extended to protections in commercial contracts, legislation and policies.	1
<b>Denial of benefits</b>		
IITs do not deny benefits to investors from non-party nation-state, investors with little business	Host state gives more rights to a broader network of investors.	1

<b>Provisions coverage</b>	<b>Comment</b>	<b>Maxim Score</b>
where the company is constituted etc.		
<b>Transparency</b>		
Provision which requires nation-states to inform each other on investment opportunities on request	Obligation to share information on investment.	1
<i>Contracting party to publish all measures that may affect investments.</i>	<i>Host is obligated to share necessary information and laws on investment to contracting party.</i>	<i>1</i>
Requirement of stakeholder participation in investment related rulemaking or comment on measures proposed for adoption or consultations.	Nation-state have obligation to involve external authorities in its rulemaking.	1
<b>Investor-State Dispute Settlement</b>		
Contracting parties grants investors some rights to directly defend their rights at an international tribunal like ICSID and UNCITRAL platform.	Nation-state gives away its right to an external adjudication authority.	1
Investors' right to submit disputes to external tribunal which relates to investment or concerning or in connection with or with respect to or arising out of an investment agreement or investment authorization.	Nation-state gives away more rights, including disputes which are outside alleged violation of IITs	1
Contracting parties to give unconditional consent to the submission of disputes to international tribunal or each party shall agree to give consent	Nation-state gives away its right to withhold its consent	1
Arbitral awards to be binding as provided by IITs or New York Convention or ICSID	Nation-state rights to review judgement on investment disputes are given away.	1
<b>State-State Dispute Settlement</b>		
Submission of disputes to a foreign tribunal and/or use of foreign rules in arbitration	Nation-state gives away adjudication of investment disputes to external authorities and rules	1
<b>Subrogation</b>		
Host state is obliged to recognize assignments of the rights and claim of party indemnified	Host state gives away its right to deal with the other party, which indemnifies the investor	1
<b>Maximum restrictive IIT provisions</b>		<b>37</b>

*Notes: Provisions in italics are alternative provisions are common in IITs, which partially gives away state-sovereignty rights.*

#### **4.1.1 Control Variables**

The control variables are traditionally known FDI determinants. These determinants were categorised into market seeking, efficient seeking and resource seeking factors. Market seeking

factors are measured by GDP and population size of a host country.<sup>614</sup> The commonly cited efficiency seeking factor is inflation measured by Consumer Price Index (CPI). Resource seeking determinants of FDI identified is infrastructure development. Two variables used as proxy for infrastructure are internet users and mobile cellular subscriptions.<sup>615</sup> Internet users have been previously used by other authors as one of the proxies of infrastructure.<sup>616</sup> Mobile subscribers have also been used as a proxy infrastructure development.<sup>617</sup> FDI data used in the analysis was an average of 2016 and 2017. All data of control variables was taken as an average of two annual years of 2013 and 2014. Data collected for all these variables is provided in annexure II.

**Table 5: Sources of data for Model 1 variables**

Variable	Sources
FDI	UNCTAD Website, UNCTADSTAT <a href="http://unctadstat.unctad.org/wds/TableView/tableView.aspx">http://unctadstat.unctad.org/wds/TableView/tableView.aspx</a>
CRIP	Bilateral Investment Treaties obtained from UNCTAD Website <a href="http://investmentpolicyhub.unctad.org/IIA/liaByCountry#iialInnerMenu">http://investmentpolicyhub.unctad.org/IIA/liaByCountry#iialInnerMenu</a>
GDP	UNCTAD Website, UNCTADSTAT <a href="http://unctadstat.unctad.org/wds/TableView/tableView.aspx">http://unctadstat.unctad.org/wds/TableView/tableView.aspx</a>
CPI	UNCTAD Website, UNCTADSTAT <a href="http://unctadstat.unctad.org/wds/TableView/tableView.aspx">http://unctadstat.unctad.org/wds/TableView/tableView.aspx</a>
Population size	UNCTAD Website, UNCTADSTAT <a href="http://unctadstat.unctad.org/wds/TableView/tableView.aspx">http://unctadstat.unctad.org/wds/TableView/tableView.aspx</a>
Internet users	World Bank Website <a href="https://data.worldbank.org/indicator/IT.NET.USER.ZS?view=chart">https://data.worldbank.org/indicator/IT.NET.USER.ZS?view=chart</a>
Mobile cellular subscriber	World Bank Website <a href="https://data.worldbank.org/indicator/IT.CEL.SETS?view=chart">https://data.worldbank.org/indicator/IT.CEL.SETS?view=chart</a>

*Sources: Websites provided in the second column of the table*

<sup>614</sup> Wadhwa 2011 Foreign Direct Investment into Developing Asian Countries: The Role of Market Seeking, Resource Seeking and Efficiency Seeking Factors 221

<sup>615</sup> Wadhwa 2011 Foreign Direct Investment into Developing Asian Countries: The Role of Market Seeking, Resource Seeking and Efficiency Seeking Factors 222

<sup>616</sup> Wadhwa 2011 Foreign Direct Investment into Developing Asian Countries: The Role of Market Seeking, Resource Seeking and Efficiency Seeking Factors 222

<sup>617</sup> Botrić and Škuflić 2005 Main Determinants of Foreign Direct Investment in the South East European Countries 16 [http://euroframe.org/files/user\\_upload/euroframe/docs/2005/session2/eurof05\\_botric.pdf](http://euroframe.org/files/user_upload/euroframe/docs/2005/session2/eurof05_botric.pdf)

#### **4.3.4 Data collection on relationship between state-sovereignty and development**

The second regression model specified in the previous chapter guided variables on which data was collected. A sample of 168 nation-states was identified and sample size was sufficiently a large size by statistical rules. In statistical analysis, an appropriate sample size should be at least 25.<sup>618</sup> Other researchers had previously used cross-sectional data.<sup>619</sup> Data on all variables specified in the model is readily available; hence, there were fewer constraints in selection of countries to be investigated. The countries selected were the ones that had data for all the five variables. Data was collected for all variables for each country in the sample. The data collected was cross sectional. The use of cross-sectional data was previously undertaken by other researchers.<sup>620</sup> The second regression model used for data analysis is as follows:

$$\text{HDI} = \beta_0 + \beta_1 \ln \text{Sov\_Globindex}_i + \beta_2 \ln \text{GDP}_i + \beta_3 \ln \text{Pop}_i + \beta_4 \ln \text{Unemp}_i + \varphi$$

#### **4.3.5 Dependent Variable**

##### **Human Development Index (HDI)**

Human development index measures human centered development in a given nation-state.<sup>621</sup> HDI was created with human focus and an emphasis that the human person has ultimate criteria for assessing the development of a given nation-state and not economic development alone.<sup>622</sup> In that respect, Sarkar *et al* argued that human development is an indicator of a nation-state's level of development.<sup>623</sup> In addition, human development is regarded as the primary objective of all

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<sup>618</sup> Hogg *et al* 2015 Probability And Statistical Inference, Ninth Edition 202

<sup>619</sup> Sasse 2011 An Economic Analysis of Bilateral Investment Treaties 69: "...authors also conduct a cross-sectional regression for 133 countries for the year 1995."

<sup>620</sup> Sasse 2011 An Economic Analysis of Bilateral Investment Treaties 69: "...authors also conduct a cross-sectional regression for 133 countries for the year 1995."

<sup>621</sup> Mansell and Scott 1994 Why bother about right to development, *Journal of Law and Society*, 21(2),185

<sup>622</sup> Arisman 2018 Determinant of Human Development Index in ASEAN Countries 114

<sup>623</sup> Arisman 2018 Determinant of Human Development Index in ASEAN Countries 114

developing economies of the world.<sup>624</sup> This makes HDI a good variable for estimating human development as already shown in the previous chapter. Some studies had used HDI as a dependent variable in data analysis. In the same way, this thesis adopted HDI as a dependent variable. The 2015 data on HDI was collected from the United Nations Development Programme website.

#### ***4.3.6 Independent variable of interest***

##### ***State-sovereignty given away estimated by Globalisation Index***

It has been argued that globalization is a reality that erodes or even eliminates sovereignty of nation-states.<sup>625</sup> In that respect, nation-states sacrifices their sovereignty whenever they embrace globalization.<sup>626</sup> These arguments predict a positive relationship between globalization and State-sovereignty given away. In that regard, globalisation can be used to estimate the state-sovereignty a country gives away in general. This therefore motivates the use of globalisation index as an estimate of state-sovereignty given away. The average of 2013 and 2014 data was used in the analysis. Globalisation index data was obtained from KOF Swiss Economic Institute website.

#### ***4.3.7 Control Variables***

Control variables are known traditional determinants of human development in a country, other than state-sovereignty given away through globalisation. Control variables enable isolated assessment of the effect of state-sovereignty given away on human development. The control variables adopted are GDP per capita, population size and unemployment rate. Data from 168

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<sup>624</sup> Ku and Yo 2013 Globalization and Sovereignty 210

<sup>626</sup> Piccin and Pusterla 2010 Defending eroded states' sovereignty the European Union humanitarian aid policy 9: "...Interdependence and globalization brought new economic and political opportunities and states may be prompted to partially or totally give up their sovereignty..."

countries was collected for all the identified variables. The average of 2013 and 2014 data in all the control variables were used in data analysis.

**Table 6: Data source for Model variables**

<b>Variable</b>	<b>Data source</b>
HDI	United Nations Development Programme (UNDP) website <a href="http://hdr.undp.org/en/data">http://hdr.undp.org/en/data</a> .
Globalisation Index	KOF Swiss Economic Institute website <a href="https://www.kof.ethz.ch/en/forecasts-and-indicators/indicators/kof-globalisation-index.html">https://www.kof.ethz.ch/en/forecasts-and-indicators/indicators/kof-globalisation-index.html</a> .
GDP per capita	World Bank Website <a href="https://data.worldbank.org/indicator/NY.GDP.PCAP.KD">https://data.worldbank.org/indicator/NY.GDP.PCAP.KD</a>
Population size	UNCTAD Website, UNCTADSTAT <a href="http://unctadstat.unctad.org/wds/TableView/tableView.aspx">http://unctadstat.unctad.org/wds/TableView/tableView.aspx</a>
Unemployment rate	World Bank Website <a href="https://data.worldbank.org/indicator/SL.UEM.TOTL.NE.ZS">https://data.worldbank.org/indicator/SL.UEM.TOTL.NE.ZS</a>

*Sources: Websites provided in the second column of the table*

## **CHAPTER 5**

### **5. DATA ANALYSIS AND RESULTS**

#### **5.1 Introduction**

This chapter outlines results of data analysis, the research findings and recommendations as informed by research findings. Regression techniques were used to analyse statistical data collected in chapter 4. The statistical package that was used to analyse the data is Eviews 3.1.

The first regression model was used to investigate the influence of giving away state-sovereignty through restrictive IITs provisions on realising IIL purpose of attracting investment. The control variables form part of the independent variables in the model. The inclusion of control variables made it possible for the study to investigate isolated influence of state-sovereignty given away on FDI, holding all other determinants of FDI constant.

A second regression model was then used to investigate the influence of state-sovereignty given away on human development, holding all other determinants of human development constant. In that regard, control variables formed part of the independent variables so as to control their influence on dependent variable.

The results from the two regression models were then used in interpretation of the third model. The third model is an explanatory model that would be used to explain nation-state behaviour in international cooperation, in an interdependent world. The results from models were used to deduce research findings. The research findings are useable for informing policy and academic improvements.

#### **5.2 Influence of state-sovereignty on international investment law**

### 5.2.1 Expected relationship of FDI and all its known determinants

Statistical techniques were used to investigate the relationship between state-sovereignty given away and international investment. The theoretical relationship between the variables of interests has already been used in specifying a first regression model. The association between FDI and all its independent variables was informed by literature and theory. The inclusion of control variables statistically enabled isolation of the influence of state-sovereignty given away on FDI, holding all other determinants of FDI constant.

The literature showed that restriction of state-sovereignty improves the effectiveness of IIL of attracting direct foreign investment. Statistically there is a positive relationship between state-sovereignty given away and inward FDI stock. The control variables of the model that included GDP, population, internet users and telephone subscription are all positively related to FDI as claimed by Wadhwa.<sup>627</sup> On the other hand, inflation has a negative relationship with FDI.<sup>628</sup> Table 7 below depicts the expected relationship between FDI as a dependent and independent variables as informed by literature.

**Table 7: Expected Relationship**

<b>Determinant</b>	<b>Expected relationship with FDI</b>
CRIP	Positive
GDP	Positive
CPI	Negative
Population size	Positive
Internet users	Positive
Mobile cellular subscriber	Positive

*Source: Wadhwa*

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<sup>627</sup> Wadhwa 2011 Foreign Direct Investment into Developing Asian Countries: The Role of Market Seeking, Resource Seeking and Efficiency Seeking Factors 221

<sup>628</sup> Wadhwa 2011 Foreign Direct Investment into Developing Asian Countries: The Role of Market Seeking, Resource Seeking and Efficiency Seeking Factors 221.

### 5.2.2 Regression Analysis

Regression techniques were used to carryout data analysis using data collected and presented in **Annexure II**. The regression equation that had been specified in Chapter 3 to be used in the analysis is as follows:

$$FDI_i = \alpha_0 + \alpha_1Sov\_CRIP_i + \alpha_2GDP_i + \alpha_3Pop_i + \alpha_4Internetusers_i + \alpha_5Mobilsub_{it} + \alpha_6CPI\_Infl_i + \varepsilon$$

A statistical package was used to analyse the data collected on all the variables in the regression model specified above using Eviews 3.1.

The regression model that was generated by Eviews 3.1 is as follows:

$$FDI = -3433.31 + 33.03*SOV\_CRIP + 0.29*GDP + 6.89*CPI\_INFL + 236.70*POP + 30.93*INTERNETUSERS - 484.24*MOBILSUB$$

The detailed statistical results generated by the statistical package are provided in table 8 below:

**Table 8: Regression Results for Model 1**

Dependent Variable: FDI

Method: Least Squares

Date: 04/20/19 Time: 23:08

Sample: 1 25

Included observations: 25

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	-3433.309	3103.208	-1.106374	0.2831
SOV_CRIP	33.03321	12.69512	2.602040	0.0180*
GDP	0.285606	0.114683	2.490392	0.0228*
CPI_INFL	6.892566	15.02997	0.458588	0.6520
POP	236.6971	145.5739	1.625958	0.1213**
INTERNETUSERS	30.92695	714.0861	0.043310	0.9659
MOBILSUB	-484.2413	214.9801	-2.252493	0.0370*
R-squared	0.854787	Mean dependent var		4575.623
Adjusted R-squared	0.806383	S.D. dependent var		6432.776
S.E. of regression	2830.545	Akaike info criterion		18.96582
Sum squared resid	1.44E+08	Schwarz criterion		19.30711
Log likelihood	-230.0728	F-statistic		17.65935
Durbin-Watson stat	2.721887	Prob(F-statistic)		0.000001*

\*Significant at 5%, \*\*Significant at 15%

### ***5.2.3 Interpretation of Regression Model results***

#### ***Statistical interpretations***

The regression results generated by Eviews package showed that the specified model is a good model as the R-squared is, at 85.5% that is above the required 60%. This shows that all combined independent variables can explain 85.5% variation of the dependent variable. In addition, the F-Statistic is significant at 1% level. F-statistic shows that all independent variables significantly affect FDI. At least half of all the independent variables are significant at 5% individually. These findings statistically confirm that the specified model is a good model.

The independent variables with the expected signs as predicted by theory were state-sovereignty as estimated by CRIP, GDP, population and internet users. The internet user variable was insignificant though it had an expected sign. Inflation and mobile subscribers had signs not expected by the theory. However, inflation was insignificant.

#### ***Theoretical significance of Independent variable of Interest***

A variable on state-sovereignty was statistically significant as shown above. The model that is statistically a good model confirmed that state-sovereignty positively attracts FDI, holding all other determinants of FDI constant. In that respect, the more sovereign rights nation-states give away in making IIL, the more IIL will fulfill its principal purpose of attracting FDI. The regression results showed that each restrictive provision a state consent-to as it enters IITs will, after two years, attract average FDI stock amounting to US33million, holding other determinants of FDI constant.

#### ***Theoretical Significance of Control Variables***

The results showed that FDI is also significantly influenced by market seeking factors; thus, GDP and population. Efficient seeking factor in the form of inflation was not significant. One resource-seeking factor, thus internet, had positive influence on FDI but was not significant. The other resource-seeking factor in the form of mobile subscribers had a negative significant influence on FDI, which is against prediction. This may be due to the reality that in the recent

years, internet had been replacing voice-telephone. Internet presents a better infrastructure than telephone infrastructure. Most telecommunication companies are now benefiting much from data as compared to voice-telephone.

#### **5.2.4 Findings**

The regression results confirmed the theoretical proposition that giving away of state-sovereignty improves the effectiveness of IIL in realising its principal purpose. That means the refusal by nation-states to give away state-sovereignty weakens the ability of IIL to fulfil its primary purpose. In other words, the refusal by nation-states to give away their sovereign rights reduces the effectiveness of IIL. Therefore, refusal by nation-states to restrict their sovereignty poses a threat on IIL.

### **5.3 Influence of state-sovereignty on human development**

The theory as supported by literature in chapter 3 showed that state-sovereignty given away has a positive influence on human development. The more sovereignty a nation-state consent to give away, the more it realises human development. The theoretical underpinnings of the relationship between state-sovereignty and human development was confirmed using the regression techniques that were applied on the data collected from 168 countries provided in Annexure III.

#### **5.3.1 Expected relationship of HDI and all its traditional determinants**

The expected relationship between the dependent variable and its traditional determinants is as provided in **table 9** below.

**Table 9: Expected Relationship between dependent and Independent Variables**

<b>Determinant</b>	<b>Expected relationship with HDI</b>
Globalisation Index	Positive
GDP per capita	Positive
Population size	Positive
Unemployment rate	Negative

*Sources: Arisman*

### 5.3.2 Regression Analysis

Regression techniques were used in undertaking data analysis. The data on all variables specified in the regression model is presented in Annexure III.

The regression equation specified in chapter 3 is as follows:

$$\text{LnHDI} = \beta_0 + \beta_1 \ln \text{Sov\_Globindex}_i + \beta_2 \ln \text{GDP}_i + \beta_3 \ln \text{Pop}_i + \beta_4 \ln \text{Unemp}_i + \varphi$$

EvIEWS 3.1 was used in carrying out the regression analysis and the detailed results are as provided below:

**Table 10: Regression Results for Model 2**

Dependent Variable: LNHDI  
 Method: Least Squares  
 Date: 08/27/18 Time: 13:46  
 Sample: 1 168  
 Included observations: 168

Variable	Coefficient	Std. Error	t-Statistic	Prob.
C	-2.048503	0.118571	-17.27658	0.0000*
LNSOV_GLOBINDEX	0.135611	0.043296	3.132176	0.0021*
LNGDP	0.128877	0.008199	15.71774	0.0000*
LNPOP	0.000348	0.004414	0.078929	0.9372
LNUNEMP	0.008423	0.008486	0.992653	0.3224
R-squared	0.853960	Mean dependent var		-0.380305
Adjusted R-squared	0.850376	S.D. dependent var		0.242251
S.E. of regression	0.093706	Akaike info criterion		-1.868007
Sum squared resid	1.431261	Schwarz criterion		-1.775032
Log likelihood	161.9126	F-statistic		238.2830
Durbin-Watson stat	1.894752	Prob(F-statistic)		0.000000*

\*Significant at 5%, \*\*Significant at 10%

The output of the regression model generated by a statistical package is specified as follows:

$$\text{LNHDI} = -2.048 + 0.136*\text{LNSOV\_GLOBINDEX} + 0.129*\text{LNGDP} + 0.00035*\text{LNPOP} + 0.0084*\text{LNUNEMP}$$

### ***5.3.3 Interpretation of model results***

#### ***Statistical Interpretations***

The regression results generated by a statistical package showed that the specified model is a good as R-squared was at 85.4% that is above the required 60%. This showed that all combined independent variables could explain 85.4% variation of the dependent variable. In addition, the F-Statistic was significant at 1% level. F-statistic showed that all independent variables significantly affect HDI. At least half of the independent variables were significant at 5% individually. These findings statistically confirm that the specified model is a good model.

The independent variables, which had a relationship predicted by theory, are state-sovereignty given away, GDP per capita and population size. Unemployment had a sign not expected by theory but it was insignificant. Further, population size though had an expected sign, was insignificant.

#### ***Interpretation of independent variable of Interest***

The state-sovereignty variable was statistically significant as shown above. The model confirmed that state-sovereignty had positive influence on HDI. Giving away of sovereign rights by a nation-state improves the nation-state's development. The regression results showed that giving away of 1% of sovereignty, results in 0.14% improvement in development. The results revealed that development is significantly influenced by state-sovereignty, holding all other determinants of development constant.

### ***5.3.4 Findings***

The regression results confirmed the argument that giving away of state-sovereignty improves human development in a given nation-state. In other words, the refusal by nation-states to give away state-sovereignty can inhibit human development. In that regard, refusal by nation-states to give away their sovereignty poses a threat on the human development of a nation-state.

## 5.4 State-sovereignty given away encourages State cooperation for mutual survival

The third test utilised results of first stage and second stage, to analyse the effect of state-sovereignty on nation-state cooperation for global development and mutual survival. An explanatory objective model developed was critical in explaining the behaviour of nation-states in an interdependent world. The objective function already specified in Chapter 3 is as follows:

*Stage 3 Objective function:  $(RIA_X + s\Delta D_Y) - IA_X = NW_X$  (in which  $IA_X \geq 0$  and  $R \geq 0$ )*

### 5.4.1 Spillover rate as measure of state-sovereignty given away

Spillover rate in the objective model function in stage 3, measures interdependence between nation-states. Literature showed that interdependence erodes state-sovereignty. In that perspective, spillover rate estimates state-sovereignty given away. Therefore, the size of spillover rate estimates interdependence between nation-states, which is positively related to state-sovereignty given away. Objective function of stage 3 showed that increase in spillover rate increases secondary wealth of a nation-state assisting another nation-state.

### 5.4.2 Restriction of State-sovereignty encourages State survival

The rise in net wealth of a country is good for state survival. Slaughter argued that nation-states are rational actors, which pursues material wealth to ensure their own survival.<sup>629</sup> Nation-state interdependence indicated that state-sovereignty given away improved net wealth of a nation-state. Independent Commission on International Development (ICAD) Report supports such a conclusion that, development and interdependence are preconditions of human survival.<sup>630</sup> A rational country aims to ensure that its net wealth is positive, which is good for its survival. This is supported by Slaughter who argued that nation-states aim at maximising their material interests and increase their wealth, rather than mere following of rules.<sup>631</sup>

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<sup>629</sup>Slaughter 2011 International Relations, Principal Theories 2: “States are self-interested, rational actors seeking to survive while increasing their material conditions and that uncertainty pervades relations between countries.”

<sup>630</sup> Independent Commission on International Development Issues Report 2002 A programme for survival 16

<sup>631</sup>Slaughter 2011 International Relations, Principal Theories 2

The results in stage 2 showed that giving away state-sovereignty increases human development in a given nation-state. The preferred condition for a nation-state, which pursues survival, requires net wealth to be positive. In a functional form, the preferred condition required is  $(RIA_X + s\Delta D_Y) - IA_X > 0$ . This showed that the restriction of state-sovereignty increases secondary consequences that increase net wealth. This confirms that giving away of state-sovereignty improves net wealth of a nation-state, which improves its chances for survival.

#### ***5.4.3 Developed state motivated to give investment assistance as a donation***

A nation-state can increase its survival by donating investment to developing states. In the event of investment donation, active return on such investment realised by an assisting nation-state will be zero ( $R=0$ ). In such a case, an objective function of stage 3 was reduced to  $s\Delta D_Y - IA_X = NW_X$ . The objective function showed that, net wealth can only be positive if secondary consequences are higher than investment donation given away. That position can only be realised if state-sovereignty is given away, and such donations improves the development of a developing state.

#### ***5.4.4 State-sovereignty given away encourages global development and mutual survival***

An objective function of stage 3 showed that investment assistance could be a rational decision for a developed country that pursues its own survival. Giving away of state-sovereignty increases secondary consequences of an assisting nation-state. Positive secondary consequences encourage developed countries to assist a less developed country. Spillover rate is crucial for encouraging assistance. The higher the spillover rate the more likely a developed state can assist a less developed country. Secondary consequences increase also with increase in development of a developing country. It was shown in stage 2 that giving away of state-sovereignty increases development of a developing country. In such a case, giving away of state-sovereignty improves development and mutual survival of nation-states.

The spillover rate encourages nation-states to assist each other. Failure by developing countries to assist developing countries can threaten the survival of developed countries as their net wealth can become negative. Fall in development can result in negative consequences. Patrick who noted

that the average loss of a single failing nation-state within the Low Income Countries category for itself and its neighbors, amounted to \$82.4 billion that was more than the global foreign aid budget amounting to \$79 billion.<sup>632</sup> The argument by Patrick presents a situation in which it is more beneficial for a developed country to assist a developing country. The objective function above explains that developed and developing countries can cooperate in assisting each other when they are interdependent. The objective function reveals that the giving away of state-sovereignty is crucial for ensuring mutual survival. In other words, refusal to give away state-sovereignty inhibits development and mutual survival.

## **5.5 General Findings of the Research**

### ***5.5.1 Effect of State-sovereignty on International Investment Law***

The results from this research showed that an additional restriction that a state consent to ratify in investment treaties would, with a time lag of two years, attract foreign direct investment amounting to about US\$33million. This means the giving away of state-sovereignty through restrictive IITs attracts foreign investment. The principal purpose of IIL is to encourage and attract investment. In that case, giving away of state-sovereignty improves effectiveness of IIL in realising its principal purpose. Conversely, the reluctance by nation-states to give away their sovereignty has a negative influence on foreign investment realised. In that case, nation-states that ratify IITs and give away less sovereignty will not effectively realise the principal purpose of IIL. Therefore, the failure to give away sovereignty threatens the effectiveness of IIL in realising its purpose.

### ***5.5.2 Effect of State-sovereignty on development***

The research found out that giving away of state-sovereignty by 1%, increases development by 0.14%. Therefore, giving away of state-sovereignty is crucial for development. In that case, failure by nation-states to give away their sovereignty has a detrimental effect on development. This finding confirms that failure to give away state-sovereignty poses a threat on development.

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<sup>632</sup> Patrick 2006 Weak States and Global Threats: Assessing Evidence of “Spillovers” 23

### ***5.5.3 State-sovereignty causes enmity between IIL and development***

The results of the thesis contribute on the debate by Schill *et al* on whether international investment law and development are friends or foes. This study showed that effectiveness of IIL has a bearing on development. IIL attracts foreign investment, which stimulates development. The effectiveness of IIL is affected by state-sovereignty given away in the making of the law. Giving away of state-sovereignty in making IIL attracts investment which will stimulate development. In cases where state-sovereignty is unrestricted in making of IIL, then IIL will not attract much investment. Cancellation of IITs reverses state-sovereignty given away, which will negatively affect investment and ultimately development. The failure by IIL to attract investment will negatively affect development. It had been confirmed that state-sovereignty given away affect the effectiveness of IIL on realising development. Therefore, giving away of state-sovereignty in making of IIL presents the answer empirical studies why at times IIL and development are not friends as theory generally predict.

### ***5.5.4 State-sovereignty obstruct international cooperation in development assistance***

Developed states had been failing to provide 0.7% of their annual GDP as ODA to developing countries.<sup>633</sup> Such an observation can be clarified by the findings in this thesis. The thesis exposes that the best way of encouraging developed states to rationally cooperate in assisting developing countries is increasing interdependence. The interdependence is realised by eroding the sovereignty of nation-states. The increasing interdependence between developed and developing countries increases their stakes in each other due to the spillover effects. However, the pursuit for interdependence can be scuttled by any activities which reverses giving away of state-sovereignty.

Despite the benefits of giving away state-sovereignty through investment treaties have on increasing interdependence of nation-states, countries are cancelling investment treaties even though maintaining investment agreement is beneficial to the international community. Already nation-states like South Africa, Indonesia, and Bolivia among others, had terminated some of

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<sup>633</sup> Bunn 2000 The Right to Development: Implications for International Economic Law 1453-1454

their investment treaties. Termination of treaties reduces interdependence of nation-states that reduces stakes countries have on each other, which reduces their size of secondary consequences. In that regard, termination of treaties may be a hindrance to cooperation in providing development assistance.

### ***5.5.5 Effect of State-sovereignty on global development and mutual survival***

Globalisation has created interdependence among nation-states. In an interdependent world, failure of development in one country has a detrimental effect on the development of other countries. Patrick claims that weak nation-states encourage the rise of an entire bad neighborhood.<sup>634</sup> The research results showed that any failure to restrict state-sovereignty have a negative effect on human development of a country. Such a failure to give away state-sovereignty negatively affects human development of the whole world. In that regard, unrestricted state-sovereignty poses a threat to global development. Therefore, a threat to global development ultimately threatens mutual survival.

## **5.6 Policy and Academic Recommendations**

### ***5.6.1 Adoption of development as an objective concept in international investment law***

International investment legal order is premised on the principles of state-sovereignty and state-consent.<sup>635</sup> The forces of globalisation, given their influence on state-sovereignty, suggest that the sacrosanctity status of state-sovereignty in IIL making should be revised and be done away with. State-sovereignty should be replaced by quest for the world to pursue development that is closer to sovereignty of people in an interdependent world. Borrowing from the declaration by President

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<sup>634</sup> Patrick 2006 Weak States and Global Threats: Assessing Evidence of “Spillovers” 22: “collapsed states are often adjacent to countries with similar characteristics that possess few defences against spillovers. Weaknesses in one state can encourage the rise of an entire “bad neighbourhood.” Such a pattern emerged in West Africa during the 1990s, as the conflict in Liberia under Charles Taylor poured across national borders”.

<sup>635</sup> Simonovid 2000 State-sovereignty and globalization: are some states more equal?

Bedjaoui of the International Court of Justice's 1996 Nuclear Weapons Advisory Opinion,<sup>636</sup> human development should be regarded as an objective conception of international investment law. Human development as an objective conception should replace "the resolutely positivist voluntary approach of international law", to ensure that international investment law responds to the necessities of the international community. Alternatively, IIL may have to adopt "right to development" as its collective judicial conscience to ensure global development.

### ***5.6.2 Encourage Development Assistance through restriction of State-sovereignty***

Developed countries can provide official developmental assistance to developing countries if nation-states are interdependent. However, the ultimate aim of assisting developing countries can be realised through giving away state-sovereignty through investment treaties that increases interdependence of nation-states in the international community. Nation-states, which are parties to an investment treaty, are interdependent as performance of investments between the nation-states affects their development. Interdependence of nation-states implies that if a nation-state assists another nation-state, the assisting nation-state will get active benefits of assistance and secondary consequences.<sup>637</sup> Developed countries are rational actors that pursue their interest for their own survival.

Active benefit takes the form of tax on dividends and tax on interest received from investment. Positive secondary consequences takes the form of reduced budget on dealing with refugees and illegal immigrants while negative consequences will be costs such as illegal immigrants.. Secondary consequences of a nation-states increases with increasing of interdependence of nation-states on each other. Treaties increases interdependence among countries making it

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<sup>636</sup>President Bedjaoui in the Nuclear Weapons Advisory Opinion declared that, "...The resolutely positivist, voluntarist approach of international law ... has been replaced by an objective conception of international law, a law more readily seen as the reflection of a collective juridical conscience and as a response to the social necessities of States organized as a community".

<sup>637</sup>A country assists another country through direct investments, concessionary loan, developmental assistance or grants.

beneficial for countries to cooperate in assisting each other. The assistance takes form of providing international investment that culminates in development of countries.

### ***5.6.3 Developing countries should consent to IITs with restrictive provisions***

Nation-states should ratify IITs with restrictive provisions so as to attract foreign investment. Foreign investment stimulates development. In that case, the giving away of state-sovereignty is crucial for speeding up development of less developed states. Development of a less developed country does affect development of other nation-states and ultimately their mutual survival.

### ***5.6.4 Donor funds should be utilised to ensure development of developing states***

Donor countries should be allowed to put strict measures to ensure that their developmental assistance is used in a way that will influence development of a country being assisted. Development of an assisted country will encourage the developed country to assist a less developed country as a rational decision.

### ***5.6.5 Shift sovereignty from Nation-State to a global International Agency in IIL making***

State-sovereignty is derived from sovereignty of people who transfer their sovereignty to their respective nation-states. The first transfer of sovereignty from people to nation-states benefited the world since the treaty of Westphalia of 1648; mainly for the peace, it brought. State-sovereignty has so far promoted co-existence of nation-states. However, the current reality of globalisation and interdependence of the world have eroded and/or is eroding state-sovereignty. This current reality requires the transfer of state-sovereignty to Regional or Continental Agencies and ultimately, to a Global Agency. The thesis has shown that globalisation makes unbound state-sovereignty obstruct effectiveness of IIL in addition to negatively affecting global development and survival of nation-states. In light of the above, nation-states should give away their sovereignty to a Regional or Global Agency that can be considered sovereign. The Supreme Agency may be given the mandate of making investment laws to ensure development in all regions. The recommendation resonates with the need for right to development to have a legal human right status. It has been recognised that development in one region affects another region

due to interdependent world. This view is supported by Piccin and Pusterla who questioned the possibility of shifting sovereignty from the nation-state to an international level due to increasing interdependence and integration of nation-states.<sup>638</sup>

### ***5.6.6 Transition from IIL of co-existence to IIL of co-operation***

Interdependence among nation-states requires movement of international investment of co-existence to an international law of cooperation.<sup>639</sup> The development of each country no matter how small, can have a significant effect on other nation-states. Co-existence recognises the existence of nation-states as independent silos where sovereignty of nation-state overrides every other contradictory decision. International investment law of cooperation can be realised by sacrificing state-sovereignty.

### ***5.6.7 Use of an Objective function model***

An objective explanatory model (5) constructed using the rational choice theory was presented as a tool that can be used in international economic law and international relations, to explain the behaviour of nation-states. The model can be used to find solutions on challenges facing the world. One challenge facing the world is failure by developed countries to achieve an official developmental assistance target of 0.7% of GDP. Compelling nation-states to achieve the target may not be best strategy as every nation-state pursues its own survival. The model showed that investment assistance improves development of developing countries, as developed countries can assist a developing state. The model is made available to other researchers for use in explaining nation-state behaviour in international relations for steering related debate. The model used in this study is as below:

$$(RIA_X + s\Delta D_Y) - IA_X = NW_X \quad (\text{in which } IA_X \geq 0 \text{ and } R \geq 0)$$

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<sup>638</sup> Piccin and Pusterla 2010 Defending eroded states' sovereignty the European Union humanitarian aid policy, "The European Union in International Affairs" 20

<sup>639</sup> Rich 1983 The right to development as an emerging human right, Virginia Journal of International Law 290

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Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Suriname.

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Economic Partnership Agreement between the CARIFORUM States and the European Community.

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Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference.

Treaty Establishing the Caribbean Community (Treaty of Chaguaramas).

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Agreement between the Government of the Italian Republic and the Government of the State of Eritrea on the promotion and protection of Investments.

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Treaty establishing the Common Market for Eastern and Southern Africa.

Treaty Establishing the African Economic Community/African Union.

## **Swaziland**

Treaty between the Federal Republic of Germany and the Kingdom of Swaziland concerning the Encouragement and Reciprocal Protection of Investments.

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Treaty Establishing the Caribbean Community (Treaty of Chaguaramas).

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Treaty between St. Lucia and The Federal Republic Of Germany Concerning The Encouragement and Reciprocal Protection of Investments.

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Agreement Between The Government of The Republic of China (Taiwan) And The Government of Saint Vincent And The Grenadines for The Reciprocal Promotion And Protection of Investments.

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Treaty Establishing the African Economic Community/African Union.

Treaty Establishing the Economic Community of West African States - Protocol A/P1/5/79 on Free Movement of Persons, Right of Residence and Establishment.

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Agreement on encouragement and reciprocal protection of investments between the Government of the Republic of Malawi and the Government of the Kingdom of the Netherlands.

Agreement for promotion and protection of Investment between the Government of the Arab Republic of Egypt and the Government of the Republic of Malawi.

Agreement Between the Government of The Italian Republic and The Government of on The Promotion and Protection of Investments.

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Treaty establishing the Common Market for Eastern and Southern Africa.

Treaty Establishing the Southern African Development Community.

Treaty Establishing the African Economic Community/African Union.

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Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments.

Agreement between the Swiss Confederation and the Republic of Kenya on the Promotion and Reciprocal Protection of Investments.

Agreement on economic co-operation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Kenya.

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Treaty for the Establishment of the East African Community.

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SADC Protocol on Finance and Investment.

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Treaty for the Establishment of the East African Community.

Treaty Establishing the Southern African Development Community.

Treaty Establishing the African Economic Community/African Union.

## **Barbados**

Agreement Between The Government Of Barbados And The Government Of The Republic Of Venezuela For The Promotion And Protection Of Investments.

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Barbados for the Promotion and Protection of Investments.

Agreement Between The Swiss Confederation and Barbados on The Promotion and Reciprocal Protection of Investments.

Agreement Between The Government of the Republic of Mauritius and the Government of Barbados.

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Economic Partnership Agreement between the CARIFORUM States and the European Community.

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Agreement Establishing the Free Trade Area between the Caribbean Community (CARICOM) and the Dominican Republic.

Agreement between the Caribbean Community (CARICOM) and Venezuela on Trade and Investment.

Treaty Establishing the Caribbean Community (Treaty of Chaguaramas).

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Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Uganda for the Promotion and Protection of Investments.

Agreement between the Swiss Confederation and the Republic of Uganda concerning the Encouragement and Protection of Investments.

Agreement on encouragement and reciprocal protection of investments between the Republic of Uganda and the Kingdom of the Netherlands.

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Treaty for the Establishment of the East African Community.

Treaty establishing the Common Market for Eastern and Southern Africa.

Treaty Establishing the African Economic Community/African Union.

Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference.

### **Myanmar**

Agreement Between The Government of the Kingdom of Thailand and The Government of the Union of Myanmar for the Promotion and Protection Of Investments.

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Agreement Between The Government of The Republic of India and The Government of The Union of Myanmar for The Reciprocal Promotion and Protection of Investments.

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Framework Agreement on Comprehensive Economic Co-operation between ASEAN and China.

ASEAN Framework Agreement on Services.

ASEAN Agreement for the Promotion and Protection of Investments.

Cooperation Agreement between Member Countries of ASEAN and European Community.

### **Papua New Guinea**

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investments.

Agreement between the Government of Japan and The Government of The Independent State of Papua New Guinea for The Promotion and Protection of Investment.

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Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part.

South Pacific Regional Trade and Economic Cooperation Agreement.

Agreement on Trade and Commercial Relations between the Government of Australia and the Government of Papua New Guinea.

### **Gambia**

Agreement between The Government of The Kingdom of Morocco and The Government of The Republic of Gambia on The Reciprocal Promotion and Protection of Investments

Agreement Between The Republic of China (Taiwan) and The Republic of The Gambia on The Promotion and Reciprocal Protection of Investment.

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Treaty Establishing the Economic Community of West African States - Protocol A/P1/5/79 on Free Movement of Persons, Right of Residence and Establishment.

## **Belize**

Agreement between the Government of the Republic of Austria and the Government of Belize for the Promotion and Protection of Investments

Agreement on encouragement and reciprocal protection of investments between Belize and the Kingdom of the Netherlands.

Agreement between the Government of the Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments.

Agreement Between The Government of Belize and The Government of The Republic of Cuba for The Promotion and Reciprocal Protection of Investments

Trade and Investment Framework Agreement between the Government of the United States of America and the Caribbean Community.

Economic Partnership Agreement between the CARIFORUM States and the European Community.

Free Trade Agreement between the Caribbean Community (CARICOM) and Costa Rica.  
Revised Treaty of Chaguaramas Establishing the CARICOM Single Market and Economy.  
Trade and Economic Cooperation Agreement between CARICOM and Cuba.  
Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part.  
Agreement Establishing the Free Trade Area between the Caribbean Community (CARICOM) and the Dominican Republic.  
Agreement between the Caribbean Community (CARICOM) and Venezuela on Trade and Investment.  
Treaty Establishing the Caribbean Community (Treaty of Chaguaramas).

## **Guyana**

Agreement between the Government of The People's Republic of China and The Government of The Republic of Guyana on The Promotion and Protection of Investments.  
Treaty between the Federal Republic of Germany and the Co-operative Republic of Guyana concerning the Encouragement and Reciprocal Protection of Investments.  
Agreement Between The Government of The Republic of Korea and The Government of The Cooperative Republic of Guyana for The Promotion and Protection of Investments.  
Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Co-operative Republic of Guyana for the Promotion and Protection of Investments.  
Trade and Investment Framework Agreement between the Government of the United States of America and the Caribbean Community.  
Economic Partnership Agreement between the CARIFORUM States and the European Community.  
Free Trade Agreement between the Caribbean Community (CARICOM) and Costa Rica.  
Revised Treaty of Chaguaramas Establishing the CARICOM Single Market and Economy.  
Trade and Economic Cooperation Agreement between CARICOM and Cuba.

Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part.

Agreement Establishing the Free Trade Area between the Caribbean Community (CARICOM) and the Dominican Republic.

Agreement between the Caribbean Community (CARICOM) and Venezuela on Trade and Investment.

Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference.

Treaty Establishing the Caribbean Community (Treaty of Chaguaramas).

### **Lesotho**

Treaty between The Kingdom of Lesotho and The Federal Republic of Germany Concerning The Encouragement and Reciprocal Protection of Investments.

Agreement between of Investments on the Promotion and Reciprocal Protection the Kingdom of Lesotho and the Swiss Confederation.

Agreement between the Government of the Kingdom of Great Britain and Northern Ireland the Government of the Kingdom of Lesotho the Promotion and Protection of Investments.

Trade, investment and development cooperative agreement between the United States and the Southern African Customs Union.

SADC Protocol on Finance and Investment.

Free Trade Agreement between the EFTA States and SACU.

Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part.

Treaty Establishing the Southern African Development Community.

Treaty Establishing the African Economic Community/African Union.

### **Afghanistan**

Agreement between Afghanistan and Germany BIT (2005)

Agreement between Afghanistan and Iran, Islamic Republic of BIT (2006)

Agreement between Afghanistan and Turkey BIT (2004)

Trade and Investment Framework Agreement between Afghanistan and the United States.

South Asian Free Trade Area Accord.

The Energy Charter Treaty.

Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference.

## **Haiti**

Agreement Between The Government of The French Republic and The Government of The Republic of Haiti on The Reciprocal Promotion and Protection of Investments.

Treaty Between The Federal Republic of Germany and The Republic of Haiti Concerning The Promotion and Reciprocal Protection of Capital Investment.

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Haiti for the Promotion and Protection of Investments.

Agreement Between The Republic of Turkey and The Transitional Islamic State of Afghanistan Concerning The Reciprocal Promotion and Protection of Investments.

Treaty between the Federal Republic of Germany and the Islamic Republic of Afghanistan concerning the Encouragement and Reciprocal Protection of Investments.

Trade and Investment Framework Agreement between the Government of the United States of America and the Caribbean Community.

Economic Partnership Agreement between the CARIFORUM States and the European Community.

Free Trade Agreement between the Caribbean Community (CARICOM) and Costa Rica.

Revised Treaty of Chaguaramas Establishing the CARICOM Single Market and Economy.

Trade and Economic Cooperation Agreement between CARICOM and Cuba.

Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part.

Agreement Establishing the Free Trade Area between the Caribbean Community (CARICOM) and the Dominican Republic.

Agreement between the Caribbean Community (CARICOM) and Venezuela on Trade and Investment.

Treaty Establishing the Caribbean Community (Treaty of Chaguaramas).

## **Legislation**

Constitution of the Republic of Albania

Constitution of the Federative Republic of Brazil

Constitution of the People's Republic of China

Constitution of the Republic of Croatia

Constitution of Finland

Constitution of the Italian Republic

Japan's Constitution

The Constitution of Nepal

Constitution of the Federal Republic of Nigeria

Constitution of the Portuguese Republic

Constitution of the Russian Federation

Spanish Constitution

Constitution of Sweden

Constitution of Zimbabwe

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## Annexure I

**Table 11: Objectives of International Investment Treaties**

	<b>Goals and Purposes of International Investment Treaties</b>		
	<b>ATTRACT INTERNATIONAL INVESTMENT</b>	<b>INVESTMENT CONTRIBUTE TO DEVELOPMENT AND PROSPERITY</b>	<b>COOPERATION AND MUTUAL BENEFIT</b>
China and Djibouti (2003)	“Recognizing that the reciprocal encouragement, promotion and protection of such investment will be conducive to stimulating business initiative of the investors, flow of capital and technology...”	“...flow of capital and technology, and will increase prosperity and economic development ...”	“Desiring to intensify the cooperation of both States on the basis of equality and mutual benefits”
ASEAN Comprehensive Investment Agreement	“...sustained inflows of new investments and reinvestments...”	“...inflows of new investments and reinvestments will promote and ensure dynamic development of ASEAN economies”	“DETERMINED to further intensify economic cooperation between and among Member States”
Caribbean Community (CARICOM) Dominican Republic Free Trade (2001)	“Recognising the need to stimulate and protect investments...”	“...stimulate and protect investments in a manner that will promote economic growth and development...”	“Interested in promoting greater economic co-operation amongst themselves ...”
Australia and Egypt (2001)	““Recognising the importance of promoting the flow of capital ...”	“Recognising the importance of promoting the flow of capital for economic activity and development ...”	“Considering that investment relations should be promoted and economic cooperation strengthened in accordance with the internationally accepted principles of mutual respect for sovereignty, equality, mutual benefit ...”
Republic of Korea and Trinidad & Tobago (2002)	“...promotion and protection of investments on the basis of this Agreement will be conducive to the stimulation of individual business initiative ...”	“...this Agreement will be conducive to the stimulation of individual business initiative and will increase prosperity in both States”	“Desiring to intensify economic cooperation between both States, ... based on the principles of equality and mutual benefit”
France and Haiti	“promotion and protection of such investments are likely to stimulate transfers of capital and technology between the two countries”	“...transfers of capital and technology between the two countries in the interest of their economic development”	“Desiring to increase economic co-operation between the two States...”
SADC Model BIT (2012)	“Seeking to promote, encourage and increase investment opportunities ...”	“Recognizing the important contribution investment can make to the sustainable development of the State Parties, including ... and the furtherance of human rights and human development”	“Desiring to strengthen the bonds of friendship and cooperation between the State Parties.”
US and Grenada	“...treatment to be accorded such investment will stimulate the flow of private capital...”	“...investment will stimulate the flow of private capital and the economic development of the Parties”	“Desiring to promote greater economic cooperation between them...”
Australia and Papua New Guinea	“RECOGNISING the importance of promoting the flow of capital ...”	“...flow of capital for economic activity and development ...”	“... economic co-operation strengthened in accordance with the internationally accepted principles of mutual respect for sovereignty, equality, mutual benefit, nondiscrimination and mutual confidence”
Italy and Eritrea	“Acknowledging that encouragement is apt to stimulate investment ...”	“...encouragement is apt to stimulate investment and increase the prosperity of the Contracting Parties”	“Desiring to intensify economic co-operation between the two countries on the basis of equity and mutual benefit”
Malawi and	“treatment to be accorded to such	“stimulate the flow of capital and	“...promote economic cooperation

Netherlands	investments will stimulate the flow of capital and technology”	technology and the economic Development”	through the protection in its territory of investments of nationals of the other Contracting Party” Article 2
German and Haiti	“protection of such investment are conducive to stimulating private enterprise”	“investment are conducive to stimulating private enterprise and to increasing the prosperity of both nations”	“Desiring to intensify economic co-operation between the two States”
Lesotho and German	“...protection of such investments is apt to stimulate private business initiative...”	“...protection of such investments are apt... to increase the prosperity of both nations”	“Desiring to intensify economic co-operation between both States”
Swiss Confederation and Lesotho	“Intending to create and maintain favorable conditions for investments ... to encourage new business initiatives,”	“...need to promote and protect foreign investments with the aim to foster the economic development and prosperity of both State...”	“Desiring to intensify economic cooperation to the mutual benefit of both States”
China and Guyana	“...encouragement, promotion and protection of investments will be conducive to stimulating the business initiatives of investors...”	“encouragement, promotion and protection of investments will be conducive to stimulating the business initiatives of investors and the economic development of both States”	“Desiring to intensify economic cooperation between both States on the basis of equality and mutual benefits”
Japan and Paupa Guinea	“Intending to create stable, equitable and favourable conditions for greater investment by investors...”	“Recognising the importance of foreign investment for national development...”	“cooperative efforts of the Contracting Parties to promote investment ... in enhancing sustainable development”
France and Malta	“...encouragement and contractual protection of such investments are apt to stimulate the transfer of capital and technology...”	“...stimulate the transfer of capital and technology between both nations in the interest of their economic development”	“DESIRING to strengthen economic co-operation between both States”
Kenya and Finland	“...treatment to be accorded such investments will stimulate the flow of private capital...”	“...treatment to be accorded such investments will stimulate the flow of private capital and the economic development of the Contracting Parties”	“Desiring to promote greater economic co-operation between them ...”
2006 Model BIT for France	“...promotion and protection of these investments would succeed in stimulating transfers of capital and technology ...”	“...stimulating transfers of capital and technology between the two countries in the interest of their economic development”	“Desiring to strengthen the economic cooperation between both States ...”
Canada and Tanzania	“...protection of such investments favour the economic prosperity and sustainable development ...”	“...to create and maintain favourable conditions for investments by investors of one Party in the territory of the other Party”	“desiring to intensify economic co-operation and promote sustainable development for the mutual benefit of both countries ...”
Uganda and Swiss	“...encouragement and promotion of such investments are apt to stimulate the flow of capital ...”	“stimulate the flow of capital to the benefit of the economic prosperity of both Countries”	“Desiring to strengthen the economic cooperation between both countries”
Finland and Tanzania	“RECOGNISING that agreement on the treatment to be accorded such investments will stimulate the flow of private capital ...”	“... will stimulate the flow of private capital and the economic development of the Contracting Parties”	“DESIRING to promote greater economic cooperation between them ...”
Afghanistan and German	“...encouragement and contractual protection of such investments are apt to stimulate private business initiative ...”	“...to stimulate private business initiative and to increase the prosperity of both nations”	“desiring to Intensify economic co-operation between both States”
Afghanistan and Turkey	“...the treatment to be accorded such investment will stimulate the flow of capital and technology ...”	“...investment will stimulate the flow of capital and technology and the economic development of the Parties”	“Desiring to promote greater economic cooperation between them ...”
United States and Uruguay (2005)	“...agreement upon the treatment to be accorded such investment will stimulate the flow of private capital ...”	“...stimulate the flow of private capital and the economic development of the Parties;”	“Desiring to promote greater economic cooperation between them ...”

## Annexure II

**Table 12: Data for 25 Countries**

State	FDI (2016,2017)	Sovereignty (2014)	GDP (2013,2014)	Population (2013,2014)	CPIinflation (2013,2014)	Internetusers (2013,2014)	Mobilesubscribers (2013,2014)
Tonga	430.61	27.00	379.50	0.106	142.93	0.03626	0.062750
Suriname	1,853.61	91.00	4,893.88	0.545	185.76	0.21122	0.898200
Eriteria	966.52	34.00	2,600.65	4.699	290.72	0.04440	0.386122
Swaziland	818.54	75.00	5,153.93	1.283	180.77	0.32643	0.904900
Dominica	362.15	104.50	497.20	0.073	119.60	0.03938	0.083731
Botswana	5,309.28	66.00	16,098.14	2.149	196.32	0.71702	3.328647
Antiga	692.38	98.00	1,191.93	0.098	121.48	0.06451	0.117200
Saint Lucia	855.18	100.50	1,236.56	0.176	126.58	0.06390	0.200207
Saint Vicent	1,145.40	106.50	703.78	0.109	132.01	0.04969	0.120198
Siera Leon	1,123.23	68.50	3,897.84	7.001	122.89	0.35204	4.378400
Grenada	2,182.59	109.50	814.78	0.106	126.59	0.04596	0.125076
Malawi	1,259.96	91.50	7,960.73	16.823	289.56	0.91517	5.461279
Lesotho	514.71	83.50	2,793.16	2.132	169.40	0.39434	1.964542
Haiti	1,557.54	110.50	7,697.51	10.502	186.88	1.15523	6.964756
Guyana	3,079.24	163.00	2,678.85	0.761	149.53	0.23963	0.560970
Gambia	368.35	153.50	1,015.18	1.889	146.70	0.27913	2.066273
Belize	2,126.15	149.00	1,522.49	0.348	117.86	0.12578	0.173458
PapuaGuinea	4,443.64	111.00	16,419.88	7.674	152.50	0.44511	3.179450
Uganda	11,542.70	152.00	23,180.47	38.194	209.15	6.18735	19.217295
Myanmar	25,635.44	230.00	52,963.90	51.686	258.79	5.04457	17.930861
Barbados	6,934.68	248.50	4,410.76	0.283	155.53	0.20791	0.306582
Alfghanistan	1,403.21	95.00	20,954.93	32.245	182.92	2.07979	17.607162
Liberia	8,456.79	64.00	1,669.80	4.339	211.84	0.18677	2.888017
Kenya	11,568.08	191.00	48,204.88	45.426	245.61	6.70027	32.731317
Tanzania	19,760.60	269.50	40,119.65	51.436	219.10	2.93184	29.652740

### Annexure III

**Table 13: Data for 168 Countries**

Country	HDI	Globalisation index	GDP	Population (000)	Unemployment
Afghanistan	0.48	32.47	631.99	32,244.85	8.58
Albania	0.76	58.82	4,370.60	2,919.88	16.57
Algeria	0.75	51.10	4,636.05	38,725.94	10.21
Argentina	0.83	58.17	10,511.20	42,760.72	6.82
Armenia	0.74	58.67	3,768.96	2,899.86	16.84
Australia	0.94	82.47	54,277.46	23,312.70	5.87
Austria	0.89	89.57	47,911.85	8,605.50	5.47
Azerbaijan	0.76	56.86	6,100.65	9,444.53	4.94
Bahamas	0.79	54.14	27,444.94	379.70	14.99
Bahrain	0.82	70.50	22,095.17	1,325.90	1.23
Bangladesh	0.58	41.63	900.87	158,488.29	4.43
Barbados	0.80	55.60	15,926.56	282.95	11.86
Belarus	0.80	61.26	6,610.60	9,481.88	0.50
Belgium	0.90	91.23	44,443.20	11,185.34	8.48
Belize	0.71	48.00	4,372.37	347.94	11.63
Benin	0.49	45.20	819.80	10,145.58	2.63
Bhutan	0.61	41.76	2,450.09	770.70	2.75
Bolivia	0.67	54.65	2,274.37	10,481.21	2.20
Bosnia and Herzegovina	0.75	66.34	4,937.88	3,585.50	27.49
Botswana	0.70	47.44	7,491.85	2,148.54	17.62
Brazil	0.75	60.96	11,892.78	203,310.88	6.83
Brunei Darussalam	0.87	67.06	33,966.40	408.71	6.43
Bulgaria	0.79	76.94	7,231.27	7,244.14	12.18
Burkina Faso	0.40	48.25	635.66	17,329.35	6.25
Burundi	0.40	34.38	241.22	9,745.99	1.53
Cabo Verde	0.65	45.80	3,379.79	523.27	10.39
Cambodia	0.56	50.25	948.05	15,146.74	0.24
Cameroon	0.52	43.14	1,406.73	21,947.81	4.59
Canada	0.92	86.06	49,790.63	35,430.11	6.99
Central African Republic	0.35	36.21	301.51	4,507.52	6.32
Chad	0.40	38.74	950.90	13,351.51	5.69
Chile	0.85	71.67	14,616.19	17,538.39	6.43
China	0.74	61.58	5,914.97	1,386,451.80	4.57
Colombia	0.73	60.24	7,171.37	47,567.45	8.86
Comoros	0.50	30.58	781.18	750.44	4.37
Congo	0.59	48.74	2,864.66	4,811.25	10.00

Congo (Democratic Republic of the)	0.44	40.82	386.51	72,519.45	3.71
Costa Rica	0.78	62.54	8,958.71	4,731.99	9.04
Croatia	0.83	78.26	13,630.79	4,267.67	17.27
Cyprus	0.86	84.80	27,088.17	857.21	15.98
Czech Republic	0.88	84.02	20,085.24	10,596.50	6.53
Côte d'Ivoire	0.47	48.37	1,345.31	22,248.83	2.79
Denmark	0.93	87.68	59,113.01	5,650.87	6.80
Dominican Republic	0.72	66.51	6,018.58	10,343.57	6.74
Ecuador	0.74	53.58	5,369.96	15,782.33	3.28
Egypt	0.69	63.15	2,599.72	90,810.00	13.13
El Salvador	0.68	63.63	3,248.79	6,265.98	3.92
Equatorial Guinea	0.59	26.63	16,331.51	1,106.59	5.51
Estonia	0.87	78.78	17,185.98	1,319.96	7.99
Ethiopia	0.45	39.32	437.08	96,127.25	4.98
Fiji	0.74	57.08	3,989.23	882.76	6.87
Finland	0.90	85.77	45,477.51	5,448.17	8.42
France	0.90	86.64	41,279.14	66,274.76	10.11
Gabon	0.70	53.20	9,458.24	1,846.49	20.23
Gambia	0.45	50.03	536.23	1,888.59	9.42
Georgia	0.77	64.17	3,742.73	4,019.13	13.46
Germany	0.93	83.99	44,688.65	81,377.40	5.11
Ghana	0.58	52.09	1,646.66	26,654.41	2.17
Greece	0.87	80.39	22,408.47	11,293.01	26.98
Guinea	0.41	44.24	709.42	11,671.06	4.53
Guinea-Bissau	0.42	37.12	550.40	1,703.62	6.23
Guyana	0.64	48.11	3,541.45	760.74	11.40
Haiti	0.49	39.31	723.60	10,502.12	13.90
Honduras	0.63	60.63	2,046.40	8,733.50	4.79
Hungary	0.84	86.19	13,814.50	9,827.52	8.96
Iceland	0.92	67.61	44,538.70	327.74	5.14
India	0.62	51.95	1,597.73	1,286,210.75	3.44
Indonesia	0.69	58.44	3,626.52	253,581.69	4.20
Iran (Islamic Republic of)	0.77	42.24	6,062.64	77,923.24	10.50
Iraq	0.65	42.33	5,321.82	34,444.61	7.73
Ireland	0.92	91.83	52,158.18	4,684.16	12.15
Israel	0.90	72.51	32,428.83	7,881.22	6.05
Italy	0.89	81.57	33,751.63	59,626.83	12.41
Jamaica	0.73	58.86	4,707.31	2,856.95	14.49
Japan	0.90	58.86	46,366.68	128,237.90	3.81
Jordan	0.74	68.56	3,374.95	8,611.39	12.25
Kazakhstan	0.79	54.64	10,507.27	17,347.52	5.13

Kenya	0.56	46.18	1,061.95	45,425.55	11.72
Korea (Republic of)	0.90	66.57	24,004.49	50,277.40	3.32
Kuwait	0.80	67.26	37,092.07	3,690.42	2.72
Kyrgyzstan	0.66	54.71	993.87	5,729.19	8.19
Lao People's Democratic Republic	0.59	35.56	1,427.10	6,535.48	0.67
Latvia	0.83	70.86	13,570.14	2,028.45	11.36
Lebanon	0.76	66.28	7,600.62	5,439.69	6.19
Lesotho	0.50	45.43	1,311.82	2,131.57	24.67
Liberia	0.43	45.04	379.83	4,338.51	2.26
Libya	0.72	49.16	7,760.33	6,200.04	18.61
Lithuania	0.85	77.28	14,618.63	2,979.59	11.24
Luxembourg	0.90	84.15	105,437.33	550.52	5.85
Madagascar	0.51	42.38	407.52	23,275.47	1.04
Malawi	0.48	44.90	478.10	16,822.99	5.94
Malaysia	0.79	78.52	10,189.69	29,967.37	2.99
Maldives	0.70	41.59	7,950.63	402.82	5.09
Mali	0.44	45.59	692.27	16,720.33	6.84
Malta	0.86	75.46	23,008.39	424.41	6.10
Mauritania	0.51	49.64	1,309.86	4,005.05	10.06
Mauritius	0.78	66.07	9,006.26	1,256.25	7.86
Mexico	0.76	62.08	9,468.46	123,378.78	4.88
Moldova (Republic of)	0.70	61.51	1,940.86	4,070.95	4.48
Mongolia	0.74	56.80	3,793.81	2,896.50	4.52
Montenegro	0.81	64.98	6,986.75	627.38	18.75
Morocco	0.65	66.03	3,095.56	34,071.43	9.46
Mozambique	0.42	47.51	482.92	26,823.38	24.28
Myanmar	0.56	37.69	1,224.70	51,686.19	0.78
Namibia	0.64	53.08	5,790.26	2,343.76	18.78
Nepal	0.56	37.99	660.49	28,154.28	3.15
Netherlands	0.92	92.28	50,233.54	16,864.53	7.33
New Zealand	0.92	77.85	35,789.42	4,542.11	5.57
Nicaragua	0.65	53.34	1,781.53	5,979.87	4.90
Niger	0.35	47.87	380.23	18,787.30	0.32
Nigeria	0.53	51.37	2,519.52	174,144.90	4.13
Norway	0.95	83.99	88,906.83	5,108.71	3.45
Oman	0.80	62.15	17,498.68	3,836.20	16.78
Pakistan	0.55	51.33	1,097.58	183,629.43	2.39
Panama	0.79	66.19	10,184.92	3,871.22	4.46
Papua New Guinea	0.52	46.74	2,195.90	7,674.33	2.64
Paraguay	0.69	60.13	3,701.22	6,509.16	4.71
Peru	0.74	65.66	5,795.54	30,769.54	3.10

Philippines	0.68	57.38	2,452.71	99,291.64	3.55
Poland	0.86	80.83	13,861.56	38,301.26	9.66
Portugal	0.84	84.54	21,380.79	10,499.42	15.04
Qatar	0.86	77.80	68,400.35	2,312.45	0.26
Romania	0.80	75.90	9,073.01	20,020.47	6.95
Russian Federation	0.80	68.56	11,742.15	143,679.30	5.31
Rwanda	0.50	45.02	656.73	11,205.25	1.72
Saint Lucia	0.74	43.85	8,174.01	176.04	22.43
Saint Vincent and the Grenadines	0.72	38.44	6,436.73	109.34	18.06
Samoa	0.70	46.93	3,517.76	191.52	8.77
Sao Tome and Principe	0.57	31.29	1,216.45	189.16	13.42
Saudi Arabia	0.85	67.35	21,094.24	30,360.60	5.64
Senegal	0.49	54.31	1,013.21	14,333.22	7.02
Serbia	0.78	68.99	5,631.89	8,902.46	20.68
Sierra Leone	0.42	44.76	556.70	7,000.62	4.65
Singapore	0.93	85.19	51,596.44	5,404.59	2.79
Slovakia	0.85	83.76	17,771.09	5,428.99	13.70
Slovenia	0.89	76.46	22,899.56	2,068.48	9.89
Solomon Islands	0.52	24.08	1,474.65	569.51	2.03
South Africa	0.67	66.00	7,567.26	54,153.48	24.73
Spain	0.88	84.12	29,252.20	46,609.69	25.27
Sri Lanka	0.77	51.53	3,439.09	20,575.40	4.42
Suriname	0.73	47.39	8,975.86	545.23	5.89
Swaziland	0.54	47.25	3,979.38	1,283.28	26.76
Sweden	0.91	87.00	53,142.40	9,652.31	7.97
Switzerland	0.94	88.55	75,955.28	8,218.13	4.79
Tajikistan	0.63	43.13	874.08	8,270.28	10.54
Tanzania (United Republic of)	0.53	37.62	791.78	51,435.73	2.52
Thailand	0.74	71.06	5,574.97	68,279.92	0.53
The former Yugoslav Republic of Macedonia	0.75	55.14	4,836.06	2,076.62	28.52
Timor-Leste	0.61	43.50	3,037.16	1,198.59	3.25
Togo	0.49	53.46	523.05	7,135.93	1.85
Tonga	0.72	32.66	3,553.03	105.56	1.09
Trinidad and Tobago	0.78	62.83	16,701.41	1,351.37	3.45
Tunisia	0.73	59.45	4,234.06	11,079.23	15.49
Turkey	0.77	70.75	13,089.28	76,408.98	9.30
Turkmenistan	0.69	36.98	6,154.52	5,416.26	3.60
Uganda	0.49	45.19	637.68	38,193.53	1.91
Ukraine	0.74	70.25	3,142.00	44,999.61	8.22
United Arab Emirates	0.84	75.04	38,455.91	9,038.57	2.63

United Kingdom	0.91	87.24	40,452.62	65,073.27	6.82
United States	0.92	79.40	50,421.81	320,417.66	6.78
Uruguay	0.80	66.53	13,662.07	3,413.78	6.50
Uzbekistan	0.70	40.10	1,695.20	30,259.68	8.03
Vanuatu	0.60	43.28	2,908.69	256.00	5.30
Venezuela (Bolivarian Republic of)	0.77	51.75	14,085.73	30,528.11	7.37
Viet Nam	0.68	52.62	1,529.29	92,021.32	1.91
Yemen	0.48	43.24	1,116.61	25,911.32	13.89
Zambia	0.58	51.50	1,608.37	15,387.09	7.80
Zimbabwe	0.52	45.41	940.91	15,233.09	5.27

## Annexure IV

**Table 14: International Investment Treaties**

Short title	Type of agreement	Status	Date of signature	Date of entry into force
Afghanistan - Germany BIT (2005)	Bilateral Investment Treaties	In force	20/04/2005	12/10/2007
Afghanistan - Iran, Islamic Republic of BIT (2006)	Bilateral Investment Treaties	In force	28/05/2006	02/02/2008
Afghanistan - Turkey BIT (2004)	Bilateral Investment Treaties	In force	10/07/2004	19/07/2005
Afghanistan-US TIFA	Treaties with Investment Provisions	In force	26/06/2004	26/06/2004
SAFTA	Treaties with Investment Provisions	In force	06/01/2004	01/01/2006
The Energy Charter Treaty (1994)	Treaties with Investment Provisions	In force	17/12/1994	16/04/1998
OIC Investment Agreement (1981)	Treaties with Investment Provisions	In force	05/06/1981	01/02/1988
Antigua and Barbuda - Germany BIT (1998)	Bilateral Investment Treaties	In force	05/11/1998	28/02/2001
Antigua and Barbuda - United Kingdom BIT (1987)	Bilateral Investment Treaties	In force	12/06/1987	12/06/1987
CARICOM - United States TIFA (2013)	Treaties with Investment Provisions	In force	28/05/2013	28/05/2013
CARIFORUM - EC EPA (2008)	Treaties with Investment Provisions	In force	15/10/2008	01/01/2009
CARICOM-Costa Rica FTA	Treaties with Investment Provisions	In force	09/03/2004	15/11/2005
CARICOM Single Market	Treaties with Investment Provisions	In force	07/05/2001	04/02/2002
CARICOM-Cuba Cooperation Agreement	Treaties with Investment Provisions	In force	05/07/2000	01/01/2001
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
CARICOM - Dominican Republic FTA (1998)	Treaties with Investment Provisions	In force	22/08/1998	05/02/2002
CARICOM-Venezuela FTA	Treaties with Investment Provisions	In force	13/10/1992	01/01/1993
CARICOM Treaty	Treaties with Investment Provisions	In force	04/07/1973	01/08/1973
Barbados - Canada BIT (1996)	Bilateral Investment Treaties	In force	29/05/1996	17/01/1997
Barbados - China BIT (1998)	Bilateral Investment Treaties	In force	20/07/1998	01/10/1999
Barbados - Cuba BIT (1996)	Bilateral Investment Treaties	In force	19/02/1996	13/08/1998
Barbados - Germany BIT (1994)	Bilateral Investment Treaties	In force	02/12/1994	11/05/2002
Barbados - Italy BIT (1995)	Bilateral Investment Treaties	In force	25/10/1995	21/07/1997
Barbados - Mauritius BIT (2004)	Bilateral Investment Treaties	In force	28/09/2004	18/06/2005
Barbados - Switzerland BIT (1995)	Bilateral Investment Treaties	In force	29/03/1995	22/12/1995

<b>Short title</b>	<b>Type of agreement</b>	<b>Status</b>	<b>Date of signature</b>	<b>Date of entry into force</b>
Barbados - United Kingdom BIT (1993)	Bilateral Investment Treaties	In force	07/04/1993	07/04/1993
Barbados - Venezuela, Bolivarian Republic of BIT (1994)	Bilateral Investment Treaties	In force	15/07/1994	31/10/1995
CARICOM - United States TIFA (2013)	Treaties with Investment Provisions	In force	28/05/2013	28/05/2013
CARIFORUM - EC EPA (2008)	Treaties with Investment Provisions	In force	15/10/2008	01/01/2009
CARICOM-Costa Rica FTA	Treaties with Investment Provisions	In force	09/03/2004	15/11/2005
CARICOM Single Market	Treaties with Investment Provisions	In force	07/05/2001	04/02/2002
CARICOM-Cuba Cooperation Agreement	Treaties with Investment Provisions	In force	05/07/2000	01/01/2001
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
CARICOM - Dominican Republic FTA (1998)	Treaties with Investment Provisions	In force	22/08/1998	05/02/2002
CARICOM-Venezuela FTA	Treaties with Investment Provisions	In force	13/10/1992	01/01/1993
CARICOM Treaty	Treaties with Investment Provisions	In force	04/07/1973	01/08/1973
Austria - Belize BIT (2001)	Bilateral Investment Treaties	In force	17/07/2001	01/02/2002
Belize - Cuba BIT (1998)	Bilateral Investment Treaties	In force	08/04/1998	16/04/1999
Belize - Netherlands BIT (2002)	Bilateral Investment Treaties	In force	20/09/2002	01/10/2004
Belize - United Kingdom BIT (1982)	Bilateral Investment Treaties	In force	30/04/1982	30/04/1982
CARICOM - United States TIFA (2013)	Treaties with Investment Provisions	In force	28/05/2013	28/05/2013
CARIFORUM - EC EPA (2008)	Treaties with Investment Provisions	In force	15/10/2008	01/01/2009
CARICOM-Costa Rica FTA	Treaties with Investment Provisions	In force	09/03/2004	15/11/2005
CARICOM Single Market	Treaties with Investment Provisions	In force	07/05/2001	04/02/2002
CARICOM-Cuba Cooperation Agreement	Treaties with Investment Provisions	In force	05/07/2000	01/01/2001
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
CARICOM - Dominican Republic FTA (1998)	Treaties with Investment Provisions	In force	22/08/1998	05/02/2002
CARICOM-Venezuela FTA	Treaties with Investment Provisions	In force	13/10/1992	01/01/1993
CARICOM Treaty	Treaties with Investment Provisions	In force	04/07/1973	01/08/1973
Botswana - Germany BIT (2000)	Bilateral Investment Treaties	In force	23/05/2000	06/08/2007
Botswana - Switzerland BIT (1998)	Bilateral Investment Treaties	In force	26/06/1998	13/04/2000

<b>Short title</b>	<b>Type of agreement</b>	<b>Status</b>	<b>Date of signature</b>	<b>Date of entry into force</b>
SACU-US TIFA	Treaties with Investment Provisions	In force	16/07/2008	16/07/2008
SADC Investment Protocol	Treaties with Investment Provisions	In force	18/08/2006	16/04/2010
EFTA-SACU FTA	Treaties with Investment Provisions	In force	26/06/2006	01/05/2008
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
SADC Treaty	Treaties with Investment Provisions	In force	17/08/1992	30/09/1993
AU Treaty	Treaties with Investment Provisions	In force	03/06/1991	12/05/1994
Dominica - Germany BIT (1984)	Bilateral Investment Treaties	In force	01/10/1984	11/05/1986
Dominica - United Kingdom BIT (1987)	Bilateral Investment Treaties	In force	23/01/1987	23/01/1987
CARICOM - United States TIFA (2013)	Treaties with Investment Provisions	In force	28/05/2013	28/05/2013
CARIFORUM - EC EPA (2008)	Treaties with Investment Provisions	In force	15/10/2008	01/01/2009
CARICOM-Costa Rica FTA	Treaties with Investment Provisions	In force	09/03/2004	15/11/2005
CARICOM Single Market	Treaties with Investment Provisions	In force	07/05/2001	04/02/2002
CARICOM-Cuba Cooperation Agreement	Treaties with Investment Provisions	In force	05/07/2000	01/01/2001
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
CARICOM - Dominican Republic FTA (1998)	Treaties with Investment Provisions	In force	22/08/1998	05/02/2002
CARICOM-Venezuela FTA	Treaties with Investment Provisions	In force	13/10/1992	01/01/1993
CARICOM Treaty	Treaties with Investment Provisions	In force	04/07/1973	01/08/1973
Eritrea - Italy BIT (1996)	Bilateral Investment Treaties	In force	06/02/1996	14/07/2003
COMESA-US TIFA	Treaties with Investment Provisions	In force	29/10/2001	29/10/2001
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
COMESA Treaty	Treaties with Investment Provisions	In force	05/11/1993	08/12/1994
AU Treaty	Treaties with Investment Provisions	In force	03/06/1991	12/05/1994
Gambia - Morocco BIT (2006)	Bilateral Investment Treaties	In force	20/02/2006	12/10/2011
Gambia - Netherlands BIT (2002)	Bilateral Investment Treaties	In force	25/09/2002	01/04/2007
Gambia - Qatar BIT (2002)	Bilateral Investment Treaties	In force	17/05/2002	03/03/2011
Gambia - Switzerland BIT (1993)	Bilateral Investment Treaties	In force	22/11/1993	30/03/1994

<b>Short title</b>	<b>Type of agreement</b>	<b>Status</b>	<b>Date of signature</b>	<b>Date of entry into force</b>
Gambia - Taiwan Province of China BIT (2010)	Bilateral Investment Treaties	In force	09/08/2005	13/10/2010
ECOWAS Supplementary Act on Investments	Treaties with Investment Provisions	In force	19/12/2008	19/01/2009
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
Revised ECOWAS Treaty	Treaties with Investment Provisions	In force	24/07/1993	23/08/1995
AU Treaty	Treaties with Investment Provisions	In force	03/06/1991	12/05/1994
OIC Investment Agreement (1981)	Treaties with Investment Provisions	In force	05/06/1981	01/02/1988
ECOWAS Protocol on Movement of Persons and Establishment	Treaties with Investment Provisions	In force	29/05/1979	08/04/1980
Grenada - United Kingdom BIT (1988)	Bilateral Investment Treaties	In force	25/02/1988	25/02/1988
Grenada - United States of America BIT (1986)	Bilateral Investment Treaties	In force	02/05/1986	03/03/1989
CARICOM - United States TIFA (2013)	Treaties with Investment Provisions	In force	28/05/2013	28/05/2013
CARIFORUM - EC EPA (2008)	Treaties with Investment Provisions	In force	15/10/2008	01/01/2009
CARICOM-Costa Rica FTA	Treaties with Investment Provisions	In force	09/03/2004	15/11/2005
CARICOM Single Market	Treaties with Investment Provisions	In force	07/05/2001	04/02/2002
CARICOM-Cuba Cooperation Agreement	Treaties with Investment Provisions	In force	05/07/2000	01/01/2001
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
CARICOM - Dominican Republic FTA (1998)	Treaties with Investment Provisions	In force	22/08/1998	05/02/2002
CARICOM-Venezuela FTA	Treaties with Investment Provisions	In force	13/10/1992	01/01/1993
CARICOM Treaty	Treaties with Investment Provisions	In force	04/07/1973	01/08/1973
China - Guyana BIT (2003)	Bilateral Investment Treaties	In force	27/03/2003	26/10/2004
Germany - Guyana BIT (1989)	Bilateral Investment Treaties	In force	06/12/1989	09/03/1994
Guyana - Korea, Republic of BIT (2006)	Bilateral Investment Treaties	In force	31/07/2006	20/08/2006
Guyana - United Kingdom BIT (1989)	Bilateral Investment Treaties	In force	27/10/1989	11/04/1990
CARICOM - United States TIFA (2013)	Treaties with Investment Provisions	In force	28/05/2013	28/05/2013
CARIFORUM - EC EPA (2008)	Treaties with Investment Provisions	In force	15/10/2008	01/01/2009
CARICOM-Costa Rica FTA	Treaties with Investment Provisions	In force	09/03/2004	15/11/2005
CARICOM Single Market	Treaties with Investment Provisions	In force	07/05/2001	04/02/2002

<b>Short title</b>	<b>Type of agreement</b>	<b>Status</b>	<b>Date of signature</b>	<b>Date of entry into force</b>
CARICOM-Cuba Cooperation Agreement	Treaties with Investment Provisions	In force	05/07/2000	01/01/2001
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
CARICOM - Dominican Republic FTA (1998)	Treaties with Investment Provisions	In force	22/08/1998	05/02/2002
CARICOM-Venezuela FTA	Treaties with Investment Provisions	In force	13/10/1992	01/01/1993
OIC Investment Agreement (1981)	Treaties with Investment Provisions	In force	05/06/1981	01/02/1988
CARICOM Treaty	Treaties with Investment Provisions	In force	04/07/1973	01/08/1973
France - Haiti BIT (1984)	Bilateral Investment Treaties	In force	23/05/1984	25/03/1985
Germany - Haiti BIT (1973)	Bilateral Investment Treaties	In force	14/08/1973	01/12/1975
Haiti - United Kingdom BIT (1985)	Bilateral Investment Treaties	In force	18/03/1985	27/03/1995
CARICOM - United States TIFA (2013)	Treaties with Investment Provisions	In force	28/05/2013	28/05/2013
CARIFORUM - EC EPA (2008)	Treaties with Investment Provisions	In force	15/10/2008	01/01/2009
CARICOM-Costa Rica FTA	Treaties with Investment Provisions	In force	09/03/2004	15/11/2005
CARICOM Single Market	Treaties with Investment Provisions	In force	07/05/2001	04/02/2002
CARICOM-Cuba Cooperation Agreement	Treaties with Investment Provisions	In force	05/07/2000	01/01/2001
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
CARICOM - Dominican Republic FTA (1998)	Treaties with Investment Provisions	In force	22/08/1998	05/02/2002
CARICOM-Venezuela FTA	Treaties with Investment Provisions	In force	13/10/1992	01/01/1993
CARICOM Treaty	Treaties with Investment Provisions	In force	04/07/1973	01/08/1973
Burundi - Kenya BIT (2009)	Bilateral Investment Treaties	In force	01/04/2009	01/04/2009
Finland - Kenya BIT (2008)	Bilateral Investment Treaties	In force	01/09/2008	02/10/2009
France - Kenya BIT (2007)	Bilateral Investment Treaties	In force	04/12/2007	26/05/2009
Germany - Kenya BIT (1996)	Bilateral Investment Treaties	In force	03/05/1996	07/12/2000
Italy - Kenya BIT (1996)	Bilateral Investment Treaties	In force	16/09/1996	04/08/1999
Japan - Kenya BIT (2016)	Bilateral Investment Treaties	In force	28/08/2016	14/09/2017
Kenya - Korea, Republic of BIT (2014)	Bilateral Investment Treaties	In force	08/07/2014	03/05/2017
Kuwait - Kenya BIT (2013)	Bilateral Investment Treaties	In force	12/11/2013	22/04/2015

<b>Short title</b>	<b>Type of agreement</b>	<b>Status</b>	<b>Date of signature</b>	<b>Date of entry into force</b>
Kenya - Netherlands BIT (1970)	Bilateral Investment Treaties	In force	11/09/1970	11/06/1979
Kenya - Switzerland BIT (2006)	Bilateral Investment Treaties	In force	14/11/2006	10/07/2009
Kenya - United Kingdom BIT (1999)	Bilateral Investment Treaties	In force	13/09/1999	13/09/1999
EAC - US TIFA (2008)	Treaties with Investment Provisions	In force	16/07/2008	16/07/2008
COMESA-US TIFA	Treaties with Investment Provisions	In force	29/10/2001	29/10/2001
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
EAC Treaty	Treaties with Investment Provisions	In force	30/11/1999	07/07/2000
COMESA Treaty	Treaties with Investment Provisions	In force	05/11/1993	08/12/1994
AU Treaty	Treaties with Investment Provisions	In force	03/06/1991	12/05/1994
Germany - Lesotho BIT (1982)	Bilateral Investment Treaties	In force	11/11/1982	17/08/1985
Lesotho - Switzerland BIT (2004)	Bilateral Investment Treaties	In force	16/06/2004	07/05/2010
Lesotho - United Kingdom BIT (1981)	Bilateral Investment Treaties	In force	18/02/1981	18/02/1981
SACU-US TIFA	Treaties with Investment Provisions	In force	16/07/2008	16/07/2008
SADC Investment Protocol	Treaties with Investment Provisions	In force	18/08/2006	16/04/2010
EFTA-SACU FTA	Treaties with Investment Provisions	In force	26/06/2006	01/05/2008
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
SADC Treaty	Treaties with Investment Provisions	In force	17/08/1992	30/09/1993
AU Treaty	Treaties with Investment Provisions	In force	03/06/1991	12/05/1994
France - Liberia BIT (1979)	Bilateral Investment Treaties	In force	23/03/1979	22/01/1982
Germany - Liberia BIT (1961)	Bilateral Investment Treaties	In force	12/12/1961	22/10/1967
Liberia - Switzerland BIT (1963)	Bilateral Investment Treaties	In force	23/07/1963	22/09/1964
ECOWAS Supplementary Act on Investments	Treaties with Investment Provisions	In force	19/12/2008	19/01/2009
Liberia-US TIFA	Treaties with Investment Provisions	In force	15/02/2007	15/02/2007
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
Revised ECOWAS Treaty	Treaties with Investment Provisions	In force	24/07/1993	23/08/1995
AU Treaty	Treaties with Investment Provisions	In force	03/06/1991	12/05/1994

<b>Short title</b>	<b>Type of agreement</b>	<b>Status</b>	<b>Date of signature</b>	<b>Date of entry into force</b>
ECOWAS Protocol on Movement of Persons and Establishment	Treaties with Investment Provisions	In force	29/05/1979	08/04/1980
Egypt - Malawi BIT (1997)	Bilateral Investment Treaties	In force	21/10/1997	07/09/1999
Italy - Malawi BIT (2003)	Bilateral Investment Treaties	In force	28/08/2003	21/03/2012
Malawi - Netherlands BIT (2003)	Bilateral Investment Treaties	In force	11/12/2003	01/11/2007
SADC Investment Protocol	Treaties with Investment Provisions	In force	18/08/2006	16/04/2010
COMESA-US TIFA	Treaties with Investment Provisions	In force	29/10/2001	29/10/2001
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
COMESA Treaty	Treaties with Investment Provisions	In force	05/11/1993	08/12/1994
SADC Treaty	Treaties with Investment Provisions	In force	17/08/1992	30/09/1993
AU Treaty	Treaties with Investment Provisions	In force	03/06/1991	12/05/1994
China - Myanmar BIT (2001)	Bilateral Investment Treaties	In force	12/12/2001	21/05/2002
India - Myanmar BIT (2008)	Bilateral Investment Treaties	In force	24/06/2008	08/02/2009
Japan - Myanmar BIT (2013)	Bilateral Investment Treaties	In force	15/12/2013	07/08/2014
Lao People's Democratic Republic - Myanmar BIT (2003)	Bilateral Investment Treaties	In force	05/05/2003	28/08/2007
Myanmar - Philippines BIT (1998)	Bilateral Investment Treaties	In force	17/02/1998	11/09/1998
Myanmar - Thailand BIT (2008)	Bilateral Investment Treaties	In force	14/03/2008	08/06/2012
ASEAN-China Investment Agreement	Treaties with Investment Provisions	In force	15/08/2009	01/01/2010
ASEAN-Korea Investment Agreement	Treaties with Investment Provisions	In force	02/06/2009	01/09/2009
AANZFTA	Treaties with Investment Provisions	In force	27/02/2009	10/01/2010
ASEAN Comprehensive Investment Agreement (2009)	Treaties with Investment Provisions	In force	26/02/2009	24/02/2012
ASEAN-Japan EPA	Treaties with Investment Provisions	In force	28/03/2008	01/12/2008
ASEAN-US TIFA	Treaties with Investment Provisions	In force	25/08/2006	25/08/2006
ASEAN-Korea Framework Agreement	Treaties with Investment Provisions	In force	13/12/2005	01/07/2006
ASEAN-India Framework Agreement	Treaties with Investment Provisions	In force	07/03/2004	01/07/2004
BIMSTEC Framework Agreement	Treaties with Investment Provisions	In force	08/02/2004	30/06/2004
ASEAN-China Framework Agreement	Treaties with Investment Provisions	In force	04/11/2002	01/07/2003

<b>Short title</b>	<b>Type of agreement</b>	<b>Status</b>	<b>Date of signature</b>	<b>Date of entry into force</b>
ASEAN Services	Treaties with Investment Provisions	In force	15/12/1995	30/12/1998
ASEAN Investment Agreement (1987)	Treaties with Investment Provisions	Terminated	15/12/1987	02/08/1988
ASEAN-EU Cooperation Agreement	Treaties with Investment Provisions	In force	07/03/1980	01/10/1980
Australia - Papua New Guinea BIT (1990)	Bilateral Investment Treaties	In force	03/09/1990	20/10/1991
China - Papua New Guinea BIT (1991)	Bilateral Investment Treaties	In force	12/04/1991	12/02/1993
Germany - Papua New Guinea BIT (1980)	Bilateral Investment Treaties	In force	12/11/1980	03/11/1983
Japan - Papua New Guinea BIT (2011)	Bilateral Investment Treaties	In force	26/04/2011	17/01/2014
Papua New Guinea - United Kingdom BIT (1981)	Bilateral Investment Treaties	In force	14/05/1981	22/12/1981
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
SPARTECA	Treaties with Investment Provisions	In force	14/07/1980	01/01/1981
Australia-Papua New Guinea Trade	Treaties with Investment Provisions	In force	06/11/1976	01/02/1977
Germany - Saint Lucia BIT (1985)	Bilateral Investment Treaties	In force	16/03/1985	22/07/1987
Saint Lucia - United Kingdom BIT (1983)	Bilateral Investment Treaties	In force	18/01/1983	18/01/1983
CARICOM - United States TIFA (2013)	Treaties with Investment Provisions	In force	28/05/2013	28/05/2013
CARIFORUM - EC EPA (2008)	Treaties with Investment Provisions	In force	15/10/2008	01/01/2009
CARICOM-Costa Rica FTA	Treaties with Investment Provisions	In force	09/03/2004	15/11/2005
CARICOM Single Market	Treaties with Investment Provisions	In force	07/05/2001	04/02/2002
CARICOM-Cuba Cooperation Agreement	Treaties with Investment Provisions	In force	05/07/2000	01/01/2001
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
CARICOM - Dominican Republic FTA (1998)	Treaties with Investment Provisions	In force	22/08/1998	05/02/2002
CARICOM-Venezuela FTA	Treaties with Investment Provisions	In force	13/10/1992	01/01/1993
CARICOM Treaty	Treaties with Investment Provisions	In force	04/07/1973	01/08/1973
Germany - Saint Vincent and the Grenadines BIT (1986)	Bilateral Investment Treaties	In force	25/03/1986	08/01/1989
Saint Vincent and the Grenadines - Taiwan Province of China BIT (2009)	Bilateral Investment Treaties	In force	17/12/2009	01/02/2010
CARICOM - United States TIFA (2013)	Treaties with Investment Provisions	In force	28/05/2013	28/05/2013
CARIFORUM - EC EPA (2008)	Treaties with Investment Provisions	In force	15/10/2008	01/01/2009

<b>Short title</b>	<b>Type of agreement</b>	<b>Status</b>	<b>Date of signature</b>	<b>Date of entry into force</b>
CARICOM-Costa Rica FTA	Treaties with Investment Provisions	In force	09/03/2004	15/11/2005
CARICOM Single Market	Treaties with Investment Provisions	In force	07/05/2001	04/02/2002
CARICOM-Cuba Cooperation Agreement	Treaties with Investment Provisions	In force	05/07/2000	01/01/2001
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
CARICOM - Dominican Republic FTA (1998)	Treaties with Investment Provisions	In force	22/08/1998	05/02/2002
CARICOM-Venezuela FTA	Treaties with Investment Provisions	In force	13/10/1992	01/01/1993
CARICOM Treaty	Treaties with Investment Provisions	In force	04/07/1973	01/08/1973
Germany - Sierra Leone BIT (1965)	Bilateral Investment Treaties	In force	08/04/1965	10/12/1966
Sierra Leone - United Kingdom BIT (2000)	Bilateral Investment Treaties	In force	13/01/2000	20/11/2001
ECOWAS Supplementary Act on Investments	Treaties with Investment Provisions	In force	19/12/2008	19/01/2009
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
Revised ECOWAS Treaty	Treaties with Investment Provisions	In force	24/07/1993	23/08/1995
AU Treaty	Treaties with Investment Provisions	In force	03/06/1991	12/05/1994
OIC Investment Agreement (1981)	Treaties with Investment Provisions	In force	05/06/1981	01/02/1988
ECOWAS Protocol on Movement of Persons and Establishment	Treaties with Investment Provisions	In force	29/05/1979	08/04/1980
Netherlands - Suriname BIT (2005)	Bilateral Investment Treaties	In force	31/03/2005	01/09/2006
CARICOM - United States TIFA (2013)	Treaties with Investment Provisions	In force	28/05/2013	28/05/2013
CARIFORUM - EC EPA (2008)	Treaties with Investment Provisions	In force	15/10/2008	01/01/2009
CARICOM-Costa Rica FTA	Treaties with Investment Provisions	In force	09/03/2004	15/11/2005
CARICOM Single Market	Treaties with Investment Provisions	In force	07/05/2001	04/02/2002
CARICOM-Cuba Cooperation Agreement	Treaties with Investment Provisions	In force	05/07/2000	01/01/2001
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
CARICOM - Dominican Republic FTA (1998)	Treaties with Investment Provisions	In force	22/08/1998	05/02/2002
CARICOM-Venezuela FTA	Treaties with Investment Provisions	In force	13/10/1992	01/01/1993
OIC Investment Agreement (1981)	Treaties with Investment Provisions	In force	05/06/1981	01/02/1988
CARICOM Treaty	Treaties with Investment Provisions	In force	04/07/1973	01/08/1973

<b>Short title</b>	<b>Type of agreement</b>	<b>Status</b>	<b>Date of signature</b>	<b>Date of entry into force</b>
Germany - Swaziland BIT (1990)	Bilateral Investment Treaties	In force	05/04/1990	07/08/1995
Swaziland - United Kingdom BIT (1995)	Bilateral Investment Treaties	In force	05/05/1995	05/05/1995
SACU-US TIFA	Treaties with Investment Provisions	In force	16/07/2008	16/07/2008
SADC Investment Protocol	Treaties with Investment Provisions	In force	18/08/2006	16/04/2010
EFTA-SACU FTA	Treaties with Investment Provisions	In force	26/06/2006	01/05/2008
COMESA-US TIFA	Treaties with Investment Provisions	In force	29/10/2001	29/10/2001
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
COMESA Treaty	Treaties with Investment Provisions	In force	05/11/1993	08/12/1994
SADC Treaty	Treaties with Investment Provisions	In force	17/08/1992	30/09/1993
AU Treaty	Treaties with Investment Provisions	In force	03/06/1991	12/05/1994
Canada - United Republic of Tanzania BIT (2013)	Bilateral Investment Treaties	In force	17/05/2013	09/12/2013
China - United Republic of Tanzania BIT (2013)	Bilateral Investment Treaties	In force	24/03/2013	17/04/2014
Denmark - United Republic of Tanzania BIT (1999)	Bilateral Investment Treaties	In force	22/04/1999	21/10/2005
Finland - United Republic of Tanzania BIT (2001)	Bilateral Investment Treaties	In force	19/06/2001	30/10/2002
Germany - United Republic of Tanzania BIT (1965)	Bilateral Investment Treaties	In force	30/01/1965	12/07/1968
Italy - United Republic of Tanzania BIT (2001)	Bilateral Investment Treaties	In force	21/08/2001	25/04/2003
Mauritius - United Republic of Tanzania BIT (2009)	Bilateral Investment Treaties	In force	04/05/2009	02/03/2013
Netherlands - United Republic of Tanzania BIT (2001)	Bilateral Investment Treaties	In force	31/07/2001	01/04/2004
Sweden - United Republic of Tanzania BIT (1999)	Bilateral Investment Treaties	In force	01/09/1999	01/03/2002
Switzerland - United Republic of Tanzania BIT (2004)	Bilateral Investment Treaties	In force	08/04/2004	06/04/2006
United Republic of Tanzania - United Kingdom BIT (1994)	Bilateral Investment Treaties	In force	07/01/1994	02/08/1996
EAC - US TIFA (2008)	Treaties with Investment Provisions	In force	16/07/2008	16/07/2008
SADC Investment Protocol	Treaties with Investment Provisions	In force	18/08/2006	16/04/2010
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
EAC Treaty	Treaties with Investment Provisions	In force	30/11/1999	07/07/2000
SADC Treaty	Treaties with Investment Provisions	In force	17/08/1992	30/09/1993

<b>Short title</b>	<b>Type of agreement</b>	<b>Status</b>	<b>Date of signature</b>	<b>Date of entry into force</b>
AU Treaty	Treaties with Investment Provisions	In force	03/06/1991	12/05/1994
Tonga - United Kingdom BIT (1997)	Bilateral Investment Treaties	In force	22/10/1997	22/10/1997
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
SPARTECA	Treaties with Investment Provisions	In force	14/07/1980	01/01/1981
Denmark - Uganda BIT (2001)	Bilateral Investment Treaties	In force	26/11/2001	19/10/2005
France - Uganda BIT (2003)	Bilateral Investment Treaties	In force	03/01/2003	20/12/2004
Germany - Uganda BIT (1966)	Bilateral Investment Treaties	In force	29/11/1966	19/08/1968
Netherlands - Uganda BIT (2000)	Bilateral Investment Treaties	In force	30/05/2000	01/01/2003
Switzerland - Uganda BIT (1971)	Bilateral Investment Treaties	In force	23/08/1971	08/05/1972
Uganda - United Kingdom BIT (1998)	Bilateral Investment Treaties	In force	24/04/1998	24/04/1998
EAC - US TIFA (2008)	Treaties with Investment Provisions	In force	16/07/2008	16/07/2008
COMESA-US TIFA	Treaties with Investment Provisions	In force	29/10/2001	29/10/2001
Cotonou Agreement (2000)	Treaties with Investment Provisions	In force	23/06/2000	01/04/2003
EAC Treaty	Treaties with Investment Provisions	In force	30/11/1999	07/07/2000
COMESA Treaty	Treaties with Investment Provisions	In force	05/11/1993	08/12/1994
AU Treaty	Treaties with Investment Provisions	In force	03/06/1991	12/05/1994
OIC Investment Agreement (1981)	Treaties with Investment Provisions	In force	05/06/1981	01/02/1988